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The Challenge of Choice

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A Call for Collaboration

Michael J. Zpevak*

*In ages of change affecting many,
many must change to effect a new age.*

At precisely the time we most need to work together to give birth to the mammoth child we call the "National Information Infrastructure" (NII), why does it seem that so often we are working at cross purposes? Instead of repeatedly straining to prove that "the pen is mightier than the sword," we, the drafters of the Information Age, should be co-authoring this critical chapter of American industry with an unprecedented level of cooperation. We should be writing, shoulder to shoulder, with free-flowing ideas exchanged in a sincere and enthusiastic spirit. This Article is a "call for collaboration" to all those currently immersed in the daunting task of penning the tome that is the future of telecommunications.

If the first step in solving any problem is recognition that a problem exists, then we should already be at the second step, which is determining *why* the problem exists. Why, then, do we find ourselves almost always working against, rather than with, one another these days?

The easy target for blame is competition. In today's increasingly competitive communications market, or so the argument goes, what could one possibly expect but constant, vigorous rivalry among market participants before regulatory and legislative bodies charged with the ultimate establishment of national policy? Easy targets are often the wrong ones, however, and such is the case here.

To be sure, heightened levels of competition in recent years have not facilitated the solidarity and cooperation we clearly need to move the communications industry forward at the optimal pace. In some instances, a by-product of competition admittedly has been the opposite phenomenon.

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But it is simply not logical—and, therefore, not justifiable—to place blame on a traditional facet of American enterprise.

To the contrary, magnified competition has only caused market participants to intensify what would naturally be their “knee jerk” reactions to various regulatory proposals under any circumstances. It has not, this writer respectfully submits, caused the lack of accordance that currently impedes our collective progress. More likely, the impediment has been the result of the manner in which regulatory proceedings have recently come to be handled, *beyond* the initial reactions of docket participants and much nearer the point where actual decisions are reached.

Not too many years ago, when the Federal Communications Commission (FCC or Commission) was beginning to draft an order in any important proceeding, its common practice was to invite major players on both sides of the issues to offer *ex parte* presentations with a very specific purpose. Parties were advised to come into the meetings with the Commission staff fully prepared to identify clearly and document persuasively all of their *genuine* “lines in the sand.” No sabre rattling, war talk, or chest beating—just the bottom line: “What can you absolutely not live with in this order and why?”

In the great majority of cases, parties experienced in the ways of the FCC knew at that point they had better be forthright, and so they were. Furthermore, in cases where Commission personnel sensed that a party might not have told the entire story regarding what it could and could not live with in the forthcoming order, they exercised sound judgment and drew their own conclusions with almost uncanny accuracy. Usually, no one was completely satisfied with the Commission’s action, but neither was anyone so completely dissatisfied that a court appeal ensued.

Contrast that approach with what seems to have become the new standard operating procedure at the Commission in recent years. Sometimes parties are asked about bottom-line acceptability of specific potential rulings and sometimes they are not. Sometimes compromises are sought and adopted, but too often the Commission comes down squarely on one side with seemingly little attempt at compromise. Sometimes there is sensitivity to the parties’ “lines in the sand,” but often there is not. Consequently, court appeals are almost assured from one sector or another.

This is by no means intended to suggest that the FCC should be castigated for its motivation in adopting this new approach. On the contrary, we can all be assured that the motivation was eminently admirable—the desire to accelerate needed accomplishments for our industry and our nation. Compromise, after all, consumes time. But honorable motivations alone do not guarantee desired results. And, in the

regulatory world, time invested in compromise pays big dividends in time saved by avoiding the potentially endless cycle of appeal, reversal, and remand.

Neither does this Article seek to condemn the FCC if indeed it has consciously moved away from the more compromise-oriented approach. On occasion, courts have been quite derogatory about good-faith attempts at compromise in FCC orders.¹ Under such circumstances, it is certainly not hard to see how a regulatory commission may wish to avoid judicial chastising for allegedly avoiding a decision placed within its discretion by the law.

However, this Article advocates no such avoidance. Rather, it merely suggests that the public interest is unlikely to be served when regulators fail to discern and avoid, to the greatest degree possible, the affected parties' breaking points while crafting important policy orders—despite the added time it may take to do so. The unhappy fact of the matter is that writing massive, multifaceted, extraordinarily complex regulatory orders of the type frequently needed from the FCC, in such a manner that *no* affected party has *any* colorable legal ground for appeal, is probably not humanly possible. Therefore, the most effective course may well be writing such orders so that, although parties can perhaps find some basis for appeal, few if any will be motivated to do so.²

Authors solicited for this publication were invited to address the challenges posed and faced by communications policymakers today and the extent to which the law should respond to these challenges. Most assuredly, the law does need to be changed in several important respects. Specifically, it has become clear that certain legal/regulatory restrictions (such as the Modification of Final Judgment³ and certain baseless tariff inflexibilities) imposed upon incumbents have become more harmful than helpful to

1.

The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated The possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one's hands and splitting the difference, was overlooked.

Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1050 (D.C. Cir. 1992).

2. To substantiate the points being made herein, one could list the recent string of cases in which the FCC has been reversed by courts of appeals, and could contrast that record with the one the Commission enjoyed for many years prior. However, this phenomenon is already of public record, and thus a formal accounting at this point would serve only to cast the Commission in a negative light, which is *not* the intent of this Article.

3. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. U.S., 460 U.S. 1001 (1983).

competition. But those topics will be left to the many other fine contributors to this special edition of this *Journal*.

Instead, this writer chooses to leave readers with one final thought: No matter what the law may say, invariably it is the manner in which the law is carried out that has the most profound effect. For the FCC to avoid time-devouring appellate detours and return to the fastest road to the NII, it should reengage its prior approach of seeking out the limits of tolerance among the affected parties before issuing its orders, and take the time to strike reasonable compromises wherever possible. Of course, where compromise is impossible or not in the public interest, the FCC can and should make the final decision. However, diligence by everyone involved should greatly limit the number of instances in which parties feel they have no recourse other than to appeal a Commission order.

For our part, as the affected parties, we should be actively involved in working earnestly with one another on such compromises. We should be striving to show the FCC that common ground can be established without losing ground. We must write the forthcoming pages of communications history together, rather than trying to tear one another's proposed pages out of the book.

We must collaborate.