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The Art of Writing Good Regulations

Harold W. Furchtgott-Roth*

Chemists use precise tests to detect and identify the component elements of different substances. Physicists have methods to examine objects, both large and small. Biologists can discern much information about the basic building blocks of life from genetic material. Scientists have many techniques to answer fundamental questions about the world, but can those techniques enable them to distinguish a good government regulation from a bad one?

Since arriving at the Federal Communications Commission (“FCC” or “Commission”) three years ago, I have often reviewed regulations, both old and new. Labeling some regulations “good” and others “bad” may seem simple, but what distinguishes one from the other? The three Articles that follow begin to answer that question.

Simple tests can be constructed easily to identify some forms of bad regulations, such as regulations that have no basis in law. In assessing the basis for a given regulation, I have adopted a four-category “sliding scale” approach: (1) rules that the Commission is legally required to promulgate; (2) rules that the FCC is explicitly permitted by law to develop; (3) regulations that have no specific statutory basis, but rather rely on the Commission’s ancillary authority; and (4) regulatory actions barred by statute. Obviously, the Commission has no discretion in the first and fourth categories. Therefore, the assessment of “good” versus “bad” regulations largely plays out in categories two and three.

It does not follow, however, that any regulation that has a plausible interpretation consistent with statutory language is “good.” Sections 4(i) and 201 of the Communications Act of 1934 (“1934 Act”) give the FCC broad authority, but only as “necessary” to implement other statutory provisions. Some have argued that these sections give the Commission

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authority to do what it pleases, regardless of other provisions of the 1934 Act. Of course, such interpretations render all other provisions of law meaningless, as those provisions neither expand nor limit the purportedly infinitely expansive power of the agency. I do not subscribe to this view under any circumstance, although many gifted legal minds find this interpretation not merely plausible, but inescapable.

In many instances, drafting “good” rather than “bad” regulations is as much an art as a science. Regulations are not minted by a dispassionate press, which imprints the only possible interpretation of statutory language. By contrast, ever-changing committees of people draft regulations, with suggestions made by parties with substantial economic interests in the final form of the regulations. Countless drafts result, practically all of which are discarded soon after creation. With all of the drafting and preparation, one can only hope that the final products of legal regulation have a more elegant and refined structure than the rough drafts.

The *Code of Federal Regulations* is many things to many people, but I have yet to meet anyone who would call it an art gallery. The works are long-lasting, perhaps even permanent. Some are widely known, even if they are not universally admired. There are even guards that make sure the public treats the regulations with some appropriate degree of respect. My empirical observation, however, is that few regulations—at least here at the FCC—are great works of art.

What is the art of writing “good” regulations? I am not certain. I have come to recognize certain characteristics of “bad” regulations. Let me describe a few objections that I have frequently raised in response to Commission proposals.

Legal Basis: Since I joined the Commission, the vast majority of my dissenting statements have relied on a very basic principle: Follow the law. Many bad regulations have no legal bases, or only tenuous ones at best. Regulators should write regulations only insofar as they have the legal authority to do so. It is not enough to demonstrate that a proposed regulation is “needed” or will “do good.” The United States has many problems, some of which may be remedied by regulation, but only a few of which the FCC has authority to address. Many of my dissents on the Commission have focused on the absence of legal authority to promulgate a certain regulation; the following Articles focus primarily on those instances in which an agency may have some authority to exercise discretion.

Helgi Walker’s Article, *Communications Media and the First Amendment: A Viewpoint-Neutral FCC Is Not Too Much to Ask For*, examines how the Commission at times tempts fate by adopting statutory interpretations that unnecessarily push the envelope of constitutionality.

Some Commission rules have violated the First Amendment by giving regulatory preference to certain viewpoints over others. Clearly, the Commission's promulgation of regulations should be informed not merely by statutory language, but by constitutional concerns as well.

Rebecca Beynon writes in *The FCC's Implementation of the 1996 Act: Agency Litigation Strategies and Delay* about the litigation confusion and market uncertainty that result from overly aggressive regulatory interpretations of the 1934 Act by the FCC. It is not enough merely to promulgate regulations that have a plausible interpretation under the 1934 Act; the Commission should write regulations that are broadly applicable and that are so closely based on statutory language that efforts to challenge them in court will be either discouraged or unsuccessful.

Finally, in *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, Bryan Tramont describes how the current FCC uses the legal vacuum created by "voluntary" agreements to circumvent the statutory limits imposed on the agency. In both license-transfer cases and consent decrees, the Commission extracts concessions from licensees that it would be unable to obtain under the statute—all while evading judicial review.

Market Failure: Regulatory agencies sometimes become ambivalent about markets and at times delude themselves into believing that regulation can "create" or "improve" a market. Regulation rarely, if ever, does either. Fashioning necessary regulation essentially admits market failure. If markets have not failed, there can be no need for regulation. Today's regulators often characterize markets as useful and good; yet, if they are too useful and too good, regulation has no role to play. The choice to exercise discretionary regulatory powers must be based not only on statutory discretion but a clear finding that markets have failed.

Cost-Benefit Analysis: Even if markets have failed, a specific proposed regulation may or may not ameliorate the situation. Too often, regulators only look at the alleged benefits of a given regulatory proposal without ever examining the costs. Relatedly, the Commission rarely examines its priorities as a zero-sum game; resources spent on expansive new regulatory ventures are resources taken away from the FCC's core obligations under the 1934 Act. The decision to proceed with a specific proposed regulation, whether discretionary or not, should be informed by a cost-benefit analysis. Will the likely benefits of a proposed regulation outweigh the likely costs? Asking the question proves far easier than answering it. Most of the costs and benefits of regulation are hidden in the future, allowing only imprecise, speculative measurement. Economics and regulation do not live in controlled laboratory conditions; the precise

effects of regulation in a market can be difficult to tease out. Regulatory agencies should at least attempt to offer a brief description of a rule's potential benefits and costs, or milestones for its review.

Company-Specific Rules: Regulations should not treat businesses differently from one another. *Too Much Power, Too Little Restraint* sets forth the unfortunate consequences of the FCC's adoption of company-specific rules. These company-specific rules result in a telecommunications market in which similarly situated entities are treated differently, not as the result of statute, but as the result of private negotiations of Byzantine "voluntary" agreements. Worse, these company-specific rules evade judicial review, they often result from negotiations that are often beyond the view of the public, and the resulting obligations cannot be found in the *Code of Federal Regulations*.

Together, these three Articles describe how regulations that may facially be consistent with statutory language nonetheless are bad rules under law. The art of writing good regulations may not be fully revealed by these Articles, but they present several aspects of less-than-artful regulations. As with any art form, good regulations can only be written with care and practice.