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Four More Years... of the Status Quo? How Simple Principles Can Lead Us out of the Regulatory Wilderness

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Four More Years . . . of the Status Quo? How Simple Principles Can Lead Us out of the Regulatory Wilderness

Adam Thierer*

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I. INTRODUCTION

As the Bush Administration begins its second term, the telecommunications sector continues to wait and wonder whether President Bush will have anything more to say about telecom policy in the next four years than he did during the last four. The President was largely MIA on telecom and high-technology policy during his first term.¹ In many ways, this is hardly surprising. Telecom policy is very dry and technical; it does not make for good stump speeches by politicians or for engaging in dinner table talk for the average family.

But that does not mean that Telecom policy is not important and

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1. Adam Thierer, *The Bush Administration's Broadband Policy Record*, TECHKNOWLEDGE No. 43 (Cato Institute, Washington, D.C.), Nov. 11, 2002, at <http://www.cato.org/tech/tk/021111-tk.html>; Adam Thierer, *Is the Bush Administration Finally Getting Serious about Broadband Policy?*, TECHKNOWLEDGE No. 81 (Cato Institute, Washington, D.C.), Apr. 28, 2004, at <http://www.cato.org/tech/tk/040428-tk.html>.

deserving of at least *some* consideration by our elected officials. A significant portion of our modern Information Age economy is built on the foundations of our communications and high-technology sectors. The rules that govern these sectors, therefore, are of extraordinary importance compared to the rules governing agriculture or steel, two of the main economic engines of the past. Sadly, however, it is those sectors which continue to capture the President's attention. It remains to be seen if the President's policies will catch up with economic history.

Even if the Bush team is not interested in pursuing major telecommunications reform, Congress might be. The respective Commerce committees have already started thinking about what the next version of the Telecommunications Act should look like. Technological changes unforeseen by the Telecommunications Act of 1996 ("Telecom Act"), such as the rapid development of wireless, the Internet and high-speed broadband, and VoIP, have forced lawmakers to begin considering how these new services fit into old regulatory paradigms.² Many policymakers still fail to grasp the fact that major portions of the Telecom Act have already been rendered somewhat obsolete by the rapid evolution of technology and competition in just the past ten years. If recent developments are any guide, this process will only continue in coming years, and at an accelerated pace.

Regulatory reform is no longer merely an option; it is essential if lawmakers want to make sure that the laws governing this important sector keep pace with the rapidly changing times. Luckily, with the tenth anniversary of the Telecom Act rapidly approaching, there will be greater focus on its flaws and failings. With increased attention there will likely be many calls to reopen the issue and revise the Telecom Act.

What went wrong with the Telecom Act? This is not the place for a full dissection of the Telecom Act to identify all its problems, but in general, a simple paradox summarizes what was most wrong about the measure: Congress wanted market competition but did not trust the free market enough to tell regulators to step aside and allow markets to function on their own.³ Consequently, the FCC, the Department of Justice, the courts, and state and local regulatory commissions, have spent the last ten

2. Adam Thierer, *Number Portability Decision Adds to Wireline Telecom Sector's Perfect Storm*, TECHKNOWLEDGE No. 66 (Cato Institute, Washington, D.C.), Nov. 20, 2003, at <http://www.cato.org/tech/tk/031120-tk.html>; Adam Thierer, *Twilight for Traditional Telecom Regulation?*, TECHKNOWLEDGE No. 91 (Cato Institute, Washington, D.C.), Oct. 25, 2004, at <http://www.cato.org/tech/tk/041025-tk.html>.

3. ADAM THIERER, CATO INSTITUTE, A 10-POINT AGENDA FOR COMPREHENSIVE TELECOM REFORM, BRIEFING PAPER No. 63 (May 8, 2001), at <http://www.cato.org/pubs/briefs/bp-063es.html>.

years treating this industry as a regulatory plaything with which to be endlessly toyed. Today, there is virtually no element of telecommunications that is not subject to some sort of meddling by some or all of these regulators.

While it is fair to say that it was probably wishful thinking to believe we could have undone a century's worth of command and control regulatory policies in only a few short years, one would have hoped that we would not still be stuck debating the same issues today that dominated the agenda over a decade ago. Indeed, if Rip Van Winkle fell asleep in 1994 and woke up in 2004, he would not think he'd missed a beat if telecom regulation was any guide.

Yet again, technology marches on even if the law doesn't. The law, however, is increasingly in conflict with marketplace realities or worse yet, is holding back further technological progress. As these revolutionary technological changes compel the consideration of regulatory change, the Bush Administration will have to make a simple choice: Do we lead or follow? That is, will the President craft a clear policy for telecom and high-technology, or will he let Congress be in the proverbial driver's seat.

Regardless of who is leading reform efforts, this Essay aims to provide a simple framework for telecom liberalization. Indeed, much of the problem with the Telecom Act could be traced to the fact that it was anything but a simple framework. It was a convoluted, bloated, ambiguously-worded mess of a legislative measure. As Supreme Court Justice Antonin Scalia famously noted of the Act, "[it] is not a model of clarity. It is in many important respects a [model of ambiguity] or indeed even [self-contradiction]. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars."⁴ This ambiguity explains why the Act was the subject of almost endless litigation, including two trips to the Supreme Court. And a third trip was only narrowly avoided when the Bush Administration and FCC chose not to push for a review of a major decision by the D.C. Circuit Appeals Court, which again overturned many FCC rules.⁵

To avoid a similar outcome on the next legislative go-round, it would be wise for policymakers to follow one very simple piece of advice: Keep it simple! Simple principles and rules should guide their reform efforts. Do not try to appease every interest with specific language; craft the new rules such that they are generally applicable to all players. Most importantly, do not live under the illusion that size matters. Indeed the opposite is probably

4. *AT&T Corp., v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

5. *U. S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

true: A ten-page bill would be infinitely better than a 100-page bill.

With simplicity in mind, the Author would like to suggest three important overarching themes or priorities that should guide future telecom policy reform efforts:

- (1) Rationalizing regulatory classifications;
- (2) Sorting out jurisdictional matters;
- (3) Getting agency power and size under control

II. REGULATORY CLASSIFICATIONS

With respect to regulatory classifications, a general consensus exists today that Congress will need to formally close the book on the archaic regulatory classifications of the past, which pigeonhole technologies and providers into distinct vertical policy silos. That is, we still have Title II for common carriers, Title III for wireless, Title IV for cable, and so on, even though rapid technological change and convergence have largely wiped out such distinctions and pitted these formerly distinct sectors against one another in heated competition for consumer allegiance. Thus, although the communications and broadband marketplace is becoming one giant fruit salad of services and providers, regulators are still separating out the apples, oranges, and bananas and regulating them differently. This must end.

One way to do this is to replace the vertical silos model with a horizontal layers model that more closely resembles the way the new marketplace operates. We can divide the new industry into at least four distinct layers: (1) content; (2) applications; (3) code; and, (4) infrastructure. Then, if we must, we can regulate each accordingly.⁶ But the Author would caution Congress against formally enshrining a network layers model as a new regulatory regime. While this model provides a useful analytical tool to help us rethink and eliminate the outmoded policy paradigms of the past, we would not want these new layers to become the equivalent of rigid regulatory quarantines or firewalls on industry innovation or vertical integration.⁷

A second and better way to tear down the old regulatory paradigms

6. Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 *FED. COMM. L.J.* 587 (2004).

7. Adam D. Thierer, *Are "Dumb Pipe" Mandates Smart Public Policy?: Vertical Integration, "Net Neutrality," and the Network Layers Model*, Apr. 15, 2004, 3 *J. OF TELECOMM. & HIGH TECH. L.* (forthcoming Mar., 2005); ADAM D. THIERER, CATO INSTITUTE, *NET NEUTRALITY: DIGITAL DISCRIMINATION OR REGULATORY GAMESMANSHIP IN CYBERSPACE?*, POLICY ANALYSIS No. 507 (Jan. 9, 2004), at <http://www.cato.org/pubs/pas/pa-507es.html>.

and achieve regulatory parity would be to borrow a page from trade law and adopt the equivalent of a most favored nation principle for communications. In a nutshell, this policy would state that the following: "Any communications carrier seeking to offer a new service or entering a new line of business, should be regulated no more stringently than its least regulated competitor."⁸ This would allow us to achieve regulatory simplicity and parity not by "regulating up" to put everyone on equal, difficult footing, but rather by "deregulating down."⁹ Given the confusion over the *Brand X* court case and the ongoing FCC investigation into a Title 1 information services classification for broadband, this most favored nation approach might help us bring some resolution to this difficult issue.

III. JURISDICTIONAL MATTERS

Next we come to jurisdictional matters, which could very well end up being the most controversial issue that Congress will take up if it chooses to reopen the Telecom Act. Here the Author is referring to the heated debate between federal, state, and local regulators for control over the future of communications policy.¹⁰

Decentralization of political power almost always has a positive effect in terms of expanding human liberty.¹¹ But as our Founders wisely realized when penning the Constitution, there are some important exceptions to that general rule. Telecommunications regulation is one of those cases where state and local experimentation does not work so well. After all, at the very heart of telecommunications lies the notion of transcending boundaries and making geography and distance irrelevant. If ever there was a good case to be made for an activity being considered interstate commerce, this is it. Yet, America's telecom market remains riddled with a patchwork of policies that actually thwart that goal, seek to divide the indivisible, and place boundaries on the boundless.¹²

8. Adam D. Thierer, *Telecom Newspeak: The Orwellian World of Broadband "Deregulation"*, in TELECRISIS: HOW REGULATION STIFLES HIGH-SPEED INTERNET ACCESS 9-31 (Sonia Arrison ed., 2003), available at <http://www.pacificresearch.org/pub/sab/techno/telecrisis.pdf>.

9. *Id.*

10. Adam D. Thierer, Federalist Society, *Federalism and Telecommunications* (2001), at <http://www.fed-soc.org/Publications/practicegroupnewsletters/telecommunications/federalism-telecomv3i1.htm>; Robert W. Hahn, Anne Layne-Farrar, & Peter Passell, *Federalism and Regulation*, REGULATION, Winter 2003-2004, at 46, available at <http://www.cato.org/pubs/regulation/regv26n4/v26n4-7.pdf>.

11. ADAM D. THIERER, *THE DELICATE BALANCE: FEDERALISM, INTERSTATE COMMERCE AND ECONOMIC FREEDOM IN THE INFORMATION AGE* (1998).

12. Adam Thierer, *Will "States' Rights" Derail Telecom Deregulation?*, TECHKNOWLEDGE No. 49 (Cato Institute, Washington, D.C.), Mar. 14, 2003, at

This must end. The only way it will end is by federal lawmakers taking the same difficult step they had to take when deregulating airlines, trucking, railroads, and banking: preemption. They must get serious about the national policy framework mentioned in the preamble of the Telecom Act by comprehensively preempting state and local regulation in this sector. The rise of wireless and Internet-based forms of communications makes this an absolute necessity.

If federal policy makers feel compelled to leave some authority to state regulators, why not devolve to them any universal service responsibilities that continue to be deemed necessary? This is one area where experimentation can work if the states devise targeted assistance mechanisms. But they should not be allowed to impose regulatory restraints or levies on interstate communications to do so.

IV. AGENCY POWER

The final big picture reform involves what may have been the most glaring omission from the Telecom Act: the almost complete failure to contain or cut back the size and power of the FCC. Again, we would do well to remember the lessons of the past. When Congress deregulated airlines, trucking, and railroads, lawmakers wisely realized that comprehensive and lasting reform was possible only if the agencies that oversaw those sectors were also reformed or even eliminated.

In the telecom world, by contrast, the FCC grew bigger and more powerful in the wake of deregulation. Greg Sidak of the American Enterprise Institute has found that, compared to the years prior to passage of the Telecom Act, FCC spending went up by 37 percent, the number of pages in the *FCC Record* tripled, and there was a 73 percent increase in the number of telecom lawyers.¹³ It is safe to say that there can be no deregulation cannot occur in an industry by granting regulators more power over that industry.

This too must end. The next attempt at revising the Telecom Act must do more than just hand the FCC vague forbearance language while suggesting that the agency take steps to voluntarily regulate less. We cannot expect the regulators to deregulate themselves.¹⁴ Lawmakers need to impose clear sunsets on existing FCC powers, especially the

<http://www.cato.org/tech/tk/030314-tk.html>.

13. J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207 (2003), available at <http://www.yale.edu/law/leo/papers/sidak.pdf>.

14. ALFRED E. KAHN, WHOM THE GODS WOULD DESTROY OR HOW NOT TO DEREGULATE, (2001), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=112>.

infrastructure-sharing provisions of the current Telecom Act.¹⁵ Then they need to impose sunsets on any new transitional powers granted them in the next Telecom Act. FCC funding cuts are also needed.

If lawmakers fail to take steps to limit and then eliminate agency powers, they run the risk of allowing regulators to gradually incorporate new competitors and technologies—such as the Internet and broadband—into the old regulatory system. The very fact that these new competitors and technologies exist makes the need for the old regulations more dubious than ever before.

V. CONCLUSION: ENDING THE “CHICKEN LITTLE COMPLEX”

In conclusion, it is the Author’s hope that regardless of who leads the reform charge in coming years—the Bush Administration or congressional lawmakers—that they will reject the many doomsdayers and naysayers in the telecom sector who claim the sky will fall without incessant regulatory oversight and intervention. The “Chicken Little complex” seems to run rampant throughout this sector even though it is less warranted than ever before.

Policymakers have a chance to make more than just a clean break with the past; they have the chance now to close the book on a regulatory past that has done little to truly benefit consumers. Regulators have been given over 100 years to conduct a grand experiment with the telecom sector. Why not give markets a chance for once?

15. ADAM D. THIERER & CLYDE WAYNE CREWS JR., *WHAT’S YOURS IS MINE: OPEN ACCESS AND THE RISE OF INFRASTRUCTURE SOCIALISM* (2003).

