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REWRITING THE TELECOM ACT: AN INTRODUCTION

PHILIP J. WEISER*

What a difference five years makes. In 2000, the Silicon Flatirons Telecommunications Program held its first conference on “Telecommunications Law for the Twenty First Century,” with my opening remarks and essay titled “Paradigm Changes In Telecommunications Regulation.”¹ That essay focused on the central themes of that conference, concluding with the observation that “Congress did not fully grasp the importance of the internet” in drafting the Telecommunications Act of 1996 and that the questions around “how to treat the internet will only heat up in the years to come.”² Today, such observations are not only conventional wisdom, but Congress and other commentators have begun to debate how to craft a new statutory framework for an Internet age.³

Our conference on “Rewriting The Telecom Act” focused on the critical set of themes related to regulating digital broadband communications. As Chairman Powell noted in his remarks, a critical effort to ensure sound competition policy in the digital age is to promote the development of a third (and fourth) broadband pipe.⁴ Of the contenders for the title of the third broadband pipe, the best prospects center on the development of new wireless technologies, such as the much-hyped WiMAX standard.⁵ On most accounts, however, the promises of wireless broadband rest on the shoulders of spectrum policy

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1. Philip J. Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819 (2000).

2. *Id.* at 842.

3. See, e.g., Staff Discussion Draft, http://energycommerce.house.gov/108/News/09152005_staff_disc.pdf (Sept. 15, 2005). See also PROGRESS & FREEDOM FOUND., *The Digital Age Communications Act Project*, at <http://www.pff.org/daca> (last visited Oct. 20, 2005) (presenting a notable effort to craft a new statutory framework).

4. Michael K. Powell, *The Digital Migration: Toward A New Telecom Act*, 4 J. ON TELECOMM. & HIGH TECH. L. 5, 12 (2005).

5. See WIMAX FORUM, *Technical Information*, at <http://www.wimaxforum.org/technology> (last visited Oct. 20, 2005).

reform. Without freeing up spectrum for new uses and facilitating more flexibility in how spectrum is used—either through a “commons” or “property rights” model⁶—we may still be talking about the prospects for a third broadband pipe in another five years.

The contributions that Gerry Faulhaber, Ellen Goodman, Jim Speta, and Travis Litman make to the debate on spectrum policy are critically important.⁷ Together, they raise four questions regarding spectrum reform: (1) how can the inarguable benefits of a property rights system be put into practice; (2) whether any concerns about fairness (i.e., unjust enrichment) should influence spectrum policy; (3) how can new, smart technologies such as cognitive radios facilitate more effective uses of spectrum; and (4) what political forces will lead Congress to take the steps necessary to update our spectrum policy. Notably, the last question may well be the hardest of the three, but Jim Speta effectively engages that issue. Unfortunately, his call for a thorough re-thinking of spectrum policy as part of comprehensive telecommunications law reform does not seem to be taking hold on Capitol Hill.

The debate about the proper substantive and institutional strategy for the Federal Communications Commission are, as former Chairman Powell put it, “really hard” and “not a simple matter.”⁸ For starters, the deregulatory initiative in airlines, for example, represented a case where the industry was structurally competitive and regulation constituted an impediment to competition. As Alfred Kahn so wonderfully explains, the challenges of telecommunications regulation are more difficult. “Telephone regulation, in contrast [to airline regulation], set the prices and other conditions of sale on services whose supply was believed to be best handled by designated franchised ‘natural’ monopolists. . . . [T]he case for deregulation of industries such as telecommunications has to be that monopoly is no longer the most efficient form of supply, if it ever was; and that competition, once released from governmental restraint on the one side and subsidization of competitors on the other, will serve the

6. See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 225–261 (2005); Philip J. Weiser & Dale Hatfield, *Policing the Spectrum Commons*, 74 FORD. L. REV. 101 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=704741; Philip J. Weiser & Dale Hatfield, *Property Rights In Spectrum: Taking the Next Step* (Sept. 30, 2005), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=818624.

7. Gerry R. Faulhaber, *The Question of Spectrum: Technology, Management, and Regime Change*, 4 J. ON TELECOMM. & HIGH TECH. L. 121 (2005); Ellen P. Goodman, *Spectrum Equity*, 4 J. ON TELECOMM. & HIGH TECH. L. 193 (2005); James B. Speta, *Making Spectrum Reform “Thinkable”*, 4 J. ON TELECOMM. & HIGH TECH. L. 181 (2005); Travis E. Litman, *Cognitive Radio: Moving Toward A Workable Framework for Commercial Leasing of Public Safety Spectrum*, 4 J. ON TELECOMM. & HIGH TECH. L. 249 (2005).

8. Michael K. Powell, *The Digital Migration: Rewriting the Telecom Act Through Self-Executing Deregulation*, 4 J. ON TELECOMM. & HIGH TECH. L. 5, 14 (2005).

public far better than public utility-type regulation.”⁹

In considering the proposal offered by Kevin Werbach related to how to conceptualize the emerging telecommunications environment, readers can appreciate the great extent to which this field presents significant intellectual barriers to entry.¹⁰ After all, to understand telecommunications regulation, one must focus not only on a complex statute, but dynamic technologies and economic principles. The difficulty in understanding these issues, along with an array of institutional challenges in implementing the Act, help explain why, to Richard Notebaert’s great frustration, regulatory decisions do not proceed at “Internet time.”¹¹

The frontiers ahead and the appropriate scope of a new Telecom Act will not be decided in the very near term. Chairman Powell’s suggestion of a self-executing deregulation model is now being considered, albeit in a bill over three times the length that he recommended.¹² Similarly, Congress is now considering instituting the broadcast flag proposal,¹³ so Molly van Houweling’s analysis of that proposal—which was invalidated on account of a lack of jurisdiction¹⁴—is most timely.¹⁵

The realities of legislation on any topic, particularly one as complex as telecommunications, is that developing thoughtful policy approaches will take time. In that respect, the work of the Journal on Telecommunications and High Technology Law is critically important. It’s a great pleasure to see that, as the need for a new statutory framework increases and the challenges grow more complicated, the University of Colorado has a terrific group of students committed to searching for thoughtful answers and producing a Journal that continues to reach new heights.

9. Alfred E. Kahn, *Reforming the FCC and its Mission: Lessons from the Airline Experience*, 4 J. ON TELECOMM. & HIGH TECH. L. 43, 43-4 (2005).

10. Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications Law for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH. L. 55, (2005).

11. Richard C. Notebaert, *Overseeing the Unforeseeable: A Rational Regulatory Approach to 21st Century Communications*, 4 J. ON TELECOMM. & HIGH TECH. L. 31, 37-8 (2005).

12. See Staff Discussion Draft, *supra* note 3.

13. Declan McCullagh, *Politicians Want to Raise Broadcast Flag*, CNET NEWS.COM (Sept. 30, 2005), at http://news.com.com/Politicians+want+to+raise+broadcast+flag/2100-1028_3-5886722.html.

14. Am. Library Ass’n v. FCC, 406 F.3d 689 (D.C. Cir. 2005).

15. Molly Shaffer Van Houweling, *Communications’ Copyright Policy*, 4 J. ON TELECOMM. & HIGH TECH. L. 95 (2005).

