
A REVIEW OF *TELECOMMUNICATIONS LAW AND POLICY* BY THOMAS G. KRATTENMAKER

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*Telecommunications Law and Policy*² is not a modest endeavor. It is, in the author's words, designed to be "an introduction to the study of the principal policy issues raised by federal regulation of the telecommunications industries, particularly issues of constitutional law, economic regulation, and administrative law."³ Additionally, it is designed to be a "comprehensive study of contending constitutional, economic and regulatory theories."⁴ These dual purposes, however, sometimes become duelling purposes and are the genesis of both the strengths and weaknesses of the book.

The author admits to writing the book not for practitioners, but for beginning students of telecommunications law. It is not a speculative discourse on what the world will be like with the coming convergence of communications technologies and the eventual blurring, if not erasure, of the lines between computers, telephones, televisions, and radios. It is neither a treatise on communications law spoon-feeding "black-letter" holdings to the reader, nor a traditional law school casebook primarily containing cases heavily redacted for pedagogical purposes. Freed from those constraints, the author is able to draw from diverse sources, both primary and secondary, to accomplish his purposes. He utilizes FCC decisions and rulemaking *Orders*, court decisions, law review articles, and textbooks. The author also puts together his own introductions to each topic and poses insightful closing questions about the material presented.

One final introductory point: *Telecommunications Law and Policy* is, as can be predicted from the author's stated purposes, heavily laden with economic analysis, especially in its first section, dealing with "conventional" broadcasting. It reflects the author's

point of view that "the history of federal regulation of telecommunications has been, too often and too consistently, to err on the side of interposing regulatory solutions when marketplace answers would be preferable . . . and to erect governmental barriers when free entry and exit were available alternatives."⁵ The concentration on economic theory certainly reflects the orientation of the FCC under current Chairman Reed Hundt's stewardship (it is no surprise that Mr. Hundt is listed among the author's acknowledgements), but it also tends to hinder the author's presentation of an overview of existing broadcast regulation. For example, the author spends one paragraph listing certain FCC regulations regarding the relationship between broadcast networks and their affiliates, and ten pages of discourse on why those rules are both illegitimate and likely to be evaded.

The author organizes the book into three broad sections. Part I deals with conventional broadcasting, Part II with cable television, and Part III with telephones. Each part begins with an excellent discussion of the history and development of the particular medium before addressing specific regulatory issues. Readers will find the concise historical discussions of the development of cable (from "Community Antenna Television" to the multichannel programming service we know today) and the AT&T telephone monopoly (the company owned the distance lines, the patents to switching technology, and vastly superior technology) particularly enlightening.

Part I of the book is divided into six chapters. Chapter One addresses the origins of broadcasting and the historical development of regulation from The Radio Act of 1912 through the Communications Act of 1934. It also contains an overview of the basic

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² THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS*

LAW AND POLICY, 1994.

³ KRATTENMAKER, at xiii.

⁴ *Id.*

⁵ *Id.*

elements of the commercial television industry. Chapter Two deals with allocation of the electromagnetic spectrum among the various media, from AM radio at 550 kilohertz (KHz) through the personal communications services and multipoint distribution services in the 1 - 3 Gigahertz (GHz) bands. It even contains a rudimentary but nonetheless helpful description of how signals are propagated and carry information via broadcast antennae. Chapter Three is quite short (nine pages), and discusses three criteria derived (correctly) by the author for "evaluating broadcast industry performance": competition, diversity, and "localism." Chapter Four addresses licensing procedures for selecting among competing applicants for new stations as well as renewals. The author also critiques the FCC's traditional licensing procedures and proposes alternatives, such as auctions and lotteries, which may be more economically sound. Chapter Five addresses what the author terms "The Licensee as Public Trustee" and presents a handful of issues regarding content regulation: the Fairness Doctrine, indecency, children's television, format regulation, televised violence,⁶ and commercialization and ascertainment. Chapter Six discusses regulatory attempts to foster competition, primarily in the television industry, but also includes a lengthy excerpt from the 1992 revision of the radio ownership rules.

Part II, dealing with Cable Television, contains seven separate chapters. Chapter Eight contains an excellent history of cable television (drawn from a law review article)⁷ and of the Commission's initial assertion of jurisdiction of the medium as "reasonably ancillary" to its authority to regulate and prevent adverse impact on conventional broadcasting. Chapter Nine discusses the 1984 and 1992 Cable Acts, paying special attention to the concepts of cable as a natural monopoly and the Commission's attempts to facilitate competition. Chapter Ten further explores the regulatory relationship between broadcasting and cable through three fora: syndicated exclusivity, "retransmission consent" as promulgated pursuant to the 1992 Cable Act, and "must-carry" rules for local broadcasts. Chapter Eleven addresses "compelled access," the requirement that cable systems make

available a portion of their channel capacity for lease by outside unaffiliated parties. Chapter Twelve discusses indecency on cable, an interesting sidebar, and Chapter Thirteen admirably and adequately examines exclusive franchising arrangements merely by including the *Santa Cruz* case.⁸ Chapter Fourteen, under the broad rubric of "Fostering Competition in Cable" addresses controls on horizontal and vertical integration of cable systems, regulation of supply contracts, and rate regulation, all promulgated by the FCC in light of the 1992 Cable Act.

Part III addresses telephone regulation and contains three chapters. Chapter Fifteen contains a superb history of the development of the telephone industry and AT&T monopoly, as well as a summary of regulation prior to the 1982 settlement which stripped AT&T of its local exchange carriers. Chapter Sixteen solely addresses Judge Greene's Modified Final Judgment ("MFJ"),⁹ including both a lengthy excerpt from the MFJ order and an article explaining in some detail the theory behind the government's antitrust case. Finally, Chapter Seventeen contains an overview of post-divestiture issues, most significantly the FCC adoption of price cap rather than rate-of-return rate regulation, enhanced or data processing services by the divested Bell Operating Companies, and provision of video services (the so-called "Video Dialtone") by telephone companies.¹⁰

More than half of the book is devoted to conventional broadcasting issues. This is both interesting and illustrative: while broadcast matters are occupying increasingly less time on the part of communications law firms and practitioners in the 1990's, broadcasting is clearly the area to which the author has given the most thought and in which he has the most interest. Therefore, the broadcast chapters are the most reflective of the author's convictions. Again, however, the author's heavy handed economic orientation leads him to paint an incomplete picture of broadcast regulation.

The book contains a concise narrative describing the historical and yes, political context for development of federal communication regulation. However, while he provides some discussion of the ramifications — *i.e.*, content regulation — of the regulation

⁶ The selection is not without humor, as the entry in the "Televised Violence" section consists solely of a fairly infamous "Calvin & Hobbes" comic strip. On the other hand, the author has a distracting tendency to cite or quote his own publications as authority to support his ideas.

⁷ Stanley M. Besen and Robert W. Crandall, *The Deregulation of Cable Television*, 44 *LAW & CONTEMP. PROBS.* 77 (1981). Mr. Besen has also co-authored several publications

with Dean Krattenmaker.

⁸ *Group W. Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

⁹ *United States v. American Telephone and Telegraph*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

¹⁰ To appeal to the students' prurient interest, the author also includes the obligatory section on indecency and telephony.

of broadcast licensees as public trustees, he provides little insight into the origin of that concept.¹¹ Rather, the author's treatment is colored by his belief that the electromagnetic spectrum should be treated no differently from land, lumber, or iron ore. This point is illustrated in the author's discussion of spectrum allocation. Traditional broadcast regulation has been premised upon the doctrine of "scarcity," *i.e.*, that there are more potential users than there are available frequencies. Not so, says the author. If the marketplace, rather than the FCC, were to apportion the spectrum, there would be no real scarcity.¹² The high bidder could take its piece of spectrum and do whatever it wanted with that allotment. In this scenario, rather than universally confining FM broadcasting to between 88.1 and 107.9 MHz, perhaps in certain places the market would value television broadcasting over FM, and some of that spectrum would be utilized for TV. This theory, which pervades much of Part I of the book, has two corollaries: if there is no real scarcity, broadcasting should be regulated only insofar as is necessary to prevent broadcasters from interfering with each other's use of the spectrum. This can be done by recognizing a property right in spectrum use. Second, if there is indeed a condition of "scarcity" in spectrum space, it is economically unjustified for the government to give away the spectrum for free. An auction, coupled with a property right, makes the most economic sense.

As the author attempts to make hamburger of the sacred cow of scarcity, he slips from overview to indoctrination. The key issue for the author is "whether spectrum is 'scarce' in some unique manner (unlike, say, land or iron ore) that peculiarly requires an allocation mechanism unique to this resource."¹³ What beginning communications students

need to understand initially is that conventional broadcasting has been regulated as though it is qualitatively different from iron ore or hog bellies. The broadcasting industry and its product — information — is regulated with the listening and viewing public, not the broadcaster, as the intended beneficiary. The tripartite evaluation criteria of competition, localism, and diversity cannot be explained or understood without first grasping this concept. The author fails to provide the proper underpinning for the extant "broadcaster as public trustee" concept.¹⁴

The point is not that comparative hearings are in all cases the best means for broadcast applicant selection. In fact, the Commission used the lottery method for selecting among applicants for low power television stations. Furthermore, the FCC considers its auction process for personal communications services ("PCS") licenses to be such an astounding success that Chairman Hundt is considering auctioning spectrum allocated for digital television.¹⁵ Rather, the point is that there are other regulatory goals for conventional broadcasting beyond economic efficiency. These goals are important unless, to paraphrase the chimerical platitude of former FCC Chairman Mark Fowler, a television really is nothing but "a toaster with pictures." Even then, however, the author's primary initial obligation to beginning communication law students is to present how and why broadcasting actually is regulated prior to presenting his views on how it should be regulated.

That criticism aside, the author does present a selection of topics representative of the principal policy issues raised by federal regulation of the broadcast medium. One possible omission, an issue which has received an unusual amount of communications press recently in light of the inquiry concerning Murdoch and the Fox network, is any discussion of federal

¹¹ For example, the author does not trace the origin of the linchpin phrase of all broadcast regulation: the "public interest, convenience and necessity." However meaningless the phrase may actually have been, and whatever meaning with which it has since been imbued, a student would benefit from knowledge that Congress determined from the outset that broadcasting should be regulated akin to a public utility, from which regulation the key phrase was appropriated. Students might also find it enlightening that the phrase was proposed by the National Association of Broadcasters at the Fourth Radio Conference in 1925, presided over by then Secretary of Commerce Herbert Hoover. See HEAD, *BROADCASTING IN AMERICA*, 322 (1976).

¹² To carry further the author's mining analogy, the authority to use any finite resource must be allocated. Interference, whether from a broadcaster on an adjacent channel or a competing company extracting from the same vein, will diminish the value of the resource to the user. The author maintains that property rights, rather than an allocation table, is the means to

protect the value of a limited resource. KRATTENMAKER, at 36-67.

¹³ KRATTENMAKER, at 39.

¹⁴ The author, for example, does not point out that the FCC is mandated by 47 U.S.C. §307(b) to devise a "fair, efficient and equitable" distribution of broadcast service. This has not been a system based on market power, but is in fact at loggerheads with a market-oriented system. The FCC can determine that a small town deserves a first local service more than a larger town deserves a fifth, despite the fact that economic factors would dictate a gravitation toward the large town and exclusion of the smaller. See, *e.g.*, Revision of FM Assignment Policies and Procedures, 90 F.C.C.2d 88 (1982).

¹⁵ The Chairman is quoted as stating that PCS Spectrum auctions are "the new paradigm for communications law in the digital age." *Hundt Says PCS Auctions will be Model for Future Allocations*, COMM. DAILY, Apr. 6, 1995, at 3. The author appears to be quite prescient on this matter.

alien ownership restrictions. Users of the book might wish to supplement the broadcast section with materials on Congress' concern with alien ownership of broadcast facilities, statutory standards Congress adopted on this issue, and the application of those standards to different ownership structures (corporations, partnerships, etc.)

The materials selected for each topic are both representative and illustrative of the principal issues raised for each topic, with several puzzling editorial choices. First, in the "licensing" chapter of the book, the author simply mentions rather than discusses the seminal *Ashbacker* case.¹⁶ While it is cited for the proposition that all applicants for a license must be afforded an equal chance of success, the case has been given a very broad reading: it has been held to apply to other federal licensing processes (Federal Energy Regulatory Commission licenses, for example) and it has been held to create a right to comparative hearing for mutually exclusive full-service broadcast applicants. Both users of the book and students would find useful an exposure to the *Ashbacker* case prefatory to studying the FCC's comparative standards. Second, while the author includes excerpts from the FCC's 1965 *Policy Statement* on comparative broadcast hearings, as well as a discussion of the agency's subsequent minority and female preference policies, he fails to include any reference to the *Bechtel* decisions in which a core comparative criterion — integration of ownership and management of a broadcast station — was overturned.¹⁷ This omission is somewhat surprising, given the author's obvious distaste for the FCC's current comparative process.

In the cable television part of the book, after a history of the service and summary of the 1984 Cable Act, the author focuses primarily on the massive revision of cable regulation engendered by the 1992 Cable Act. He first provides a wonderful overview of the 1992 Act, taken from Judge Thomas Penfield

Jackson's *Daniels Cablevision* decision.¹⁸ He then proceeds to provide excellent materials on each major issue raised by the legislation, quoting equally from court cases and Commission rulemaking *Orders*. Professors and students alike will find this part of the book extremely comprehensive, thorough, and beneficial. Users of the book should note, however, that presumably due to the author's publication deadline, the detailed analysis of cable rate regulation concludes with the 1993 *Rate Order*.¹⁹ Users may wish to supplement the materials here by including the modification and revisitation of the *Rate Order* in March of 1994²⁰ (which, *inter alia*, recalculated the "competitive price differential" for cable companies not subject to effective competition from ten percent to seventeen percent, and adopted interim "cost of service" rules to prevent cross-subsidization) and the more recent "going forward" rules for new regulated services, for which comments were sought in the March 1994 *Rate Order*.²¹

Finally, in Part III of the book, dealing with telephone regulation, the author provides a thorough overview of telephone regulation, from pre-divestiture through the MFJ and into the post-divestiture regulatory (mine)field. While the organization is issue- and not service-specific (users will not find separate sections on cellular telephony, specialized mobile radio [SMR] service, etc.), professors and students will find a comprehensive, concise, and coherent treatment of a very complex system of regulation. The author includes materials on everything from rate regulation to provision of enhanced services by local exchange carriers. Two areas in which users might advantageously supplement the materials collected here are with respect the very recent revisions to the price rules (which set forth the methodology — the "X-factor" — for determining a carrier's annual productivity adjustment and require that local exchange carriers make an "add-back" adjustment in earnings calculations)²² and the provi-

¹⁶ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

¹⁷ *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); *Bechtel v. FCC*, 10 F.3d 95 (D.C. Cir. 1993). In light of the *Bechtel* decision, the FCC issued a Notice of Proposed Rulemaking with an eye toward completely revising its comparative criteria. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd. 2664 (1992).

¹⁸ *Daniels Cablevision v. U.S.*, 835 F. Supp. 1 (D.D.C. 1993).

¹⁹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 8 FCC Rcd. 5631 (1993).

²⁰ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regula-

tion, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd. 4119 (1994).

²¹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd. 1226 (1995); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Seventh Order on Reconsideration*, 10 FCC Rcd. ____ (1995), 60 *Fed. Reg.* 4863 (Jan. 25, 1995).

²² Price Cap Performance Review for Local Exchange Carriers, *First Report and Order* in CC Docket No. 94-1, FCC 95-132 (released April 7, 1995); Price Cap Regulation of Local Ex-

sion of video services by telephone companies: federal courts have uniformly been overturning (on First Amendment grounds) the prohibition on telcos offering video programming within their services areas.²⁸

In sum, *Telecommunications Law and Policy* provides a useful overview of the major issues raised by federal telecommunications regulations. The materials collected are well-chosen and well-edited, and no major topics or issues have been omitted. Again, the author's economic views are imposed in a rather heavy-handed fashion in the "Conventional Broadcasting" portion of the book, diminishing its value as

a comprehensive introduction. However, the excellent choice of materials and the quality and clarity of presentation, especially in Parts II and III, serve to outweigh the author's tendency to proselytize in Part I. Finally, users will find the questions posed by the author after each set of materials to be both thought-provoking and insightful. While it is perhaps symptomatic of today's rapidly changing communications environment that almost any book will contain some outdated material before it is published, this book generally will prove extremely useful to its intended audience.

change Carriers; Rate of Return Sharing and Lower Formula Adjustment, *Report and Order* in CC Docket No. 93-179, FCC 95-133 (released April 14, 1995).

²⁸ See, e.g., *U.S. West, Inc. v. U.S.*, 855 F. Supp 1184 (W.D.

Wa. 1994), *aff'd*, ___ F.3d ___ (9th Cir. 1994); *Chesapeake and Potomac Telephone Co. of Virginia v. U.S.*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994).

