

## BOOK REVIEW

### Dogma in Cyberspace

**Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm, by Peter Huber, Oxford University Press, 1997, 265 pages.**

Reviewed by Philip V. Permut\*

The origins of governmental regulation in America go back to the colonial period when the legislature controlled prices for many items. The regulatory commission, however, is a more modern institution. The progenitor of today's regulatory agencies was the Rhode Island Railroad Commission (RIRC), established in 1839 to help railroads develop joint schedules and rates. The railroads declined the help, and the RIRC soon died. Despite that experience, other regulatory commissions followed and were more successful in maintaining a *raison d'être*.<sup>1</sup>

One of the driving forces behind the creation of the first regulatory commissions was the public's frustration with the "railroad problem," including, but certainly not limited to, the incompatible ideals of competition and providing the cheapest possible transportation.<sup>2</sup> The legislatures were unable to protect the public because, in the words of Charles Francis Adams, an early proponent of public regulation, "[k]nowledge cannot possibly creep into the legislature, because no one remains in the legislature long enough to learn.' In order to close the gap between public and private interests, analytical expertise must somehow be made a permanent part of the government."<sup>3</sup> For Adams, regulatory agencies were the only solution.

As even the casual observer of history knows, Adams's view of a regulatory commission as expert and apolitical was optimistic or, perhaps, even utopian. It did, however, reflect the societal beliefs of his era; government had a proper and necessary role in making peoples' lives better by, inter alia, curbing market excesses.

How things have changed! Joseph Ellis, in his brilliant award-winning book on Thomas Jefferson, points out that the conservative wing of today's Republican Party has adopted Jefferson's animosity, if not hostility, toward government power per se.

Starting with Barry Goldwater in the 1960s, then reaching a crescendo of national success with Ronald Reagan in the 1980s and continuing with Newt Gingrich's Contract with America in the 1990s, the conservative movement has campaigned against the encroaching character of the federal government . . . . Indeed, since the end of the Cold War in 1989, the American government has replaced the Soviet Union as our domestic version of the Evil Empire.<sup>4</sup>

Ellis's rhetoric places in perspective Peter Huber's book, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm*.<sup>5</sup> Huber's book, like a *Columbo* movie, quickly makes clear who is the villain. He sees the central debate surrounding the creation of the Federal Communications Commission (FCC or Commission) in very black and white terms: the New Deal's commitment to central planning versus the ideal of the marketplace and common law.<sup>6</sup> In Huber's words:

[Between 1927 and 1934] [n]ational socialism, right-wing or left, seemed more efficient, the only workable approach to modern industrialism. Around the globe, people in power persuaded themselves that the technical complexities of broadcasting, and the natural-monopoly economics of telephony, had to be managed through centralized control. The night of totalitarian government, always said to be descending on America, came to earth only in Europe. But America was darkened by some of the same shadows. One was the FCC.<sup>7</sup>

It is not happenstance, therefore, that George Orwell is quoted throughout.

Huber sees the "telecosm" (Huber's term for the marriage of computers and communications) as a force of unknowable

direction, whose existence clearly demonstrates that the principal rationales for creating the FCC—scarcity and monopoly—are no longer valid.<sup>8</sup> A good portion of the book, in fact, attempts to show that they were never valid.<sup>9</sup>

Commission law, described by Huber as top-down edicts, is deemed to be neither dynamic nor fluid enough to be practical in the new world of the telecosm. Again resorting to political terminology, Huber states:

Commission law has been tried. Not just in the telecosm but in command-and-control economies around the globe. Like Communism, commission law has failed. It is rigid, slow, and . . . ignorant. . . .

. . . In [the telecosm], nothing except common law can keep up. The law must build itself the old-fashioned way, through action in the market first and reaction in the courts thereafter.<sup>10</sup>

Regulatory commissions, according to Huber, must therefore be replaced by the marketplace and common law, his dual antitheses to central planning. The common law and the marketplace are depicted as sending "bottom-up" edicts. People in this panglossian world act first and, if necessary, litigate later. In essence, the courts only intervene in the most significant situations.

Huber's thesis, while not original, raises significant issues clearly worthy of serious discussion. He exhibits a broad knowledge of FCC regulation and history as he plies his way through numerous examples of what he describes as Commission failure because it did not share his perspective. The real issue, however, is not whether Commission regulation has had failures. Of course it has. Rather, the question is what form of government regulation, if any, is appropriate for the telecommunications world. Unfortunately, the book does not contribute significantly to that debate. Instead of presenting a balanced discussion of the issues, Huber presents limited and one-sided arguments on regulation and antitrust.

As an initial matter, the book generally portrays commissions as entities that can grasp neither the issues before them nor the obvious answers to those issues. While in some limited cases that criticism might be valid, it is a vast oversimplification of reality. The world is not so black and white; nor are the answers so clear. Regulatory issues, especially in the common carrier area, are usually many-faceted with equities on all sides.

Huber's view of the regulatory environment also is unidimensional. He basically ignores the fact that the Commission is just one actor in a multiplayer arena. The FCC rarely drives its own agenda, particularly when setting common carrier policy. Instead, industry leaders, Congress and members of the executive branch perform that function. Those who participate in significant debates before the Commission meet not only with FCC staff and Commissioners, but also with the Department of Commerce's National Telecommunications Information Association (NTIA), the Department of State, congressional staff and members and, in some cases, the Departments of Justice and Defense. Thus the FCC, for better or for worse, does react to the bottom-up edicts of the marketplace—a marketplace based mostly on economics, but economics translated by the political process.

Huber also overdramatizes the conflict between the FCC and antitrust laws when he alleges that the FCC has been the "single largest impediment to effective antitrust enforcement . . . ." <sup>11</sup> The facts simply do not support such a claim. Clearly, the FCC, through the doctrines of primary and exclusive jurisdiction, can affect antitrust enforcement.<sup>12</sup> However, the Commission has never been inclined to take any steps to protect its common carrier regulatees from antitrust suits. In fact, in the very next sentence after his claim that the FCC impedes antitrust enforcement, Huber admits that "[e]ven with the FCC at its most accommodating, Bell had to worry about the antitrust lawyers. Anti-trust plaintiffs . . . kept suing."<sup>13</sup> Certainly, the litigants would not have sued if they believed the FCC would thwart their efforts.

The Commission, in fact, played a major role in the 1974 AT&T antitrust suit. Despite two rounds of briefs from the Department of Justice and AT&T and an oral argument on the validity of AT&T's allegation that it enjoyed antitrust immunity due to the FCC's pervasive regulation, the court, apparently feeling uncertain, requested the Commission's views. The FCC's amicus comments took the position that AT&T enjoyed no antitrust immunity and was fully subject to the jurisdiction of the antitrust court.<sup>14</sup> The court agreed. In a contemporaneous discussion, AT&T counsel stated his

belief that, without the FCC's filing, AT&T would have succeeded in at least limiting the scope of the Department of Justice's complaint. No one will ever know whether this is true. However, it is certain that the FCC did not impede the application of antitrust laws to AT&T.

Not only has the FCC not protected its regulatees from antitrust scrutiny, but it has often actively supported competitive entry—even when others did not. With regard to competitive entry, it was the FCC, not the Department of Justice in its antitrust role, that favored IBM entering the telecommunications market to compete with AT&T. The Antitrust Division of the Department of Justice opposed, both formally and informally, an application by Satellite Business Systems (SBS), an IBM affiliate, for a domestic satellite system. Ultimately, the FCC ignored the Antitrust Division's views and granted SBS's application.<sup>15</sup> The Antitrust Division opposed this decision so strongly that it unsuccessfully appealed the order to the United States Court of Appeals for the District of Columbia.<sup>16</sup>

The FCC also set the foundation for competition in both the common carrier transmission and equipment areas. The Commission not only authorized nontelephone company equipment to be interconnected to the public network, but it established the technical standards necessary to make such equipment easier and cheaper to manufacture and use.<sup>17</sup> The equipment registration program was established despite strong Congressional and state commission pressures against it. By any standard—even Huber's—the FCC program has been a success. It has facilitated the rapid growth of the terminal equipment industry.

In the common carrier transmission area, the FCC has also been procompetitive. For example, it was the FCC that prevented AT&T from fully entering the domestic satellite market until others had a chance to become established.<sup>18</sup> And it was the FCC, over strong opposition, that required AT&T to make the Bell System network and services available to its competitors.<sup>19</sup>

Clearly, none of these commission actions is beyond criticism—and some may even have been wrong. They demonstrate, however, that the FCC has not been, by its nature or intent, anticompetitive. In fact, a strong argument can be made that competition in telecommunications would not have advanced to its current state without many of the FCC's actions.

While Huber correctly points out various flaws in FCC action, he seems to ignore the fact that similar flaws are inherent in his proposed antitrust paradigm. An old Chinese proverb warns against asking for something without great forethought because you might actually get your wish. In addition, as Churchill is said to have quipped, "democracy is the worst form of Government except all those other forms that have been tried from time to time."<sup>20</sup> Thus, for Huber to carry the day, it is necessary for him to demonstrate that antitrust regulation, as a comparative matter, is the preferred approach.

Huber alleges that the antitrust paradigm is superior to the regulatory model primarily for three reasons.<sup>21</sup> The first is that most antitrust suits reach "compact" conclusions.<sup>22</sup> While this may be true in some instances (he cites no source for this), it is also true that in major areas, such as telecommunications, they often do not. Discovery alone in large cases (like AT&T) lasts for years. As Huber himself notes, the Department of Justice brought an antitrust suit against IBM in 1932 because of its computer card practices and the general issue remained alive until 1956.<sup>23</sup> A further antitrust suit was brought against IBM in 1969 and ended thirteen years later when the government dismissed the suit.<sup>24</sup>

Closer to home is the AT&T experience. The AT&T antitrust complaint was filed in 1974 and the case was settled without a day of trial approximately a decade later. Moreover, its termination resulted in the creation of a "mini-FCC" that lasted fourteen years. Judge Greene and the Antitrust Division of the Department of Justice took on the role of a regulatory commission, arguably with no better results than if the FCC had done the job.<sup>25</sup> Huber chronicles the morass of the antitrust suit in his book and candidly admits that "[g]etting an answer to a simple question [from the court] often took years."<sup>26</sup>

Huber next argues that the antitrust model is superior because antitrust courts act on specific complaints against

specific parties and base their judgment on past events, not future predictions.<sup>27</sup> This feature, however, has both positive and negative implications. Moreover, some antitrust decisions, such as those involving mergers, are also based on probable future effects. In contrast, most regulatory proceedings deal solely with past events.

Huber's third contention is that "[w]hen the FCC gets paralyzed . . . entire industries grind to a halt," while "[u]nder the antitrust laws, economic life goes on . . ." <sup>28</sup> This is a gross overstatement. Certainly, the common carrier industry has not ground to a halt. It has been an amazingly dynamic and fast-developing market for more than three decades. However, even to the extent that things may be held up for some period, the same is true in the antitrust environment. Most companies do not proceed with acquisitions or mergers unless they have first cleared government review. Numerous mergers have, in fact, died while they were still in the Hart-Scott-Rodino process.

Huber fails to deal with another important downside to antitrust lawsuits—more costly judicial review. A large proportion of antitrust issues are settled by entering into agreements with the government. In such situations, government lawyers have tremendous power and are not subject to any effective judicial review. If an antitrust defendant or potential antitrust defendant disagrees with a government position, it can either accept it or litigate at an extreme cost in money and time.

While there is much to be said for the court system's ability to solve problems, it is, like other systems, imperfect. Antitrust litigation today is typically a long, drawn-out affair. Discovery often goes on and on until one side decides to settle. Like regulation, antitrust can be affected by politics. Recently, as antitrust has regained some of its past influence, opponents have begun to "lobby" state Attorneys General and federal authorities on their positions and to request instigation of antitrust suits or demand consent decrees.<sup>29</sup>

*Law and Disorder in Cyberspace* is provocative and well-written. It will interest people who follow the industries that the FCC regulates. However, its major flaw is that it is ideologically driven and, therefore, adopts regulatory failure as a premise, not a conclusion. Many readers of this book will not be able to discern clearly whether the author's biggest complaint is the regulatory process itself or the fact that regulators have not always shared his views. The question that comes to mind after reading the book is, if the antitrust paradigm had been chosen in the nineteenth century instead of the regulatory commission model, could a modern day Charles Adams have written the same book, but with the opposite premise?

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1. Thomas K. McCraw, *Prophets of Regulation* 17 (1984).
2. *Id.* at 8-9. For a historical perspective on railroad competition during the early and mid-1880's, see Ron Chernow, *The House of Morgan* 46-70 (1990).
3. McCraw *supra* note 1, at 15.
4. Joseph J. Ellis, *American Sphinx* 295 (1997).
5. Peter Huber, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm* (1997).
6. *Id.* at 4-5.
7. *Id.* at 5.
8. *Id.* at 4. Acceptance of this premise, of course, does not necessarily mean that regulatory agencies are unnecessary.
9. Mr. Huber, in this endeavor, spares almost no one. He criticizes in strong terms such people as Felix Frankfurter (immortality through a spectacular error), Richard Posner (ordinarily sensible), and numerous Congresses and Commissions throughout the book for either a lack of imagination or understanding. *See* Huber, *supra* note 5, at 41, 53.

10. *Id.* at 8. Huber goes so far as to state that the "Commission [has] never thought of anything useful on its own." *Id.* at 68. His only praise is for the FCC's actions in 1968 deregulating terminal equipment and thereby creating the ferment of the Internet. *Id.* at 78-79.
11. *Id.* at 89.
12. *Id.* at 96. Under the prior section of 221(a) of the Communications Act, the Commission could explicitly immunize certain conduct. Communications Act of 1934, ch. 652, § 221(a), 48 Stat. 1048, 1080 (codifying the Willis-Graham Act, ch. 20, 42 Stat. 27 (1921)), *repealed by* Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(b)(2), 110 Stat. 56, 143; *see also* International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1180 (D. Haw. 1972), *aff'd*, 518 F.2d 913 (9th Cir. 1975) ("Because 47 U.S.C. § 221(a) gives to the FCC the power . . . to evaluate the effect upon the subscribers and the public . . . and thereafter upon specific approval by the FCC, to insulate the merger against antitrust attack.") The Commission's implicit authority to immunize parties from antitrust review arguably remains under very limited conditions.
13. Huber, *supra* note 5, at 89.
14. *See* Memorandum of Federal Communications Commission as Amicus Curiae, U.S. v. AT&T, 427 F. Supp. 57 (D.D.C. 1976) (No. 741698).
15. Satellite Bus. Sys., 62 F.C.C.2d 997, 39 Rad. Reg. 2d (P & F) 1291 (1977), *reconsideration denied*, 64 F.C.C.2d 872 (1977).
16. United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980) (en banc).
17. Proposals for New or Revised Classes of Interstate and Foreign Message Toll Tel. Serv. (MTS) and Wide Area Tel. Serv. (WATS), *First Report and Order*, 56 F.C.C.2d 593 (1975); *Second Report and Order*, 58 F.C.C.2d 736 (1976).
18. Establishment of Domestic Comm. Satellite Facils. By Non-Governmental Entities, *Second Report & Order*, 35 F.C.C.2d 844, 24 Rad. Reg. 2d (P & F) 1942 (1972). While Huber is correctly aghast at the FCC's *Hush-A-Phone* decision, that decision did not directly address the application of antitrust laws. *Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956). In fact, Judge Bazelon specifically noted that the FCC raised antitrust issues in its analysis of the case. *Id.* at 268 n.9.
19. Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facils., *Report and Order*, 60 F.C.C.2d 261, 38 Rad. Reg. 2d (P & F) 141 (1976); *Memorandum Opinion and Order*, 62 F.C.C.2d 588, 39 Rad. Reg. 2d (P & F) 765 (1977), *aff'd*, *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir. 1978).
20. The Oxford Dictionary of Modern Quotations 55 (Tony Augarde ed., 1991).
21. Huber, *supra* note 5, at 100-01.
22. *Id.* at 100.
23. *Id.* at 91.
24. *Id.*
25. *Id.* at 98-99. As this experience demonstrates, even if antitrust is the sole government approach to regulate telecommunications, the FCC or its equivalent will still be required. Courts and the Department of Justice will need experts to help them navigate the murky aspects of complex issues.
26. *Id.* at 99.

27. *Id.* at 101.

28. *Id.*

29. *See, e.g.,* Mike Mills, *MCI-WorldCom Deal Review Requested*, Wash. Post, March 13, 1998, at F3.