

FEDERAL COMMUNICATIONS LAW JOURNAL

FORMERLY

FEDERAL COMMUNICATIONS BAR JOURNAL

VOLUME 57

MARCH 2005

NUMBER 2

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Article

THE CONTRASTING POLICIES OF THE FCC AND FERC REGARDING THE IMPORTANCE OF OPEN TRANSMISSION NETWORKS IN DOWNSTREAM COMPETITIVE MARKETS

By Harvey Reiter..... 243

The Federal Energy Regulatory Commission (“FERC”) and the Federal Communications Commission (“FCC”) have undergone a remarkable role reversal. After years of resistance to the very notion of competition in the electric and gas industries, FERC has, with considerable vigor and consistency spanning nearly two decades, promoted policies to open access both to gas pipeline and high voltage electric transmission networks to downstream competitors of the network owners. FERC has stated plainly and repeatedly that the underpinning of these policies is that open access is essential to the protection of competition in the sale of the largely deregulated services reliant upon those networks. By contrast, the FCC has done an about-face, reversing nearly forty years of policymaking to pry open cable and telecom networks and substituting a near total reliance on unregulated intermodal competition among a handful of broadband providers to protect the public. The FCC’s purpose, stated plainly and repeatedly, is to ensure that regulatory burdens do not discourage investment in broadband technologies or deter its deployment. In his Article, Harvey Reiter examines the forces that led to the development of FERC’s open access policies and explores the FCC’s policy shift and its philosophical underpinnings. He concludes by questioning whether differences in either industry structure or the regulatory schemes governing the energy and communications industries justify the FCC’s hands-off policy, and offers suggestions for a different approach.

Note

BROADCAST FLAGS AND THE WAR AGAINST DIGITAL TELEVISION PIRACY: A SOLUTION OR DILEMMA FOR THE DIGITAL ERA?

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With the advent of digital TV, many homes in the U.S. are now on the cutting edge of what is likely to be a sea change in how this country watches TV. While these homes can now begin to enjoy the numerous benefits of the technology, regulators and industry experts are working to craft responses to problems, both actual and anticipated, that the technology creates. Mindful of the piracy issues that came with the popularity of digital file formats in the music industry, the FCC addressed piracy in the digital TV context by endorsing the use of “broadcast flags” on all digital TV transmissions in a 2003 *Notice of Proposed Rulemaking*. In her Note, Debra Kaplan describes the workings of broadcast flags, the applications of the flags in practice, and the concerns that accompany their use. She explains and supports the FCC’s jurisdiction to regulate the digital TV industry, addresses how the FCC might work to ensure the use of flags, analyzes the impact of the widespread use of broadcast flags from both a copyright and public policy perspective, and details potential alternatives. These alternatives are ultimately rejected, and the Author concludes by arguing that the flags strike the appropriate balance between protecting content creators and encouraging the widespread dissemination of information.

Book Review

INNOVATION POLICY IN TELECOMMUNICATIONS: REVISITING THE SUCCESES OF GUGLIELMO MARCONI

By John M. Williamson345

A review of Gavin Weightman's *Signor Marconi's Magic Box*, Da Capo Press, 2003. An entertaining and informative biography of the inventor of applied wireless communications, this book also gives practical insight into the effect of patent policy on innovation. The Marconi story parallels the challenges faced by today's telecommunications innovators and offers a significant historical perspective relevant to present-day debates over the direction of innovation policy and its application to the telecommunications industry.