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Articles

THE ART OF WRITING GOOD REGULATIONS
By Commissioner Harold W. Furchtgott-Roth 1

In this introduction to the three pieces that follow, Commissioner Harold Furchtgott-Roth proposes his view that the regulation-drafting process relies more on art than science. The Commissioner sets out a four-category sliding scale to evaluate regulations, and lists the most frequently noted problems with FCC-promulgated rules.

COMMUNICATIONS MEDIA AND THE FIRST AMENDMENT: A VIEWPOINT-NEUTRAL FCC IS NOT TOO MUCH TO ASK FOR
By Helgi Walker 5

In the "new economy" driven by the telecommunications industry, the FCC is a busy agency. Given the myriad legal issues faced daily by agency decisionmakers and the lack of perfect clarity in major communications legislation, a few legal missteps here and there by the FCC might be expected. In one area, however, the public can and should demand a first-rate agency record: regulation of communications media without regard to the viewpoint expressed via that media, as the First Amendment requires. This Article offers two case studies in which the FCC arguably took viewpoint-discriminatory actions with regard to regulated broadcasters, and suggests means by which the FCC may avoid drawing such distinctions in the future.

THE FCC'S IMPLEMENTATION OF THE 1996 ACT: AGENCY LITIGATION STRATEGIES AND DELAY
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Since it began promulgating rules to implement the local competition provisions of the Telecommunications Act of 1996, the FCC has been under attack in the courts. The road has been a rough one, and the Commission has lost on a good many issues. The Commission has regularly accused its opponents in these legal battles—chiefly the incumbent local exchange carriers—of using litigation to impede the implementation of the 1996 Act's local competition provisions. As discussed in this Article, if litigation has in fact slowed the introduction of competition in the local exchange markets, the

Commission itself must share some of the blame. The Commission might have encouraged more effectively the introduction of competition in the local markets had it taken an approach that was less antagonistic toward parties affected by its local competition rules and more defensible in light of the statute's provisions.

TOO MUCH POWER, TOO LITTLE RESTRAINT: HOW THE FCC EXPANDS ITS REACH THROUGH UNENFORCEABLE AND UNWIELDY "VOLUNTARY" AGREEMENTS
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The character of a regulatory agency is most severely tested at the zenith of its power. When the Federal Communications Commission breaks free of the limitations imposed by the law, the Commission's leadership sets its own course. It is at these times, when legal oversight is at a minimum, that it becomes most important for the agency to "pay more attention to justice." Unfortunately, as outlined in this Article, the FCC has often failed this test of institutional character. In at least three contexts, the Commission has proven to be something less than a benevolent master. In each context, the current Commission leadership uses the vulnerability of licensees and the absence of legal oversight to advance its particular public policy agenda; impose many requirements it cannot or will not enforce; and facilitate the creation of vast company-specific regulatory regimes that undermine transparency and predictability.

THE FCC'S FINANCIAL QUALIFICATION REQUIREMENTS: ECONOMIC EVALUATION OF A BARRIER TO ENTRY FOR MINORITY BROADCASTERS
By Yale M. Braunstein 69

When analyzing issues surrounding minority ownership of media, scholars have often noted that policy discussions in the area suffer from the linked problems of inadequate data and a lack of tools with which to analyze the data that do exist and might be collected. In Issue Three of Volume 51, several authors made this particular observation. This Article shows how one may use economic analysis and a financial model of a "typical" radio broadcaster to quantify the effects of specific policies. Specifically, the Article focuses on barriers to entry imposed by the FCC's financial qualification requirements and the absence of the minority tax certificates.

THE RIGHTS OF COMMON CARRIERS AND THE DECISION WHETHER TO BE A COMMON CARRIER OR A NON-REGULATED COMMUNICATIONS PROVIDER
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The decision whether to be a regulated common carrier or a non-regulated communications provider carries with it numerous benefits and burdens that must be weighed. Although one may automatically assume that non-regulation is preferable, that may not always be the case. This Article directly addresses the decision to be a lightly regulated non-dominant common carrier or a non-regulated private carrier. The Article argues that certain statutory and regulatory rights enjoyed by common carriers are more important than the minimal regulatory burdens associated with non-dominant common carrier regulation.

Notes

UNIVERSAL SERVICE HIGH-COST SUBSIDY REFORM: HINDERING CABLE-TELEPHONY AND OTHER TECHNOLOGICAL ADVANCEMENTS IN RURAL AND INSULAR REGIONS
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Universal service is a public policy initiative designed to ensure that all United States citizens receive widespread access to affordable telecommunications services. Customers in high-cost service regions are typically excluded from the latest telecommunications technology. Most large carriers serving these regions prefer to implement technological updates in urban areas with higher profit margins while the rural infrastructure deteriorates. The Universal Service Fund currently offers subsidies to telecommunications providers serving high-cost regions, but the FCC has announced efforts to reform the subsidy allocation system that could potentially impede technological advancement in these areas. As telecommunications services become more advanced, the difference in the quality and cost of service provided to customers in high- and low-cost regions will become further polarized. This Note argues that the FCC should consider developing specialized universal service funding that subsidizes technological improvements in high-cost regions to ensure that technological advancements such as cable-telephony reach rural customers.

INCREASING TELEPHONE PENETRATION RATES AND PROMOTING ECONOMIC DEVELOPMENT ON TRIBAL LANDS: A PROPOSAL TO SOLVE THE TRIBAL AND STATE JURISDICTIONAL PROBLEMS
By Jennifer L. King 137

Under the Telecommunications Act of 1996, Congress instructed the FCC to ensure that all Americans have access to affordable telecommunications services. Consistent with that mandate, the FCC implemented a series of public hearings to discuss with tribes the issues they face concerning low telephone penetration rates. The FCC recommended investigation of universal service in unserved and underserved areas because telephone penetration rates among low-income consumers on tribal lands lagged behind rates in the rest of the country. From these hearings, the FCC proposed a jurisdictional framework to determine which eligible carriers would be under tribal, state, or federal jurisdiction. This Note argues that the FCC's proposed tribal and state jurisdiction policies deter eligible telecommunications companies from serving tribal and non-tribal lands, because the process of petitioning the state or federal commission to determine jurisdiction is time-consuming and goes against the principles of tribal sovereignty. In addition, this Note proposes that Congress must expressly limit state jurisdiction in order for telephone penetration rates to increase on tribal lands.

THE FCC AND SECTION 312(a)(7) OF THE COMMUNICATIONS ACT OF 1934: THE DEVELOPMENT OF THE "*UN*REASONABLE ACCESS" CLAUSE
By Philip J. Gutwein II 161

Section 312(a)(7) of the Communications Act of 1934 requires that broadcast stations provide legally qualified candidates for federal elective office with reasonable access to advertising time on behalf of their candidacies. The FCC has long struggled with defining "reasonable access." On September 7, 1999, the FCC issued a *Memorandum Opinion*

and Order in which it ruled that broadcast stations may not refuse a request for political advertising time solely because the station does not sell or program such lengths of time. That ruling—consistent with most Commission precedent—did not require broadcast stations to sell or furnish candidates time for political advertising in increments neither to sold commercial advertisers nor programmed during the one-year period preceding the election. Commissioner Harold W. Furchtgott-Roth dissented from the *Memorandum Opinion*, arguing that the Commission should uphold its policy of requiring regulatory parity between candidates and advertisers with respect to time. His approach to reasonable access represents the most sensible employed by the FCC to date. This Note argues that the FCC should adopt Commissioner Furchtgott-Roth's position on reasonable access.

Book Review

CHASING SHADOWS: THE HUMAN FACE BEHIND THE CYBER THREAT
By Jim Christy 185

Richard Power's *Tangled Web: Tales of Digital Crime from the Shadows of Cyberspace* presents a comprehensive account of computer crime. The book unveils and explores in meticulous detail the nature and scope of the cyber threat, and—more importantly—the tremendous potential that common criminals, terrorists, and nation-states now have at their fingertips. This Book Review describes *Tangled Web* as a must-read for all cyber cops, prosecutors, and information technology heads and policy-makers