

Endangered Species, Lassoos, and Unmet Promises

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I. INTRODUCTION

The Eighth Circuit, in its famously evocative scolding of the Federal Communications Commission (“FCC”) for overstepping its jurisdiction, wrote that the division between state and federal regulatory responsibilities was defended by a fence that was “hog tight, horse high, and bull strong. . . .”¹ We Easterners, who thought we had done a pretty good job of anticipating in the 1996 Telecommunications Act (“1996 Act”) and its implementing regulations what would be necessary to jump start competition, chuckled over this amusing regionalism. We also agreed that one of the best things about the 1996 Act was that it did not require all appeals to go to the District of Columbia Circuit where such colorful words

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1. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997).

would have been doused with bleach before seeing the light of day in a published opinion.

I suggest in this Essay, in homage to the Eighth Circuit's metaphor, a three-part image of what to anticipate in the rewriting of the 1996 Act, whether that occurs wholesale or piecemeal over the next months or years: endangered species, lassoes, and unmet promises. As developed below, endangered species are legacy concepts that may not—some would say should not—survive the next rewrite. Lassoes apply to fields that are not typically regulated as part of telecommunications, but are increasingly susceptible to being roped into telecommunications regulation, for better or worse. Unmet promises are found largely in the area of public safety spectrum policy and reflect the real-world problems that have cropped up and remain unaddressed while the bulk of telecommunications policy remains aimed at facilitating commercial service offerings.

II. A LEARNING EXPERIENCE

The eight years following the Eighth Circuit's opinion, rounding out a decade of experience with the 1996 Act, would prove that the authors of the 1996 Act, of which there were many in the government and in the private sector, underestimated some things and overestimated others. The mantra that the authors did not foresee the importance of the Internet is one of the most repeated pieces of conventional wisdom about the 1996 Act. It does not matter whether that assertion is literally true; what is certainly true is that no one could have predicted the brisk adoption rates and price decreases that made Internet access and the applications dependent upon them so popular in both residential and business settings. In this sense, the authors underestimated the impact of the Internet.²

The authors also overestimated how easy it would be for competitors to the incumbent local exchange carriers ("ILECs") to induce customers to switch providers and thereby gain market share and revenue that would make them sustainable businesses. They also overestimated the ability of a system of regulations to create the conditions for allowing competition to gain a foothold. Whatever impediments the ILECs may have placed in the road for competitors, the on-the-ground reality for the competitors' sales teams was that getting customers to accept the risk of switching carriers was difficult. Customers were hesitant to do so unless they were extremely dissatisfied with the incumbent for their own reasons or the competitors

2. U.S. Households with broadband Internet went from 1/10th of the country to 1/5 of the country from 2001 to 2003. DEP'T OF COMM., *A NATION ONLINE: ENTERING THE BROADBAND AGE I* (2004), <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf>.

could promise significant long-term savings, which created a business plan at war with itself.

In the first years after the 1996 Act's passage, the February anniversary of its enactment was a grim, geeky commemoration for its authors and adherents. Those still in government geared up for the day with briefing books and talking points for their principals urging patience in the wait for competition. The press published annual reviews of progress and pratfalls in the 1996 Act's implementation.³ The authors' protestations that it was too soon to tell was an unsatisfying retort. In a world where chip speeds were doubling every eighteen months, laptop hard drives had crossed the gigabyte divide in storage, and residential high speed internet access was finally achieving critical mass, patience was an unconvincing message. After the second anniversary of the 1996 Act, the annual observation fell blessedly more or less out of public consciousness leaving the FCC to struggle with implementation.

Of course, the FCC was not left to struggle with implementation on its own. Although the 1996 Act involved massive delegations of authority from Congress under tight deadlines for rulemakings, the official authors of the 1996 Act, the Members of the House and Senate committees and their staff surrogates, were liberal in their pronouncements and advice about what the 1996 Act and its specifics really meant. This revealed one major advantage that the FCC had in its work before the 1996 Act, which largely consisted of interpreting the last major statute in the field, the Communications Act of 1934: all the authors of the 1934 Act were dead. Not so for the 1996 Act. Many proceedings before the FCC benefited from the advice and viewpoint of Members and former Members of Congress and their staffs, current and past, to the effect that they had been in the room when a particular provision was conceived, edited, or discussed, thus enhancing their personal authority to shed light on what the provision meant.

The real point of ten years' experience in working with and under the 1996 Act is the lesson in humility that it taught everyone involved about the limits of law and regulation to force consumer and corporate behavior

3. An early 1997 article, for example, critiqued the Act's role in failing to deliver on the promise of a "two-wire world". See Neil Hickey, *SO BIG: The Telecommunications Act at Year One*, COLUM. JOURNALISM REV., Jan.-Feb. 1997, at 23. A February 1998 article gave voice to the discussion of amending the Act, only two years after its adoption in part because the Act had failed to deliver lower prices for consumers. See Andrew Glass, *Congress Revisiting Telecom Act*, THE ATLANTA CONSTITUTION, Feb. 22, 1998, at 03H. These are examples of the assessments that embraced expectations that the Act would transform telecommunications quickly, ignoring the reality that the economic incentives established by the Act and the Commission's regulations would take time, in the best of circumstances, to have an effect.

that does not coincide with economic self-interest. What can now be analyzed as the systematic over- and underestimation of how things would play out is ample proof of that.

III. DOING BETTER NEXT TIME

In this light, it is worth asking whether the authors of the next significant revamping of the economic and social law and regulation around telecommunications can be smarter about avoiding the pitfalls of over- and underestimation. I suggest that there are three regions where a new effort to regulate telecommunications may be susceptible to over- and underestimation.

First, there is the region of legacy regulation that may not survive a new generation of telecommunications regulation. Some will not be sorry to see these erode or vanish altogether. But, they are concepts that have served the system well and so should not be buried without proper thought about what we are doing and why. I call these concepts endangered species because it is far from clear that they will emerge in recognizable form from a thorough rewrite of the law and the regulations that implement it. Examples are dual jurisdiction regulation of telecommunications and universal service.

Second, there is a region of adjacent regulation. By this, I mean areas that are not part of telecommunications regulation, but touch upon it in some way that makes them susceptible to being “lassoed” into the field of telecommunications regulation. Examples are privacy and intellectual property—specifically, digital rights management. It may be best to reserve judgment about whether enfolding these areas into telecommunications regulation is a good thing or a bad thing. But in rewriting the 1996 Act, the authors should be candid and open-eyed about what it would mean to give such authority to the FCC or validate its jurisdictional forays into these areas. This would shape a very different FCC than the one that has glided through the decades and generations, limited to rectifying interference, auctioning spectrum, and refereeing disputes between carriers and between carriers and their customers. It portends an FCC that peeks into the bits carrier on hitherto dumb pipes or enables interested parties to do so.

Third, there is the region of unmet promises, and this bill falls due nowhere more acutely than in the area of public safety communications interoperability. Since the mid-1990’s, Congress and the FCC have been working in a desultory way on public safety spectrum issues. The first step was to acknowledge public safety’s need for additional spectrum, which Congress did in the mid-1990’s by designating 24 MHz of spectrum in the upper 700 MHz band, where UHF television stations are currently authorized to operate in channels 63, 64, 68, and 69 for use by public

safety. This was in large part a designation for future use, since the spectrum was encumbered in many places by the broadcast operations of UHF television stations. Today, much of that spectrum remains unavailable for use by public safety because of delays in the transition of broadcasters to spectrum set aside for digital television broadcasts. Worse, the main problem to be addressed by the designation of the additional spectrum—interoperability, that is, the ability of police, fire, and other emergency responders to talk to one another at the scene of a crime or disaster—continues to fester. Public safety spectrum issues received no attention in the 1996 Act. So while government raced ahead to ensure that consumers had more than one choice in local phone service, the primitive work-arounds to which first responders had to resort in the Columbine High School shooting in 1999 and the Oklahoma City bombing in 1995 remain state of the art in public safety communications today.

The following Parts elaborate on these themes and suggest ways in which the next revisions of the 1996 Act could affect outcomes.

A. *Endangered Species*

If state jurisdiction over telecommunications services has a future, it needs a new rationale. The old rationale that some services do not entail transmission paths that cross state lines will not withstand scrutiny much longer. It has been eroded by the migration to wireless services over which state regulators lack regulatory jurisdiction because they are pre-empted from exercising such jurisdiction by the statute. It has been further eroded by the FCC's predictable assertion of exclusive jurisdiction over Voice over Internet Protocol ("VoIP") traffic. As traffic migrates from traditional wireline paths to alternative platforms such as wireless and the Internet, the state regulators' grip over intrastate traffic will be an increasingly tenuous *raison d'être*.

There is precedent for this shift in jurisdictional foundation. In the mid-1990's, Congress rewrote the jurisdictional lines in the area of securities regulation. State securities regulators long had paralleled the federal system of regulation for securities offerings with a pastiche of rules referred to as blue sky laws, so named because they were intended to prevent promoters from selling unsuspecting investors empty promises as big as the sky itself. In the National Securities Market Improvement Act of 1996, Congress rewrote the entire pattern of regulation in the field to preclude state authorities from requiring the registration of most securities offerings at the state level.⁴

4. National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.).

In a world in which bits are increasingly difficult to tag and trace as to their transmission paths, and seem more interstate or international than intrastate to the extent it is possible to tag and trace them, state regulation seems increasingly vulnerable to being sidelined. A new rationale is essential. One possible such rationale would be consumer protection. Although the FCC purports to respond to consumer complaints, the sheer volume of such complaints prevents the FCC from giving individual consumers the sort of satisfaction that they should reasonably expect from an agency charged with adjudicating consumer complaints. This is one area where the states could fill an important void.

Another possible rationale would be an enhanced role in supervising universal service funding. The universal service funding system continues to experience strains, owing to many factors, including the difficulty of ensuring that funds are actually spent for the authorized purposes: disbursement to support schools' and libraries' connections and infrastructure build-outs by competitive eligible telecommunications carriers. State officials are closer to the action in many important respects and could serve an important role in protecting the public interest with this connection.

These are merely examples of what a redefined state regulatory mission might entail as the jurisdictional lines become more blurred. To be sure, consumers' attachment to local service will not end overnight, and neither will state regulators' mission of protecting those consumers' interests through economic and social policy regulation. But the end of a crisply defined line of delineation between intrastate and interstate services is in sight, and a new rationale for the state role is imminently needed.

B. Lassoos

The future of telecommunications and media regulation undoubtedly will be fraught in the future with the battles between providers that characterize it today. Indeed, the upcoming revisions of the statute appear largely spurred on by an only slightly new variety of the regulatory parity battles that long have raged between cable and ILECs, including the applicability of local franchising rules, long endured by the cable industry, to the ILECs' broadband video offerings.

But increasingly, disputing parties are inviting the FCC to play an unaccustomed role that goes beyond regulating the usual suspects. These efforts present an opportunity or risk of the FCC lassoing areas adjacent to telecommunications regulation, particularly intellectual property and privacy, to bring them within the ambit of their regulatory jurisdiction.

For example, in the Broadcast Flag proceeding,⁵ the FCC agreed with Hollywood that copyright principles merited identification of bits belonging to copyrighted works transmitted over the digital cable platform. This seemingly logical extension of the FCC's jurisdiction over the transition to digital television is actually a new foray into the adjacent field of intellectual property, with attendant implications for viewers' privacy interests and the ways in which they may seek to use content. The United States Court of Appeals for the District of Columbia Circuit overturned the Broadcast Flag Order on the ground that the FCC had no authority to regulate demodulation equipment outside the scope of its role in a broadcast—the code involved in the broadcast flag only operated after the end of the broadcast to prevent redistribution of the content.⁶

The FCC's foray into intellectual property law was stemmed in this instance. But digital distribution is the corpus of what the FCC will be regulating in the future, and digital copying retains its primacy as what Hollywood perceives to be the main threat to its business model. The pressure for further adventures in this direction will be strong, and it will be crucial for Congress to give clear direction to the FCC about what its role will be.

In the area of privacy intrusion, as opposed to privacy protection,⁷ there are additional tests of the FCC's jurisdiction pending. These principally involve the growth in popularity of VoIP services. As these services challenge and replace legacy services on the public switched telephone network ("PSTN"), the pressures for migrating legacy regulation to these new services will be considerable. Among the regulations that are candidates for migration are the entire suite of regulations that accompany a classification of a service as a telecommunications service and important niche regulations relating to law enforcement, such as the Communications Assistance to Law Enforcement Act, which requires telecom providers to make their networks amenable to wiretapping. The problem with migrating these regulations to VoIP is that implementing them in the VoIP environment necessitates those involved in the transmission path investigating the content of bits passing across the platform. The essence of wiretapping in the analog environment is a privacy intrusion, authorized in specific circumstances where the needs of the system of justice outweigh

5. Digital Broadcast Content Protection, *Report and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23550 (2003).

6. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005).

7. The FCC's jurisdiction to protect consumer privacy is also controversial. The FCC has met with judicial reversals both in trying to protect consumers from unwanted telemarketing calls and in protecting consumers' confidential telephone bill-related information.

the individual's privacy rights. Investigating the content of bits in a VoIP wiretap would seem no worse than just that. But importing this kind of intrusion to what is essentially just another application riding the Internet is a key moment that portends the end of an era in the development of the Internet where anonymity and privacy were protectable commodities.

Likewise, the pressure from ILECs to require treatment of VoIP traffic like PSTN voice traffic and require payment of access charges and universal service fees necessitates knowing what is in the data packets passing over the platform. Some traffic can be classified in this way, if regulators deem it desirable and necessary, at the carrier level—that is, the VoIP provider can declare that traffic passing from certain nodes is predominantly VoIP traffic and settle up with the local exchange carrier on that basis. But even this declaration is at least an incipient intrusion on consumers' privacy—no declaration concerning the type of traffic involved is required with respect to e-mail, e-commerce or Web browsing, and the music industry's efforts to peek inside packets to find and punish file sharers has been controversial, although founded in the law. The era of the Internet in which “a bit is a bit,” an adage so often repeated that the original coiner of the phrase is obscure, has yielded to a moment when a bit is a bit only so long as it does not effect a negative arbitrage on a legacy business.

C. *Unmet Promises*

It has been the pattern to treat public safety spectrum issues separately from legislation addressing commercial offerings. But far from resulting in special treatment for public safety, this pattern has left public safety spectrum issues as orphaned afterthoughts. The next major rewrite of the Act should squarely address public safety spectrum needs with a view to solving three problems:

First, the continuing problem of interoperability, referred to above.

Second, bringing public safety and commercial wireless systems into compatibility so that public safety procurement can benefit from the economies of scale that characterize the commercial sector.

Third, and related to the second, creating a ubiquitous, nationwide network for public safety users that is reliable and secure and available in the event of an emergency. This network could be a shared system with commercial offerings with usage preemption rules that shift capacity as needed to public safety users in the event of an emergency.

Most will agree that these are problems worth solving, but few among the stakeholders will agree how to solve them. It is unlikely that they will find solutions in the old way of treating public safety and commercial spectrum issues and needs as separate universes.

Nor will it suffice to continue to look at spectrum policy issues as budget issues, distinct from the telecommunications policy outcomes they influence. The rewrite of the Act must unify consideration of budget and policy aspects of spectrum policy and the commercial and public safety aspects of spectrum policy.

IV. CONCLUSION

A decade from now, a retrospective of the Telecommunications Act of 2006—or 2007, or 2008 as it may evolve—doubtless will include insights as to what was overlooked despite the lessons of the 1996 Act. It is the nature of legislating and making policy in the technology sphere that regulation reacts to developments and rarely anticipates them. But two overarching lessons may be of value, above the din of the specific battles and wars that competitors will wage in the marketplace, in Congress and before the FCC.

First, if and as competition remains a goal of any new legislation, it is difficult to create merely by legislation and regulations conditions sufficient for its sustained success. Only marketplace wins can do that, and the campaign takes a long time.

Second, every innovation tends to become a commodity over a long enough time horizon. This lesson is of no comfort to innovators who experience adverse financial consequences as they are overtaken in the marketplace. But it should be reassuring to legislators and regulators whose responsibility is not to ensure the continued success of particular competitors, but rather to ensure a robust environment where success or failure turns on the merit of an idea and the quality of service, not on the law and regulations that define the rules of engagement.

