California Western Law Review

Volume 27
Number 1 *Telecommunications Law Issue*

Article 2

1990

Introduction

Carl Hilliard

CALIFORNIA WESTERN LAW REVIEW

VOLUME 27 1990-1991 NUMBER 1

INTRODUCTION

CARL HILLIARD*

Are we headed towards a global village or a world divided into regional confederations? The telecommunications network critical to the global village is becoming increasingly fragmented and incompatible. Fundamental differences in telecommunications policies exist between nations. These differences are linked to the history and culture of each nation. United States telecommunication laws were principally written at a time when our economy was more insular and independent. Must we reform these laws to effectively compete in today's global environment, or is the law flexible enough to accommodate change? This issue of the *California Western Law Review* is part of an ongoing program at California Western School of Law to focus attention on some of the many legal issues arising out of the rapid development of new telecommunications technology.

Structuring Foreign Investments in FCC Licensees Under Section 310(b) of the Communications Act by Ronald W. Gavillet, Jill M. Foehrkolb, and Simone Wu presents a comprehensive study of the case law interpretations of the prohibition against alien control of U.S. radio licenses. Section 310(b) was enacted in 1934 at a time when control of radio facilities was considered a matter of national security. Times have changed but our laws have not. The authors point out that the globalization of communications and growth of technology are forces which push towards international ownership and financing of communications companies. While foreign investment barriers have been removed (or have never been erected) for technologies such as cable and fiber, they remain in the case of radio licenses as limits on international ownership of communications companies.

The authors explore and explain the alternatives available to satisfy some of the objectives of foreign investors without raising the specter of de jure or de facto control prohibited by section 310(b).

* Associate Professor of Law, California Western School of Law.

Innovative Telecommunications Services and the Benefit of the Doubt by Warren G. Lavey discusses the regulatory obstacles to telephone company-provided Information Age services. Drawing from the examples of three different state public utility commission cases, the author illustrates the dampening effect on the introduction of new innovative services by regulatory policies which do not adequately address the rapid development of technology.

The alternative proposed in this article is to treat innovative services as non-common carrier offerings in the short run. When (and if) the new service matures into a regular offering, it would become part of the regulated service of the carrier. The author would establish a streamlined tariff review, a new complaint process, and monitoring reports as safeguards against carrier abuse.

An Answer to Professor Pierce: How Utility Regulation Can Be Reformed in Harmony with Constitutional Principles by Richard McKenna and Ward W. Wueste, Jr., discusses the appropriate role of the judiciary in reviewing regulatory decisions. The article is a challenge to the thesis put forward by Professor Pierce that regulation will be replaced by competition because of the failure of the courts to fulfill their role in restraining regulatory abuse.

Regulation is a substitute for competition and justified only when a monopoly enterprise is vested with the public interest (enterprises we call "public utilities"). Since the inception of public utility regulation in this country, utility rates were based on return on investment, and such investment was approved or prescribed by utility commissions. The commissions were restrained from setting rates which were unfair to utilities because to do so violates the Constitutional prohibitions against the taking of property without just compensation. As the authors point out, the regulators were also constrained by the capital markets which would not invest in, or loan money to, utilities who could not earn a profit.

The difficulty with rate of return regulation was that it gave public utilities the incentive to invest and operate inefficiently. The electric utilities, discussed by Professor Pierce, built huge inefficient plants because their return was based on a cost plus contract with the public. The public utilities commissions reacted by fixing long depreciation periods for plant investment in order to keep rates to the public low.

This regulatory model began to erode when technology fostered competition in the marketplace. In the case of electric utilities, co-generation plants demonstrated a rate distortion of many magnitudes. The same is true in the telephone industry. There the combination of obsolete telephone plant and regulatory rate shifting resulted in wholesale defection of traffic from the public networks by large business to private and alternative networks.

The initial utility/regulatory response to change was to maintain the status quo—an effort doomed by technology and the courts. According to Professor Pierce, the public utility commissions then reacted by unreasonably limiting new investment and unfairly shifting the burden of costs to the utility investors. Professor Pierce states that the electric utilities have been able to use the intricacies of the regulatory process to thwart some of this regulatory unfairness.

However, the utilities have now reached the conclusion that they would be better off in a competitive environment than an increasingly hostile regulatory one.

The authors point out "that public utility regulation is designed to function in a reasonably predictable world of modest incremental changes and relatively low risk."[1] That world no longer exists. The struggle to find a new regulatory model during this period of dynamic change is a daunting task–one in which Professor Pierce sees the courts deferring to political institutions. Competition, in the view of Professor Pierce, is coming about because of the failure of the courts to prevent regulation gone amuck. The authors see a kinder, gentler regulator, still constrained by the courts and capital markets, but engaged in an orderly transition to competition.

Privately-Owned Commercial Telecommunications Satellites by Professor Pamela L. Meredith and Franceska O. Schroeder is a survey of the U.S. regulatory approach to the licensing of private satellite systems. Although all of the current private satellite systems are in a stationary position over the globe, several new low-flying polar orbit satellite systems are on the drawing boards. One of these, Motorola's $2 billion Iridium network, seeks to provide portable telephone service on a global basis using seventy-seven small satellites.[2]

The authors point out that international treaty law leaves the details of satellite licensing to nations. The U.S. has developed a unique regulatory scheme to promote competition in satellite service. This has resulted in a variety of new satellite services which are responsive to marketplace demands.

Are U.S. regulatory policies well suited to competition on a global basis? "[O]ur ability to maintain our accustomed standards of living in an increasingly competitive world will probably depend heavily on our success in exploiting the opportunities created by the exploding telecommunications and computing technologies. . . . "[3] Some commentators believe regulatory obstacles will prevent U.S. companies from effectively competing with foreign companies. A recent newspaper advertising campaign by Bell Operating Companies stated, "If You Like Being No. 2, You'll Love America's Telecommunications Policy."[4] Who is number one and why?

Telephone Systems in the United States and Japan by Steven M. Spaeth discusses the cultural and philosophical differences with regard to telecommunications regulation in the U.S. and Japan. Japan has used two main vehicles to guide the

---

1. McKenna & Wueste, *An Answer to Professor Pierce: How Utility Regulation Can Be Reformed in Harmony with Constitutional Principles*, 27 CAL. W.L. REV. 81, 96 n.85 (1990).

2. Malgieri, *Strategic Plans May Signal AT&T Challenge to Iridium*, Radio Communication Report, Sept. 24, 1990, at 1, col. 2.

3. Kahn, *Telecommunications, Competitiveness and Economic Development--What Makes Us Competitive?*, PUB. UTIL. FORT., Sept. 13, 1990, at 12.

4. Bettelheim, *Baby Bells' Calls for Decontrol Ring Loudly*, Denver Post, May 6, 1990, at G1, col. 1.

development of its telecommunications infrastructure: a governmental agency called the Ministry of International Trade Industry ("MITI") and the Nippon Telephone and Telegraph ("NTT"). The author notes that Japan historically has taken a consensus approach to industry and business as opposed to the competitive regime adopted by the U.S. This enables Japan to regulate with a view towards its national interests while the U.S. regulates to ensure free pursuit of individual economic interests. These two divergent approaches to regulation stem from fundamental differences in culture. The open question is: Which approach will generate the best result in our changing environment?

Law of Telecommunications and Broadcasting in India by K.D. Gaur is a thorough discussion of the development of communications systems in India. All communications facilities in India are government-owned or controlled. There are extensive legislative prohibitions concerning the ownership of components and materials used, or useful, in constructing communications systems with stiff penalties for violators. Government agencies are vested with near dictatorial power and control over India's communications facilities. This has resulted in arbitrary and discriminatory conduct. In the author's view, the exercise of these powers is inconsistent with the Indian Constitution and the spirit of other laws governing their society.

The author notes two impediments to change. First, the government receives substantial revenues from its regulatory activities. Second, the courts have turned away past challenges to the government's regulatory authority. The author argues that, as a practical matter, legislative reforms can only be accomplished with respect to the new communications technologies. He suggests that a broadening of statutory definitions in regulatory acts covering traditional communications services is the best approach.

European Regulation of Transborder Television by C.A. Giffard traces the development of broadcast regulations and policies for the 1992 European common market. These regulations contain restrictions on content, advertising, and program origination. The author advances the arguments that the barriers to distribution of U.S. entertainment services in Europe are justified on cultural and economic grounds. No harm is seen to the U.S. entertainment industry because the rapid proliferation of channels of entertainment in Europe will lead to greater opportunity for distribution of mass media. This argument ignores the fact that increased channels of distribution erode the "mass" in media.[5] However, the central point remains: the resistance to change which threatens traditional values and economic self-interest mitigates against opening borders and removing restrictions.

Prospects for the International Treaty on Telecommunications by Y.M. Kolossov argues that new telecommunications technologies are increasingly global in

5. *See* Levine, *The Last Gasp of Mass Media?*, FORBES, Sept. 17, 1990, at 176.

nature and impact. The state regulatory approaches are outmoded and the sole international regulatory body ("ITU") has a charter which limits its effectiveness. The author notes the development of regional treaties which replace state regulation and suggests that these treaties be used as an international model. In his view, failure to obtain international accord governing global telecommunications is not a viable alternative.