

# Twilight of the FCC?

PETER HUBER

LAW AND DISORDER IN CYBERSPACE:

ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM

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ONLY A QUARTER-CENTURY AGO a proposal to abolish a significant federal regulatory agency would have been unlikely to generate substantial attention or support. But that was before the wave of deregulation in the transportation industries: this began with airline deregulation in the late 1970's, which led to the elimination of the Civil Aeronautics Board, and culminated in the demise of the "granddaddy" of all federal regulatory agencies – the Interstate Commerce Commission – on January 1, 1996. Should the Federal Communications Commission, created by Congress in 1934 and today the agency with probably the largest influence on the American economy and society, be the next to go?

Peter Huber thinks so. In his book, *Law*

*and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm*, Huber, a Washington lawyer who has gained attention over the past decade as an influential voice on such public-policy issues as the "liability crisis" and "tort reform,"<sup>1</sup> suggests that the FCC at best is a relic of the central planning favored by New Deal-era policymakers. At worst, Huber regards the FCC as not merely anachronistic but, by hamstringing private decision-makers, as holding back the American "economy, culture, and society of the twenty-first century" from realizing their full potential. In place of regulation by commission, Huber would have the courts control harmful corporate conduct in the communications industries by applying the common law (which Huber regards as having had its devel-

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<sup>1</sup> See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

opment arrested by decades of FCC regulation) and the antitrust laws. His presentation of this proposal is eminently readable, for Huber has a gift for the clever phrase – as in his characterization of the trend wherein the revenues of cellular telephony (“carrying the intelligent conversations of ordinary Americans”) will soon surpass those of broadcast (“the inane babble of *Roseanne*”). Huber terms this the triumph of “mind over chatter.”

His entertaining rhetoric notwithstanding, Huber is quite serious in his libertarian thesis. At bottom, Huber does not believe that there exists a “public interest” (the term found in many of Congress’s mandates to the FCC and other regulators) beyond that reflected in individual market transactions – or at least not one that can be determined with any tolerable degree of precision by the FCC. Consider, for example, the task of spectrum allocation, which Congress has directed the FCC to undertake according to “the public interest.” The FCC has over the years allocated different amounts of spectrum for different purposes – some for television broadcasting, other for AM and FM radio, other for cellular telephony, and, most recently, still other for personal communications services (or PCS). Huber regards the FCC’s tight control over how licensees can use the spectrum as having created scarcity in some areas (e.g., the delays before cellular was finally rolled out in the early 1980’s) and overabundance in others (e.g., broadcast entertainment that appeals to mass tastes). Society would be better off, Huber suggests, if private-property rights were created in the spectrum and the owners of the property then allowed to use it, like other property, in whatever ways strike them as efficient.<sup>2</sup> For example, television stations, Huber tells us, “would abandon broadcasting in droves and rush into wireless common

carriage if only the Commission would let them.” Although recent trends in the communications industries have been toward deregulation and relaxed government oversight of competitive businesses, Huber would vastly accelerate and expand these trends through outright elimination of the FCC.

So Huber would dezone the spectrum, establish property rights in it, “and then let the market be.” But even if this proposition, to which Huber devotes much of his book, is accepted, this does not make out a case for elimination of the FCC. For what would Huber do with the seemingly essential role of the FCC and state commissions (which he also proposes to abolish) in overseeing the prices as well as other terms and conditions under which long-distance carriers and others can interconnect with entrenched monopolists such as the Baby Bells (for example, to reach end users)? As a threshold matter, Huber appears quite sanguine about the extent to which the provision of local telecommunications is not a natural monopoly. In this regard, Huber evidently shares the publicly stated views of his law firm’s clients (nowhere in this book does Huber or his publisher disclose the author’s day job as a name partner in a Washington, D.C., law firm whose primary clients are the Baby Bells). But even Huber concedes that such an oversight role for the FCC may be appropriate for at least the next few years. This may be optimistic. If the rate at which the Telecommunications Act of 1996’s promise of competitive local telecommunications service is being realized (i.e., very slowly) does not improve markedly, these monopolies will be around for some considerable time beyond Huber’s estimate. In all events, the details and prices of interconnection with the incumbent local companies controlling the public switched telephone

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<sup>2</sup> This proposal, of course, was first made by Ronald Coase some four decades ago. See R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959).

network are the most substantial issues with which the FCC wrestles these days, and Huber has virtually nothing to say on how non-discriminatory and reasonably priced interconnection would be ensured under his proposal. This is a notable shortcoming.

Notwithstanding his skirting around the central question of monopoly, Huber's new book is significant. His books on the "liability crisis" and junk science in the courtroom were among the catalysts of "tort reform" at the state and federal levels over the past decade. Huber's latest entry may similarly provoke a debate over how we regulate conduct in the information age. To use Huber's terms, will it be in advance and from the top down (by the

promulgation of rules by a commission) or after the fact and from the bottom up (through the common law and antitrust processes of judges and juries)? Given the uncertainties of the common law (which Huber acknowledges) and the inherent difficulties of prosecuting antitrust cases (which he ignores), the real choice may be between continued government oversight, on the one hand, and, on the other, minimal control. So long as the nut of the Baby Bells' and other local telephone companies' monopolies remains essentially uncracked, the only reasonable choice, though not a perfect one, is to continue with something like the FCC for the foreseeable future, at least in the area of telecommunications. *GB*