
PREFACE

Veryl V. Miles[†]

This issue of *CommLaw Conspectus* marks a somewhat sad occasion for the *Journal*. At the end of the 2005 fall semester, Professor Harvey Zuckman will conclude his thirty-five year teaching career as a member of the full-time faculty of the Catholic University of America's Columbus School of Law. With his resignation, *CommLaw Conspectus* bids farewell to its trusted advisor, advocate, and friend of more than fourteen years.

The thought of Harvey's resignation is one that everyone who has known him as a teacher, faculty colleague, and friend to the Columbus School of Law finds hard to accept. His robust passion and commitment to the Catholic University of America has been unwavering and with each year his enthusiasm, energy, and love for our community has grown and sustained his passion as a teacher, scholar, friend, and mentor. We have been abundantly blessed to have had Harvey Zuckman at this University for these many years.

Not only has the Catholic University of America been blessed each day during the past thirty-five years by Harvey's generous spirit, but we will long enjoy the good fruits of his phenomenal talent and vision that have been the results of the Institute for Communications Law Studies, which he founded twenty-five years ago. Of course Harvey's legacy to the Columbus School of Law does not end with the Institute. It continues through the law school's communications law journal, *CommLaw Conspectus*, and the National Telecommunications Moot Court Team. In addition, nearly 300 law school alumni

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Dean Miles has taught at the Columbus School of Law since 1987. She teaches consumer bankruptcy and several courses in commercial law. Much of her scholarship has been devoted to the subject of consumer bankruptcy law. Prior to joining the faculty at the Columbus School of Law, Dean Miles was on the law faculty at George Mason University School of Law. She has also taught in the summer school program at Washington University School of Law in St. Louis, Missouri, and served as an adjunct professor at the American University of Law in Washington, D.C.

Dean Miles received a B.A. from Wells College in Aurora, New York and a J.D. from the Catholic University of America.

have gone on to work in the specialized practice of telecommunications and media law throughout the country. These individuals continue to lend their support to the program and mentor current students through the Communications Law Institute Alumni Association.

Harvey's passion for the subject of communications law has been longstanding; for him it goes back to his undergraduate work as a staff member on the University of Southern California's student newspaper, *The Daily Trojan*. This experience continued to influence and inspire the direction that his scholarship and teaching took as he became a law professor at St. Louis University School of Law in the 1960s where he introduced his first course on the subject of Federal Communications Commission regulatory practice. While the seeds of interest in the emerging practice of communications law regulation were planted long before Harvey joined the faculty at the Catholic University of America, it was here that these seeds would be nurtured and flourish through the support of former Dean Steven P. Frankino and the law school faculty.

Shortly after his arrival at the Columbus School of Law, Harvey founded the Institute for Communications Law Studies. This academic year marks the twenty-fifth anniversary of this program which offers one of the broadest and richest curricula in the area of communications law among the nation's law schools. The Institute includes the best communications law experiential program in legal education through the externship offerings provided and required by the program. When the good counselors at the Federal Communications Commission ("FCC" or "Commission") are in need of the most knowledgeable and prepared interns, they often look to the Columbus School of Law. The communications law community is indebted to Harvey for creating this program which has become a feeder institution for the FCC, the National Telecommunications and Information Administration, congressional committees overseeing communications, as well as other organizations such as the Corporation for Public Broadcasting, the National Association of Broadcasters, and the Telecommunications Industry Association.

Harvey's knowledge of communications law has been shared with generations of law students outside of The Catholic University of America as well, as he is universally regarded as one of the nation's premiere experts in the field. His renowned three-volume treatise, *Modern Communication Law*, and his study aid, *Mass Communications Law in a Nutshell*, are found on the bookshelves of many leading practitioners and regulators throughout the world.

I would of course be remiss to not mention the fact that Harvey's talents as a teacher and scholar have reached well beyond communications law. For years Harvey has been that unforgettable "first-year torts prof" who demanded everything possible from first-year students in terms of complete preparation and intellectual agility through the daily course routine of case law analysis, syn-

thesis, and Socratic dialogue. In addition to the subject of tort law, Harvey has also taught Family Law, each year preparing his students to be not only be substantively aware and knowledgeable about the law, but also to be perfectly attentive to the special sensitivities and responsibilities that go along with a family law practice. Through a unique practice simulation exercise devoted to the representation and negotiation of a separation agreement in a bitterly contested separation, Harvey has made his Family Law course one of the most memorable experiences in law school. For so many of us, Harvey will always be a memorable part of the law school experience at the Columbus School of Law, demanding excellence and devoted to the achievements of his students and his program.

In this, the final issue of *CommLaw Conspectus* where Harvey will serve as beloved advisor, the Journal offers a collection of articles that will make him proud. Harvey is never hesitant to discuss the importance of the First Amendment in giving everyone a voice in American society. Harvey's course, First Amendment and the Media, has given generations of law students a firm foundation in First Amendment jurisprudence and history. While this issue's articles do not directly invoke the First Amendment, they do examine how U.S. citizens and consumers with little or no national voice are impacted by the FCC's regulatory agenda. The articles propose solutions that represent the interests of those at risk of being left behind. As technology evolves, it is crucial that regulators contemplate the effects of regulation on those living in rural areas, and ensure that citizens continue to reap the benefits of services such as noncommercial educational programming. It is appropriate that the last issue of *CommLaw Conspectus* of the Zuckman era focuses on a theme that has permeated Zuckman's classes for decades—shaping regulation for the benefit of those it is designed to protect.

Jerry Ellig's and Nicholas Taylor's article, *What Did the Unbundled Network Element Platform Cost?*, undertakes an economic analysis of the federal regulation of the unbundled network element platform ("UNE-P"). Congress, in enacting the Telecommunications Act of 1996, attempted to promote local competition in telecommunications markets. In response to this legislation, the FCC required incumbent telephone service providers to lease or "unbundle" portions of their networks to competitors at discounted rates. This article examines whether the federal mandate to unbundle incumbent telephone network elements for resale to competitors is the most efficient economic policy to ensure that consumers ultimately benefit in the form of reduced rates. Dr. Ellig and Mr. Taylor suggest that the recent abandonment of the FCC's unbundling requirement will promote the reduction of long-distance access charges and federal Universal Service Fund contributions.

In the article, Dr. Ellig and Mr. Taylor conduct a review of various eco-

conomic studies and conclude that many economists have too quickly reached the conclusion that the FCC's former UNE-P policy resulted in positive benefits for consumers. After analyzing the economic benefits and detriments of the UNE-P policy, along with a hypothetical policy that would reduce long-distance access charges and Universal Service Fund contributions, Dr. Ellig and Mr. Taylor conclude that regulation of the UNE-P did not sufficiently stimulate competition to result in savings for consumers. The authors conclude that consumers would have received larger benefits if federal regulators had focused on reducing the "market distorting" effects caused by long-distance access charges and Universal Service Fund contributions. Ultimately, Dr. Ellig and Mr. Taylor agree that the FCC's decision to abandon the UNE-P requirements will benefit consumers' wallets and purses.

In Craig A. Anderson's article, *Toward a Fair Network Access Rate Policy*, the author argues that the FCC's policies relating to rural broadband service providers ("BSPs") have placed the companies at a significant disadvantage and ultimately interfere with capital investment and competition among other things in rural markets. The rise of competitive rural BSPs began with the enactment of the Telecommunications Act of 1996. As early as 1997, BSPs began operating in small rural community markets by building their own proprietary networks. In an effort to compete with incumbent broadband providers, several BSPs constructed their own networks to connect directly to consumer premises. The FCC has long recognized that a primary factor in establishing competition in telecommunications is mandatory interconnection of competing networks. Mandatory interconnection removes substantial barriers to entry into telecommunications markets; however, it also introduces the problem of requiring just compensation under the Fifth Amendment's Takings Clause to individual network owners, like BSPs.

In 2001, the FCC imposed caps on network leasing rates based on incumbent access rates assuming that these rates were representative of market prices. Anderson argues that this policy does not consider smaller telecommunications providers struggling to compete with larger companies. He suggests that as a result, rural BSPs are forced to cap their access rates at levels far below their actual costs. Although the Commission attempted to ameliorate these problems through the "rural exemption," Anderson suggests that it is so narrowly drawn that it is ineffective. Anderson concludes by proffering a solution for establishing network access rates for rural BSPs.

In *Mutually Exclusive Noncommercial Educational FM Applications: Accepted for Filing, Tentatively Selected, and . . . Granted?*, Carly T. Didden analyzes a policy recently implemented by the FCC for determining who shall be awarded a license to broadcast a low-power noncommercial educational FM radio station. While broadcast licenses are typically sold to the highest bidder

at auction, noncommercial licenses must undergo a different process. When there is more than one applicant for a noncommercial station, the FCC must look at which applicant will better serve the public interest.

In order to make this determination, the FCC has developed a competitive bidding system based on the allocation of points for certain factors (such as whether an applicant has an established local presence). Didden maintains that the point system is a significant improvement from the previous methods and has the potential of being a catalyst of service to the public interest. Didden first examines and distinguishes the various application methods in her determination of the best approach for evaluating mutually exclusive applications. Despite the point system's significant potential, Didden ultimately argues that problems are inevitable in the implementation process and greater oversight is needed to clarify definitions, assign point determinations, and establish a series of checks and balances once tentative selections are made. The FCC can only improve this process with the help of regulatory and legislative actions that will fully facilitate the implementation of mutually exclusive noncommercial education FM applications.

I hope you enjoy this edition of *CommLaw Conspectus*. These articles speak to the spirit of the Catholic University of America: the notion that all members of society should have a voice and not be forgotten. I am proud of the hard work and dedication that the Editorial Board has demonstrated in publishing this issue. Their dedication to excellence is further evidence that Harvey Zuckman's legacy will continue in the pages of *CommLaw Conspectus* long after his resignation.

