

Addressing Political Feasibility as Well as Economic Viability Constraints To Achieve Sustainable Telecommunications Policies in the U.S.

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Abstract

Sustainable development of a nation's telecommunications infrastructure requires that regulatory policies be politically feasible and also satisfy the economic conditions for maintaining a financially viable telecommunications industry. Fulfilling these joint requirements is becoming particularly difficult under deregulatory policies. Thus far, academic research emphasizes the need for policymakers to better understand the economic realities that limit achievability of policy goals in a competitive environment, but lacks sufficient recognition of political feasibility problems. This paper provides the foundation for an analytical framework to fill the gap between political feasibility and economic viability constraints in designing sustainable telecommunications policies. This paper provides examples of sustainability problems both pre- and post-Telecommunications Act of 1996, and discusses unique political problems associated with attempts to retrench from traditional public utility regulation. This paper concludes with a discussion of recent events that may open new windows of opportunity for policy change.

1. Introduction

Sustainable development of a nation's public utility infrastructure, such as electricity and telecommunications, requires regulatory policies that satisfy *both* political feasibility and the economic conditions for maintaining a financially viable utility industry. The recent electricity crises in California and the 2003 Blackout in the Northeast of the U.S. are dramatic examples of the adverse consequences – such as rolling blackouts, utility bankruptcies and government bailouts – that may arise when deregulatory policies conflict with conditions for economic viability. Fulfilling the joint requirements of political feasibility and economic viability in deregulatory policies for telecommunications is also becoming particularly difficult given the rapid rate of technological change, the growing complexities of communications technology, and the increasingly vital role of the information sector to global economies. Early warning signs of problems facing the telecommunications industry include declining stock values and investments, numerous bankruptcies, and growing customer service problems.

To date, much of the academic research evaluating telecommunications deregulatory policies has focused on the need to properly design *regulatory incentives* affecting behavior of private parties to better achieve desired policy goals. More recently, research has also emphasized the need to focus on the attributes of *regulatory governance* restraining the behavior

of regulators in order to create a suitable environment for infrastructure investment (Levy & Spiller, 1996; Cherry & Wildman, 1999a).¹ Furthermore, Cherry and Wildman (1999a) have shown that the need to properly design both regulatory incentives and regulatory governance may require the sacrifice of some economic efficiency goals.²

Prior research has contributed to an improved understanding of how to design and enforce regulatory rules – both regulatory incentives and regulatory governance – in a manner that is compatible with achieving the desired economic behavior of private parties. The emphasis of this research has been to encourage government officials – whether legislative, executive, administrative, or judicial – to better understand the constraints posed by the economic viability needs of firms and industries on public policy goals and associated regulatory designs. In so doing, many policy prescriptions have been made that appear, at least theoretically, to be quite straightforward.

Yet many such policy prescriptions – for example, rebalancing retail rates and funding universal service through explicit charges on consumers' bills – tend to pose politically infeasible solutions (Cherry, 2000b; Cherry & Nystrom, 2000). *For this reason, it is important not only for policymakers to better understand the economic realities that limit achievability of policy goals, but also for all parties attempting to influence the policy process to be aware of the political constraints that limit policymakers' choices.* This paper attempts to fill a gap in the academic literature by focusing on political feasibility problems that constrain the adoption and sustainability of reasonably achievable policy options for telecommunications regulation. These political feasibility constraints may require modification or even abandonment of desired policy objectives or features of regulatory design to enable implementation of reasonably successful and sustainable telecommunications deregulatory policies.

¹ In this regard, regulatory governance requires the coexistence of three complementary mechanisms to restrain arbitrary administrative action: (1) substantive restraints on the discretion of the regulatory; (2) informal or formal constraints on changing the regulatory system; and (3) institutions that enforce these formal, substantive and procedural, constraints. However, the governance structures required to provide these mechanisms will vary among nations given the differences in their institutional endowments.

² For example, short-term economic efficiency goals may need to yield to long-term ones, particularly when transitioning from a monopoly to a competitive regulatory regime. The author has already discussed the necessity of this trade-off in addressing stranded costs of incumbent local exchange carriers (ILECs) (Cherry & Wildman, 1999a) and pricing of unbundled elements by ILECs (Cherry, 2000a). More generally, the author has described the economic constraints on regulatory interventions and the implications for applying constitutional principles to communications policies in the context of governance under the U.S. Constitution (Cherry & Wildman, 2000; Cherry & Nystrom, 2000).

This paper is organized as follows. Based on prior research (Cherry & Wildman, 1999a & 2000), section 2 reviews the economic viability constraints on policy choices that arise from the need: (1) to support private investment generally, and (2) to be compatible with the financial viability of specific firms or industries. Section 3 examines political feasibility constraints in three contexts: (1) to support the legitimacy of government itself; (2) to enable initial adoption of a policy; and (3) to enable sustainability of a policy over time. Drawing on the political science literature, key factors affecting political feasibility are identified for each context. Section 3 also shows how the political feasibility and economic viability constraints are interrelated. In some cases, regulatory interventions can enhance governmental legitimacy as well as mitigate economic viability problems; however, in others, political feasibility constraints may require sacrifice of some economic efficiency objectives, or economic viability constraints may require modification or even abandonment of some political objectives.

Section 4 discusses some of the economic viability and political feasibility constraints on deregulatory telecommunications policies from several perspectives. First, it reviews some economic and legal problems related to pursuit of deregulatory policies that could not be adequately addressed without federal legislation. These problems led to passage of the Telecommunications Act of 1996 (TA96), which was the politically feasible solution at the time of adoption. Second, this section discusses some of the sustainability problems – from new economic, legal and political difficulties - that have arisen with implementation of TA96. These sustainability problems relate to the federal universal service funding mechanism, the unbundling regime and broadband regulation. Transcending problems associated with specific provisions of TA96, this section also describes how the legacy of public utilities regulation – particularly the common law doctrines of the “just price” and “businesses affected with a public interest” – creates substantial retrenchment problems for deregulatory policies. However, recent major events – such as the terrorist attacks of September 11, 2001, the California electricity crisis, the 2003 Northeast Blackout, and the downturn of the telecommunications sector - may create new windows of opportunity for policy change.

Conclusions include that adoption and retention of sustainable deregulatory policies requires a common understanding among those participating in the policy process as to the underlying political and economic problems. To achieve such a shared understanding will require not only that policymakers better understand the economic viability problems, but also

that policy experts better understand and incorporate the political feasibility problems into research and policy recommendations. The difficult retrenchment problems created by pursuit of deregulatory policies affecting traditional public utility services, such as telecommunications and electricity, must also be expressly acknowledged. Recent events may provide new windows of opportunity for policymakers to engage in a more direct dialogue with constituents - rather than to rely on blame avoidance strategies - regarding the tradeoffs inherent in deregulatory policies. New policy options may then become both politically feasible and economically viable.

2. Economic Viability Constraints on Policy Choices

The economic realities of providing goods and services through private entities places constraints on the design of governmentally imposed regulatory rules – both regulatory incentives and regulatory governance – likely to achieve desirable social objectives. Cherry and Wildman (1999a & 2000) have discussed the nature of the economic constraints that affect the design of regulatory rules to achieve policy objectives based on reliance of private investment to provide telecommunications infrastructure and services. Based on this prior research, section 2 provides an overview of the types of economic problems that must be satisfactorily addressed through appropriate regulatory design in order for public policy objectives to be economically sustainable over time.³ This overview not only summarizes admonitions to policymakers of how to prevent economic problems through a better understanding of the implications for regulatory design, but it also provides a foundation for the discussion in section 3 of how policy experts and stakeholders need to address mirror-image political sustainability problems that are faced by policymakers.

2.1 To Support Private Investment Generally⁴

Government's own performance influences what can be achieved by private entities in a system of voluntary exchange. Through rules affecting transactions among parties, whether public or private, government affects the long-term certainty and risk that parties face. The levels of uncertainty and risk, in turn, affect the profitability of investment and commercial activities.

³ Although much of the prior work has been done through evaluation of economic problems in the context of governance under the U.S. Constitution, the fundamental types of economic problems remain the same across governance structures.

⁴ For a more in-depth discussion of the points covered in this section, see Cherry & Wildman (1999a, pp. 613-619; 2000, pp. 64-74, 81-85).

Government contributes to the viability of the market itself through definition and enforcement of private property rights and rules of contract. However, these rules must constrain government as well as private party behavior. For example, constraints on government's eminent domain power⁵ protect private party investment by reducing the risk of government confiscation of private property.

Similarly, government must be held accountable for the breaches of contracts for which it is responsible.⁶ First, there need to be constraints on government action that impairs contracts between private parties. Second, government should be held liable for its breach of a contract to which it is a party (referred to as a public contract). Such enforceability is necessary to ensure that government can, in fact, make credible commitments and thereby preserve its capacity to make contracts in the future.

Such constraints on government as well as private party behavior serve to generally support economic investments of individuals and firms that are rooted in the underlying systems of property rights and contracts. Furthermore, these constraints play a particularly critical role in supporting private investment in utility infrastructures, such as telecommunications, that are characterized by high sunk costs. In fact, differences in telecommunications sector performance among nations can be traced to problems in their respective regulatory governance structures (Levy & Spiller, 1996).

2.2. To Be Compatible With Financial Viability of Firms or Industries

Even if a system of regulatory rules generally supports private investment in the market, rules applied to a specific sector or industry may not be compatible with the economic viability of the affected firms or industries. As a result, the desired economic performance and social consequences underlying policymakers' objectives may not be forthcoming. This subsection summarizes those attributes of regulatory design that create firm or industry viability problems that may undermine fulfillment of underlying or related policy objectives.⁷

⁵ Under the U.S. Constitution, both the federal and state governments are prohibited from taking private property for public use without providing just compensation.

⁶ In the U.S., the state governments are constrained by the Contract Clause of the U.S. Constitution. Similar constraints have been interpreted by the U.S. Supreme Court to apply to the federal government in *United States v. Winstar Corporation*, 518 U.S. 839 (1996).

⁷ Cherry and Wildman first discussed these problems in the context of developing universal service policy for the telecommunications industry (1999b), and then expanded the analysis to economic activities in general, pointing out particular ramifications for public utilities (2000).

Regulatory rules may pose economic viability problems for a given firm or industry, among firms within a given industry, or among industries. For simplicity, the collective set of economic viability problems will be referred to as interfirm or interindustry viability problems. The interfirm or interindustry viability problems created by government action can be designated as prospective or transition problems.

Prospective problems arise from the prospective effects of government rules that (1) treat some firms or industries differently than others, whether on a per se or de facto basis; (2) impose unreasonable and fundamentally unremunerative financial obligations on firms or industries; or (3) require compliance with coexisting yet conflicting or incompatible rules. An example of the first type is the application of different tax laws to providers of competing services, such as facilities-based carriers and resellers. An example of the second type includes cross-subsidy requirements or price controls that amount to confiscation of property. The third type includes coexisting, conflicting federal and state requirements for which simultaneous compliance is impossible.⁸

Transition problems arise from changes in governmental rules that affect the earnings on preexisting investments, contracts, or conduct, and thereby the willingness of private actors to rely on government commitments in planning future economic endeavors. For example, elimination of ILEC's monopoly rights and imposition of asymmetric requirements on ILEC's to provide access to their facilities to competitors will affect the ILEC's abilities to recover preexisting investment made during the monopoly regime as well as their willingness to make future investments.⁹

In order to address these prospective and transition problems, specific remedies or adjustments to regulatory design are required. In some cases, monetary compensation may suffice to offset the nature of the financial inviability. In others, the offending rule(s) may need to be modified or even eliminated. The following Table 1 summarizes the relationship of remedies or regulatory design modifications to prospective and transition problems.

⁸ Cherry and Wildman (2000) discuss how certain Clauses of the U.S. Constitution provide protection and relief from some of these prospective problems.

⁹ Cherry and Wildman (2000) also discuss how certain Clauses of the U.S. Constitution provide protection and relief from some transition problems.

**Table 1. Relationship of Remedies or Regulatory Design
To Prospective and Transition Viability Problems¹⁰**

Interfirm/Interindustry Viability Problem	Source of Viability Problem	Characteristic of the Remedy or Regulatory Design
Prospective problem	Differential treatment among firms or industries (per se or de facto asymmetric regulation)	Eliminate or reduce the asymmetry <ul style="list-style-type: none"> • Invalidate or repeal the rule • Amend rule to restore symmetry • Compensate, in whole or in part, person(s) bearing burden of the asymmetry
Prospective problem	Unreasonable burden of rule(s) (especially unremunerative obligations)	Eliminate or reduce the burden <ul style="list-style-type: none"> • Invalidate or repeal the rule • Amend the rule to reduce the burden • Compensate, in whole or in part, person(s) bearing the burden
Prospective problem	Impossibility of complying with coexisting, conflicting rules (combinatorial rule problems)	Eliminate the conflict of rules <ul style="list-style-type: none"> • Invalidate or repeal one or more the rules • Amend one or more of the rules to remove conflict • Compensate person(s) for losses while bearing burden of conflicting rules
Transition Problem	Change in rules affecting preexisting investment, contracts or conduct	Protect interest in preexisting investment <ul style="list-style-type: none"> • Invalidate or repeal the rule change • Compensate for losses suffered due to the rule change

Table 1 can be used as a tool to help government face the challenges of designing and enforcing regulatory rules in an increasingly technologically dynamic and unpredictable information economy. It illustrates how government can create prospective and transition problems for particular firms or industries through its actions or inactions; but it also provides guidance for how policymakers can better anticipate the problems they create and prevent them through more thoughtful, initial regulatory design. It also indicates that government should perhaps be more willing to accept evidence of the specific viability problems that arise, and be prepared to adopt appropriate remedies or regulatory modifications.

3. Political Feasibility Constraints on Policy Choices

Policy choices that are likely to lead to fulfillment of the underlying policy objectives are constrained by political feasibility, as well as economic viability, problems. An analytical framework for understanding these political feasibility problems, and incorporating this

¹⁰ This table is based on Table 4 in Cherry & Wildman (2000, p. 99).

understanding to enhance the development and adoption of more workable and achievable regulatory rules, has been sorely missing from the debate of how to design telecommunications deregulatory policy. This section provides the foundation for such a framework to facilitate mutual understanding among policymakers and those attempting to influence them – whether policy experts, industry members or other stakeholders – of the political constraints inherent in the policymaking process.

In so doing, this section explains how certain political feasibility constraints arise from the need to support the legitimacy of the existing government itself (section 3.1), whereas others arise to enable a given policy to remain in force over time (section 3.3). These two types of situations can be thought of as mirror-images of the economic viability constraints arising from the needs to support private investment generally (section 2.1) and to be compatible with the ongoing financial viability of the specific firms or industries (section 2.2). However, some political feasibility constraints are endemic to the initial adoption of any specific policy proposal that must be considered separately, and in addition to, the sustainability of that policy over time. These constraints are discussed utilizing Kingdon's model (1995) of the policymaking process (section 3.2).

3.1 To Support Legitimacy of Government Itself

Successful pursuit of policy objectives requires, perhaps most fundamentally, that regulatory intervention be constrained by those limitations on government action that support the legitimacy of the government itself. The legitimizing principle of political authority in the modern state is the principle of popular sovereignty, which contrasts with traditional bases of theocracy, divine right, noble birth, or caste (Finer, 1999, Vol. III, p. 1474). The principle of popular sovereignty “affirms that no government is legitimate and hence obedience-worthy unless it can demonstrate to its subjects that its powers have been conferred by them. This dogma, it must be noted, is neutral – it does not predicate any particular form of regime; it will accommodate liberal-democracy, autocracy, oligarchy, even totalitarianism, providing only that the office-bearers are able to convince the public they have received office by popular mandate – whatever this is (and however contrived).” (Finer, 1999, Vol. III, p. 1476).

Under a form of government based on popular sovereignty, the importance of a government's adherence to self-imposed limitations on its power in order to retain its legitimacy

and stability has often been explained in terms of social contract theory.¹¹ In this regard, the concept of social contract is a helpful analytical tool for understanding the development and maintenance of sovereign authority. Social contract theory can be defined as “the view that human authorities are established by agreement with their subjects for specific tasks, that their legitimacy depends upon fulfillment of these tasks, and that such agreements may be enforced by clear, defined procedures, as one would enforce a contract in private law” (Black, 1993, p. 57). As with contracts generally, the social contract may or may not be reflected in a written document. Under the concept of social contract, the sovereign – whether elected or not – retains its legitimacy to rule by subordinating its use of power to the terms of the contract (Black, 1993). As with the need to generally support private investment in a market economy by adhering to terms of its public contracts, as described in section 2.1, government needs to adhere to the terms of its social contract in order to maintain credible commitments to rule.

The specific limitations to which a given nation’s government has acceded will vary, of course, with the “social contract” and associated governance structure of that nation. Furthermore, core values reflected in the limitations on government power will also likely vary among nations. However, for any given nation, these core values – and their expression in direct or indirect limitations on government power¹² – must be recognized as political (as well as legal) feasibility constraints on regulatory intervention for public policy purposes.

As for a constitutional democracy, its legitimacy requires that the constitutional state simultaneously guarantee the private autonomy of individuals to pursue their personal success and happiness as well as secure the public autonomy (or popular sovereignty) of those subject to it through rights of political participation so that the legal order is seen as derived from the citizens’ self-legislation (Habermas, 1999, p. xxv (translator’s introduction)). In the U.S., the chosen balance of private and public autonomies is reflected in the U.S. Constitution. Core values underlying U.S. constitutional principles are provided in Table 2.

¹¹ Several philosophers – Hobbes, Locke, Rousseau, and Kant - are associated with the development of social contract theory. Interpretations of social contract theory differ, such as whether the social contract is merely a legal fiction for legitimizing a political community or represents historical fact. *See, e.g.*, Priban (2003); Kary (1999); Allen (1999); and Rosenfeld (1985). Notwithstanding these differences, social contract theory remains a useful analytical tool (Black, 1993; Hoepfl & Thompson, 1979).

¹² Direct limitations consist of judicially enforceable guarantees that specifically deny government the right to engage in certain actions or to exercise certain types of authority. Indirect limitations consist of governance structures, such as separation of powers or a system of checks and balances among branches of government, that constrain use of government power. (Strong, 1997, pp. 7-12)

**Table 2. Relationship of Equity or Fairness Problems
To U.S. Constitutional Provisions¹³**

Problem of Equity or Fairness	Constitutional Direct Limitations on Power
Protection of specific, individual liberties	<ul style="list-style-type: none"> • Bill of Rights
Differential treatment among persons	<ul style="list-style-type: none"> • First Amendment (freedom of speech) • Ex Post Facto/ Bill of Attainder • Equal Protection Clause • Due Process Clause
Unreasonable burden of rule on person	<ul style="list-style-type: none"> • First Amendment (burden on protected speech) • Equal Protection Clause (no reasonable relationship between burden of rule and its stated purpose; cumulative effect of rules) • Takings Clause (unreasonable burden on person for public good)
Conflicting federal v. state rules	<ul style="list-style-type: none"> • Supremacy Clause <ul style="list-style-type: none"> • Commerce Clause (interstate preemption) • Takings Clause (prevent “trapping” of costs) • Tenth Amendment
Change in government rules affecting preexisting investment, contracts or conduct	<ul style="list-style-type: none"> • Contract Clause, <i>U.S. v. Winstar</i> • Ex Post Facto/Bill of Attainder • Takings Clause

Comparing Tables 1 and 2, the last four rows of equity and fairness problems in Table 2 correspond to the four sources of economic viability problems identified in Table 1. In other words, how government addresses various problems of equity and fairness is directly related to potential sources of economic viability problems for specific firms or industries created by regulation. This interrelationship between economic viability and equity/fairness problems is depicted in Table 3. By recognizing this interrelationship, it may be possible – provided that there is appropriate judicial enforcement of constitutional principles – to design regulatory interventions that both enhance governmental legitimacy as well as mitigate economic viability problems faced by the regulated firms and industries (Cherry & Wildman, 2000, pp. 93-105).¹⁴ However, the ability to design regulatory interventions with such dual properties is greatly enhanced not only if policymakers better understand the economic viability constraints on regulated firms and industries but also if those attempting to influence policy choices also understand the equity and fairness constraints on policymakers.

¹³ This table is based on Table 1 in Cherry & Wildman (2000, p. 94).

¹⁴ Conversely, certain regulatory interventions may simultaneously undermine government legitimacy and policy objectives that depend on the economic viability of the regulated entities. In any event, any

Table 3. Addressing Economic Viability and Political Feasibility Problems

Economic Viability and Equity/Fairness Problem	Characteristic of the Remedy of Regulatory Design	Constitutional Direct Limitations on Power
Differential treatment among persons, firms or industries	Eliminate or reduce the asymmetry <ul style="list-style-type: none"> • Invalidate or repeal the rule • Amend rule to restore symmetry • Compensate, in whole or in part, those bearing burden of the asymmetry 	<ul style="list-style-type: none"> • First Amendment • Ex Post Facto/Bill of Attainder • Equal Protection Clause • Due Process Clause
Unreasonable burden of rule(s)	Eliminate or reduce the burden <ul style="list-style-type: none"> • Invalidate or repeal the rule • Amend the rule to reduce the burden • Compensate, in whole or in part, those bearing the burden 	<ul style="list-style-type: none"> • First Amendment • Equal Protection Clause • Takings Clause
Impossibility of complying with coexisting, conflicting rules	Eliminate the conflict of rules <ul style="list-style-type: none"> • Invalidate or repeal one or more of the rules • Amend one or more of the rules to remove conflict • Compensate for losses incurred while bearing burden of conflicting rules 	<ul style="list-style-type: none"> • Supremacy Clause • Commerce Clause • Takings Clause • Tenth Amendment
Change in rules affecting preexisting investment, contracts or conduct	Protect interest in preexisting investment <ul style="list-style-type: none"> • Invalidate or repeal the rule change • Compensate for losses suffered due to the rule change 	<ul style="list-style-type: none"> • Contract Clause, <i>U.S. v. Winstar</i> • Ex Post Facto/Bill of Attainder • Takings Clause

Regulatory intervention in other nations requires a similar examination of the core values underlying the given nation's "social contract". These values and the nature of their enforcement will necessarily create political constraints on the policy options that can be adopted and maintained over time. By examining the interrelationship between these political constraints and those that derive from economic viability problems, the opportunity to design policy options that satisfy both sets of constraints is greatly enhanced.

3.2 To Enable Initial Adoption of a Policy

In addition to the political constraints arising from the need to support legitimacy of government itself, a policy choice is constrained by the circumstances prevailing at the time of its adoption. These constraints are endemic to the policy decisionmaking process itself.

regulatory intervention must also be constrained to protect specifically enumerated individual liberties in the Bill of Rights (see the first row of Table 2).

Kingdon (1995) has developed a model of this process. It has recently been applied to policy decisionmaking affecting the telecommunications industry.¹⁵ Kingdon's model is utilized here to identify political constraints relevant to the initial adoption of a policy. Kingdon's model is depicted graphically in Figure 1 at the end of this paper, and its components are briefly described below.¹⁶

Kingdon describes policy decisions as the outcome of three processes – the problem, policy and political streams – that are coupled during windows of opportunity. Each stream is affected by its own institutional structures, but they also interact. Windows of opportunity are created by changes in the problem or political streams, during which policy entrepreneurs attempt to couple the three streams to produce the policy outcomes they desire.

More specifically, the *problem stream* is the process whereby policy problems are defined and rise to a sufficient level of urgency that they find a place on policymakers' agenda. For an issue to be considered by policymakers it must present a problem more urgent than others (Kingdon, 1995, pp. 113-114). The *policy stream* is the process of developing and selecting alternative policy solutions through consensus within the policy community. The criteria for acceptance of a policy solution are technical feasibility (primarily the economic and legal abilities to implement the solution), value acceptability (compatibility with the values of members of the policy community) and anticipation of further constraints (anticipating acceptability of the solution in the political stream) (Kingdon, 1995, pp. 131-139). The *political stream* is the process of developing consensus on policy issues in the broader political environment through coalition building (Kingdon, 1995, pp. 144-149). *Windows of opportunity* are the opportunities for advocates of policy proposals to push their solutions or to draw attention to their special problems. A window of opportunity is created by a change in the problem or political stream, such as a crisis, a disaster or a turnover in administrative or elected officials.

Coupling of the three streams by policy entrepreneurs during windows of opportunity is the critical step for producing policy outcomes. The coupling process is a challenging one for many reasons: many windows of opportunity are unpredictable; windows of opportunity are open only for a limited period of time; policy entrepreneurs compete to take advantage of the

¹⁵ Zahariadis (1992, 1995) used it to study the political processes surrounding privatization decisions in Britain and France. Cherry (2000b) applied the model to explain the adoption of different rate rebalancing policies by the federal U.S. and European Union policymaking bodies.

¹⁶ For a discussion of Kingdon's model, see Cherry (2000b) and, of course, Kingdon (1995).

windows of opportunity, during which only a limited number of policy outcomes can possibly be adopted; once events are set in motion the outcome may be unpredictable, requiring policy entrepreneurs to consider the risks of attempting to capitalize on windows of opportunity; and, the interdependence of the three streams contributes to the complexity of coupling the streams and the unpredictability of the outcome (Kingdon, 1995, 168-190).

The implications of understanding the policy decisionmaking process in terms of the problem, policy and political streams of Kingdon's model are that *political considerations dominate the ability to develop and adopt policy outcomes*. In the context of the problem stream, the policymakers' views of economic viability problems control the policy agenda. Furthermore, with regard to the policy and political streams, the policymakers' views of political feasibility ultimately determine both the attributes of a proposed policy solution and the political strategy deemed necessary for its adoption.

3.2.1 Policymaker View of Economic Viability Problems

In the policy decisionmaking process, the policymakers identify and define the policy problems that rise to a sufficient level of urgency so as to find a place on the policymakers' agenda. With regard to policy problems that may derive from economic viability problems of regulated firms or industries, it is the policymakers' views of economic viability problems that are critical.

Policymakers' views of economic viability problems are affected by several factors. First, their views are influenced by their perceptions of prior policy choices and the impact on economic behavior of parties. In this respect, path dependence or inertia based on prior experience is embedded in policymakers' current perceptions. This is just one of the elements of path dependence in the policy decisionmaking process that explains why most public policy change is incremental and major policy change requires the intervention of strong conjunctural forces (Hall, 1986; Wilsford, 1994).¹⁷

Second, policymakers' perceptions of policy problems are influenced by various information sources, which are likely to provide a wide range of often conflicting perspectives. One source is the information provided by the affected firms or industry representatives that may be selectively produced and presented to reflect business strategies. Frequently, competing firms take conflicting policy positions in an effort to gain competitive advantage through regulation.

Another source of information is the lobbying of other stakeholders driven by their own special interests. Experts – whether on their own initiative or on behalf of affected firms, industries or other stakeholders – may also attempt to influence policymakers’ perceptions through analytical arguments, perhaps supported by theoretical models and/or empirical studies. The mass media may also report relevant information about the financial condition and activities of affected firms and industries, provide their own perspectives of pressing policy problems, and contribute to policymakers’ perceptions of public opinion on the subject. Furthermore, in some cases, government entities may directly collect and evaluate relevant data as a resource for policymakers.

Third, policymakers evaluate the relative importance of the perceived economic viability problems in light of other policy problems requiring their attention. The realities of limited time and resources compels policymakers to compare and rank the importance among numerous, often unrelated policy problems – a task often overlooked, underappreciated or further confused by those sources of information upon which policymakers rely.

These factors contribute to the likelihood that there will be gaps between policymakers’ views of economic viability problems and the views of those attempting to influence them. Importantly, one type of gap may be between policymakers and policy experts. Flawed theoretical assumptions underlying expert opinions that fail to incorporate the characteristics of the problem stream process – such as path dependence, information problems, and criteria for the ranking of disparate policy problems – will only contribute to widening this gap.

3.2.2 Policymaker View of Political Feasibility

Assuming that an economic viability problem ranks highly on the policy agenda in the problem stream, policymakers’ views of political feasibility will ultimately determine the attributes of the selected policy option and the political strategy deemed necessary for its adoption. Analyzing the process of making these determinations in the policy and political streams reveals further political constraints on the adoption of a policy option.

The political strategy for addressing a policy problem is driven by policymakers’ perceptions of what is politically possible under existing circumstances. In this regard, the process of coalition building in the *political stream* is essential. As identified in Kingdon’s model, the critical components for developing consensus on policy issues in the broader political

¹⁷ In this context, path dependence is viewed in terms of historical contingency, not determinism.

environment are evaluation of the organization of political forces in support or opposition, perceived public opinion, and other politician approval. Assessment of these components will be affected by prior experience of policy initiatives that succeeded or failed and of constituent expectations of equity and fairness.

But perhaps more importantly, these components are considered in light of policymakers' own political objectives, often posing principal-agent problems in which policymakers' personal long-term political objectives may foreclose pursuit of more socially beneficial policy options. For example, for policymakers driven by electoral motivations, the choice of political strategy is determined by several factors: constituent gains and losses; the concentration versus diffusion of costs and benefits among constituents; and the negativity bias of voters (i.e. constituents respond more to losses than gains), causing politicians to discount gains relative to losses (Weaver, 1986, pp. 373-374). As a result, policymakers favor *credit claiming strategies* when a policy option produces concentrated constituent benefits and diffuse losses and forces of political opposition. However, given the negativity bias of voters, policymakers favor *blame avoidance strategies* when a policy option requires retrenchment of substantial benefits from a concentrated group of constituents but confers relatively small benefits to a diffuse group of constituents, thereby imposing significantly lower transaction costs to organize political opponents rather than supporters (Pierson, 1994; Weaver, 1986).

In contrast to credit claiming strategies to organize and leverage political support, *blame avoidance strategies* consist of distinctive tactics to diffuse political opposition (Pierson, 1994, p. 8). They include obfuscatory tactics to decouple the relationship between the desired policy and its negative consequences through manipulation of information available to constituents; avoidance of deciding critical policy elements through delegation to other governmental entities; and compensation to victims of retrenchment, such as grandfather clauses (Pierson, 1994; pp. 19-26; Weaver, 1986, pp. 384-390). Reliance on blame avoidance strategies – reflecting policymakers' fears to dismantle existing policy and thereby limiting the perceived feasible set of policy alternatives – also contributes to the path dependency of preexisting, even failing, policies (Weaver, 1986, pp. 393-395).

The selection of a political strategy for addressing a policy problem is also interrelated with the specific attributes of the proposed policy solution ultimately selected from the *policy stream*. As previously mentioned, the criteria for acceptance of a policy solution in the policy

stream are technical feasibility, value acceptability and anticipation of future constraints. Technical feasibility includes the economic and legal abilities to implement the solution. In this way, policy options are constrained by existing governance structure and the consequences of prior policy choices. Policy experts may provide valuable insights for fulfilling this criterion, depending upon the validity of the underlying assumptions upon which their opinions are based.

Value acceptability relates to compatibility of the values of those within the policy community. The policy community consists of specialists (whether inside or outside of government) in a given policy area, including congressional staff, agency staff, academics, consultants, and analysts of other spokespersons for interest groups. A major barrier to satisfying this criterion is that, at some point, consensus within the policy community usually requires choices to be made among considerations of equity/fairness and efficiency. However, it is precisely such choices that policy experts – typically economists and lawyers – are so ill equipped to provide guidance (Cherry, 2000b, pp. 366-358). Economic theories typically do not provide a means for making equity or value-based decisions, deeming such decisions to be answerable only by reference to other disciplines. Similarly, lawyers provide opinions regarding legal consequences arising from policy alternatives, recommending perhaps a range of legally feasible policy options but deferring selection of a specific one to the client or policymaker. Furthermore, some policy choices may require tradeoffs between short-term and long-term benefits, for which even a theoretically optimal choice is unclear or at least constrained by value-laden considerations.

Finally, anticipation of future constraints requires anticipating acceptability of the policy solution in the political stream. It is at this juncture that members of the policy community need to incorporate the political problems of adopting a policy option (reflected in the perceived need to use credit claiming or blame avoidance strategies) into the substantive dimensions of proposed policy solutions. This requires recognition and incorporation of the characteristics of the political stream process discussed earlier – such as path dependence of prior policy choices, the existing governance structure and distribution of political power, negativity bias of voters, and choice of political strategies – into the assumptions underlying their opinions. Failure to incorporate the political feasibility constraints from the political stream into proposed policy options within the policy community will create a gap between the policymakers' and policy community's views of feasible policy options. The result may be the failure to adopt any new

policy option, the adoption of a policy option inferior to even existing policy, or the failure to adopt a policy option not even contemplated due to this gap.

Of course, successful adoption of any policy option requires coupling of the problem, policy and political streams during requisite windows of opportunity. Although some windows may open due to features of existing governance structure or regulatory policies, such as statutory sunset clauses, most are difficult to predict. However, sensitivity to conditions likely to give rise to such windows and “softening up” of policymakers in order to facilitate receptivity for desired action when a window opens can enhance the possibility for successful coupling (Kingdon, 1995, pp. 168-186).

From the discussion throughout section 3.2, it is clear that numerous political feasibility problems constrain the ability to adopt a policy option at a given point in time. Among these are the factors contributing to the policymakers’ views of what economic viability problems are sufficiently important to require a place on the policymakers’ agenda. These factors have characteristics often overlooked by policy experts, such as path dependence of prior policy choices and perceptions of their success or failure, difficulties in assessing the validity of distorted and often conflicting information from sources driven by their own self-interest, and criteria for ranking the importance of disparate policy problems. Additional problems stem from factors affecting policymakers’ perceptions of politically feasible policy options and strategies for adoption. Policy experts have also tended to overlook or ignore characteristics of these factors, such as path dependence of prior policy choices, the limitations posed by existing governance structure, the existing distribution of political power, negativity bias of voters, the necessity to make value-laden choices, and the effect of choosing credit claiming or blame avoidance strategies.

Failure to appreciate these political constraints contributes to perceptual gaps among policymakers’ and policy experts’ views of feasible policy alternatives. The results of these gaps may be the lost opportunity to adopt beneficial policy options,¹⁸ whether through failure to adopt a known policy option, adoption of inferior policy, or failure to develop new policy options by virtue of the perception gap. Recovering these opportunities requires an improved mutual understanding of the political feasibility problems constraining adoption of policy options.

¹⁸ In this respect, “beneficial” refers to the societal perspective, reflecting a choice among considerations of efficiency and core values embedded in the social contract.

3.3 To Enable Sustainability of a Policy Over Time

Even if the problem, policy and political streams are successfully coupled during a window of opportunity to enable initial adoption of a policy option, fulfillment of the underlying policy objectives requires the sustainability of the policy over time. In this way, political feasibility constraints affecting the effectiveness of policy choices over time is the mirror image of the economic viability constraints discussed in section 2.2. Of course, the relevant time frame that a given policy needs to remain in effect depends upon the specific policy objectives and economic conditions required to achieve them.

Section 3.2 analyzed political feasibility problems associated with adoption of a policy at a given point in time. However, the ability to retain a policy over time requires analysis of the political problems associated with surviving subsequent efforts of retrenchment. Thus, analysis must provide a dynamic, not static, assessment of the policy decisionmaking process over time.

Important research in the political science literature has contributed to a better understanding of retrenchment politics – that is, the pursuit of policy changes through blame avoidance strategies. Weaver (1986) and Pierson (1994) describe the uniqueness and difficulties of retrenchment politics, some aspects of which have already been discussed in section 3.2.2.

Political scientists have also examined the characteristics of policies that tend to better withstand attacks of retrenchment. Perhaps most relevant to the consideration of adopting sustainable telecommunications deregulatory policies are the conclusions of research in the context of social welfare programs.¹⁹ In democracies, universalistic programs are more politically sustainable than targeted ones (Mishra, 1990; Skocpol, 1995; Wilson, 1987). The underlying reason is that the more broadly defined the group of beneficiaries, the broader the support from constituencies for maintaining the existing policy notwithstanding changes in circumstances affecting the problem, policy or political streams. For this reason, universalistic programs are more politically sustainable even if they are more expensive than policies targeted solely on the poor or marginal groups (Skocpol, 1995, pp. 250-253). Consequently, some political scientists advocate “targeting within universalism”, that is, addressing the needs of the less privileged through programs that include more advantaged groups (Skocpol, 1995, pp. 267-272; Wilson, 1987, p. 1188-124). This recommendation is in stark contrast to those of many

¹⁹ Cherry (forthcoming, 2003a) discusses how public utility regulation can be understood as an early form of welfare state regulation, bearing similar policy retrenchment problems.

economists who advocate, for example, narrowly targeted universal service programs as a component of telecommunications deregulatory policy in order to minimize the funding burden.

Skocpol (2000) has also identified other characteristics associated with successful social policy programs in the U.S. These are: (1) benefits provided in exchange for service rather than as entitlements; (2) policies nurtured by partnerships between government and popularly-rooted voluntary associations; and (3) programs backed by reliable public revenues. The validity of these characteristics may vary among nations, depending upon differences among their institutional endowments (Levy & Spiller, 1996) and core values embedded in their social contracts as discussed in section 3.1.

The importance of the discussion here is that factors affecting the political sustainability of a given policy option *over time* need to be contemplated when designing and selecting a policy option for adoption *at a given point in time*. Thus, incorporation of the factors of section 3.3 into the analysis of section 3.2 raises the likelihood of adopting a policy option that actually fulfills the desired policy objectives. Of course, the available options remain constrained by the overall set of options supportive of the legitimacy of government itself, as described in section 3.1. In this way, compliance with all the political feasibility constraints described in sections 3.1 through 3.3 must be achieved simultaneously.

4. Economic Viability and Political Feasibility Constraints on Telecommunications Policies

Sustainable telecommunications policies require the simultaneous fulfillment of economic viability and political feasibility constraints in all the situations described in sections 2 and 3. In other words, policies must support private investment in general and be compatible with the financial viability of the specific firms or industries. In addition, the policy choices must be consistent with the legitimacy of government itself, be capable of initial adoption, and be politically sustainable over time.

This section discusses from several perspectives some of the economic viability and political feasibility constraints on deregulatory telecommunications policies. First, Section 4.1 reviews the historical reality that deregulatory policies, although initiated under longstanding federal statutes, could not proceed without new federal legislation to address certain legal and economic problems. This reality led to enactment of TA96. Second, section 4.2 discusses how some of the policy choices in TA96 have created new sustainability problems. Examples are provided with regard to the federal universal service funding mechanism, the unbundling regime,

and broadband regulation. Section 4.3 describes how some sustainability problems transcend those arising from specific provisions of TA96. More specifically, certain common law doctrines embedded in public utility regulation create substantial retrenchment problems for deregulatory policies affecting both telecommunications and electricity. Finally, section 4.4 identifies some recent major events – such as the terrorist attacks of September 11, 2001, the California electricity crisis, the 2003 Northeast Blackout, and the downturn in the telecommunications sector - that may create new windows of opportunity for policy change.

4.1 Pre-Telecommunications Act of 1996

Given the dual jurisdictional nature of federal-state regulation of the telecommunications industry in the U.S., pursuit of deregulatory policies requires coordination between the federal and state governments. Many policy changes to permit competition in telecommunications markets developed under the Communications Act of 1934 and federal antitrust law without the need for further federal legislation. FCC orders permitted entry into long distance telecommunications and customer premise equipment markets. The Modified Final Judgment (MFJ), settling the Department of Justice antitrust case against AT&T, further changed market structure in the long distance, manufacturing and information services markets. After the divestiture of AT&T, many states amended their laws to accommodate competition in the long-distance telecommunications market; however, removal of state legal barriers to competition in the local exchange market developed more slowly and unevenly among jurisdictions.

Yet, deregulatory approaches exposed some legal and economic problems that could not be adequately addressed without federal legislation. These problems include the following. First, legal barriers to entry in local exchange markets persisted in many states, and could only be uniformly removed through federal preemption. Second, FCC efforts to detariff long distance services had been held by the U.S. Supreme Court to be beyond the FCC's statutory authority under the 1934 Act.²⁰ Third, competition was eroding the economic viability of artificially imposed implicit subsidies characteristic of traditional monopoly regulation. As a result, mechanisms for achieving universal service objectives in a competitive environment needed to shift from primary reliance on implicit subsidies to explicit funding mechanisms and rate rebalancing (Cherry, 1998; Cherry & Wildman, 1999b). This shift required a heightened degree of federal-state coordination for which the roles of the FCC and the states required further

²⁰ 512 U.S. 218 (1994).

clarification, and federal statutory authority was necessary to create more explicit funding mechanisms. Fourth, the waiver process for seeking relief from conditions of the MFJ further fragmented decision making processes affecting telecommunications regulation because waiver decisions were in the hands of a single federal district court judge. Express coordination of MFJ-related issues, with or by the FCC, required Congressional action.

These problems, among others too numerous to explicate here, induced intense Congressional legislative activity and ultimately culminated in the passage of TA96. As to the problems enumerated above, TA96 preempted the states from maintaining or creating entry barriers (section 253), provided the FCC with forbearance powers to address issues such as detariffing (section 10), created a framework for universal service policy (section 254), and codified conditions originating in the MFJ with oversight authority now residing with the FCC (sections 271-274). Among other things, it also provided a framework for addressing issues such as interconnection, unbundling, resale and payphone competition. Importantly, for purposes of discussion here, TA96 constitutes the set of federal legislative policy options that was politically feasible at the time of its adoption by Congress.²¹

4.2 Post-Telecommunications Act of 1996

Notwithstanding the political feasibility of the statutory enactment of TA96, implementation of the policy options embedded in TA96 are creating new sustainability problems. These problems arise from new economic, legal and political difficulties triggered by federal and state government actions to implement the provisions of TA96. Although views may vary as to whether the difficulties are inherent in the statutory provisions of TA96 or stem from the manner in which the provisions are being interpreted and enforced, the existence of the difficulties is clear.²² Three examples are briefly discussed here.

²¹ With regard to universal service, Cherry (2000b) discusses how the political feasibility constraints on rate rebalancing policy options differed between the U.S. and the European Union, how the differing constraints resulted in the adoption of differing policies, and how those constraints prevailing in the U.S. are manifested in the statutory language of section 254 of TA96.

²² “It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.” *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 738 (1999) (J. Scalia, Opinion for the Majority). Cherry (1998) and Cherry and Wildman (1999b) discuss potential sustainability problems embedded in section 254 and, particularly, in the rules promulgated by the FCC. More fundamentally, Cherry and Nystrom (2000) and Cherry (2001) discuss why the universal service framework established in section 254 of TA96 constitutes an unconstitutional delegation of legislative power by Congress to the FCC.

The first example is the economic sustainability of the funding mechanism for federal universal service programs that is already under serious scrutiny. The long term viability of the fund is threatened by a combination of factors, such as the overall size of the fund (approximately \$5.9 billion in 2001), the statutory requirement that telecommunications providers' contributions to the fund be based on interstate revenues, and industry developments that are creating a declining assessable interstate revenue base. This financial viability problem has been acknowledged by the FCC, which recently issued its *Interim Contribution Methodology Order*²³ to provide interim measures to maintain viability of universal service support in the near term while long term reforms are considered. Although an economically viable solution is to expand the assessable revenue base to include intrastate revenues, the political feasibility of obtaining the necessary federal legislation is unclear.

Another example concerns the sustainability of an unbundling regime as a means of encouraging viable local exchange competition. Although impossible to comprehensively discuss all the difficulties associated with implementation of the unbundling provisions of TA96 due to their complexity, several observations are highlighted here. First, some difficulties arise from differing opinions as to how unbundling rules need to be designed to better ensure economically viable local exchange competition. Although necessarily a simplification, incumbent local exchange companies (ILECs) argue that the financial viability of their firms is threatened by policy options imposing greater unbundling obligations and lower prices for unbundled network elements (UNEs); whereas competitive local exchange companies (CLECs) argue that their financial viability is threatened by policy options favored by ILECs. Assessing the veracity of the respective assertions of economic inviability by ILECs and CLECs is a difficult task for the regulators. Second, some difficulties arise from jurisdictional battles between the FCC and the states. In this regard, legal challenges to FCC unbundling rules, such as *AT&T v. Iowa Utilities Board*,²⁴ were brought not only by industry members but by state commissions asserting that the FCC had unlawfully intruded on states' intrastate regulatory authority. However, even though the U.S. Supreme Court upheld the FCC's jurisdictional authority in *AT&T v. Iowa Utilities Board*, federal-state jurisdictional battles are still far from resolved. Disparate views of the appropriate roles of the FCC and the state commissions in

²³ *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 3752 (2002) (hereinafter referred to as the "*Interim Contribution Methodology Order*").

implementing unbundling decisions have resulted in a contentiously debated and divided decision by the FCC in its *Triennial Review Order*²⁵ and in unprecedented delay in its issuance. This order is already being challenged in the courts. In addition, current litigation over the Illinois legislature's recent attempt to override aspects of FCC's rules through statutory direction to the Illinois Commerce Commission has created uncertainty as to a state legislature's (otherwise sovereign) authority to control the powers it has delegated to its state regulatory commission. Significantly, a federal district court has stayed the effectiveness of the Illinois legislation on the basis that state legislatures have been preempted by Congress' express delegation of power directly to the state commissions under TA96.²⁶

It is unclear whether local competition based on CLEC access to UNE's is sustainable in such an environment. Particularly troublesome is the severity of the continuing delay and legal uncertainty created by federal-state jurisdictionally related battles, which are likely to be prolonged given the allocation of federal and state powers under the U.S. Constitution. A more stable political and legal environment could be created through reassessment and realignment of federal and state regulatory powers over telecommunications. Canada and the European Union are instructive of possible alternative governance structures. In Canada, the federal government has preempted the provinces with regard to telecommunications regulation.²⁷ In the European Union, some tensions between the EU and Member State governments have been avoided through the principle of subsidiarity, which, for example, places responsibility for cost recovery solely on a Member State's national regulator (i.e. there is no cost separations process between the EU and Member States analogous to that existing in the U.S.).²⁸ However, similar

²⁴ 525 U.S. 366 (1999).

²⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (released August 21, 2003) (hereinafter referred to as the "Triennial Review Order").

²⁶ *Voices for Choices, et al v. Illinois Bell Telephone Co., et al*, Docket No. 03 C 3290, unreported Memorandum Opinion (U.S. Dist. Ct. N.D. Ill., June 9, 2003) (ruling on motion for temporary restraining order or preliminary injunction). This order is currently under appeal to the 7th Circuit Court of Appeals.

²⁷ This was accomplished by order of the Canadian Supreme Court in *Telephone Guevremont Inc. v. Quebec (Regie des Telecommunications)*, 1 S.C.R. 878 (1994), applying the Canadian Constitution which – unlike the U.S. Constitution – reserves non-enumerated powers to the federal Parliament.

²⁸ The significance of the differing governance structures and historical telecommunications regulatory regimes between the U.S. and the European Union on the political feasibility of alternative rate rebalancing policies is discussed by Cherry (2000b).

realignments of federal and state government regulatory powers in the U.S. would require either Congress to more aggressively exercise its federal preemption powers, or a constitutional amendment to override the presumption of powers reserved to the states under the Tenth Amendment. Either option poses daunting political obstacles, the former would invoke opposition based on states' rights – the intensity of which is historically illustrated by the founding of the U.S. and the Civil War - and the latter would require no less than renegotiation of the social contract (U.S. Constitution). In any event, the unique political feasibility constraints created by the U.S. governance structure need to be explicitly acknowledged and incorporated into evaluation of what might constitute a sustainable unbundling regime in the U.S.

A third example concerns the sustainability of access to broadband and narrowband services, given recent service classification proceedings considered by the FCC. First, in its *Cable Modem Access Order*,²⁹ the FCC defined cable modem service to endusers as an information service with no separable telecommunications component under TA96.³⁰ Thus, provision of cable modem service is not subject to common carrier regulation. The FCC's ruling is currently under appeal.³¹ Meanwhile, the FCC has issued a *Wireline Broadband Internet Access NPRM*.³² To avoid imposing asymmetric obligations between cable modem service providers and wireline broadband Internet access providers (DSL providers), in this NPRM the FCC tentatively concludes that wireline broadband Internet access service to endusers is also an integrated information service with no separable telecommunications service.³³ However, by attempting to provide intermodal regulatory parity between cable modem access and wireline broadband Internet access, the FCC would create *intramodal asymmetric regulation* between broadband and narrowband services over the networks of wireline carriers. It is not clear whether such intramodal asymmetric regulation is sustainable³⁴ as it may erode the common

²⁹ *Declaratory Ruling and Notice of Proposed Rulemaking*, In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, GN Docket No. 00-185, 17 FCC Rcd 4798 (released March 15, 2002) (hereinafter referred to as the “*Cable Modem Access Order*”).

³⁰ *Ibid.* at par. 38.

³¹ *Brand X Internet Services v. FCC*, Dkt. No. 02-70518 (9th Cir. Ct. of Appeals 2002).

³² *Notice of Proposed Rulemaking*, In the Matter of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, 17 FCC Rcd 3019 (released Feb. 15, 2002) (phrase “just and reasonable hereinafter referred to as the “*Wireline Broadband Internet Access NPRM*”).

³³ *Ibid.* at par. 17-26.

³⁴ Cherry (2003b) discusses the legal principles required to achieve broadband access objectives, and the consequences of deviating from such principles.

carrier obligations long embedded in public utility regulation.³⁵ The unique political feasibility constraints on attempts to retrench from such obligations are discussed in the next subsection.

4.3 The Unique Legacy of Public Utility Regulation

The sustainability problems associated with universal service funding, unbundling, and classification of broadband services discussed in section 4.2 are directly related to specific attributes and implementation of TA96. Yet, there are some political feasibility constraints impeding the adoption of sustainable deregulatory policy objectives that arise from prior policy choices embedded in traditional public utility regulation – the regime from which any deregulatory utility policy is attempting to transition – which long preceded and constrained the provisions deemed acceptable in TA96 itself.

More specifically, Cherry (2003a) discusses how the common law doctrines of “just price” and “businesses affected with a public interest” constrain the adoption of sustainable deregulatory models for public utility industries. These common law doctrines are derived from the medieval concept of fairness in economic exchange and the sovereign’s inherent power to regulate private party activity to protect the general welfare. The associated obligations imposed on public utilities in the U.S. have also been long codified in federal and state statutes regulating the electricity and telecommunications industries.³⁶

Attempts to retrench from these common law doctrines to pursue deregulatory policies are politically hazardous. As Cherry (2003a, 2000b) explains, this is because public utility regulation bears characteristics similar to other forms of welfare state regulation. Perhaps most important, both face similar political barriers associated with policy retrenchment (discussed in section 3.3) that affect the sustainability of that policy over time. Furthermore, in attempting to transition from monopoly public utility regulation to a competitive regulatory regime, the conditions for political feasibility often conflict with those for economic viability – for example, political resistance to, but the economic necessity of, rate rebalancing. This conflict exacerbates the difficulty in adopting and maintaining sustainable – that is, reasonably achievable – deregulatory policy objectives. Examples which illustrate how public utility retrenchment

³⁵ Common carriers have the obligation to charge reasonable prices, to serve without discrimination, and to provide service with adequate care. These obligations originated under English common law during the Middle Ages and are a subset of the obligations borne by public utilities under U.S. law. For a discussion of the history and interrelationship of common carrier and public utility law, see Cherry (2003a, 2003b).

problems constrain the set of politically feasible policy options and simultaneously pose economic viability problems include the electricity deregulatory efforts in California and implementation of section 254 of TA96 by the FCC.³⁷ These retrenchment problems and the inherent tension between political feasibility and economic viability constraints necessitate careful reevaluation of the design and efficacy of deregulatory policies.

4.4 Possible New Windows of Opportunity for Policy Change

The sustainability problems arising under TA96, and further attempts to retrench from traditional public utility regulation discussed in sections 4.2 and 4.3, illustrate the difficulties of simultaneously satisfying the political and economic conditions for a financially viable telecommunications industry under deregulatory policies. Under what circumstances can these difficulties be overcome? Kingdon's model does provide some insights.

For adoption of a policy at a given point in time, a window of opportunity must open to enable coupling of the problem, policy and political streams. Changes in the problem stream, such as crises or other major focusing events, can create such windows. There have been several recent events that have increased policymakers' perception of economic viability problems and may provide a window of opportunity for adoption of further regulatory reforms that to date have not been politically feasible.³⁸ For example, the terrorist attacks of September 11, 2001 inflicted enormous damage and loss of life. The attacks also exposed the vulnerability and importance of telecommunications infrastructure to the nation's economy and security. The economic vulnerability of the telecommunications industry has been further heightened by the dramatic downturn in the telecommunications sector, the rash of CLEC bankruptcies, and the questionable accounting practices and bankruptcy of Worldcom. Recent events affecting the electricity industry may also have spillover effects for the telecommunications industry.³⁹ These include the electricity crisis arising from deregulatory efforts for the electricity industry in California, which has been a major impetus for the recall of California Gov. Davis, and the recent electricity blackout affecting more than 50 million people in the Northeast of the U.S.

³⁶ Telecommunications carriers' obligation to provide "just and reasonable rates" remains under TA96.

³⁷ These examples are discussed in Cherry (2003a).

³⁸ Cherry (2000b) discusses changes in circumstances that could create windows of opportunity to better enable adoption in the U.S. of rate rebalancing policy more consistent with competitive markets.

³⁹ The appearance of a window of opportunity for one subject may increase the probability that a window will open for another, creating a spillover (Kingdon, 1995, p. 190).

These events have raised the problem of public utility regulatory reform to a higher level of urgency on policymakers' agenda, creating pressure for policymakers to seek a new political consensus regarding electricity and telecommunications regulatory reform. What is unclear is whether the window of opportunity has opened for further deregulatory reform or for retrenchment from deregulatory policies adopted thus far.

The attributes of a new political consensus will depend upon activities and circumstances in the policy and political streams. In this regard, policymakers' choices are dependent upon the potential solutions offered by the policy community as well as policymakers' perception of which solutions would be acceptable to constituents. It is possible that, given recent events, policymakers may perceive changes in policy solutions now deemed acceptable to constituents. For example, to better ensure uninterrupted and reliable utility services, voters may now be more willing to accept the rate rebalanced and more volatile retail rates required in a competitive environment, or, on the other hand, voters may prefer retrenchment to vertically integrated and monopolistic firms with averaged and more stable retail rates. However, to determine which option is more acceptable to constituents will require that obfuscatory political rhetoric be replaced with a public discourse that openly acknowledges how the economic pressures that improve efficiency and innovation under deregulatory policies also inevitably require rate rebalancing and greater pricing volatility. In general, policymakers must be willing to be more accountable to constituents of the inevitable tradeoffs between increased reliance on competitive markets and traditional public utility goals.

5. Conclusion: Filling the Political Feasibility and Economic Viability Gap

Telecommunications deregulatory policies that are likely to fulfill the underlying policy objectives must satisfy both political feasibility and economic viability constraints. However, satisfying these joint constraints is a challenging endeavor. It requires that policy choices be designed to support private investment in the market as a general matter and to be compatible with the economic viability needs of firms or industry subject to specific regulation. It also requires that policy choices be designed to support the legitimacy of government itself, to enable initial adoption of the policy, and to enable political sustainability of the policy over time. These requirements cannot be evaluated in isolation but are interrelated, adding to the complexity of the task. In some cases, regulatory interventions can be designed to enhance governmental legitimacy as well as mitigate economic viability problems. However, in others, political

feasibility constraints may require sacrifice of some economic efficiency objectives, or economic viability constraints may require modification or even abandonment of some political objectives.

To develop and reach political consensus on deregulatory policies that satisfy all of these constraints requires a common understanding among those participating in the policy process as to the underlying political and economic problems. This will require more conscious efforts to identify - and to narrow gaps in the perceptions of - these problems by policymakers, policy experts and constituents. To this end, several important steps are required.

First, policymakers need to better understand the economic realities that limit achievability of policy goals. Such improved understanding has been the subject of much academic research. Important contributions have included increased attention to the effects on private investment of regulatory governance associated with a nation's institutional endowment.

Second, it is also necessary for parties attempting to influence policymakers to be aware of the political constraints that limit policymakers' choices. In this respect, this paper differs from others' telecommunications research by emphasizing the need for policy experts to incorporate political feasibility constraints into their analyses and recommendations for policy options. In particular, policy experts must be more sensitive to the equity and fairness considerations that underlie the overall legitimacy and long-term sustainability of the governance structure itself. These considerations must be reflected in specific public policy objectives, and may conflict with economic efficiency objectives. Furthermore, policy experts should not ignore political factors relating to initial adoption of a policy, nor the attributes of policy options that tend to be more politically sustainable over time. Failing to incorporate such considerations into analyses, recommendations are likely to be based on flawed assumptions. Consequently, policy experts may not only recommend inferior policy options but also encourage adoption of disastrous ones.

Third, reaching consensus among policymakers, policy experts and constituents will require acknowledgement of the serious retrenchment problems created by pursuit of deregulatory policies affecting traditional public utility services, such as telecommunications and electricity. So long as policymakers deem it necessary to engage in blame avoidance strategies, the true political and economic problems will be obscured from constituents. Such tactics of deception may better enable adoption of a policy option at a given point in time, but may also serve to undermine its sustainability over time. Recent events may provide new windows of

opportunity for policymakers to engage in a more direct dialogue with constituents – rather than to rely on blame avoidance strategies – regarding the tradeoffs inherent in deregulatory policies. New policy options may then become both politically feasible and economically viable.

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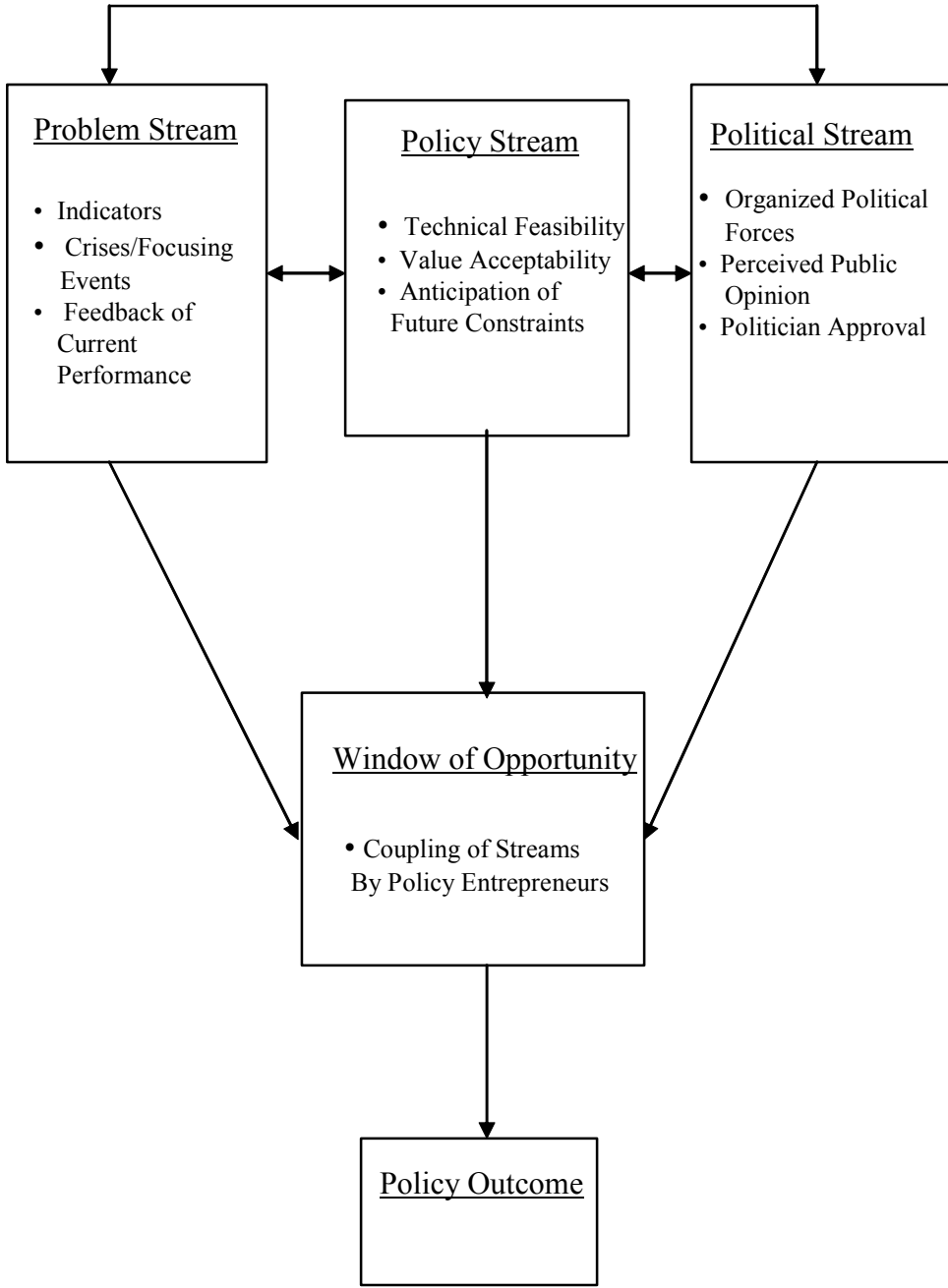


Figure 1. Kingdon Model of Policy Decisionmaking Process