

# Convergence and Competition—At Last

**Antoinette Cook Bush\***  
**John Beahn\*\***  
**and Mick Tuesley\*\*\***

Nearly nine years after enactment of the 1996 Telecommunications Act and thirteen years after the 1992 Cable Act, the convergence set in motion by these landmark statutes is beginning to materialize. Intermodal competitors are entering each other's voice, video, and data markets, investing substantial capital to build out the facilities necessary for large scale competition and operation. Indeed, despite nearly a decade of false starts, cable operators seem poised (finally) to roll out local phone offerings in the near term to compete against the regional bell operating companies ("RBOCs"). Such entry is significant considering that today, cable is the largest provider of wire-based broadband services. Moreover, while RBOC partnerships with Direct Broadcast Satellite ("DBS") operators have temporarily filled their video needs, their long term plans clearly revolve around the provision of fiber-based video offerings.

While a boon for consumers, who enjoy increased choices and lower costs, this convergence presents significant challenges for policymakers contemplating revisions to the 1996 Act. Indeed, constrained by an obsolete statutory scheme, the FCC has engaged in regulatory

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\* Antoinette Cook Bush, Skadden Arps Slate Meagher & Flom, LLC. Formerly served as Executive Vice President of Northpoint Technology Ltd. and BroadwaveUSA, Inc., and Senior Counsel to the Communications Subcommittee of the U.S. Senate Commerce, Science and Transportation Committee.

\*\* John Beahn, J.D., Skadden, Arps, Slate, Meagher & Flom, LLC. J.D., Catholic University of America; B.A., Boston College.

\*\*\* Mick Tuesley, Skadden, Arps, Slate, Meagher & Flom, LLC. J.D., B.S.B. Indiana University—Bloomington; Former Editor-in-Chief of the *Federal Communications Law Journal*.

incrementalism rather than regulatory overhaul during the past several years. Agency gradualism, coupled with technological advances and the rapid expansion of IP-based services, has caused regulatory policies to fall behind current marketplace realities. In light of the gap between regulation and the actual marketplace and technological realities, some members of Congress and the FCC, as well as many leaders of the communications industry, recognize the need for legislative and regulatory action to rationalize the policies applicable to voice, video, and data service providers.

The policy model for converged service providers should be the same light touch regulation applied to the wireless industry. As exemplified by developments in the wireless market over the past ten years, the existence of unregulated facilities-based service providers not only results in decreased prices, but also expanded and innovated services for consumers. With the advent of PCS (and Nextel-type) technologies, the wireless marketplace experienced a significant increase in facilities-based competition, directly resulting in dramatic price declines and a substantial increase in innovative content-based service offerings. Lacking regulations covering their facilities or the bundles they provided, wireless operators developed unique and innovative service offerings in order to compete. Developments in bucket pricing plans, free nights and weekends, text messaging, ringtones, music downloads, mobile gaming, and video and Internet-capable phones all took place in the absence of intrusive regulation. The wireless marketplace proves that consumers benefit when deregulation sparks facilities-based competition since it inevitably leads to decreased prices, increased service offerings, and dramatic marketplace innovation.

To adapt to the technological and competitive upheaval that is taking place, policymakers must discard the statutory and regulatory schemes of the past and follow the successful policies that are working in the wireless context. Policymakers must reward and promote facilities-based competition in all transmission media. Deregulation of broadband facilities would promote the regulatory parity between wireline, cable, and wireless that is vital to spur investment in the facilities that will deliver the IP-based applications of the future. The regulatory finality provided by these policies would provide the market certainty needed to fund these facility roll-outs over the next decade. Ultimately, freeing distribution platforms from a legacy of overregulation would enable them to compete and innovate. This would expand consumer options for voice, data, and video services; reduce prices for these services; and augment consumers' ability to receive diverse informational services.

Increased deployment and reduced prices would spur adoption of these next-generation services, especially by demographic groups to whom these services were previously unavailable. In this manner, deregulation of all facilities-based competitors may assist in closing the digital divide that has plagued the deployment and adoption of broadband services. Moreover, the ubiquitous availability of broadband to consumers will spur the development of diverse informational services. Finally, competition among facilities-based competitors will ensure that content providers have continued access to all consumers.

Regulatory certainty has been another key factor in the growth of the wireless industry. Thus, policymakers must determine conclusively whether IP-based services should continue to be free from the regulatory obligations placed on providers of telecommunications services, including access charges, universal service fees, E911 requirements, nondiscriminatory network access, and CALEA obligations. Through its *Pulver.com*, *AT&T VoIP*, and *Vonage* rulings, the FCC has incrementally established the outside markers of regulation. Limited in these rulings by a decades-old statutory scheme, the FCC simply determined that some VoIP can be an information service and some can be a telecommunications service. In these rulings, however, the FCC failed to make any clear determination regarding whether end-to-end VoIP services constitute a “telecommunications service” or an “information service.” Now that the FCC has preempted the state regulation of IP services, clear federal guidelines are required.

A renewed focus on deregulation and regulatory certainty also should extend to the media sector. The Commission must complete its multi-year odyssey with its broadcast ownership rules. The current review of the Commission’s rules started in 2001 with Chairman Powell’s creation of the Media Ownership Working Group and represents the most extensive review of the rules since the 1996 Act established the biennial review cycle. As part of the 2002 review (the most recent), the FCC analyzed its six broadcast ownership rules to determine if, as a result of competition, they were still necessary to further the public interest. The proceeding generated the largest public record in the agency’s history and culminated with the FCC’s several-hundred page decision in June of 2003, in which it, among other things: revised the local television multiple ownership rule; tightened the local radio ownership rule by revising the local radio market definition; retained the dual network rule; and developed a single set of cross-media limits to replace both the radio/television cross-ownership rule and the newspaper/broadcast cross-ownership rule. A year later, the Third Circuit reversed and remanded the Commission’s decision and issued a stay on the enforcement of the new rules.

The Commission should revise its decision to address the Third Circuit's concerns. This continued state of uncertainty has greatly restricted the market for broadcast properties and adversely affected the flow of capital into the sector. Regulators must act expeditiously on reconsideration given the near-certain legal challenges that will meet any new proposal and further delay implementation. Modification of the current ownership restrictions to reflect the current marketplace will better enable broadcasters to compete and ensure the continued viability of over-the-air service. Broadcasters should not be hamstrung by antiquated regulation that no longer makes sense in today's incredibly diverse media market. Recent investments by broadcasters in less-regulated services, like cable and satellite, speak to the direction that current regulation is pushing the flow of capital. Without prompt regulatory action, moreover, the ability of broadcasters to serve their communities for the long-term is in serious peril.

Policymakers also should work to free media from cumbersome and unnecessary regulation because of the positive impact deregulation can have on content diversity and the development in new service offerings. For example, in the programming realm, companies differentiate themselves from their competitors based on their content. As the extensive record in the ownership proceeding makes clear, larger operators are able to provide more diverse programming. This is because these entities have greater resources and are able to program to different audiences. Once an entity has established itself in a particular segment, it often looks to expand to serve smaller niche markets. Two networks that cater to minority audiences (BET and TV One) received important support from large multi-system cable operators (and, more recently, from DBS provider DirecTV) and have thrived on the less-regulated cable platform. Facilities-based entry by the RBOCs into the video space will further increase diversity of programming.

In their upcoming debates, policymakers must implement policies that reflect the technological and marketplace developments that have taken place since the 1992 Cable Act and 1996 Telecommunications Act. These policies must reward facilities-based competitors and promote regulatory parity between intermodal voice, video, and data service providers. Above all, these policies must ensure that consumers, rather than the government, decide the future success of any technology or distribution platform.