

Ten Years Under the 1996 Telecommunications Act¹

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Approximately every two years, on average, Congress makes significant changes in the nation's rule of law governing the communications and media industries. Sometimes the changes express direct commands, but more often than not, the new laws express intent to achieve a general goal through specific regulation.

The Telecommunications Act of 1996 ("1996 Act") contained, for instance, the direct command, in effect, to allow rapid and major consolidation of the radio industry. Even direct commands do not necessarily produce the outcomes sought. A few companies did consolidate the terrestrial radio industry under a few roofs. That consolidation did substantially limit the possibility of a liberal radio network and might have been intended for this purpose by Congress. However, the Federal Communications Commission ("FCC") quite consciously offset the congressional desire to cement a conservative point of view in radio by creating two national satellite radio firms that each would have enough channel capacity to carry diverse viewpoints for purely economic reasons. And so it came to pass that eventually Karmazin took his managerial genius to the very high tower called a satellite, and Stern inevitably followed.

The FCC more directly determines outcomes when the congressional mandate is more directional than specific. In the 1996 Act, Congress intended to allow the Bell companies to escape the *Modified Final*

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Judgment by entering the long-distance fixed-line voice market and in return intended to have AT&T and MCI enter the historically lawfully monopolized local fixed-line voice market. These two markets were both very large. Presumably, it was imagined by some in Congress that pursuant to the statute, a high-stakes musical chairs game would result. Presumably, the drafters believed that the competition in each other's adjacent market would lead to an equilibrium by which—to give a hypothetical example—AT&T would have 40% of the long-distance (“LD”) market and 30% of the local market, and in any geographical market, the competing Bell would have 30% of the LD market and 40% of the local market.

This was the central focus of the 1996 Act. The result I have outlined was at all times improbable. Technological change and adjacent market entry produced different strategic challenges than the statutory drafters apparently presumed. Intrusive and Jarndycean—and what a Bleak House indeed!—judicial intervention delayed crucial timing for market entry by the interexchange carriers (“IXCs”). Regulatory policy flip flops at the FCC in 2001 and 2002 played a big role in the outcome. Strategic blunders by AT&T, corruption at MCI, and wise moves at (then) SBC and Bell Atlantic were more important than any rule of law in determining the outcomes. But at all times, the more likely result was not the tottering seesaw balance imagined by some in Congress but a winner-take-all result in which either the local firms or the long-distance firms emerged after competition as winners, measured by return to shareholders and economic profit.

It has come to pass that all communications companies, not just telephone companies (“telcos”) but all, including cable and wireless firms, have returned to shareholders about three times their money from 1995 to the present. That's a terrific result in terms of total return to shareholders. Some, like AT&T and MCI, destroyed value for shareholders in the decade. Competitive local exchange carriers (“CLECs”) largely went from zero to a big number and back to nearly zero in a rapid cycle in the middle of the decade. However, the winners in American telecommunications emerged transformed and successful from a decade of change. The big story is that some communications companies successfully went into the adjacent markets of wireless and broadband, while a few failed to negotiate such entry in a timely or effective manner.

The success stories were only partly a function of the FCC's rule of law. Regardless of the FCC, MCI and AT&T were principally doomed by their management's unfortunate decisions—in the former case, not to go into wireless and then not to tell the truth in financial statements; in the latter case, to spin off wireless and then to sell cable. An honest MCI with a wireless business would be what Sprint is today—a huge value-creation

story and a real threat to its rival. If AT&T had kept wireless and not borrowed too much for cable acquisitions, it would be today's Comcast and it also would have the wireless business Comcast wants. As such, AT&T would be the leading communications firm in America. Of course, it is anyhow—but in name only.

Is the story of law, then, a story of it not mattering as much as Washington thinks to the outcome of communications markets? Not really. In fact, the rule of law shaped choices for firms. It created an architecture of opportunities. Not all took equal advantage of opportunities, but we choose competition as a form of market structure precisely in order to reward those who have the audacity, skill, and luck to take advantage of their chances.

The first crucial architectural statute was the 1993 Omnibus Budget Reconciliation Act ("OBRA"), by which the FCC was granted the authority to create a multifirm competitive wireless industry through the efficient technique of auctions. The mistake the FCC made, for which I am responsible, was not filing liens that would have provided protection against bankruptcy by a winning bidder. Bankruptcy itself was not a bad result for the economy; the litigation about the bankruptcy was the bad result because it kept the spectrum off the market. Otherwise, the auctions worked out superbly for long-run investors, entrepreneurial operators, and both business and consumer customers. An important contribution to these outcomes was the FCC decision pursuant to the 1996 Act to establish a clear and very low cost interconnection price for wireless to wire communications. In some countries, wire subsidized wireless through interconnection regulation; in others, wireless subsidized wire; in the United States, the interconnection regime did not pass major sums to either side. Reasonably efficient competition between wireless and wire resulted, and at the same time, wireless entrepreneurs had a fair chance to compete against wireless-wire integrated firms.

One of the chief reasons for the FCC's good decisions was brilliant new hires. The lesson here is that the chairman of the FCC needs talented people to tell him what to do. I had such people. The reason I had enough of them was that Senator Stevens and Senator Hollings kindly honored our request for more people in 1993 and again in 1995. We hired about 400 people in my four years. Many are leaders of the Communications Bar today. The hiring was done primarily by people skilled in the field and in the mores of the bureaucracy, and I do not mean me. Chairman Martin is brilliant, able, genial, and astute. My advice to him is to hire well, often, and soon. In this respect, among others, he's off to a great start.

The 1996 Act and its predecessor the 1934 Act also wisely gave the FCC the authority to preclude the owners of the local loop from

appropriating narrowband Internet access as a business just for them. Instead, the FCC in the 1990s chose to make the local wire network a platform for the World Wide Web and to deny the Bells the ability to charge anything significant to Internet Service Providers for using that platform. The platform became a commons in which creativity flourished. This led to the lowest priced Internet access in the world. Given America's large installed base of computers, the result was that the Internet became an American phenomenon. Now that the Web experience is migrating to broadband, the question of a free and open platform is again one of the most important issues facing the FCC. However, for its time, the free narrowband platform was, in my view, one of the great contributions to economic growth, productivity gains, and entrepreneurship in the history of the United States.

The IXC versus incumbent local exchange carrier ("ILEC") competition, meanwhile, produced two interesting outcomes, the first not predicted by anyone and the second quite specifically intended by the 1996 Act and the FCC.

First, many rival IXC networks were built. However, the capital markets were so easy to access, and Alan Greenspan was so loath to pop the equity bubble, that many thousands of miles of redundant fiber were laid between city pairs. As a result, by the time the Bells entered long distance, the market was not worth the effort. Businesses and consumers were better off with LD becoming almost as free as the Internet, but the Bells had little value to capture. It was as if the Spanish had launched an armada to go to the New World and found the Incans and Aztecs had not hoards of gold but palaces of dross.

Second, IXCs and other CLECs competed successfully for enterprise customers and drove prices way down for American businesses. That contributed to a productivity surge that has lasted to this day.

After many years of pointless and time-consuming judicial review, consumers in 2001 were about to enjoy the same price reductions as a result of unbundled network elements-platform ("UNE-P"). But Michael Powell chose to assign value to companies, not consumers, and over the objections of his colleagues obtained the blessing of the D.C. Court of Appeals for the elimination of UNE-P. I'm tempted to say that he voted for UNE-P before he voted against it. My own view is that the FCC would have done well to have phased out UNE-P on a predictable basis through the early 2000s, as cable and wireless offered substitutes in the local market. A compromise plan to that effect would have been superior both for capital formation and competition as compared to the contentious FCC proceedings and unnecessary judicial intrusions. In any case, this topic illustrates the crucial importance of the FCC chairman in determining the

outcome of any statute in this area.

In the area of universal service, the 1996 Act very wisely and effectively accomplished two things: first, it gave the FCC the power to collect universal service funds from every firm competing in relevant markets. On this topic, more needs to be done, and Chairman Martin will need the help of his able colleagues to do what we know he knows is the right thing. Second, it empowered the FCC to connect to the Internet 100% of children in classrooms, through Section 254, and also 100% of people with disabilities, through Sections 255–57, which came from the Americans with Disabilities Act. In both these respects, Chairman Martin has important decisions to make, but already the United States leads the world in terms of providing Internet access and expertise to children of every income level and ethnic origin. That is a truly laudable accomplishment for which the country must thank Senators Snowe and Rockefeller, as well as hundreds of people at National Exchange Carriers Association (“NECA”), Universal Service Administrative Company (“USAC”), and the FCC, and of course thousands of educators and librarians.

Some contend that the history of the 1996 Act demonstrates that lawmakers and regulators cannot predict the results of their actions and so should do nothing. By this reasoning, few of us would get out of bed in the morning. Moreover, overall, the 1996 Act helped firms create value for shareholders, helped competitors transfer much value to consumers, and greatly stimulated productivity gains and entrepreneurship in America.

Less noticed and very interesting is the fact that the 1996 Act sparked a civil contest of ideas among national, federal, and state regulators and other policy influencers. As a result, most of the world’s nations entered into a World Trade Organization telecommunications treaty that contributed substantially to global economic development. That treaty now should be used to tackle in global forums the crucial issue of maintaining a unified, seamless, transparent global Internet. Chairman Martin would be a great ambassador for the United States. We have only a year or two to shape the future of the global Web.

Another good outcome of the exchange of ideas—ideas are always more important than courts in shaping a culture—was that America’s state regulators enthusiastically embraced the national policy of promoting competition as their primary goal. Ultimately, they became perhaps more Catholic than the Pope on many issues, to the surprise of many incumbent companies. I suspect Commissioner Tate will prove of great value to Chairman Martin in maintaining rapport between the state and federal regulators. The chief challenges for federal-state cooperation now include maintaining an adequate and pro-competitive base of funding for universal

service and extending broadband to 100% of children, disabled, and low-income citizens.

Ten years after the 1996 Act, there is no need for a sweeping overhaul of the communications law. The FCC has all the jurisdictional power it needs for implementing wise policies. It would be nice to have a law that ordered courts to apply *Chevron* deference and that gave one circuit court jurisdiction over the statute. It would be good if that court was not the D.C. Circuit Court of Appeals, given its refusal to eschew judicial activism in this topic area. Let's not nominate the Eighth Circuit Court of Appeals either; they'll tell you how to tie your shoes if you let them. However, as long as the FCC general counsel—not anyone else!—writes the decisions that are voted and is given free hand to argue as appropriate, the FCC will win on appeal whatever is important. By contrast, a new law would delay many issues from being resolved, will not necessarily produce clearer guidance than the FCC, and would not improve the consultation that Congress can already provide. History also shows that any telecommunications bill opens the door to the sort of lobbying that is not giving Washington a good name right now.

In any event, with or without a new law, the FCC will affect the future in a major way by its approach to the question of broadband's openness. Sometimes called net neutrality, the question of openness is multidimensional. It is hard to define and harder to answer. Chairman Martin and his colleagues have the talent, expertise, and courage to come up with the right answers on this topic.

In conclusion, I want to exercise the traditional power of the former chairman to offer free advice to the current chair without regard for the degree of difficulty in translating advice into action and paying no attention to my own lack of information and wisdom.

First, discuss the complexities of the open Internet in an open way. By asking the right questions not only in the United States, but all around the world, you will help everyone find sensible answers.

Second, cultural change is more important than regulatory change. Talk openly and consistently about the pros and cons of an open Web in terms of American and international culture.

Third, Michael Porter of the Harvard Business School correctly stated that the only purpose of a national economic policy is to produce a high and rising standard of living for a country's citizens. That, in turn, implies that the only economic purpose of the FCC's policies is to increase productivity gains in communications and information industries. Those gains, in turn, come from increases in aggregate and per capita bit production and consumption. Bit production includes, for example, a voice

telephone call and making a movie. Bit consumption includes, for example, reading e-mail while I'm talking, glancing at an instant message when I want you to look at a slide, browsing on your blackberry when I want you to be applauding, and buying my new book from Amazon.com this fall. So this is the FCC's goal. The rest is detail. But go ahead and issue a white paper stating the goal!

Fourth, every quarter, issue reports on sectoral performance so that everyone in the communications and information industries can know how America is doing. The current reporting function is woefully out of date and out of tune with relevant markets.

Fifth, explicitly tie every decision to your overall policy goal. Write that linkage into the decision and try to drive your philosophy into the heads of the reviewing judges. There's no way around them, so just run through them.

Sixth, as the facts change, change your opinions.

Seventh, endlessly explain what you are doing and why you are doing it.

Eighth, add fifty key people of your choice to the policymaking ranks. You have fine folks around you, but as always, they will welcome the help.

Ninth, experiment. Jawbone industry to build a Wi-Fi mesh network available for free use in New Orleans, or endorse a single all-fiber completely open network providing 100 gigabits per second and 1000 cable channels for all of western Montana. Just see what happens.

Tenth, don't hesitate to tell Congress what is true. They can take it.

Eleventh, don't hesitate to tell industry what is true. They already know, and they just need to know that you know.

Twelfth, don't hesitate to tell Americans what is important. They want to know.

Thirteenth, you will never again in your life have such a fine opportunity to help the American Dream come true. On everything, hurry up and do the right thing as you see it. Remember, you're not elected, and you're not there long, so just do what you think is right in an open manner, and let the chips fall where they may.

