

# The 1996 Telecommunications Act: Ten Years Later

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Like all legislation, the Telecommunications Act of 1996 (“1996 Act”) was justified on the basis of the public interest. And as in many legislative processes, the public interest was interpreted by each stakeholder group as coterminous with its own, while think tanks and policy advocates jockeyed for position, sniped at ideological foes, and—for those not acting as fronts for corporate stakeholders—mostly failed to mobilize large enough constituencies to substitute for the large bank accounts that commercial stakeholders drew on to impress legislators.

The 1996 Act created Frankenstein telecommunications policy with discontinuous parts stitched together. It was, however, grounded in a general (and incompletely observed) principle, articulated in Title IV: increased competition—especially across traditional platforms—for provision of both communications and media services among large players, was effectively a good enough measure of the public interest. Consumer choice was an acceptable stand-in for the stake of the American public in its own telecommunications infrastructure—the neural network of democratic life.

By its own standards in Title IV, the 1996 Act failed by not generating intersector competition for similar services. Ironically, consumers do have more choices both of media and telecommunications services than they did in 1995, but with little help from the 1996 Act. Those changes have been fueled by the vastly expanding possibilities of the Internet and digital communication. However, today’s overstimulated

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media environment calls into question, at a deeper level than the 1996 Act engaged, the competition-is-a-good-enough-measure principle on which the 1996 Act's innovations were justified.

The failures were easy to see from early on. Cross-platform competition was not generated from the 1996 Act's provisions. Open video systems ("OVS") never happened. Telephone companies, so eager before the 1996 Act to leap into video delivery, suddenly decided to buy each other out instead, and the survivors are only now dipping their toes into video provision. Telephone incumbents found every reason to delay or obstruct the new right of competitors to hook up to their systems. Cable companies, which had seemed poised to offer phone service, after the fact, decided to consolidate their cable holdings. Broadband deployment proceeded at a stately pace in both phone and cable, and at a relatively low level of bandwidth provision. Radio became vastly more consolidated, which sometimes meant that communities received more of the handful of overlapping standard formats, but it did not give them more competing businesses or new formats to choose from. Television broadcasters dawdled about building their digital channel capacity, while the larger companies bulked up and further diminished their local presence.

Quality went down; cable customer complaints rose again after the 1992 Cable Act had reined them in and telephone company services lost the expectation of reliability. The junk ratio went way up on radio and TV, while local, niche, minority, and emergent programs at the edges of popular consciousness went off the air. And no one envied the people of Minot, North Dakota, when in the middle of the night a train derailment resulted in a chemical spill, but no one was at the remote-controlled, Clear Channel-owned local radio station designated as an emergency broadcaster. The vision of ex-monopolist behemoths lumbering into a competitive marketplace has failed for multiple reasons. In some cases, for instance in cable, legislators were snookered by large companies' claims that high-tech paradigm shift was around the corner if only they would be granted special favors. Further, in the instance of competitive telephony, legislators ineffectually passed on the problems of guidelines and enforcement for rules that challenged powerful incumbents to an underfunded Federal Communications Commission ("FCC"). In still others, such as radio and TV, legislators simply trusted that unspecified good things would happen from bulking up.

Another big lesson of the 1996 Act, much harder to see by staring close up at the telecommunications policy process, was that calling competition a good enough synonym for the public interest simply masked the real policy challenges in making sure that communications services function well for democratic culture and for the public that is the only

guarantor of such culture.

The public—in the sense of active participants in the ordinary problem solving of daily life of an open society, in the sense of people who can count on knowing what the important problems facing society are and can count on being able to use communications services to address them, in the sense of a public described by the great American philosopher John Dewey<sup>1</sup>—was not even in the discussion. It was convenient for the leading stakeholders to ignore the need of a democracy for this kind of public; such a public would only get in the way of the lobbyists. So, of course, that public was ill-served by the law and probably would have been even by a law that was better crafted and less plagued by magical thinking about the evolution of alternative economic models for telecommunications businesses.

Outside the now-quaint environment of the 1996 Act, members of the American public have a paradoxical problem. Whether or not we have intersector competitors or even competing companies offering us our many services, we certainly have a lot of communications and media options. We are barraged relentlessly with new gizmos, more channels, more programs, and the chance to Google them all. We also have unprecedented opportunities to create our own media and to share it. And that vastly increases the distraction level along with the opportunity.

There are so many competitors for our eyeballs and the precious minutes of our attention in a day that we need ever newer filters—our spamblockers, TiVos, Netflix, and Amazon recommendations lists, MySpace, friends-and-family networks, metablogs—to cut through what David Shenk<sup>2</sup> calls “data smog.” On the other hand, we lack reliable sources of high-quality information about critically important issues and even about what those issues might be until they suddenly pop up as tragedy, as the New Orleans disaster did, or in episodic crises, as global warming is doing. We pay ever higher monthly rental fees for an expanding budget of communications services that make us ever more accessible to advertisers, promoters, and telemarketers. We can now be overworked at our virtual offices in the middle of the traffic jam that results from poor local government planning after developer sweetheart deals that we knew nothing about.

We have too much media, in one sense, and too few ways to make sense of what comes out of it, in another. Our mass media seems to have some trouble doing a basic job of providing public information before crisis

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1. *See generally* JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

2. *See generally* DAVID SHENK, *DATA SMOG: SURVIVING THE INFORMATION GLUT* (1st ed., Harper Edge 1997).

hits and helping people understand rather than rant about differing points of view. Investigative journalism teams have been cut back at newspapers and networks; foreign correspondents are fewer than ever; science beats are rare; “fair and balanced” means quoting “both sides” of a story, even if one side has created the fiction of a two-sided debate; television news typically features the fun, the violent, and the weird rather than the significant. These are all predictable, if regrettable, aspects of a superheated commercial media environment.

At the same time, we have in the Internet a growing range of ways to create social networks—blogs and wikis added to Friendster and listservs—that let us amplify rumor, innuendo, misinformation, aggrieved argument, and sly, sardonic jokes. These are all understandable phenomena of emerging networks that grow out of think-and-feel-alike communities. So we lack widely shared, trusted venues to learn about big, long-term issues, and we also lack the experience and experiment with social networks that help us to share, debate, and deliberate about such issues.

We know what communications and media that serve the public can look and sound like. They model constructive and respectful ways of addressing each other. They encourage members of the public to interact. They are open to new interaction. We even have a few, sadly limited, demonstrations of explicitly public media in our noisy, polluted communications environment. We have public radio and TV services whose audiences were much more likely to believe that Saddam Hussein was not linked to Osama Bin Laden than Fox News viewers were (as a poll in Autumn 2003 taken by the Program on International Policy Attitudes at the University of Maryland and Knowledge Networks showed).<sup>3</sup> When public broadcasters are not dunning viewers for donations or kissing up to corporations for more funds (thanks to penny-wise-pound-foolish federal policy), our public broadcasters frequently conduct exciting experiments in public engagement. We have cable access channels that, despite their pathetic reputations, often provide the only truly local programming on key local issues such as school system expansion, utility regulation, development codes, and, yes, cable franchise renewals. We have direct broadcast satellite set-aside channels for nonprofit use, through which many Americans have engaged with world culture and public affairs, for instance through Link TV’s *Mosaic* program rounding up TV news programming in the Middle East. We have low-power radio stations that, in spite of all the odds, serve microcommunities.

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3. STEVEN KULL ET AL., THE PIPA KNOWLEDGE NETWORKS POLL, MISPERCEPTIONS, THE MEDIA AND THE IRAQ WAR (2003), available at [http://65.109.167.118/pipa/pdf/oct03/IraqMedia\\_Oct03\\_rpt.pdf](http://65.109.167.118/pipa/pdf/oct03/IraqMedia_Oct03_rpt.pdf).

We also have some exciting glimmers of what public communications systems can be in a digital era. Public Wi-Fi networks, open-source-based Web and blogging platforms, and municipal broadband networks are a few instances of more or less accidentally generated or demonstration examples of communication systems that encourage public participation. Demonstration examples, niche experiments, and bleeding-edge forays: that is where this society is actively nourishing public life with mass media and communications.

While we may all celebrate the energy released into the marketplace by competition (when it actually occurs), commercial competition in itself promises and threatens nothing for public culture. It is our communications and media policies that either promote or discourage public culture. And it is a culture. Public culture is not spontaneous generation. Accident and the unintended consequence may create new opportunities, but nothing guarantees that those opportunities turn into cultural habit. Two decades ago social scientist Ithiel de Sola Pool<sup>4</sup> argued that emerging open technologies would liberate enchained social forces and undercut the traditional power of elites. Those “technologies of freedom” have arrived. But they did not bring the vaunted release that many (not necessarily Pool) imagined from regulatory responsibility.

Communication policies that promote public life are not utopian. However, many have worked, though imperfectly, in the past. For instance, obligations upon broadcasters to serve their communities with local programs appropriate to the concerns they ascertained in deliberation with community members were clumsy but also useful ways of getting designated monopolists to pay some attention. As imperfect as such regulations were, when faithfully enforced they resulted in active relationships between media and local communities. The aggressive retirement since 1980 of a range of mass media public interest obligations and relaxation of structural regulations, including concentration limits, was not accompanied by good-faith efforts to assess the consequences of their dismissal.<sup>5</sup> Nonetheless, their utility has not been retired, in part because the *ancient regime* in which they were crafted has also not yet been retired.

As communications scholar Philip Napoli has pointed out, the public interest standard has always been saluted at a high conceptual level, and become a political skirmish at the level of application with not much in the way of principles that help people operationalize the concept.<sup>6</sup> The goal of

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4. See generally ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983).

5. See Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613–33 (2004).

6. See generally PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY:

encouraging active public engagement with the issues that affect our joint present and future is wholly nonpartisan and consistent with bedrock political values.

Encouraging public life with media policy can have, in this tempestuous era of digital opportunity, many facets. Approaches such as encouraging entry of new players (that is, competition policies that are not gifts in disguise to incumbents), government support for standards-setting, and privileging open-access zones in spectrum policy are as rich in possibilities for the benefit of public culture as more classic public interest approaches. There are plenty of good ideas in circulation today by many of the underfunded organizations representing stakeholders in the nonprofit environment. Some of them include:

- Investment in public media (whether delivered by broadcasting, cable, satellite, or emerging technologies) that can afford to do the work of public engagement rather than scouting for the next Suze Orman to rescue the budget during pledge drives.
- Policies that encourage local mass media responsiveness to local publics, including protection of cable franchise requirements, community programming expectations, and community needs ascertainment by broadcasters, license renewal requirements exigent enough to allow regulators to know what local engagement broadcasters have engaged in, and license terms and ownership limitations appropriate to encouraging local engagement.
- Policies that encourage universal broadband deployment and access.
- Policies that reallocate spectrum so that more is available to develop grassroots Wi-Fi and other unlicensed networks permitting collaborative communication and content generation.
- Policies that move toward a more flexible spectrum policy with encouragement for noncommercial, public uses.
- Policies that encourage rather than punish public debate and discussion, especially online and digitally. Currently, the use of Strategic Lawsuits Against Public Participation (“SLAPP”) by the powerful discourages such discussion. So do rigid and high-bar intellectual property protectionist policies such as broadcast flag, the Digital Copyright Millenium Act, and

hardware and software initiatives developed in the private sector to limit copying, but which in the process strangle the ability to quote materials for public discussion.

- Policies that encourage inclusion, as the Americans with Disabilities Act did with continuing and sometimes surprising success for populations never originally considered.

Americans need to invest in their own democratic culture through their tax dollars and their communications policies. Policymakers can be leaders of that process. They need to participate in and learn from public discussion and input—encouraged by hearings, public statements by policymakers calling for input, and engagement with the broad nonprofit sector—as they reshape the law. They need to seek policies that are friendly to such processes as well. This can happen. The independent sector is blooming with good suggestions from all political viewpoints. The corporate sector is full of cross-currents and interests that can benefit from a vital civil society. The alternative is the cynical invocation of public interest by highly interested parties that made the making of the 1996 Act such a travesty of public policymaking.

