No Sight Like Hindsight: The 1996 Act and the View Ten Years Later

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I. INTRODUCTION

Ten years is not long in the span of human history, which is now estimated to be anywhere from 40,000 to 100,000 years old or more. It is not even long in the history of human communications or even in the history of electronic communications. Telephony is well over 100 years old and last century's so-called "new" services such as wireless, cable, and satellite services have already been around for far more than a single decade. Yet, in reflecting upon the ten years that have elapsed since the

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passage of the Telecommunications Act of 1996[1] ("1996 Act"), it seems almost an eternity. Whether we knew it or not (and, no question, technological change as well as the rapid growth of the Internet were contemplated in 1996), the fact remains that the communications world that we are confronted with in 2006 looks vastly different than what was contemplated in the 1996 legislation.

This commentary does not offer an exhaustive review of what we knew and what we did not back then or a delineation of the litany of unexpected consequences post-1996. Indeed, the focus here is not even as broad as the scope of issues of the 1996 Act itself. For such an endeavor, far more space and time would be required, especially to address the intricate and important issues that still swirl around many areas such as the future of the broadcast industry in the digital world, the proper role of the FCC and/or Congress in addressing content and media, or the specifics of convergence, a term that has been used far longer than the now outmoded "information super highway." Instead, the goal in this commentary is far more modest: to offer some perspective on how the 1996 Act impacted wireline services and particularly competitive wireline services. Especially as the possibility of a congressional rewrite of the 1996 Act looms, we will be well served by bearing in mind the lessons of the past.

II. THE 1996 ACT: TRULY LANDMARK LEGISLATION

Despite its many critics (one wonders how an Act that passed almost unanimously could suddenly find itself virtually orphaned), the 1996 Act was a landmark statute that reflected congressional understanding of a new communications landscape. Congress rightly understood that monopoly was not the best form of service provision for American consumers in terms of innovation, service quality, and pricing. Consequently, Congress codified changes that it believed, implemented swiftly, would move us to a competitive world. At the same time, however, there were blind spots where past lessons were forgotten or where it was easier or more expedient to ignore the changes that the emerging Internet was almost certain to bring or the likely difficulties caused by disruptive change.

The 1996 Act substantially moved communications law and regulation forward by codifying for the first time the notion that wireline communications services should operate in a competitive market. This action was taken, of course, against the backdrop of AT&T divestiture implementation, which itself formally launched the idea that long-distance services could and should be competitive if split off from the "natural

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 stat. 56 (codified at scattered sections of 47 U.S.C.).

monopoly" sector of local services.[2] While there was some nascent "local" competition that the FCC helped jump start with its *Expanded Interconnection* and related dockets,[3] it was the 1996 Act that took the first statutory step to recognize affirmatively the goal of wireline services competition across all markets.

The core of the statute's market opening provisions represented a type of trade-off between the local competition interconnection and access provisions and the opening of the long-distance services market to the former Bell Operating Companies ("BOCs"). In fact, Sections 251–52 and 271–72, concerning local competition and long distance, were designed as a roadmap that in effect rewarded BOCs that complied with the statute's directive to open their lines so that consumers could have access to competitive carriers for their telephone services.[4] Given that the incumbent carriers at that time controlled almost all last mile loops, Congress recognized that the market opening would be more of a prying than a happily negotiated arrangement. Under the law's framework, local service competition was premised not only on unbundling piece parts of the network ("UNEs"), but upon resale as well, with the express goal not to dictate to would-be competitors how best to woo consumers with their competitive services.[5] In today's parlance, the Act expressed no preference for either intermodal or intramodal competition; to the contrary, it affirmatively sought to promote both.

In addition to codifying a procompetitive direction, the 1996 Act also took critical steps to tackle the difficult issues of universal service and intercarrier compensation, including for wireless services.[6] Though these issues are still far from resolved, it is notable that Congress understood sufficiently the interconnectedness of pricing, service availability, and leverage; these key provisions were designed to address the practical realities of an emerging industry in formerly monopoly territory. Put more directly, the law was informed by real-world accounts of incumbent carrier practices that could surely kill competitors without some oversight. While

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2. United States v. AT&T, 552 F. Supp. 131, 335–38 (D.D.C. 1982) [hereinafter *Modification of Final Judgment*], *aff'd sub nom.*, 460 U.S. 1001 (1983).

3. Expanded Interconnection with Local Telephone Company Facilities, *Report and Order and Notice of Proposed Rulemaking* 7 F.C.C.R. 7369 (1992), *modified by* 8 F.C.C.R. 127 (1992), *modified by* 8 F.C.C.R. 7341 (1993), *vacated in part and remanded,* Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

4. *See* Telecommunications Act §§ 251–52, 271–72.

5. *See id.* § 251; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 F.C.C.R. 15499 (1996), *modified by* 11 F.C.C.R. 13042, *modified by* 12 F.C.C.R. 12460, *recon. by* 14 F.C.C.R. 18049 [hereinafter *Local Competition Order*].

6. Telecommunications Act §§ 251, 254.

it is hard to know how the legislature envisioned implementation, and it is likely that no one foresaw the *Jarndyce versus Jarndyce*[7] nature of the subsequent legal wrangling that ensued, the 1996 Act remains a milestone in communications legislation and is still the model for many nations who have adopted analogues to many of the key competition-oriented provisions.

III. CONGRESS LOOKED BACK AND THOUGHT AHEAD

Reflecting an understanding of the steps the FCC had taken to facilitate competition in the information services sector, the 1996 Act also codified the Commission's basic/enhanced distinction between "telecommunications services" on the one hand and "information services" on the other.[8] Notably, these definitions were integral both to the decades of successful FCC rulemaking that helped propel the information services industry from the data processing functions of the 1960s to the robust Internet services market that grew up in the 1990s and to the *Modification of Final Judgment* court that oversaw the breakup of the BOCs from AT&T.[9] In fact, in numerous places, the 1996 Act expressly supports and endorses the growth of information services competition, clearly reflecting congressional approval of the FCC's supple implementation of the 1934 Act.[10] Despite today's talk that these definitions are less relevant than previously, the growth of the information services sector under this legal paradigm speaks volumes.

The Congress that passed the 1996 Act was also forward-thinking. While much is currently made of the enormous growth of the Internet and broadband services since the passage of the 1996 Act, there is no doubt that these services were squarely within the scope of issues before the 104th Congress. Numerous sections all reflect an awareness of the technologies and services that have proliferated in the ten years that have elapsed.[11] To be sure, Congress did not know that Amazon would become a major presence or that Google would become a supremely popular search engine among web seekers, but they were well aware of the Internet as well as its potential to pose a competitive, disruptive change. In fact, the FCC at that time was touting the benefits of Internet telephony as a way to address the

7. Readers will recall the never ending case immortalized in Charles Dickens' *Bleak House*. CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1971) (1853).

8. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, para. 106 (1996).

9. *Modification of Final Judgment*, 552 F. Supp. at 131.

10. *See, e.g.*, Telecommunications Act, §§ 254, 256, 257, 259, 271, 275, 601.

11. *Id*. §§ 230, 706.

thorny problem of exorbitant international settlement rates.[12] As for broadband, it was no secret that cable companies were actively upgrading their facilities and the BOCs had long before developed DSL technology but failed to deploy it for many years.[13] The push for broadband deployment was wise and the goal of competitive broadband deployment even wiser.

IV. WHAT WE CAN SEE IN HINDSIGHT: PITFALLS ON THE COMPETITIVE ROAD

For all its plusses, there is little question that the 1996 Act was far from a model law insofar as implementation. Though there is much finger pointing and probably as many disparate views as to root causes as there are industry participants and pundits, the fact is that the future did not unfold in an orderly way producing the desired competition as rapidly or smoothly as legislators and competitors had hoped. Ironically, one major problem with implementation might simply have been the extraordinarily short deadlines that the statute provided for implementation of complex and sweeping changes. While the FCC and others strived to comply with those deadlines, and there is indeed a benefit to swift action especially in an industry better know for a glacial pace, there are some issues that are just not susceptible to resolution in 180 days.[14] As agencies go, the FCC has a very talented staff; yet, faced with multiple simultaneous deadlines on difficult matters, it is no wonder that initial iterations of implementing rules were far from perfect. It appears, with hindsight, that Congress may have underestimated the magnitude of the task it delegated to the FCC in light of the speed at which it expected action.

Similarly, while the law commendably recognized the important policy interests surrounding universal service goals, the FCC's ongoing access charge rulings, and the need for a sustainable intercarrier compensation mechanism, it did not give clear direction as to how to

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12. *See e.g.*, International Settlement Rates, *Report and Order*, 12 F.C.C.R. 19806, paras. 9–13; Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23891 (1997); Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501, para. 93 (1998).

13. *See e.g.*, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54–63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 F.C.C.R. 5781 (1992).

14. For example, while Congress directed the FCC to adopt and implement unbundled network access and interconnection rules within six months, §251(d). The issue remains unresolved even to date. *See, e.g.*, Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 20 F.C.C.R. 2533 (2004), *appeal pending*, Covad Comm. Co. v. FCC, Nos. 05-1095 et al. (filed Feb. 24, 2005).

resolve sometimes competing objectives. For instance, in fleshing out the scope of the Sections 251 and 252 intercarrier compensation provisions, together with the admonition regarding access charges, the FCC came up with an intricate framework that eventually incorporated EELs and other acronyms nowhere mentioned (or seemingly contemplated) in the 1996 Act.[15] In turn, these efforts to harmonize by the FCC caused it to come under attack by a barrage of parties, each claiming the goals of the 1996 Act as the basis for action, with many of these parties eventually turning to the courts as the final arbiter of the statute's meaning and the scope of the Commission's authority.

Finally, while the statute gave nod to the FCC's successful regime for information service providers, it failed to grasp that information services were and remain the wave of the future, offering consumers diversity, innovation, and choice in ways distinct from telecommunications services. As such, Congress did not expressly state that consumers should continue to gain unfettered access to all information service providers and their offerings, even when those offerings compete with the affiliated information services of last-mile owners. On the other hand, neither did the statute direct that information service providers should have no access. Had the Congress addressed directly how such services should be treated for purposes of consumer access, interconnection, pricing, and other regulation, it is likely that years of uncertainty could have been avoided, allowing companies to devote resources to workable business models within defined parameters rather than to legal and political strategies aimed at attaining clarity.[16]

V. WHERE TO NOW? PRINCIPLES TO KEEP IN MIND GOING FORWARD

Though there are far more lessons from the 1996 Act, four guiding principles emerge from the competitive wireline arena of the last ten years to assist us as we contemplate changes to the Communications Act.

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15. *See, e.g.*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978 (2003), *as modified by Errata*, 18 F.C.C.R. 19020, *recon*., 19 F.C.C.R. 15856, *recon*., 19 F.C.C.R. 20293, *vacated and remanded in part, aff'd in part*, U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

16. See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005), which culminated roughly ten years of uncertainty regarding cable obligations to offer common carriage transmission services.

A. Technology Will Not Solve All Problems

First, while technological progress has enormous potential to enhance the reliability and ubiquity of our national communications infrastructure, it is erroneous to assume that technology alone will create an affordable, diverse, and innovative system of communications that will also meet our social policy objectives. For example, while the advent of wireless and satellite technologies has enhanced the delivery of services to rural Americans, issues of universal service nonetheless remain to be addressed. Likewise, although we have made promising strides in many areas, including significant steps to deploy services such as broadband-over-power lines and enhancements to satellite broadband technology to bring service to more consumers, the fact is that technology has not offered a competitive choice of broadband for many consumers.

Indeed, the ability of facilities owners to manipulate technology can itself pose certain dangers to a functioning and robust communications landscape. As advocates of "net neutrality" often reference, as "new" networks are deployed using IP technology and equipment, there is the potential that the networks will be constructed and managed so as to favor affiliated content and services, thereby diminishing consumer choice and decreasing service options. While the answer is not for Congress or the FCC to engage in micromanaging technological advances, certainly the potential for such adverse impacts should be acknowledged and policymakers should be prepared to act decisively and swiftly to ensure that facilities owners do not use technology to stifle competition. In sum, for all its promise, technology will not change market conditions, whether disparities in negotiating leverage between entrenched incumbents and competitive newcomers, economic disparities among communities, or the business incentives of companies seeking to capture consumers' communications dollars.

B. Duopoly Does Not Amount to Competition

Second, we have yet to attain full-fledged wireline services competition. Undoubtedly, during the last decade, cable companies have made enormous advances in upgrading and utilizing their traditional cable infrastructure for broader communications services. Today, many consumers obtain telephone, data, and IP-based services from their cable companies, and the cable industry boasts that cable's advanced digital services, such as high-speed Internet access, digital cable, video-on-demand, and telephone service, are available to more than 105 million

homes, or eighty-eight percent of U.S. households passed by cable.[17] This is certainly good news for consumers that previously could purchase some of those services only from their incumbent telephone company since now there is at least an option in some areas of the country. Yet, there should be no confusion that even in those areas, there is not full-fledged competition. Economists and others have long known that a duopoly, while arguably more competitive than a monopoly, is less than optimal.[18] Simply put, to obtain the benefits that competition brings—greater innovation, declining prices, and improved service quality—robust competition is needed.

Going forward, we are well served to bear in mind the lessons of the past. For instance, while wireless services are today generally competitive, such was not always the case. In the early days of wireless (the 1980s), wireless was a government-endorsed duopoly, with the incumbent wireline telephone companies securing one of the two licenses in a given area. As the wireless industry slowly began to grow, it became apparent that to obtain the benefits of vigorous competition, additional competitors were required. Congress responded by allowing the FCC to auction spectrum for PCS services.[19] Today, consumers have multiple wireless options; most importantly, subscribership has exploded and per-minute prices have dropped dramatically.[20] Notably, as new competitors emerged, government did not sit idly by hoping incumbents would treat new players fairly. Instead, in key areas such as spectrum allocation and licensing, auction set-asides for small businesses, interconnection, and intercarrier compensation, there was an express recognition that competition requires governmental input to ensure unequal negotiating leverage does not sink it.[21]

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17. NCTA, Broadband Information, http://www.ncta.com/Docs/PageContent.cfm?pageID=37> (last visited Apr. 12, 2006).

18. *See* William P. Rogerson, *The Regulation of Broadband Telecommunications, The Principle of Regulating Narrowly Defined Input Bottlenecks, and Incentives for Investment and Innovation*, 2000 U CHI LEGAL F 119, 139–40 (2000) ("There is a long tradition of skepticism among economists and antitrust enforcers as to whether two firms are sufficient to create effective competition. When there are only two competitors, the two often achieve some sort of implicit accommodation with one another not to compete vigorously."). *See also* FTC v. H.J. Heinz, 246 F.3d 708, 724 (D.C. Cir. 2001) ("In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.") (citation omitted); Application of Echostar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations), *Hearing Designation Order*, 17 F.C.C.R. 20559, para. 100 (2002) ("[C]ourts have generally condemned mergers that result in duopoly . . . ."); *id.* para. 103 ("[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality.").

19. 47 U.S.C. § 309(j) (2000).

20. *See* CTIA SEMI-ANNUAL WIRELESS SURVEY (2005), http://files.ctia.org/pdf/CTIA MidYear2005Survey.pdf.

21. *See, e.g*, *Local Competition Order*, *supra* note 5, para. 34 (ordering LECs "to enter

Accordingly, there should be no mistake about the true state of competition in the wireline telecommunications area. Competitive carriers, having gone through many twists and turns on the competitive road, are not as far ahead as many had hoped. Especially in the growing broadband space, most consumers face only two competitors—the local incumbent telephone carrier and the cable company—and even this choice is not available to many Americans. Although we may be able to sense that real competition lies ahead, no amount of viewing today's data from different angles will turn the current broadband landscape into anything, at best, beyond duopoly. Until genuine competition emerges, lawmakers and regulators should keep an especially watchful eye on potential anticompetitive conduct in the emerging broadband services marketplace. As with the 1996 Act itself, deregulation should follow fulsome competition, not precede it.

C. Consumer Choice Should Govern Service Deployment

Third, consumer choice must be honored, which not only places the emphasis where it belongs but best serves core First Amendment principles and the free flow of ideas. Perhaps the greatest benefit of a plethora of competitive service offerings is the ability of consumers to take the services that best meet their needs—and only those services. No consumer should be required to take a service simply because the provider can leverage its control over less competitive offerings. Fortunately, there is growing awareness of this fundamental tenet and for this reason, for much of the country, consumers are no longer required to purchase legacy local telephone service as a condition of obtaining broadband DSL services.[22] This approach provides a solid foundation for consumer preferences to dictate market development and best serves vibrant competition. While consumers should be able to avail themselves of service bundles—and may indeed reap service and efficiency benefits—they should not be forced to take what they do not want.

Similarly, to ensure that consumers are truly able to select the services that best meet their needs, core net neutrality principles should be adopted, with adequate enforcement and oversight. While it may be the case that

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into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks" pursuant to section 251(b)(5).").

22. *See* Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18433, para. 3 (2005); SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18290, para. 3 (2005) (incorporating stand-alone DSL commitments).

there are no serious problems today, and that many, if not most, service providers voluntarily adhere to net neutrality directives because it is good business, the fact is that once practices become entrenched, it is virtually impossible for government to step in and change them. In fact, communications history is rife with examples of industry pleading that regulation is premature and later claiming reliance on no regulation when regulators seek to step in and address abuses.[23] As we journey into a world of ever-growing IP and broadband service options, we should ensure that if consumers choose video or IP applications through one provider (e.g., Google or EarthLink) the network facilities owner should not be able to undermine those choices.

D. Effective Enforcement is Vital to Successful Regulatory Implementation

Finally, the need for and benefit of effective and swift enforcement of legal rights and obligations is vital. Of all the lessons the 1996 Act has taught us, this is perhaps the most important. As many a new competitor quickly learned, it is the small companies who are most often in need of enforcement that are outgunned in terms of resources. Incumbents and large entities well know that the legal process can be used as a tool to kill competition, often by a slow, procedural death. The old saw that "justice delayed is justice denied" has nowhere proved to be more true than in the communications wars, with issues dragging on in multiple fora and endless legal maneuvering. Aggrieved parties often focus on public relations and lobbying strategies rather than pursue legitimate legal rights given the time and resources that would be required to attain a possible victory years later.

What is needed is a clear statutory framework to address violations of the law; in effect, a revamped Section 208 process that recognizes the fast-moving pace of the current communications environment. Keys to such a framework are reasonable and swift statutory deadlines; a right to immediate access in questions of access and interconnection, pending the outcome of the dispute; and the right to attorney's fees and punitive damages. The FCC should also be given express direction to consider alternative dispute resolution mechanisms such as "last offer" or "baseball-

23. For example, the cable industry urged in 1974 that a common carrier-type separation between content and conduit should not be implemented because such a policy would be best applied to a more developed and mature industry. *See* CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 4 (1974). When the FCC looked again at this issue, the cable industry urged that it has built its network with private capital in reliance upon established policies. *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002).

style" arbitration. Not only will these measures be a giant step to ensuring that parties can obtain effective redress, but they should encourage parties to reach mutually agreeable settlement of their disputes in light of the threat of meaningful sanctions. While not all possible disputes can or should be the subject of prophylactic regulation, there must be effective means to address the inevitable bumps on the competitive road.

VI. CONCLUSION

We who spend our careers enmeshed in communications law know that uncertainty is certain. We often find ourselves guessing about how to forecast and adapt to future legal and technology changes, especially as new laws are being discussed. Consistent experience teaches, however, that while hindsight often reveals missed signals and off-base predictions, we must be guided by the past and be prepared to use it to refine our laws going forward. While adoption of these four guiding principles may not prevent missteps, it is hoped that they will serve us well in 2006 and beyond.