The 1996 Telecommunications Act

Jim Robbins*

I. INTRODUCTION

Without a doubt, the Telecommunications Act of 1996 ("1996 Act") has been a triumph for the cable industry and consumers, ushering in a new era of competition that has greatly benefited the public interest. The law's implementation has not been perfect. But on the whole, it has reinvigorated and revitalized telecommunications as we know it, arguably hastening the greatest sea change ever to affect this country's telecommunications infrastructure.

The 1996 Act was also just the first step. In the ten years since passage, the world has changed dramatically. Internet-enabled wireless devices are becoming ubiquitous. Broadband service is fast becoming available just about everywhere. And we are moving to an on-demand world in which the consumer has total control. As Congress makes the difficult choice of either revising or rewriting the 1996 Act, lawmakers have much to consider. But they would be wise to retain some core

*Mr. Robbins was President and CEO of Cox Communications, Inc. (ret'd as of Dec. 2005), a multi-service broadband communications and entertainment company with more than 6.7 million total customers. A graduate of the University of Pennsylvania with a B.A. in American Studies, Mr. Robbins also holds an M.B.A. from Harvard University. Prior to joining Cox Communications in 1983, he served as senior vice president of operations for Viacom Communications, Inc. He serves on the Board of Directors of Cox Communications, which is significantly affected by the legislative issues discussed in this article. The ideas and positions contained in this article are those of Jim Robbins and not necessarily of Cox Communications."

principles, including the 1996 Act's dedication to the encouragement of facilities-based competition and to regulatory parity. Only with built-out facilities, where like services are treated alike, can competition flourish and consumers truly benefit.

As Congress began work on the 1996 Act fourteen years ago, the cable industry was living under the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). The Cable Act could only be described as overbearing and burdensome. Its complicated price regulation was making it impossible for Cox and other cable operators to fund needed investments to expand our channel capacity and transform infrastructure from one way analog networks to two way digital networks. Accordingly, our customers were being denied the new services they desired.

It was a frustrating time for us. As an industry, we saw rate regulation as a harsh, overbroad, and misguided effort to curb the rising cost of cable service because it ignored the fact that cable service was providing, on a highly capital intensive network, the additional content demanded by our consumers. Indeed for two decades, cable operators were in a full court press to wire the entire country as demand increased exponentially. People wanted cable service so badly that they literally chased our trucks down the street. Those days brought great promise and prosperity, but they also spurred inevitable growing pains. Service was sometimes sporadic. Telephone wait times could be long. And, yes, as cable operators added more and more content to the mix, they had no choice but to pass those costs on to customers in the form of higher prices. Customers, of course, were not interested in our economics. Many cable critics, meanwhile, seemed obsessed with forcing an artificial correlation between cable rate increases and the rate of inflation. This was folly. The overall inflation rate never had much to do with the higher license fees we were paying to add new programming or the money we were spending to build out our networks. It was an apples-to-oranges comparison if there ever was one. But such obvious realities were ignored by our critics.

In short, the Cable Act was bad medicine for consumers and for the industry. It erected economic barriers for many cable operators to make necessary investments to improve capacity and service, add new channels,or otherwise experiment with new technology. Meanwhile, the Federal Communications Commission ("FCC") issued decision after decision to try to bring order to chaos. But, while the FCC often did the best it could, its edicts could be confusing and contradictory. We won some small victories. One example, the "going-forward" rules, allowed us to modestly increase rates when we added new channels sought by our customers. But by this point, direct broadcast satellite competitors such as DirecTV and EchoStar were already plowing millions of dollars into marketing campaigns designed to peel off our customers. The cable industry fought hard and largely survived these circumstances. But, to use a sailing term, the Cable Act put us in irons. We were anxious for a fair shake in the marketplace because we knew we were building out a superior telecommunications platform.

II. THE 1996 ACT: A NEW HOPE

Over time, the cable industry was able to make its case against the Cable Act. But our opportunity really came in the mid-1990s when Congress—concerned that current telecommunications regulations were strangling competition—initiated a massive overhaul of the 1934 Communications Act. The mantra was the encouragement of facilities-based competition as a substitute for regulation. It was a chance for the cable industry to finally throw off the shackles of the Cable Act and enter a new era in which we could compete for voice and data customers and in which telephone companies could compete in our core video business. Confident that our entrepreneurial spirit, marketing prowess, and new focus on customer service (the latter was always a Cox strength) would win the day, we happily welcomed the telephone companies ("telcos") into a world where line of business restrictions would be a thing of the past. We were ready for competition. And the 1996 Act was a great gust of fresh air and source of hope for those of us toiling under the Cable Act's repressive regime.

In contrast to some of my cable-industry peers, I was an early believer in residential telephony. In fact, as passage of the 1996 Act approached, Cox started installing telecommunications equipment in select markets so that we would be ready to go the minute the new law went into effect. In September 1997, we launched local phone service to 1,500 homes in Orange County, California and immediately realized that our initial estimates of consumer demand were far too conservative. Within the first twelve months, we signed up ten percent of customers to whom the service was available. Since those early days, Cox has expanded phone service nationwide, and it is now available to nearly 8 million homes in twenty-three markets. We are experiencing year-over-year growth of about thirty percent, with a current roster of more than 1.7 million Cox Digital Telephone customers nationwide.

In 2005 alone, we added nearly 380,000 residential telephony customers, suggesting continued demand for a service that we could not even offer prior to passage of the 1996 Act. We are also chipping away at the incumbent telcos' dominance in commercial telephony services. Cox

Business Services offers a full suite of voice, data, and video services for business, government, and education clients with more than 300,000 switched access lines. None of this would have been possible without the 1996 Act, which gave us the freedom to compete in these exciting new markets. Cox is living proof that a new facilities-based competitor can be successful—even when pitted against an entrenched incumbent. Consumers in those markets, meanwhile, have experienced choices they could not have imagined just a few short years ago.

Our telephony success suggests that consumers were ready for an alternative to the incumbent telcos, but it also demonstrates an even more salient point: the power of the bundle. With the 1996 Act, Cox and other cable operators were, for the first time, allowed to offer a full panoply of voice, video, and data services to their customers. It enabled cable operators to move beyond their core video business and offer new services as part of a cogent package—complete with volume discounts, the convenience of one bill, and the benefit of consolidated customer support and service from one company. At Cox, the bundle has helped us grow our other businesses as well: we now have more than 2.7 million Cox Digital Cable subscribers and more than three million broadband data customers, representing year-over-year growth of twelve percent and twenty-two percent, respectively. More than one million customers subscribe to the full video, voice, and data bundle. So the power and value of the bundle cannot be overstated. It drives new customer growth. Perhaps even more importantly, it helps us keep the customers we have already won. In fact, bundled services helped Cox reach 13.8 million revenue-generating units ("RGUs") in 2005, a ten percent increase over 2004.

As I mentioned earlier, not all of my cable colleagues have always shared Cox's enthusiasm for the full bundled offering—especially when it comes to a telephony component. But our growth numbers have started to convince even the skeptics. As we continue to roll out circuit-switched telephony and are now adding Voice-over-Internet Protocol ("VoIP") services to the mix, other cable operators are increasingly offering a telephony component to their own slate of services. VoIP technologies have progressed to the point of no return. Telcos, meanwhile, have reacted with more attractive bundles of voice and data products. Our telco opponents may have failed to successfully launch video services in the years immediately following passage of the 1996 Act, but they are now preparing another assault. In fact, many plan to attack our core video business by offering IP-based video services, or IPTV. And, as always, so long as there are no unfair regulatory advantages, we are fully prepared for the competition.

So the 1996 Act has been good to us. It has enabled us to transform a one-way analog network into a high-bandwidth, route-diverse, two-way interactive system. Our high-speed data and telephony products continue to grow at an impressive clip, giving our customers access to multiple flavors of bundled services. Without doubt, the 1996 Act's elimination of line-of-business restrictions and its encouragement of facilities-based competition—bolstered by fair interconnection rules, the easing of burdensome rate regulations for both cable and the telcos, and the establishment of dispute-resolution standards and deadlines for government decision-making—has been a boon to the public interest. Our services, meanwhile, have been rated number one in seven J.D. Power & Associates surveys.

Our network reliability and the price-to-value ratio we offer consumers is unmatched by history, and the continued demand we see for new bundled services suggests that consumers are quite happy with the more open and deregulatory environment of today. But implementation of the 1996 Act certainly has not been without its missteps. We always felt it was important to spend whatever it took to create a viable, facilities-based alternative to the incumbent telco, much to the chagrin of many short-sighted Wall Street analysts. But the regulatory environment often allowed non facilities-based entrants to buy unbundled network elements ("UNEs") and UNE platforms at a discount to the actual cost of building the facilities themselves. This led to arbitrage behavior that made it difficult for us to compete on a level playing field. Through perseverance, Cox has managed to build its telephony business despite the advantages that non facilities-based competitors have tried to exploit. In addition, the public record on cross-ownership reform remains incomplete, delaying the kind of market reforms that would enable us to expand our telephony offerings more rapidly to new markets. While the 1996 Act did a good job setting deadlines for regulators to act, vital decisions regarding classification and jurisdiction of carriers took longer than expected, further delaying our efforts.

The good news is that the overarching benefits of the 1996 Act have more than outweighed the inevitable errors that always occur when implementing such sweeping legislation. In fact, the aggressive timetable Congress laid out to implement reforms was an incredible challenge for everyone involved. The fact that so many parties could work together constructively is a testament to the dedication of all sides. Indeed, close coordination between the affected industries and state and federal regulators helped ensure that the post-1996 Act world of today could flourish. For that and other reasons, we believe that the 1996 Act has been a huge success for us and for consumers.

III. REFORM BUT WITH CAUTION

Despite the 1996 Act's resounding success, it is important to keep things in perspective. The legislative language was mostly hashed out in the early-to-mid-1990s. Although it was not that long ago, the 1996 Act addressed a far different world than the one of today. Back then, the World Wide Web was a relatively new phenomenon. Millions of people still managed to get through the day without sending or receiving a single e-mail. Cell phones were just starting to roll out beyond the affluent with several cities on the cusp of launching affordable new wireless services that utilized more efficient digital transmission methods.

The dot.com boom, meanwhile, was still just starting to bubble up, no pun intended. The first real sign did not come until Netscape went public in August of 1995, and by this time, the 1996 Act had already passed the Senate and was largely a done deal, spare a few amendments that would tweak the language at the edges. In many ways, the 1996 Act was written for a pre-Internet world because that was the world we lived in back then. But as we settle into the new millennium, we all understand that this world has changed mightily for all of us. I could not live without e-mail or my Blackberry. Americans of all stripes, professions, and income levels are simply wired to the hilt. Our society is now interconnected like never before, and telecommunications policy must reflect that. The question is how to preserve the 1996 Act's fair, deregulatory environment while reflecting the new realities of 2006 and beyond.

Having said that, it is important to remember that the 1996 Act continues to work well in its current form despite the changing world around us. An avalanche of new technologies and the convergence of old ones have not eroded the firm foundation built by Congress in 1996. As I have described, the 1996 Act has allowed Cox to enter the telecommunications and data businesses and offer innovative new services to our customers. The telcos did not really start rolling out digital subscriber line services aggressively until cable operators started taking their dial-up customers by offering far superior cable-modem services. And despite the failed attempts of the telcos to enter our core video business in the past, those failures were more the result of bad business planning and execution than any supposed flaws in the 1996 Act. The telcos have been able to compete with us for years. The fact that they have been unsuccessful so far should not reflect poorly on the deregulatory reforms that rightly created opportunity for all of us. Correlation, after all, is not causation.

In fact, even under the ten-year-old 1996 Act, the telcos are already getting their second wind. In September 2005, Verizon began rolling out its fiber-to-the-premises video service, known as "FiOS." Moreover, AT&T plans to launch an extensive IPTV product in multiple markets in 2006. In both cases, our telco rivals are trying to utilize new IP-based technologies to compete with us for video customers. They too now realize the power of the bundle that I referenced earlier. They have seen the cable industry's immense success, and they are envious. Will they be successful this time? No one knows the answer, but we in the cable industry are more than confident that we can compete with them—primarily because the 1996 Act has enabled us to offer such attractive service bundles to our customers. They will not be tempted away easily. But the competition that ensues as our customers start receiving offers from our telco rivals will only encourage us to improve our services and responsiveness even more, which is great for consumers and the public interest at large.

So as Congress looks to reform the 1996 Act, it must be careful. Much about the current law is worth preserving. The trick is to initiate reforms that improve rather than dismantle what is working in the 1996 Act while adding provisions that recognize the new IP-based, interconnected world in which we all now live. Reaching that delicate balance will likely be a challenge, but a lot of smart people will no doubt deliberate with consumers in mind—hopefully enacting reforms that increase facilities-based competition, innovation, and ultimately the availability of new services that will enhance the lives of millions of Americans.

Among specific principles that Congress should keep in place are the bright-line standards now applied to facilities-based interconnection. This is the bedrock of what enables companies like Cox to compete robustly with incumbent telcos, thereby creating an environment of constant competitive pressure that benefits consumers. Competitors work to win over new customers while incumbents fight to keep them. This tension forces everyone to constantly offer better value, packages and customer service. But facilities-based companies cannot compete if they lose the right to physical interconnection that is equal in quality to that provided by the incumbent telco itself. Only through such regulatory parity can competition prosper.

Preservation of other policies is also important. For example, Congress must preserve cost-based reciprocal compensation so that Cox and other facilities-based entities can get paid fairly for the cost of terminating calls on their networks. This is vital to supporting the underlying economics upon which our network depends. In markets in which the telecommunications traffic between carriers is relatively balanced, this compensation may include a "bill-and-keep" accounting system. Such a regime helps to eliminate much of the gaming that surrounds the current system of access charges.

Any reforms to the 1996 Act also should preserve the right to number portability for competitive carriers like Cox. A consumer who is unable to transfer his or her local phone number to a new carrier is far more reluctant to switch in the first place, which creates an unfair advantage for incumbent telcos. Giving consumers the ability to keep their numbers has been a key ingredient for healthy competition. From a network perspective, Congress needs to protect our right to use pole attachments on reasonable terms and conditions when building out our facilities. And we also need access to local rights-of-way under reasonable terms and conditions so that we can compete on a level playing field with incumbents. In fact, this principle extends to most of the traditional advantages that benefit the incumbent. We must, for example, have access to multidwelling units ("MDUs") so we can continue to extend our telecommunications services to apartment and condominium residents, as well as to commercial customers. Where space is available, we need the continued right to co-locate our telecommunications equipment, as well as the associated rights to transit our traffic through incumbent facilities. We also need to maintain our access to operational support systems ("OSSs") and associated databases.

With the world fast converting to an IP-based platform, it is especially important that Congress preserve these rights not only with respect to circuit-switched telephony, but also for emerging VoIP services. Only by creating an environment in which competitive facilities-based local exchange carriers ("LECs") can offer IP-based voice services on equal footing with the incumbents will the full scope of competition be realized. Cox and other cable operators are rolling out exciting broadband-based services such as VoIP, so any reforms set out by Congress must recognize these important new options that did not even exist ten years ago. And when it comes to vital interconnection protections, the federal government also needs to ensure a continued strong role for state authorities, which are best suited to understand the telecommunications networks and market needs in their individual regions. The states should be involved in arbitrating and enforcing interconnection provisions to ensure that the gears of competition remain well greased going forward.

The importance of regulatory parity is tantamount as Congress considers a rewrite of the 1996 Act. Like services should be treated alike. Period. In the past, Washington lawmakers and regulators have at times seemed obsessed with regulatory classifications that carry wide-ranging obligations and legal burdens. There was a time when these kinds of divisions made some sense, considering that the various entities offered very specific services and generally weren't competing for each other's customers. Cable operators offered video service. Telcos offered telecommunications services. But now that the 1996 Act has made it easier for us to compete with one another, the old regulatory classifications can be a morass that slows competition's efficient progress.

I do not mind responsible telco deregulation. But if lawmakers are going to re-examine telco obligations under Title II of the 1934 Communications Act, they should also take a fresh look at our obligations under Title VI. Many of them remain in place despite the clear competition we now face as an industry. Customer-service standards, leased-access obligations, and rate regulation of the basic service tier should all be on the table for discussion. In fact, it seems odd that, even in 2006, cable operators still must prove that effective competition exists in a local market to escape rate regulation of the basic cable service tier. If anything, that presumption should be reversed.

And when it comes to Title VI, one issue of considerable concern is the question of local franchising. For decades, cable operators have signed franchise agreements that give us the right to offer service in return for paying a fee, usually about five percent of our local gross cable revenues, to the local government. In many cases, we have also agreed to provide many other benefits, including public, educational, and governmental ("PEG") programming and, in recent years, even municipal access to broadband data services. This bond with our communities is strong, and the system has worked for consumers and city officials, both of whom have enjoyed the fruits of this public-private cooperation.

As Congress looks to reform the 1996 Act, lawmakers may want to study the telcos' recent state lobbying efforts, which seek to bypass the entire local franchising process. In October, SBC (now known as AT&T) filed for a statewide franchise in Texas after successfully lobbying state lawmakers to exempt it from local cable franchising obligations. That certainly makes life easier for AT&T and other telco entrants into the video-service business. And while I do not necessarily oppose a more streamlined franchising process, I would add a very important caveat: such reforms must apply equally to all entities, including the incumbent cable operator. It is simply unfair to change the rules to allow for special treatment for the large telcos, while requiring existing cable operators to continue to operate under local franchises with varied and typically much more burdensome obligations.

For example, a Texas cable operator that has agreed to serve every corner of a particular community, including remote and low-income areas, could now face video competition from a telco whose state-issued franchise contains no such obligations. That creates a dangerous situation for consumers. We have come too far in bridging the digital divide in this country to risk a bout of "redlining" in which new entrants cherry pick the most affluent customers and leave the rest of the local community behind. The Texas Cable & Telecommunications Association has already challenged the Texas state franchising law on those and other grounds. Any rewrite of the 1996 Act needs to ensure parity when it comes to franchising.

The 1996 Act reform process also gives Congress a great opportunity to address the difficulties surrounding the "must carry and retransmission consent" provisions. Under these rules, local broadcasters can either demand free cable carriage or require the cable operator to pay compensation in return for retransmitting its signal. While many of these TV stations are desired by our customers, excessive retransmission demands can unreasonably raise our costs and therefore translate into higher cable bills. Cox has sometimes been faced with a devil's choice: either cave in to the unreasonable compensation demands of a local broadcaster—often including requirements to carry other jointly-owned channels of dubious value—or face the wrath of customers when that station goes dark because the station withheld carriage. These fights lead to consumer confusion and can sully the reputations of broadcasters and cable operators alike. Congress must take a hard look at the must carry/retransmission consent regime. We must find a fair system in which the cost of news and entertainment programming resulting from retransmission consent negotiations does not impose unreasonable costs on the American consumer. Cox is more than ready to work with lawmakers to find a reasonable reform of this process.

IV. CONCLUSION

At the end of the day, the 1996 Act has been a huge success for the cable industry, telecommunications providers, and consumers. It has thrown open doors that were closed to cable operators and phone companies for decades and created a newly vibrant and thriving competitive environment for telecommunications services. Consumers are reaping the benefits every single day. As technologies progress and the Internet becomes a huge force in global society, Congress should indeed take a fresh look at the 1996 Act as it celebrates its tenth birthday. Some reforms are certainly needed. But lawmakers should also be mindful to preserve the 1996 Act's dedication to regulatory parity and the encouragement of facilities-based competition as the best, and preferred, alternative to regulation. This approach to public policy has allowed competition to flourish in the first place. I look forward to this next chapter in telecommunications policy. With careful reform, we can ensure that the revolution that began in 1996 will continue into the new millennium, bringing even more innovation and competition to my industry and, most importantly, to consumers everywhere.