

The Greatest Story Never Told: How the 1996 Telecommunications Act Helped to Transform Cable's Future

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It'll be 10-to-1 in our favor. I would say that by 2000, we'll have 50 percent of the cable TV business—no doubt about it, which is why some cable companies are in a panic. Meanwhile, the cable companies won't have even 3 percent of telephony revenues in their best market. Not in their best market. It's just not going to happen.

Those were the words of the chief operating officer of Bell Atlantic, Ray Smith, as reported in *Wired Magazine*, February 1995. And those words prove yet again the wisdom of the famous Yogi Berra quote: "The hardest thing to predict is the future."

Of course, predicting the future is exactly the task that the United States Congress took on when it fashioned, and ultimately passed with overwhelming bipartisan support, the Telecommunications Act of 1996 ("1996 Act"). Congress thought that the new Act would pave the way for facilities-based competition in local telephone service, and that by breaking down the legal barriers to entry by phone companies into the cable television marketplace, it would also stimulate more facilities-based competition in multichannel video services.

In retrospect, the provisions of the 1996 Act that have made the most difference in the communications marketplace were not those that were the

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1. David Kline, *Align and Conquer*, WIRED MAG., Feb. 1995, at 110, 115.

most debated and discussed, but rather a single change that barely rates a footnote in most analyses of the 1996 Act: the decision by Congress to deregulate most rates charged by cable television providers effective in 1999.

Why did this small provision turn out to be so important, and what has it made possible? To give the most complete answer, let me provide some background on the state of the cable industry as the 1996 Act gained steam in Washington.

America did not have a national policy on cable franchising until Congress passed the 1984 Cable Act (“1984 Act”), which for the first time regularized franchising procedures, placed reasonable limits on the regulatory authority of local government, and curbed most of the abuses that had afflicted the wild and woolly franchising process until then. The 1984 Act inaugurated boom times for cable.² From 1980–89, cable’s customer base soared from nearly 16 million to nearly 53 million. Cable construction boomed. New cable channels proliferated. After decades of struggling to establish ourselves, which included overcoming opposition from broadcasters, Hollywood studios, and telephone companies, and fighting our way through franchising, cable was finally entering a Golden Age. But this rapid growth was accompanied by some problems. Consumers experienced frequent service difficulties as systems were being rebuilt. Many companies did not take customer service as seriously as they should have—in a nation that loves television, nothing could be more annoying than losing service for long periods of time or waiting literally days for a service technician to arrive. And while consumers enjoyed all of the new programming, they just did not like what they perceived as their lack of choice among providers (this was back before direct broadcast satellite (“DBS”) services became a serious competitor).

Regrettably, by 1992, Congress felt it necessary to step back in to reimpose some regulations on cable. At the same time, it took steps to encourage more competition from DBS companies, including the requirement that all programming in which cable operators had a financial interest be made available to DBS providers. While the cable industry warned that reregulation could have a devastating affect on cable’s growth, congressional attitudes had hardened, and the 1992 Cable Act (“1992 Act”) was passed over President George H. W. Bush’s veto—the only veto override he suffered during his term.³ Over the next several months, the

2. See Nat’l Cable & Telecomm. Ass’n, Industry Overview, History of Cable Television, <http://www.ncta.com/Docs/pagecontent.cfm?pageID=96> (last visited Apr. 3, 2006).

3. Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C.

Federal Communications Commission (“FCC”) exercised its new authority over basic cable pricing by requiring seventeen percent across-the-board reductions,⁴ which undercut investor confidence and choked off investment. In the words of two economists who examined the aftermath, “One revealing fall-out from rate regulation under the 1992 Cable Act was that the U.S. cable industry largely missed an entire capital upgrade cycle.”⁵ The launch of new cable networks and the introduction of new services essentially ground to a halt. The excitement of cable growth in the 1980s gave way to a serious case of Wall Street malaise for cable that persisted for years.⁶

The most unfortunate thing about the timing of the 1992 Act was that cable had just begun to understand the incredible possibilities of the coaxial networks it had strung across most of America. As we looked around our offices, we realized that all of our data networks consisted of these same coaxial cables. We were excited about the chance to digitize our networks to expand their effective capacity and to introduce new capabilities. The opportunity to use our networks to provide two-way services—like telephone—held out attractive revenue potential. And something called “the Internet” was just starting to get headlines.

As an industry, we were truly at a crossroads. It became increasingly apparent that DBS, whose services were 100% digital, were going to provide formidable competition. And the phone companies, epitomized by comments like Ray Smith’s,⁷ were making serious noises about jumping into the fray. At the same time, it became apparent to cable that if we could use our networks to provide telephone services, we would be in a position to provide facilities-based competition to the incumbent telephone monopolies. We decided that the time had come to embrace competition wholeheartedly and to make it work for us—the trade-off would be less

§ 521 (2000).

4. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 F.C.C.R. 4119, para. 2 (1994), modified by 10 F.C.C.R. 6870 (1994), modified by *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151 (D.C. Cir., 1994); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Report & Order and Further Notice of Proposed Rulemaking*, 8 F.C.C.R. 5631, para. 9 (1993), suspended in part by 8 F.C.C.R. 5585 (1993).

5. Thomas W. Hazlett & George Bittlingmayer, *The Political Economy of Cable “Open Access,”* 2003 STAN. TECH. L. REV. 4, para. 62 (2003).

6. In later years, Reed Hundt, who chaired the FCC when it implemented rate regulation pursuant to the 1992 Act, observed, “A far better way to serve consumers and promote investment is to rely on competition.” Reed Hundt, Op-Ed, *Cable competition works*, USA TODAY, Sept. 2, 2003, at 10A.

7. Kline, *supra* note 1, 115.

regulation and more business opportunities.

Meanwhile, by 1994, it had become clear that competition in the telephone industry could no longer be managed effectively by a federal judge. The forces were mounting for major telecommunications legislation, and there was support in both parties for moving forward. As the legislative train began to roll, I was serving my first term as chairman of the National Cable Television Association (“NCTA”). In that role, I testified before the Senate Commerce Committee, where I explained the great potential that cable had to introduce real competition. “We face major barriers—technological, economic, legal and political—to competing in this market,” I testified.⁸ But, I added, “we are ready to go—provided that you will do what only you are in a position to do—create the legal and political environment essential to our success.”⁹ I asked the Congress to give the cable industry greater regulatory freedom and to make the promotion of “facilities-based competition” the paramount public policy goal.

The following year, as the legislative process entered the home stretch, I told the House Commerce Committee about the excitement in our industry. I had just flown in from Dallas where the NCTA was hosting its biggest convention to date. Our theme for the 1995 National Show was “The Future is on Cable”, and I had come away from the convention feeling that the cable industry really was poised to deliver competitive telecommunications to American homes and businesses. At a hearing chaired by U.S. Rep. Jack Fields of Texas, I told the Committee,

The technology is there. Consumer demand is there. Our desire is there.

Only two things are missing: First, our industry is constrained in its ability to compete for capital to invest in this exciting future . . . and second, *we lack a stable, pro-competitive legal and regulatory environment* that would permit us to move forward.

Those two things are inextricably linked¹⁰

I concluded:

We need your unambiguous command to the FCC and the states to clear the way for competition without delay.

We need the kind of incentives your bill provides to get the Bell companies to do what they need to do to open up local markets.

And we need reduced regulation of the way that cable companies

8. *The Communications Act of 1994: Hearing on S. 1822 Before the S. Commerce, Science, and Transportation Comm.*, 103rd Cong. 520–21 (1994) (statement of Brian L. Roberts, President, Comcast Corporation).

9. *Id.* at 521.

10. *Communications Law Reform: Hearings on H.R. 1555 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong. 35 (1995) (statement of Brian L. Roberts, President, Comcast Corporation).

price and market our video services . . . to give us more flexibility to respond to all of this competition.¹¹

Less than six months later, the House and Senate would reach agreement on landmark legislation. On my office wall hangs a letter that Chairman Fields sent to me on the day the 1996 Act was signed. The letter generously thanks me for my participation in the hearing process and for “inspiring the ‘facilities-based competitor’ language of the bill.” Whether or not my testimony may have influenced getting that concept into the 1996 Act, it is unfortunate that the final version of the 1996 Act did not create the right set of incentives to promote facilities-based competition.

The big political battle around the 1996 Act had everything to do with the Regional Bell Operating Companies (“RBOCs”), seeking the right to enter the long-distance business from which they had been barred by the 1984 Consent Decree that broke up AT&T, and the interexchange carriers (“IXCs”), mainly AT&T and MCI, who were motivated primarily to continue protecting their turf against the RBOCs, but who were also realizing that Congress was tired of waiting for competition and wanted to see RBOCs and IXCs go head-to-head.

Competition between the RBOCs and the IXCs was skewed by bad policy decisions in ways that almost guaranteed competition would be unsustainable. Congress was persuaded to adopt a complicated scheme in the 1996 Act intended to ensure competitors’ access to RBOCs’ networks through resale and unbundled network elements. While this was intended to be transitional to facilities-based competition, there were no timelines or other incentives to move competitors out of the resale business and into building their own facilities. As a result, most of the competition that the 1996 Act generated took place before the FCC and the courts, not in the marketplace.

But almost inadvertently, just by some modest price deregulation of cable, Congress set the stage for the real competition to come. Even though the lifting of price regulation of certain basic cable services contained in the 1996 Act would not even take effect until 1999, the mere expectancy of reduced regulation, and the growing excitement about the potential of cable technology were enough to put Wall Street in a positive frame of mind and to open up capital flows once again.

Since 1996, the cable industry has invested over \$100 billion in digital broadband technology.¹² Within months of President Clinton’s

11. *Id.* at 36.

12. NAT’L CABLE & TELECOMM. ASS’N, 2005 MID-YEAR INDUSTRY OVERVIEW 7–8 (2005), available at http://www.ncta.com/industry_overview/CableMid-YearOverview05FINAL.pdf [hereinafter 2005 MID-YEAR INDUSTRY OVERVIEW].

signature on the 1996 Act, it became clear that cable was in a position to be the first to bring broadband to the masses. Delivering these high-speed Internet services—rather than traditional telephone service—became the cable industry’s primary focus for several years. Cable’s great leap forward in infrastructure shook the RBOCs, who raced to introduce digital subscriber line (“DSL”) technology that they had warehoused for years. More recently, it has prompted the RBOCs to announce major investments in fiber to the home (“FTTH”) and fiber to the node (“FTTN”) network upgrades.¹³

In addition, the 1996 Act also gave the RBOCs the opportunity to enter the cable television business for the first time. Until then, they had been barred from the business, and the FCC had attempted to jerryrig something they called “video dial tone” as a means of letting the phone companies offer video without violating the federal statute. When Ray Smith and others promised that the RBOCs would compete vigorously in video, we took them at their word, and we decided that we were ready to face more competition and to bring more competition to markets that the RBOCs had controlled (e.g., phone) or ignored (e.g., broadband).

While it is sometimes argued that the 1996 Act did little to anticipate either broadband or the Internet, this overlooks the powerful impact of the statute on cable’s investment in broadband facilities. In 1996, virtually none of America’s Internet users had high-speed broadband connections. Our industry’s competitive investment would forever change this. By early 2005, over twenty-two million U.S. households had become cable modem customers.¹⁴ Across the nation, cable operators are offering consumers residential high-speed connections with download speeds up to ten Mbps, and greater speeds are coming soon. This stimulated a competitive response from the RBOCs, and today, nearly fourteen million U.S. households and small businesses use DSL.¹⁵ Fully half of the Internet users in the United States have broadband connections and, in absolute numbers, the United States has more broadband households (i.e., cable and DSL) than any country in the world.¹⁶

13. See, e.g., Press Release, Verizon Comm. Corp., Verizon Deploying Fiber Optics to Homes and Businesses in Six More States in Northeast and Mid-Atlantic (Oct. 21, 2004), <http://investor.verizon.com/news/view.aspx?NewsID=559>; Press Release, SBC Comm. Inc., SBC Communications To Rapidly Accelerate Fiber Network Deployment In Wake Of Positive FCC Broadband Rulings (Oct. 14, 2004), <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21427>.

14. 2005 MID-YEAR INDUSTRY OVERVIEW, *supra* note 12, at 9–10.

15. Press Release, FCC, Federal Communications Commission Releases Data on High-Speed Services for Internet Access (July 7, 2005), http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf.

16. See Michael D. Gallagher, Assistant Sec. for Comm. and Info., Dept. of Commerce,

The expanded video channel capacity provided by cable systems of 750 MHz and greater, coupled with retail price deregulation, led to renewed investment in cable programming, too. In the decade since the 1996 Act was passed, annual cable industry programming expenditures have increased from \$11.7 billion to \$27.3 billion a year, and the number of cable networks has increased from 145 to 390.¹⁷

Cable's high capacity digital broadband networks also gave high-definition television ("HDTV") a real push in the United States. For me, the moment of realization came when I toured the exhibit floor at the Consumer Electronics Show in Las Vegas in 2001, and I saw a sea of plasma TV screens carrying satellite-fed HDTV. It looked phenomenal, and I knew that cable had to commit itself to match and exceed what DBS had to offer. Today, more than ninety percent of the nation's seventy million cable customers are able to enjoy high definition ("HD") programs from more than twenty-five cable and broadcast networks. And the United States is the world leader in HDTV.

In addition to fostering the deployment of high-speed Internet access, HDTV, Video on Demand, and other digital services, cable is now on the verge of achieving the primary goal of the 1996 Act: providing a real choice for residential phone customers. When I asked Congress to promote facilities-based competition, the cable industry was contemplating major investments in traditional circuit-switched telephone service. Many cable operators did invest in circuit-switched service and provided the only significant facilities-based competition to American homes (cable serves over 4.5 million homes with circuit-switched voice today).¹⁸ However, the immense opportunities presented by broadband became our focus.

This proved prescient, as we are now rolling out Internet Protocol telephone ("IP phone") technology, which gives us the ability to offer our customers digital voice service with an array of features at a price that is less than what they pay for comparable services offered by the incumbent local exchange carriers ("ILECs"). Over the past year, the number of cable IP phone customers has grown by more than one million. By the end of 2005, Comcast will have IP phone capability in front of as many as fifteen million homes, and by 2007, to virtually all forty million homes that we pass.

Remarks at Law Seminars International: Top Priorities for 2005: Insights from the Department of Commerce and FCC 10 (May 20, 2005), available at http://www.ntia.doc.gov/ntiahome/speeches/2005/MGallagher_LSI_05202005.pdf.

17. See 2005 MID-YEAR INDUSTRY OVERVIEW, *supra* note 12, at 14–15, 17.

18. See 2005 MID-YEAR INDUSTRY OVERVIEW, *supra* note 12, at 2 (citing 3.5 million, however, cable companies have been adding phone customers aggressively since the publication of this report).

The failure of the 1996 Act was Congress' to bet the future on a complicated resale scheme. When the government gave market entrants access to the RBOCs' networks at less than market rates for an indefinite period of time, it killed both the RBOCs' incentive to open up their facilities and the incentive of the new entrants to build competing facilities. Instead of launching competition from the main companies that were supposed to provide it—AT&T and MCI—the resale provisions permitted those companies to play stall ball for several years. Now they are gone, swallowed up for ten cents on the dollar by SBC (which has now recycled the AT&T name) and Verizon.

If my message favoring facilities-based competition had really been understood in 1996, Congress would have done more to stimulate investment sooner in competitive facilities. In exchange for retail price deregulation, this is exactly what the cable industry did. By using our own facilities, we require much less from government—mainly the right to interconnect our networks with the ILECs, a sensible system of intercarrier compensation, and the ability to ensure that our customers can keep their phone numbers when they leave the RBOCs' networks for ours. I believe our competitive model will succeed because we are not dependent upon using the ILECs' own facilities to compete with them.

Today, ten years after the most sweeping changes in telecommunications law since 1934, there is again talk of undertaking a "major rewrite" of the Communications Act. As someone who has seen first-hand just how jarring constant changes in federal policy can be for our business, I want to urge caution. We should learn from what did not work in the 1996 Act—an elaborate scheme intended to create rights of access to networks built by others—and from what did work—a reduction of economic regulation on facilities-based competitors. I think that Congress need look no further than the preamble of the 1996 Act, which declares support for a pro-competitive, deregulatory communications policy, and should continue to be guided by that goal.

Without question, there are ways to improve and refine the 1996 Act. With competition increasing, a lot of the 1996 Act's requirements should decrease. However, Congress must be very mindful of the fact that the uncertainty created by throwing all policy assumptions up in the air will only compound the extraordinary uncertainty already in the marketplace, where rapid technological change confounds business assumptions every day, and companies need the freedom to react. The game is on, and changing the rules of the game while everyone is scrambling around the field can cause far more harm than good.

Cable may have been just a footnote in the history of the 1996 Telecommunications Act, but I think that footnote has enabled us to write

an important new chapter in America's broadband future. I am proud that Comcast is a part of that story.

