Reflecting on Twenty Years Under the Telecommunications Act of 1996

A Collection of Essays on Implementation

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INTRODUCTION

It is appropriate that the Federal Communications Law Journal is devoting this special issue to analysis of the Telecommunications Act of 1996 on its twentieth anniversary because the '96 Act significantly amended the Communications Act of 1934 in many important ways.

The most fundamental change mandated by the Act was to open local telecommunications markets to competition. To implement that change, Congress adopted detailed provisions designed to foster local competition and Congress's decision to address *local* telecommunications issues upset the traditional division of authority between state and federal regulators. Congress also adopted provisions permitting the Bell Operating Companies to provide long distance service after they opened their local markets to competition. In addition, Congress recognized that local competition would require major changes in the existing universal service and intercarrier compensation rules and adopted provisions addressing those critical issues. Congress also recognized that regulation should recede as competition developed and enacted a novel provision permitting the Federal Communications Commission to forbear from enforcing provisions of the Communications Act that were not needed once competition developed. These are only a sample of the provisions adopted in 1996.

Congress mandated that the FCC issue rules implementing the market-opening provisions of the Act within six months of enactment. Along with many of the contributors to this special issue, I worked at the Commission while the landmark *Local Competition Order* was drafted between February and August of 1996. It was only the first of dozens of FCC orders resulting from the Act.

To say that the requirements of the Act and the Commission's implementation of its provisions were subject to extensive debate at the Commission and litigation in the courts is a major understatement, but that is about all I can say in my role as President of the Federal Communications Bar Association. However, this special issue of the FCLJ includes articles by scholars examining the Act and essays by many communications lawyers that, together, provide useful celebration and critical analysis of the Act. Those contributors include key drafters of the Act, the Chairman of the FCC when '96 Act became law, lawyers representing state commissions and public interest groups, and lawyers who represented the many telecommunications companies affected by the Act. I would like to thank all of the contributors for their articles and essays.

I also would like to thank the Journal staff, especially Amy McCann Roller, and the FCBA's Law Journal Committee, especially Jeff Lanning and Larry Spiwak, for their excellent work on this special issue.

Christopher J. Wright
President, Federal Communications Bar Association

REPRESENTATIVE RICK BOUCHER*

By the late 1980s, technological innovations, such as the advent of fiber optics, made it possible to open monopoly communications markets to competition. Consumers, communications companies, and members of Congress saw the opportunities that creating competition in communications services would provide for robust infrastructure investments, market pricing for services and broader public access to information.

On the House Energy and Commerce Subcommittee on Telecommunications and Finance, we began a long process of holding hearings, introducing early legislative drafts and proceeding to markups and floor consideration of bills. The culmination of that effort was the Communications Act of 1996.[1] The first seeds for the Act were planted in 1989 with a proposal I co-authored with then Senator Al Gore to allow telephone companies to offer cable television service inside their telephone service areas.[2] That amendment to the cross-ownership restriction of the 1984 Cable Act became the first plank in the Telecommunications Act of 1996.[3]

Over time, additional planks were added. The monopoly local telephone exchange was opened to competition.[4] The long-distance market was made more competitive by enabling the Bell Regional Operating Companies to offer nationwide long-distance service once they had fully established that their local telephone exchanges were open to voice competition,[5] and the Bell companies were given the permission to manufacture telecommunications equipment.[6]

In the same timeframe that the '96 Act made communications markets competitive, the Clinton administration and the FCC adopted a light touch regulatory approach for the nascent fiber-optic broadband network. That farsighted decision ignited a virtual explosion in broadband investments and created the foundation for the modern Internet which is now the preferred medium for communications of all kinds.

The 1996 Telecommunications Act was a product of bipartisan cooperation in both the House and the Senate. It passed in both bodies by overwhelming margins. As we mark the twentieth anniversary of the Act, we are reminded that landmark achievements in Congress rarely happen on a partisan basis. The nation now faces new communications policy challenges

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 118 (codified as amended in scattered sections of 47 U.S.C.).
2. *See* Cable Competition Policy Act, H.R. 2437, 101st Cong. (1989).
3. *See* Telecommunications Act, § 202(i) (amending telephone company/cable cross-ownership restrictions contained in 47 U.S.C. § 533(a)).
4. 47 U.S.C. § 251 (2012).
5. 47 U.S.C. § 271 (2012).
6. 47 U.S.C. § 273 (2012).

ranging from transitioning from the circuit switched telephone network to an all IP network, finding effective ways to transition large allocations of spectrum from government ownership to commercial auctions and securing a durable foundation for network neutrality protections. Just as for the ’96 Act, bipartisan cooperation will be the key to legislative success.

JAMES L. CASSERLY*

It was an honor and a privilege to participate in the herculean effort needed to implement the Telecommunications Act of 1996,[1] and I will be forever grateful to Commissioner Susan Ness for giving me that opportunity. The Act required dozens of rulemakings, and established tight timetables, but the entire agency rose to the challenge and implemented the Act as faithfully as possible. Key factors in the success of this effort were the Commissioners' wisdom, humility, and willingness to compromise, the Bureau and Office staffs' experience, professionalism, and collegiality, the active and (usually) constructive participation of a wide range of stakeholders, and—something I only came to appreciate with hindsight—the strong oversight provided by engaged congressional overseers.

But the biggest successes of the Act came not from new regulations that Congress instructed the agency to promulgate but from new freedoms the Act created. Telephone companies were allowed to provide video services,[2] opening the door for new competition to cable and satellite providers (though it took a decade before this opportunity was aggressively pursued). Cable companies were freed from the yoke of rate regulation,[3] restoring their ability to maintain and upgrade their networks and enabling them to carry a multitude of new channels and to develop new services. Broadcasters were freed from certain ownership limitations and given greater assurance of license renewals, and a pathway for transmission of digital, high-definition signals was opened.[4] And Congress established a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[5]

Inevitably, then, telephone, cable, and broadcast services are vastly better today than they were twenty years ago, but these gains are trifling compared to the explosive growth of the Internet. We should not forget that only a small percentage of Americans used the Internet in 1996 and that those who did typically did so using dial-up access that allowed only 14, 28, or at most 56 thousand bits per second—and there were proposals to focus on "integrated services digital networks" that would increase speeds to 128 or perhaps 256 kbps. Fortunately, cable company innovators didn't listen, and

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. Telecommunications Act, § 202(i) (amending the telephone company/cable cross-ownership restrictions contained in 47 U.S.C. § 533(a)).

3. *See* 47 U.S.C. § 543(c)(4) (2012).

4. *See, e.g.*, 47 U.S.C. §§ 309(k), 336 (2012) (respectively prescribing broadcast station renewal procedures and permitting licensing of advanced television services); Telecommunications Act, § 202(a)-(f) (directing FCC to modify its broadcast-ownership rules contained in 47 C.F.R. §§ 73.658(g), 73.3555, 76.501).

5. 47 U.S.C. § 230(b)(2) (2012).

they plowed ahead with a risky bet on cable modem technology, which in turn drove telcos to deploy digital subscriber line technology, which paved the way for wireless and satellite broadband—all of which now allow consumers to communicate at many millions of bits per second. I firmly believe that this progress would have come much more slowly were it not for the Commission's steadfast determination, in 1998 and 1999, to follow the guidance that Congress had given and resist the entreaties of those who demanded regulation of Internet service providers. The benefits of this "hands-off" approach have surpassed all expectations, and the predicted harms proved to be illusory. Chairman Kennard and his colleagues deserve enormous credit for recognizing the imperative of creating an environment conducive to investment, and Chairman Powell likewise should be honored for carrying that policy forward.

JIM CICCONI*

Passage of the Telecommunications Act of 1996 [1] offers great perspective on today's political and policy gridlock in Washington. It signified a moment in time when an Administration and far-sighted legislators from both parties, holding different perspectives, but all keenly interested in the dawning Internet age, joined ranks to craft a statute that was far-reaching in its scope and visionary in its impact.

At bottom, the framers of the '96 Act embraced a wise humility toward technology and its future development. They were conscious of the Communications Act of 1934's[2] sixty-year legacy, and wanted their work to last. It took nearly six years over three Congressional sessions to negotiate, compromise, draft and re-draft what ultimately became the Telecommunications Act of 1996, and their work provided a roadmap for the future of the nation's communications landscape.

Indeed, the framers of the Act did their work better than they perhaps knew, piloting the ship of telecommunications policy through a foggy harbor into an open and unknown sea towards a destination of today's cross-platform communications marketplace. In retrospect, it is easy to forget how different things looked at the advent of the Internet. Back then, a consumer reached the Internet over a slow, twisted pair telephone line. The incumbent telephone companies who provided those lines were just starting to see the effects of competitive entry into their markets. Back then, the companies that comprised the current AT&T operated just over 70,000,000 switched access voice telephone lines. We didn't provide any video services, and DIRECTV had just passed 1,000,000 video subscribers in the United States. The entire cellular industry had just over 44 million subscribers in the United States. The cable companies had not yet entered the voice market. The Internet existed but, broadband was still off in the future. It was a world where the dominant companies were traditional telephone companies, like Southwestern Bell, BellSouth, NYNEX and Bell Atlantic. Facebook, Google, and Twitter didn't exist (Mark Zuckerberg was 11 years old when the Act passed). Apple was foundering in the wake of Microsoft's dominance, having fired Steve Jobs eight years earlier.

Compare that to today. The large Internet companies literally have billions of customers. First Apple and Steve Jobs reunited to give us the iPod, which revolutionized the entertainment world, then the iPhone, which did

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064 (codified as amended in 47 U.S.C.).

the same for the wireless marketplace. In states where AT&T provides traditional telephone service, less than 15% of households even bother to subscribe to POTS service. AT&T/DIRECTV have over 25 million video connections. Cable companies now provide voice service to approximately 30 million customers. Without even considering connected cars and the Internet of Things, there are more than 350 million wireless subscribers in the United States alone (an 800% increase). According to the United States government, more than 45% of American households have cut the traditional landline telephone cord. In other words, we have gone from a near-monopoly telephone company voice market to a consumer communications nirvana.

In 1996, we didn't yet have broadband or know fully its potential to create entire new industries and revolutionize not only communications, but all commerce on the planet. So how did we end up with a communications system that leads the world? Wisely, the Act was drafted from the premise that telecommunications markets – in time, *all* telecommunications markets – could be opened to competition successfully and, once competition took root, those markets could be substantially deregulated. Indeed, the Act itself stated its purpose as: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[3]

The pro-competitive goals of the Act have been achieved. The numbers cited above reflect the dramatically different communications landscape that exists today. Innovation, investment, and easy market entry have combined to ensure that today competition is the rule, not the exception, in every segment of the marketplace. Convergence of technologies and cross-platform competition are not future prospects but accomplished facts.

The introduction of Apple's iPhone in June 2007 conveniently divides the twenty years since the Act and marks a significant milestone in the success of the Act itself. Since that date, smartphones and connected tablets have become commonplace, Americans have consumed broadband voraciously, and the United States passed Europe in adoption of broadband technologies and in average speed of broadband connections. This, too, may be attributed to the Act and to policies that favored deregulation, innovation, and capital investment rather than top-down regulation like the Europeans, who subsequently lost both their initial lead in broadband and their associated edge in economic competitiveness.

Despite this history, rather than completing the Act's deregulatory mandate, the FCC now appears ready to extend pre-1996 Act monopoly-era regulations and rules to today's competitive broadband markets and services.[4] By contrast, in 1996, the Act's framers chose the path of restraint in the expectation—fully justified by subsequent events—that the marketplace would encourage innovation and investment, spreading the

3. Telecommunications Act, pmbl.

4. Protecting & Promoting the Open Internet, *Report and Order on Remand and Declaratory Ruling and Order*, 30 FCC Rcd 17905 (2015).

benefits of broadband to all Americans. In reversing course, we now risk jeopardizing this success by turning back towards outmoded and unnecessary regulation rather than advancing successful policies based on regulatory restraint and confidence in competition first set forth during the Clinton Administration.

The agency's dramatic break from this successful policy of regulatory restraint is striking and worrisome. In 1996, Congress unleashed competitive forces in order to reduce regulation. Yet today, the FCC has turned Congressional intent on its head, refusing to recognize competition in order to expand its own regulatory role. Rather than back away in competitive situations as the Act clearly envisioned, the FCC more and more is intervening to direct outcomes it prefers rather than leave them to the decisions of consumers. Broad phrasing intended to allow the FCC discretion to deregulate is now being used to justify expansion of FCC authority. It is because of this trend, and the seeming inability of a government agency to understand let alone direct wise outcomes in an era of hypersonic technological change, that many now recognize the need for Congress to reassert its primacy.

Clearly this situation calls for a new Communications Act, a rewrite of our laws based upon the realities of today's competitive marketplace where new, innovative companies and technologies compete against each other and against global players at a pace unheard of twenty years ago. It would be a rewrite that places consumer choice, not a government agency, at its center.

Of course, this new Act should protect twenty-first century consumers against abuse irrespective of technology, provider, and legacy classification by treating similarly situated providers throughout the broadband ecosystem equally, rather than continue uneven protections based on the silos of the past. Moreover, in crafting a new Act, Congress could revisit the FCC's role in the twenty-first century digital economy to ensure a constructive government mission to advance high-speed broadband infrastructure deployment and technological innovation, while ensuring that consumers, not government, decide winners and losers in the marketplace.

Thomas Jefferson famously wrote (here, in paraphrase) that the tree of liberty was best watered by a rebellion every twenty years.[5] In the two decades since 1996, rapid technological change has produced a revolution—the broadband revolution—and also a rebellion of users essentially bypassing legacy services weighed down by outmoded and unnecessary regulatory restrictions. Today, consumers adopt and discard services and technologies at amazing speeds. A wise rewrite of the Communications Act will empower those consumers, not burden their range of choices based on which services government favors or disfavors. A wise law will also recognize that this pace of change requires policies that encourage investment, especially infrastructure investment, as well as innovation.

5. *See* FRED R. SHAPIRO, THE YALE BOOK OF QUOTATIONS 393 (2006) (quoting Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787)).

Congress should ensure that any FCC policy that inhibits either must meet a heavy burden of proof before it is allowed.

To achieve this vision fully will require a significant revision of the Act, building on its deregulatory, pro-competitive premises and recognizing that government regulations cannot keep pace with the rate of technological progress and, if they try, will surely slow it down to the detriment of consumers. As in 1996, the key to a successful revision of the Act will be to rethink how to approach a new competitive dynamic that is already improving lives and advancing our Nation's progress. Even more than in 1996, regulatory humility is called for. Consumers must be protected against harm, but we should find ways of doing so that do not discourage needed investment and innovation. Our experience with the Federal Trade Act shows this can be done without burdening a major portion of our economy with ex ante regulation, and could provide a new way to think about the FCC and its mission. But whichever approach it may choose, Congress must act. As the FCC continues to deal with the problems of today by applying statutes and rules designed for another era, the confidence and certainty needed for investment wanes. Innovative new services and offerings wait for an endless series of rulemakings, notices of inquiry, interpretations and court appeals. And as the FCC strays farther into gray areas of interpretation, we see partisanship and external ideologies having more influence over decision-making, to the detriment of that respect for its nonpartisan expertise on which the agency depends.

Reconceiving the communications laws needed for a modern era is a worthy task for the Congress and is increasingly vital to our economy as well. Too much has changed since 1996 to avoid the task, and too much is at stake if we shrink from this challenge.

CHARLES M. DAVIDSON*

IMPLEMENTING THE ACT IN FLORIDA
FOLLOWING CONGRESS'S CLEAR DIRECTIVES

At the state level, the decade or so after enactment of the Telecommunications Act of 1996[1] was a time of much confusion vis-à-vis implementing the law's many telephone-related provisions. Justice Scalia's criticisms of the Act, that it was not a "model of clarity" and was in "many important respects a model of ambiguity or indeed even self-contradiction,"[2] proved to be an enduring truth, as state regulators clashed with the FCC over jurisdictional boundaries and regulatory roles.[3] Although a central part of the legislation, the Act's primary focus on creating competition in local telephone markets was quickly undermined by the rapid emergence of more robust IP-enabled competitors like VoIP, the meteoric growth of the wireless sector, and the increased popularity of high-speed Internet connectivity. Unlike many other states at the time, Florida was among the first to recognize the profound importance and enormous potential of these services for consumers and economic development.

Florida was a leader in responding to Congress's bipartisan directive to keep these new services "unfettered" by state regulation.[4] In 2003, Florida became the first state to explicitly deregulate VoIP, finding that a minimalist regulatory approach for this dynamic service was in the public interest.[5] It was also among the first to clarify that wireless services were not to be regulated by the state public service commission,[6] bolstering the certainty provided by the national regulatory framework for mobile that was

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

3. *See generally* Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L. J. 1131 (2014) (detailing many of these battles and the shifting balance of regulatory federalism before and after the Act).

4. 47 U.S.C. § 230(b)(2) (2012).

5. *See* Fla. Stat. § 364.01(3).

6. *See* Fla. Stat. § 364.01(1), (granting the Florida Public Service Commission jurisdiction over "telecommunications companies"); *see also* Fla. Stat. § 364.02(13)(c) (excluding CMRS (wireless) providers from definition of "telecommunications company").

implemented in the 1990s.[7] State policymakers also acted in the 2000s to free broadband service of unnecessary state and local regulation, aligning Florida's policy with the federal light-touch "information service" model that was being formalized at the time.[8] The resulting framework for these advanced communications services—light-touch in nature; supportive of market forces; and consumer-focused in all respects—contributed to the development of a vibrantly innovative and intensely competitive high-tech sector in Florida, positioning it as a rational and effective model for furthering the spirit and letter of the Act.[9]

Despite the considerable successes facilitated by Florida's minimalist regulatory approach to advanced services, many states elected to pursue a decidedly different approach to implementing the Act. Indeed, many state regulators focused primarily on defending their regulatory authority over basic telephony, suing the FCC on numerous occasions in the decade following enactment in an effort to protect what they viewed as the proper balance of regulatory federalism.[10] This created a schism between traditionalist regulators, who focused only on preserving a formal regulatory role, and regulators who were accepting of a more limited regulatory role in order to unleash the true potential of advanced communications services.[11] Over time, more states elected to replicate Florida's deregulatory framework for advanced services, but the contours of this clash of regulatory philosophies persist to this day.[12]

In addition, recent actions by the FCC to reinterpret a key provision of the Act relating to regulatory authority over advanced services[13] and reclassify broadband undermines much of the progress made by forward-looking states like Florida, which acted in response to Congress's clear directive to implement light-touch regulatory frameworks for these services. In sum, it appears that, after 20 years, the sector has come full circle from a

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7. *See, e.g.,* Charles M. Davidson & Michael J. Santorelli, *Seizing the Mobile Moment: Spectrum Allocation Policy for the Wireless Broadband Century*, 19 COMMLAW CONSPECTUS 1, 31-35 (2010) (discussing implementation of national regulatory framework).

8. *See, e.g.,* Fla. Stat. § 364.0361 (clarifying that local governments cannot regulate broadband providers); *see also* 47 U.S.C. § 153(24) (2012); Inquiry Concerning High–Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, para. 7 (2002).

9. *See generally* FLA. PUB. SERVS. COMM'N, REPORT ON THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY AS OF DECEMBER 31, 2014 (2015), http://www.psc.state.fl.us/publications/pdf/telecomm/20150730MasterComp.pdf (providing supporting data).

10. *See Federalism in Transition*, *supra* note 3, at 1154-1161 (discussing these clashes).

11. *Compare* Comments of the Nat'l Ass'n of Regulatory Util. Comm'rs, IP-Enabled Services, WC 04-36 (May 28, 2004), http://apps.fcc.gov/ecfs/document/view?id=6516199621 (advocating for state-level regulatory oversight of VoIP services), *with* Comments of the Fed'n for Econ. Rational Util. Policy, IP-Enabled Services, WC 04-36 (May 28, 2004), http://apps.fcc.gov/ecfs/document/view?id=6516200200 (providing contrary view).

12. *See generally Federalism in Transition*, *supra* note 3.

13. *See* Verizon Comm'ns, Inc. v. FCC, 740 F.3d 623 (D.C. Cir. 2014) (discussing at length the FCC's reinterpretation of Section 706 of the Act, 47 U.S.C. § 1302).

regulatory standpoint, an outcome that seemed unthinkable only a few years ago. Looking ahead, now might be the most opportune time for Congress to update the law lest the policies governing this sector become impediments to, rather than enablers of, further investment, innovation, and competition.

MICHELE FARQUHAR*

The Wireless Telecommunications Bureau was only a year old when the Telecommunications Act of 1996[1] was passed. The Bureau's immediate priority was to conduct the initial PCS spectrum auctions under its new auction authority,[2] as well as the related rulemaking proceedings and licensing efforts. The PCS C Block bidding was currently underway, with record-breaking bidding of more than $10 billion when the auction closed in May of 1996.

At the time, policymakers viewed wireless spectrum as a prime opportunity for new entrants to compete with the "duopoly" cellular carriers as well as incumbent local telephone companies and cable operators down the road. Accordingly, FCC Chairman Reed Hundt and the Bureau were focused on adopting spectrum caps, resale and roaming requirements and other regulations to bring new competition and investment to the relatively nascent wireless industry.

The Telecom Act presented a major opportunity to bring competition and investment to the broader telecommunications industry, although mobile wireless lagged far behind the wireline and cable segments in terms of deployment and penetration at that stage. Indeed, mobile wireless was typically viewed as a complement rather than a substitute to local wireline service, and generated less consumer and public interest group attention. The Telecom Act put the initial tools and framework in place to drive today's cord-cutting culture, however, particularly with its focus on interconnection,[3] access,[4] universal service,[5] number portability,[6] and cross-platform competition.

On a more personal level, the Bureau was an exhilarating and overwhelmingly busy place to work when I arrived in late November of 1995 from NTIA. The staff was hard working and enthusiastic, reflecting the combination of the former Private Radio Bureau with parts of the Common Carrier Bureau, as well as the new Auctions Division team, many of whom came from other agencies. Spectrum and licensing issues dominated our agenda, including proposing more flexible service rules and preparing to auction many new spectrum bands as well as the remaining "Swiss cheese" from previous site-by-site licensing. The Bureau was also focused on

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. *See* 47 U.S.C. § 309(j) (2012).
3. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 387 (codified as amended at 47 U.S.C. § 309(j)).
4. *See* 47 U.S.C. § 251(c).
5. *See* 47 U.S.C. §§ 254, 1302 (2012).
6. *See* 47 U.S.C. § 251(b).

developing new rules governing Local Exchange Carrier (LEC)-Commercial Mobile Radio Service (CMRS) interconnection arrangements when the Telecommunications Act was passed, and we needed to rethink some of our priorities going forward. Fortunately, our overall approach already dovetailed well with the competitive framework of the new legislation, but the devil was in the details—and there were many details to resolve.

Following passage of the Act, the Bureau worked closely with the Common Carrier Bureau, the Office of General Counsel, and other Bureaus on implementation of many provisions. Chairman Hundt recognized the importance of utilizing the perspectives and expertise of the Bureau staff, particularly given the disruptive role that mobile wireless carriers were likely to play in the future. The level of engagement and commitment was extremely high across the agency, enabling the Commission to undertake countless rulemakings on many complex and cutting-edge issues stemming from the Act during a compressed time period.

GEORGE S. FORD*

I joined the newly-created (and now eliminated) Competition Division at Federal Communications Commission about eighteen months before Congress passed the 1996 Act.[1] To give you an idea about the state of the market at the time, consider the following statistics: At the time, all but 6% of American households had a wireline telephone provided by a local telephone monopoly; today, less than half do.[2] Access charges were nearly $0.07 and a long distance call would run you about $0.14 per minute;[3] today, there is no longer an independent "long distance market." Wireless voice service was considered a luxury, with only about 20 million wireless subscriptions; today, there are over 355 million.[4] The first spectrum auction would take place in my first year at the Commission, permitting the entry of multiple new wireless providers and creating a consumer product of broad appeal not long afterwards; today, the FCC recently completed Auction 97.[5] Windows 3.1, the first commercially successful version of the now-ubiquitous Windows operating system, became available only two-years prior to the Act.[6] My FCC computer had a 20-megabit hard drive running a 486 processor. The Internet was in its infancy. About a year after I started, a few of us in the Competition Division would figure out how to hack our way to the World Wide Web from our work desktops using the Mosaic browser—a practice not formally encouraged by the Commission. AOL would not begin offering an unlimited fixed-price dialup service until 1996.[7] The FCC

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See* FCC, TRENDS IN TELEPHONE SERVICE (July 1988), https://transition.fcc.gov /Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend298.pdf; *see also* Alina Selyukh, *The Daredevils Without Landlines—And Why Health Experts Are Tracking Them*, NPR (Dec. 3, 2015), http://www.npr.org /sections/alltechconsidered/2015/12/03/458225197 /the-daredevils-without-landlines-and-why-health-experts-are-tracking-them.

3. *See* TRENDS IN TELEPHONE SERVICE, *supra* note 2, at 4 tbl. 1.2, 74 tbl. 13.5.

4. *See id.* at 8 tbl. 2.1; *see also Year-End U.S. Figures from CTIA's Annual Survey Report*, CTIA (June 2015), http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey.

5. *See* Peter C. Cramton, *The FCC Spectrum Auctions: An Early Assessment*, 6 J. ECON. & MGMT. STRATEGY 431, 438 (1997); *see also Summary for Auction 97*, FCC (Oct. 1, 2015), http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=97.

6. *See A History of Windows*, MICROSOFT (Oct. 2015), http://windows.microsoft.com/en-us/windows/history#T1=era3.

7. *See AOL Pricing Draws Fire*, CNN MONEY (Nov. 1, 1996), http://money.cnn.com /1996/11/01/technology/aol.

would not begin reporting the number of high-speed Internet connections until 2000.[8]

There was plenty of traditional regulation going on at the time, but the promotion of competition was the focus of attention.[9] Americans had already experienced the benefits of competition in consumer premises equipment and in long distance services—they could choose from over 800 long distance providers in 1994 and prices were steadily falling.[10] But, local telephone and cable television services remained, for all practical purposes, monopolies. As for local telephone services, FCC statistics assigned a market share to competitive providers of 0.3% in 1994, and DirecTV was launched in that year.[11] Direct competition from cable overbuilding, the topic of my PhD dissertation, was exceedingly sparse. Increasing, if not outright creating, competition in these last vestiges of monopoly in communications was on everyone's mind.

As we searched for ways to affirmatively nudge these markets toward competition, the tendency at the time was to point to regulation as a barrier to competitive entry, and rightfully so. Regulation was then, and remains today (though perhaps less so), a barrier to entry into local markets. More significant to the deterrence of entry, however, was and is the fundamental economics of providing local wireline services; fixed costs are high relative to market size thereby limiting the number of financially-viable providers.[12] But we weren't greedy—we would be happy with only one additional facilities-based entrant and understood even this to be a long shot. Duopolistic competition was the objective, and we understood that even two-firm rivalry would outperform regulation in almost all cases. Congress felt the same and codified the sentiment: the 1992 Cable Act defined "effective competition" as the presence of one-half a competitor, a situation that led to the forbearance of rate regulation.[13] If duopoly could be achieved, it was a

8. *See* HIGH-SPEED SERVICES FOR INTERNET ACCESS: SUBSCRIBERSHIP AS OF JUNE 30, 2000 (2000), https://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/ hspd1000.pdf.

9. While much attention is given to the Telecommunications Act of 1996, history shows that there were efforts well underway to produce competition in local exchange markets before the Act. MCI Communications' "building blocks" approach laid out an early version of a network unbundling scheme. *See, e.g.*, Alexander C. Larson & Steve G. Parsons, *"Building Block" Cost Methods for Pricing and Unbundling Telecommunications Services: Implications for the Law and Regulatory Policy*, 36 JURIMETRICS J. 59, 87-96 (1995). Resale and unbundling were being "litigated" before some of the public service commissions in the Ameritech territory, especially in Illinois. *See* David J. Teece, *Telecommunications in Transition: Unbundling, Reintegration, and Competition*, 1 MICH. TELECOMM. & TECH. L. REV. 47, 94 & n.111 (1995). These ideas would form the basis of the unbundling regime contained in the 1996 Act. Unbundling was not a federal idea.

10. *See* TRENDS IN TELEPHONE SERVICE, *supra* note 2, at 38 tbl. 9.1, 74 tbl. 13.5.

11. *See id.* at 29 tbl. 8.1; *see also A Look Back at 1994*, SATELLITE BIS. NEWS (June 29, 1994), http://www.satbiznews.com/94look.html.

12. George S. Ford et al., *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FED. COMM. L. J. 331 (2007)

13. 47 U.S.C. § 543(*l*)(1)(B) (2012).

victory and the starting point for deregulating the communications landscape.

Promoting competition and deregulation, though the two need not be interdependent (regulation can be bad even under monopoly), were our goals and eventually the nation's goals with the passage of the Telecommunications Act of 1996.[14] I would not work on implementing the 1996 Act at the Commission; in August of that year, I took an economist position at MCI Communications. MCI was the leader in promoting competition in those days—a creative and intelligent group with great respect for the law, the economics, and the engineering of the communications industry. Later, as a result of the darkness we know as Bernie Ebbers,[15] I would take a job with Z-Tel Communications, a small Competitive Local Exchange Carrier (CLEC) based in Tampa, Florida. The company began as a software company, trying to make telephone service more useful, but learned that to offer its services it needed to own the customer, a need that could be met using the unbundled network element (UNE) Platform.

Both MCI and Z-Tel were active users of unbundled elements and vocal advocates for it. About the time a business plan using network elements appeared feasible, the unbundling regime began crumbling. Incessant litigation, the FCC's inability to set a legal "impairment" standard, and the adverse political winds were taking their toll. Regulation and litigation were against the CLECs, but my vision of the CLECs death came in the early 2000s, a few years before the FCC would effectively shelf the unbundling experiment. Bright House (the cable system in Tampa) began offering a fully-featured, unlimited voice service for much lower than the price offered (or could be offered) by CLECs for the same service. Seeing this development first hand, I knew the CLEC sector was doomed.[16] The unbundling regime—which rested on shifting political sands, heavy regulation by both state and federal regulators, and poor incentives—was no match for facilities-based entry by the cable industry. In my research on the industry prior to my employment at the FCC, I had read numerous articles published the 1980s and 1990s talking of cable systems offering phone service and telephone carriers offering video service. This cross-entry was a bit of running joke at the Commission. And then, it wasn't a joke anymore—it was reality. Since the costly unbundling regime offered nothing better than the cable industry could provide (as well as other Internet-based phone providers), the unbundling scheme became, in almost an instant, a very high-cost, low-benefit public policy.[17]

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14. *See* George S. Ford & Lawrence J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 COMMLAW CONSPECTUS 126, 133 (2014).

15. *See Bernie Ebbers*, TIME (June 9, 2009), http://content.time.com/time/specials/packages/article/0,28804,1903155_1903156_1903277,00.html.

16. *See* Louis Hau, *Bright House Rolls Out Internet Phone Service*, ST. PETERSBURG TIMES (Aug. 31, 2004), http://www.sptimes.com/2004/08/31/Business/Bright_House _rolls_ou.shtml.

17. *See* Ford & Spiwak, *supra* note 14, at 134-36.

During the implementation of the 1996 Act, I was engaged in a continual stream of fights over unbundling rates, statistical performance plans, and the entry of the local phone companies into the long distance industry. It was an exciting time for communications policy professionals. The lessons learned over this period are too numerous to list and perhaps too numerous to recall (though likely stored in the unconscious). There are a few lessons, however, that continually influence my thinking on the industry and its regulation.

First, an expert in local wireline service competition must be an expert in the economics of competition in concentrated markets. Almost all the policy conservation is about large numbers competition, which is entirely inappropriate and misleading given that the economic conditions of the industry limit the number of financially-viable competitors. In fact, when fixed costs are high, as they are, adding competitors can be detrimental to social welfare. What is often misunderstood about competition is that price cuts must be purchased by society, the price of which is the replication of fixed costs. At some point, the price effects just aren't worth the cost, and this happens with very few competitors in naturally concentrated markets.

Second, there is no real constituency for competition. Firms mostly hate it, and the government is interested only if competition produces the outcomes it deems desirable. It rarely does. Competitive firms don't like to sell things below their costs, but government officials love for them to do so. Subsidies, which infect the industry even today, are the enemies of competition but the friend of elected officials (and their appointees). Practices like usage-based pricing, promotional strategies, and two-sided pricing are competitive outcomes, yet often despised by regulators.[18] Regulators want what they want, not what the interaction of buyers and sellers produces. As economist Friedrich Hayek observed, "competition is important only because and insofar as its outcomes are unpredictable and on the whole different from those that anyone would have been able to consciously strive for; and that its salutary effects must manifest themselves by frustrating certain intentions and disappointing certain expectations."[19] Policymakers often pick desired outcomes and then, unthoughtfully, expect competition to produce them. It often doesn't work out as intended.

Third, the argument for competition is an argument against regulation. Both telephone and cable services were heavily regulated in the early 1990s. Regulation, done properly, is intended to mimic competition. If effective, then the presence of regulation should imply no need for competition. Yet, when competition appeared in the communications landscape, there was no question about its measurable and often significant effects. The desire for competition demonstrates a dissatisfaction with regulation, something often forgotten in today's policy debate—a lapse that had led, in part, to the present

18. *See* George S. Ford et al., *A Policy and Economic Exploration of Wireless Carterfone Regulation*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 647, 650-51 (2009).

19. *See* Friedrich Hayek, *Competition as a Discovery Procedure*, 5 Q. J. AUSTRIAN ECON., Summer at 9, 10 (2002).

regulatory revival at the FCC. Neither regulation nor competition can consistently satisfy the ever-shifting whims of politicians and political advocates; dissatisfaction is the only constant.

Fourth, and related to the third, the 1996 Act provided an experiment that revealed just how hard regulating the communications business is. I learned this lesson working on the payphone proceeding, implementing Section 276[20] of the 1996 Act (a task most would view as dreadful, but I continue to consider the most interesting proceeding of my twenty-plus year career). In the years after the 1996 Act was passed, the Commission was engaged in a number of highly involved and simultaneous proceedings including unbundling and the reform of the access charge regime and its universal service programs. But, in the midst of all this complexity, there was a payphone proceeding in which the Commission was required to set a single price for a single service—a service whereby consumers could connect to a long distance provider to make phone calls from payphones to avoid the typically high rates charged by the payphone providers. This simple task served as a test for the Commission's regulatory prowess. It took the Agency three tries to write a legally-defensible order.[21] In my view, the final order was as defective as the two prior, but the court seemed exhausted with the issue and by the time the FCC was done, the payphone industry was a shadow of its former self (falling from over two million phones to about 400,000 today). The Agency's inability to routinely set a single price for a clearly defined service shows just how hard it is to regulate communications. A little humility, and a little empathy, are called for.

Fifth, now that competition exists in pretty much every sector of the communications industry, the FCC is primarily in the business of shifting around rents among industry participants. The Commission's net neutrality rules, for example, are plainly designed to shift rents away from infrastructure companies and toward edge providers. Given that few competitors is the rule, a "high concentration" story is always available to those wanting more regulation as an excuse for regulatory intervention to favor one industry segment over another or to "protect consumers." The number of competitors sufficient to end the call for regulation equals the number of guitars a guitar player needs—one more. If you put out a complaint box, you'll get complaints.

Sixth, language matters. Sitting on my desk at Z-Tel was a large stack of testimony by ILEC experts from years before touting the benefits of LRIC (long run incremental cost) pricing. It was unusable against their attacks on TELRIC (total element long-run incremental cost pricing) because the FCC had appended "TE" to "LRIC" and, consequently, created an entirely new animal. They were the same cost standards, but this simple change in the language led to enough confusion to largely render decades of research and testimony on LRIC useless in an adversarial proceeding. Through a smart

20. 47 U.S.C. § 276 (2012).
21. *See* Sprint Corp. v. FCC, 315 F.3d 369, 371-73 (D.C. Cir. 2003).

and effective media campaign, the ILECs defined TELRIC (in the public view) as "below cost pricing." Despite the Supreme Court affirming the cost standard in 2002, TELRIC would never shake this perception (it remains intact today).[22] Be careful of the language you use.[23]

Of course, the bigger question is what has the larger "policy collective" learned from the experience of the 1996 Act? As far as I can tell, not much. It is said that those who cannot remember the past are doomed to repeat it.[24] The early reflections are now audible.

22. *See* Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002).

23. *See, e.g.*, Julian Hattem, *A New Name for Net Neutrality*, THE HILL (Sept. 11, 2014), http://thehill.com/policy/technology/217391-new-name-for-net-neutrality.

24. *See* George Santayana, LIFE OF REASON, VOL. I (1905).

ANNA GOMEZ*

It is important to remember how monumental the task of implementing the 1996 Telecommunications Act[1] was for the Commission. Many of the deadlines in the Act were extremely challenging, starting with a thirty-day deadline to initiate a proceeding to overhaul the Universal Service regime. This was followed by numerous Notices of Proposed Rulemaking to be adopted within six months of passage of the Act. The first thing the staff did, therefore, was break down the Act into a series of tasks with deadlines. The Bureaus then designated teams to work each of the categories of proceedings. It was a very heady time, with even junior staff often given significant responsibility for implementing the provisions in the Act. The Act's multiple policy pieces formed a "competition puzzle" that the Commission had to, and did eventually complete.

The Commissioners and their advisors were heavily engaged from very early on in the process. We held numerous meetings to brief them on the Act and on our proposals for meeting each of the Act's mandates. When we delivered the drafts, we met with the Commissioners' advisors collectively to discuss their questions and proposed edits. The advisors negotiated their edits together in meetings that the staff attended, and the Bureaus helped facilitate those negotiations. For a staffer, it was a thrill to participate in these meetings, with the legal advisors debating the law and the policies—in an impressively collegial manner given the pressure that everyone was under—and reaching bipartisan consensus in time to meet the statutory deadlines.

In terms of substance, one of the major policy goals of the Act was opening local markets to competition. At the time, long distance and local service were still largely separate services, and the "death of long distance" was still to come. The Act did not anticipate mobile substitution, convergence, or VoIP as a competitor to the incumbent local exchange carriers. Therefore, most of the discussions within the Commission were about creating an environment that would allow local competition to flourish. The issues were extremely complex and hard fought, but in the end, the Commission was optimistic that its policies would drive lower prices and foster innovation. One can debate whether the Commission's policies were ultimately successful. But, at the time, even though there were many different points of view, there was an extraordinary sense of common purpose throughout the agency, as everyone was unified in the desire to meet the Act's objectives.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

CHAIRMAN REED E. HUNDT*

Presidents sign important bills into laws with multiple pens, so as to hand out a dozen or so to key participants in the process. When Bill Clinton signed the 1996 Telecommunications Act[1] into law, Commerce Secretary Ron Brown grabbed two off the table—one for himself and one he gave to me, because I was the chairman of the Federal Communications Commission. He gave me his trademark wink, as if to say, good luck! My pen is framed on my wall. I don't know what happened to Ron's. Two months later he died in a plane crash in Croatia.

Anyone who lives long enough confronts tragedy. If we can learn from it, the lesson is to be infinitely grateful when visited by luck and success. For those of us at the Commission and elsewhere in government who implemented, enforced, and reformed the nation's regulatory paradigm over the last two decades, the enactment of the 1996 Act was a great piece of luck. It permitted all of us to help create the fascinating, overwhelmingly successful, and never-ending communications revolution.

Plainly some of the results of the digital age have been sinister, deadly beyond imagination. No technology resists use by forces of evil. Yet the overall legal framework of the 1996 Act has enabled principles of entrepreneurial competition and individual liberty to spread around the world.

All knew from the day of signing that the Act had everything to do with change, and something to do with the Internet. Vice President Gore's policy adviser, Greg Simon, arranged for President Clinton's bill signing to take place on the Internet, a first in such ceremonies. Simon, who in late 1993 was the first person to show me the Internet in action, also had the superb idea of setting the signing ceremony in the spectacular central room of the Library of Congress. The law, among other things, was meant to fulfill the promise Vice President Gore had made years before: "The schoolgirl in Carthage, Tennessee, should be able to have access to all the information in the world's biggest library without leaving her hometown." And indeed, then-Congressman Ed Markey and Senator Jay Rockefeller had assured (thanks to Senator Olympia Snowe's crucial vote) that the bill authorized the FCC to allocate enough money to connect every classroom and library to the Internet—this was the E-Rate, recently reformed and expanded by the Wheeler Commission.

The Republicans had won the House and Senate in the previous election by running against the Administration's tax increase in the Omnibus Budget Reconciliation Act of 1993 and the failed universal health care bill. Nevertheless, the Republican leadership, Senator Dole and Speaker Gingrich, supported the telecommunications reform, as did the White House

* In 1996, Reed E. Hundt was Chiarman of the FCC.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

and Congressional Democrats. The principal reason for the huge bipartisan support (only Senator John McCain was a prominent outlier) was that the great lobbying enemies, AT&T and their severed satrapies, the regional Bell companies, had agreed to attack each others' markets, and thus wanted a bill that let them both have at it. Neither the Bells nor AT&T then understood that the Internet was the ring to grasp.

The guiding principle of the new law was that FCC rules would open every communications market to competition. By contrast, the 1934 Communications Act gave the Commission the task of regulating monopolies, especially the national telephone monopoly of AT&T. In succeeding decades, Congress expanded the Commission's jurisdiction to cover such new markets as broadcast television, cable, satellite and cellular. In each case the Commission's regulations tended to minimize business risk for incumbents, in exchange for providing public interest benefits. At least until the 1980s, Congress and the agency typically encouraged oligopolistic market structures, hived off markets from one another, slowed the pace of technological change, and created barriers to market entry.

By contrast, the 1996 Telecommunications Act asked the Commission to adopt the opposite approach. Rules should be erased or rewritten to create competitive markets. Barriers to adjacent market entry and new market creation should be reduced. The agency should encourage firms to take risks in return for reward. In short, everyone should compete with everyone and try everything that innovation permitted. The Act was only a tenth as long as, say, the Affordable Care Act, because it did not contain a plan for a particular outcome for any market. Competition, not Congress or the Commission, would produce optimal results.

Because existing markets were monopolized or oligopolized, the Commission had to write rules that in effect created irresistible opportunities for new entrants. Overall, the agency had to conduct more than four dozen separate proceedings. The affected parties had billions of dollars at stake, and they hotly contested every erasure of old rules and every phrase of new rules. This sea change in regulation and business models was accomplished, under the Congressional deadlines, in eighteen months, not counting the time for judicial review that followed.

Not only those in the agency, but also the business participants in this process would probably say, twenty years later, that they never worked so hard to produce such momentous results.

As everyone drilled down on the details of reform, the Internet's rapid growth and astounding potential for transformation transfixed imagination and stimulated a huge stock market run-up. In that ramshackle eyesore of a building at 1919 M Street, we were at the center of global change.

Fortunately, as we worked, the President sailed smoothly to re-election, so that our team stayed in office until we completed our processes. Our brilliant lawyers then won the key cases on judicial review, including a five to three victory on the meaning of federalism in the Supreme Court after I had turned over the agency's helm to the new chairman, Bill Kennard.

Because of technological innovation and the new paradigm of the Act, seismic waves of change hit the communications, computer and content industries. How could any of the leaders of the incumbent companies know what new strategies to select?

The old AT&T telephone monopoly had been broken up by the Department of Justice in 1982. It was divided into seven regional local telephone monopolies, known as the Baby Bells, and a separate long distance industry, dominated by AT&T, with MCI and Sprint as challengers. This structure was locked into place by a court order known as the Modified Final Judgment. The new law repealed the MFJ, and permitted the Baby Bells to enter long distance when the FCC granted permission.

The two most visionary local companies, Southwestern Bell and Bell Atlantic, used the new law to pursue an acquisition strategy. They bought the other telephone companies, in order to achieve economies of scale as they attacked AT&T in long distance. But soon they realized that their right goal was to become what they are now, under the names AT&T and Verizon, namely, the leading national wireless carriers. The firms' shift from regional wire line to national wireless is the most dramatic business model change at a really large scale in modern history.

AT&T also welcomed the 1996 Act. It argued especially hard for the Commission's rules that gave it the right to lease the local access network. The company wanted to offer its customers, more than half of the population, local and long distance service. But after barely a year of effort in this strategic direction, AT&T tried to merge with Southwestern Bell. Don't beat them, join them—that was what AT&T's CEO Bob Allen seemed to be saying in 1997 when he declared that this merger, at odds with the premises of the Act, was in fact "thinkable." In one of the last decisions during my chairmanship, my team coached me up (with the support of key Senators) to explain publicly under the new law's competition paradigm the suggested merger was "unthinkable." That word, I learned years later, killed the merger that was actually being negotiated in a conference room at the time of my speech.

In the wake of this fiasco, Mike Armstrong replaced Bob Allen as AT&T's CEO. He also had no stomach for leasing the Bell network to acquire local voice customers. Instead, he used the cash flow from the company's huge but shrinking long distance revenue to acquire cable companies. By 2000 AT&T had become the biggest cable company in the United States, under the name AT&T Broadband.

As AT&T splurged on acquisitions the tech-driven stock market soared to bubble heights. The cheap capital of IPOs and easy credit enabled firms to build the new communications infrastructure at a rapid rate. From the mid-90s to the early '00s, firms invested more than a trillion dollars in building the new, digitized networks that undergird communications to this day.

But AT&T's timing was dismal. It paid sky-high prices for the cable assets, and had to borrow a lot for the deals. Almost from the moment it had finished construction of its cable empire, the stock market began a long, steep

decline, and the nation entered the mild recession of 2000-2001, AT&T could not hold on to its purchases. In 2001 it sold its cable companies at huge losses to astute, patient Comcast, and Brian Roberts became the new king of cable.

Even worse, AT&T spun off its wireless business: expanding that should have been its strategic goal. But how could anyone in the old fixed line telephone business have that insight? The 1996 Act exiled big companies from edenic incumbency and sent them wandering into unknowable futures. Some thrived. Others, like AT&T, withered.

In 2005, SBC bought that once great company after all. The buyer wanted this icon of twentieth century America for its long haul assets and its brand name. SBC paid $16 billion. AT&T's market capitalization was $250 billion in 1997, when I had blocked the same merger. The 1996 Act envisioned competition, and therefore necessarily imagined that some firms would be destroyed in the market.

A few weeks before the momentous day when Ron Brown snatched that pen for me, Bill Gates, then Microsoft's CEO, went to the Oval Office to make a last-ditch effort at persuading the President to veto the bill. Perhaps he was concerned about the speed of change that would follow. He already knew the Internet was threatening his operating system monopoly. Clinton listened attentively. Gates felt he had made some headway, as he flew to New York. Looking at the television screen in LaGuardia after landing, he saw that the President had agreed to sign the bill.

A year and a half later, in 1997 the FCC extended the enhanced service provider exception to Internet access by explicit order. As Steve Case, then CEO of AOL, understood, this decision guaranteed that firms like his could offer dial-up access to the Internet by using the local Bell company's monopoly telephone network for free. He enjoyed guaranteed distribution to almost every building in the country. Case leveraged this regulatory advantage into the creation of a national franchise in e-mail.

Gates had imitated, and then crushed Netscape's browser, the initial method of accessing the Internet. However, under threat of both the Department of Justice lawsuit against extending his Windows monopoly and the pace of change, he was not able to lead in the next big thing, e-mail. Then came search, where Google won dominance. Later, access became a mobile experience, and Apple made apps the cool new way into the Internet. Gates had more reasons to ask for a veto than he knew.

The government wanted the 1996 Act to produce this sort of Schumpeterian competition—cycles of creative destruction producing increasing social and economic benefits. Everyone knew that somehow the story was about the Internet. But no one knew which firms would win, or how long winners would hold their leads. Rapid change was the only certainty.

That access decision, and many other decisions implementing the pro-competition paradigm of the 1996 Act, helped assure that the culture of the Internet would be open and ever-changing, chaotic and creative, risk-taking and reward-producing. Over the last two decades, through all the twists and

turns of technology and politics, the Commission has continuously supported and extended the best attributes of that culture. To this day, the results of that steady purpose should give us confidence that the public and private sectors can work in rambunctious concert to better the human condition.

MICHAEL L. KATZ*

COMPETITIVE CONSEQUENCES OF TECHNOLOGICAL CHANGE AND THE TELECOMMUNICATIONS ACT OF 1996

In 1995, as today, digital was all the rage. Although ISDN stood for "it still does nothing," there was excitement about ATM (Asynchronous Transfer Mode, not cash machines) and the possibility of having "Swiss Army networks" that would carry voice, video, and data. The potential for the Internet—at least the fixed-line version—was widely recognized by Commission staff. In fact, I think we tended to overestimate how quickly it would disrupt the established regulatory order. I remember how each holiday season we predicted that, because voice was so cheap when viewed as data, this was going to be the year when a new VoIP product would destroy the landline telephone pricing regime as we knew it. It never happened. But an even more important development that people eagerly anticipated was that digital networks would engender greater competition. It was hoped that the convergence of broadband networks would lead telcos and cable companies to enter each other's lines of business.

Although I don't recall the issue's ever rising to the Commissioner level, even in the mid 1990s several of us on the staff and in industry believed that the biggest issue in future telecom policy debates was very likely going to be the regulation of Internet access services. The big question that no decision maker had the appetite to address in advance was this: would the likely cable/telco duopoly for Internet access services be considered competitive enough to avoid regulation, or would data also eventually become subject to price regulation?

Looking back, the biggest technological development that we failed to foresee was how important mobile data would become. In 1996, we had recently finished the first spectrum auctions for Personal Communications Service. People were very excited about the benefits of mobile phones, especially the new smaller flip phones. But the excitement was about the convenience of mobile voice, not data. And the biggest excitement about mobile voice was the possibility of relying on competition, rather than regulation, to set prices.

While many of us were excited by the prospects of competition facilitated by wireline convergence and wireless entry, the Telecommunications Act of 1996[1] largely pinned its hopes for competition on getting local and long distance carriers to enter each other's markets in return for various forms of regulatory relief.[2]

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See* 47 U.S.C. §§ 251, 271 (2012).

So what happened? With the benefit of hindsight, it is clear that the 1996 Act bet on the wrong horses for competition. After fits and starts, cable companies and telcos did enter each other's business, and they now compete head to head. Today, we have competition among four nationwide wireless carriers as well as several smaller, local and regional carriers. By contrast, neither the 1996 Act's grand plan for inducing local and long distance telcos to create competing local exchange carriers, nor the considerable regulatory efforts to promote competition by unbundling the local loop, led to significant, lasting competition. Many of us were skeptical at the time of the Act's fundamental premises with respect to the mechanisms for promoting competition, and that skepticism proved to be well founded. Fortunately, there were several other avenues to competition.

MICHAEL KELLOGG*

BE BOLD!

"Be bold!," FCC Chairman Reed Hundt told his staff implementing the 1996 Act.[1] And they were indeed bold in their efforts to open up local telecommunications markets to competition. So bold that the resulting regulatory scheme was repeatedly rejected by the courts.

The goal of competition was laudable, but the means chosen were lamentable. Despairing of actual facilities-based competition, the Commission chose instead to create artificial competition through radical unbundling and rock bottom pricing of the local telephone networks. The jewel in the crown of the FCC's creation was the so-called UNE Platform at TELRIC prices.[2] UNE-P is the sham equivalent of resale; TELRIC is . . . well, few remember what the letters even stand for. The idea was to push prices to idealized levels that no actual provider could possibly match. The result of course would have been to discourage anyone from building competing facilities had the courts not intervened.

Stock market values for start-ups soared as analysts either believed the FCC's rhetoric or anticipated a giant regulatory wealth transfer. Stock market values crashed when investors realized that none of these local competitors had a viable business plan for adding value. Competition has come: but it has come from cable, VoIP, and wireless, not from regulatory fiat.

The FCC itself later admitted that almost no genuine competition resulted from the agency's extreme interpretation of the unbundling and resale provisions of sections 251 and 252.[3] The most significant advances from the 1996 Act were the provisions that simply required regulators to get out of the way: the removal of state and local entry barriers in section 253;[4] the required interconnection among networks; and the entry path to long distance for the Bell companies in section 271.[5] The long distance restrictions in the AT&T consent decree had cost consumers billions of dollars in inflated pricing for a service that, once opened to competition, has become essentially free. The lesson we should take away from the 1996 Act is that regulators cannot create competition. They can only get in the way. The FCC's implementation of the '96 Act created was a costly mess and a cautionary tale.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. *See* Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, para. 672 (1996).
3. 47 U.S.C. §§ 251, 252 (2012).
4. 47 U.S.C. § 253 (2012).
5. 47 U.S.C. § 271 (2012).

"Be bold!" President Obama directed the FCC in its ironically-named Open Internet proceeding: competition cannot be trusted without extensive regulation to ensure a level playing field; new business ideas are a danger to least common denominator service for all comers. The resulting regulatory scheme will, once again, damage competition, pick winners and losers in the marketplace, encourage regulatory arbitrage, and, we can only hope, be thrown out by the courts.

La plus ça change.

GENE KIMMELMAN* & MARK COOPER†

The Telecommunications Act of 1996[1] resulted from almost a decade of political struggles between the increasingly powerful local telephone and cable television monopolies, versus long distance, satellite and the growing competitive electronics industry. It was based on the belief in a free market philosophy, which assumes that markets are always efficient and that competition will grow if government gets out of the way. This deregulatory experiment failed because market forces were far too weak to do the job. Consequently, the powerful transmission monopolies scored an enormous victory in 1996, gaining significant deregulation—but they also had to swallow updated consumer protections in the process.

Although proponents may have hoped transmission competition would somehow blossom from the Act, this was never economically plausible and instead consolidation of local telephone and cable companies exploded. The domination of the communications and media spaces by incumbents is as great, if not greater, today than it had been before the Act. The protection of consumers and competition has been weakened by the assault on Title II of the Communications Act and the effort to shift services to the other Titles of the Act that afford fewer protections. As a result, the updated FCC regulatory powers were called upon to police the exploding telecommunications sector dominated by transmission monopolies. Had the Act's proponents recognized the likelihood of massive consolidation, they may have provided antitrust enforcers or the FCC with stronger tools to prevent market abuse as the digital revolution unfolded. But they didn't.

The prematurely deregulated digital communications sector delivers more value to consumers, but that has nothing to do with deregulation; it is entirely a function of new technologies, which would have been deployed under all conditions. Today, the ongoing concentration of power in the hands of dominant cable and telephone based Internet service providers makes the nondiscrimination and consumer protection powers granted to the FCC under the Act critical to promoting fair competition, innovation and affordable access to essential services. So far, enforcement agencies have, at best, struggled to rein in transmission abuses and inflated prices resulting from market concentration in transmission of Internet and video services. Without strong antitrust enforcement and enhanced regulatory intervention,

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

the 96 Telecommunications Act is unlikely to ever produce the economic and social opportunities promised by its proponents.

JEFF LANNING*

People frequently comment about how amazing it is that dial-up Internet access and cell phones were in their infancy when the Telecommunications Act of 1996[1] became law. It is, indeed, remarkable how far we have come in just twenty years. If you stop and think about it, however, it may be even more amazing how little telecommunications had changed in the twenty years (and more) prior to the 1996 Act.

The decades prior to 1996 saw great innovation and change in computers but the biggest developments for telecommunications consumers were relatively small innovations such as answering machines, faxing documents, and long distance competition. More broadly, the biggest change in communications probably was the spread of cable television service, which was still largely analog and trying to adjust to the implementation of rate regulation. It is not hard to see why it was widely believed that the communications sector was not keeping pace with technology, and this was decidedly not just an American problem. Indeed, things were generally far worse elsewhere as most of the world had spent most of the Twentieth Century struggling with government-owned communications monopolies (frequently part of the postal service).

Much is made of the fact that the 1996 Act did not unfold as predicted, and even now it is common to hear passionate discussions about mistakes that were made or ways in which implementation of the 1996 Act may have deviated from Congressional intent. When we take this opportunity for reflection, however, it seems (to me at least) that maybe this state of affairs is exactly as it should be. No, things did not happen as planned, but isn't that the point? If market outcomes could have been planned, and regulatory oversight could have optimized consumer welfare, the 1996 Act would not have been needed in the first place.

I think we have to admit that, for all of the inevitable flaws in the statue and its implementation, the 1996 Act has been a success overall. Consumers, including the enhanced service providers (edge providers, as we call them today), have done very well. In addition, many of the social bargains struck throughout history, for example in support of public safety and universal service, have been preserved to a significant degree even as some measure of deregulation has been achieved. Looking ahead, however, it is clear that more needs to be done. In particular, network providers of all types face considerable challenges and uncertain futures while dealing with outdated and asymmetrical rules. We need to develop a new legal framework, whether through forbearance, regulatory reform, or legislation, that facilitates

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

competition while treating all providers equally, minimizing administrative costs, and promoting investment.

BLAIR LEVIN*

THE '96 ACT AND THE INTERNET
THE MYTH OF THE CONSENSUS LIGHT-TOUCH

Many hold the common but mistaken view that the successful Clinton-era telecommunications/Internet policies reflected a bipartisan consensus that light-touch regulation was all that was necessary for the Internet to thrive.

True, communications policy was more bipartisan in those days. That derived, however, not from a lack of controversy but from how that era's great policy divide—between Local and the Long-Distance Phone Companies—had advocates on both sides of the aisle. It is also true that in that galaxy a long time ago, compromise was not a dirty word. Both sides focused, not on press releases and tweets, but rather on how to obtain a healthy percentage of a loaf for their interests. The 1996 Act,[1] required the FCC to complete 110 rulemakings within eighteen months. Thanks to an extraordinary process organized by Ruth Milkman (then in the Chairman's Office and now back as Chief of Staff) in which the stakeholders knew immediately after the Act passed the precise timing for all filings and votes, the Commission met every deadline. Almost without exception, those votes were unanimous, even though the Chair and Commissioners generally started from different perspectives. What some now see as a bipartisan consensus was in reality more a fair and transparent process combined with a bipartisan willingness to compromise to move forward.

The bigger error, however, lies in the myth that all the Internet needed was the benign neglect of the government. A more accurate assessment is that the nascent Internet needed government assistance, just as did the nascent broadcast industry (with spectrum allocations and various protections for local broadcasters), the nascent cable industry (with mandated access to broadcast programming and pole attachment rights), and the nascent direct broadcast satellite industry (with spectrum and cable program access rights) all required in their early stages.

In the case of the Internet, the new platform faced the dominance by the incumbent communications platform, the telephone network, over which it initially rode. That dominance, was, of course, constrained by the application of Title II to the dial-up world, so thousands of ISPs were able to offer an on-ramp to the Internet of that era. But the Telcos had another tool to shape the Internet to their liking—terminating access charges. In the early days of the Internet, the Reagan era FCC wisely prohibited the imposition of

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

such charges on data traffic, which is one reason so much experimentation occurred here. Once the Internet went commercial, however, the Telcos again asked the FCC for permission to charge per-minute terminating access charges.

We teed that issue up for a rulemaking in 1997. Chairman Hundt went to visit Senator Ted Stevens, the legendary Chair of the Commerce Committee to persuade him of the wisdom of continuing the no access charge regime. Hundt did not succeed. Stevens, while supportive of many of our competition policies, characterized the policy prohibiting access charges as theft and advocated treating data and voice identically. We, however, responded by meeting with Steve Case, the CEO of AOL. Subsequently, the first e-mail lobbying campaign in history sent the Congress over 400,000 e-mails. Senator Stevens, and the Bell Company advocates who had convinced him to adopt his initial point of view, decided to drop the topic.

In its rulemaking, the FCC explicitly protected data from access charges, saving consumers billions (if ISPs paid the long-distance rate of 3 cents a minute, an hour of web surfing would have led to a monthly bill in the neighborhood of $60 a month) and enabling AOL and others to market an affordable, all you can eat Internet. The Telcos were hardly hurt, as they sold a record number of phone lines. But the important outcome was that the United States led in Internet innovation, as American consumers were willing to try different applications that others charged per minute, such as in Europe, would not have tried. The Stevens episode, and there were many like it, demonstrate that the policies did not emerge from a light-touch regulatory consensus. Rather, the policies reflected a tough-minded goal of assuring that incumbent platforms did not stifle the new, and a political process that did not avoid, but did resolve, conflicts.

Today, people increasingly take advantage of the manifold communications functions the Internet offers over mobile. There too, government played a key role. The early market of the 1980's, however, was constrained by two government decisions. First, the government only allocated two spectrum licenses per market, limiting competition and leading to mobile initially being a premium product. Second, wire line providers were able to charge high terminating access charges, placing the wireless platform at a significant disadvantage to the wired voice platform.

In the 90's, the government effectively reversed those decisions. First the FCC auctioned more licenses to create a much more competitive (with, at one point, seven national players) mobile market. Second, the FCC replaced high wireless to wireline terminating access charges with lower reciprocal compensation charges. The benefits of those decisions were felt first in the wireless voice market, which shortly after the reduction of access charges shifted from a premium to a mass-market service that today serves as the foundation of the mobile Internet.

There were many other government decisions that accelerated and benefited the Internet ecosystem, ranging from favorable sales tax treatment to stimulating demand and a build-out to lower income areas by subsidizing connections to schools, to the program access rules, that, by enabling Direct

Broadcast Satellites to compete more vigorously with cable, gave cable the incentive to upgrade its network and add broadband capability which in turn forced the Telcos to upgrade to DSL and fiber. There are many lessons to be learned from these historical patterns, including the role of government research and development in creating new technology alternatives, how the government has to assure incumbent platforms don't stifle new platforms, and how adjacent, non-symmetric competition drives a new consumer surplus much more readily than competition from new entrants or existing players in a mature market. But anyone who draws the lesson that the Internet arose from a hands-off policy is telling the tale their ideology dictates, rather than accurately reflecting the history those of us in the trenches experienced in confronting the choices and battles that shaped today's Internet.

COMMISSIONER SUSAN NESS*

THE LAW OF UNINTENDED CONSEQUENCES TWENTY YEARS LATER

Ten years ago, in a longer law review article entitled, *The Law of Unintended Consequences*,[1] I took stock of the impact of the then-decade-old Telecommunications Act of 1996.[2] I posited that the Act was a transitional roadmap, largely resolving past battles between major industry players, but not the best navigation device for charting the long-term rules of the digital road. I concluded that the underlying goals of the Act—promote competition and deregulation in local telephony and video, link schools and libraries to the Internet, and relax broadcast ownership rules—largely were met, although they were sometimes achieved in ways not fully anticipated by Congress.

My observations ten years ago remain valid today.

Over the past twenty years, our robust broadband ecosystem, coupled with the FCC's light regulatory touch, produced the right conditions for explosive growth and innovation. Digital platforms, web services, connected devices, and mobile technology are changing the way we live and work. In the United States, companies enjoy the marketplace conditions needed to break new ground and to reach countless potential customers for broadband-enabled services (think Amazon, Facebook, Google, Twitter, Expedia, Netflix, Uber, etc.). Technology and ingenuity, together with low-cost capital and a risk-taking culture—not the 1996 Act—have been the main drivers of this progress.

Like many acts of Congress, the 1996 Act has also been plagued by jurisdictional battles. Two decades later the wisdom behind the ill-fated "Title VII" proposal is more apparent. A streamlined regulatory regime for broadband providers might have provided the FCC with a less litigious path[3] to establish and enforce a practical, technology-neutral, light-touch, open Internet regime (not to mention freeing up two decades of FCBA attorney time for more productive debates).

As a result of the digital revolution, we are increasingly confronted by global policy challenges, such as cybersecurity, online privacy, and digital copyright protection. Stakeholders and governments working through these and other complex issues will need to be mindful that the slow-moving

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1. Susan Ness, *The Law of Unintended Consequences*, 58 FED. COMM. L.J. 531 (2006).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

3. *See, e.g.*, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010); U.S. Telecom Ass'n v. FCC, 15-1086 (D.C. Cir. Apr. 13, 2015).

regulatory process does not always adapt well to the dizzying pace of technological change and disruptive new business models.

Finally, a noteworthy achievement back then seems even more remarkable today: the 1996 Telecom Act required the FCC to complete around 75 rulemakings, many with very tight deadlines. The Commission did so—each one on time and with unanimity.

MELISSA NEWMAN*

Soon after the 1996 Act[1] became law, I was serving as Legal Advisor to Common Carrier Bureau Chiefs Kathy Wallman and Gina Keeney. The Act required the agency to undertake dozens of rulemakings—often under aggressive statutory deadlines—and most of those fell within the Common Carrier Bureau's bailiwick. Suddenly, an already-busy Bureau was immersed in a sea of additional proceedings, addressing a range of new issues: What elements of the incumbents' networks should be made available to competitors on an unbundled basis? At what prices?[2] Where and on what terms should incumbent carriers be required to interconnect, or allow their competitors to install equipment in their central offices?[3] How should the agency transition from a long history of implicit cross-subsidies to an explicit universal service program?[4] And what was the proper balance of state and federal power in addressing all of these questions?[5] Many of these were new and novel issues. It was both an exciting and very stressful period.

In some ways, it is hard to believe that this was twenty years ago. But in many ways, today's communications marketplace is nothing like the one the FCC regulated in 1996. Broadband services were still in their infancy in early 1996—indeed, most Americans were first coming to learn the word "Internet." Wireless voice services existed, but were a specialty offering utilized by very few. And term like "cable telephone service," "voice over Internet protocol," and "over-the-top" would have elicited blank stares from almost any FCC staffer. Thus, the decisions the agency reached in implementing the Act very much reflected the realities of the day—a marketplace in which intermodal competition was difficult to envision, and Congress's goals seemed difficult to effectuate without aggressive treatment of the incumbent local carriers. I was and remain very proud of the work my colleagues and I did to implement the Act under those conditions, and several of my coworkers from that period are among my closest friends.

As technology has evolved, though—and, to be sure, as I have moved from the public sector to a position at a Bell Operating Company—I have been struck by the ways in which the foundations underpinning our work in 1996 have eroded. After peaking at almost 118 million access lines in 2008, incumbent LECs as of December 2013 had only 66 million access lines. In contrast, there are now over 335 million wireless "lines" in service in the United States. Almost 39 million customers are served using VoIP. Many of

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. *See* 47 U.S.C. § 251 (2012).
3. *See* 47 U.S.C. §§ 251, 252 (2012).
4. *See* 47 U.S.C. §§ 254, 1302 (2012).
5. *See* 47 U.S.C. §§ 251, 252.

these developments, of course, have more to do with technological advance than with the work we did in 1996. But whatever the reasons, we live in a world very different from the one Congress faced two decades ago. In that light, the two most important questions arising from the 1996 Act may now be these: Can today's marketplace be governed by a statute written in the era of monopoly phone service and dial-up Internet? And, if not, what must all of us—in the private sector, in government, in the public-interest community, and elsewhere—do to ensure that the next twenty years are as successful for the American communications sector as the last twenty years have been?

JONATHAN E. NUECHTERLEIN*

I was a new telecommunications lawyer at the FCC when the 1996 Act[1] was passed. Within the Commission, people greeted the event with two distinct reactions. In public, they revered the far-sighted magnificence of this landmark legislation. In private, they began puzzling over the details and became more and more confused. For example, no one could tell exactly what role Congress wanted the Commission (as opposed to the states) to play in the pricing of network elements and interconnection. This was a glaringly obvious question, so why was it so hard to discern Congress's answer from the text of this highly detailed law?

The 1996 Act and its interpretive conundrums followed me when I left the FCC later in the year to join the Solicitor General's office. There I prepared briefs explaining to the Supreme Court why the FCC was right to read the 1996 Act as it did. I spent many long hours staring hard at the cryptic turns of phrase in Sections 251 and 252.[2] What I found was uncanny. For almost every major dispute, Congress had given each side almost equivalent statutory ammunition. An oblique phrase in one corner of the statute would balance a seemingly contradictory phrase in another. The Supreme Court noticed this too, calling the 1996 Act "a model of ambiguity or indeed even self-contradiction."[3]

This self-contradiction may have been no accident. The legislative enterprise often requires compromise. Sometimes compromise takes the form of a clearly articulated middle-ground solution. But sometimes, as in the 1996 Act, legislators compromise by enacting statutory ambiguity. Such ambiguity consigns important policy issues to years of legal uncertainty and punts their ultimate resolution to agencies and courts. But ambiguity also comes with a political benefit: each legislator can tell disparate constituencies that he or she had their best interests in mind and can blame someone else for any contrary interpretation that wins out.

Of course, Congress faces acute political challenges whenever it enacts major legislation with high commercial stakes. In the telecommunications sector, however, Congress also faces the equally difficult challenge of seeing around the technological bend. The 1996 Act was passed mainly to increase competition among circuit-switched providers of landline telephone services. Congress acknowledged the Internet but did not clearly foresee the broadband revolution and thus had little to say about broadband Internet access (fixed or mobile). By the time I rejoined the FCC

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. 47 U.S.C. §§ 251, 252 (2012).
3. AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

in 2000, that statutory omission had become painfully clear, as stakeholders began arguing about whether and how the FCC should regulate broadband Internet access. Sixteen years later, that dispute has only intensified.

All this said, it would be unfair to criticize Congress too harshly for politically expedient compromises and lapses of technological foresight. Arguably, the 1996 Act was among the better legislative packages Congress could have been expected to pass in the mid-1990s, given the political constraints and widespread technological assumptions. For example, by centralizing various policy issues at the national level, the 1996 Act enabled the FCC (eventually) to rationalize an increasingly chaotic intercarrier compensation regime and bring universal service support into the modern era. Congress also wisely gave the Commission forbearance authority to undo statutory mandates that outlive their usefulness.

If and when Congress considers new telecommunications legislation of comparable scope, it should draw two main lessons from the 1996 Act and its aftermath. First, as with the forbearance provision, Congress should continue legislating on the premise that competition, when effective, promotes consumer welfare more effectively than traditional regulation can and that policymakers should retain broad discretion to deregulate as appropriate.

Second, because this is a field characterized by unpredictable technological flux, Congress should enact mainly high-level principles and leave most of the details for the Commission and the marketplace to address as industry conditions evolve. There will always be room to question and litigate the wisdom of the FCC's regulatory choices. Ideally, however, that litigation should concern whether those choices make economic and technological sense in today's marketplace, not whether they comport with obscure statutory phrases written many years ago with different regulatory problems in mind.

COMMISSIONER MICHAEL O'RIELLY*

I will be forever grateful for the opportunity to work on the Telecommunications Act of 1996,[1] albeit as a very junior staffer. That legislative experience laid a solid foundation for the rest of my congressional career and eventually helped lead to my current position.

Generally, I believe that it is extremely helpful when Congress speaks on a particular issue, especially those that are communications-related, because it clarifies what is expected of regulators and industry participants. Appropriately, Congress should be complimented for enacting the 1996 Act, since it was the first comprehensive overhaul of the statute in over 60 years. And many of its fundamental principles still hold true, especially the idea that competition and free markets should reign over monopolies and regulation.

But in many regards, as can be the case with ambitious legislative efforts, the Act was a melding of different themes and compromises. Certain central provisions that seemed paramount at the time were somewhat backwards-looking and perhaps, in retrospect, naive. For instance, responding to the judicial breakup of AT&T[2] by opening the then-existing long distance market in exchange for local switched access voice competition.[3] The relevance of those markets quickly faded, but some of those provisions have taken on an unforeseen life of their own. Equally important, the adoption of general and vague statutory language in order to reach consensus has enabled many practitioners and the Commission to abuse such provisions for unrelated, unintended or ulterior purposes.

It is important to note that, at the same time the Act was being implemented, the unregulated tech economy rushed ahead, making many statutory provisions and assumptions obsolete, and leaving the Commission in the dust or even on the sidelines. While certainly there were discussions regarding the nascent Internet during the Act's formation, no one could have envisioned the colossal role it would eventually assume in the communications regulatory environment or Americans' daily lives. Since then, the disruptive effect of the Internet has blurred the lines between telecommunications, media and technology industries, and the Commission seems intent on dangerously flexing its regulatory muscle to impose legacy rules on modern technology to avoid being made irrelevant in the future.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See* United States v. AT & T, 552 F. Supp. 131 (D.D.C. 1982), *consent decree terminated sub nom.*, *United States v. W. Elec. Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. 1996) (terminating consent decree *nunc pro tanc*, as of Telecommunications Act's February 8, 1996, effective date).

3. 47 U.S.C. §§ 251, 271 (2012).

My central lessons from the 1996 Act experience add up to this advice for my friends on Capitol Hill: be specific, include sunset provisions where appropriate to keep new technologies free from old rules and bargains that have nothing to do with them, and be forward-looking. There used to be greater trust between the Congress and the Commission with regards to executing the provisions of a law. That no longer holds, and it is all-important that Congress write exactly what it wants and does not want from the Commission. Do not leave it up to chance. At the same time, spending a majority of energy on the hot topics of the moment, like imaginary net neutrality problems, prevents real focus on shaping the law for decades to come, rather than on the past.

MICHAEL PELCOVITS*

The Telecommunications Act of 1996[1] provided two important, and very different, mechanisms for increasing competition in wireline telecommunications markets. First, it removed barriers to entry, such as the legal prohibitions and obstacles (such as access to right-of-way) that were essential to new entrants.[2] In the same category, I also include the Act's imposition of very basic market rules, such as interconnection obligations that were a necessary foundation to introducing competition in previously monopolized markets.[3] Second, the Act enabled a regulation-intensive path to competition, whereby incumbents were required to offer unbundled network elements ("UNEs") at regulated rates.[4] I believe the first mechanism was a great success and the second a great failure. As the success is relatively obvious, let me focus on the failure.

The concept behind the "regulation-intensive" UNE approach was that certain elements, or components, of the local exchange network were much more difficult for entrants to duplicate than others. This was generally attributed to large economies of scale in the subscriber loop plant. The reasoning went that the only way that the entrants could succeed was by gradually building their own network, and in the interim, they would "lease" the monopoly components of the network still controlled by the incumbents. So much for theory—in practice the new entrants competed successfully only when they leased the entire local network of the incumbents (the so-called UNE platform), and this strategy was yanked out from under the entrants after extended legal and regulatory wrangling. The largest new entrants in the local market at that time, namely the long distance companies, were unable to find another strategy to compete against the incumbents and eventually faded away, in some cases by merging with the Regional Bell Companies.

The moral of the story is that policymakers must *keep it simple*. Detailed regulation of conduct, i.e. the transactions between a firm with significant market power and its fringe competitors, does not work. *It is not simple*. My own experience as the Chief Economist of MCI, which was a major player in this process, has left me convinced that regulation is too blunt a tool, and is subject to too time-consuming and too costly a legal process, to improve on the functioning of a market that will otherwise function reasonably well, especially if the market is technologically complex and changing at a rapid pace. I think this is mostly due to the asymmetry in

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56(codified as amended in scattered sections of 47 U.S.C.).

2. *See* 47 U.S.C. §251(b)(4) (2012).

3. *See* 47 U.S.C. § 251(c)(2).

4. *See* 47 U.S.C. § 251(c)(3).

information between the players and the regulators, and the formality of the procedures that govern regulation in the United States.

The role of government in these industries, even where there is a significant potential for monopolistic behavior, should be limited to basic structural controls and simple market rules. An example of basic structural controls would be the denial of mergers with significant competitive overlap (as opposed to merger approval with complex regulatory conditions attached). An example of simple market rules would be requirements on dominant providers to interconnect with horizontal competitors. The FCC did a good job developing and monitoring the rules that governed traffic exchange between incumbent and entering local telephone companies.

Have regulators learned this lesson? Obviously not, as the FCC reclassification decision proves. The FCC is once again leaping into the thicket of highly-detailed conduct regulation, albeit with the fig leaf of forbearance covering up the return of old-fashioned conduct regulation.

CHAIRMAN MICHAEL K. POWELL*

YES OR NO

When I was FCC Chairman I frequently testified before Senator John McCain's Commerce Committee. The Senator always began with a pointed question to me: "Was the 1996 Telecommunications Act a success, yes or no?" He wanted me to say no, given that he voted against the Act. I always answered emphatically, "Yes."

The Act,[1] to my mind, had a single compelling virtue. It rejected the longstanding view that communications services were natural monopolies and, as such, there should be a single, heavily regulated provider in each sector. Instead, the 1996 Act placed its faith in markets and lighter regulation as a way of unleashing competitive forces that would lead to increased innovation and better consumer outcomes. This single organizing principle provided a guiding light toward resolving issues, whether looking backward or looking forward. It was a blueprint for untangling the legacy of classic telecommunications regulation by allowing local companies to finally enter long distance markets (and vice versa).[2] It also invigorated competition by aligning incentives and removing restrictions for cable companies to enter telephone markets, telephone companies to enter video markets, and opening pathways for new companies to enter.[3] As regulatory success goes, this one was exceptional.

Looking forward, the amended Communications Act[4] was also a lodestar for addressing the emerging world of the Internet. Congress declared: "It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal and State regulation."[5] This directed regulators to resist the temptation to treat the Internet as a mere improvement of the telephone system and to avoid the reflexive instinct to regulate it as such. My office door was visited by untold numbers of Internet entrepreneurs asking anxious questions as to whether instant messaging, or Skype, or Vonage, or interactive gaming were regulated telecommunications services. Statutory words are rarely crystal clear when applied to emerging services. But the overarching principles of the statute gave direction to interpret this ambiguity in a manner consistent with the goal of not saddling the Internet with

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 118 (codified as amended in scattered sections of 47 U.S.C.).
2. *See* 47 U.S.C. §§ 251, 271 (2012).
3. *See* Telecommunications Act, § 202(i) (amending cable and telephone company cross-ownership restrictions contained in 47 U.S.C. § 533(a)).
4. Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064 (codified as amended in 47 U.S.C.).
5. 47 U.S.C. § 230(b)(2) (2012).

burdensome regulations. The bet was that by not doing so, the Internet would grow and reach Americans more quickly. And, by making the Internet more ubiquitous, give sustenance to the budding industry just starting to squeak on the west coast. Again, the results were stupendous. The Internet has deployed faster than any technology in history and many of those squeaks heard in the Valley now roar with global ferocity.

Sadly, the exceptional bipartisan consensus that gave birth to the 1996 Act and its liberating regulatory framework is breaking down. Now, the ambiguity of the Act—only getting worse with time—is being used to resurrect a muscular regulatory model that places renewed (and unfounded) faith in regulators to manage the Internet. The trends are ominous and cause me to rethink how I would answer Senator McCain today. I confess, I am wavering.

SENATOR LARRY PRESSLER*

The Telecommunications Act of 1996[1] is one of the finest and most successful pieces of legislation passed during my three terms in the United States Senate. It is certainly not perfect and needs to be updated. It was the product of nearly twenty years of options papers, debate, and struggle. Under the leadership of Senators Jack Danforth and Fritz Hollings, it did pass in the Senate once before but failed in the House; thus, when I became chairman of the Commerce Committee in the 1990s, I inherited the fruits of years of hard labor by many people.

We had sort of a magical moment in late 1995 when all the parties finally seemed in agreement to this massive document. During the two years before this, I personally visited all one hundred United States senators to try to get their input and to tell them we needed to pass this on a bipartisan basis, which we finally did with a 97-3 vote.

Basically, the Telecommunications Act of 1996 tried to deregulate (or re-regulate) the whole communications industry. Our goal was to let everyone get into everyone else's business if they wanted to.[2] We also tried to recognize that new technologies require large international firms. For example, it takes a big international company to put a satellite up or to lay fiber-optic cable in places such as India; thus, we were criticized for giving too many breaks to big companies.

On the other hand, we tried to create a whole host of new opportunities for smaller businesses to sometimes sell the products of a bigger company within their former domain.

And we worked on a daily basis with the labor unions, as they had to be on board for passage. Due to their demands, we had to accept limitations of out-sourcing on a lot of functions that a complete deregulation bill would have allowed. And believe it or not the labor unions were adamantly opposed to our putting any anti-trust language into the bill.

There were many strange twists in the tortuous path to passage. Vice President Al Gore usually spoke for the administration on this bill. Al and I had worked out a fairly complicated set of parameters for regulation of the cable industry, but then suddenly without any fanfare President Clinton returned from a cable convention in Las Vegas and word was sent over to me that the administration would only sign the bill if it only had complete deregulation of cable. I was astounded and disappointed, but most of my

* Senator Pressler served South Dakota for three terms in the United States Senate, from 1979 until 1997. Between 1995 and 1997, he chiared the Senate Commerce Committee, overseeing the Telecommunications Act's enactment. Prior to his time in the Senate, he served in the United States House of Representatives for two terms, from 1975 to 1979. Today, Senator Pressler is a lawyer, speaker, professor, and volunteer for homeless veterans.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See, e.g.*, 47 U.S.C. §§ 251, 271 (2012).

Republican colleagues were delighted; thus, the cable industry probably became the most deregulated were industry in the United States.

In terms of geography, the whole broadcast industry was turned upside down. Whether we like it or not, it is virtually impossible for players such as Sirius Radio to provide local news and local weather; thus, many people outside of urban areas feel they have lost their local radio news reporter and local radio news. This is unfortunately probably true, but we hope that gap has been filled by newer technologies.

Many people who complain about the Telecommunications Act of 1996 are concerned about lack of antitrust enforcement. In my opinion, no president during or since the 1996 Act has aggressively enforced antitrust laws. I have always been a "Teddy Roosevelt-type Republican" and am now an Independent. I believe in a more rigorous enforcement of the antitrust laws. I had not foreseen all of the consolidations that were to occur, particularly in radio, since the '96 act. The '96 act had almost nothing to do with anti-trust enforcement. The whole media industry benefits from a laxer enforcement of antitrust laws because the media falls under the Federal Trade Commission. The Federal Trade Commission does not have the staff or the expertise to successfully enforce antitrust laws and the Congress, presidents of both Democratic and Republican parties, and the public have been sound asleep about the enforcement of antitrust laws. We need stronger enforcement, but that is not the fault of the '96 Act.

We carefully avoided regulating the Internet going forward. We did not fully foresee how big the Internet would become, but leaving it deregulated has probably worked out better than having onerous government regulation.

The Act has worked out well. One economist called it the greatest industrial reconstruction of modern times. Others have said that it allows powerful companies and labor unions to take advantage of a struggling public. We do need a new updated Telecommunications Act to deal with the completely new technologies that we were not aware of in 1995-1996. And we were totally unaware of the national defense challenges that will have to be dealt with in a new telecommunications act.

MICHAEL PRYOR*

I was in the Policy Division of the then Common Carrier Bureau from January 1996 through 1999. From this perspective, the FCC's primary task was to utilize the framework contained in the 1996 Act[1] to jump start competition in the local telecommunications market. The Act gave the FCC just six months to flesh out a novel regulatory regime establishing the conditions for competition.[2] The resulting *Local Competition Order*[3] was truly an amazing achievement. It established ground rules for interconnection, identified the incumbent local exchange carrier (LEC) network elements that were to unbundled and offered to new entrants, and created a cost-based pricing methodology (TELRIC).

The 1996 Act's directive to jump start local competition seemed to compel entry through the use of incumbent LEC, and particularly Bell company, unbundled network elements (UNE).[4] Facilities-based entry did not seem viable in the near term, particularly for residential consumers. The emphasis on UNE-based entry not only seemed consistent with the statutory directive to open quickly local telecommunications markets to competition, but was also seen as the only practical grounds by which the Bell Companies could satisfy the competitive entry showing required by section 271[5] that Bell Companies needed to provide in-region long distance service. Although some Bell companies attempted early on to demonstrate competitive entry through *de minimis* wireless substitution, practically the only route to section 271 authority ran though UNE-access, and hence the extraordinary focus on the Bell Company back office (OSS) processes through which competitive carriers gained such access.

Of course, we will never know whether broad, UNE-based competitive entry would have resulted in consumer enhancing competition. The District of Columbia Circuit rejected the FCC's interpretation of the so-called impairment standard by which UNEs were to be identified.[6] The FCC's policy migrated toward a preference for facilities-based competition, and over time, facilities-based competition, at least for voice services, arrived through wireless and VoIP services.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 118.
2. *See* 47 U.S.C. § 251(d)(1) (2012).
3. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996).
4. *See* 47 U.S.C. §§ 251, 271 (2012).
5. 47 U.S.C. § 271.
6. *See* U.S. Telecom Ass'n v. FCC, 290 F.3d 415, 422-428 (D.C. Cir. 2002).

GREGORY L. ROSSTON[*] & BRADLEY S. WIMMER[†]

The Telecommunications Act of 1996's[1] (the Act) goal was to open telecommunication markets to competition. The Act provided mechanisms and safeguards that were intended to replace heavy-handed regulations with the discipline and incentives provided by competition. Long distance companies wanted access to local voice networks so they could provide one-stop shopping, while the Regional Bell Operating Companies (RBOC) wanted relief from the line of business restrictions imposed on them at the time of the break-up the old AT&T.[2] The Act required the RBOCs to open their local markets to competition before such relief would be granted. As a result, the main focus of the Act's implementation was on rules and regulations that governed competitive entry into local voice markets. Neither the regulators, nor the firms their rules governed, could foresee how the rise of the Internet and advances in computing and wireless technologies would transform telecommunication markets over the next twenty years.

The Act provided mechanisms and regulatory safeguards intended to open markets to competition. Allowing RBOCs to enter the market for long distance services was easy—the law eliminated the line of business restrictions imposed on them a decade earlier once they were found to have opened their markets to competition.[3] Opening local markets, however, was viewed as a difficult proposition. The provision of local telephone services using traditional technologies benefitted from economies of density, and the Act determined that incumbents should be required to provide competitors access to their local networks.

The Act determined that competitors should have three avenues of entry into local markets: as a facilities-based provider that built its own network; as a reseller of RBOC services; or by leasing pieces of the RBOC network.[4] The third mechanism, which required RBOCs to lease Unbundled Network Elements (UNEs) to their competitors garnered the majority of the attention. Which parts of networks should be unbundled? What prices should be charged for these elements? These and other related questions were

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See* United States v. AT & T, 552 F. Supp. 131 (D.D.C. 1982), *consent decree terminated sub nom.*, *United States v. W. Elec. Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. 1996) (terminating consent decree *nunc pro tanc*, as of Telecommunications Act's February 8, 1996, effective date).

3. *See* 47 U.S.C. §§ 271-76 (2012).

4. *See* 47 U.S.C. § 251, 271 (2012).

debated intensely. Millions of dollars were spent on these fights, both at the FCC and in state regulatory proceedings.

The remaining forms of entry were less controversial. The Act's method for setting resale rates resulted in rates that exceeded the prices associated with UNEs, and this avenue was largely ignored by competitors. Very few carriers provided facilities-based competition for local service at the time of the Act. The majority of competitive facilities was for long-distance business service in dense downtown areas. Potential entrants that intended to use their own facilities assumed that they would be able to interconnect with the incumbent using arrangements similar to those used by long distance companies and competitive access providers.

There were only 34 million cell phone subscribers and price of cell phone service was much higher than even long distance services in 1996. State regulators viewed cellular service as a luxury and taxed it heavily so they could keep the price of local residential services low. Most cellular traffic originated on a cell phone and terminated on a landline phone. Fees for terminating cellular calls tended to be high, one to three cents per minute, and it was not uncommon for charges to only be levied on cellular providers; cellular carriers, in such cases, were not allowed to collect fees from landline companies when a call originated on landline phone and terminated on a cellular phone. Wireless services were not able to compete effectively with landline services under these conditions.

While the contentious UNE debates were under way, regulators addressed the Act's mandate that interconnection agreements must include "reciprocal compensation for the transport and termination of traffic." One RBOC economist suggested that "If we pay the 1 cent and they pay us 3 cents; that is 'reciprocal.'" The FCC did not agree and changed "reciprocal" to "reciprocal and symmetric" in its Order implementing the Act.[5] This subtle change went through unchallenged. The RBOCs, with the understanding that eighty percent of cellular traffic terminated on their networks, went to state PUCs and argued for high termination fees and got them. But they did not see the Internet coming. AOL, and other Internet service providers (ISPs), became favorite customers of competitive providers because ISPs generated billions of terminating minutes and virtually no originating minutes. High terminating charges resulted in entrants that specialized call termination. Soon the RBOCs awoke to this problem and tried to carve Internet access calls from the symmetric model, but failed.

The RBOCs' inability to use the regulatory process to protect their inflated termination fees resulted in a push towards cost-based termination charges. These low charges affected more than competitors serving ISPs. Low termination charges allowed wireless carriers to introduce plans such as "Free nights and weekends" and AT&T's "Digital One Rate" plan. The reduction in the price of wireless services, along with the introduction of

5. *See* Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, paras. 1085-88 (1996).

VoIP service, was the beginning of consumer substitution away from traditional landline phones to wireless and other alternatives.

It now seems anachronistic that so much attention was paid to the local voice telephone market when we worked on the Act twenty years ago. The rise of the wireless and data services has resulted in a rapidly decreasing share of landline voice services, and the time for regulating local telephone services has likely passed. Less than fifty-five percent of households have a landline telephone according to the Centers for Disease Control. These changes were not widely foreseen twenty years ago, when the Act envisioned a market with long distance companies competing against the RBOCs using UNEs.

Looking back, it may seem easy to see that wireless and Internet would be the key to communications competition, but at the time the necessary advances were not clear. That is why regulators should not limit markets to a single means of entry, and that they should craft rules that do not favor one technology over another. Advances in technology and the creation of new services suggest that the intense lobbying over rules and regulations that governed the provision of landline voice services were ultimately meaningless. The main benefit of the Act and its implementation is that it outlawed the ability of regulators to block competitive entry the source of competition was unknown at the time. The Act laid the groundwork for facilities-based entry of services and technologies that were not fully developed at that time. While the Act's focus on voice telephony and unbundled elements may have been misplaced, its rules governing the entry conditions and the exchange of traffic ultimately allowed new technologies and services to find their way to the marketplace.

GIGI SOHN*

I will remember the Telecommunications Act of 1996[1] foremost as the first instance of broad, robust and impactful public interest stakeholder engagement in communications and Internet policy. Even though the Cable Act of 1992[2] was a pro-consumer and competitive triumph with its provisions, among others, on program access,[3] program carriage,[4] vertical and horizontal ownership limits[5] and other consumer protections, public interest engagement was limited mostly to a handful of public interest and consumer organizations with expertise in communications law and policy. By contrast, from the earliest days of debate over the 1996 Act, nonprofit organizations from the education, children's, library, arts, disability, civil rights, civil liberties, religious and other fields joined with communications policy public interest organizations to make their mark on the last significant rewrite of our communications laws.

As early as 1993, it became clear that Congress had both the motivation and the support to pass a major revision of the Communications Act of 1934. At the time, I was a young lawyer at the Media Access Project (MAP), one of the very few communications policy advocacy organizations in existence at the time. The "field" largely consisted of MAP, Consumer Federation of America, the Center for Media Education, Action for Children's Television and the Office of Communications of the United Church of Christ. But as it became clear that Congress was looking to tackle privacy, disability rights, media ownership deregulation, indecent speech online and the deployment of "advanced telecommunications services," the larger public interest community became engaged. To better organize the different interests, the Center for Media Education formed the Telecommunications Policy Roundtable, where representatives of nonprofit stakeholders met monthly to discuss the draft bill *du jour* and develop strategies to ensure the protection of competition, consumer rights and democratic values.[6] Among the notable participants in the almost 200 member "TPR" were the American Library Association, the American Civil Liberties Union, People for the American Way, the National Education Association and American Council of the Blind.

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* In 1996, GiGi Sohn was Deputy Director of the Media Access Project. She currently serves as Counselor to Chairman Tom Wheeler. This article was written in her personal capacity. The views expressed therein are hers and not those of the FCC or Chairman Wheeler.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. §§ 521-555).

3. *See* 47 U.S.C. § 548 (2012).

4. *See* 47 U.S.C. § 536 (2012).

5. *See* 47 U.S.C. § 533 (2012).

6. *See* PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996, 45-46 (1999).

While the members of the TPR didn't get everything they wanted from the Telecommunications Act of 1996, their impact was unquestionable. Among other things, the '96 Act placed into law consumer privacy protections for telecommunications services;[7] universal service mandates for schools, libraries, health care facilities, rural residents and the poor; [8] requirements that equipment, telecommunications services and video programming be accessible to the disabled; [9] a requirement that the Commission examine and eliminate market entry barriers for small businesses; [10] a requirement that the FCC promote competition in "competitive navigation devices";[11] and a mandate that the FCC examine the state of advanced telecommunications services and take whatever steps necessary to ensure that they are deployed "on a reasonable and timely basis."[12] Not a bad public interest result for a law that was portrayed at the time as largely a wish list for communications industry interests.

7. *See* 47 U.S.C. § 221 (2012).
8. *See* 47 U.S.C. § 254 (2012).
9. *See* 47 U.S.C. § 255 (2012).
10. *See* 47 U.S.C. § 257 (2012).
11. *See* 47 U.S.C. § 548 (2012).
12. *See* 47 U.S.C. § 1302 (2012).

DAVID SOLOMON*

The FCC's implementation of the 1996 Telecommunications Act[1] transformed a great institutional challenge into a great institutional success. Congress required the agency to complete dozens of rulemaking proceedings to implement the bipartisan congressional vision for pushing telecommunications markets toward competition and deregulation. Congress imposed strict deadlines, directing the Commission to complete numerous major rulemakings within six months.

While one can certainly disagree with some of the FCC's specific decisions, the agency rose to the occasion. Virtually everyone at every level—from junior staff to the Chairman and Commissioners—worked extraordinarily hard as a team to meet the congressional deadlines. The FCC produced decisions at a record pace, with nearly five hundred full Commission decisions in 1996 and over four hundred in 1997. The Commission met all the congressional deadlines and also completed numerous related rulemakings not mandated by the Act (e.g., access charge reform) within the same short time frames. The FCC acted unanimously in virtually all its early 1996 Act implementation decisions, and the courts affirmed the majority of them. The agency did all of this in a technological era very different from today; for example, its "master tracking system" was a huge, hand-written flow chart on the Chief of Staff's wall.

Implementation of the 1996 Act also led to important structural change at the FCC. Policymakers and stakeholders understood the significance of effective FCC enforcement to ensure compliance with the competitive rules of the road and to protect consumers against any side effects of an increasingly competitive market. Accordingly, in 1999, the Commission established the Enforcement Bureau.[2] I am proud to have served as the first leader of the Enforcement Bureau, from 1999 to early 2005.

The FCC viewed enforcement as a central complement to deregulation. In the words of Chairman Kennard, "in an increasingly competitive communications marketplace," enforcement was of "enormous importance" in the FCC's "transition from an industry regulator to a market facilitator."[3] Chairman Powell also underscored the link between enforcement and deregulation, saying the FCC would "shift from constantly expanding the bevy of permissive regulations to strong and effective

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See* Establishment of the Enforcement Bureau & the Consumer Info. Bureau, *Order*, 14 FCC Rcd 17924, *passim* (1999).

3. Press Release, FCC, Chairaman Kennard Delivers to Congress Draft Strategic Plan for 21st Century, 1999 WL 606942 (Aug. 12, 1999).

enforcement of truly necessary ones."[4] Consistent with this bipartisan approach to enforcement, the Enforcement Bureau focused in the early years of 1996 Act implementation on "firm, fast, flexible, and fair" enforcement of the rules adopted by the Commission to help implement Congress's pro-competitive, deregulatory vision.

From a personal perspective, being part of the FCC's implementation of the 1996 Act was an exciting and invigorating experience. While debate can and will continue about the wisdom of various FCC decisions, the agency has a right to be proud of its accomplishments.

4. Hearing on Agenda and Plans for Reform of the FCC Before the Subomm. Telecom. & the Internet of the H. Comm. on Energy & Commerce, 2001 WL 310970 (opening statement of Chairman Michael K. Powell, FCC) (Mar. 29, 2001).

LAWRENCE J. SPIWAK*

At the time the 1996 Act[1] was enacted, I was an attorney in the now-defunct Competition Division in the General Counsel's Office at the Federal Communications Commission. An inter-disciplinary unit formed by then-Chairman Reed Hundt, our job as lawyers and economists was to bring (to the extent practicable) greater analytical rigor to, and cohesion across, the various bureaus of the Commission. As with the rest of the talented staff of the FCC, we were all looking forward to the opportunity to implement such a sweeping piece of legislation to facilitate the transition from monopoly to competition.

Despite our enthusiasm, there were many of us at the Commission who recognized that it would be a challenge to find a readily-available facilities-based competitor to take on the local Regional Bell Operating Company ("RBOC") for retail voice service (which was the only service of relevance at the time). Just as now, facilities-based entry into the local market is extremely expensive, and in 1996 there were few comers on the horizon. Indeed, it is important to remember that in February 1996, mobile was a luxury service provided by a duopoly (one of which was the incumbent RBOC), and VoIP technology was still a glimmer in someone's eye at Bell Labs. (In fact, I can recall conversations with senior folks at the Commission in which we wishfully thought that if only the cable industry would wrap a twisted copper pair around their coaxial cable then all of our competitive problems would be solved.)

Given such skepticism, the Commission dedicated significant staff to implementing the unbundling paradigm set forth in Section 251.[2] I, however, was not among them. Instead, given my background as a former electric utility attorney, I was tasked with shepherding the rulemaking to implement Section 103 of the 1996 Act, which amended the Public Utility Holding Company Act of 1935 ("PUHCA") to allow registered public utility holding companies to enter into the telecommunications business without prior Securities and Exchange Commission approval through an unregulated "Exempt Telecommunications Company" or "ETC."[3] The hope was that electric utilities, with their significant "spillover" effects (i.e., rights of way, billing systems, access to capital, culture of customer care, etc.), would provide a strong candidate for that elusive second wire to the home. I am

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. 47 U.S.C. § 251 (2012).
3. 15 U.S.C. § 79z-5c (2000) (repealed 2005).

proud to say that this was the very first rulemaking the Commission voted on to implement the 1996 Act.[4]

So how did it work out for investor-owned utilities becoming the proverbial "second wire" into the home? Unfortunately, not well. To begin, the notion of an ETC was a bit ridiculous in the first instance, because rather than just repeal PUHCA entirely, Congress essentially decided to set up a paradigm where you needed *more regulation at one agency* (the FCC) just to be *deregulated at another* (the SEC). (To Congress's credit, it eventually saw the light and repealed PUHCA nearly a decade later in 2005.[5]) Still, because investor-owned utilities were (and continue to be) subject to aggressive regulation at both the state and federal levels that restricts their use of spillovers, utility entry into the "last mile" was, and is, unprofitable from a "greenfield" perspective. (Significantly, the investor-owned utility experience differs vastly from the municipal entry story, where self-regulation permits municipal utilities to engage in massive cross-subsidization between their electric and telecom businesses.[6]) In the mean time, the march of technology moved on: the cable companies realized that they could add a VoIP box (and eventually a cable modem) to their existing plant for relatively little cost and, as such, easily beat the utilities in the race to become the proverbial "second wire" to the home. Given that the economics of the last mile make for a difficult business case for a third wireline provider, it seems that the boat has sailed for investor-owned utilities to get into the facilities-based local telephone business.[7] Which brings me to the important (and broader) question of "lessons learned" from the 1996 Act. At bottom, although I understand enacting legislation is a political process, if my academic research and personal experience over the last twenty years have taught me anything, it is that while the 1996 Act may have contained some innovative ideas, perhaps policymakers should have given a bit more thought to the consequences of the proposed legislation before they voted on it. While this caveat certainly applies to Congress's choice of legislative language (see, e.g., the on-going kerfuffle of whether Section 706[8] provides the FCC with an independent grant of authority[9]), the 1996 Act is replete with provisions that I have no doubt somebody thought was a great idea but paid little attention to the details.

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4. *See* In the Matter of Implementation of Section 34(A)(1) of the Public Utility Holding Company Act of 1935, *Report and Order*, 11 FCC Rcd 11377 (1996).

5. *See* Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594.

6. *See, e.g.*, George S. Ford, Why Chattanooga Is Not the "Poster Child" for Municipal Broadband (Phoenix Ctr. Pol. Perspective No. 15-01, 2015), http://www.phoenix-center.org/perspectives/Perspective15-01Final.pdf.

7. George S. Ford et al., *Competition After Unbundling: Entry, Industry Structure and Convergence*, 59 FED. COMM. L. J. 331 (2007).

8. 47 U.S.C. § 1302 (2012).

9. *See* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 J. INTERNET L. 1 (2015); *see also* Verizon v. FCC, 740 F.3d 623, 638 (D.C. Cir. 2014).

For example, as we demonstrate in our paper about the 1996 Act's unbundling paradigm, which is published in this commemorative issue of the Journal, the unbundling paradigm collapsed upon itself due to (a) a failure of policymakers to understand the economics of the last mile, (b) the paradigm's failure to correctly align the incentives among the stakeholders, and (c) policymakers' failure to account for the possibility of technical change.[10] The exact same factors also led to the FCC's billion dollar policy dud to try to implement Congress's desire to create a retail market for set-top boxes under Section 629[11]—a stand-alone market for set-top boxes is inefficient, and markets abhor inefficiency.[12] And, let's not forget the "Open Video System" paradigm of Section 653,[13] which magnanimously allows telephone companies to enter into the video business without having to obtain a franchise provided that they set aside up to two thirds of their channel capacity for their competitors at regulated rates.

Still, despite its warts, we cannot say the 1996 Act was a total failure. First, the 1996 Act "primed the pump" in consumers' minds that it was possible to have a competitive market, so for that I suppose we should all be a bit grateful. Second, although there were certainly hiccups, the market has moved from monopoly to competition (although I'm not sure how much corresponding deregulation has occurred with the increase in such competition[14]). Indeed, for those of us who were at the Commission in 1996, if you would have told us twenty years ago that we would have, in most markets, two wireline firms and four national wireless firms, we would have thrown a party.

So will there be an update to the 1996 Act? I have absolutely no idea. In 1996, the stars and the moons all aligned for a once in a lifetime opportunity, and whether that can happen again in today's toxic political environment remains to be seen. We should also remember that in 1996, the fight was essentially an "intra-family" squabble—i.e., RBOCs, IXCs, CLECs, cable companies and broadcasters; now, we have a plethora of non-traditional players added to the mix, which will probably make achieving consensus more difficult. Still, if we do get to a point of new legislation, I can only hope that we avoid the temptation of cutting an expedient political deal and instead take a few moments to contemplate what we have learned from the amazing experiment of the last twenty years. Given the tenor of the current telecom debate, however, I am not particularly optimistic.

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10. *See* George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FED. COMM. L. J. 95 (2016).

11. 47 U.S.C. § 549 (2012).

12. *See* T. Randolph Beard, George S. Ford, Lawrence J. Spiwak, & Michael Stern, *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes*, 21 COMMLAW CONSPECTUS 1 (2012).

13. 47 U.S.C. § 573 (2012).

14. George S. Ford & Lawrence J. Spiwak, *The Unpredictable FCC: Politicizing Communications Policy and its Threat to Broadband Investment* (Phoenix Ctr. Pol. Perspective No. 14-05, 2014).

JOHN THORNE*

The story is told of a European immigrant to the United States, the great inventor Nikola Tesla, who arrived in New York City in the 1880s. Tesla looked around New York, remembered his beloved Europe and said: "What I had left was beautiful, artistic, and fascinating in every way." And what were his impressions of America? "What I saw here was machined, rough, and unattractive. America is a century behind Europe in civilization."

His assessment of America, of course, was a bit harsh. Why, in just a few years alone, American civilization would already be hard at work inventing the hamburger, the hot dog, and the ice cream cone . . . .

And yet, a few years after Tesla's arrival, this rough civilization would soon adopt one of the world's first wide-ranging antitrust laws, followed in subsequent decades by industry-specific regulatory statutes and agencies. One of the early targets of the Sherman Act was J.P. Morgan, banker, über-industrialist and a man so wealthy that he served as a kind of one-man Federal Reserve Board.

Morgan typified the initial response of American business to regulation. "I don't want a lawyer to tell me what I cannot do," he said. "I hire him to tell me how to do what I want to do." At some time or another, most lawyers have had a client like that.

Here's the point of these two stories: Curiously enough, Tesla—the eccentric, shaggy-headed European inventor, intersected with Morgan—the glowering, bulbous-nosed American tycoon. At one of their meetings around the turn of the century, Tesla proposed something tantalizing to Morgan, something he called a "world system" of wireless communications. This global web could not only relay telephone calls across the ocean. It could give consumers instant access to news, music, stock market reports, electronic letters and even pictures. Morgan, mesmerized, listened as Tesla predicted: "When wireless is fully applied the earth will be converted into a huge brain, capable of response in every one of its parts."

I like this story because it reminds us that law can govern progress, but law cannot create it. Trust-busters would force Morgan to sell off his companies, and patent attorneys would bedevil Tesla. But no lawyer could have imagined a prototype of the wireless Internet like Tesla, or would have had the vision to finance early research into it like Morgan.

In regulating competition, a balance is needed between protecting society from abusive practices, and protecting the inventive impulses that create wealth and social progress.

The 1996 Telecom Act[1] should have been a landmark in American deregulation. Instead—its potential was adulterated by the FCC under Chairman Reed Hundt. We now know that its forced sharing created two

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

classes of companies—those that built facilities, and those that sought rents off those facilities. Even the startup CLECs were victimized by this scheme. Those that wanted to build out, couldn't make an economic case for it—not when the facilities of others were free for the asking.

Despite this heavy regulatory thumbing of the scales—one that required Chairman Hundt's FCC to add more than 10,000 pages to the Federal Register—in the end the only companies that prevailed were the ones that owned and operated facilities.

In the meantime, the industry had to deal with what my friend Peter Huber has called "a stupefying complex labyrinth of rules" that "suppressed competition rather than promoting it" and that "enriched no one but legions of lawyers."[2] All of these actions, Huber adds, were done with the conceit that they would somehow lead us back to deregulation.

The rules that governed which broadband medium would be regulated, over which part of its length, and toward what purpose, often seemed to emerge from a sausage factory operated by a fractious band of intoxicated butchers. The consequences of their handiwork were the infliction of a living hell on American workers, investors, and telecom companies. As lessons go, you would think that would be one to remember.

Not everyone was taken in of course. Alfred Kahn, the father of deregulation, referred to Chairman Hundt's TELRIC as TELRIC-BS, the last two words he assured us with a straight face, standing for "blank slate."[3]

So what were the fruits of Chairman Hundt's TELRIC-BS and other forms of trying to game the future? An industry that had been responsible for the lion's share of the productivity gains of the 1990s lost, within the span of four years, 900,000 jobs, $2 trillion in market capitalization, and $280 billion in capital investment.[4] Hardest hit were the makers of telecom equipment, in particular, those betting on a broadband future. At the time, one Corning manager said, "[w]e have been through a hell worse than the Great Depression."[5]

The implementation of the 1996 Act leaves us, then, with two lessons. The first is that legal prohibitions on entry, no matter how fevered the dreams of regulators, are absolute poison for the deployment of technologies and the development of markets.

The second lesson learned is that respect for property rights encourages investment. If we leave the markets alone, as we mostly have with wireless and with cable, they will amaze us.

It may seem paradoxical to look for wisdom from J.P. Morgan, the arch-monopolist. But a man who could have pondered the creation of the

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2. Peter Huber, *Telecom Undone*, MANHATTAN INST. (Jan. 26, 2003), http://www.manhattan-institute.org/html/_comm-telecom.htm.

3. *Id*.

4. Opinion, *The Telecom Follies*, WALL ST. J. (Mar. 26, 2004).

5. William C. Symonds, *Corning: Back From The Brink*, BUSINESSWEEK (Oct. 17, 2004), http://www.bloomberg.com/bw/stories/2004-10-17/corning-back-from-the-brink.

wireless Internet more than a century ago is someone worth listening to. Morgan said: "No problem can be solved until it is reduced to some simple form. The changing of a vague difficulty into a specific, concrete form is a very essential element in thinking." In other words, the more complex a regulatory solution, the less likely it is to *be* a solution.[6]

As we look ahead, we must avoid the kind of anticipatory thinking about technologies that move faster than any human can anticipate. We must avoid the arrogance that we are smart enough to be able to impose legal entry barriers or property piggybacking arrangements without them leading to the sort of calamity the 1996 Act teaches us will occur.

6. *Cf.* Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 415 (2004) ("We think that Professor Areeda got it exactly right: 'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.'").

GERARD J. WALDRON*

If one dug into the annals of the House of Representatives in search of how the Telecommunications Act of 1996[1] came to pass, you would find buried under many layers of forgotten bills and unread hearing transcripts the first evidence of what evolved into parts of the 1996 Act in early 1984, shortly after the Bell System was broken up. The question arises of how long did it take to pass the 1996 Act, and the honest answer is twelve years and scores of bills and compromise drafts, thousands of hours of hearings, and generations of Members and staff. That long slog served a purpose, however, for it became increasingly clear to all stakeholders at the start of the 1990s that major statutory changes were needed in order to let key players get into new lines of business, and that those new entrants would benefit consumers by promoting competition and innovation.

Today many companies try to claim the mantle of "disrupter," but they are only the latest incarnation of that concept. Because that is exactly what we were discussing in the early 1990s: how to encourage new entrants to *disrupt* the monopoly cable companies (monopolist by law in most of the country); to *disrupt* the monopoly local telephone company (same); to *disrupt* the cozy cellphone duopoly (by FCC design); and to *disrupt* the weakly competitive long distance industry (a legacy of AT&T's long-standing *de facto* monopoly). What is remarkable is that those discussions turned into action, and it all happened fairly quickly.

- In October 1992, Congress passed the 1992 Cable Act;[2] though that vote went down in history as the only to override President George H.W. Bush's veto, what is forgotten is that the bill had broad bipartisan support including from the Republican leadership in the Commerce Committees and floor leadership. That bill can be credited as giving birth to the DBS industry and to the disruptive force that DISH and DIRECTV and their corporate antecedents have brought to the monopoly cable companies.
- In August 1993, Congress passed the 1993 Omnibus Budget Act,[3] which directed the NTIA to free up 200 MHz of spectrum for next-generation cellular ("Personal Communications Service"), and for the FCC to use auctions to quickly assign the spectrum. That marked

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. §§ 521-555).

3. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified as amended at 47 U.S.C. §§ 921-927).

a radical change: Congress was taking spectrum away from government users and designating it for private use; the FCC was directed to take valuable beachfront spectrum away from microwave users and reallocate to PCS; and instead of this process taking years of comparative hearings, Congress mandated it would be done in several months with spectrum auctions. A look at the history books suggests that the vote was partisan (no Republican voted for the 1993 Act). But that is misleading: building on the bipartisan nature of communications policy in the House Commerce Committee, every page of the spectrum bill was negotiated with Ranking Member Jack Fields and his staff, even though the majority staff knew no Republican would support the bill. That was the proud tradition in the Committee then, it endured right through the 1996 Act, and (thankfully, from my perspective) it exists today.

- In 1994, these same staff and policymakers also passed the Communications Assistance for Law Enforcement Act (CALEA).[4] Perhaps not the proudest accomplishment of that time frame, but still it represented major legislation that was passed on a bipartisan basis in less than twenty-four months.

One bill from that time that did not become law during this two-year flurry of legislating, but did set the stage for a transformative law, was the Telecommunications Act of *1994*. (That is not a typo.) In the course of House Subcommittee Chairman Ed Markey and Ranking Member Jack Fields working together in 1992, on cable legislation; in 1993, on spectrum legislation; and in early 1994, on CALEA, it became increasingly clear to them that comprehensive legislation was needed. As a result, they worked collaboratively, along with full Commerce Committee Chair John Dingell and Judiciary Committee Chair Jack Brooks, to construct comprehensive legislation that would remove the local telephone company monopoly, set up a process to allow the Bell companies into the long distance and manufacturing businesses, remove obstacles to allow the cable companies to enter the telephone business, eliminate legal barriers keeping local telephone companies out of the cable business, and create mandates and incentives for local telephone companies to promote deployment of "ISDN," or Integrated Services Digital Network)—at the time, that was the only technology available to allow for (relatively) high speed information services. The Telecommunications Act of 1994 (Markey-Fields) [5] and Antitrust and Communications Reform Act of 1994 (Dingell-Brooks)[6] were passed in June 1994 by overwhelming bipartisan votes: 423-4 and 423-5.

4. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C. §§ 1001-1010).

5. H.R. 3636, 103d Cong. (1994).

6. H.R. 3626, 103d Cong. (1994).

So why do we not celebrate the Telecommunications Act of *1994*? Because when those bills went to the Senate in mid-1994, Minority Leader Dole put a hold on them since he was (rightly) convinced that Congress was about to flip to Republican control and he would revise the bills more to the Republicans liking. And that is what happened. The core of the 1994 Act can be found in the 1996 Act—parts, such as Section 254[7] on universal service, were copied almost intact. Other provisions were flipped from a tilt one way to a tilt the other way, but that is the nature of bipartisan compromise. And many more parts were added, including all the provisions affecting broadcast ownership as well as many other provisions that were added on when it appeared to all the broad range of communications stakeholders that the Telecommunications Act presented a once-a-generation opportunity. So the new chairmen, who took over the telecommunications committees in 1995-1996, had confidence they could pass comprehensive legislation; because so many important bills had been passed in the previous three years, the bipartisan legislating muscles were well trained. And that's what they did.

7. 47 U.S.C. § 254 (2012).

PHILIP J. WEISER*

THE FORGOTTEN CORE OF THE TELECOMMUNICATIONS ACT OF 1996

Twenty years ago, I entered the world of telecommunications law and policy. In 1996, I joined the Department of Justice's Antitrust Division as senior counsel to Assistant Attorney General Joel Klein. In that role, I focused on what was then a—if not, the—central issue in telecommunications policy: how to evaluate the prospective entry of the local Bell Companies into long distance markets. Because the Justice Department had played an essential role in overseeing the AT&T consent decree, which restricted the Bell Companies to providing local telephone service, it was afforded the right to weigh in on Bell Company applications to long distance under "any standard the Attorney General considers appropriate."[1] At the Justice Department, we implemented that mandate by developing a standard that conditioned Bell entry into long distance on a showing that local markets were "irreversibly opened to competition."[2]

From today's standpoint, it is easy to forget that the Telecommunications Act of 1996[3] was passed in considerable part to remove the then-formidable barriers between local and long distance providers. As a result, market-opening processes, which enabled entry into local markets[4] and Bell Company entry into long distance,[5] were at the very heart of the Act, including a now forgotten "fourteen-point checklist."[6] To implement these measures, the Act relied on a cooperative federalism regulatory regime that ended the legacy of the rigid "dual federalism" regime that held sway under the Communications Act of 1934.[7] In line with the cooperative

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1. 47 U.S.C. § 271(d)(2) (2012).

2. The standard was also explained in an affidavit by Marius Schwartz, which was later published in an article. *See* Marius Schwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, 18 J. REG. ECON. 247 (2000); *see also* Marius Schwartz, Econ. Enforcement Dir., U.S. Dep't of Justice, Address at the Robert Schuman Centre of the European University Institute: Conditioning the Bells' Entry into Long Distance (Sept. 9, 1999), http://www.justice.gov/atr/speech/ conditioning-bells-entry-long-distance-anticompetitive-regulation-or-promoting; Joel Klein, Address at the American Enterprise Institute: The Race for Local Competition (Nov. 5, 1997), http://www.justice.gov/atr/speech/race-local-competition-long-distance-run-not-sprint.

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

4. *See* 47 U.S.C. § 251 (2012).

5. *See* 47 U.S.C. § 271.

6. *See* 47 U.S.C. § 271(c)(2)(B).

7. *See* AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); *see also* Philip J. Weiser, *Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

federalism model, the Federal Communications Commission smartly enlisted state public utility commissions to develop factual records and judgments (on compliance with the fourteen-point checklist, among other things), leveraging their capabilities to make the process more manageable.[8]

From the vantage point of twenty years later, Bell Company entry into long distance is a foreign concept to those who no longer think of telecommunications markets in terms of local or long distance services or even think of any of today's providers as Bell Companies. There are, nonetheless, three lessons that can be learned from the experience of the Telecom Act's Bell entry provisions. First, we should recognize that, for future reforms of the Communications Act, the model of a broad standard grounded in economics (such as the one used by the Justice Department in evaluating Bell entry) provides for a more effective model of regulatory oversight than relying on specific statutory criteria like the fourteen-point checklist. Notably, with technology changing so quickly in this area, any specific criteria risk becoming outdated and, worse yet, hindering sound competition policy. Second, the development of flexible institutional arrangements, such as the cooperative federalism model of working with the states to implement Section 271, needs to be a priority for telecommunications policy going forward.[9] And, finally, as the overshadowing of the once-central Section 271 demonstrates, humility is a central value in developing regulatory strategies for a fast-changing industry.[10]

8. *See* Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, paras. 53-62 (1996).

9. For a discussion of the institutional side of telecommunications policy, see Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675 (2009), and JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE DIGITAL AGE 376-88 (2013).

10. *See* NUECHTERLEIN & WEISER, *supra* note 9, at 386-88.

KEVIN WERBACH*

WordPerfect kept crashing.

We were at the moment of truth, assembling the *Interconnection Order*[1] from separate files that teams had worked on frantically for weeks. To our horror, the massive, heavily-footnoted document choked the under-powered PC.

In hindsight, the scene was ironic. The FCC staff implementing the 1996 Act[2] had none of the broadband-based tools—cloud storage, online document collaboration, mobile messaging, video chat—which grew out of the digital infrastructure we helped to enable. And I had personally set aside my mostly-completed working paper on internet issues, *Digital Tornado*,[3] to plunge into the minutiae of local unbundling. The FCC's number one job was to implement the telephone-focused statute Congress passed.

Yet we were not ignorant of the coming technological transformations. It was during the immediate aftermath of the 1996 Act that the FCC put off requests to ban VoIP, declined the Justice Department's invitation to bolster the Communications Decency Act, refused to allow per-minute access charges for internet service providers, articulated a policy of avoiding knee-jerk legacy regulation of online services, helped lay the groundwork for internet governance with the transition of the domain name system, created favorable regulatory environments for cable and wireless data services, helped the Clinton Administration develop a landmark framework for global electronic commerce, and pioneered open government as one of the first federal agencies to offer electronic comment filing. Not a bad record.

For all the competitive shortcomings (and there are many), today's communications marketplace is far more dynamic than it was twenty years ago. The even more extraordinary ecosystem of networked digital platforms and services on top was never a foregone conclusion; it owes something to the FCC's actions during that formative period.

And thankfully, we eventually got WordPerfect to process the order.

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1. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

3. Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* (FCC Office of Plans & Pol., Working Paper No. 29, 1997), http://www.fcc.gov/Bureaus/OPP/ working_papers/oppwp29pdf.html.

CHAIRMAN RICHARD E. WILEY* & THOMAS J. NAVIN†

On February 8, 1996, in an event that brought together the nation's political leadership, the Librarian of Congress, titans of the communications industry and, in fact, the two of us, President Clinton signed the Telecommunications Act of 1996[1] into law. President Clinton told the story of how Thomas Jefferson filled the Library of Congress with his own books after the British burned the Library in the War of 1812 in order to facilitate public access to essential knowledge. The President expressed the hope of all gathered that the new statute would bring the Library's voluminous ideas to every child in America. In spite of the many legal battles waged over the past twenty years in implementing this landmark legislation, the Telecommunications Act of 1996 has ushered in a new era of Enlightenment in which most Americans instantly can access a world of information equivalent to visiting every library in the world.

At the time of its enactment, many believed that the most important issues addressed by the 1996 law were legal balkanization and technological convergence—issues that demanded regulatory parity. For example, at the signing ceremony, President Clinton emphasized that the Act would open the "local exchange" markets to competitive entry and increase competition in the "long distance" services market. As such, lawyers and regulators devoted considerable attention to regional entry of the Bell Operating Companies (RBOCs) into the long distance market as well as the legislation's necessary market opening provisions, including the interconnection and unbundling provisions of Section 251.[2] The RBOCs filed over seventy voluminous Section 271[3] applications to enter the long distance market, which the FCC resolved over the course of seven years. Additionally, over an eight-year period, the Commission wrote five different orders interpreting Section 251's unbundling provisions, which the U.S. Court of Appeals for the DC Circuit eventually sustained in 2006. Today, however, there is almost no discussion of the "inter-LATA" or "long distance" telephone markets. This is so because lightly regulated mobile wireless and Internet platforms have supplanted wireline voice as the

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. 47 U.S.C. § 251 (2012).
3. 47 U.S.C. § 271 (2012).

primary means of communications. These platforms make jurisdictional and geographical regulatory limitations seem antiquated.

Therefore, the greatest success of the 1996 Act has been its enduring light-touch regulatory approach to broadband Internet access and wireless markets. Information services and the Internet were excluded from the market-opening provisions of the statute and, as a result, cable companies, incumbent telephone carriers, competitive entrants, and mobile wireless providers were able to invest billions of dollars into broadband networks and offerings. Regulatory forbearance and platform parity were keys to making good on the promise of the Act's preamble: "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[4] Thus, the genius of the 1996 Act turned out to be that it focused policymakers' attention on delivery of wireline voice telephony while the Internet, mobile wireless, and broadband developed and eventually supplanted the heavily regulated markets at the core of the legislation.

4. Telecommunications Act, prmbl.

JOHN WINDHAUSEN, JR.*

The 1996 Telecommunications Act [1] has often been criticized, including by the Supreme Court, for its lack of clarity. Yet, the Act adopted a balanced approach to communications regulation that is both relevant and, properly understood, a model for the future.

While the Act encouraged facilities-based competition, it also recognized that interconnection, unbundling and resale were necessary "raw materials" that could allow facilities-based competition to develop. [2] Building competitive, stand-alone networks from scratch could only be done in stages, and access to the incumbents' networks (at fair prices) was necessary to provide nascent competitors the stepping stones to deploying their own competitive networks.

While the Federal Communications Commission (FCC) properly focused on opening markets to new technologies and established a solid framework to expand universal service, its TELRIC pricing and UNE-P[3] decisions tilted the balance created by Congress. These decisions treated the incumbents as natural monopolies, rather than as participants in a newly competitive market. They fueled unrealistically high expectations of competitive players, which contributed to the Dot-Com bust of 2000-2002, and a political dynamic that reverberated against competition. The FCC then over-corrected, withdrawing competitors' access to fiber,[4] the most essential stepping stone, notwithstanding the Act's explicit directive that unbundling should be technologically-neutral. A more careful and consistent approach from the beginning would have worked more slowly but more effectively.

The universal service provisions were not contrary to these pro-competitive goals. Rather, the Act continued the movement begun with the FCC's access charge regime established after the AT&T divestiture to identify and make the previously implicit subsidies more explicit and rational. Subsidies for rural areas, schools and libraries, rural health and lifeline are making progress in part because they are subject to healthy debate in the public arena.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See* 47 U.S.C. § 251 (2012).

3. *See* Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, para. 672 (1996).

4. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, para. 86 (2005).

While broadband was in its infancy at the time, the Act presaged the future by encouraging "advanced" services in both the universal service provisions of Section 254[5] and in Section 706.[6] At the staff level, we debated long and hard how to reconcile the Modification of Final Judgment (MFJ)[7] and FCC definitions of telecommunications ("basic") and information services ("enhanced"), but ultimately concluded that the FCC's Computer II[8] and III[9] definitions, even though flawed and overlapping, would allow the FCC the flexibility needed to respond to future change.

The fact that all parties can point to portions of the statutory language in their favor is a reflection of the Act's balance, not its inconsistency. Democrats agreed to the hortatory, deregulatory preamble sought by Republicans in exchange for the more meaningful regulatory provisions embedded in Title II and Section 706,[10] which directed the FCC to open new markets to competition. The balance we needed to secure votes from both sides of the aisle was also the right policy. We sought to foster entrepreneurship and new entrants while also encouraging incumbents to invest in new markets, such as long distance, wireless and video. In so doing, the Telecom Act of 1996 created an environment that fostered technological innovation and economic growth and established a foundation for the broadband ecosystem that is thriving today.

5. 47 U.S.C. § 254 (2012).

6. 47 U.S.C. § 1302 (2012).

7. United States v. AT & T, 552 F. Supp. 131, 189-90 (D.D.C. 1982), *consent decree terminated sub nom.*, *United States v. W. Elec. Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. 1996) (terminating consent decree *nunc pro tanc*, as of Telecommunications Act's February 8, 1996, effective date).

8. Amendment of Section 64.702 of the Comm'ns Rules & Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384 (1980).

9. Amendment of Section 64.702 of the Comm'ns Rules & Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986).

10. 47 U.S.C. § 1302.

CHRISTOPHER J. WRIGHT*

The central goal of the market-opening provisions of the 1996 Act[1] was to provide mass-market consumers with a choice of multiple wireline telephone companies providing local as well as long-distance service. In particular, Sections 251[2] and 252[3] of the Act established rules permitting long-distance companies such as AT&T and MCI to use "unbundled network elements" to enter local markets. Once that happened, Section 271 [4] established rules under which the seven regional Bell Operating Companies ("BOCs") would be permitted to provide long-distance service. This central goal of the Act was not achieved, largely on account of litigation by the BOCs. The BOCs speak of the litigation following the enactment of the 1996 Act as a sweeping victory for them, but in fact they won a war of attrition. They mostly absorbed losses while winning just enough to hold off competitive entry.

As the Commission was drafting the Local Competition Order that implemented the market-opening provisions of the 1996 Act, my colleagues and I in the Office of General Counsel ("OGC") were identifying important legal issues and attempting to ensure that the Commission's implementation of the Act would be upheld in court. One important issue was whether the FCC or the state regulatory commissions had primary authority to adopt rules implementing the Act. This was critical in part because, as Justice Scalia famously stated in his 1999 decision for the Supreme Court in *AT&T v. Iowa Utilities Board*, [5] the Act was "a model of ambiguity, even self-contradiction."[6] (Congressman Billy Tauzin famously said in response that, "If you had a law that everybody understood completely, nobody would like it.") Accordingly, there was a lot of room for disagreement about how to implement the Act, and therefore (a) who had rulemaking authority mattered a lot, and (b) implementation under different rules in every state would, as a practical matter, favor incumbents rather than new entrants. It was no surprise to anyone that this jurisdictional issue would be the focus of litigation concerning the FCC's implementation of the Act.

In addition, there were three important issues relating to "network elements" that were sure to be litigated. One concerned the pricing rules for network elements, which were required by the statute to be "cost-based" to

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. 47 U.S.C. § 251 (2012).
3. 47 U.S.C. § 252 (2012).
4. 47 U.S.C. § 271 (2012).
5. AT & T Corp. v. Iowa Utilis. Bd., 525 U.S. 366 (1999).
6. *See id.* at 397.

encourage competitive entry.[7] The second issue was whether competitors ought to be required to provide at least some network element themselves or could lease the "UNE platform" of transport, switching, and the loops. The third issue was how to implement the statutory provision requiring competitors to show that they would be *impaired* without access to a network element in order to be entitled to lease the element.[8]

An issue that OGC did not spot that turned out to be important was whether Section 271 of the Act was a bill of attainder. Bills of attainder are unconstitutional laws that single out persons for punishment,[9] and historically the only laws struck down as bills of attainder have been those punishing confederate supporters after the Civil War and communists during the height of the Cold War. I will not fault us for failing to foresee an argument that Section 271—which *benefitted* the BOCs by authorizing them to enter long-distance markets closed to them on account of their ability to extend their local monopolies into those markets—in fact unconstitutionally *punished* them within the meaning of the bill of attainder clause.

After the Commission released the Local Competition Order in August of 1996, the state commissions, the BOCs, and GTE (the eighth large incumbent local telephone company, which merged with Bell Atlantic to form Verizon) quickly challenged the Order in court. Petitions for review were filed in numerous circuits and the Eighth Circuit won the lottery to hear the case. Judges Bowman, Wollman, and Hansen would hold five separate oral arguments over the next few years as the case bounced back and forth between the Eighth Circuit and the Supreme Court.

The Eighth Circuit's first and most consequential decision was to issue a stay in October 1996 on the ground that the FCC lacked jurisdiction to issue rules concerning most of the provisions of the Act.[10] That decision was reversed by the Supreme Court in *Iowa Utilities Board*.[11] The government advanced two different jurisdictional arguments. One focused on the various provisions of the 1996 Act itself, which pointed in different directions concerning who had rulemaking authority. The other focused on Section 201(b),[12] the provision of the Communications Act adopted in 1934 that gives general rulemaking authority to the FCC. The Eighth Circuit focused on the contradictory provisions in the 1996 Act, but the Supreme Court emphasized Section 201(b) in holding that the Commission had rulemaking authority with respect to every provision in the Communications Act of 1934, as amended, including provisions added by the 1996 Act. Nevertheless, the stay, while overturned, significantly delayed implementation of Commission's rules.

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7. *See* 47 U.S.C. § 252(d).
8. *See* 47 U.S.C. § 251(d)(2).
9. U.S. CONST. art. I, § 10, cl. 3.
10. Iowa Utilis. Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996).
11. *See Iowa Utilis. Bd.*, 525 U.S. at 397 (1999).
12. 47 U.S.C. § 201 (2012).

Another consequential decision was a decision by District Court Judge Joe Kendall of the Northern District of Texas on New Years' Eve 1997 striking down Section 271 as an unconstitutional bill of attainder.[13] It was as irrational as it sounds to strike down a law that benefitted the BOCs as a bill of attainder. But three different court of appeals decisions followed before the issue was dead and buried.[14] Because the BOCs would have been able to enter long-distance markets without satisfying the requirements of Section 271 if their bill of attainder argument had somehow prevailed, they had less motivation to attempt to do so until the argument was finally rejected by the courts.

Regarding the pricing rules for network elements, on remand from the Supreme Court's *Iowa Utilities Board* decision the Eighth Circuit struck down those rules on the merits.[15] But the Supreme Court reversed in its 2002 *Verizon*[16] decision and upheld the Commission's decision to apply a total element long run incremental cost ("TELRIC") model to determine the prices for leasing network elements. But six years elapsed between adoption of the rules and the Supreme Court's decision upholding them.

With respect to the other network elements rules, the Eighth Circuit upheld both (a) what the Supreme Court called the "all elements" rule permitting competitors to lease the "UNE platform" and (b) the FCC's "impairment" rule that essentially presumed that competitors were necessarily impaired without access to any network element they wanted to lease because they would choose to buy rather than lease if they could. In *Iowa Utilities Board*, the Supreme Court upheld the all elements rule. But the Court reversed the Eighth Circuit's decision upholding the FCC's interpretation of the impairment requirement. The Supreme Court did not suggest that the statutory impairment requirement set a high hurdle, but rather faulted the FCC for not requiring *any* showing of need.

When new unbundling rules were issued in 1999, review occurred in the District of Columbia Circuit. In 2002, Judge Williams sent the revised standard back to the Commission in the first *United States Telecommunications Association v. FCC*[17] decision. Chairman Michael Powell then issued another set of unbundling rules, which Judge Williams vacated in 2004.[18] The court's key decision was to overturn the Powell Commission's conclusion that competitors would be impaired without access to unbundled switching on the ground that an extremely granular and time-consuming analysis was required to justify unbundling.

There had been relatively little competitive entry into mass market telephone markets in the eight years since the Act was passed. The entry that

13. SBC Comm'ns, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997).

14. *See, e.g.*, BellSouth Corp. v. FCC, 162 F.3d 678, 683 (D.C. Cir.1998); BellSouth Corp. v. FCC, 144 F.3d 58, 62 (D.C. Cir.1998); SBC Comm'ns, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998).

15. Iowa Utilis. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000).

16. Verizon Comm'ns, Inc. v. FCC, 535 U.S. 467 (2002).

17. U.S. Telecomms. Assn. v. FCC, 295 F.3d 1326 (D.C. Cir. 2002).

18. U.S. Telecomms. Assn. v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

had occurred was primarily by cable operators, who were low-hanging fruit because they already had broadband connections to consumers' homes. Entry by other would-be competitors depended on access to unbundled network elements, and there was no realistic prospect of competitive entry into the mass market without access to switching. MCI and AT&T, whose stock values had collapsed, gave up and sought to be acquired after the D.C. Circuit's 2004 decision. Verizon bought MCI and SBC bought AT&T (and adopted its name).

The BOCs had ground out a victory by outlasting and then acquiring their two main potential competitors. To recap, in the Eighth Circuit, the BOCs won a jurisdictional victory and overturned the TELRIC rules, but ultimately lost in the Supreme Court on both issues. Similarly, they initially prevailed on the bill of attainder argument that would have let them provide long-distance service without even attempting to open their local markets, but ultimately lost on that issue as well. The BOCs lost the all elements rule in the court of appeals and the Supreme Court. They won the impairment issue in the Supreme Court after losing in the Eighth Circuit, but that should not have been a victory that prevented competitive entry. As the FCC concluded, the statute requires unbundling of network elements when competitors would be impaired without them and nothing in the Supreme Court's decision is to the contrary. The fact that no mass-market competition developed after the D.C. Circuit struck down the Powell Commission's unbundling rules shows that competitors were in fact impaired without access to unbundled switching.

Could it have been different? Under considerable congressional pressure, the Commission granted the BOCs authority to enter the long-distance markets before there had been any substantial competitive entry into local mass markets. Here the Commission relied on determinations that local competition was possible rather than that it had been actual competitive entry on a significant scale. With 20-20 hindsight, that was a mistake. In my view, an ounce of empirical evidence is worth a pound of theory. Moreover, in hindsight it was a mistake to rely on competition that depended on the availability of unbundled network elements when the litigation concerning the availability of unbundled switching had not concluded.

But if any one change might have led to mass-market competition by multiple competitors, it would have been to require the BOCs to actually enter other local markets themselves to a significant extent in order to obtain authorization to provide long distance. Thus, for example, Bell Atlantic might have been required to compete with Nynex in the New York metropolitan area rather than acquire it. In order to successfully compete in another BOC's region, the BOCs would have been forced to support rules that would have permitted competitive entry using network elements, including unbundled switching. Of course, Congress did not require competitive entry by the BOCs, so the FCC could not have imposed such a requirement. The FCC nevertheless attempted to force a BOC to compete in other local markets by conditioning SBC's acquisition of Ameritech on

SBC's promise to enter multiple local markets outside its territory, but SBC chose to pay the fines imposed by the FCC rather than compete.

A common view of the rise and fall of the market-opening provisions of the 1996 Act is that it is good as a policy matter that the Act failed to achieve its central goal. That is because there was and is a pressing need for deployment of broadband loops and, it is argued, such deployment was unlikely to occur if unbundling were required. As an initial matter, it should be noted that this argument is an attack on the statute, which provides that competitors are entitled to lease network elements if they would be impaired without them. In any event, if the BOCs had been required to compete with each other, it seems likely that they would have devised rules that supported broadband deployment while permitting competitive entry—otherwise, they would not have been able to compete with the cable operators. And a healthy MCI and AT&T might have spurred rather than deterred deployment.