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

---

* Jim Cicconi is Senior Executive Vice President of External and Legislative Affairs for AT&T and Chair of the AT&T Foundation. Prior to joining AT&T, he was a partner at Akin Gump Strauss Hauer & Feld LLP (1990-1998) and served in two presidential administrations, as deputy chief of staff to President George H.W. Bush (1989-1990) and as a special assistant to President Ronald Reagan and to White House Chief of Staff James A. Baker, III (1981-1985).

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.