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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.