

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.