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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

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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.