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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).