Where Do We Go from Here?

Larry F. Darby, Ph.D.
ldarby@erols.com
Visiting Fellow
Economic Strategy Institute

The fifth anniversary of the Telecommunications Act of 1996 this February and the post-election transition to a new telecommunications policy team combine to provide a good opportunity to review the success of the Act. The Act was greeted by great fanfare and garnered the support of most interest groups. Some hardliners carped, but the verdict to Congress was, "Well done!" What a difference five years, tens of thousands of pages of Federal Communications Commission notices and orders, dozens of court reversals and remands, a sour stock market and, last but not least, the Internet can make. Praise has given way to dissatisfaction by industry, government, and consumers. Calls for re-opening the Act are proliferating.

Has the Act Been Successful?

The Conference Committee declared the Act's purpose to:

> . . . provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans.

This statement expresses four goals:

- To increase competition
- To expand and rationalize universal service
- To encourage investment and innovation
- To reduce government's role.

The Act's implementation under FCC Chairman Reed Hundt emphasized encouraging competition of various sorts with local Bell companies. The first FCC post-Act order, spelling out TELRIC, UNEs, resale, and other terms of interconnection, stands as a monument to that effort.

The jury is out on Commission efforts to create competition. Even now, the basic ground rules for incumbent/entrant interconnection are tied up in the courts; the sector is hampered by financial uncertainty; new entrants are in disarray and full retreat from initial business plans; and, most importantly, not enough consumers are enjoying more choice or better quality of service. On the other hand, billions of new capital has been committed; the entry of new competitors can be observed on thoroughfares in most major cities; and, many business users have more and better options. Most believe the future is bright for well-managed entrants.

The verdict on universal service is clearer. Not only did the Kennard Commission follow up and fill in the details of the broad changes mandated in the Hundt interconnection order, it also implemented the Act's universal service language. The universal service program overall has generally matched Congressional intentions, although income-based and geographic service differences continue to challenge policy makers.

Realization of the third goal, fostering investment, is more problematic. Section 706 directs the FCC and state commissions to:

> ". . . encourage the deployment on a reasonable and timely basis of advanced telecommunications capability. . . by utilizing. . . [varied] methods that remove barriers to infrastructure investment [including regulatory forbearance].

The FCC has consistently claimed credit for inducing investment, but it is instructive that investment has grown fastest in the areas least regulated by the agency – wireless and broadband backbone facilities in particular. The surge in investment in sectors administered by the FCC is arguably the product of technological opportunities, market demand growth accompanying general economic expansion and, very importantly for new entrant investment, rosy financial market conditions.

The Commission has assumed that promotion of *competition* alone is sufficient to ensure timely, reasonable, and high levels of infrastructure investment, even without offering much theoretical or empirical support for that proposition; or, factoring in the clear and substantial negative investment incentive effects borne of regulatory delay, risk and episodic transfers of wealth from incumbent shareholders.

If progress toward the first three statutory objectives is uncertain, however, there is little room for debate on the fourth – regulatory forbearance.

The FCC has deregulated few activities. Nor has it eliminated or attenuated its rules under the terms of various sections of the Act urging and enabling regulatory forbearance by the Commission. The Commission's obligatory review of its rules has been half-hearted. Its greatest success has come in the international arena, where it has streamlined much of the international regulatory program. Ironically though, that effort has been driven by WTO constraints rather than by the 1996 Act.

Problems with the Act

The 1996 Act is technologically obsolete. It is backward looking and directed toward longstanding issues growing out of the breakup of AT&T and the uneven development of market competition under the 1934 monopoly-oriented statute. The debate and drafting of the Act preceded the explosive growth of IP technology, the take-off of fiber optics, the "mobility" revolution, the "Internet" phenomenon, and other changes only now taking form.

Ownership restrictions, regulatory boundaries and classifications, the FCC's internal structure, and federal rules crafted when industries were distinctly divisible and clear lines divided broadcasting, cable, and telephony, no longer make administrative, economic, or bureaucratic sense. Five years of interplay between Moore's and Metcalfe's Laws has transformed the post-divestiture marketplace that largely defined the 1996 Act.

What Should Congress do?

We need a national telecommunications policy that reflects the current tempo of technology and market change. What we have is a collection of rules, based on old regulatory categories and technological distinctions, specially tailored and differentiated for particular markets and firms based on a tangle of conflicting precedent and reckoning of the balance among different policy objectives. Harsh language indeed. But, as Casey Stengel might say: "You can look it up!"

Congress and the FCC should recognize that old regulatory models and concepts cannot keep pace with technological and market change in an age of packet networked, intelligent user devices. Recognition of the mismatch between government processes and market developments means reversing the current presumption that change has to be controlled lest bad things happen.

Determining and drafting needed statutory change will be tricky and well outside my ken. But, let the debates begin. One approach would be to elevate on the FCC's agenda and to make more binding on their day-to-day activities and rulemakings the two largely neglected goals of the 1996 Act – deregulation and capital formation incentives – while insisting on true technology

neutrality. Rules to advance competition or universal service should and would survive if they are tailored to meet the test of clear, beneficial impacts on consumers and investment.

Other possibilities include drafting language directing symmetric treatment of facilities used to provide Internet services; or to focus on a regulatory scheme for "broadband infrastructure" that does not discriminate among alternative technologies. Whichever path is chosen, the language should get government out of the way of investment and creation of consumer welfare and put an end to the current scheme of regulatory handicapping.

In the fiscal arena, the Congress should move quickly to provide tax credits designed to encourage broadband network investment. The principle of using "tax expenditures" to influence economic activity is well established. The corporate income tax has long been a tool of US national economic policy. The Congressional Budget Office expressed it best: ". . . the corporate tax is used not only to raise revenue but to influence economic activities that might not otherwise be undertaken."

The clear connection between telecommunications investment and realization of other important national goals establishes a firm foundation for supporting telecommunications tax incentives as an important tool of macroeconomic policy. The forward-looking nexus between telecom investment and the macro economy are strongest in the case of broadband networks, particularly local and regional distribution facilities. In recent years the information technology sector can be credited with much of the surge in the stock market and performance of the national economy.

Historic growth of the Internet, and firms that supply it, cannot be sustained without elimination of the bandwidth constraints resident in local and regional networks. Tax credits tailored to address that problem would combine nicely with changes in the regulatory regime.