

## The Telecommunications Act at Five

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On the fifth anniversary of its enactment, it would be exaggeration to suggest that the Telcom Act of 1996 has lived up to its promise. After all, its vision was made clear right in the preamble: “An act to *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid growth of new telecommunications technologies.” To the same effect, the Conference Committee report stated the Act was intended “to provide a **pro-competitive, deregulatory** national policy framework.

Five years later, competition in various segments of the telecommunications marketplace is not as robust as the legislation’s framers must have (or at least should have) hoped it would be. And there hasn’t been much meaningful deregulation under the supposedly deregulatory framework. So, the reality has not matched the rhetoric.

This is not to say that some progress towards the goals of the ‘96 Act has not been made. For example, competitive local exchange carriers (CLECs) now serve about 7% of local lines nationwide, a 53% increase just since the end of 1999. And the Federal Communications Commission (FCC) just recently granted two more applications for the former Bells to offer long distance services – bringing the number of states which now have the benefit of this additional competition to four! There have been positive developments on the wireless front as well, with most consumers across the country typically having a choice of five or six facilities-based providers, and of pricing plans offering buckets of minutes on an “anytime, anywhere” basis. (In the marketplace, anyway, the

distinction between “long distance” and “local” is rapidly being rendered obsolete, even while the Commission faces the prospect of considering 48 more RBOC applications seeking permission to enter the “long distance” market upon showing that their “local” markets are open to competition!)

Perhaps history will judge that, under the circumstances, with the various industry interests fighting each other tooth and nail to preserve every conceivable regulatory advantage while seeking to disadvantage their real and imagined competitors, the ‘96 Act was the best that could be accomplished under the circumstances. Put more positively, when we look back, perhaps we will judge that it proved serviceable as a transitional bridge to the piece of legislation that at some future point we surely will see: “The Telecommunications Deregulation Act of ?????.”

In a broad sense, the most problematic aspect of the ‘96 Act is that rather than providing more specific deregulatory direction (say, for example, the extent of the unbundling of the local network required), Congress left too much open-ended discretion in the hands of the agency regulators. Would you believe the statute contains almost 100 delegations of authority to the Commission to act in “the public interest”? Indeed, Section 271 itself – the provision containing the famous 14-point checklist – includes the further requirement that the Commission find the application is in “the public interest.” Small wonder that with these and other such indeterminate delegations of authority (see, for example, Section 254, the universal service provisions) the first five post-‘96 Act years have been such a litigation feast.

In only a somewhat more narrow, but nevertheless very important sense, the Act's perpetuation of the traditional "stovepipe" model of different regulatory regimes for services with different names – "cable," "information services," "telecommunications," "broadcast" – which are now converging in a competitive marketplace may prove to be a serious obstacle to achieving an appropriate [de]regulatory regime. For example, in the aftermath of the Ninth Circuit's *AT&T v. City of Portland* decision holding that cable modem service is "telecommunications" subject to Title II's common carrier provisions, the Commission is now forced to wrestle with questions such as whether it must regulate this particular broadband service and whether other broadband services (say, DSL) should be treated comparably.

But do not despair – completely! Maybe the first problematic aspect of the Act, the broad discretion granted to the Commission, will now prove to be not as much of a hindrance to more robust competitive development after all. While the bias of the post-'96 Commission has been to use the broad discretion to micromanage competitive development, the new commission, under Michael Powell's leadership, may well find ways to use the same discretion to take actions that reflect a more deregulatory bias. The new chairman seems to have an appreciation that, with technology evolving so quickly, regulatory micromanagement is an increasingly hazardous occupation. Or as he put it recently at a Progress & Freedom Foundation conference: "[O]ur bureaucratic process is too slow to respond to the challenges of Internet time."

Indeed, Powell may yet find ways to lead the Commission to use its discretion to fashion a

regime which will contain legacy regulation to narrowband services, while refraining from regulating all currently unregulated broadband services (e.g., cable) and deregulating those currently regulated (e.g., DSL). Hint: Revisit Section 706 and interpret its forbearance authority more expansively.

So, I'm optimistic that the new commission can achieve much in the way of reform on its own if it puts its mind to it. For instance, there are definitely some aspects of the merger review process that can be reformed absent legislative action.

But, if you ask me to suggest just three itsy-bitsy changes to the Act going forward, they would be:

- Mandate the deregulation of all broadband services, regardless of technology platform.
- Curtail the commission's authority to use the license transfer process to duplicate the competitive analyses performed by the antitrust authorities and as a forum for imposing conditions unique to the merger applicants that more appropriately should be considered in a generic rulemaking proceeding.
- Sunset all of the delegations of "public interest" authority to force Congress to decide what it really wants the agency to be doing. The sunset period can be sufficiently leisurely to give Congress a chance to figure it out, but it's not too much to ask that Congress be more specific than: "Go forth and do whatever three of the five of you commissioners think makes sense today."