The Telecom Act and the Internet

Dave McClure
dmcclure@usiia.org
President & CEO
US Internet Industry Association

Five years later, the Telecommunications Act of 1996 is universally scorned as a failure. However, the Act has been a mix of both success and failure for the Internet community. In fact, the Internet may have gained more than any other segment of the telecommunications industry from passage of the Act.

The Act was to have been a major achievement for the 105th Congress – the first significant overhaul of telecommunications law in 62 years. It was intended "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Unfortunately, once signed into law, the Act almost immediately became a disaster.

Key provisions of the Act were challenged and overturned in court on Constitutional and other grounds. Competition between telephone and cable companies never materialized. Basic telecom definitions and policies were rendered obsolete by technological advances or mired in bureaucratic wrangling. The result was higher prices for consumers, stalled progress in core technologies such as high-definition television and broadband Internet, and an environment in which the courts rather than the Congress dictated US telecommunications policy.

The Act simply had too many interests working against it. Coming before the Congress in an election year, with all of the House and one-third of the Senate up for grabs in addition to the White House, meant that compromises and pork were inevitable. The battle for reform quickly became a battle for balance between conflicting industry segments so that no single segment would get too much or too little. Further, the telecommunications industry was highly fragmented and lacked consensus – the process presented a handful of large players with an opportunity to use the Act as a competitive weapon, with each company fighting both to secure its position and to punish competitors. This forced even the most reform-minded companies to abandon the public interest in favor of defense and offense. It also guaranteed that the Act would face immediate court challenges.

Another problem was that implementation rested with the Federal Communications Commission (FCC). That agency was by its own admission hampered by a structure that convergence has rendered obsolete. The FCC's "bureau" structure was simply not flexible enough to deal with a communications industry in which telephone lines deliver movies, cable lines deliver telephone calls, and electrical utilities deliver broadband Internet. The result was bureaucratic gridlock.

Still in the formative stage in 1996, the Internet community was impacted directly by the Act in only a few places. But the implementation of the Act has touched on virtually every Internet service provider or company in the five years since.

Much of the impact has been negative.

The Communications Decency Act. The brainchild of Sen. James Exon, this bill was purported to be a means to protect children from online pornography. But that was largely an election-year red herring – by creating a new and

legally undefined standard of "indecency," the bill gave Congress a powerful tool to censor content on the Internet. The Communications Decency Act was enrolled in the Telecom Act when it passed. The Communications Decency Act placed web sites and ISPs at risk for any content the Congress wished to block. Fortunately, the courts overturned it almost immediately.

Reciprocal Compensation. Opening telephony networks to competition meant that the FCC had to establish new rates for incumbent and competitive local exchange carriers (ILECs and CLECs, respectively) to compensate one another for passing phone traffic back and forth. An unintended consequence was to make it highly profitable for the competitors to be paid for calls to ISPs. CLECs bought up hundreds of ISPs, while smaller service providers were encouraged by self-styled consultants to become CLECs themselves and base their revenue projections on ILEC funding. The FCC has attempted to reverse the damage by ruling such calls are not locally terminated, but by the time reciprocal compensation is sorted out, thousands of CLECs and ISPs will be forced out of business.

Regulatory Disparity. In implementing the Act, the FCC continued to view the telecom industry through its traditional lenses, with cable, wireless, satellite, local telephony and long distance all seen as separate and with little or no overlap. By the time cable companies had jumped into telephony and Internet services, the FCC was unable or unwilling to change course. The result was an unparalleled opportunity for one or two companies to build empires with which to crush competition. AT&T and AOL Time Warner did exactly that, closing access to the cable platform for thousands of ISPs while the FCC continued to pursue a policy of "forbearance." That strategy has also left open the possibility that the telephone companies could sue for regulatory parity, closing telephony networks to competition in the same manner that cable networks are closed.

The damage done by these three elements of the Act has been extensive, particularly in terms of the healthy, competitive marketplace the Act was designed to create. But there are a number of positive elements made possible by the Act as well.

The Online Family Empowerment Act. This was the first collaboration between Sen. Ron Wyden (D-OR) and Rep. Chris Cox (R-CA), and remains today as the most far-reaching and protective piece of Internet legislation ever crafted. Though it suffered a few compromises from the original draft, it was included as Section 509 in the Telecom Act as an offset to the Communications Decency Act. Section 509 did two critical things for the Internet community – it limited liability for ISPs from the acts of their subscribers and it provided a "good Samaritan" protection for ISPs. This latter protection allowed ISPs to remove objectionable materials from their servers without being liable for what they might miss. All three remain today as the core of US Internet legislative policy.

The "E-Rate." In 1996, only 35% of public schools had access to the global information superhighway. The E-Rate provided a much-needed incentive to wire schools not only in more affluent and easily accessible areas, but also in rural and poorer urban areas where it might not otherwise have been done. It gave the legitimacy of the Federal government to the whole notion that the Internet was a serious learning tool. Billions of dollars and thousands of schools and libraries later, the E-Rate has been a major factor in Internet penetration and closure of the "Digital Divide."

For all of these, the good and the bad, the Telecom Act cannot ever be regarded by the Internet industry as a failure. For this single piece of legislation set the tone for future Internet policy at the federal level with these words:

> It is the policy of the United States. . . to promote the continued development of the Internet and other interactive computer services and other interactive media. . .

The Telecom Act of 1996 gave a fledgling industry its first hand up, its first lines on the stage of public policy, and its birthright as the future of telecommunications. That makes the Telecom Act, even five years later, a vital piece of legislation whatever else it may or may not have achieved.