

The Promethean Illusion Continues

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In Greek mythology, the Titan god Prometheus is regarded as the protector and benefactor of man. He gave mankind a number of gifts, including fire, and was considered a patron of craftsmen and artisans. From this myth sprang the term "Promethean," which in more common vernacular has come to mean life-giving or life-enhancing; boldly creative or defiantly original; or, inspiring and done with great forethought.

When Congressional legislators and President Clinton signed the Telecommunications Act of 1996 into law on February 8, 1996, policy makers of all political stripes heralded it as a Promethean moment. In unusual unison, policy makers boasted that they were creating a bold new world for communications companies and consumers; a veritable telecommunications Nirvana seemed set to dawn.

Regrettably, however, this apparent Promethean moment was no more a reality than the Greek myth. In almost every way possible, the Telecommunications Act of 1996 has been an unmitigated failure. Whether judged against previous deregulatory initiatives or the Act's stated goal of promoting increased competition, investment, and entrepreneurialism within this sector, the Telecom Act has not lived up to its over-hyped billing.

The reasons for this failure are numerous, and when explained in technical terms, appear quite complicated. In reality, however, what lies at the heart of the Telecom Act's failure is a rather simple concept which might best be described as "Chicken Little complex": a persistent and all-embracing apprehension held by legislators and regulators who fear that if they let go of the reins

of power, the proverbial sky will fall on telecom companies and consumers.

Legislators and regulators often conjure up an endless parade of horrible possibilities that they fear would befall this market if all operating restrictions, price controls, and other regulatory "safeguards" were removed completely. Policy makers appear fixated with fears of potential price hikes, possible job losses, temporary service outages, or other imagined calamities.

Consequently, since its inception, a troubling paradox has characterized the structure and plain language of the Telecom Act. On one hand, in reading through the Act's legislative history or reviewing the many speeches policy makers have made about the legislation, the student of the bill is struck by Congress' genuine interest in promoting – as the preamble of the Telecommunications Act sets forth – a "pro-competitive, de-regulatory national policy framework" for this sector.

On the other hand, even if the student of the Act takes this pledge at face value, they are immediately left wondering why a "pro-competitive, de-regulatory framework" entails hundreds of pages of legislative language, a litany of meticulously detailed regulatory requirements and obligations, and a significant delegation of broad and exceedingly ambiguous authority to regulators at the Federal Communications Commission (FCC).

In essence, therefore, the Telecom Act is a statute at war with itself. In true "have-your-cake-and-eat-it-too" fashion, Congress attempted to engineer an illogical balancing act between the

contradictory goals of promoting increased competition and that of preserving the regulatory status quo. Simply stated, *Congress wanted market competition but did not trust the free market enough to tell regulators to step aside and allow markets to function on their own.* Consequently, the FCC, the Department of Justice, state Public Utility Commissions, and the courts, have treated the industry as a plaything to be endlessly toyed with.

Exhibiting a unabashed regulatory hubris, these bureaucrats actually believed they could “create competition” if they just tried hard enough. And trying hard meant regulating a lot. Hence, the situation five years after the passage of the Telecom Act is only slightly rosier than it was in 1996, not because regulation has helped improve matters, rather because technology has continued to evolve in spite of the continued presence of burdensome regulation.

Although it may not be politically realistic to expect this situation to be remedied in the short term, an enlightened Congress and principled FCC could correct the flaws of the Telecom Act by proposing an ambitious reform agenda to complete the deregulation of this industry. The principles governing this agenda should be as follows:

- End quarantines. End all remaining market restrictions and quarantines on a strict timetable, say by 2003.
- End forced access. Stop the spread of mandated open access. Allow voluntary negotiation, freedom of contract, and complete pricing flexibility. Encourage private dispute resolution mechanisms to solve interconnection controversies.
- Demand parity. Mandate *deregulatory* parity between formerly distinct industry sectors by borrowing a page out of the pages of trade law and adopting the equivalent of a “Most Favored Nation” (MFN) clause for telecommunications

which stipulates: “Any communications carrier seeking to offer a new service or entering a new line of business, should be regulated no more stringently than its least regulated competitor.”

- Free the spectrum. De-zone and fully privatize the electromagnetic spectrum by creating unambiguous and fully-flexible property rights in use. Disgorge more spectrum from federal agencies for immediate auction. Eliminate artificial caps and controls on spectrum aggregation.
- End entitlements. Comprehensively reform and then devolve universal service programs (including the “E-Rate” program) to the states. Encourage the states to use direct, means-tested vouchers to provide financial assistance to the extent any is required.
- Reform antitrust. End unwarranted FCC antitrust meddling and merger review policies. Leave antitrust review to Department of Justice authorities.
- End the public interest charade. Eliminate the vague and frequently misused “public interest” standard.
- End broadcast mandates. Get out of the broadcast censorship and content control business entirely.
- End the Net censorship crusade. Stop proposing Internet censorship and mandatory filtering initiatives.
- Put the FCC to bed. Undertake sweeping FCC reform and propose a plan for eventual closure.

If Congress wants to effectuate a truly Promethean moment for telecommunications, it will follow the course outlined here. If, on the other hand, federal lawmakers continue to pursue a heavy-handed, pro-regulatory agenda that entails endless federal regulatory micromanagement of this fast-paced industry, they will have to contend with another Greek myth, that of Pandora and her fabled box.

Congress must admit it opened a Pandora's Box of problems in the Telecommunications Act of

1996 that now must be closed by completing the job of deregulation once and for all.