
THE TELECOMMUNICATIONS ACT OF 1996 IN THE TWENTY-FIRST CENTURY

By Howard W. Waltzman*

I. INTRODUCTION

Prior to 1996, local telephony was perceived to be a natural monopoly, subjecting such service to strict pricing, entry and exit, and even investment regulation. At that time, the Federal Communications Commission (the Commission) had only recently introduced competition in the long-distance market after the advent of microwave technology made such competition possible. And cable operators received exclusive franchises to provide cable service, though Congress introduced competition from Direct Broadcast Satellite (DBS) providers.

The telecommunications industry hailed Congressional enactment of the Telecommunication Act of 1996 ('96 Act).¹ The Communications Act of 1934,² which the '96 Act amended, had not been materially changed, at least with respect to telecommunications services, since its passage. The '96 Act obliterated the legal boundaries between the local telephone and long-distance markets, permitting AT&T, MCI, and Sprint to enter the former, and the Baby Bells to enter the latter. The '96 Act also formally terminated the AT&T consent decree.³

But that was then, and this is now. More than sixteen years after its enactment, the '96 Act is a statute that has been overtaken by technological and market developments, especially the convergence of voice, video, and data services emanating from the Internet revolution. While almost any statute would need at least some modifications two decades later, the dramatic changes in the delivery and consumption of voice, data, and video services precipitated by the Internet and Internet Protocol (IP) technology has left the Commission in the unenviable position of applying twentieth century law to twenty-first century technology. This task is increasingly analogous to fitting the proverbial square peg in a round hole.

In addition, the '96 Act is perceived as including a number of ambiguous provisions that have resulted in a significant amount of litigation and caused uncertainty within the communications sector regarding statutory requirements and the scope of the Commission's authority. U.S. Supreme Court Justice Scalia opined shortly after the enactment of the '96 Act that "[i]t would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."⁴

**Howard Waltzman is a Partner at Mayer Brown in Washington, DC. He focuses his practice on communications and Internet law and commercial transactions in the United States and other key international markets. He represents some of the nation's leading communications service providers, manufacturers, and trade associations in commercial transactions, as well as in regulatory and legislative matters, including with respect to Internet services, spectrum policy, privacy, video programming, wireline competition, and communications-related homeland security. He also represents investors on these and other communications-related matters.*

II. THE '96 ACT

The '96 Act focused primarily on local and long-distance telephone competition. Section 251 of the '96 Act requires incumbent local exchange carriers (ILECs) to permit interconnection at "any technically feasible point within the [ILEC's] network,"⁵ provide "nondiscriminatory access to network elements on an unbundled basis,"⁶ and resell services to CLECs at wholesale rates.⁷ These detailed obligations on ILECs were intended to facilitate local telephone competition.

Section 271 established the requirements under which the Bell Operating Companies (BOCs) would be permitted to offer long-distance service in their home markets. These requirements included a fourteen-point "competitive checklist" intended to ensure that a BOC opened its local market to competition before being permitted to offer long-distance services.

The legislation also formalized a federal universal service system for subsidizing access to "advanced telecommunications and information services" throughout the United States and to "advanced telecommunications services" by schools, health care providers, and libraries.⁸ Creating an explicit system for subsidizing services in high-cost and low-income areas was important because, in a monopoly environment, companies utilized implicit mechanisms to cross-subsidize within their own customer base.

While the '96 Act primarily focused on telephony competition, the legislation also modified cable service regulation. The '96 Act sunsetted the regulation of upper-tier cable services, and created a mechanism for cable companies to avoid even basic-tier regulation when they face "effective competition."⁹

Section 706 of the '96 Act was a somewhat obscure, but now highly debated, provision of the law. Section 706(a) provides that the Commission and State Public Utility Commissions must "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."¹⁰ Section 706(b) requires the Commission to conduct regular inquiries into "the availability of advanced telecommunications capability to all Americans."¹¹ If the Commission determines that such capability is not being deployed to all Americans "in a reasonable and timely fashion," the Commission is required to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."¹²

III. HOW THE INDUSTRY HAS CHANGED SINCE 1996

The changes in consumer use of communications services

since 1996 are staggering. When Congress enacted the '96 Act, the Internet was in its infancy, the vast majority of multi-channel video programming distributor (MVPD) customers were cable subscribers, there were no cable-telephone or interconnected VoIP subscribers and only 44 million wireless subscribers, and no wireless Internet connections. Today, the United States has more than 26 million cable-telephone customers,¹³ 34 million total interconnected Voice over Internet Protocol (VoIP) subscriptions,¹⁴ more than 330 million wireless connections,¹⁵ and more than 245 million Internet users,¹⁶ including approximately 120 million wireless data connections.¹⁷ Non-cable MVPDs now account for more than 40 percent of MVPD subscribers.¹⁸

As these statistics demonstrate, the industry has changed dramatically since 1996. ILEC-provided wireline subscriptions are declining,¹⁹ whereas cable-telephone, VoIP, and wireless subscriptions have grown exponentially. Wireless service is increasingly a full substitute for wireline service, with more than 40 percent of consumers identifying their mobile device as their primary or exclusive means of communication.²⁰ Cable operators face significant competition in many parts of the country from at least three other facilities-based video providers, in addition to a burgeoning industry of “over-the-top” Internet video providers. Not only is the Internet a dominant presence in consumers’ lives, but wireless Internet connections are basically on par with wireline connections as consumers’ means of accessing the Internet. In fact, the ability of ILECs, competitive local exchange carriers (CLECs), wireless carriers, and cable operators to utilize IP technology to deliver voice, data, and video services over their platforms means that the barriers to entry in all of these markets have largely been demolished. Convergence has replaced the monopoly provision of services as the dominant characteristic of the communications sector.

The dramatic evolution of technology, innovation developed by the communications sector, and unceasing consumer demand for “anytime, anywhere” services have resulted in new challenges for the Commission. This evolution has called into question whether ILECs should remain classified as dominant in the voice business, cable operators as dominant in the video business, or whether *any* technology platform could dominate the data market. So the traditional regulatory models created or solidified by the '96 Act seem archaic in today’s dynamic marketplace.

More importantly, there is the fundamental question regarding whether the '96 Act empowers the Commission to determine the regulatory (or deregulatory) framework for IP services and facilities, or even merely to resolve disputes involving the provision of Internet services. The clash over the Commission’s authority to adopt its Open Internet Rules²¹ illustrates the tension between the scope of the Commission’s authority under the '96 Act and Commission’s *ability* to establish firm ground rules for today’s Internet marketplace.

IV. SECTION 706 AND THE COMMISSION’S AUTHORITY TO REGULATE **Internet Services**

In its brief defending the Open Internet Rules, the

Commission asserts that “[i]n the Telecommunications Act of 1996, Congress granted the FCC a central role in making and implementing federal policy regarding the Internet.”²² The Commission further argues that “Congress assigned the FCC—in which it vested policy-making authority over all communication by wire and radio—a central role in protecting Internet openness and the resulting investment in broadband facilities.”²³ Yet the Commission primarily points to Section 706 in making this argument: “Section 706 plainly envisions an FCC role in broadband policy.”²⁴

The Commission’s argument is premised on the notion that Congress empowered the agency to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”²⁵ However, the statute also states that the tools available to the Commission to encourage such deployment only include “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,”²⁶ many of which seem rather outdated in today’s Internet marketplace. For example, price cap regulation is a vestige of a telecommunications market characterized by a dominant provider. Additionally, “promot[ing] competition in the local telecommunications market” as a means of incentivizing broadband deployment appears unnecessary given the dwindling base of ILEC-provided local service and the rapid growth of cable-telephone and VoIP subscriptions, as well as the increasing rates of “cord-cutting” wireless substitution.

As set forth in its brief, the Commission argues that “Section 706(b) authorizes—indeed requires—the Commission to accelerate the deployment of broadband and promote competition in telecommunications markets.”²⁷ However, the '96 Act in general (and Section 706 in particular) does not provide the Commission with explicit authority over the prices, terms, or conditions of *broadband services*,²⁸ or to intercede in disputes between providers of broadband services and Internet applications. The '96 Act created a prescriptive regulatory regime for telecommunications services and preserved such a regime for cable services, though the legislation also provided the Commission with the explicit authority to deregulate when competition rendered regulation unnecessary. In contrast, the '96 Act merely provides ambiguous authority to encourage the deployment of “advanced telecommunications capability,” rather than any specific authority to regulate broadband services.

The question today is: Did Congress, through the language set forth in Section 706, give the Commission the authority to regulate the manner in which broadband providers manage Internet traffic by granting the agency the ability to adopt “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment” as the agency argues in its brief? The Commission cites this language to support its Open Internet Rules by asserting that such rules “protect the creation of new services. The resulting consumer demand for more, faster, and

better Internet connections drives access provider investment in infrastructure to satisfy that demand, thus serving the goals that the Commission must further under Section 706(a) and (b).”²⁹ Under this theory, the Open Internet Rules are based upon the presumption that, if broadband providers block or degrade Internet applications, there will be less incentive to create new applications, which will undermine consumer interest in the Internet and give broadband providers less of a reason to invest in newer, faster networks.

V. CONGRESS NEEDS TO ESTABLISH A CLEARER FRAMEWORK FOR INTERNET SERVICES

For now, it appears that the courts will decide the scope of the Commission’s authority under Section 706, and whether the statutory language permits the Commission to impose regulatory obligations on broadband providers, and to police broadband network management practices. But, if nothing else, the complexity and fluidity of the Internet market demonstrates that Section 706 is an unsustainable framework for this rapidly changing market. Congress needs to provide clearer guidance to the Commission beyond simply prodding the agency to incentivize infrastructure investment. Rather than simply telling the Commission that there needs to be more broadband network deployment, Congress should establish a clear framework regarding the Commission’s authority (or lack thereof) over broadband services and infrastructure; the relationship between broadband network providers and applications providers; and what, if any, rules apply to the transmission of applications over the Internet. Twenty-first century technology and services warrant a twenty-first century framework.

There will be differences of opinion regarding whether Congress should grant the Commission explicit authority over broadband services, and, if so, the extent of that authority. But the ability to use the Internet and IP technology to deliver voice, video, and data services undermines many of the assumptions underlying the ’96 Act, and further exacerbates the ambiguity inherent in the statute.

Today, the Commission must rely upon a statutory provision that did not, and could not, envision the vast majority of the innovations in the delivery and use of IP technology to serve as the primary source of the Commission’s authority over broadband services. In reality, however, Section 706 is inadequate guidance for an agency that must navigate through the continued evolution of the communications industry. The impetus for Congressional action is clear, even if the outcome of the legislative process is not.

Endnotes

- 1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), available at http://library.clerk.house.gov/reference-files/PPL_104-104_Telecommunications_1996.pdf.
- 2 See 47 U.S.C §§ 151–621 (2011).
- 3 Pub. L. No. 104-104, § 601 (codified as amended at 47 U.S.C. § 152(a)(1) nt.).
- 4 AT&T Corp. v. Iowa Utilities Board, 525 US 366, 397 (1999).
- 5 47 U.S.C. § 251(c)(2) (2011).

- 6 47 U.S.C. § 251(c)(3) (2011).
- 7 47 U.S.C. § 251(c)(4) (2011).
- 8 See 47 U.S.C. § 254(b)(2) and (6) (2011).
- 9 47 U.S.C. § 202(i) (2011).
- 10 47 U.S.C. § 1302(a) (2011).
- 11 47 U.S.C. § 1302(b) (2011).
- 12 *Id.*
- 13 Data, *Operating Metrics*, NATIONAL CABLE AND TELECOMMUNICATION ASSOCIATION, <http://www.ncta.com/StatsGroup/OperatingMetric.aspx> (last visited Dec. 4, 2012).
- 14 FCC REPORT BY THE INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, WIRELINE COMPETITION BUREAU, TRENDS IN TELEPHONE SERVICE (2010). The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at <http://transition.fcc.gov/wcb/iatd/trends.html>.
- 15 Background on CTIA’s Semi-Annual Wireless Industry Survey, *CTIA’s Wireless Industry Indices: 1985-2011*, CTIA—THE WIRELESS ASSOCIATION (last visited Dec. 4, 2012).
- 16 Usage and Population Statistic, INTERNET WORLD STATS, <http://www.internetworldstats.com/dsl.htm>.
- 17 WIRELINE COMPETITION BUREAU, FCC REPORT BY THE INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2011 (2012). The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at <http://www.fcc.gov/wcb/stats>.
- 18 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8581 (2012).
- 19 WIRELINE COMPETITION BUREAU, FCC REPORT BY THE INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2010 12 (2011). The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at <http://www.fcc.gov/wcb/stats>.
- 20 STEPHEN J. BLUMBERG ET AL., WIRELESS SUBSTITUTION: STATE-LEVEL ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, 2010-2011 (National Health Statistics Reports No. 61) (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf>.
- 21 *Preserving the Open Internet, Report and Order*, 25 FCC Rcd 17905 (2010).
- 22 Brief for Appellee/Respondents at 6, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Sept. 10, 2012).
- 23 *Id.* at 18.
- 24 *Id.* at 36.
- 25 47 U.S.C. § 1302(a) (2011).
- 26 *Id.*
- 27 Brief for Appellee/Respondents, *supra* note 22, at 28.
- 28 The Commission has classified broadband service as an information service rather than a telecommunications or cable service, a finding upheld by the U.S. Supreme Court. See *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).
- 29 Brief for Appellee/Respondents, *supra* note 22, at 38.

