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Toward Regulation That Fosters Competition

Chairman Reed Hundt*

As the Communications Act of 1934 turns sixty, the communications community is in the midst of a number of dramatic changes. Some of the networks comprising the "information highway," such as the wireless communications network, are developing at a rapid pace. Other communications networks are converging. For example, cable companies may soon offer telephone service and wireline telephone companies may soon offer cable service.

With development and convergence comes the opportunity for competition throughout the communications industry. From my perspective as Chairman of the Federal Communications Commission (FCC or Commission), I consider no goal to be more important than fostering competition within and between the communications networks. Although the Act has served the country well, many of its key provisions date from an era in which there was no competition in the communications industry and no realistic prospect for its introduction.

The organizers of this special issue have asked us to address how the law should be changed to respond to the challenges facing the communications industry. I favor the enactment of a statutory provision granting the Commission broad authority to waive or adapt the other provisions of the Act in order to promote competition. Analysis of the issues raised by four recent cases shows the need for such a provision.

In *Bell Atlantic Telephone Companies v. FCC,* the U.S. Court of Appeals for the D.C. Circuit struck down the Commission's "physical collocation" rule, which required the local exchange companies (LECs) to set aside part of their central offices for use by competitive access providers (CAPs).[1] The purpose of the rule was to promote competition in a portion

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* Chairman, Federal Communications Commission.

1. *Bell Atlantic Tel.*, 24 F.3d 1441 (D.C. Cir. 1994).

of the local telecommunications market, which—unlike the long-distance market—remains largely uncompetitive.

The CAPs offer a service that allows businesses to bypass part of the local exchange system when making long-distance calls. In order to allow the CAPs to connect their transmission facilities to their customers' lines most efficiently, the Commission determined that it was necessary to allow the CAPs to install equipment in the LECs' offices and to string their cables into those offices.[2]

The Commission found the authority to order physical collocation in Section 201(a) of the Act,[3] which provides that the Commission may order telephone companies "to establish physical connections with other carriers."[4] The D.C. Circuit Court of Appeals disagreed. In its view, "[t]he Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."[5]

It is not my purpose here to quarrel with the court's construction of Section 201(a), although I believe the court of appeals should have deferred to the Commission's interpretation of the statute. The point I want to make is that no one contended that the FCC's policy was not procompetitive or that it was not desirable to introduce a measure of competition into this part of the telecommunications field. What the court of appeals held was that the relevant provision of the Act did not authorize the Commission to introduce competition into that part of the market in the most efficient manner possible.

The Commission is committed to introducing competition into the local exchange market and announced the adoption of a "virtual collocation" policy forty-five days after the D.C. Circuit handed down its decision.[6] However, it should not have been necessary for the Commission to formulate a fall-back position. The Act ought to provide, in terms that no court will dispute, that the Commission has broad authority to take the steps necessary to introduce competition throughout the communications industry in the most effective manner possible.

That lesson may also be drawn from the Supreme Court's recent decision in the "permissive detariffing" case, *MCI Telecommunications*

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2. *Id.* at 1444.
3. 47 U.S.C. § 201(a) (1988).
4. *Bell Atlantic Tel.*, 24 F.3d at 1444-45.
5. *Id.* at 1446.
6. Expanded Interconnection with Local Tel. Co. Facilities, *Memorandum Opinion and Order*, in CC Dkt. No. 91-141, FCC 94-190 (July 14, 1994).

Corp. v. AT&T.[7] The provision of the Act requiring telephone companies to file tariffs listing their rates[8] remains on the statute books unchanged despite the introduction of competition into the long-distance market in the 1970s. The tariff requirement was enacted to help the Commission police AT&T's predecessor, the Bell System, which had a monopoly in 1934, by providing evidence showing whether the Bell System was charging unreasonable or unduly discriminatory rates. However, by 1979 the Commission became concerned that the tariffing requirement was having the perverse effect of assisting AT&T in resisting competition. The Commission initiated rulemaking proceedings and subsequently determined that the tariffing requirement induced noncompetitive pricing.

Tariffs had that effect because they made public any discounts that AT&T's new competitors were offering, which allowed AT&T to match those discounts immediately and, in turn, discouraged the new long-distance companies from offering discounts in the first place. In addition, the cumbersome regulatory apparatus implementing the tariffing requirement allowed AT&T to delay price cuts by others and to impose substantial legal costs on competitors attempting to offer discounts.[9]

The Commission responded by providing that long-distance companies lacking market power—i.e., all but AT&T—were not required to file tariffs. The Commission based its decision on a provision of the Act which authorizes the Commission to "modify any requirement" of Section 203 of the Act.[10] Once again, no one argued that this was bad policy. AT&T complained, but only because it also wanted to be relieved from filing tariffs on the ground that the long-distance market was sufficiently competitive that it could no longer discriminate unreasonably. But when the Commission decided that AT&T should not be relieved from the tariff-filing requirement because it still controlled 60 percent of the long-distance market, AT&T sued, contending that the Commission had exceeded its authority. The Supreme Court ultimately agreed with AT&T, holding that the elimination of the tariff-filing requirement "for forty percent of a major sector of the industry is much too extensive to be considered a 'modification.'"[11]

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7. *MCI Telecomm. Corp.*, 114 S. Ct. 2223 (1994).
8. 47 U.S.C. § 203(a) (Supp. IV 1992).
9. *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facils. Authorizations Therefor, *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, paras. 24-26 (1981).
10. 47 U.S.C. § 203(b)(2) (Supp. IV 1992).
11. *MCI Telecomm. Corp.*, 114 S. Ct. at 2232.

A properly deferential Court would not have reached that result. One commonly used dictionary defines "modify" to mean, among other things, "to make a basic or important change in," which plainly encompasses relieving some telephone companies of the tariff-filing requirement.[12] In addition, all dictionaries define "modify" to mean "change." Thus, the statute is most reasonably interpreted as granting the Commission authority to *change* "any requirement," including the tariff-filing requirement. Again, my purpose here is not to quarrel with the Court's construction, but to acknowledge that the Act did not provide the Commission with authority to take a step that plainly was procompetitive in terms that were sufficiently clear to persuade the judicial branch.

The Act ought to provide explicitly and clearly that the Commission may change any provision of the Act in order to promote competition. There is no good reason to require compliance with provisions, like the tariff-filing requirement, that made sense in another era, but ought to be modified today.

The conclusion that a statute may outlive is useful life also is shown by *Chesapeake and Potomac Telephone Co. v. United States*.[13] In that case, the district court addressed the constitutionality of 47 U.S.C. § 533(b), which was enacted in 1984 and codified a long-standing Commission rule barring the LECs from providing cable service in areas where they have a monopoly on local telephone service. The Commission's rule dated from a time when cable television service reached only 9 percent of American homes and had been maintained in part out of fear that the LECs would use their telephone revenues to cross-subsidize cable operations and cripple the smaller and newer cable operators.[14]

By 1992, however, enormous changes had occurred in both the cable industry and the telecommunications industry. The cable industry had grown considerably, reaching 60 percent of American homes. In addition, in the wake of the 1983 judgment dispersing the Bell System, the LECs were starting to enter lines of business beyond the traditional local telephone business, and their entry into other fields was promoting more vigorous competition in those fields.

More important changes were on the horizon, but were being stifled by Section 533(b). In the "video dialtone" order, the Commission anticipated that telephone companies could offer multi-channel video

12. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (1976)).

13. *Chesapeake and Potomac Tel. Co.*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, No. 93-2340 (4th Cir. Nov. 21, 1994).

14. *Id.* at 912-13.

transmission services.[15] Under the Commission's plan, the programmers using the transmission service would compete with each other and the existing cable monopolist (less than 1 percent of cable operators faced head-to-head competition from another cable operator in 1992) under rules designed to ensure that the LEC offered nondiscriminatory access to programmers.

The Commission's plan plainly was superior to the status quo under which consumers have only one choice. But telephone companies have been reluctant to enter the video dialtone market if they may not provide video programming, and legislation is needed to authorize telephone companies to provide programming service on account of the enactment of Section 533(b), even though both the cable and telephone industries have changed dramatically since 1984. Moreover, a number of courts have concluded that Section 533(b) unconstitutionally restricts telephone companies' free speech rights, even though it may be that Section 533(b) would have passed constitutional muster when it was enacted.[16] A statutory provision giving the Commission broad and explicit authority to waive and adapt any provision of the Act to foster competition would allow the Commission to permit telephone companies to provide video programming, thus advancing consumers' interests and avoiding a difficult constitutional issue.

The "must-carry" rules that were at issue in *Turner Broadcasting System, Inc. v. FCC*,[17] also illustrate the need for flexibility. Those rules were enacted against the background of the pervasive cable monopoly that currently exists and the resulting incentive to cable operators to treat broadcasters unfairly. As the Supreme Court recognized, "[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[18]

Because cable operators compete with broadcasters for advertisers and currently view broadcasters as their primary competitors, it is predictable that cable operators with bottleneck control will drop marginal broadcast

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15. *In re* Telephone Co.-Cable TV Cross-Ownership Rules, §§ 63.54-63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781 (1992), *aff'd*, National Cable TV Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994).

16. Ameritech Corp. v. United States, No. 93-C-6642, slip. op. at 30 (N.D. Ill. Oct. 27, 1994).

17. *Turner Brdcst.*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

18. *Id.* at 2466.

stations wherever possible. Congress attempted to ensure fair competition between cable operators and broadcasters by enacting the must-carry rules, which require cable operators to devote slightly more than one-third of their channel capacity to broadcast stations.[19]

However, the relationship between broadcasters and cable operators will change dramatically if true head-to-head competition between cable operators and telephone companies becomes a reality. If, for example, more than one video programming provider was competing to serve the same household, then it would be difficult for a cable operator to discriminate against broadcasters. In fact, in such an environment video programming providers might bid against each other for the rights to carry network affiliates and other popular broadcasters. Perhaps special rules would be needed to ensure that each video programming provider was able to carry certain broadcast stations, since a video programming provider might not provide realistic competition if it did not carry, for example, programming provided by local network affiliates. At the same time, there would seem to be little need for the must-carry rules.

The sort of statutory provision that I envision would grant the Commission authority to ensure that the competition between the cable operators was conducted fairly. For example, if such a step were warranted to promote competition, the Commission might prohibit exclusive agreements locking popular broadcasters into only one of the competing video progamming providers. At the same time, the statutory provision I envision would allow the Commission to retire the must-carry rules when they no longer serve the purpose for which they were enacted.

CONCLUSION

The principles underlying my proposal provide a useful framework, I believe, for judging the other proposals advanced in this special issue of the *Federal Communications Law Journal*. Does the proposal foster competition? Does it recognize that change is proceeding at such a rapid pace that the basis for the proposal may change before the proposal is implemented? In my view, proposals for legislative change must meet those two tests in order to respond adequately to the challenges facing the communications community on the sixtieth anniversary of the enactment of the Communications Act of 1934.

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19. *See* 47 U.S.C. §§ 534-35 (Supp. IV 1992).