

12-1998

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Recommended Citation

Wallman, Kathleen (1998) "A Birthday Party: The Terrible or Terrific Two's? 1996 Federal Telecommunications Act," *Federal Communications Law Journal*: Vol. 51 : Iss. 1 , Article 5.

Available at: <https://www.repository.law.indiana.edu/fclj/vol51/iss1/5>

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SPEECH

A Birthday Party: The Terrible or Terrific Two's? 1996 Federal Telecommunications Act

Kathleen Wallman*

Good afternoon and welcome to the Ohio Public Utilities Commission's observance of the Telecommunications Act's "Cotton Anniversary."¹

That's right. The first anniversary is paper, and the second is cotton.

Now, paper made sense as a first anniversary observance. There were certainly tons of trees that were felled in the first year of implementation of the Act, with the new rules coming out and all the litigation, the court

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.). The Telecommunications Act was signed into law on Feb. 8, 1996. It was a major overhaul of the existing federal regime governing telecommunications in voice, data, and video.

briefs and the judges' decisions.² And that's not over yet. Maybe the most appropriate thing we could do to observe the Act's anniversary is for every one of us to go out and plant a tree in the interest of avoiding deforestation.

I really don't know what to make of cotton as the second anniversary gift. There's certainly been nothing soft and fluffy about what policymakers, lawmakers, the public, and the industries affected by the Act have been through in the past couple of years. It has been a bumpy process, full of twists and turns and unexpected developments.

And through this wild ride, everyone who had anything to do with the birthing of the Act has awoken to the reality that the euphoric predictions of instant cross-industry competition that lots of people made when the Act was being debated,³ and to which lots of people in government succumbed, were just that—euphoric—not real.

2. The FCC offers a list of the numerous orders issued to implement the Telecommunications Act of 1996 at its Web site *Federal Communications Commission Home Page* (visited Sept. 9, 1998) <<http://www.fcc.gov/telecom.html>>. Among the landmark orders issued by the Commission during the first two years after the Act's enactment were its order on interconnection entitled Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 F.C.C.R. 15,499, 4 Comm. Reg. (P & F) 1 (1996), *recons. in Order on Reconsideration*, 11 F.C.C.R. 13,042, 4 Comm. Reg. (P & F) 1057 (1996), *further recons. in Second Order on Reconsideration*, 11 F.C.C.R. 19,738, 5 Comm. Reg. (P & F) 420 (1996); its orders on access charge reform, Access Charge Reform, *First Report and Order*, 12 F.C.C.R. 15,982, 7 Comm. Reg. (P & F) 1209 (1997), Price Cap Performance Review for Local Exchange Carriers, *Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 F.C.C.R. 16,642, 8 Comm. Reg. (P & F) 119 (1997); and its universal service order, Fed-State Joint Bd. on Universal Serv., *Report and Order*, 12 F.C.C.R. 8776, 7 Comm. Reg. (P & F) 109 (1997) [hereinafter *Universal Service Report and Order*]. During the same period, one federal district court ruled that key provisions of the Telecommunications Act were unconstitutional, and a federal court of appeals overturned the key provisions of the FCC's order on interconnection. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

3. The Conference Report on S. 652, the bill that eventually was signed into law, reflects this optimism:

[T]he [House] Commerce Committee Report (House Report 104-204 Part I) that accompanied H.R. 1555 pointed out that meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated. For example, large, well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets. Similarly[,] Cablevision has recently entered into an interconnection agreement with New York Telephone with the goal of offering telephony on Long Island to its 650,000 cable subscribers.

What the past two years confirm are three fundamental principles: first, competition will come first to the markets where new entrants can achieve the highest margins.⁴ This means business markets before residential markets, and urban before ex-urban markets. This principle rules like a tyrant. There is no getting around it. It is not a good thing or a bad thing. It's just a reality.

Second, opening a market that is a near monopoly overall and a plain old monopoly in residential markets to competition is a hard, grueling process for new entrants, incumbents, and policymakers. At every single step of the way, there are colorable questions about how exactly the law and the rules were meant to be interpreted and applied. Policymakers have been drawn into the finest details of implementation in order to help make local entry work, and the work is still far from done.

Third, it is essential that we not lose sight of the public interest and consumers' interests. These are two separate concepts that usually coincide, but not always. Consumers' interests are in lower prices and more choice.⁵ The public interest is about that, too, but it's about more than that, as well. It's about the long term, about having a network that will serve today's needs and fulfill today's interests in price and choice, but will also serve tomorrow's needs for high bandwidth and reliability. It has become temptingly easy to be drawn into the battle over the minute details that need to be supervised, and to lose sight of the big picture.

The first two principles counsel patience in the implementation process. They counsel the importance of staying the course and seeing through the process that the Act set in motion.

H.R. CONF. REP. NO. 104-458, at 148 (1996). Testimony before Congress formed the basis for this optimism. For example, in a May 1995 hearing, Gerald Levin, Chairman and CEO of Time Warner, reported that his company's "'schedule is now' for providing telephony services to customers" *House Panel May Vote on Telecom Measure This Week; Witnesses Outline Concerns During Three-Day Hearing*, TELECOMM. REP., May 15, 1995, at 1, 33.

4. This propensity is sometimes called "cream skimming" and has been a source of concern in the debate on universal service. For example, the Fed.-State Joint Bd. on Universal Serv. recommended that the FCC, in its final decision, take steps to ensure that cream skimming would not result in higher-cost customers in a "study area," the area within a state served by a local exchange carrier, being priced out of the market. *Universal Service Report and Order*, *supra* note 2, paras. 172-74 (rural telephone companies); paras. 175-78 (non-rural telephone companies).

5. See CAMPBELL MCCONNELL, *ECONOMICS* 103 (6th ed. 1975) (comparing benefits of competition to downsides of monopoly).

The third principle, however, counsels impatience—restlessness. Because the success of the Act will be judged by the public—by consumers—and how well they judge those who passed the law and those who are charged with implementing it.

This is what I want to address today. Instead of talking about the Cotton Anniversary, I think we should be thinking about what the Act and its implementation will mean and look like ten years after its implementation. That is the frame of reference that should be relevant to us, and we should be focusing on what it will take to make the public judge the Act a success then. I'm not saying we should run away from the responsibilities that the Act assigns to policymakers and the industry today. I'm only saying that we should not let today's obstacles obscure our responsibility as stewards of the long view. That's why I want us to think about the tenth anniversary.

Now, I hate to tell you what the tenth anniversary is. You know that the twenty-fifth is silver, and fiftieth is gold. The tenth is tin. But let's not worry about that.

TWO VERSIONS OF THE FUTURE

There are two competing versions of the future out there. I submit that the public will be saying one of two things about the Act when it is ten years old.

They will either be saying: "The Telecommunications Act of 1996—what a great idea."

Or, they will be saying: "The Telecommunications Act of 1996—what were they thinking?"

Now, obviously, no one aspires to the second version of the future. The question is: what will it take to make sure that we achieve the first version? And to understand that, we should be asking what's in this for consumers.

WHAT'S IN IT FOR CONSUMERS?

There are a number of concrete steps that policymakers can take to capture the flag on the first, positive version of the future. But to make sure that there is real progress in that direction, it is crucial to understand what the Act means for consumers.

When it comes to what consumers get out of the Act, the answer most frequently offered is “more choice and lower prices.”⁶ I think we should take a closer look at that.

What kinds of additional choices are consumers going to get? The answer most frequently offered here is “more choice in local telephone service.”⁷ This is clearly a good thing. Monopolies in any industry are just not as good as competitive markets in producing value and innovation in products and services.

But what other choices are consumers going to get, and will they value them? When the Act is fully implemented, the Bell companies will be allowed to offer long-distance service. There are already dozens of long-distance companies from which consumers can choose today; will consumers value being able to choose from among even more long-distance carriers? The FCC’s Chairman Kennard has said that once the Act is fully implemented, no one will ever again be able to eat dinner in peace with all the telemarketing calls that will be inundating the household.⁸

More choice is better than no choice. But the arrival of new, aggressive marketers of various network services will necessitate, at the very least, careful consumer education about what all the new choices mean,

6. See Reed E. Hundt, Implementation of the Telecommunications Act of 1996 before the Subcomm. on Telecomm. and Fin., Comm. on Commerce, U.S. House of Representatives, July 18, 1996 (visited Nov. 1, 1998) <<http://www.fcc.gov/Reports/reh71896.html>> (referring to “the new law’s promise of new investment, job growth, lower prices, and better service for consumers . . .”) [hereinafter Hundt Statement on the Telecomm. Act]; Reed E. Hundt, *Statement Regarding Passage of the Telecommunications Act of 1996*, Feb. 1, 1996 (visited Sept. 9, 1998) <<http://www.fcc.gov/Speeches/Hundt/spreh603.txt>> (noting that “[t]his bill creates the promise of good, high-paying jobs for millions of Americans and the promise of competition and its benefits of lower prices, higher quality and better service to us all”); Susan Ness, *Statement Regarding Passage of the Communications Act of 1996*, Feb. 1, 1996 (visited Sept. 9, 1998) <<http://www.fcc.gov/Speeches/Ness/States/020196.htm>> (asserting that the new law “will bring new choices—and lower prices—to American consumers”); FCC Comm’r Rachele Chong Hails Passage of New Telecom Bill, Feb. 1, 1996 (visited Sept. 9, 1998) <<http://www.fcc.gov/Speeches/Chong/sprbc602.txt>> (“Consumers can look forward to lower prices, more choices and innovative new services . . .”) (quoted in original).

7. See Hundt Statement on the Telecomm. Act, *supra* note 6. In a section entitled “Demonopolizing the Local Exchange,” Chairman Hundt said, “[t]he Telecommunications Act reflects a bipartisan consensus that deregulating and introducing competition in America’s largest monopolized markets offers numerous potential benefits for consumers, business users, communications companies, and the economy as a whole.”

8. William E. Kennard, *Remarks to the Natl. Ass’n of State Util. Consumer Advocates*, Feb. 9, 1998 (visited Sept. 9, 1998) <<http://www.fcc.gov/Speeches/Kennard/spwek803.html>> [hereinafter *Kennard Remarks*].

how to evaluate them, and how to manage the flood of information. Consumers will need a great deal of help in managing the formidable information search costs that the new system will heap upon consumers. Consumers will need the telecommunication equivalent of "nutritional labeling" that helps them evaluate and compare service offerings. The Administration's Statement on Retail Competition in Electricity adopts the position that this is one of the most important things that policymakers can do for consumers in the transition to a competitive market.⁹

Another form of consumer choice that is touted is that when the Act is fully implemented, consumers will be able to buy an integrated stack of services, or bundled services—local, long-distance, data, and video—from a variety of integrated service providers.¹⁰ If this develops in a way that offers consumers lower prices for the combined services, it might very well be as great as its proponents are saying it will be. But it will also be important to help consumers manage the transaction costs of deciding whether the combined services really are cheaper given their usage patterns and preferences. It is already a challenge for many long-distance customers to figure out which calling plan is best for them, and that challenge will have many more layers when competition has fully flowered.

And it will be important that the integrated service providers offer consumers something more than a repackaging of the same services that they can buy individually right now.

This is the kind of choice that policymakers and the industry need to keep their eye on. The version of the future that consumers deserve when the Act is fully implemented is not a warmed over version of what they can get today. In the year 2006, consumers will judge the Act no success at all if what we have done is allow them to buy local service from their long-distance company, and long-distance service from their local telephone company. In fact, a lot of people are likely to say, "Isn't that a lot like where we started this whole process in 1984 before we dismantled AT&T?"

9. Press Release, *The Clinton Administration's Comprehensive Electricity Competition Plan*, Mar. 25, 1998 (visited Sept. 9, 1998) <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma/eop.gov.us/1998/3/26/4.text.1>> [hereinafter *Electricity Competition Plan*].

10. See Daniel Ernst, *To Bundle or Not to Bundle*, TELETIMES, Fall 1997, at 12. Ernst describes a study by the Strategis Group entitled *Branding and Bundling Telecommunications Services: Telephony, Video, and Internet Access* that reported that "more than 80% of telecommunications consumers were interested in purchasing combinations of telephony, wireless, video, and Internet services from a single provider." *Id.*

Now, to be sure, the Act when fully implemented envisions this sort of cross-industry competition and it opens the door to everyone with access to wires or bandwidth to join the fray.¹¹ And the Act requires the FCC and the states to work through the difficult questions that need to be answered to make that work.¹²

But the real challenge is figuring out how the Act's restructuring of telecommunications policy and its shaking up of the boundaries between industries can serve the public interest by making fundamental improvements in the way people work and live.

An example of a fundamental improvement that previous changes in telecommunications policy have brought us is the advent of cellular telephony,¹³ and the gradual way in which it has become more and more affordable over the years as quality, reliability, and ubiquity have improved.¹⁴ Another example is telemedicine. These are more than mere

11. The Act barred states from prohibiting "any entity to provide any interstate or intrastate telecommunications service," thus opening the door to cable operators and other new, competitive local exchange carriers (CLECs), such as NextLink and Teligent, wishing to compete with incumbent local exchange companies. 47 U.S.C. § 253(a) (1998). It also amended the Public Utility Holding Company Act to allow registered public utility holding companies to offer telecommunications services for the first time. 15 U.S.C. §§ 79-79z-6 (1998). The Act also rationalized and liberalized the rules governing local exchange companies, such as the Regional Bell Operating Companies (RBOCs), that wish to provide multichannel video services.

12. The Act contains several provisions that outline implementation roles for the FCC and for state authorities. Section 251 of the Act outlines the duties that telecommunications carriers must undertake to establish a competitive local exchange market. 47 U.S.C. § 251 (1998). Subsection (d) directs the FCC to promulgate regulations to implement section 251. *Id.* Subsection (f) exempts rural telephone companies from the duties of section 251 unless and until an exempt company receives a "bona fide request" for interconnection and the state commission of jurisdiction determines that the request is not economically burdensome, and is technically feasible and consistent with the Act's universal service provision. *Id.* Section 252 outlines the respective roles of the FCC and the states in handling disputes surrounding the terms of interconnection between two carriers. 47 U.S.C. § 252 (1998).

13. There are now over 60 million wireless telephone subscribers in the United States. See *The World of Wireless Communications* (visited Nov. 1, 1998) <<http://www.wow-com.com/consumer/>>. Wireless telephones have made travel safer and crime easier for law enforcement to detect and prevent because observers and witnesses can report infractions, accidents, and suspicious activity more readily, all contributing to improved quality of life. See <<http://www.wow-com.com/consumer/>> for anecdotal information about how wireless subscribers have used their telephones to report crime, for example, in Hawaii, and to summon emergency assistance to accident scenes, for example, in Georgia and Montana.

14. See Reed E. Hundt, *The Long and Winding Road (or: The Seventh Inning Stretch), Before The Freedom Forum and Georgetown University*, Feb. 7, 1997 (As Prepared for Delivery) (visited Sept. 9, 1998) <<http://www.fcc.gov/Speeches/Hundt/spreh705.html>> (stating that "[n]o one should expect broad-based competition for all of the nation's 150

conveniences for busy people. These are paradigm shifts in the way that we communicate that go directly to the quality of life.

This is what consumers want and deserve out of the Act, and delivering it is what it will take for industry's performance and policymakers' performance in this new era to be judged a success.

COMPETITION ON TODAY'S NETWORK

This standard for judging performance may seem a tall order, but I think it is truly what consumers expect. What needs to be done to get there? There are three things to focus on.

First, on local competition in today's network, everyone should take a deep breath and remember that the breakthrough concept of the Act was to use market incentives to erode market power in the bottleneck.¹⁵ The breakthrough result was to be the introduction of a second competitor in the local exchange, not the "nth" choice in long-distance service.¹⁶ Realizing a fully flowered version of competition in today's network is a job

million access lines to occur overnight"; the average cellular telephone bill in 1997 was down 61% from 1988, and down over 25% from 1993) [hereinafter *Long and Winding Road Speech*]; Laurie J. Flynn, *A Welter of Wireless Choices*, N.Y. TIMES, Feb. 26, 1998, at G8 (reporting that an average monthly cellular phone bill was \$95 in 1988 and \$44 in 1997; noting development of digital networks "vastly superior" to older cellular networks).

15. The House of Representatives Report, on H.R. 1555, 104th Cong. (1995), and the Senate Conference Report, on S. 652, 104th Cong. (1996) each contain a section on the need for legislation to update the Communications Act of 1934. The House Report notes that the Bell Operating Companies (BOCs) provide "over 80% of local telephone service in the United States" and that in providing such service "telephone companies have historically been protected from competition by State and local government barriers to entry." The House Report further notes that in "the overwhelming majority of markets today, . . . local providers maintain bottleneck control over the essential facilities needed for the provision of local telephone service." The House Report reflects, therefore, an awareness of the absence of competition in the local exchange market and nowhere identifies the need for more competition in the long-distance market as a goal or as one of the reasons that updating of the Communications Act of 1934 is needed. H.R. REP. NO. 104-204, pt. 1, at 49 (1995).

In comparison, the Senate Report on S. 652 discusses changes needed to advance local competition, and identifies "[l]ong distance relief for the BOCs" as a reason that legislation is needed. S. REP. NO. 104-230, at 5 (1996). But the discussion focuses on the checklist requirements that the BOCs are required to meet and concludes that "[b]y opening up local telephone service and long distance to competition, the Committee anticipates consumers will have a greater choice of services and providers." *Id.*

16. In 1995, there were 583 long-distance carriers offering service in the United States. See THE NEW YORK TIMES ALMANAC 788 (1998). By contrast, in each RBOC region, the former Bell company retains dominant status, both as a regulatory classification and as a practical matter.

that the Act unequivocally delegated to state and federal regulators.¹⁷ I'd rather talk about the tenth anniversary than the second anniversary, but we have today's networks and today's facts to deal with first. We have now an environment that has become supercharged with pressure to declare that the local exchange is open in states with major urban markets, like New York and Texas, so that the incumbent local exchange provider can get into the long-distance business. But the Act is not really about rewarding companies by letting them into long-distance. That is not the public interest goal of the Act. The public interest goal of the Act is opening the local exchange, eliminating the bottleneck—at which time there will be no further need to exclude the incumbents from entering new businesses like long-distance.¹⁸ Once the bottleneck is eliminated, there will be no danger then that the local exchange service provider can leverage any monopoly power emanating from control of the local exchange.

So it is important to take the step of declaring the local exchange market in any state irreversibly open, which is the standard that the Department of Justice has said it will apply, very carefully and very deliberately. The risk is not that we will do too little too late, it is that we will do too much too soon and lose the benefit of the statute's careful balance of incentives before the local exchange is open.

Second, policymakers need to insure the soundness of the universal service system without hobbling the Internet. There are vigorous arguments on both sides of the issue of whether the Internet should be subject to universal service assessments.¹⁹ Some argue that Internet Service Pro-

17. Examples of these delegations of authority on competition issues are found in section 251, which assigns federal and state authorities responsibilities in outlining a regime of interconnection, and section 252, which assigns states certain responsibilities in connection with negotiation, arbitration, and approval of interconnection agreements, and directs federal authorities to act if state authorities do not act. 47 U.S.C. §§ 251-252 (1998).

18. See Susan Ness, *The New Telecommunications Marketplace: Radical Changes and Golden Opportunities, Remarks as part of the Public Policy Forum Series, The Wharton School of the University of Pennsylvania, Philadelphia, Feb. 22, 1996* (visited Sept. 9, 1998) <<http://www.fcc.gov/Speeches/Ness/spsn604.html>>.

Once the local telephone monopoly has been broken, the line-of-business restrictions imposed on the RBOCs will vanish. For the first time since they were divested by AT&T 12 years ago, the RBOCs will be permitted to provide long-distance service and to manufacture equipment. Congress recognized that once local competition had arrived, these monopoly-based safeguards were no longer necessary. *Id.*

19. See Fed.-State Joint Bd. on Universal Serv., *Report to Congress*, 13 F.C.C.R. 11,501, 11 Comm. Reg. (P & F) 1312 (1998). The report contains a discussion of the arguments for and against subjecting Voice over Internet Protocol to universal service assessments (paragraphs 33 to 38), many of which are offered by senators who were active in the

viders (ISPs) are clearly providing telecommunications services, and that some of their services, like Voice on the Internet, are indistinguishable from services on the public switched telephone network.²⁰ Therefore, they argue, the ISPs must be covered and pay their fair share. Others argue, also from within the framework of the current statutory definitions, that ISPs are providing a service over the telecommunications network, not a telecommunications service itself.²¹ Therefore, they argue that ISPs must be exempt from the system of assessments.

Another layer of this same debate proves that just when you think you understand the regulatory issues, technology is sure to overtake them and make the issues even harder. The Internet's idea of sending data in packets turns out to be such a good idea, so efficient, that long-distance companies are incorporating the idea into their networks by deploying Internet Protocol Telephony.²² Policymakers will be reluctant to conclude that this is not a telecommunications service. Among other things, such a conclusion would subtract revenues from the universal service system in a drastic way that could make the system unsustainable.

Now, it took sixty years of federal regulation to make our telecommunications policy what it is today²³—a thing of such beautiful complexity that almost no one understands it. It has been built up over six decades of zigging and zagging to where it is today, much like the federal tax code that we all know and love and to which we are about to pay our ritual annual homage.

The Internet provides an opportunity for a fresh start without that complexity, and without the sacrifices in innovation and speed to market that regulation exacts. There has to be a way to achieve parity and harmony in the system of federal regulation without imposing the burdens of new regulation on the Internet. Industry and policymakers should commit to finding that way.

drafting and passage of the Telecommunications Act of 1996 and describes the debate as "heated." *Id.* para. 33.

20. *Id.*

21. *Id.*

22. *Id.*; see *Level 3 Signs Right-of-Way Pact with Union Pacific*, TELECOMM. REP., Apr. 6, 1998, at 37 (describing Level 3's plan to deploy nationwide IP standard network); see *ICG Launches IP Telephony Offering, Plans DSL Rollout*, TELECOMM. REP., Mar. 16, 1998, at 33 (describing IP network plans of ICG).

23. Modern regulation of telecommunications began with passage of the Communications Act of 1934, 48 Stat. 1064 (codified at 47 U.S.C. § 151 *et seq.*).

Third, industry and policymakers should turn their attention to the deployment of higher bandwidth networks. This is the area that holds the most promise for delivering the kind of benefits that consumers want and deserve from the Act. It has the most promise for delivering the paradigm shift that I am talking about. It is a live and current issue in federal policymaking as we speak.²⁴ One of the Act's provisions, section 706,²⁵ calls upon the FCC and the States to monitor the deployment of advanced telecommunications services. If they determine that these services are not being deployed quickly around the country, the Act directs them to take steps, including deregulatory steps, to facilitate deployment.²⁶ The FCC is required to convene a proceeding by August of this year to consider the issue,²⁷ and several of the Bell companies, including Ameritech, have filed individual petitions seeking relief from regulations to facilitate their own plans to build advanced networks.²⁸

This is a public policy exercise that demands concentrated and immediate attention. What constitutes an advanced telecommunications service? How much regulatory relief is in order to promote its deployment? To what extent is regulation an obstacle to its deployment in the first place? How do you open the existing local exchange network to competition and, at the same time, extend regulatory relief to advanced telecommunications services²⁹ that may be offered to some extent over the same copper loop? These are crucial questions.

The answers to these questions will make all the difference in the world to how telecommunications services look and feel to consumers in the coming decade. It is legitimate to ask whether it will make any differ-

24. Several RBOCs and one non-profit organization have petitioned the FCC for regulatory relief in order to provide incentives for them to deploy advanced networks. *See, e.g., Reply Comments of the Alliance for Public Technology* (visited Sept. 5, 1998) <<http://www.fcc.gov/Bureaus/Wireless/Comments/fcc98055/apt-r.txt>>;

Bell Atlantic's Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services (visited Sept. 5, 1998) <http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1998/da980376.txt>; *Ameritech Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services* (visited Sept. 5, 1998) <http://www.fcc.gov/Daily_Releases/Daily_Business/1998/db980306/da980470.txt>.

25. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 706(a), 110 Stat. 56, 706(a) (codified at scattered sections of 47 U.S.C.).

26. *Id.*

27. *Id.*

28. *Id.*

29. The term "advanced telecommunications capability" appears in section 706 of the Act. It is not defined in the statute. *See id.*

ence to them in the life-changing, paradigm-shifting way that I have been urging should be the standard for measuring success. Will higher bandwidth simply mean faster, less annoying Internet surfing for people who have time to do that? Or will it mean that your connection to the network is always on and that you need not dial up anymore? And what are the implications of being able to have a persistent connection to the network? What does it mean for the availability of full motion video entertainment and information? What does it mean for household-wide control of appliances, from within the house and remotely?

STAYING THE COURSE

I want to close with a pitch that we should stay the course.

Despite the unexpected twists and turns of the first two years, there have been a number of significant market developments suggesting that the lowering of barriers that the Act effected have put things on the right course. On the anniversary of the Act in February, Chairman Kennard cited a number of encouraging statistics:

There are more than 100 competitive local exchange carriers in the United States.

The ten largest CLECs have switches in 132 cities.

About 2,400 interconnection agreements were reached pursuant to the 1996 Act's framework.

Over the past two years, \$14 billion has been invested in competitive local exchange carriers, which have achieved a combined market capitalization of over \$20 billion.³⁰

At the same time, the successes of the Act will be for some time to come quite fragile and subject to reversal both by market forces and judicial forces. The courts will continue for a long while yet to sort out the constitutionality of the law and to determine whether the FCC interpreted the law properly in its implementing regulations.

I saw recently a bumper sticker that read: "My karma just ran over my dogma." I love that bumper sticker because what I think it means, apart from the wordplay, is "What I believe is right and true has just completely overtaken what I thought I knew for sure was true." We need to be open to that very thought process as the implementation of the Telecommunications Act unfolds. Look at all the things that we thought for sure were true

30. *Kennard Remarks*, *supra* note 8.

when Congress enacted the law that are turning out not to be entirely true, or true at all. There are four major things in this category.

First, we thought that competition would be a big bang, like the bursting of a dam. But it has turned out to be more like a steady, determined stream, seeking its way through the rocks and branches of a dry riverbed. There is a tendency here to blame the people who said in 1994, 1995, and 1996 that they could not wait to compete, but what's the point? After all, people like me in government at the time believed them. It just turns out to be harder and more expensive than anyone imagined to start these new lines of business.³¹ We should take a page from what's going on in retail competition in electricity, where states have been working on introducing competition for years already.³² And the federal policy statement, which went to Congress two weeks ago, contemplates that by the year 2003, retail customers should have a choice.³³ These things do not happen overnight, and we need to pull back from the irrational exuberance that made us think otherwise in the first place.

Second, we thought that resale of local telephone service would be a viable, sustainable method of competition. Wrong again. The margins are not great enough, and that may be the one thing that the first two years of experience under the Act have definitively settled.³⁴

Third, we thought that the core balancing act that the statute put in place—when the bottleneck is eroded, the Bell companies may enter the

31. *Long and Winding Road Speech*, *supra* note 14; see *AT&T's Armstrong Says Bells' Discounts Delay Competition*, TELECOMM. REP., Feb. 16, 1998, at 11 (identifying "uneconomic" discounts for resold local services for delay in implementation of local competition) [hereinafter *Bells' Discounts*]; *CLECs Tell FCC of Success in Entering Local Markets*, TELECOMM. REP., Feb. 2, 1998, at 8, 9 (reporting on en banc FCC testimony by Cox characterizing upgrades needed in order for cable companies to provide telephone service as "very, very expensive," and reporting that Cox had spent \$3.5 billion on such upgrades).

32. The Energy Information Administration of the Department of Energy maintains a Web site containing information about state deregulatory activity and records activity dating back to 1995. See *Energy Information Administration* (visited Nov. 1, 1998) <<http://www.eia.doe.gov/index.html>>.

33. *Electricity Competition Plan*, *supra* note 9.

34. See *Bells' Discounts*, *supra* note 31, at 11 (reporting on speech of AT&T Chairman Michael Armstrong calling total service resale "fool's errand" and noting that AT&T was losing \$3 per month per customer offering local service on total resale basis); *MCI Abandons Reselling Residential Local Service To Focus on Facilities-Based Business Offerings*, TELECOMM. REP., Jan. 26, 1998, at 17 (quoting MCI Comm. Corp. President and Chief Operating Officer Timothy F. Price; resale of residential local exchange services "just doesn't work").

long-distance market—would be a self-executing system. We thought that the balance of incentives would make it all work. Wrong. It turns out that the system has required a tremendous amount of detailed involvement in command and control regulation.³⁵ Who's to blame here? Everyone and no one.

It is in the nature of incumbents, particularly ones that have shareholders to answer to, to defend market share. The creative challenge for policymakers and new entrants will be to try to take what we've got in front of us and figure out how to get out of the business of detailed government regulation. Performance measures that require incumbents to do as well in serving competitors' customers as they do in serving their own customers—and to pay a penalty if they do not—are a way to do that. The legislative proposal that Senator DeWine discussed this morning is another embodiment of this philosophy.³⁶

Fourth, we thought unbundled network elements were a transitional device to get to pervasive facilities-based competition for business and residential customers. Partly true, but more wrong than we thought. Not all of the companies in which the Act invested competitive hopes have a facilities-based strategy. Nor do they have a facilities-based budget. Some companies will need access to recombined elements, at the right price, for the foreseeable future to reach customers.

This is a reality that we need to acknowledge. I was originally persuaded by the point of view that the law intended to favor facilities-based competition, and that the unbundled network elements approach was intended to be transitional. It may turn out to be true that facilities-based competition is the more stable and durable result, but, Congress did not write the law to require it. It specifically provided for recombined network

35. An example of this approach is the Commission's order on interconnection, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Second Report and Order and Memorandum Opinion and Order*, 11 F.C.C.R. 19,392, 4 Comm. Reg. (P & F) 484 (1996), and the accompanying rules which specify in detail where and how incumbent local exchange companies are required to provide interconnection to requesting carriers.

36. See *FCC, DoJ, State Commission Officials Advise Senate Panel to 'Stay Course' on Section 271*, TELECOMM. REP., Mar. 9, 1998, at 4 (quoting Sen. DeWine's announcement at hearing on RBOC long-distance that he and Sen. Kohl were circulating a proposal "titled the Telecommunications Competition Act of 1998, . . . a voluntary bill that would allow the [Bells] to bypass the section 271 review process if they completely divest their local network facilities") (alteration in original).

elements.³⁷ Without this option, it's important to realize that the Act's promise of competition will be a very long time in coming to a lot of customers. Beyond the tin anniversary. We will be well into the precious metals by that time.

CONCLUSION

So I look forward to meeting with you here again in eight years to compare notes and see where things stand. I do not think that Telecommunications Act reunions are exactly what Neil Simon had in mind when he wrote "Same Time Next Year," but if our success in implementing the Act is a fraction of what he has enjoyed, we will be in very good shape.

37. 47 U.S.C. § 251 (1998).

