Remarks of Commissioner Meredith Attwell Baker

Making the 90s Work: Governing Within the '96 Act

Federal Communications Bar Association
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There is a long tradition – often at this forum – for commissioners to lay out their vision for a new Communications Act. Much of it I agree with: The need to shift towards a more case-by-case adjudicatory structure, and a rejection of requirements built for single purpose networks that have long since converged. Which one of my advisors should be assigned to issues like broadcast spectrum reform, or mobile universal service? Our now-dated siloed structure makes little sense, and undermines the Commission's overall effectiveness and the adoption of the most coherent and consistent policies possible. Along these same lines, Tom Tauke earlier this year laid out his convincing vision for a new regulatory framework for telecommunications, and I'd be remiss not to mention Progress and Freedom Foundation's Digital Age Communications Act Project.

So instead of focusing on what a new regime should look like, I want to focus on living within the statute as it exists—a more realistic road, slightly less traveled rhetorically. If proponents of full-scale rewrite urge divorce, I recommend counseling. This is simply pragmatism. In the Senate alone, the 96 Act required 31 hours of testimony, 11 days of hearings, and 86 plus witnesses. We have a ways to go. All of that said, I wholeheartedly agree with those seeking more global reform, and that the optimal path is for our elected officials to define the FCC's role for the Internet Age. But I am afraid we will be operating under today's structure for some time, and we need a better means to do so.

The starting point for our analysis must be the 96 Act itself. The suggestion that our statute is outdated is far from revolutionary. While we often malign it, we must also acknowledge how successful and groundbreaking this legislation has been. We forget that one of the primary drivers of the Act was to end the day-to-day involvement of the Justice Department and Judge Greene in our national telecom policy. And, fundamentally, the Act represented a seismic shift in how we perceive the industries we regulate. They aren't monopolies requiring government micromanagement. They are platforms to deliver multiple services: your video, local, long distance, and Internet services can come from the same entity. Did the Act do enough, that is a fair question. But this overarching philosophical shift in how we view telecom providers and the proper role of government cannot be underestimated.

We should also recall what our telecom space looked like in 1996. The average family had a landline phone, a separate long distance bill, less than 50 channels of cable TV, a VCR to tape Suddenly Susan, and dialed 1-800-COLLECT from a payphone to call home. In '96, Comcast was a regional cable company, AT&T was a long distance provider, and Verizon… well, Verizon wasn't even a word yet. For that matter, broadband didn't exist either. Only 18 percent of homes even subscribed to a dial-up connection, typically priced by the hour. It was in 1996 that AOL started flooding our mailboxes with CDs promoting its new all-you-can-eat offering for $19.99/month. David and Jerry's Guide to the World Wide Web had only changed its name to Yahoo! in '94. Craiglist, Amazon, and eBay appeared in '95. Google to follow in '96.

At the time, FCC commissioners were still hedging their bet on the Internet itself; one conceded that we cannot even be certain of the Internet's success, it might end up as the "CB radio of the 1990s." AOL also grossly underestimated our future online habits, estimating that 90 percent of consumers would use less than 5 hours of Internet a month. The future path of broadband was also one of conjecture. Commissioners predicted three pipes into the home, telco fiber, cable modem, and LMDS wireless technology. Well, 2 out of 3 is not too bad.

So it is no surprise that the '96 Act fails to account for the Internet in a truly meaningful manner. It does, however, instruct us in great detail about how to promote long distance competition and protect long distance

companies. That industry essentially no longer exists—a victim of the Act's own success. We also have on the books requirements to protect the alarm monitoring industry and to promote open video systems.

Dated provisions are not just a statutory issue. Many in this room have been active in fights over broadband over powerline, ultrawideband, Northpoint and Nextwave. All of these policy tussles dot our rules and regulations, some of which leave requirements on the books that may inhibit our ability to respond effectively to tomorrow's challenges.

Despite this less than perfect launching pad for broadband, the central purpose of the Act—to promote cross-platform competition—has been a remarkable success. Traditional phone companies are now top 10 video providers, and vice versa. It has also helped foster the billions in capital investment and robust competition that have driven broadband deployment to 95 percent of the country. Congress's continued leadership to keep the Internet free from regulation, and a consistent minimal regulatory approach from the FCC has served consumers, entrepreneurs, and innovators well. Chairman Hundt's almost 15 year old warning remains true today: we must "resist[] all efforts to bring Internet communication within [our] out of date regulatory scheme."

So back to our family from 1996? What does this all mean to the average consumer? They may or may not even have a landline today, and certainly don't have a separate long distance bill. The VCR player is now in the attic stacked besides dusty copies of Top Gun and Pretty Woman. Instead, that household has a 100 channel pay TV service with a DVR, a high-speed Internet connection, a DVD player, a laptop computer, at least one HD TV, a couple of cell phones that connect to the Internet, and a video game unit that can stream movies.

Say what you will, our governing statute has not foreclosed—or at least not gotten too much in the way of—a pretty amazing amount of technology and new innovation. The shift in where our telecom money goes is the starkest evidence of the sea change in our lives: mobile and Internet services jumped from 1/6 of our telecom expenses to about 2/3 today. Family fights about staying on the phone all night with out-of-state relatives are ancient history. Now families fight over thousands of text messages, devices at the dinner table, and sharing a bit too much on Facebook and Twitter.

My tenure at the FCC has been dominated by the Broadband Plan, and the Net Neutrality and Title II debate. The National Broadband Plan is the clearest evidence of how limited our authority is over the Internet ecosystem. Of the 207 recommendations detailed in the Plan, the Team concluded that only half were within the FCC's authority. The Plan should serve as a constant reminder that so much of the challenges facing the nation with respect to broadband services will be resolved beyond our agency—in the private sector or by other governmental entities.

And there are significant national challenges we must work together to resolve. For example, delivering broadband to 7 million unserved homes; deploying 4G wireless nationwide; addressing broadband adoption hurdles, and re-focusing our USF and intercarrier compensation regimes. So what should an agency with limited explicit authority over broadband do to address these challenges? I offer five themes for living within our means.

One. Focus on our core competencies. Looking at that list of challenges, a few jump out as clearly within our historic purview and are areas where there is a growing consensus around our need to act. Spectrum reform has been an issue near-and-dear to my heart. We still need to work more aggressively to establish a national spectrum plan, and update our allocation and service rules to reflect modern technologies and spectrum demands. We cannot let another year go by without providing a clear roadmap to industry about future spectrum availability. Universal service and intercarrier compensation are also within the Commission's authority. The existing structures are unsustainable and fraught with opportunities for arbitrage, waste and abuse.

It is when we reach beyond our core competencies that we too often find ourselves in a political and legal morass. The Title II fight has underscored that this agency has limited authority and cannot create jurisdiction on its own. More judicious self-selection of the issues and proceedings we tackle would help us become a more predictable agency that fosters greater legal certainty, which can translate into private sector investment and jobs. This also means resisting the urge to seek comment on issues well beyond our authority to act. Even asking questions – with the best fact-finding intent – creates regulatory overhang that has real-world consequences.

Two. Act incrementally. We must resist the urge to radically depart from our existing framework in an effort to engineer better results or specific flavors of competition. Likewise, in everything we do, we cannot close our eyes and wish away incumbent users and existing rules. If we drew up a spectrum allocation chart today or established a new intercarrier compensation regime, they would not look at all like the ones that frustrate us today. Regardless, we must recognize our rules and past actions have created settled expectations—from consumers to investors—that we need to address.

Incremental action also recognizes that in many instances our jurisdictional authority is not always clear, and that working within court-approved parameters is the best path for a sustainable policy. Incremental steps also show our humility. Technology is changing so fast, and the engineering complexity of our decisions eclipses both sides' talking points. On-ramps to the Internet are hard to isolate and even harder to define. How video is sold online and will flow through our house is not something easily dictated by government fiat.

This is not a call for regulatory four corners, a delay tactic to forestall efforts I may or may not support. Rather, it is a call for a more structured and deliberative approach, the tortoise over the hare. After all, with over a decade's worth of clear success there is little reason to believe a significant course correction is warranted.

Three. Provide better information. Being data-driven as an agency is not solely a matter of our internal decisonmaking. It is also about making our processes and databases more transparent. The FCC should redouble its efforts to release information it has at its finger tips. A great example of that is the spectrum dashboard, part of our concerted effort to inventory commercial spectrum. One of the central reasons our spectrum secondary market has not thrived is a lack of reliable data about spectrum availability and usage. The Commission can leverage the dashboard to lower transaction costs and help foster a private market to better use fallow spectrum across bands. Similarly, the success of the White Spaces database will be critical to efforts to promote opportunistic use of spectrum. To do so, the database must be accurate, protect incumbent users, and reveal the untapped value in underutilized spectrum. With respect to broadband specifically, NTIA's funding for state maps can serve as a repository for what is working in different pockets of the country, highlight areas of opportunity for entrepreneurs, and offer a measuring stick as to how much more work is left to be completed.

All of these efforts should be scalable – a spectrum dashboard should be constructed to be able to incorporate federal spectrum at a later date, and a broadband map of Delaware may be of little use if it cannot be easily incorporated into maps of neighboring Maryland and Pennsylvania.

Four. Work collaboratively across government and industry. We should recognize that we do not have unlimited financial and human resources, and that we have significant power to help galvanize efforts across groups, highlight areas of public concern, and drive resolution. This need not be through affirmative regulation. The Net Neutrality debate at the FCC helped jump start efforts within the industry to create the BITAG group to address concerns about how broadband networks are managed. A private engineering-based mechanism is far more flexible and responsive, not to mention infinitely less polarizing and political than regulation.

On the whole, industry needs to do a better job of demonstrating to consumers and the government that they will step forward and address clear public interest issues in a forthright and equitable manner, particularly with respect to those issues that lie outside traditional governmental jurisdictions. Failure to act lends itself to overreaching by one or more agencies and can inject even greater uncertainty.

For example, I hope content providers and distributors work more aggressively and more uniformly to educate parents and help them control and monitor the content available to children across the four screens now available in our homes.

And Five. Seek targeted statutory authority. While a complete overhaul may not be likely, Congress did pass accessibility legislation last term. The Commission needs to do a better job communicating with the Hill as to the need for targeted legislation to strengthen the FCC's authority to move forward with its agenda. An area warranting legislative attention next term is spectrum reform to give both the FCC and NTIA the tools and means to manage spectrum for a digital age. To be successful, we need to highlight discrete issues that can attract a clear consensus.

Thank you for having me today, and I hope you all prove me wrong and get the Telecom Act of 2011 passed. Until then, I hope these five themes can help us to become a more efficient and effective agency. Thank you.