

**Remarks of  
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**as prepared for delivery at**

**Incompas 2016 Policy Summit  
Newseum  
Washington, DC  
February 10, 2016**

**“20<sup>th</sup> Anniversary of the Telecom Act”<sup>1</sup>**

Thank you for inviting me today. I first met Chip Pickering when he was a member of Congress working on the competitive issues at the heart of the Telecommunications Act of 1996. He’s been an important advocate for competition ever since.

Today I’d like to offer some personal views about the Telecom Act, signed twenty years ago this week, which has had long-lasting, beneficial effects on the telecom sector and on the economy as a whole.

The FCC focuses on facilitating competition, eliminating artificial barriers to entry, providing incentives for the marketplace to innovate and deliver consumer benefits through competitive forces. But how did we get here? The anniversary this week gives us an opportunity to reflect on that question.

For me, this trip down memory lane has brought back a lot of recollections from the early years of the Clinton Administration when I worked with those, first and foremost the Vice President, who were establishing a vision for our national broadband future. More about that later.

From my perspective, the ’96 Act was critical because it enshrined competition at the core of the statutory framework governing telecommunications – replacing regulation based on scarcity and monopoly, offering new competitive opportunities to companies and new competitive benefits to consumers. Let me explain.

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<sup>1</sup> I would like to thank Bill Dever of the Commission’s Office of General Counsel for his assistance in the preparation of these remarks.

## Three Acts

The Act was the climax of a three-act play, one in which Congress recognized the power of competition – and gave the FCC new tools and a new mission fit for the Internet Age.

Communications policy had been for a long time based on scarcity – and artificial scarcity at that: One national telephone company; two wireless companies per market (one reserved for the incumbent telephone company); exclusive franchises for cable operators.

The implications for regulators were obvious: They had to stand, to a considerable degree, in the shoes of consumers who themselves had little or no choice – and therefore little or no impact – on the pricing, quality, or innovation of communications services.

By the early 1990s, change was afoot. The ability of consumers to buy a telephone instead of having to rent it from Ma Bell, the break-up of AT&T (and I should note that Phil Verveer, now Senior Counselor to Chairman Wheeler, was the DOJ lawyer who signed the complaint that started that lawsuit), the arrival of competition in long-distance telephony, the growth of cable as an alternative to over-the-air TV, and the early stirrings of wireless voice.

What Congress knew at the time was this:

- The Commission had taken important steps to protect and promote competition in data services (*Computer Inquiries*).
- The breakup of AT&T and the creation of the so-called Baby Bells had led both to competition in long distance and the need to ensure that gatekeeper control in local markets would not frustrate the introduction of new services.
- The role of regulation had fundamentally changed. From an era of legally-protected monopoly with little or no choice of provider, to an era in which the introduction and preservation of competition required careful attention.
- New entrants were poised to enter new markets.

Much of this happened without additional congressional direction. But, in the early '90s, Congress focused on three occasions on the role of government in promoting and protecting competition in communications services.

First, the cable market. In 1992, Senator Jack Danforth (R. Mo.) introduced what became the "Cable Television Consumer Protection and Competition Act of 1992", which looked to the market power of cable companies and required them to offer their vertically-owned programming to a new competitive force: Direct-Broadcast Satellites. That law, passed with bipartisan support, has had important implications, including for competition policy. Just last year, the Commission adopted a rebuttable presumption that video competition exists in all American communities. In large part because DBS has brought two additional video competitors to the nation.

Then a revolution in wireless. In the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Congress re-set the wireless industry: first, by applying a "light touch" form of Title II to mobile voice; and second, by creating the first wireless auctions, which inaugurated the critical process – itself competitive – of bringing more spectrum to create and maintain a competitive wireless industry.

The apex of these efforts came in 1996. Again a bi-partisan effort. Again a recognition that competition was the best way to serve consumers – including competition from novel sources. And again, a new and nimble role for the FCC.

The competition provisions of the '96 Act banished legally-protected monopolies, embedded the importance of ensuring competitive data services into the text of the Act through the statutory definitions of “telecommunications” and “information” services, and gave the FCC new tools (through forbearance) to ensure that regulation protects and promotes competition without burdening network investment or innovation from any source. The '96 Act also anticipated future forms of competition – looking to the emergence of the types of advanced telecommunications that bring us the Internet today. Today’s app economy may not have been envisioned in 1996, but it was enabled. The principles in the Act are broad and flexible, and so have stood the test of time.

Those who assert that Title II is suited only to monopoly regulation miss an important point. Pro-competition provisions were written into the DNA of Title II. Congress even took the extraordinary step of permitting the regulator to decide not to apply provisions of the statute that Congress had enacted if that would further the public interest, including competition.

This flexibility has made the Communications Act adaptable to changes in markets and technology. The basic provisions of the statute have not changed in the last 20 years, yet new services are introduced every day.

Indeed, the promise of broadband was clearly recognized in Section 706, defining advanced telecommunications capability as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” That such capability be deployed was established as a national priority.<sup>2</sup>

Congress also recognized that this new environment based primarily on competition would need to have the implicit subsidies that were built into the system made explicit and adequately supported. That’s why Congress established a framework for a Universal Service Fund that addresses a variety of needs to ensure all Americans have access to communications services regardless of region or income. Special attention was paid to schools, libraries and health care providers to guarantee that the benefits of connection to advanced telecommunications services include the country’s critical institutions. For the Commission, that work continues today – great successes have been achieved and there is more to do.

The actions Congress took in 1992, 1993 and 1996 together form the critical foundation: Policymakers are to look to competition as the first and best way to deliver innovation and investment, while simultaneously recognizing that the FCC must play an important role in ensuring that competition is not artificially blocked or hindered. Of course, this built on a long tradition in communications regulation, including the FCC’s *Carterfone* decision, *Computer Inquiries*, and *Competitive Carrier* proceedings. But it was in the 1990s that Congress explicitly endorsed the Commission’s leadership, gave the Commission flexible authority, and, very critically, altered the perspective of governmental action from the kind of regulation that accompanies legally-protected market power to one that is designed to incentivize investment, new entry and competition.

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<sup>2</sup> See 47 U.S.C. § 1302(a) (originally adopted as Section 706(a) of the Telecom Act: “The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) 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.”).

These were bipartisan ideas, enacted on a bipartisan basis. We owe continuing thanks to leaders of both parties. Republicans Tom Bliley, Jack Fields, Trent Lott and Larry Pressler. Democrats Fritz Hollings, John Dingell and Ed Markey.

## **The Vision of a New Innovative and Competitive Communications Marketplace**

At the time of the consideration of the Act, I headed the policy shop in the Department of Commerce and I was also an advisor to the Vice President, one of the group of people who met with him for breakfast in his West Wing office weekly to chart the Administration's broadband policies, including the Administration's view of what would become the Telecom Act. My current colleagues were also heavily involved in the creation and execution of the Telecom Act, for example our Chief of Staff Ruth Milkman, who was then Chairman Reed Hundt's Senior Legal Advisor, and Gigi Sohn, then a consumer advocate.

This was a time that seems both familiar and foreign. The Internet was just being privatized in 1995. The first popular Web browser had just been introduced by Netscape. Internet access speeds were 56k for the lucky ones, cellphones were still 2G, and wireless calls were 45 to 75 cents a minute, much more while roaming. Smartphones, tablets, streaming HD video – all a long way off.

In January 1994, Vice President Al Gore gave a speech at UCLA in which he laid out his vision for the legislation that would become the Telecom Act. (I should say that I was a member of the team that advised the Vice President on the speech.) The Vice President endorsed the following five principles as fundamental to effective communications policy:

- (1) Encourage Private Investment
- (2) Provide and Protect Competition
- (3) Provide Open Access to the Network
- (4) Take Action to Avoid Creating a Society of "Haves" and "Have Nots",  
and
- (5) Encourage Flexible and Responsive Governmental Action.

These principles have stood the test of time as the digital revolution has taken shape. I believe that is because they were informed by a remarkably clear vision of the coming transformation of the communications landscape. Listen to these

words. The Vice President predicted that a day would arrive when: “[t]here may not be cable companies or phone companies or computer companies, as such. Everyone will be in the bit business. The functions provided will define the marketplace. There will be information conduits, information providers, information appliances and information consumers.”

That is a remarkably prescient view. Today we, in fact, do have information conduits – the broadband providers; information providers – now known as the edge; and information appliances – from Smart TVs to smartphones to boxes for over-the-top services to tablets. Edge providers offer content to information consumers, who access it using all kinds of devices and through broadband providers operating an array of technologies, with IP at the core. And the identity of companies has become more fluid. Is Google offering content, devices, network access, or all of the above? Is Comcast just a cable provider, Verizon just a phone company? Each of these companies – and many more – provide a series of value propositions that defy the stovepipe industry definitions of the past.

The discussion of broadband competition and open networks seems equally prescient. Vice President Gore observed that “[for] some time, in many places, there are likely to be only one or two broadband, interactive wires, probably owned by cable or telephone companies.” And then the Vice President said:

“We cannot permit the creation of information bottlenecks that adversely affect information providers who use the highways as a means of supplying their customers. Nor can we can permit bottlenecks for information consumers who desire programming that may not be available through the wires that enter their homes or offices.”

Turning to the regulatory philosophy that would underlie the Telecom Act still two years away, the Vice President concluded by saying: “In the information marketplace of the future, we will obtain our goals of investment, competition and open access only if regulation matches the marketplace. That requires a flexible, adaptable regulatory regime that encourages the widespread provision of broadband, interactive digital services.”

I’ve put a lot of emphasis on this speech because I believe it bears re-reading. The principles that the Vice President articulated were sound in 1994 and are, in my view, equally sound today. Much has changed – I recall the day before he became Vice President when I was riding in a car with then-Senator Gore and he made a mobile phone call – on a device the size of a breadbox. And not a small breadbox

either. But what hasn't changed are the fundamental principles on which good policy can be constructed. First, to promote and protect competition in the face of artificial restrictions is the primary way to serve the public interest. Facilitating the introduction of more competitors – rather than administering scarcity – is the best approach wherever possible. Second, based on the rapid pace of change in today's communications markets, the Commission must always be forward-looking. And that includes not only preserving and protecting competition that exists now, but recognizing the importance of nascent forms of competition and the potential for future innovation. Third, in keeping with its competition mission, the Commission must employ a flexible approach that is in accord with, and anticipates, the dynamism of markets and innovation in the communications sector. When these principles are applied, consumers win.

### **The Job is Not Done.**

This new marketplace that has grown up under the Act creates its own challenges. We have made much progress over the last twenty years, but our job is not complete. Chairman Wheeler has charted an aggressive agenda for the year, and one that will further the principles of the Telecom Act.

By the end of March, the Commission will begin the incentive auctions that will use competitive bidding processes to reallocate spectrum from broadcast to broadband, in a manner that can boost competition in the wireless sector.

On a variety of fronts, the Commission is working to ensure that over-the-top video providers do not face unfair, artificial barriers to entry, including because consumers use broadband conduits owned by pay TV providers to access their services. The Open Internet Order was one important step. At its February meeting next week, the Commission will take up another: the Chairman's proposed rulemaking to ensure that consumers are not locked in to renting their cable boxes from their pay TV provider but, instead, will have the advantages of competition and innovation from independent companies. Much as consumers in the 1970s were given the ability to buy a telephone rather than having to rent one from AT&T, so the Chairman supports consumers having the ability to use the devices of their choice to access the video content that they purchase from pay TV providers. This is an important step toward freeing video competition from artificial barriers to consumer choice.

One question raised about the Chairman's proposal concerns protection of copyright. It is always critical that copyright be protected, not just as a matter of law, but in recognition of its role in powering innovation, investment and, of course, the creative arts. The Chairman's proposal fully respects the copyright interests of content creators. Programming now distributed by the MVPDs will continue to be distributed by the MVPDs, with full protection of its content, including the ability to ensure that only paying subscribers gain access to copyrighted materials and that any restrictions on copying, etc. are preserved. The only difference is this: Consumers will be able to use the device or app of their choice to access the pay TV content, bringing the kind of competition that traditionally lowers prices and boosts quality. This is no more a threat to copyright than the traditional ability of consumers to watch pay TV on the TV device of their choice or, in the mobile world, than the ability of consumers to download the apps they want, like Netflix or Amazon Video, onto the mobile devices they choose.

The Commission is also focused on the so-called special access market for dedicated business data services. As you know, the Commission is in the midst of a proceeding to determine the extent to which market power continues to exist for these services, and to decide what is the appropriate regulatory regime if, where, and when economic analysis of the data shows that competition is limited.

After all, competition in telecommunications matters to consumers even when they don't feel it and touch it directly. For example, the structure and efficient performance of the market for dedicated business data services may be fundamental to the deployment of 5G mobile broadband, which will require many more cell sites and thus much greater demand for the business data services generally referred to as backhaul. Control of a necessary input can impact the competitiveness of the downstream market, in this case mobile broadband. Similarly, when retailers and other companies can enjoy lower prices for competitive telecommunications services, economic forces can translate their lower costs into lower prices for consumers of a wide variety of goods and services.

In all these areas, the Commission is applying the principles of the Telecom Act: Look to competition as the best means of providing lower prices, more choice, new entry, and greater innovation. Use governmental authority wisely where the facts show that competition needs to be promoted or protected, for example in the face of market power or artificial barriers to entry. Keep an eye toward the future and consider the impacts for consumers of any action or inaction. At the end of the day, it is about ensuring that American consumers are able to decide which

innovations succeed and which innovations fail, which value propositions stimulate consumer demand and which are met with indifference. That is what we mean when we say “consumers win”.

Thank you.