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The Telecom Act of 1996 Needs a Deregulatory Overhaul

by

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February 8 will mark the 30th anniversary of the Telecommunications Act of 1996, which updated the Communications Act of 1934 in certain important respects. The only way for Congress to properly celebrate this anniversary would be to initiate a serious legislative review that leads to a deregulatory overhaul of the Communications Act.

By 1996, the communications markets subject to the Federal Communications Commission's regulatory jurisdiction already had undergone significant change. For example, AT&T's telephone monopoly had been dismembered, creating separate "Baby Bells" offering local service in their own regions, with AT&T providing long distance service in competition with new entrants like MCI. And in the media marketplace, multichannel cable TV operators and emergent satellite TV providers were competing with the traditional broadcasters for viewers' eyeballs.

In other words, when Congress enacted the Telecom Act of 1996, the communications and media landscape already was considerably more competitive than it had been a couple of decades earlier. New entrants were competing in various telecommunications and media market segments.

At least in a hortatory sense, Congress appeared to acknowledge the marketplace changes. The 1996 Act's preamble declared that its purpose was to "promote competition and *reduce regulation* in order to secure lower prices and higher quality services." Similarly, in the principal legislative report accompanying the 1996 Act, Congress stated its intent "to provide for a pro-competitive, *de-regulatory* national policy framework."

Thus, it certainly appears that Congress wanted the 1996 Act to be implemented in a deregulatory way as a means of fostering further competition and consumer choice.

Alas, while there have been some deregulatory actions over the years, including some important ones by the FCC during the first and second Trump administrations, on the whole, the 1996 Telecom Act has not been implemented in a consistently deregulatory way. For proof, look no further than the adoption by successive Democrat-controlled FCCs of so-called "net neutrality" rules applicable to Internet service providers – stringent mandates intended to prohibit any differential treatment of customers. Even though successive Republican-controlled FCCs abandoned these "neutrality" straightjackets each time they regained control of the FCC, the fact that they could be adopted in the first place demonstrates the fallacy of suggesting that the 1996 law established a "deregulatory national policy framework."

Perhaps the best explanation for the deregulatory failure was offered by Justice Antonin Scalia in 1999 in the first case under the new law to reach the Supreme Court: “It 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.”

While there have been profound technological and marketplace changes in the last couple of decades attributable largely to the continuing proliferation of digital technologies and services, there's no doubt that the flip-flopping between intrusive pro-regulatory and deregulatory implementation of the 1996 Act has deterred private sector investment and innovation that otherwise would have occurred. So, in overhauling the Communications Act, Congress should make certain that the new effort does not result in a law that is a "model of ambiguity."

Granted, any new legislative update should include matters such as reexamining the division between federal and state regulatory authority, reforming the broken Universal Service subsidy system, and making more spectrum available for private sector use. But two major "structural" reforms should take center stage: replacing the existing statute’s "stovepipe" regulatory paradigm and the law's pervasive delegation of authority to the FCC merely to act in the "public interest."

Stovepipe regulation refers to the fact that the Communications Act contains definitions for various denominated services, such as “telecommunications,” “information services,” “cable service,” “mobile service,” and “broadcasting,” and different regulations are applied to services classified in one of these stovepipes or the other – even though the services may be comparable

from a consumer's perspective. This existing framework no longer makes sense as today's communications markets are characterized by rapid innovation, intermodal competition, and abundant substitutes for both traditional telephony and broadcasting.

With cable, fiber, mobile and fixed wireless, and low-earth orbit satellite systems vying to deliver constantly evolving converging services, it is no longer possible to delineate service categories that reflect stable real-world market boundaries. Yet the statutory "stovepipes," based on outdated "techno-functional" definitional constructs, serve as impediments to deregulating markets in which comparable services compete. The result is to keep power in the hands of bureaucrats rather than consumers.

After passage of the 1996 Act, there remain nearly one hundred statutory provisions that authorize the FCC to act in the "public interest," an essentially standardless standard enabling the agency to exercise, and at times abuse, unconstrained bureaucratic discretion. Aside from continuing to govern certain key aspects of the operations of wireline telecommunications providers, the vacuous public interest standard is the regulatory vise that hold in its grip any user of the radio spectrum.

Thus, the agency's decision to grant or renew a broadcast license must be based on a finding that such action serves the public interest. This authority has long been the basis of the agency's regulation of broadcast programming content, such as the now long abandoned Fairness Doctrine. And because the agency must determine that a proposed transaction to transfer a broadcast license is in the public interest, the agency holds a proverbial sword of Damocles over merger applicants.

This sword has been much in the news in recent months as Brendan Carr, the current FCC Chairman, has used it to threaten broadcast licenses with holdups of pending merger applications absent changes to programming content, presenting delicate First Amendment issues. To be sure, he's not the first FCC chairman to wield the agency's public interest authority to dictate program content. But in this age of media abundance, he should be the last.

The best way to commemorate the Telecommunications Act of 1996's 30th anniversary would be for Congress to undertake a deregulatory overhaul of our basic communications law. To be meaningful, such reform must include replacing both the existing "stovepipe" regulatory paradigm and the vacuous public interest standard.

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