The Telecommunications Act of 19961

I. Background

Congressional concerns about the competitiveness of American telecommunications grew throughout the late 1980's and early 1990's. By the time of the 104th Congress, the consensus was for change. The American telecommunications industry was chained by rules formed to foster competition. However, as the global economy grew, the rules stifled competition. Republicans took control of Congress in 1994 and sought change. The precursor to the 1996 act, the Communications Act of 1994 embodied the spirit of change, but it never made headway because of the regulations that accompanied it. When Congress convened in 1995, most agreed that the telecommunications industry needed to be opened to competition.

II. The Committee Reports

a. The Senate Report2

On January 4, 1995, Senator Pressler, the incoming chair of the Committee of Commerce, Science, and Transportation, introduced the Telecommunications and Deregulation Act of 1995. As stated in the committee report, the major issues dealt with by the bill were: "(1) long distance entry by Bell Operating Companies ("BOCs"); (2) telephone company entry into cable; (3) competition for local telephone service; (4) entry of registered electric utilities into telecommunications; (5) broadcasters' rights to provide additional services; (6) protection and advancement of universal telephone service…" The bill was aimed at amending the Communications Act of 1934. The industry was ready for opening to competition, and the

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1 Public Law 104-104; 110 Stat. 56.

2 Senate Report 104-23.

monopoly fears that generally ruled in the past were quieted due to technological and market changed.

The Committee had already heard 31 hours of testimony when considering the 1994 bill. In 1995, the Committee held only 3 hearings. The Committee was encouraged to hasten telecommunications reform because of its economic benefits. The reform should increase competition and decrease regulation. Witnesses testified that the industry was ready for competition, and many advocated that Congress establish a certain date of deregulation to prevent delay by the FCC or Department of Justice. Many testified that laws previously meant to encourage competition were now impediments to it.

In the additional notes which accompanied the bill, Senator Burns expressed several concerns. First, he was concerned that the bill might not bring about competition soon enough. He advocated that the FCC's role in allowing competition should be limited to prevent undue delay in opening the markets. He also expressed concern with the Rockefeller amendment which required "essential carriers" to provide universal service to a wide range of health care and educational institutions. He was concerned that it was overreaching to too broad a definition of such institutions. He also was concerned with the Kerrey amendment which was adopted during committee. This amendment entitled "incremental-cost-based rates" to educational, charitable, and government users. Telephone affiliated cable systems would be required to offer these three groups very low cost channel access. The amendment doesn't address the demand for such service. Because of the absence of support for this amendment, he declined to support it.

Senator Hollings supported the checklist approach to BOC entry into long distance markets versus the calendar approach. He also supported a role for the DOJ in determining if a BOC will live up to its public interest standard so that the could FCC benefit from the DOJ's

experience in determining if adequate competition exists. He also supports the fact that the BOC must provide long distance service through a subsidiary.

Senators Packwood and McCain, the only two dissenters, expressed the view that the legislation did not go far enough. They see the bill as creating more regulation, as 87 regulatory proceedings are suggested to the FCC to implement the bill's policies. They also disagreed with an absence of a determined date for deregulation, and the fact that, in the long run, the FCC was to eliminate regulations as it saw fit, instead of automatic terminations.

b. The House Committee Report3

The House Committee Report reasoned that the Telecommunications Act was needed to reform competition in telecommunications. The local markets were controlled by monopolies and needed to be open markets. Further, companies confined to one form of telecommunications needed permission to compete with each other across other forms. Phone companies and cable companies were ready to compete with each other in the provision of both services.

The Commerce Committee's Subcommittee on Telecommunications and Finance held three days of hearings on the proposed bill. On May 17, 1995, the Subcommittee reported the bill to the full Committee, and on May 25, the bill was reported to the House.

As the bill came out of the committee, both the majority and dissent expressed many concerns. The majority expressed its concerns over the sweeping Sterns amendment, which allowed cross-ownership limited only by a FCC finding that one companies market concentration was too high. Some saw the bill as not deregulating enough of the industry. The idea that BOC's must conform to a checklist was seen as more regulation, not lesser, and the bill was disparaged because it eliminated the BOCs' own business judgment in deciding when to compete

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3 House Report 104-204.

in the marketplace. The dissenters also objected to the lack of a "V-chip" provision, which they eventually won on the floor. These criticisms, however, only reflect the compromising nature of the legislation.

III. The Role of the DOJ and the V-Chip

The two major issues in both houses were: (1) the entry of the BOCs into the long distance market and the role of the DOJ; and (2) content ratings and control over television programs by parents.

The bill reported in committee by Sen. Pressler contained a 14-point checklist that BOC's had to meet before they could provide long distance in their region. Regulation was viewed as necessary to keep the BOCs from abusing their monopoly power within their own regions. As originally presented, the bill did not give the DOJ a determinative role in determining whether competition was sufficient to allow BOC entry. Many wanted a larger role from the DOJ antitrust division. In the bill reported, however, the DOJ was given a consulting role. After the BOC met the checklist terms, the FCC was to consult with the DOJ to ensure that entry was consistent with the public interest. As Sen. Hollings said in opening comments on the bill:

> The public interest test is fundamental to my support for the legislation. In making this public interest evaluation, the FCC is instructed to consult with the Department of Justice which may furnish the Federal Communications Commission with advice on the application using whatever standard it finds appropriate, including antitrust analysis under the Clayton and Sherman Acts and also section VIII(C) under the Modified Final Judgment.4

On the floor of the Senate, two amendments were introduced to give the DOJ a larger role. Sen. Dorgan introduced an amendment which would have required DOJ approval of BOC entry into in-region long distance service. Sen. Thurmond introduced another amendment to give authority

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4 *Cong. Rec.* 07 June 1995: S7896.

over BOC entry to the attorney general. However, both amendments were defeated. The final Senate bill required only that the FCC present the BOC's entry application to the Attorney General for analysis.

The House version of the bill also faced similar debate. The bill contained a checklist which must be fulfilled before the BOCs could compete for long distance service in their own markets. However, the bill as reported out of committee did contain a sunset clause which eliminated the provisions of that section within a local exchange market after a finding that the market was open to full and open competition. Rep. Hyde introduced his own bill in the House because the Communications Act as reported contained no role for the DOJ. His bill made it out of committee but never was voted on. Rep. Bliley, the Chairmen of the Commerce Committee, addressed his concerns. He offered a manager's amendment to the bill which required the FCC to consult with the DOJ before allowing BOCs to compete within their regional markets. Rep. Conyers presented an amendment to require the approval of the Attorney General, but that amendment was defeated. Also, under the House version, BOCs are allowed to apply for entry on a state-by-state basis.

The conference agreement5 was a combination of both bills. A BOC seeking entry was required to satisfy the in-region test which requires the presence of a facilities-based competitor (or show that no request for access was made). This requirement came from the House version. The conference version adopted the Senate structure for FCC approval. The FCC must consult the Attorney General about the BOC's application and must give substantial weight to his determination.

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5 Conference Report, Joint Explanatory Statement, H.R. Rep. No. 104-458, 104th Congress, 2nd Session, January 31, 1996.

Television Content Control

The Act also included a requirement that a system of television program ratings created and a device which would block these programs be developed. As adopted, the law required the FCC to oversee the development of industry standard blocking technology and its installation in televisions.

In the Senate, the provision was introduced by Senator Conrad and amended by Sen. Lieberman. The provision encouraged the television industry to voluntarily develop television ratings. If not done within one year, it called for the creation of an independent commission to do so. As stated by Sen. Conrad:

> Mr. President, what this amendment does is really two things. It provides that television manufacturers will include in new television sets, at a time that they, in consultation with the FCC, determine is the workable time, to require a choice chip in the televisions. Just as we have chips in the television now that provide for closed captioning, we would provide choice chips in new televisions, which would be able to empower parents to exclude programming that comes into their homes, programming that they find objectionable--not any Member of Congress, not the FCC, not anybody else, but what parents find objectionable or something they do not want to come into their homes. These choice chips that are now under development--in some cases, already well-developed--would enable parents to be involved in their children's viewing habits…[and regarding the ratings system] we give the industry, working with all interested parties, parent-teacher groups, school administers, other interested parties, churches, and others, a 1-year window of opportunity to make a decision on what that rating system ought to be. We give the industry, working with all interested parties, a chance, a 1-year chance. Let them decide what the rating system should look like.6

While the amendment seemed to garner enough support while on the floor, it turned out to be somewhat controversial. The amendment was offered and discussed in mid-June, but by August criticism was already being levied against it. Sen. Dole disparaged the amendment

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6 *Cong. Rec.* 13 June 1995: S8228

because the so-called "V-Chip" did not exist at the bill's passage, and it was doubted whether the chip would ever exist.

In the House, the content control provisions were introduced in a floor amendment by Rep. Markey. The Markey amendment called for the development of television program ratings. It required stations to broadcast the ratings so that those programs may be blocked. It also required distributors to equip televisions with a blocking device. The opposition supported the Coburn-Tauzin substitute. Rep. Paxon believed that the Markey amendment to spell doom:

> It would require thousands of bureaucrats, costing hundreds of millions of dollars, to view and rate the 10,000 individual shows on 2,000 stations, encompassing 150,000 hours of local and national broadcast programming. Of course, the ratings would be subjective. What is rated as offensive would be decided by Government censors based on their personal interpretation. The end result, giving the Federal Government unprecedented power to establish standards of morality and decency in the media, unbridled power to the very government many Americans believe has already contributed greatly to the breakdown of values in our land.7

The Coburn amendment alternatively called for a more market based solution, with the Federal Government encouraging the development ratings and blocking technology without an active government role. In support of his amendment, and in opposition to that of Rep. Markey, Rep. Coburn stated:

> This amendment is a worthwhile alternative to the V-chip. It puts parents, not the Federal Government, in the driver's seat on the subject of television program viewing choices. The amendment of the gentleman from Massachusetts [Mr. **Markey**] assumes only that a congressionally mandated board will know best. The Markey amendment calls on Government to choose one technology over another, not the marketplace. I thought that was what this was all about, the marketplace deciding how we make these decisions. His amendment calls on the Government to mandate a single technology and develop rating systems and require the transmission of those ratings. Whether it is a Government agency or a Government-mandated board, it is still the same. My amendment says that the market knows best. With dozens of devices already on the market and dozens

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7 *Cong. Rec.* 04 Aug. 1995: H8488

> more in the development stage, the Federal Government should not be in the business of forcing a single solution on consumers. A statutory mandate will develop much more advanced, better technologies that will empower parents better and further. There is no question that television is a powerful influence in our society. That is one of the very important reasons why it sould be parents' decision, not the Government. The parents should be making the decisions based on individual family values, not a politically balanced advisory committee. Broadcasters, too, have a responsibility to assess the impact of their work, and understand the damage that it causes to our youth and our society. This industry must continue to take actual tangible steps towards addressing violence and sexual illicitness. This amendment, this substitute amendment, will drive that change to empower parents with the latest technology, with the broadest technology to exclude what they decide is inappropriate.8

The Markey amendment ultimately prevailed. The Coburn amendment was not enough of an affirmative step towards government safeguards of American youth. Many Representatives believed that action was needed to force the industry to change.

The conference agreement required the FCC to establish an advisory board to report to the Commission within one year its recommendations for a ratings system. The FCC was then to establish guidelines to allow broadcasters to rate their programs. Further, television manufacturers were required to produce televisions with the capability to block television programming.

The Satellite Act of 19629

The Satellite Act came about partially in response to President Kennedy's statement in 1961 that, as a matter of national policy, private ownership of satellite communications was preferred as long as certain policy conditions were met. The Act was introduced by Senator Kerr and referred to the Senate Committee on Aeronautical and Space Sciences with an agreement that thereafter it would be referred to the Committee on Commerce. In the House, two

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8 *Cong. Rec.* 04 Aug. 1995: H8493.

9 Public Law 87-624.

companion bills were introduced, but the bill ultimately reported to the House was identical to the Senate version of the bill from the Aeronautical Committee.

The Report of the Committee of Interstate and Foreign Commerce10 to the House stated that the reason for the legislation at that time was to preserve the role the private business community would play in the future of satellite technology. If the role of private industry was not preserved at the outset, then government agencies would take over, and it would be too difficult then for the private sector to become involved.

The Committee held several sets of hearings in 1961 and 1962. Many bills were introduced dealing with the ownership, operation, and regulation of the United States' portion of the international satellite system. The divergent views were assembled adequately into the bill introduced by the Committee Chariman, Rep. Harris on April 2, 1962. The bill called for the creation of a private satellite corporation to be funded by a stock offering. The American public was allowed to purchase stock, but 50 percent of the stock was to be reserved for "authorized carriers." The corporation would also be allowed to issue other forms of debt.

The additional views found in the report revealed some concerns about the bill. The corporation would be more or less tied to the type of satellite system described in the bill. Further, the corporation was to engage in the business of supplying relay services to other telecommunications carriers. Thus, the corporation was precluded from directly broadcasting to individual receivers instead of to larger ground stations owned by other carriers. The corporations managerial functions were also hindered because of the regulatory oversight given to the FCC. The corporations buying of equipment and services is determined by the FCC, as it who and at what price to which it sells.

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10 House Report No. 1636, 87th Congress, 2nd Session, 1962.

After passage in the House, the bill was referred to the Committee on Commerce in the Senate.11 The Commerce report stated that the bill was guided by certain unalterable truths: (1) that there is only one electromagnetic spectrum; (2) the spectrum is finite and universally distributed throughout the universe; (3) it is always and already distressingly crowded; and (4) that all telecommunications services, both present and potential, must use frequencies, and in a manner that does not interfere with other services. The Committee sought to strengthen the regulatory provisions of the previous bill. The bill from the Commerce Committee also gives no preference to the operation of ground stations, and the FCC may make that determination based on the public interest. In the Committee hearings, the telecommunications carriers urged that they be given preference in the ownership of ground stations, but the Committee did not want to legislatively limit the power of the FCC in this regard. The dissenting views in the Committee report express that legislation was not needed so soon. There was still much experimentation to be done. The bill would also create a private monopoly which would benefit to some extent from taxpayer money. The minority essentially pushed for government owned control of the satellite system. It saw private ownership as structured by the bill to create conflicts of interest and disincentives to true competition.

The final version of the bill as enacted on August 31, 1962 is virtually identical to the bill which emerged from the Senate Committee of Commerce.

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11 Senate Report No. 1584, 87th Congress, 2nd Session, 1962.