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THE GOOD, THE BAD, AND THE UGLY OF TELECOM REFORM

Roy M. Neel*

Every decade or so Congress and the White House, Republicans and Democrats, sit down in Washington, roll up their sleeves, shut out the adversarial rhetoric and the partisan squabbling, and get it *right*. The amazingly smooth passage of the new telecommunications law on February 8, 1996 was one of those rare occasions.¹ And, when you peel back all the news hype, it was a genuinely remarkable event in the history of the U.S. economy.

As I sat in the audience watching the President sign the bill, I marveled that one of the longest-running Washington legislative side-shows, beginning with the so-called "Bell Bill" in 1976, was now over.² Indeed, former Congressman Lionel Van Deerlin, largely responsible for early efforts at advancing deregulatory policy, was introduced by the President during the ceremonies, much as Ernie Banks is trotted out at all the Cubs' old-timers' games.³

The event had everything: a spectacular setting in the Great Hall of the Library of Congress; the President; Vice President Gore, who is arguably the "father" of the effort to accelerate the information superhighway; every major congressional leader who helped make the law a reality, and many others; the entire Washington telecommunications establishment; the first-ever cyber-signing of a new federal law; and even an interactive Internet exchange between Al Gore and Lily Tom-

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1. Telecommunications Act of 1996, 47 U.S.C.A §§ 151-614 (West Supp. 1996).

2. Consumer Communications Reform Act of 1976, H.R. 12323, 94th Cong., 2d Sess. (1976), commonly known as the "Bell Bill," proposed to establish a single, integrated telecommunications system. Ted Vaden, *Bell Telephone Presses Case for Monopoly*, 34 CONG. Q. WKLY. REP. 2615, 2615 (1976). The legislation, drafted by AT&T lawyers, would have the effect of eliminating most competition in the telecommunications industry. *Id.*

3. Representative Lionel Van Deerlin, Chairman of the House Communications Subcommittee, opposed the Bell Bill and sought to derail it by undertaking a revamping of the Communications Act of 1934. Although Van Deerlin's comprehensive rewrite bills were not adopted, the introduction of other rewrite bills and the debate they engendered had a significant impact on communications policy. For an interesting account of Van Deerlin's efforts to rewrite the Communications Act see ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 240-70 (3d ed. 1982).

lin. In short, this was the kind of legislative-political ceremony usually reserved for major social legislation such as health care reform, to mention one of the great lost public policy opportunities of this decade. But let's not get started down that path.

As I was saying, that day at the Library of Congress was very special. Everyone who had even a small role in the process was transfixed by the scene until, during a brief pause late in the ceremony, a gruff voice was heard from the back row. A lobbyist who had somehow snuck into the affair was getting tired of the parade of speeches. "Let's get this over with!" he was heard to say, "I gotta get over to the FCC and file against Ameritech before the place closes!"

There, in a nutshell, is the story of the Telecommunications Act of 1996. That is, no fight in Washington ever ends. It just changes stripes and comes back in a different form, in a different arena, with different rules, but with the stakes just as high. If I were not such a terminal optimist, I would be downright depressed.

In fact, the new law starts a new game in the marketplace. Barriers will fall, new deals will be done, and very unusual business alliances will materialize. Indeed, today—only three weeks after passage of the Act—we have literally hundreds of dramatic new business relationships that were not possible before the introduction of the Act.⁴

Yet, despite the "sky-is-falling" rhetoric of so-called consumer activists, customers will benefit from new services, much greater choice, and lower prices—all made possible by new competition in cable, local telephone, long distance, and network access. Consumers will also benefit from the rapid acceleration of all the telecommunications services that have sprung like gremlins from the head of "Gizmo." Sprinkle a little hydroponic vegetable juice over a community of technonerd and you get the founders of Netscape and Silicon Graphics and, yes, Microsoft—the veritable Morgans and Vanderbilts of the nineties. Everyone in the business of telecomputing seems to be in the game, making money and exciting investors, the media, and more recently, the politicians.

The old monopolies are vanishing. Companies are rapidly learning something about marketing, realizing that consumers do not buy technology, they buy products. Consider a recent national consumer poll which unearthed this fact: Only one in thirteen consumers stated that they could not live without the personal computer, far down the list in

4. See John J. Oslund, *Telecommunications Overhaul; Telecom Reform: It's All About Bits*, STAR TRIB. (Minneapolis), Feb. 2, 1996, at 16A (noting the abundance of corporate alliances undertaken in anticipation of the new telecommunications legislation).

importance from aspirin and microwave ovens.⁵ Consumers will buy it if it makes a real difference in their lives today.

As our telecommunications companies rush to develop and deploy new technologies such as ISDN and the cable modem, they might pause to remember the story about the dog food company executives who could not understand why the new, improved product failed on the store shelves. They developed seductive packaging and spent millions on brilliant advertising. So what went wrong? The answer, of course, was that the dogs would not eat it.

As we tout the massive economic gains of the new law, a cautionary note is necessary. The pace, and even the certainty, of these benefits depends upon the next step in the process, the less public but no less critical, and just as high-stakes, phase—that is, the regulatory implementation of this new law. It is within the dreary walls of the FCC building on M Street in Washington that the *real* test of telecommunications reform will unfold.

In short, there is one essential question for everyone in this industry: Will policy makers—the FCC, the states, and the Congress—follow the *spirit*, as well as the letter of the new law? Anyone who observed the Congressional debate can tell you that the spirit of telecommunications reform is *less* regulation, not more. Safeguards should protect *consumers*, not incumbent providers such as the local telephone company, mega-moguls Gates and Malone, or even AT&T. As FCC Chairman Reed Hundt has stated, we must have rules that create *competition*, not competitors.⁶

But back to that fellow from Gucci Gulch rushing out of the Great Hall to go lobby the FCC for his client. His goal is not to seek a level regulatory playing field; his contract doesn't depend upon balanced decisions at the FCC. No, what he is determined to do is roll back the clock to try to change the results of the great public debate that culminated in the ceremony on February 8.

He will have a lot of opportunities. The inventory of regulatory brushfires is daunting with nearly eighty major FCC proceedings over the next year or so, each with enormous implications for competitors and consumers. There are also fifty-plus state regulatory forums, each

5. *MIT Poll Sparks Worries About "Invention Deficit,"* PATRIOT LEDGER (Massachusetts), Dec. 26, 1995, at 5. According to a Massachusetts Institute of Technology poll of 1,005 adults nationwide, only 8% of those polled said they could not live without a personal computer. *Id.* By contrast, nearly 20% of those polled said they could not live without aspirin and 13% said they could not live without a microwave oven. *Id.*

6. Reed E. Hundt, *Implementing the Telecommunications Law of 1996: The Real Work Begins*, Address at the *Newsweek* Telecommunications Forum (Feb. 21, 1996) (transcript available on the Internet at <http://www.fcc.gov/Speeches/Hundt/spreh608.txt>).

with dozens of market opening proceedings to implement.⁷ Industry lawyers, lobbyists, and economists are not about to go hungry. And those of you studying communications law have no reason to worry about the job market.

The FCC, under Chairman Reed Hundt, has made genuine efforts to reinvent its approach to regulation, eliminate duplicative proceedings, and streamline the process for everyone. This is clearly not the old-fashioned, "regulate-at-any-cost" mind-set. My industry often disagrees with the Chairman and other commissioners, regardless of whether they are Democrats or Republicans. However, this FCC, under budget attacks from many quarters, deserves a lot of respect from taxpayers for managing the extraordinarily successful auction of spectrum—\$20 billion worth of respect, to be specific.⁸

Once new laws are passed, funny things happen during the gestation period before the Commission gives birth to final rules. Take, for example, the first notice to emerge from the Common Carrier Bureau after the new law took effect, an interim rulemaking that proposes the regional Bell companies create a separate subsidiary for prospective out-of-region long distance business.⁹ Under this proposal, if a separate subsidiary is not created, these companies will be considered "dominant" and forced to follow crippling tariffing rules.¹⁰

This proposal was designed to do the right thing, to immediately accelerate Bell companies' entry into out-of-region long distance services.¹¹ It may also be a helpful transition rule for some companies. The Commission may have had little choice, and to its credit, it may consider complete elimination of any out-of-region restrictions.

7. See, e.g., John Rendleman, *FCC Sets Timetable*, COMM. WEEK, Feb. 19, 1996, at 32 (noting the approximately 80 rulemakings the FCC must conduct under the 1996 Act); see also Albert R. Karr, *Texas Defies Washington in Phone Deregulation, Protecting its Local Bell Against Giant Rivals*, WALL ST. J., May 2, 1996, at A16 (describing mixed results that states have achieved in advancing competition and facilitating entry into the local telephone market).

8. See *FCC Spectrum Auctions Top \$20 Billion*, Newsbytes, Apr. 9, 1996, available in LEXIS, News Library, Curnews File (reporting that the FCC has exceeded expectations by raising over \$20 billion dollars from six auctions the agency has completed to date).

9. See *In re Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, 61 Fed. Reg. 6607, 6609 (1996) (proposed Feb. 14, 1996). On February 14, 1996, the FCC proposed in a Notice of Proposed Rulemaking that the Regional Bell Operating Companies' (RBOCs) out-of-region long distance services would be regulated as non-dominant provided they meet several conditions. *Id.* at 6609. The affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the BOC local company; and (3) obtain any BOC local exchange telephone company services at tariffed rates and conditions. *Id.*

10. See *id.* (proposing to regulate as dominant carrier offerings those services that fail to comply with separation requirements).

11. See *id.* (contemplating efficient and rapid entry by the BOCs into out-of-region interstate, interexchange services).

But the *spirit* of the new law calls for no such handicap for the Bell companies trying to compete with the long distance oligopoly made up of AT&T, MCI, and Sprint. If there was ever a justification for allowing the Bell companies into the long distance business everywhere, and immediately, it was AT&T's announcement within days of the new law's signing that the company would raise its long distance rates.¹²

To put the dominant-nondominant issue in perspective, AT&T, by far the marketplace heavyweight, has about eight million customers and several billion dollars in revenues in California alone.¹³ And the FCC considers AT&T a "non-dominant" carrier free to set rates in any fashion it chooses.¹⁴ Ameritech, for example, might seek to compete with AT&T in California immediately, which would provide a significant new choice for consumers. Yet, to be able to move quickly, Ameritech would be required to set up an entirely new subsidiary or face dominant status, even though it would not have a single customer or a dollar of revenues in that market.¹⁵ Does anyone in the industry today believe that AT&T, the world's largest telecommunications company, will be at a competitive disadvantage in any business? The fact is, a large percentage of American consumers believe AT&T is *still* their local telephone company. Now *that* is clout, if not outright dominance.

I'm hopeful that all of this will ultimately be fairly sorted out during this risky, complicated phase of telecommunications reform at the FCC, and that the real benefits of competition will prevail. There is ample history to support the effort to deregulate and stimulate competition in U.S. commerce. Airline deregulation was decried by many consumer activists in 1978. However, it is less expensive to fly today

12. See *AT&T Raises Basic Rates for Long Distance*, L.A. TIMES, Feb. 17, 1996, at D8 (announcing that AT&T will raise basic long distance rates by 4.3% causing the monthly bill of its 80 million residential customers to increase by an average of \$.40).

13. AT&T Communications of California, Inc., 1995 Annual Report att. E (1995) (on file with the California Public Utilities Commission).

14. See *In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, 11 F.C.C.R. 3271, 3273 (1996) (finding that AT&T lacks market power in the overall interstate, domestic interexchange market and granting AT&T nondominant carrier status in that market). The FCC's decision to reclassify AT&T as a nondominant carrier has several important effects. First, AT&T is freed from price cap regulations for its residential and other domestic service offerings. *Id.* at 3281. Second, AT&T may file tariffs for all of its domestic services on one day's notice, and the tariffs will be presumed lawful. *Id.* Third, several § 214 requirements are either reduced or eliminated, allowing AT&T greater flexibility in expanding its network. *Id.* Finally, as a nondominant carrier, AT&T is relieved of certain annual reporting requirements. *Id.* at 3282.

15. See *supra* note 9 and accompanying text (discussing the proposed rule requiring BOCs to set up separate subsidiaries for out-of-region services).

than it was eighteen years ago, despite 134% inflation over that period.¹⁶ In addition, more than ninety percent of all tickets sold today are discounted, and capacity has increased by eighty-seven percent.¹⁷ We now have frequent flyer programs, computer reservation systems, and a healthy air express cargo industry—all innovations made possible by major reforms in airline regulation.¹⁸

The rail freight industry was teetering on wholesale bankruptcy in 1979 when the Congress stepped in to free these carriers from burdensome regulations and to make the industry competitive with lightly regulated trucking.¹⁹ Over the past fifteen years, consumer prices have dropped precipitously,²⁰ while revenue per ton has declined by seventeen percent.²¹ Profits have tripled,²² capital investment has been breathtaking,²³ and the rail freight industry is now fit and competitive.²⁴

16. PAUL TESKE ET AL., *DEREGULATING FREIGHT TRANSPORTATION: DELIVERING THE GOODS* 44 (1995) (explaining that average passenger fares declined by 30% in real terms between 1976 and 1990, resulting in total savings to customers of \$5 to \$10 billion dollars per year).

17. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *DEREGULATION AND AIRLINE COMPETITION* 55 (1988); see also GEORGE WILLIAMS, *THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION* 59-60 (1994) (charting the growth of discounted fares from 1981 through 1989).

18. See Williams, *supra* note 17, at 28-38 (discussing the impact of computer reservation systems and the frequent flyer programs in determining the structure of the deregulated airline industry); TESKE ET AL., *supra* note 16, at 46 (1995) (noting the strong growth of the air cargo industry as a byproduct of airline deregulation).

19. In 1980, Congress partially deregulated the railroads, seeking to restore the railroads' profitability through the market by eliminating much of the regulation that had prevented the railroads from competing effectively. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 49 U.S.C.). "The Staggers Rail Act of 1980 substantially relaxed controls over rates, allowed railroads to enter into long-term contracts with shippers, eased merger guidelines, and facilitated abandonment of unprofitable branch lines." TESKE ET AL., *supra* note 16, at 47.

20. Since passage of the Staggers Rail Act, freight rates have declined by roughly 1.5% per year in real terms, compared with a 2.9% increase per year in the five years prior to 1980. U.S. DEPT. OF COMMERCE, *U.S. INDUSTRIAL OUTLOOK* 40-5 (1994). Adjusted for inflation, rail rates in 1994 were 22% lower than in 1982. STANDARD & POOR'S, *INDUSTRY SURVEYS*, R25 (Apr. 1996).

21. See STANDARD & POOR'S, *supra* note 20, at R6 (tracing the decline in rail revenue per ton mile).

22. See *id.* at R8, R15 (describing the rail industries' strong profit performance since the early 1980s and its estimated record profits in 1995).

23. Between 1980 and 1993, railroads invested more than \$160 billion dollars in track and equipment. U.S. DEPT. OF COMMERCE, *supra* note 20, at 40-5 (1994).

24. In 1996, the rail industry is expected to post its tenth consecutive traffic gain, advancing rail traffic to a record 1.28 trillion ton-miles (the product of weight and distance). STANDARD & POOR'S, *supra* note 20, at R28. In addition, railroad productivity doubled between 1983 and 1992, and continues to increase at a faster rate than most other industries. U.S. DEPT. OF COMMERCE, *supra* note 20, at 40-5 (1994).

For regional carriers in both the airline and rail freight industries, we continue to see a rapid growth that responds more to the demands of smaller markets.²⁵ Entrepreneurship, new businesses and services, lower rates, and technological innovation are all products of procompetitive changes in the rules governing major parts of our economy.

Fortunately, Congress and the White House did not have to wait until the telecommunications industry was in the tank before acting. The new law has no bailouts and no taxpayer expense in "fixing" an industry problem. If our figures are correct, the federal, state, and local treasuries will gain an additional \$298 billion added to the nation's economy over the next decade if the regulators follow the spirit as well as the letter of the new law.²⁶ If the implementation process is done right, universal telephone service, the transcendent principle of telecommunications policy over the past half-century, will not only survive in a competitive market, it will be enhanced.²⁷

On the surface, the new law is a contradiction. The principle of universal service is reaffirmed, but the mandate for competition could potentially eviscerate the implicit subsidies that make universal telephone service a reality for vulnerable individuals and communities, especially in hard-to-serve rural areas. These subsidies primarily involve the access charges paid by long distance companies to local companies to support local service.²⁸

The numbers speak for themselves. Without the Universal Service Fund, local telephone rates in high-cost areas would increase significantly.²⁹ In thousands of communities, the cost of providing basic dialtone service is often two, three, and four times greater than the prices residential consumers pay to receive the service. Consider several examples. In Carney, Michigan consumers pay nine dollars per month for local service, but it costs fifty-two dollars to provide that

25. U.S. DEPT. OF COMMERCE, *supra* note 20, at 40-2 (airline); STANDARD & POOR'S, *supra* note 20, at R17 (rail freight).

26. WEFA GROUP, ECONOMIC IMPACT OF DEREGULATING U.S. COMMUNICATIONS INDUSTRIES, EXECUTIVE SUMMARY 5 (1995).

27. See Jeff A. Taylor, *The Gray New World of Telecom*, INVESTOR'S BUS. DAILY, Feb. 13, 1996, at A1 (noting that, while the delivery of universal service previously meant simple dialtone service, the new law could increase access to advanced services, such as high-speed data and phone lines, in all regions of the country).

28. *Id.* (explaining that long-distance access charges subsidize the cost of local telephone service).

29. See Comments of GVNW Inc./Management at 4, Ex. A, *In re* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board (FCC) (CC No. 80-286) (analyzing 97 independent telephone companies and concluding that without USF support, potential local rate increases range from \$3.10 to \$189.98 per month).

service.³⁰ In Bluffton, South Carolina consumers pay about seven dollars monthly, but it costs the local telephone company forty-four dollars monthly to serve those customers.³¹ In Alpine, Texas a customer pays about nine dollars per month, while it costs almost ninety dollars monthly to provide that service.³² These figures are not wild aberrations in the rural telephone marketplace.

On February 25, 1996, the FCC formed a joint board of federal and state regulators to sift through the numbers and produce a plan that will collect funds from all telecommunications providers and redistribute those funds to local service providers to keep local telephone rates affordable in high-cost areas.³³ That is the principle in the new law, and it will guide the Joint Board. But establishing the principle was the easy part. The political stakes are high: If local telephone rates increase dramatically, there could be loud cries for reregulation and for rolling the clock back on the procompetition gains in the new law.

To illustrate the dilemma, consider this fact: When the cable industry raised its basic rates approximately forty percent over a three-year period after the 1984 cable deregulation act, Congress reacted with sweeping reregulation in 1992, won over a Presidential veto.³⁴ John Malone, Chief Executive Officer of Tele-Communications, Inc. (TCI), who knows a thing or two about cable finances, has stated that Congressional reaction cost the cable industry more than five billion dollars in net worth and set back investment plans by years. Of course,

30. *Id.*

31. *Id.*

32. *Id.*

33. See Arielle Emmett, *Universal Service: The New Deal? Telecommunications Act of 1996*, AM. NETWORK, March 15, 1996, at 50 (discussing universal service and potential problems the Joint Board may encounter in moving from a monopoly local service model to a competition model).

34. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a), 106 Stat. 1460, 1460 (1992) (current version at 47 U.S.C. §§ 521-559) (finding that "[s]ince rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40% or more for 28% of cable television subscribers"). According to General Accounting Office surveys conducted in 1990 and 1991, during the first four years of deregulation, the monthly charge for the lowest-priced basic service rose by 56%, and for the most popular basic service by 61%. Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 348 (1993). This increase was more than three times the inflation rate. *Id.*

On October 5, 1992, responding to consumer complaints about unreasonable increases in cable prices and poor service quality, Congress overrode President Bush's first and only veto of his presidency and enacted the Cable Television Consumer Protection and Competition Act of 1992. Mary Lu Carnevale, *Bush's Veto of Cable-TV Bill Is Overturned*, WALL ST. J., Oct. 6, 1992, at A3. One of Congress's main objectives in enacting the 1992 Cable Act was to control cable rates. S. REP. NO. 92, 102nd Cong., 2nd Sess. 1, 1 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1133.

because many cable operators abused their relationship with consumers during cable's post-deregulation rapid growth period, it could be said that the industry deserved this response.³⁵

Therein lies the lesson. In the case of cable's behavior, the political response was swift and brutal, and it affected not only the Darth Vaders of that industry, but also the responsible companies who tried to do a good job for their customers.³⁶ Transition to full competition, away from a highly regulated environment dominated by monopoly players, must be handled carefully so as to not reverse the gains of regulatory reforms. Efforts to preserve universal telephone service will test that lesson.

New entrants into the telecommunications arena may resist paying their fair share to ensure universal service. After all, their short-term interest is in high-volume, high-profit services used by business and institutional customers. Their forays into local telephony will, for the near future, be as resellers taking the incumbent carrier's facilities and services and packaging them with more lucrative products to lure customers from the incumbent local telephone company. It is a great business opportunity, but it potentially sets back the goal of universal service if it weakens the ability of local carriers to serve *everyone* in *every* community.

There is no easy answer to this dilemma. If the FCC and its Joint Board fail to get the universal service solution right, the effect on political support for the new law could be devastating. The industry players themselves are struggling with technological solutions to the new challenges presented by changing law. For instance, the well-meaning but ill-fated plan to stimulate the "video platform" as a way to jump start telco competition to cable under the old law is all but dead.³⁷ In fact, even before the new law cleared away many impedi-

35. See, e.g., 138 CONG. REC. H11,479 (daily ed. Oct. 5, 1992) (statement of Rep. Gunderson) (noting that Eau Claire, Wisconsin saw an increase of 206% and LaCrosse, Wisconsin experienced a 79% increase in basic cable rates as a result of deregulation); *id.* at H11,480 (statement of Rep. Raueneil) (remarking that in 95% of the country, where cable companies have no competition, cable rates have risen 60% in the past five years).

36. See Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 FED. COMM. L.J. 1, 3-5 (1993-1994) (noting the 1992 Cable Act's broad, bipartisan support and summarizing the major changes it made).

37. In March, the FCC eliminated the video dialtone rules and proposed regulations for a new video delivery option, open video systems (OVS), thus making the death of video dialtone official. Chris McConnell, *FCC Proposes Open Video System; Commission Seeks Comments on Plan to Replace Video Dialtone*, BROADCASTING & CABLE, March 18, 1996, at 21. The OVS model is one of several options afforded telephone companies under the Act. *Id.* Under the OVS model, telephone companies can avoid some cable regulation in exchange for carrying unaffiliated program providers, charging "reasonable rates" and meeting additional require-

ments to investment in video, telcos had determined that the real world application of this concept made no sense in the marketplace. AT&T's vaunted entry into the local telephone business in Rochester, New York, all but collapsed when the company discovered that the vast majority of consumers are pleased with the dependability and pricing of their current carrier.³⁸ A press release announcing a new business does not a business make. You must sell customers something they really want and provide better services and prices than competitors.

Nevertheless, if there can be a win-win outcome, the Telecommunications Act of 1996 has the potential to become the single biggest boost to every facet of the whole industry, indeed, to the entire economy, in recent history. Depending upon which analyst you consult, the emerging winners could be the local telephone companies, which are moving fast to build on the new network demands by deploying state of the art technology to keep customers in a competitive environment. Or it could be the sexiest current player, the wireless industry, which some predict will surpass local wireline telephone revenues in a few years. Or it could be that megaforce AT&T, still the *real* dominant player in the lucrative long distance market, with unsurpassed brand recognition. Or it could be the cable industry, with new pricing freedoms and a genuine determination to reverse two decades of nearly fatal inattention to customer service. Or it could be . . . well, you get the picture. There seem to be winners everywhere.

The FCC's job, or that of the state utility commissions will be extremely difficult. There will be intense pressures by long distance and cable companies in every policymaking forum to reverse the procompetitive gains in the long distance and video arena, and vigorous lobbying to abandon even the modest deregulatory initiatives in the new law, to try to win in the regulatory arena what they lost in the great debate over the past three years.

Other storm clouds are forming in the skies above the Information Superhighway. Provisions in the new law to battle cyberporn have sent civil libertarians and a host of free-Internet-speech coalitions into

ments. *Id.* Telephone companies also can deliver video as cable systems or wireless cable providers. *Id.*

38. See *AT&T Fires on Bell Atlantic Turf in Local Phone Bid War*, REP. ON AT&T, July 31, 1995 (reporting that AT&T's local service trial in Rochester, New York has been less than profitable); *Chicago and Grand Rapids Latest Sites for Local Competition*, REP. ON AT&T, May 8, 1995 (reporting the opinion of an AT&T spokesman that the company is losing money in Rochester, New York).

convulsions.³⁹ This intervention is only the tip of the iceberg. Pending in the House and Senate Judiciary Committees are serious proposals designed to ensure that the unauthorized transmission of copyrighted material be policed.⁴⁰ This challenge is properly now a front-burner issue in the coming digital era.⁴¹ Everyone has a stake in the debate—publishers, Hollywood, on-line services, schools, libraries, and all current and future travelers on the Infobahn. As telecommunications carriers, local and long-distance telephone companies have an obligation to transmit these infostreams, yet they cannot legally monitor and police the content.⁴²

Ironically, part of the secret of success of the new telecommunication technologies—decentralization and end-user control—threatens to be its undoing. If creators of content have no certainty of compensation, where will be the incentive to create?⁴³ There is a serious political standoff in the making with the content creators on one side and those who would seek the content without paying on the other side. The pending copyright legislation holds the local and long-distance companies accountable for policing copyright infringement on the network. However, these are the wrong parties, because neither can realistically become the copyright cybercop. Yet, there are stiff

39. On February 8, 1996, free-speech Internet activists protested President Clinton's signing of the Telecommunications Act of 1996 by "blacking out" their home pages on the World Wide Web. See Michael J. Miller, *The Web Wore Black*, PC MAG., Mar. 26, 1996, at 29. Thousands of Web sites changed their backgrounds from white to black in prearranged protest of speech restrictions on the Internet contained in the Communications Decency Act, which was enacted as part of the 1996 Telecommunications Act. *Id.*; see also *Communications Decency Act 96: First Wave of Lashbacks*, Online Library & Microcomputers, Mar. 1, 1996, available in LEXIS, Fedcom Library, Compub File (noting that the provisions making it illegal to transmit indecent materials have been opposed by the American Civil Liberties Union, the American Library Association, the Electronic Freedom Foundation, publishers, human rights groups and Internet providers). Shortly after President Clinton signed the new legislation, the ACLU representing itself and 19 other organizations filed a lawsuit in federal district court in Philadelphia challenging the indecency provisions of the bill. Andrew Kantor, *Communications Decency Act Becomes Law*, INTERNET WORLD, May 1996, at 16.

40. H.R. 2441, 104th Cong., 1st Sess. (1995); S. 1284, 104th Cong., 1st Sess. (1995). The proposed legislation, known as the National Information Infrastructure Copyright Protection Act of 1995, would amend the Copyright Act to clarify that the right of public distribution of copies or audio recordings of works applies to electronic transmissions. H.R. 2441 § 2(b)(2); S. 1284 § 2(b)(2).

41. See Linda Marsa, *Whose Ideas Are They Anyway: Intellectual Property in the Information Age*, OMNI, Dec. 1995, at 36 (discussing the importance of determining intellectual property rights in building the Information Superhighway).

42. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (stating that a common carrier such as a telephone company makes a public offering to provide service "whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . .").

43. Carlos J. Moorhead, *Is Congress Turning the Internet into an Information Toll Road?*, INSIGHT, Jan 15, 1996, at 25.

financial penalties for failure to comply, whether or not other privacy and common carrier laws prohibit these companies from complying.⁴⁴

There will be a strong push to pass this bill this year. Its supporters seem to say, "Let's get it done and we'll come back and deal with the liability issue later on."⁴⁵ But, if such a bill becomes law, no company in its right corporate mind would carry any information service whatsoever, which is a very real and very deep potential pothole on the Information Superhighway.

In addition to potential setbacks, there are also opportunities for changes in public policy that would build on the reforms in the new law. For example, overhaul of the FCC could be a productive and bipartisan process. Both Congressional Republicans and Democrats and the FCC Chairman have good ideas about ways to reduce the role of government in the new telecommunications economy. Also, there is still far too much burdensome regulation of local telephone carriers. For instance, it costs local telephone companies many millions of dollars and countless "burden-hours" to comply with hundreds of unnecessary cost allocation rules, to mention only one area of overregulation. The FCC should take advantage of opportunities to forbear from regulation when there is no obvious reason to regulate and quickly move to eliminate all rate of return and cost allocation regulation. Life at the FCC will be easier, the affected companies and their customers will be better served in the process, and competition would thrive. This seems to be the direction Chairman Hundt wants to go, and he should have broad support to get there.

The international telecommunications market presents similar challenges. American companies trying to build telecommunications networks abroad face severe trade roadblocks to investment. Yet, the effort to reduce limits on foreign ownership of U.S. media properties was left unfinished in the recently passed law.⁴⁶ Congressman Mike Oxley of Ohio, a leader in the passage of the recent law, has been tireless in his efforts to bring down this barrier.⁴⁷

44. As introduced, the legislation would impose copyright infringement liability upon online services and Internet access providers even when the provider has no knowledge of or participation in copyright infringement and exercises no control over the content on its service.

45. *House Subcommittee Considers Limited Internet Copyright Bill*, AUDIOWEEK, Feb. 12, 1996; *On-Line Parties to Try to Resolve Copyright Issues*, COMM. DAILY, Feb. 26, 1996, at 2.

46. Provisions which would have removed foreign ownership restrictions on common carrier facilities were deleted from the bill. *Irving Believes Telecom Act Serves as "Beacon" to Rest of World*, WASH. TELECOM NEWS, Feb. 19, 1996. Nonetheless, the new legislation makes strides toward market reform by lifting restrictions on foreign officers and directors participating in U.S. markets. *Id.*

47. Representative Mike Oxley was instrumental in pushing a foreign ownership provision in the new law. See *Oxley Introduces Legislation to Repeal Competition Ban*, REP. ON AT&T, Jan.

But, we have no fear that this industry will be forgotten in the wake of the new law's enactment. Congress has "discovered" this industry and it has no intention of letting go, despite completion of a decades-long battle. Additionally, because we now have thousands of communications lawyers and hundreds of telecommunications trade associations, everything will be litigated 'till the cows come home.

So was the recent fight worth it? Did it really accomplish anything? The answer to both questions is yes, absolutely. All progress is incremental, especially economic and political reforms, and efforts to make our telecommunications economy truly competitive are no different. The FCC, the White House, and the Congress, however, should be equally vigorous in battling potential reversals. Otherwise, the dream of a real information superhighway, celebrated so compellingly in the Library of Congress on February 8, will unfortunately be little more than that—a dream that ends like most, waking up the morning after with business as usual.

16, 1995 (introducing legislation designed to repeal foreign ownership restrictions on broadcast and common carrier facilities); *WTN Newsmakers*, WASH. TELECOM NEWS, February 26, 1996 (containing an interview with Oxley revealing his extensive involvement with the Telecommunications Act of 1996 and his efforts to regulate foreign ownership). An earlier version of the bill included Oxley's foreign ownership provision, which would eliminate the restrictions on foreign ownership of U.S. common carriers on a reciprocal basis, but was later dropped from the final version of the telecommunications reform legislation. *House Commerce Committee Passes H.R. 1555*, COMM. DAILY, Mar. 25, 1996; *Irving Believes Telecom Act Serves as "Beacon" to Rest of World*, *supra* note 46.

