

Keynote Address

Andrew C. Barrett

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Recommended Citation

Andrew C. Barrett, *Keynote Address*, 45 DePaul L. Rev. 987 (1996)
Available at: <https://via.library.depaul.edu/law-review/vol45/iss4/3>

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KEYNOTE ADDRESS*

*Andrew C. Barrett***

I. INTRODUCTION

Dean John C. Roberts, thank you for that kind introduction. It is truly a pleasure to be with you here today at my *alma mater*, DePaul College of Law. I wish I could stay longer, but I've got to leave before the school discovers all of the late fees I owe on overdue library books.

For many people, those of us that currently work in telecommunications, those that study the industry, and those that consume telecommunications services, these are momentous times. Thanks to the work of Congress and this Administration, we finally have new telecommunications legislation that is already shaking things up a bit. For some consumers, this could mean, over the long haul, a choice of service provider, more services, and competitive prices. Throughout the legislative process, members of Congress from both sides of the aisle tried to be consistent, and craft a forward-looking, procompetitive, deregulatory framework for the provision of telecommunication services.

We need to recognize that, while much credit is due to the leadership of both parties in Congress for its persistence with respect to the legislative effort, the effort to rewrite the country's telecommunications law was started by Representative Lionel Van Deerlin in 1978 as Chairman of the House Subcommittee on Communications. During his five-year tenure as Chairman of the Subcommittee, Representative Van Deerlin submitted three bills to substantially rewrite the Commu-

* This paper was delivered as the Keynote Address at the *DePaul Law Review's* Fifth Annual Symposium entitled *Telecommunications Regulation in an Era of Convergence* held on March 1, 1996, at the University Club in Chicago, Illinois.

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nications Act of 1934.¹ Today, as we applaud the efforts of leaders like Senator Larry Pressler, Senator Ernest Hollings, Representative Thomas Bliley, Representative Jack Fields, Representative John Dingell, and Representative Ed Markey, we must not overlook the pioneers of communications law reform, like Lionel Van Deerlin, who had tremendous foresight and whose ideas were ahead of his time.

Today, my comments will draw upon my experience as a state and federal regulator. In both capacities, I have had a hand in implementing new legislation, and I believe that my perspective may be helpful to the discussion today. Clearly, if the Telecommunications Act of 1996 (1996 Act or Act)² is to be fully and successfully implemented, federal and state regulators will have to work together. Jurisdiction over telecommunications remains shared between the states and the Federal Communications Commission (FCC). The states still have primary jurisdiction over intrastate telecommunications, while federal regulators generally govern interstate telecommunications. First, I would like to give you my impression of the legislation and share my beliefs on how the regulatory process will evolve. In addition, I would like to talk about the possible effects that this new legislation may have on the industry and consumers. Then, I would like to describe how the 1996 Act prudently preserves state authority over telecommunications and how this delegation meshes with federal authority. Finally, I would like to share some of my thoughts and concerns about the future of telecommunications in this country.

II. IMPACT OF THE TELECOMMUNICATIONS ACT OF 1996

Not surprisingly, the Telecommunications Act of 1996 means different things to different people. While some people focus on the potential consumer and general public interest benefits, others discuss the Act's impact on business opportunities. Though I personally believe that the Act has the potential, at some point in the future, to benefit the consumer, I submit that the Telecommunications Act of 1996 is a "business bill." By this, I mean that the legislation was largely driven by the communications industry and that the immediate beneficiaries of the legislation will be that industry and the large business users that it serves.

Clearly, the 1996 Act will change the composition of the industry and the market landscape. The more interesting question, I submit, is

1. See ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 240-70 (3d ed. 1982) (chronicling Van Deerlin's efforts to rewrite the Communications Act during the period 1976-1980).

2. 47 U.S.C.A. §§ 151-614 (West Supp. 1996).

what effect will the legislation have upon small businesses, consumers, and the American workforce?

The responsibility to implement the Act is shared between the FCC and the states.³ Due to the monumental, revolutionary nature of the 1996 Act, it will take some time to be fully implemented. I believe that the implementation of the legislation will occur in two phases. The first phase will include the numerous rulemakings and reconsideration of those rulemakings. It will also include litigation, which, if history teaches anything, will take time. The second phase is likely to resemble the first: rulemaking, reconsideration, and litigation. I don't want to be a doomsayer, but I've been through this before.

Notwithstanding the challenging time deadlines in the 1996 Act and, what I believe will be a prolonged implementation, consumers will not begin to see the benefits generated by the legislation until four or five years from now. In my estimation, it may very well be after the turn of the century before most consumers reap any benefits from the 1996 Act.

What I believe may result is a new oligopoly consisting of two or three national, multiple service providers, through which subscribers could purchase all of their voice, video, and data needs. The net result for consumers, however, could be an absence of price competition because of the industry's structure.

Some have called the 1996 Act the greatest job creation legislation since the New Deal. For the short term, I think this may be hyperbole. What we have seen to date are job losses or, as some call them, "dislocations."⁴ I'm not very sure what that term means. But, what I do know, is that, in the near term, as the industry continues to change and consolidate in some segments, people are going to lose their jobs. The long term result of such changes may be different. These lost jobs may be made up in other areas of the industry. For instance, if some of the 100,000 or so former employees who have lost their jobs over the last few years are employed in other segments of the communications industry, what we may see is job *replacement*—not job *creation*. Let's hope so.

3. *Id.* § 251(d).

4. See *Telecom Reform as Job Creator May Be off the Mark, Carriers Say*, COMM. TODAY, Sept. 18, 1995. Between 1984 and 1994, several Bell Operating Companies (BOCs) cut thousands of employees. *Id.* For example, in that period, Bell Atlantic cut 16,000 workers, and US West let over 19,000 employees go. *Id.*

III. FCC IMPLEMENTATION OF THE 1996 ACT

The efforts of policy makers to introduce and foster competition in telecommunications is, with the enactment of the 1996 Act, only one-half complete. The task of implementing this landmark legislation now falls on the FCC, and in some cases, both state and federal regulators. The lobbying process will endure, but it will shift to the offices of 1919 M Street. Like the legislative process, the lobbying effort at the Commission will be intense. Many interests will be competing for attention: industry trade associations, affected companies, prospective entrants, entrepreneurs, state governments, and consumer organizations. Notwithstanding the time pressures, the process will be open to all interested parties.⁵ The time constraints, however, will require interested parties to focus their input and offer constructive suggestions in a concise, understandable format.

What we cannot allow during this critical process, however, is renegotiation, re-hashing, and re-visiting issues that have been settled by the legislation. The time deadlines dictated by the legislation simply won't permit parties to re-fight battles lost on the Hill. From my perspective, those issues lost on the legislative front are lost forever, unless the judicial process decides otherwise. Simply put, our task as regulators is to implement the statute enacted by Congress, not to re-do their job.

In addition, to make the best use of our time and avoid confusing messages, I believe we should be meeting with principals during the rulemaking process. More and more, industry trade associations are having a difficult time representing a single position before the Commission. Even among a given industry or a group of companies, it is hard to get a consensus position on a given issue.⁶ To the degree, however, that companies are able to form coalitions with common positions, I encourage them to do so. Through their discussions, some companies may discover that they have more in common than not.

IV. FEDERAL-STATE IMPLEMENTATION OF THE 1996 ACT

While the 1996 Act changes many things, Congress, fortunately, has left the important federal-state jurisdictional dichotomy intact. This

5. *But cf.* Letter from Andrew Jay Schwartzman, Executive Director & Gigi B. Sohn, Deputy Director, Media Access Project to Reed E. Hundt, Chairman, FCC (Feb. 27, 1996) (expressing concern that certain implementation practices amount to private, closed rulemakings, which may violate notice and comment procedures of the APA).

6. *See, e.g.*, Mark Landler, *7 Bells With 7 Agendas Struggle to Keep Unified Front on Communications Bill*, N.Y. TIMES, Dec. 22, 1995, at D4 (reporting lessened unity among the regional Bell telephone companies due to differing business strategies).

relationship has largely been effective. I'm not saying that the relationship hasn't been difficult at times, because all relationships are, but it has produced good, sound policy that has introduced competition in some market segments, and resulted in benefits for some consumers. Thus, for states, the 1996 Act generally says, "continue your efforts to open up the local telecommunications markets consistent with federal initiatives and, if you haven't started to do so, get going!"

The Telecommunications Act of 1996 fully recognizes the important and sometimes divergent interests of state and federal regulators with respect to regulating telecommunications. In this regard, the 1996 Act preserves state jurisdiction over intrastate telecommunications and gives the states critical tasks for implementing the legislation.⁷ Clearly, if the 1996 Act is to be fully and properly implemented, federal and state regulators will have to cooperate.

While, in some respects, the legislation augments federal jurisdiction over telecommunications, the 1996 Act gives the states several important responsibilities to ensure that procompetitive regulatory policies are adopted and carried out. For example, the Act preserves all existing state policies regarding equal access, interconnection, and pricing flexibility adopted prior to passage of the 1996 Act, provided that such policies are not inconsistent with the new law.⁸ This is significant because several states, including Illinois, New York, Ohio, and Michigan, have been at the forefront of enacting and implementing procompetitive legislation to eliminate traditional telecommunications monopolies.⁹

An absolutely critical element of the procompetitive thrust of the 1996 Act will be federal and State implementation of interconnection

7. 47 U.S.C.A. § 253(a); see Joe Estrella & Linda Haugsted, *States Made out Fine in Act*, MULTICHANNEL NEWS, Feb. 12, 1996, at 6, 53 (noting the key role states have in implementing the Act).

8. 47 U.S.C.A. § 251(d)(3). A handful of states will be immediately affected by the legislation. Until passage of the 1996 Act, Idaho, Arkansas, Missouri, and Oklahoma had laws that protected established LECs from competition in the provision of intrastate telephone service. Estrella & Haugsted, *supra* note 7, at 53. The 1996 Act prohibits the states from erecting or maintaining barriers to competition in intrastate telecommunications. 47 U.S.C.A. § 253(a).

9. On several occasions, the Commission has recognized changed competitive circumstances brought on by state legislation and regulation, and has modified its policies, albeit on a limited basis. The Commission has granted waivers of its access charge rules to NYNEX, Rochester Telephone Corporation, and, most recently, Ameritech, acknowledging that procompetitive state policies have led to changed circumstances, justifying recovery of certain access charges in different ways. See *In re NYNEX Tel. Cos. Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment*, 10 F.C.C.R. 7445 (1995); *In re Rochester Tel. Corp. Petition for Waivers to Implement Its Open Market Plan*, 10 F.C.C.R. 6776 (1995); *FCC Grants Ameritech Limited Waivers of Access Charge Rules in Connection with Its "Customers First Plan,"* Rep. No. FCC 96-58, Feb. 15, 1996, available in WESTLAW, 1996 WL 65706.

policy pursuant to new Section 251. Without efficient and reasonable interconnection, the goals of the legislation will not be realized, and consumers will not have new choices of local service providers. While the Act requires that the FCC adopt national interconnection policies, it does not allow federal policy to supersede or trump otherwise consistent state interconnection and access policy.¹⁰ The Act gives the states important oversight responsibility over interconnection agreements reached between telecommunications carriers. Specifically, the Act empowers states to review all interconnection agreements, including those reached through compulsory arbitration.¹¹ The Act also authorizes the states to establish or enforce state law requirements, including service quality standards, in its review of an agreement.¹² Not only do states have the authority and responsibility to review interconnection and access agreements, but the Act also gives the states the ability to establish interconnection rates in the compulsory arbitration situation.¹³

Universal service also takes a prominent place in the 1996 Act. Although, historically, the term "universal service" referred to the interconnection of competing telephone exchanges,¹⁴ today, policy makers equate universal service to policies that promote connecting and maintaining subscribers on the public switched telephone network.¹⁵ Though federal universal service policies have generally been effective, one could argue that they can be improved. Currently, 93.9% of all homes in the nation have a telephone line.¹⁶ I believe that we, as regulators, can always do better and get that number to 100%.

Fortunately, the 1996 Act requires reexamination of universal service policy and requires a new proceeding to consider our policies, including the definition of universal service.¹⁷ Continuing past policy, the Act directs that these issues be referred to a Federal-State Joint

10. 47 U.S.C.A. § 251(d)(3).

11. *Id.* § 252(e)(1).

12. *Id.* § 252(e)(3).

13. *Id.* § 252(d).

14. Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, 17 TELECOMMUNICATIONS POL'Y 352, 363 (1993).

15. 47 U.S.C.A. § 254(c). Section 254(c) requires the Joint Board to consider several factors in determining carrier obligations with respect to universal service: (1) the extent to which a telecommunications service has been subscribed to by a substantial majority of residential customers; (2) whether such service is essential to education, public health, or public safety; (3) whether such service is deployed in the public switched network; and (4) whether such service is consistent with the public interest, convenience, and necessity. *Id.* § 254(c)(1)(A)-(D).

16. *In re* Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network, 10 F.C.C.R. 13003, 13003 (1995).

17. 47 U.S.C.A. § 254(a).

Board for formulation of a recommendation to the Commission.¹⁸ I am pleased that I will serve on this Joint Board and I thank Chairman Reed Hundt for the nomination.¹⁹

While the Act requires Joint Board and Commission cooperation, states and their regulatory commissions are also given a significant role in the process. For instance, state commissions will designate which carriers will be eligible for universal service support.²⁰ Also, the states are not limited to the policies adopted by the FCC and the Joint Board. States are permitted to adopt additional regulations to preserve and promote universal service, provided that these additional standards are supported by state-approved support mechanisms.²¹ Personally, I am committed to a thorough examination of our universal service policies, in light of rapidly changing competitive circumstances. Furthermore, I am interested in adopting support mechanisms that are targeted, predictable, and reasonable.

The states also won a role in considering Bell Operating Company (BOC) entry into the in-region long-distance business. The Act grants the states a "consultant" role of certifying that a BOC has met a 14-point checklist for entry.²² In this regard, the state commissions' efforts will be combined with the work of the Department of Justice.²³ Before ruling on a BOC application to provide interLATA service, the FCC must consult with the Attorney General, whose opinion must be given "substantial weight."²⁴

18. *Id.*

19. *Commission Establishes Joint Board and Initiates Rulemaking for Consideration of Universal Service Issues Pursuant to Telecommunications Act of 1996*, CC Docket 96-45, Mar. 8, 1996, available in WESTLAW, FCOM-FCC Database. Subsequent to the delivery of this paper, Mr. Barrett completed his term at the FCC. Commissioner Rachelle B. Chong was appointed by the Commission to serve on the Joint Board to fill the position vacated by Mr. Barrett. *In re* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 11 F.C.C.R. 7360 (1996).

20. 47 U.S.C.A. § 214(e).

21. *Id.* § 254(f).

22. *See id.* § 271(d)(2)(B) (requiring the FCC to consult with state commissions in order to verify BOC compliance with 14 specific interconnection requirements before permitting entry into in-region long-distance service).

23. *See* Bryan Gruley, *Justice Department Asks to Keep Data of Four Baby Bells*, WALL ST. J., Feb. 29, 1996, at B3 (suggesting that documents given to the Department of Justice by four BOCs could play an important role in determining whether BOCs are permitted to enter the long-distance market).

24. 47 U.S.C.A. § 271(d)(2)(A).

V. CONCLUSION

So, what does all this mean for the future of telecommunications and for the FCC? Well, if I knew that answer, I wouldn't be here—I'd be on Wall Street making a bundle.

What I can tell you is that, regardless, it is going to be a very exciting period for all of us—regulators, industry, and consumers. While both state and federal policy makers have a lot to accomplish and that this process will take probably several years to implement, one thing seems clear to me about the 1996 Act—it contemplates that, if it is fully and properly implemented, regulators will necessarily have diminished roles in the future because market forces will have taken their place. Make no mistake, the FCC will continue to be needed to protect the public interest, but I believe that in time there will be areas in which the Commission's role can be appropriately reduced without compromising the public interest.

With the enactment of the legislation, one part of the task is complete. Now, the second and, in my opinion, more important, task is about to begin: the implementation of the 1996 Act. The implementation of this legislation will occur in several fora—the FCC, state commissions, the courts, and the market. In the initial stages of the implementation, regulators will have to keep a close eye on the market. Many people hope, however, that eventually federal and state regulators will not have to closely regulate the industry, thus allowing market forces to determine the winners and losers. Should this condition occur, the responsibilities of the FCC could be appropriately scaled back. Once again, I want to point out that, if any of the FCC's responsibilities are eliminated by operation of the market, the Commission will still be needed to protect the public interest, including the interests of consumers.

While we are all fortunate to live in this great country, we're even more fortunate to be here now, as students of the telecommunications policy making process. I'm excited by the task of implementing the 1996 Telecommunications Act, because I believe that the future holds great promise. But as Einstein said, and I think it is apropos to telecommunications policy making: "I never think of the future. It comes soon enough."²⁵ Thank you.

25. HARPER BOOK OF QUOTATIONS 169 (Robert I. Fitzhenry ed., 1993).