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# COMPETITIVE TELECOMMUNICATIONS: AT A FORK IN THE ROAD

Congressman Charles W. "Chip" Pickering\*

The Telecommunications Act of 1996 ("1996 Act" or "Act") set forth the most dramatic changes in the telecommunications field since the 1984 break up of AT&T. Despite the years of debate leading up to its enactment, the Act left many issues to be decided by the Federal Communications Commission ("FCC"), resulting in a wealth of litigation. As Justice Antonin Scalia cynically remarked in *AT&T Corp. v. Iowa Utilities Board*, the Act "is in many important respects a model of ambiguity."<sup>1</sup> However, few could have predicted that this "model of ambiguity" would ignite the technological revolution that has occurred over the past seven years. This technological revolution was stimulated by the drafters' prescience in providing sufficient flexibility in the statute to allow the marketplace to drive rapid advances in technology and to determine which business models would succeed and fail.

No one can deny that the 1996 Act sparked a tremendous amount of investment in the telecommunications ("telecom") industry. Since enactment, competitors have invested more than \$71 billion in new telecom facilities and, as FCC Chairman Michael Powell recently testified, nearly 16.7 million consumers are served by full facilities-based competitors.<sup>2</sup> Nevertheless, despite these tangible fruits of competition and the amount of wealth generated, the telecom sector could not escape the recent economic downturn.

Not surprisingly, this economic downturn is

being opportunistically leveraged by those who demand a new national broadband policy. Daily press and analyst reports mimic such calls for a national broadband policy, and blame recent market failures on faulty regulatory policies. However, policymakers must not automatically assume that the most prudent policy is a "national" policy. Sometimes, the wisest policy is one where regulators simply establish the framework, and allow decisions to be made at the local level.

Today, we find ourselves hopefully emerging from the telecom "boom and bust" and at the nascent stage of a telecom recovery. Because the government played a role in creating the dynamics of the boom and the bust, the government now has a responsibility to help ensure the recovery of the sector is not left to chance. Therefore regulators must implement policies that will promote both investment and competition. Thus, with so many significant issues pending at the FCC, the potential telecom recovery stands at a fork in the road, and the years of effort to establish a roadmap for competition could be for naught if regulators choose the wrong path.

It is essential that policymakers recognize that the telecom recovery is linked directly to policies that promote investment and competition over stagnation and monopolies. This lesson can be learned from the wireless industry. As Chairman of the Wireless Caucus in the U.S. House of Representatives, I know first hand that the wireless in-

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\* Congressman Charles W. Pickering (R-MS) has represented the 7th District in Mississippi since 1997. He serves as Chairman of the Wireless Caucus in the United States House of Representatives focusing on policy issues affecting the rapidly growing wireless telecommunications industry, which is an important component of Mississippi's economy and is a Member of the House Committee on Commerce, Subcommittee on Telecommunications and the Internet, whose jurisdiction extends over issues including telecommunications, energy, health care, agriculture and environmental policy. Pickering also serves as an assistant whip in the House of

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Representatives. Prior to his service in Congress, Mr. Pickering was a legislative assistant to then-Majority Leader Trent Lott in the United States Senate and was a principal staffer in drafting the Telecommunications Act of 1996. He and his wife, Leisha, have five sons, Will, Ross, Jackson, Asher, and Harper.

<sup>1</sup> 525 U.S. 366, 397 (1999).

<sup>2</sup> *Competition Issues in the Telecommunications Industry: Hearing Before the Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2003) (statement of Michael K. Powell, Chairman, Fed. Communications Comm.).

dustry faced two early roadblocks to competition—availability of spectrum and licensing—both of which had to be overcome before we could realize more fully the potential of wireless. The exponential growth of wireless did not occur while the industry was controlled by two players but rather, only after the third, fourth and fifth carrier entered the industry. This growth and the technological advances that have taken place are therefore a direct result of government policies that promoted competition and made available sufficient spectrum for carriers. In addition, the speed and scope of competition were also a result of the changes in the license auction process. As a result, the wireless industry today can confidently declare that it will eventually become a substitute to traditional landline phones.

Similarly, in the wireline context, the 1996 Act identified local exchange monopolies as the bottlenecks to local competition and required that these bottlenecks be made available to competitors. In September of 2003, the FCC released its Triennial Review Order (“TRO”) of unbundled network elements, which reevaluated the basic rules for competitors’ access to the local exchange network. The TRO has injected a significant amount of uncertainty into the business plans of both incumbents and competitors. However, despite the fact that the degree of access afforded to competitors will likely be litigated for years to come, our long-term goals must remain stable. If we are to achieve true competition in the local wireline market, we must not waiver from the principle that certain bottleneck facilities must be made available to competitors. The ongoing challenge though is to recognize that technology will incrementally change the demarcation points of today’s bottleneck facilities. Thus, as we work towards a full telecom recovery, the government’s ongoing role is to decide the appropriate degree of regulation when both technology and market forces fail to protect competition and consumer choice.

#### NO TWO MARKETS ARE ALIKE

As policymakers examine broadband policies that impact both wireless and wireline competition, it is important to recognize the unique characteristics of the individual market sectors, including the residential market, the small and medium

sized enterprise (SME) market, large enterprise markets and rural areas, and tailor the level of regulation to their specific attributes. In deciding what level of regulation is appropriate, the government should reduce regulatory burdens once a competitive market has developed—not before. Conversely, as new industries achieve levels of maturity in service and quality equal to that of legacy industries, the government should be hesitant to impose traditional regulations on those services until a specific harm is identified. For example, the dominant broadband provider to small and medium-sized businesses—95% of all businesses in this country—is the incumbent local exchange carrier. Since incumbent telephone companies control the bottleneck loops that are necessary to reach these customers, regulation should not be based on whether the loop is “old, new, borrowed or blue.” Instead, the focus should be on whether or not it is a bottleneck. Simply put, a “one-size-fits-all” approach rarely works in such a dynamic industry as telecom. Therefore, we must focus on a competitive analysis of individual markets.

#### THE MOST EFFECTIVE CHANGE IS INCREMENTAL CHANGE

As evidenced by the events of the past seven years, change is inevitable, particularly in telecom, and advances in technology will constantly facilitate that change. A truism of this dynamic is Moore’s Law, which holds that computing power will double approximately every eighteen months due to advances in technology. Translated into the language of telecom, Moore’s Law dictates that competitive markets will provide end-users with more bandwidth at a lower cost with each generation of technology. The key to realizing this potential is to ensure that there is sufficient competition in each market. In addition, any regulation must be implemented incrementally so as not to disrupt the competitor’s or incumbent’s business plans.

True broadband deployment, a vital prerequisite to the United States retaining its status as the global leader in information and telecommunications technologies, is underway. However, convincing consumers to sign up for broadband services will require more than simply upgrading the transmission medium by adding sophisticated

electronics and high capacity fiber into the infrastructure. Such tasks will take years to accomplish and the purported benefits of such deployment will not occur without the stimulus of competition or the development of new broadband applications. As such, any underlying policy changes to the current regulatory regime must be based on the actual developments in the marketplace, as opposed to promises and hype from press releases.

Competitive telecom is a constantly evolving concept that Members of Congress will be dealing with for years to come. As such, policymakers must also consider the impact that competition and technological advances may have on certain long-standing social goals that have served this country well. For example, the wireless industry will continue to play an increasingly integral and critical role in today's society. As a result, the wireless industry and the government's role in regulating the wireless industry will continue to face new challenges and responsibilities. As wireless becomes the replacement for wireline, many Americans will expect the same level of service, quality and consumer privacy protections they have with their wireline phones. Such a shift in consumer expectations should come as no

surprise and will no doubt prompt some policymakers to reevaluate whether legacy wireline policies should be imposed on the wireless industry. Here again, a "one-size-fits-all" approach is not appropriate. The industry must recognize these realities and approach them as an opportunity. Where there is an identifiable shift in consumer expectation within an industry, the individual companies should take the initiative to address these concerns in a proactive manner. Such preemptive steps will help avoid the unwanted intrusion of government regulation. It also shows leadership and that self-regulation can work. This will only enhance the industry's argument for less regulation elsewhere and will allow the industry to dictate the terms of change and timeframes for any such change.

In sum, the fate of competitive telecom stands at a fork in the road. The industry has been through a significant amount of change over the past seven years and its future lies in the hands of policymakers at all levels. If policymakers choose the right path and maintain their commitment to pro-competitive policies in the midst of an ever-changing marketplace, the sector will soon return to a robust environment that encourages investment and consumer choice.

