COMMUNICATIONS DEREGULATION AND FCC REFORM: FINISHING THE JOB

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edited by

Jeffrey A. Eisenach and Randolph J. May
The Progress & Freedom Foundation

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Foreword

Jeffrey Eisenach and Randolph J. May
The Progress & Freedom Foundation

At the time that we commissioned the essays that comprise the heart of this book, it was our intent that, taken together, they would provide the guideposts for moving forward with the next phase of reform of our nation's communications laws and policies. To that end, we engaged as authors a group of well-known experts and policy analysts to present their proposals for reform on the major topics at the heart of the communications policy debates in the wake of the Telecommunications Act of 1996.

In the first chapter, "Communications Deregulation and FCC Reform: Finishing the Job", we provide an overview of each of these essays and put them in the context of current issues confronting policymakers in light of the rapidly changing technological and business environment. Suffice it to say here that the hot-button issues involving local and long distance competition, universal service, spectrum allocation, program content regulation, and the public interest doctrine are confronted head-on. As importantly, the authors recommend specific reform proposals to be considered by the Federal Communications Commission and Congress.

The ideas contained in the experts' essays were presented and debated at a conference hosted by The Progress & Freedom Foundation which was held in Washington, DC, on December 8, 2000. At the time, we commissioned the essays and chose the December 8 date, it was our thought, based on a good deal of American history, that an FCC transition team for a new Administration, whoever might be at its helm, would be in place. Our hope was that as the transition team went about its work, it would find the experts' papers and conference sessions useful in focussing on what needs to be done to move communications policymakers closer to the 1996 Act's vision of promoting competition and deregulation in the communications marketplace.

Of course, as it turned out, the presidential contest was not decided for almost another week after the conference, and the transition necessarily was rather truncated. While both of us were privileged to serve on the FCC transition team, it's fair to say, through no fault of anyone, that there was not much time available for the Bush-Cheney Transition Team to prepare the type of more detailed policy and planning documents that often accompany changes in administrations.

As it happens, though, it appears that publication of this book could not be more timely. As we write this, the FCC has a new Chairman, Michael K. Powell, and President Bush has nominated three new commissioners to the five-member agency, so when the new commissioners come aboard there truly will be a "new" commission in place. We anticipate that the new commission will be eager to consider fresh ideas and approaches for reform of our nation's communications policies such as those presented in this book.

As it also happens, we were prescient—or lucky—enough to have asked Michael Powell to deliver the keynote address for the conference and Representative Billy Tauzin, who in January of this year became Chairman of the House Energy and Commerce Committee, to give the luncheon address. We are most appreciative of the time and effort that obviously went into the preparation of both of these major addresses. Considering the widespread notice—indeed, acclaim—that was accorded each of their presentations, and their key positions in the crucible of communications policymaking, we knew that it was important that their addresses be converted into essays to be included in this book. We are grateful that they readily and wholeheartedly agreed to allow us to include them.

In his essay, Chairman Tauzin explains that the FCC's "old mission" was a "regulatory mission", one defined by the need to protect consumers from abuses in a largely monopoly environment. While making his own views in favor of further deregulation on a timely basis abundantly clear, he asks rhetorically: "Now that we are moving more rapidly to open marketplaces, and now with merged and converged communications systems, what is the role of the FCC?" In a very important sense, Chairman Powell provides an encouraging response when he emphasizes the need in a world of converged communications—a world in which he so aptly characterizes as the scene of a "great digital broadband migration"—to eliminate outdated and innovation-inhibiting regulations. Indeed, Chairman Powell acknowledges that the FCC's "bureaucratic process is too slow to respond to the challenges of Internet time."

So, on behalf of The Progress & Freedom Foundation, we are pleased to present this volume in the hope it will not merely stimulate debate, but will actually influence policymaking. We hope it will help shape policy in a way

that leads, in something not out of keeping with the idea of Internet time, towards the more deregulated and competitive environment we believe is appropriate in an era of digital revolution.

We wish to thank the authors for their hard work and for the excellence of the resulting contributions. We are grateful to Toni McGowan of Chairman Powell's office and Jessica Wallace and David Marventano of Chairman Tauzin's office for their assistance in facilitating the publication of the essays of the two chairmen.

Thanks are due also for the suggestions and constructive criticism received from The Progress & Freedom Foundation's Communications Policy Advisory Board, which includes many of the nation's leading authorities on government regulation generally and communications regulation in particular.

Finally, at The Progress & Freedom Foundation, we want to express special thanks to Program Associate Katie Flint and Research Associate Ian Dillner, without both of whom this volume would not have been possible, and Jane Creel, who keeps our office running so smoothly. Many others helped in many ways, and we are grateful to all of them.

Washington, DC
May 2001

Chapter 1

Communications Deregulation And FCC Reform: Finishing The Job

Jeffrey A. Eisenach and Randolph J. May
The Progress & Freedom Foundation

Communications markets have made much progress towards competition and deregulation in recent years, but much remains to be done. Indeed, as 2000 draws to a close, it is increasingly clear that much more *needs* to be done, and that new approaches, both at the Federal Communications Commission and in Congress, will be required to complete the task. In this volume, we present six papers that show how to finish the job of deregulating communications markets and reforming the FCC.

In early 1996, Congress made a decision with profound implications for the American economy in general, and the communications market in particular. Recognizing that technological progress favors competition, and building on a twenty-year trend towards less regulation, Congress passed the Telecommunications Act of 1996.

The vision of the Act is made clear in its opening words: This is "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[1] And hopes were high. As President Clinton said in signing the Act, "with the stroke of a pen, our laws will catch up with the future. We will help to create an open marketplace where competition and innovation can move as quick as light."

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Preamble.

Has the 1996 Act delivered on that promise? Certainly much progress has been made. The market for telecommunications services is more competitive today than at any time since the early days of voice telephony. Cable television prices have been deregulated. Spectrum continues to be made available through auctions, and the use of wireless telephones continues to skyrocket. Broadband services are vastly more available and affordable. Content regulation, at least in the form envisioned by the Communications Decency Act, has been held mostly at bay. The Internet remains essentially free of government control.

We applaud both the Act and the FCC for these achievements. It is all too easy to imagine things going in the other direction, with disastrous results. But the inherently pro-market vision of the Act has proven to be robust; and, on many occasions since 1996, the Commission has chosen the path of the market over the path of regulation.

It is also clear, however, that the larger promise of the Telecommunications Act remains unfulfilled. Five years after the Act was passed, the communications marketplace still teeters on the cusp between monopoly and competition, between regulation and freedom. Further progress, it seems, will require new approaches.

The need for new thinking should not be surprising. When the Telecommunications Act was written (for the most part, in 1995), the public Internet was only two years old. "Video-on-demand" (based on a new technology known as "ADSL") was the new-new thing. Personal computers had 486 chips, PDAs were unheard of, and color printers cost thousands of dollars. Cell phones were not only not Web-enabled, they were still almost entirely analog and relatively rare. Dial-up modems operated at 28.8 kbps (at most); if you had "broadband" (and no one called it that), you had a T1 line. There was no Teligent or Covad or Global Crossing or Level 3 or Qwest. Worldcom and MCI hadn't yet been introduced, let alone gotten married. TCI was contemplating a big merger – with Bell Atlantic. And (counting GTE), there were eight, count 'em, eight Regional Bell Operating Companies.

New FCC Chairman Michael Powell sets the tone for this volume with his striking conceptualization of the challenge facing today's public policymakers.[2] He claims that we are now facing a "great migration" to a digital broadband world that is having a similarly profound effect on society

[2] At the time that the speech was delivered which is the basis for his paper in this volume, Chairman Powell was a commissioner of the agency. He was designated Chairman of the FCC by President Bush on January 22, 2001.

as any of the great migrations of old that led to more rapid diffusion of cultures, tools, habits, ideas, and forms of organization. Chairman Powell says that while the 1996 Act "set the foundation for deregulated competitive markets, which are essential for innovation and technological change," rather than looking back, we now need "to focus ahead toward the far-reaching transformation of the Digital Broadband Migration."

Powell offers an agenda for doing just that, including suggestions for greater reliance on deregulation and rationalization of the regulatory regime so that, in a world of converging technology where "a bit is a bit", comparable services will be treated in a similar fashion. And, importantly, he urges a clearing away of the "regulatory underbrush" in order to change a bureaucratic process that is "too slow to respond to the challenges of Internet time."

Charles Eldering's piece explains just how much the world of the present and the immediate future is indeed a very different place from the largely analog, largely stove-piped world of 1995. The current world is digital and converged, with providers of integrated services utilizing multiple technologies to deliver bits and bytes of content through packet-switched networks. Digital. Converged. Integrated. Packet-switched. We hardly knew these words in 1995. Since then, the world has changed, but our policies remain grounded in old realities, our vision shaped by outdated assumptions.

Nowhere is the need for new approaches more apparent than in the FCC's policies under Title II of the Act. As detailed in this volume by Robert Crandall, the FCC has pursued an approach aimed at manufacturing the *appearance* of competition in local telephony by "jumpstarting" competitors – assuming, erroneously, that more competitors must mean more competition. Its method has been to put in place what is arguably the most arcane and complex scheme of economic regulation ever devised, all for the purpose of requiring incumbent local telephone companies to resell their "essential facilities" to competitors so that the competitors, in turn, can resell local telephone service to customers.

The main problem with this approach is not its complexity; the problem is simplicity itself. By making incumbent facilities available at incremental cost, the Commission greatly reduced the incentives of both incumbents and entrants to invest in new facilities. As Justice Stephen Breyer said in *Iowa Utilities*, "a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. . . . Nor can one guarantee that firms will undertake the investment necessary to produce complex

technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."[3]

Lacking the incentive to compete on the basis of better technology, some of the FCC's new "competitors" instead tried to win customers with clever marketing campaigns, or to profit by engaging in various forms of cream skimming and regulatory arbitrage. Most of them never made money even at that, and by late 2000 it seems investors had run out of patience with such shortsighted business models.

In its defense, the FCC points to scores of new "facilities-based" entrants, which have invested billions of dollars in new equipment, and are providing millions of lines.[4] But these firms, too, must face competition from the resellers and arbitragers, and building new telephone networks is, in the end, an expensive proposition. By late 2000, investors were questioning whether, in the face of such competition, the billions invested in fiber optic cables and new switches would ever yield a solid return.[5]

Moreover, such competition as has developed has taken place largely in urban areas, and almost exclusively in the market for business customers. For residential customers, and for those in rural areas, competition is mostly an unfulfilled promise. Kenneth Gordon's paper in this volume helps us understand why: In the name of promoting "universal service," we (that is Congress, through the Act, the FCC, through its policies, and the states, through their public utility commissions) continue to hold the regulated price of local phone service below cost for residential and rural customers, while setting long distance, business and urban rates above cost. Entrepreneurs are free, in principle, to compete for the privilege of serving residential and rural customers, but only if they are prepared to charge prices that fail to cover costs. If they want to make money, they must compete not only for the customers, but also for the largesse of universal service subsidies needed to turn a profit. Not surprisingly, few have chosen to do so.

The end result is that competition has developed more slowly and less completely than anyone envisioned at the time the Act was passed. In 1996, most observers believed the "14-point checklist" Congress enumerated as criteria for RBOC entry into long-distance telephony would be satisfied virtually everywhere within three to five years. Thus far, those criteria have

[3] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 429 (1999) (Separate Opinion of Justice Stephen Breyer).

[4] FCC, *Local Telephone Competition as of June 30, 2000* (Dec. 4, 2000). *Available at:* <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/comp.html>.

[5] The market valuation of telecommunications stocks is addressed in Jeffrey Eisenach, *Economic Anxieties in High-Tech Sector*, WASH. TIMES, Dec. 12, 2000, at A17.

been officially satisfied in only two states -- and the FCC, which says it is dedicated to promoting competition, instead continues to enforce the Act in a way that constitutes a near-absolute barrier to long-distance entry by the RBOCs.

The great irony is that none of the above matters very much anymore. Voice telephony as a discrete market is (almost literally) history. The future – the immediate future – is about the market for integrated voice, video and data services carried on broadband digital infrastructures (wired or wireless) across distances that are never measured, because distance no longer matters much either. The future of telecommunications, in other words, looks less and less like Ma Bell and more and more like the mother of all integrated networks, the Internet.

The essential characteristic of the Internet is that it is digital, and the essential characteristic of digital information is that it is mode-independent– that is, it can be carried equally well, and interchangeably, on virtually any mode of communications. Thus, the new approach to telecommunications deregulation has to begin by insisting on eliminating the barriers and regulatory distinctions that separate different communications technologies– telephony, cable, wireless, satellite.

Soon after the Telecommunications Act was passed, PFF Senior Fellow Donald McClellan wrote a seminal paper arguing for a "containment policy" to protect the Internet from regulation.[6] The idea was simple: the Act, for better or worse, demanded a continuing period of regulation of voice telephony. Donald suggested that the policy imperative must be to "contain" regulation within the old world of voice and not allow it to spill over into the new world of data. For five years, containment has proven a successful strategy: data services – even when provided by the heavily regulated incumbent LECs – are subject to somewhat less regulation than voice.

Five years later, the reality of convergence threatens to overtake the strategy of containment. On the battlefield of integrated broadband services, cable, wireline telephony, wireless and satellite providers compete head to head. Cable services presently operate under one set of rules, wireline telephony under another. Wireless is treated like wireline, unless it moves, in which case, for regulatory purposes, it becomes like satellites. And voice is telephony, unless it is converted by a personal computer into Internet

[6] DONALD W. MCCLELLAN, JR., ESQ., A CONTAINMENT POLICY FOR PROTECTING THE INTERNET FROM REGULATION: THE BANDWIDTH IMPERATIVE, (The Progress & Freedom Foundation, *Progress on Point* 4.5, 1997) at 1.

Protocol (IP) bits and bytes before being transported, in which case it becomes "voice over IP" (VOIP) and is treated as unregulated data.

The emergence of cable modem services virtually identical in capability and pricing to those offered by telephone companies through DSL technology has brought this crisis of unequal treatment to a head, forcing the FCC to confront the issue directly in a proceeding now underway[7] Court decisions have disagreed on how cable modems should be classified for regulatory purposes, and the FCC must now decide: Are cable modems a telecommunications service? An advanced service? An information service? Simply asking these questions is enough to illustrate the absurdity of such almost metaphysical regulatory distinctions in a converged world.

FCC Chairman Kennard has argued strongly against imposing the "morass of [telephone] regulation"[8] (his words) on the cable industry, and promised, instead, to create a "new paradigm"[9] in the FCC's current rulemaking on open access for cable platforms. As we have suggested elsewhere,[10] the FCC can contain the spread of regulation simply by declaring cable and other comparable broadband services to be "advanced services," and then exercising its authority under Section 706 of the Telecommunications Act to forebear from regulation. And then, without undue delay, a truly "new" paradigm must find a way to go beyond containment to deregulate voice as well as data, telephone companies as well as cable providers.

In the end, telecommunications deregulation must mean what the word suggests: The elimination of entry barriers, including line of business restrictions, and doing away with price controls at every level. This volume's papers by Eldering, Crandall and Gordon provide a detailed roadmap for achieving such deregulation.

Wireless services, in most cases,[11] already benefit from substantial deregulation. But they are subject to even more intimate forms of

[7] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC 00-355, GN Docket No. 00-185, Sept. 28, 2000.

[8] FCC Chairman William E. Kennard, *Consumer Choice Through Competition*, Remarks at the National Association of Telecommunications Officers and Advisors, 19th Annual Conference, Atlanta, GA, (Sept. 17, 1999), at 5.

[9] *Kennard Vows Year-End Action on 'Recip Comp,' Sees 'New Paradigm' for Cable Modem Access*, TR DAILY, Nov. 15, 2000.

[10] Jeffrey A. Eisenach and Randolph J. May, *Comments of The Progress & Freedom Foundation*, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC 00-355, GN Docket No. 00-185, Dec. 1, 2000.

[11] At least so long as they keep moving, either on the ground in cars and briefcases, or on satellites orbiting the earth. If wireless applications settle down for any length of time, they risk being mistaken for telephones and regulated accordingly.

governance. As users of the broadcast spectrum, they are *de facto* wards of the FCC, acting in its role as "steward" of what Congress continues to view as the exclusive and unalienable property of the United States government.

Charles Eldering's paper makes clear how crucial the role of wireless technology is in achieving the Act's vision of ubiquitous competition. Mobile, satellite and fixed wireless technologies offer unique competitive advantages for particular uses and in particular markets. Existing satellite and fixed wireless technologies already offer broadband services; third (3G) and fourth (4G) technologies will make mobile wireless broadband available within five years.

But progress in deploying such new technologies is slow. Lawrence White's paper examines a major reason why this is so, and proposes a simple, if seemingly dramatic, solution: "Propertyze" the spectrum and allow markets to manage its use, just as markets manage the use of other goods with complex attributes – like land. White's argument is compelling. Spectrum management by government fiat invariably leads to inefficient and inflexible allocations of this increasingly valuable resource; and, it provides opportunities for interest groups, usually representing entrenched incumbents, to engage in what economists often call "regulatory predation." Markets, White argues, might also make mistakes, but such mistakes would be more easily and quickly corrected. In the end, markets would do a better job than government in allocating resources to their highest valued uses. Moreover, White shows how a transition to a property-based system could actually be accomplished.

Whether Congress is prepared to adopt such a system remains to be seen, but the need for more efficient and flexible allocation of spectrum is clear. For all its efforts to make spectrum available through auctions and to allocate its use to the highest valued functions, the FCC continues to be an impediment to the timely deployment of technologies like 3G. A new approach to spectrum management, one which allows the market to play the dominant role in allocating use, is an absolute imperative from an economic perspective.

A market-based approach to spectrum allocation would also make for good constitutional law. Scot Powe's paper in this volume examines the state of First Amendment law at the FCC and finds that the legal basis for differential treatment of electronic media (i.e. broadcasting) has been eroded by a number of recent Supreme Court decisions. "Because of the [Supreme Court's] refusal to apply the broadcast analogy to newer media, while simultaneously suggesting that the sweep of government authority over broadcasting is more constricted than *Red Lion* and *Pacifica* suggest," Powe argues, "the Court appears to have left little constitutional room for future

content regulation." Moreover, he suggests, technological progress has made the historical rationale for treating broadcasting differently from other media (i.e. scarcity) less and less plausible. "Broadcasting is unique," Powe explains, "not because it is unique, but rather because we have mistakenly assumed that it is unique."

A new approach to communications regulation must come to terms with the realities White and Powe describe. Just as convergence has brought competition and diversity to telecommunications markets, it has done the same for what we still refer to, anachronistically, as "mass media." It is time to recognize that the broadcast spectrum is not a public park, and to stop telling those who use it where to plant the daisies.[12]

The ultimate anachronism at the FCC, however, may well lie at the very core of its organic statute, the Communications Act of 1934.[13] As the final paper in this volume explains, the Act gives the FCC broad authority to act "in the public interest." It applies this standard in setting the terms of entry and the parameters of competition, in devising subsidy programs, in setting technological standards and in evaluating and prescribing program content. Perhaps most notoriously, the agency invokes its practically standardless public interest authority to approve or deny the license transfers that invariably take place in communications industry mergers. By doing so, it is able to hold such mergers hostage to the imposition of supposedly "voluntary" conditions that, in many cases, it could or would never impose through a generic rulemaking. Whether it is in the public interest for the FCC to have such unbridled discretion is, at best, highly debatable.

So, it turns out, is the question of whether such discretion any longer would pass muster under modern constitutional jurisprudence relating to the delegation of authority by Congress. There is a strong case to be made that the non-delegation doctrine prohibits such indeterminate delegations of authority as a violation of separation of powers. From a policy perspective, moreover, such a broad delegation simply is not consistent with the new, less regulatory, more market-oriented approach we believe is required: even if the Commission were to constrain its regulatory impulses for a time, the very existence of such an unbridled grant of power would ensure that the threat (and the temptation) of regulation would always remain. Congress, therefore, should not wait for the courts to find an opportunity to constrain the FCC's public interest authority; it should do so itself.

[12] We are indebted to Peter Huber for this colorful metaphor.

[13] Indeed, the FCC's public interest authority dates to the Federal Radio Act of 1927.

Despite the title -- *Communications Deregulation and FCC Reform* -- readers may note that there is no comprehensive paper that addresses in detail some of the structural and management issues generally associated with FCC reform initiatives. The omission is a conscious one. While we clearly have views on how the Commission's structure might be improved,[14] we believe that in this case it is best for form to follow function: If the substantive changes recommended here are pursued, the structural implications ultimately will be obvious and should be more easily implemented. If substantive changes are not made, on the other hand, little will likely be achieved by purely structural reforms in the agency.

This said, we strongly concur with the conclusion of the Commission's draft strategic plan, that within five years communications markets will evidence "vigorous competition that will greatly reduce the need for direct regulation."[15] Unlike the plan, however, we suggest that such a finding should lead to a discussion about how to reduce the size and regulatory authority of the Commission, rather than spawning a search for new and creative missions such as the "market facilitator" role envisioned by the plan. Competitive markets do not need government agencies with 2,000+ staffers to serve as market facilitators.

So, on a final note, we take encouragement in pointing out that the new Chairman of the House Committee on Energy and Commerce, the committee with jurisdiction over the FCC, seems to agree on the need for a "remissioning" of the FCC. In the last paper in this volume, Representative W. J. (Billy) Tauzin asks pointed questions concerning the FCC's role in a world in which we see "the collision between the old regulatory structure and the unregulated computer and Internet world." And, he ends up in the same place we do: there is an urgent need "to complete the deregulation of the '96 Act and to protect as much as possible the stirrings of free competitive choice in this marketplace."

[14] See, for example, Jeffrey A. Eisenach, *Testimony Before before the Committee on Government Reform, Subcommittee on Government Management, Information and Technology, United States House of Representatives* (Oct. 6, 2000); and, Randolph J. May, *A Leaner FCC*, LEGAL TIMES, Nov. 15, 1999, at 78.

[15] FCC, STRATEGIC PLAN, "A NEW FCC FOR THE 21ST CENTURY," (Aug. 1999), at 1.

Chapter 2

The Great Digital Broadband Migration*

Michael K. Powell
Federal Communications Commission

I. INTRODUCTION

In the wake of the 1996 Act, the FCC is often cast as the Grinch who stole Christmas. Like the Whos, down in Who-ville, who feast on Who-pudding and rare Who-roast beast, the communications industry was preparing to feast on the deregulatory fruits it believed would inevitably sprout from the Act's fertile soil. But this feast the FCC Grinch did not like in the least, so it is thought.

It is undoubtedly appealing to see the government as the Grinch who stole Christmas as telecommunications companies still scurry around the marketplace looking for their colorfully-clad presents. I submit, however, that something more profound is occurring that cannot be simplistically cast as poor implementation of the 1996 Act. Instead, there has been a dramatic change in the climate and conditions in which communication "life-forms" exist. FCC and communication policy "reform" is not the question. Instead, the real questions are revealed by opening our eyes to the great exodus from legacy business models, legacy technical infrastructures, and legacy regulations.

* This is a slightly edited version of a speech delivered to a conference hosted by The Progress & Freedom Foundation on December 8, 2000.

II. MIGRATION

I would conceptualize our challenge as a great migration. A migration is defined as a movement from one place, region, or country to another with the intention of making permanent settlement in a new location. A migration leads to more rapid diffusion of cultures, tools, habits, ideas and forms of organization.

Ancient migrations shaped the world we live in today. The invasion of Palestine by the Hebrew tribes (which developed the ideas on which the Jewish, Christian and Islamic religions are founded) had a significant impact on Western civilization.

More recent movements have advanced science, realigned our politics and demographics, and altered our economy. European migration to the United States during the World Wars, the Great Migration of African-Americans from the South to the North, and migration from rural areas to industrial areas during the great depression, all profoundly altered the character of our nation.

Today, a great migration is having a similarly profound effect on the communications industry and on our society as a whole. It is not a movement of people, though it will change how people live. Rather, it is a fundamental shift of technology—the arrival of "disrupting technologies" (in the words of Clayton Christensen, the author of *Innovator's Dilemma*). And it is the unleashing of the power of "creative destruction," the phrase coined by the late great economist Joseph A. Schumpeter, who is celebrated more and more as the father-figure of the New Economy.[1] Schumpeter saw that technological change "incessantly revolutionizes the economic structure from within."[2] Rather than talk of "reform," a relatively pedestrian, incremental notion, we need to consider the Schumpeterian effect on policy and regulation. That is, what are the implications of "creative destruction" economics on economic-regulatory policy.

Before I move to the great technological migration that is occurring today, let me say a word about the 1996 Act, which is a very important catalyst of change, but should not be seen as the end of the journey itself. In other words, our challenge is not simply the faithful implementation of the statute,

[1] JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (HARPER AND BROTHERS, 1942) 83.
[2] Id.

but one that requires us to use the principles of the statute to adapt to a more dramatic shift taking place in communications.

III. THE 1996 ACT. THE FIRST STEP

The Telecommunications Act of 1996 was a remarkable and important shift in telecommunications policy. Its purpose was to move from a regulated monopoly model of telecommunications to a deregulatory competitive markets model. The Act's preamble declares that its purpose is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers."[3]

The 1996 Act is focused principally on deregulation and the move to markets. It is not a technology statute. It was not a direct response to the tectonic shift in communications technology that was only beginning to be felt in 1996.

Rather, the 1996 Act is best understood as an important change in legal and economic thinking that helped ignite what I call the Broadband Digital Migration. As to the law, the Act, at its heart, is a political compact between local phone companies and long distance carriers to end the Modified Final Judgment, and the oversight of telecommunications markets by Judge Harold Greene, stemming from the historic divestiture of AT&T.[4] The most sweeping provisions of the statute deal with the terms and conditions for Bell Operating Company entry into long distance markets, and the terms for new entrants, principally long distance companies, to enter the local markets.

On another dimension, the 1996 Act represented a changed economic judgment. For nearly a century, we regulated the telecommunications industry on the assumption that phone service was a natural monopoly and that the public was best served by a single regulated carrier. This promoted the objective of a universal, seamless, low-cost network. Though there had long been some erosion in the natural monopoly thesis, and increasing experimentation and interest in competition, the 1996 Act was a seminal and resounding declaration of faith in competition.

There are parts of the statute that recognize growing technological convergence, but they offer only modest guidance for regulation in the

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Preamble.
[4] Modification of Final Judgment, *reprinted in* United States v. AT&T, 552 F. Supp. 131, 233 (D.D.C. 1982).