

OVERSEEING THE UNFORESEEABLE: A RATIONAL REGULATORY APPROACH TO 21ST CENTURY COMMUNICATIONS

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Thank you very much and good morning everybody. It is really fun to be here and have a chance to discuss the various topics on the agenda. Looking at it, there is nothing on the agenda that is not fun, challenging, and interesting to debate.

In our sector, every hour of every day, we have to deal with the very real ramifications of technology, and the technological migration that we face today; some of us have participated in a similar migration at least two previous times. We also have to be really conscious of what this means in a regulatory framework and what it means for regulatory reform. And lastly, we need to look at the legislative effort and the need for legislative reform.

The realities of what I'm talking about impact every aspect of our business, including our decisions about how many dollars we invest, and they are really the crux of our ability, or in fact our *inability* to serve customers the way they want to be served. So those three items also impact

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the customer, and we try to see the world through the eyes of the customer.

The title of this year's program, "The Digital Broadband Migration - Rewriting the Telecom Act," is pretty intriguing. Not only is it relevant to the discussions that take place everyday in our industry, but also to the discussions that are going to take place in the future. For those of us who are critics or cynics, the idea of a new Telecom Act is a fairly tough notion. On the other hand, anything is possible. We were able to change a 60-year old piece of legislation with the '96 Telecom Act, so, again, anything is possible.¹

I will begin with an overview of the 1996 Telecom Act, followed by a discussion of the sufficiency of the Federal Communications Commission ("FCC") as a regulatory authority, new communications business models, and an analysis of the potential rewards and fallacies of rewriting the Act.

I. THE 1996 TELECOM ACT OVERVIEW

The 1996 Telecom Act is far from being everything we'd hoped it would be. On the other hand, we were very encouraged by the monumental effort that took place to get that law written. We felt that it had a chance to be progressive, rational, and to create a national, not state, telecom policy. I really believe, given my intimate knowledge of the Act, that that is exactly what Congress had intended. I remember working with the people on both sides in 1994 and 1995; namely John Dingell, Jack Fields, Larry Pressler, and Fritz Hollings. We were adamant about what we needed to do. Henry Hyde ran the Judiciary Committee at the time, and we were adamant in our belief that there would be no market share test; notwithstanding the assurances we heard from the legislation. The other assurance we were given was, the incumbent communications players would not be handicapped in favor of new players. Public policy makers guaranteed us that they were not going to pick winners and losers; they claimed to support the opportunity to create choices for customers. The one statement that always stands out in my mind is the first line of the 1996 Telecom Act. It says that the purpose of the Act is "to promote competition and to *reduce regulation*."²

Unfortunately, I remember with equal clarity the conversations that took place once that bill was passed. This time policy makers had a very clear perspective that more regulation was better than less; they focused on competition, and the theme was consistent. It became clear that the

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18, and 47 U.S.C.).

2. *Id.* at pmbl. (emphasis added).

1996 Telecom Act would be used to handicap incumbents.³ The Act would be interpreted in ways that would hasten the loss of 20 to 30 percent market share for incumbents because it was what the federal regulators, under the leadership of Reed Hundt, believed was necessary. If other providers would not invest in actual infrastructure or spend capital to create the competition, then the government would eliminate the need to make an investment. This was accomplished by forcing incumbents to resell unbundled network elements as a means to arbitrage the system.

Eventually, however, technology created real competition which is what we have today. But the 1996 Telecom Act, based on what I have shared with you thus far, was a failure. Not the law itself, but the interpretation of that law. Needless to say, more than one person has suggested that I should just get over it. After all, a friend of mine who was a staffer of one of the prior administrations in Washington recently said to me, "You know, Dick, you should stop talking about the 1996 Telecom Act. It's just not that important anymore." As you would imagine, I rolled my eyes and said, "That's true because you represent the cable companies now." After all, the 1996 Telecom Act is the law of the land. It is what governs how our industry is regulated and it does, in fact, impact my company and other companies in the sector. It also affects our ability to achieve the services customers want us to deliver every day.

I have to confess to you that every time I go and revisit this discussion, I look out at folks like you and think of Tommy Lasorda who said, "I find it's not good to talk about my problems. Eighty percent of the people who hear them don't care, and the other twenty percent are glad I'm having trouble."⁴

Accordingly, I'm not going to stand here today and whine. I'm going to listen to that great philosopher Tommy Lasorda and not talk about my problems. I do, however, feel it is critical for us to have a discussion about pursuing new and better telecommunications law and policy. To do that, we have to talk about some of the fundamentals that caused the failure of our last attempt to craft legislation to regulate the communications industry.

II. IS THE FCC THE REGULATORY SOLUTION?

Let's pause for a moment to talk about what has happened over the last few years. The reality is that the FCC currently has sufficient regulatory authority to do what needs to be done today. There is no question

3. J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 869-71 (1996).

4. "Eighty percent of the people who hear them (your troubles) don't care and the other twenty percent are glad you're having them." Baseball Almanac, Tommy Lasorda Quotations, <http://www.baseball-almanac.com/quotes/quolasor.shtml> (last visited Sept. 26, 2005).

of what the best option is for our country. I'm sure you know, particularly since our President made an announcement to this effect, that we continue to fall behind progressive countries of the world with our approach to broadband deployments.⁵ We can point our finger at a lot of places, but public policy really does both incentivize and retard broadband deployment.

Would it be such a tall order for the FCC to step up to this challenge? Without question, the politics would be brutal. It would require hard work. It requires merging diverse opinions among the Commission. It necessitates tremendous focus and it calls for determination on the part of the Commission and its staff to do the right thing, to face the dissent and the criticism that would come pouring out.

I really haven't had the good fortune to observe this kind of determination in the staff nor the various offices at the FCC, although I would love nothing more than to not have to go through the legislative battle again and have the FCC step up to the plate. In the meantime, the communications regulatory state languishes due to the lack of resolution. Let me offer broadband as an example. This is the one service in which we have invested a lot of time. Unfortunately, there are glaring discrepancies in the way the regulations are interpreted.

A. *Disparities in Regularity Treatment*

It's fairly obvious, I think, to anyone that there's something amiss with the way cable communications services are regulated vis-à-vis traditional telephony communications services. Cable companies have two-thirds of the broadband market.⁶ No one debates this. I haven't heard anyone say, "No, Dick, that's not true." In large part my friends on the other side of the competitive landscape, the CEOs of the cable companies, have enjoyed success because they don't have any regulatory impediments. Various surveys conducted by third parties point out that subscribers, in many cases, would prefer DSL.⁷ However, companies like Qwest that do provide DSL, have been hobbled by current regulation that runs the gamut.

5. President George W. Bush, President Unveils Tech Initiatives for Energy, Health Care, Internet, Remarks at American Association of Community Colleges Annual Convention (Apr. 26, 2004) (stating that "we [the U.S.] rank 10th amongst the industrialized world in broadband technology and its availability. That's not good enough for America. Tenth is 10 spots too low as far as I'm concerned."), <http://www.whitehouse.gov/news/releases/2004/04/20040426-6.html>.

6. Ken Belson, *Bells are Catching Up In Battle for Broadband*, N.Y. TIMES, July 28, 2004, at C4.

7. Jim Hu, *Survey: Users Want DSL But Can't Get It*, CNET NEWS.COM, Aug. 6, 2003, http://news.com.com/Survey+Users+want+DSL+but+cant+get+it/2100-1023_3-5060701.html.

1. Pricing issues

It took three weeks and over \$100,000 to offer services that customers begged us to provide. Yet, the Friday before we launched, an FCC staffer actually asked us not to launch it so they could add some regulatory oversight to manage our pricing. Wow! I hardly call that supporting competition.

2. Service roll out

To roll out new services, we have to notify our entire market—post our rates of each service. If we were a cable company, this wouldn't be necessary. Cable companies can look at our postings and know what our service revenue will be in the next sixty days. Can you guess what they'll be doing in those sixty days?

3. Promotions

If we want to run a promotion, we have to go through an unbelievable process to get permission. We have to go through the FCC regulatory drill. If our competitors decide tonight at five o'clock that they want to run a promotion tomorrow, it's done. In contrast, we have to give so much notice that it's hard to imagine that a cable company would not have its feet on the street weeks before we even start to advertise particularly since we can't advertise until we get permission to move forward.

4. Cable companies: An unregulated competitor

Cable companies have twice as many subscribers but they do not have any regulatory requirements. We, on the other hand, are regulated at virtually every turn. For example, how do you tax a cable modem versus DSL? You slap state taxes, federal taxes, USF [Universal Service Fund], etcetera on DSL but not cable. Is there any logical argument here? No! Clearly, it would make more sense to treat them the same. One can hardly argue with this. Instead, what you invariably hear is, "Dick, we have no authority over cable deployment." I got it; you do have authority over telephony. Then why don't you back off and make the decision to treat cable telephony and DSL the same? Instead of looking at why you can't regulate cable, why don't you look at having a level playing field by treating DSL in the same manner?

The disparities are getting worse and this is why I am raising the issue. What makes matters worse is the fact that the terms "cable company" and telephone company are misnomers. These terms are no longer applicable. We are *communications* providers. One, cable companies, may aggregate entertainment and let you select, while the other, telecom

companies, may enable you to visit a website and let you download the same entertainment. Since we are all trying to meet customer preference from a single source to deliver various communications needs, we are, in fact, going head-to-head.

Everyone knows that now you have choices. Cable is going into the telephone business. And we are collaborating with the satellite folks. Some of my peer companies are doing fiber-to-the-home or fiber-to-a-node and attempting to do ten megabytes per second or a high definition television ("HDTV") play. We are also looking at that. I think this is one case where we can take a lesson from wireless. The lesson is: step away regulator and let the capital market work. You'll be surprised at how fast technological innovation will occur.

Let me take this just one step further. If you go to Omaha, Nebraska - I probably shouldn't talk about that here, bad judgment on my part - but by their own count, the cable company there, Cox Cable, provides more than half of the local telephone service there.⁸ That's their count, not ours. Despite their huge market share, no one pushes back against that. On the other hand, we are regulated as a dominant provider. Hello! How is this possible? (The state commission has responded to this situation with what I think are very good-faith efforts to create a level playing field on the retail side and I applaud their efforts.) So we went to the FCC last summer and filed a petition to deregulate our wholesale offers. Sounds logical, does it not? We said that we have less than half of the market and that competition has been achieved. We argued that it is only right to release us from the restrictions that are applied to dominant providers.

What happened? Nothing. We are on hold. There is no sense of urgency, certainly not the kind of urgency that should exist in a competitive market. In fact, the FCC has 15 months to respond and, even then, they can ask us for an extension. Sometimes one is forced to grant the extension because there is a need to deal with people on multiple levels. We can only make a guess as to what the communications landscape in Omaha will look like 15 months from now.

These are the challenges faced by the FCC and its implementation of the 1996 Act. These challenges are not easily addressed, and they point out the shortcomings of the Act. If Congress were to muster the will to make this right, I'd applaud their efforts, and I would work tirelessly to help. But I would suggest that this time they begin with a clear-eyed analysis of what went wrong with the '96 Act. Such analysis would need to be accomplished through hard-nosed determination, no matter

8. COX COMM'CONS, WHITEPAPER: VOICE OVER INTERNET PROTOCOL: READY FOR PRIME TIME, *available at* <http://www.cox.com/about/NewsRoom/files/VoIPreadyMay04.pdf>.

what pressures were applied, to avoid the mistakes this time around.

III. FIXING THE 1996 TELECOM ACT; THREE SUGGESTIONS

With this in mind, I have three suggestions that could launch the examination. I'd start with the fact that the 1996 Telecommunications Act was too narrow in its approach; we must expand the scope of the Act. Second, we must promote competition while reducing regulation. Third, we must address the difficult issues relating to replacement services in a competitive market of public services.

A. Expand the Scope

The '96 Act tried to focus on existing technology, but in fact, it really didn't. It focused back a few years. We were looking in that rear-view mirror. We never even thought about new technologies. We didn't think about wireless. We didn't think about cable data modems. We didn't think about cable telephony even though, in fact, it was there on the edge. We didn't look at the ways technology would evolve.

The '96 Act focused on landline telephony. It focused specifically on local and long distance. It did not anticipate the Internet. It did not see what effect the Internet would have on the competitive landscape. It barely addressed wireless. The Act does not even address the fact that Brian Roberts, my friend at Comcast, markets telephony and broadband data. In fact, their announcement that within 18 months they'll provide this to all the customers should send a strong signal of what the Act missed.⁹

You may be thinking, "Dick, that's pretty cool. You've got 20/20 hindsight; very good." The point is, at the time the Act was written, there was no attempt to look at the way the industry would grow and the shifts that it would make. Instead, the legislation was based on the platforms and the distinctions that were correct in the early 90s. But today, these distinctions are, without question, *incorrect*; in fact, they were incorrect shortly after the passage of the Act.

Bottom line - customers like you and I don't think about whether our service comes over coaxial cable, whether it comes over copper wires, or whether it comes over our wireless devices. Most customers look at Evolution Data Optimized ("EvDO") and say, "What does that mean, and I don't care." Those of us that are addicted to that little black thing called Blackberry, or Crackberry, or whatever you want to call it, aren't really too sure how it works. We just know it works all the time, and we

9. Chris Walsh, *Bees Buzzing Around Adelpia Assets; Swarm of Potential Bidders May Now Include Comcast*, ROCKY MTN. NEWS, May 4, 2004, at 2B.

can't stop hitting the keyboard with our thumbs.

We must not analyze competitive services through the eyes of a regulator; competitive services must be analyzed through the eyes of the customer. We should look not at individual technologies but look at the services they provide. , We should then decide whether or not those *services* should be regulated, regardless of the technology used as the delivery system. In the real competitive world, this is the way new product introduction is determined.

We really need to understand what we mean by competitive services. We have to understand the application and the goals we are trying to accomplish, and then decide what to regulate. This is the reality of the communications world that we operate in today and for the foreseeable future. There are so many choices and so many opportunities.

Wireline and wireless—I've worked in both—are examples of two, technologies that provide the same service, yet are treated totally differently. In years past when students arrived on this campus [CU Boulder] in September, we had to dispatch our crews on campus to provide communications services. We blocked the vacation schedules of our crews and wouldn't let anyone off. We worked overtime, seven days a week, because everyone here had to have a telephone and we knew we would have a real peak in our workload. Today, there's no such increase. In fact, there is actually a decrease in the number of services because a lot of the students use their cell phones exclusively.

The reason we offer naked DSL, or stand-alone DSL, is because the customer said, "I don't need a telephone number with my broadband. I need my computer hookup and I'll use my cell." This is the kind of competitive business models that we need to think about. We need to realize that no matter how much some people would like to deny it, these are substitutable services.

I saw some numbers that stated nine million Americans use their cell phones exclusively.¹⁰ It is not clear where they got such a small number. Have any of you ever sat at your desk or sat in your home, looked at the phone with the wire hooked up to it while you were talking on your cell phone? I do it all the time. I find myself say, "Oh my God, I'm in the telephone business. What am I doing?" I mean, I'm not supposed to use my cell phone when I have a landline available and yet, I do it all the time. There are 174 million subscribers needing communications services and to say that one service is not substitutable at the expense of the other is missing the whole point.¹¹ They are totally substitutable. All you have

10. Tyler Hamilton, *Better Speak Up If You Want Wireless White Pages*, TORONTO STAR, Oct. 25, 2004, at D01.

11. Maureen McDonald, *Cell Phone Company Returns to Its Roots*, DETROIT NEWS, Jan. 7, 2005, at 2C.

to do is look at the minutes of use on the networks.

For legislation to succeed, it has to recognize this. It can't get hung up in trying to define the finer points of whether it is 173 million or 172 million. When we look at a particular service and recognize that it is provided by company X or Q, then we shouldn't say, "Because the service provider is Q, the services should be regulated this way and because the service provider is X, services should be regulated a different way—or not at all." It comes down to distinctions of a Regional Bell Operating Company ("RBOC") vis-à-vis new competitive companies. This just doesn't make sense; new legislation needs to recognize the reality of this fact.

B. Promote Competition while Reducing Regulation

There is a second failure of the 1996 Telecom Act. As I mentioned earlier, the exact words were "to promote competition and to reduce regulation" and while there was an effort applied to how this first goal could be accomplished, the second one was pretty much, I think, ignored.

The legislation punted, for instance, when it came to specifying time tables for the FCC to make decisions. We've seen that with the Triennial Review Order (TRO).¹² We have a sector moving at warp speed. Look at the technology that's flowing out. Look at what's happening in an agency that moves way too slowly. It's unfair to them in many ways.

Take the process surrounding Voice over Internet Protocol (VoIP). I got to tell you, I applauded the FCC when they voted last November that Voice over IP, VoIP, is an interstate service and not intrastate.¹³ It was a unanimous decision and we thought this was positive. The decision is really helpful. We're going to have a national policy; how good is this? This delivery option, however, is already mainstream and it has taken over a year to get where we are. But still, glad to get it. In fact, we carry over two *billion* minutes of VoIP on our network every single month.¹⁴ While the interstate decision is a step forward, this decision – given that there are so many issues surrounding this technology on which the FCC continues to vacillate – continues to be debated.

12. Review Of The Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report & Order & Order on Remand & Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 19,020 (2003) (adopting rules pursuant to section 251 of the 1996 Act, requiring incumbent local exchange carriers to make elements of their local network available to competitors on an unbundled basis).

13. Vonage Holdings Corporation, *Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22,404 (Nov. 9, 2004).

14. Press Release, Qwest Commc'ns Int'l Inc., Qwest Communications Expands VoIP Solutions for Enterprise Customers With IP Centrex Prime (Oct. 6, 2004), http://www.qwest.com/about/media/pressroom/1,1281,1605_archive,00.html.

Back in 1999, former Chairman Bill Kennard outlined a plan to overhaul the agency for the 21st century.¹⁵ Unfortunately, that outline resulted in nothing. Just a few weeks ago, the Progress & Freedom Foundation called for serious institutional changes, even suggesting that the five member Commission go down to three members.¹⁶ Maybe having two less people to discuss it with, you could move faster. I'm not sure that's the issue.

Lots of people recognize that the FCC is based on bureaus set up to oversee technologies. You got to stand back and say, "Wow, wrong idea; it is time to change." I'm sure in his seven years of service to the FCC, Michael Powell has had some insight on how this agency should be, or might be reformed. I'm not here to advocate a position. I'm simply saying if we have legislation, it can only be written if it takes reform into account. The legislation must address this issue.

C. *Address the Difficult Issues*

The third area where Congress can learn from the failure of the current legislation has to do with taking on difficult issues. We watered down the 1996 Telecom Act; we tried to compromise. We also tried to get the different parties—I'm not just talking about different sides of the aisle but the different strong views—to come together.

I understand that is the way legislation is written on sensitive issues, but if we do that again without providing specific direction, then we will not address the issues. How do we reform the Universal Service Fund? It's a complex and thorny issue. This is an issue that we really need to analyze with an open mind about whether it is universal service that we are defining now. Is it broadband to the schools and the libraries? We really need to stand back and assess what we have accomplished with the current program, determine what our objectives for the future fund should be, and then figure out how big of a fund we need.

Should we be getting rid of subsidies? How do we create competition and not inhibit economic development? And then how do we deal with intercarrier compensation, a non-thorny issue that everyone has an easy answer for?

These questions were ignored in 1995 and are still ignored today. Most of these questions have only grown tougher and harder to address. We need to face these questions with the new legislation and in the end

15. Bob Metcalfe, *The Internet in 1999: This Will Prove to be the Year of the Bills, Bills, and Bills*, INFOWORLD, Jan. 18, 1999, <http://www.infoworld.com/cgi-bin/displayNew.pl?metcalfe/990118bm.htm>.

16. Thomas M. Lenard et al., *Panel Discussion: Reinventing the FCC for the Digital Age*, 11.22 PROGRESS & FREEDOM FOUND. PROGRESS ON POINT (2004), <http://www.pff.org/issues-pubs/pops/pop11.22reinventingfcc.pdf>.

it's going to take a strong commitment to try to resolve these issues. It took us eight years to get the 1996 Telecom Act written. It's hard for me to tell you how many times we went to Washington where we wrote, re-wrote, and discussed. The 1996 Telecom Act took almost as long as it took to put the Clean Air Act into place.¹⁷ I think the effort required to rewrite the Act would be worthwhile but only if we're willing to step up to complete the task. Today, you and I have six to ten different choices of communications services. This is America and the free enterprise system works. If we can't accept that free enterprise works, then rewriting the Act is an exercise in futility. If we could just accept the concept of free enterprise, we would be better off.

IV. FCC CHANGES—NEW LEADERSHIP OPPORTUNITIES?

In the meantime, I think the FCC and the new members of the FCC have a chance to demonstrate leadership if they are willing to step up and eliminate some of the rules in the bureaucracy. All the issues that I talked about today could have been addressed. They have been discussed, and it's time for a progressive FCC pursuant to the authority granted by Congress to take action. Unfortunately, the FCC will have to take action without the benefit of Michael Powell. I think Chairman Powell is the most visionary FCC chairman that I have worked with during my 36 years in this business. I believe this true public servant had the greatest desire to implement competition and he showed it everyday. I think he followed up on the second part of the first line of the 1996 Telecom Act because he tried to reduce regulation like no other chairman that I have seen; not regulation that serves customers, but regulations that exist for the sake of regulation.

We will miss Chairman Powell in our sector. We wish him God-speed on whatever he does. The FCC needs to continue to do the good work that this great American has done for us. At Qwest, we pledge our professionalism, integrity, and the vigorous pursuit of sane regulatory policy to the new commission. We offer the same to any members of the House and Senate with the courage and initiative to step up to the challenges of new telecom legislation.

CONCLUSION

We consider it a privilege to be part of an extraordinarily dynamic industry. There's never been a more exciting time in our industry. We're in transition. Transitions are painful, but they have so much opportunity. We are anxious to see the developments that will take place in the next

several months and in the years ahead. I appreciate the opportunity to talk to you today. I really enjoyed it.