# [US] The Telecommunication Act of 1996: an Overview

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On 8 February 1996, President Bill Clinton signed into law the Telecommunications Act of 1996 ("Act"), the most extensive rewrite of U.S. telecommunications law since the Communications Act of 1934. The Act addresses the gamut of communications media, including: local and long distance telecommunications services, cable television, broadcasting, on-line computer services, and manufacturing of telecommunications equipment. The Act's emphasis is to open various segments of the industry to competition. While ordering the Federal Communications Commission (FCC) to conduct over 80 rulemakings, several of which must be concluded within six months after enactment, the Act establishes a framework leading towards decreasing regulatory oversight in favor of relying on the prospect of competition to discipline telecommunications markets.

Opening the Local Exchange Market to Competition

Title I of the Act alters the landscape of the telecommunications market left in place by the Modification of Final Judgment (MFJ) that divided AT&T into the current long distance operator and seven local telephone companies (the "Regional Bell Operating Companies" ("RBOCs")). The Act preempts regulatory agencies and immediately opens the monopoly local telecommunications markets to competition in states that have not yet opened their markets. In order to facilitate competitive entry, the Act directs the FCC to conduct rulemakings on interconnection between carriers, while simultaneously setting out a process for voluntary negotiations (with state oversight) between market entrants and the monopoly local exchange carriers. The FCC must adopt rules on key interconnection issues by 8 August 1996. Some of the key interconnection issues that must be addressed by the FCC include: reciprocal compensation for the exchange of telecommunications traffic; unbundling and resale of network elements; number portability; and equal access to poles, ducts, conduits, and rights of way owned or controlled by a telecommunications carrier. The reciprocal compensation provisions require the FCC to establish a mechanism by which local telecommunications carriers mutually compensate each other for terminating calls that originate on the other carrier's network. The Act explicitly allows for bill and keep arrangements, where carriers reciprocally terminate calls originated on another carrier's network without an explicit monetary payment. Congress recognized that facilities-based competitors (that is, carriers owning their own network) could not possibly be expected to build ubiquitous local exchange networks equal to that which incumbents took over a century to build. Therefore, so that entrants can compete for the greatest number of consumers while they build their own networks, Congress chose to require the FCC to conduct rulemakings that would allow entrants access to network elements on an unbundled basis at any point on rates, terms and conditions that are just, reasonable and non-discriminatory. Resale of these unbundled elements shall be at wholesale rates established and determined by a state commission and based on the retail rate, excluding the portion attributable to avoided costs for marketing, billing and collection.

Service provider number portability refers to the ability of a consumer to retain a telephone number when changing local telephone carriers. The Act requires that the costs necessary to implement service provider number portability shall be borne by all carriers on a competitively neutral basis as determined by the FCC. Notwithstanding the ultimate FCC rules, parties may negotiate different terms. During the period between the 135th day and the 160th day from the original request by a party to commence negotiations, any party to the negotiations may request a state public utilities commission to intervene. In that case, the state commission must arbitrate issues that remain unresolved by the parties within 9 months of the original request for negotiations. The state commission must resolve the issues consistent with FCC rulemakings as required by the Act.

Cable Regulation

Largely reversing the effect of the Consumer Protection and Competition Act of 1992, the Act eliminates rate controls for non-basic programming after March 31, 1999. Rates for basic programming will continue to be regulated. As a result of the 1992 Act, cable rates were subjected to benchmarks to protect consumers from rate gouging by monopoly providers. The 1996 Act instead relies on competition from telecommunications companies to discipline cable rates, retaining current rate controls for three years to allow competition to form. Where effective competition from telecommunications providers occurs in less than three years, rates will be deregulated earlier.

Rates are immediately deregulated for small cable operators in franchise areas in which it serves 50,000 customers or less. A small cable operator is defined as one that serves fewer than 1% of all subscribers in the United States and is not affiliated with another entity, or entities, that gross annual revenues in the aggregate of $250,000,000.

RBOC Entry Into the Long Distance Market (InterLATA)

The Act will immediately allow the RBOCs to provide long-distance service originating outside the regions in which they serve as local exchange carriers.

Nothing prevents an RBOC from terminating long distance calls originated outside the region in which it serves as a local exchange carrier.

The RBOCs will be allowed to provide long distance service in their own regions when they have completed four steps designed to open up the local exchange market to competition. First, the RBOC must enter into one or more binding agreements under which the RBOC is providing access and interconnection to its network facilities to an unaffiliated, facilities-based provider of local exchange service serving both residential and business customers. In order to allow the RBOC to enter the long distance market where local exchange competition is less likely to flourish, the Act allows the RBOC to satisfy this requirement by filing with the state commission a statement of the terms and conditions under which it will generally provide such access and interconnection services. Such a statement may be utilized where the FCC finds that after 8 December 1996, no local exchange provider has requested access or local exchange service within 3 months of the RBOC's application to provide long distance service.

Second, the RBOC's agreement with a facilities-based provider, or in absence of an interconnection request, a statement of interconnection arrangements, must pass a checklist of requirements designed to open the local exchange market to competitors. The checklist includes, among other requirements: reciprocal compensation for the termination of traffic; number portability, unbundling of network elements, and the ability to resell the incumbent's telecommunications services in accordance with the Act; non-discriminatory access to the incumbent's poles, ducts, conduits, and rights of way; and non-discriminatory access to emergency services, directory listings and directory assistance.

Third, the RBOC must set up a separate subsidiary to provide long distance service. This requirement is designed to create cross-subsidization and nondiscrimination safeguards. These requirements cease at the end of 3 years, unless the FCC chooses to extend the period.

Finally, the FCC must determine that allowing the RBOC to provide interLATA service is consistent with the public interest. Therefore, the FCC can withhold interLATA authority despite compliance with other provisions of the Act if it finds that the RBOC could use its market power in the local exchange market to leverage an anticompetive advantage in the long distance market. Additionally, the FCC is apparantly free to go further than the 8(c) test of the MFJ and consider the effect of such a waiver on the local exchange market.

Before the FCC can grant an application by an RBOC to enter the interLATA market, it must first consult with each state in which the RBOC seeks such authority to ensure that it has met its checklist requirements, as described above. In addition, the FCC must consult with the U.S. Department of Justice which shall make its own determination whether interLATA relief is appropriate. The FCC shall afford the determination of the Department of Justice "substantial weight", but the Department's determination is not binding. In contrast, since compliance with the competitive checklist requirements is a condition of interLATA relief, state certification is a prerequisite.

The Act provides that parties aggrieved by the FCC's final determination may appeal the decision to the Court of Appeals for the DC Circuit. This means that appeals will bypass the District Court for the DC Circuit, which had overseen the MFJ for twelve years. If the FCC determines that an RBOC has ceased to meet any of the conditions required for approval after such approval has been granted, the FCC may, after notice and an opportunity for a hearing, either issue an order requiring the correction of the deficiency, impose a penalty, or suspend or revoke such approval.

RBOC Entry Into Other Telecommunications Markets

The Act frees the RBOCs to enter the equipment manufacturing and interLATA information services, subject to separate affiliate and nondiscrimination requirements such as those the RBOCs must adhere to in entering the long distance telecommunications market. Authorization by the FCC for any RBOC to provide long distance service provides the trigger for when an RBOC subsidiary may manufacture and provide telecommunications equipment and manufacture customer premises equipment. As with the long distance rules, the separate affiliate and nondiscrimination requirements cease to apply to the RBOC's provisioning and manufacturing of equipment 3 years after the RBOC is authorized to provide interLATA telecommunications service, unless that period is extended by the FCC. The separate affiliate and nondiscrimination requirements cease to apply to the RBOC's interLATA information services on 8 February 2000, unless the period is extended by the FCC.

RBOCs may provide elecronic publishing subject to nondiscrimination and separate subsidiary requirements, as well as a joint marketing prohibition. These requirement will cease to exist on 8 February 2000. Except for activities in which it is already engaged, an RBOC may not engage in the provision of alarm monitoring until 8 February 2001. At that point, the RBOC may provide such services subject to nondiscrimination and joint marketing restrictions.

Universal Service

Increasing competition in telecommuncations is expected to spur advancement of innovative technology. So that all Americans will benefit from these new services, Congress established a Federal-State Joint Board, to be convened by the FCC by 8 March 1996. The Joint Board shall make recommendations on universal service policy to the FCC by 8 November 1996. The FCC must implement those recommmendations by 8 June 1997. Subsequent recommendations from the Joint

Board must be implemented within a year of receiving them.

The Act calls for an evolving definition of universal service. In considering the services that should be included in the definition of universal service, the Joint Board and the FCC shall consider the extent to which particular telecommunications services: (a) are essential to education, public health or public safety; (b) have been subscribed to by a majority of residential subsribers; (c) have been deployed in the public telecommunications networks by telecommunications carriers; and (d) are consistent with the public interest, convenience, and necessity.

The Act requires all telecommunications carriers to contribute on "an equitable and non-discriminatory basis" to a federal universal service fund established by the FCC. In order to encourage the benefits of competition, carriers that agree to provide service to all customers in a given area and advertise the availablity of such services will be eligible to draw upon the fund. Without this provision, local exchange market entrants would be forced to compete against subsidized, monopoly providers for low-income and high-cost customers. States are free to construct their own, additional universal service programmes, but are not required to do so. The Act requires that telecommunications carriers provide rural health care providers with service at comparable rates to those offered to urban health care providers. In addition, educational institutions will receive service at discounted rates, to be determined by the FCC. Lost revenues from these obligations are credited towards a carrier's universal service obligations. The FCC also must establish competitively neutral rules to enhance access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.

Cable/Telephone Cross-ownership

The Act repeals the statutory ban on cable/telephone cross-ownership. Significantly, the Act does not explicitly overrule the regulatory ban. Thus, the issue is up to the discretion of the FCC. The Act does repeal the FCC's video dialtone regulatory regime. In order to assure that allowing the telephone companies into the cable market will not run counter to the pro-competitive intent in the Act, it generally does not allow telephone companies to acquire a cable company in the market in which it provides telephone service (an exception is provided for franchise areas with a population of less than 35,000).

Broadcast Ownership

As competing technology, such as cable television, competes for the nation's audience, the Act relaxes many of the television ownership rules that were put in place to encourage multiple viewpoints in media. For example, the Act instructs the FCC to eliminate the restriction on the number of television stations owned or operated by one entity, and increases the national audience share limitation to 35%. Current FCC rules limit any entity to 12 television stations and national audience share of 25%. In addition, the Act requires the FCC to conduct a rulemaking to determine whether to retain, modify or eliminate current duopoly rules that prevent an entity from owning multiple broadcast stations in the same market.

Radio station ownership rules are likewise relaxed. The Act instructs the FCC to eliminate its national radio ownership restrictions, which are currently set at 20 AM and 20 FM stations. In addition, the Act relaxes restrictions on the number of radio stations that may be owned or controlled by one entity in a market. The cap varies according to the total number of stations in particular markets. Additionally, the FCC may waive the restriction if it finds that such a waiver would have the effect of increasing the total number of radio stations in a market.

Broadcast Licences

Broadcast licenses may be granted for 8 year terms. The Act eliminates comparative hearings for broadcast licenses. Instead, a license will be renewed upon an FCC finding that the station has served the public interest and that there have been no serious violations of the federal law or FCC rules. For the purpose of renewing the license, the FCC is forbidden from considering whether an alternative broadcaster would better service the public interest. Thus, an entity seeking a license renewal must meet only a minimum threshold. In order to encourage advanced television services such as High Definition Television (HDTV), the Act provides that the FCC may issue additional licenses to existing television broadcasters. Following the conversion to advanced television services, broadcasters must relinquish either their existing or new license. Broadcasters may provide supplemental or ancillary services on a subscription or fee basis with the available spectrum, subject to an annual fee to the FCC. Supplemental or ancillary programming may not degrade the quality of advanced television services. This provision was the topic of heated debate as the last phase of legislative negotiations came to a close. Senator Bob Dole, Majority Senate Leader and presidential candidate, feared that Congress was giving away free spectrum that was worth billions of dollars to broadcasters who would then be free to make a profit on new services. In the end, a compromise was struck, as Larry Pressler, Chairman of the Senate Commerce Committee, agreed to take up the issue as part of a spectrum management bill later in the year.

License Ownership Restrictions by Foreigners

The Act eliminates statutory restrictions that prevent a corporation with an alien officer or director, or a corporation directly or indirectly owned by such a corporation, to own broadcast, common carrier and aeronautical en route or aeronautical fixed radio station licenses. However, statutory ownership restrictions of such properties remain on aliens, any organization organized under the laws of any foreign government, any corporation where more than one fifth of the capital stock is owned or voted by aliens, by a foreign government or by a corporation organized under the laws of a foreign government, if the FCC finds that the public interest will be served by the refusal or revocation of such license. The same restriction remains on corporations directly or indirectly controlled by another corporation where more than one fourth of the capital stock is owned or voted by aliens, by a foreign government or by a corporation organized under the laws of a foreign government.

Content Control

The Act takes several steps to provide parental control of the content distributed to minors through broadcasting, cable television and on-line computer services. Broadcasters are expected voluntarily to establish content ratings that would identify programming that contain "sexual, violent, or other indecent material of which parents should be informed before it is exhibited to children." If by 8 February 1997, the FCC determines that broadcasters have not voluntarily produced such guidelines, the FCC must do so on the basis of recommendations from an advisory committee. In addition, broadcasters must transmit such ratings to permit parents to block the display of video programming that they have determined to be inappropriate for their children. The Act requires television manufacturers to equip all television sets (13 inches or greater in size measured diagonally) with the capability of blocking all programming with a common rating. The "V-chip" will have the capability to block programming that is violent or indecent, as rated according to guidelines to be prescribed by the FCC.

Cable operators must scramble or block the video and audio programming of any channel at no charge at the request of a subscriber. If a cable operator, or another multichannel video programming distributor, offers sexually explicit or indecent programming on a dedicated channel, it must fully scramble or block the audio and visual portions of that programming so that nonsubscribers will be unable to receive it. One provision addressing the distribution of communication on the Internet was the subject of a constitutional challenge on the very day of enactment. That provision of the Act makes it illegal to use an interactive computer device to send to minors, directly or indirectly, communications that are patently offensive as measured by contemporary community standards, or sexual or excretory activities or organs, regardless of whether the user of such service placed or initiated the communication. Liability also accrues where a person knowingly permits the use of a telecommunications facility under his/her control with the intent that it be provided for such activities.

The Act encourages voluntary censorship by cable operators and Internet access providers through "good samaritan" provisions. The Act allows any cable operator to refuse to transmit any public access programming or leased access programming which contains obscenity, indecency or nudity. The Act also states that no provider or user of an interactive computer service shall be held liable for restricting access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not that material is constitutionally protected.

Regulatory Forbearance

As telecommunications markets become more competitive, the Act provides for less regulatory oversight. Epitomizing the Act's deregulatory vision, the FCC must review its regulations that apply to operations or activities of providers of any telecommunications service every two years beginning in 1998, and eliminate regulations that it determines are no longer necessary to protect the public interest. The Act also requires the FCC to forebear from applying any statutory provision or regulation to a telecommunications provider or service, or class of telecommunications providers, if enforcement is unnecessary to ensure that charges, practices, classifications or regulations in connection with the provider(s) or service(s) are just, reasonable, and not unreasonably discriminatory, where enforcement of the statutory provision or regulation is not necessary to protect consumers, and where forbearance is consistent with the public interest.

Conclusion

As illustrated, the Telecommunications Act of 1996 is broad in scope and delegates significant authority to the FCC in shaping the future of the US communications markets. Meanwhile, the overall trend of the Act is towards deregulation and a reliance on competition to ensure reasonable rates, quality of service, and the promotion of innovative technology.

***The Telecommunications Act of 1996, signed into law by President Clinton on 8 February 1996***