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PHILIP J. WEISER*

THE FORGOTTEN CORE OF THE TELECOMMUNICATIONS ACT OF 1996

Twenty years ago, I entered the world of telecommunications law and policy. In 1996, I joined the Department of Justice's Antitrust Division as senior counsel to Assistant Attorney General Joel Klein. In that role, I focused on what was then a—if not, the—central issue in telecommunications policy: how to evaluate the prospective entry of the local Bell Companies into long distance markets. Because the Justice Department had played an essential role in overseeing the AT&T consent decree, which restricted the Bell Companies to providing local telephone service, it was afforded the right to weigh in on Bell Company applications to long distance under “any standard the Attorney General considers appropriate.”¹ At the Justice Department, we implemented that mandate by developing a standard that conditioned Bell entry into long distance on a showing that local markets were “irreversibly opened to competition.”²

From today's standpoint, it is easy to forget that the Telecommunications Act of 1996³ was passed in considerable part to remove the then-formidable barriers between local and long distance providers. As a result, market-opening processes, which enabled entry into local markets⁴ and Bell Company entry into long distance,⁵ were at the very heart of the Act, including a now forgotten “fourteen-point checklist.”⁶ To implement these measures, the Act relied on a cooperative federalism regulatory regime that ended the legacy of the rigid “dual federalism” regime that held sway under the Communications Act of 1934.⁷ In line with the cooperative

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1. 47 U.S.C. § 271(d)(2) (2012).

2. The standard was also explained in an affidavit by Marius Schwartz, which was later published in an article. See Marius Schwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, 18 J. REG. ECON. 247 (2000); see also Marius Schwartz, Econ. Enforcement Dir., U.S. Dep't of Justice, Address at the Robert Schuman Centre of the European University Institute: Conditioning the Bells' Entry into Long Distance (Sept. 9, 1999), <http://www.justice.gov/atr/speech/conditioning-bells-entry-long-distance-anticompetitive-regulation-or-promoting>; Joel Klein, Address at the American Enterprise Institute: The Race for Local Competition (Nov. 5, 1997), <http://www.justice.gov/atr/speech/race-local-competition-long-distance-run-not-sprint>.

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

4. See 47 U.S.C. § 251 (2012).

5. See 47 U.S.C. § 271.

6. See 47 U.S.C. § 271(c)(2)(B).

7. See *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); see also Philip J. Weiser, *Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

federalism model, the Federal Communications Commission smartly enlisted state public utility commissions to develop factual records and judgments (on compliance with the fourteen-point checklist, among other things), leveraging their capabilities to make the process more manageable.⁸

From the vantage point of twenty years later, Bell Company entry into long distance is a foreign concept to those who no longer think of telecommunications markets in terms of local or long distance services or even think of any of today's providers as Bell Companies. There are, nonetheless, three lessons that can be learned from the experience of the Telecom Act's Bell entry provisions. First, we should recognize that, for future reforms of the Communications Act, the model of a broad standard grounded in economics (such as the one used by the Justice Department in evaluating Bell entry) provides for a more effective model of regulatory oversight than relying on specific statutory criteria like the fourteen-point checklist. Notably, with technology changing so quickly in this area, any specific criteria risk becoming outdated and, worse yet, hindering sound competition policy. Second, the development of flexible institutional arrangements, such as the cooperative federalism model of working with the states to implement Section 271, needs to be a priority for telecommunications policy going forward.⁹ And, finally, as the overshadowing of the once-central Section 271 demonstrates, humility is a central value in developing regulatory strategies for a fast-changing industry.¹⁰

8. See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, paras. 53-62 (1996).

9. For a discussion of the institutional side of telecommunications policy, see Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675 (2009), and JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE DIGITAL AGE 376-88 (2013).

10. See NUECHTERLEIN & WEISER, *supra* note 9, at 386-88.