

December 5, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 17-108

Dear Ms. Dortch,

Yesterday I had the privilege of meeting separately with Jay Schwarz, Wireline Advisor in the Office of Chairman Ajit Pai; Amy Bender, Legal Advisor, Wireline in the Office of Commissioner Michael O’Rielly; and Jamie Susskind, Chief of Staff in the Office of Commissioner Brendan Carr regarding the above-referenced proceeding.

I expressed my unqualified support for restoring the classification of broadband Internet access service that was affirmed by the Supreme Court in the *Brand X* decision in 2005 (*i.e.*, an “information service”), for reinstating the private mobile service classification of mobile broadband Internet access service and for resurrecting the bipartisan “light-touch” framework under which the Internet thrived for almost 20 years.

Although the 2015 *Title II Order* forbears from enforcing 30 separate provisions of Title II—which it acknowledges are inappropriate for broadband Internet access services—the Commission is free to change it’s mind in the future. If the past is any guide, unless Internet freedom is restored there is a possibility that over time the Commission will find it politically appealing to intervene in the market to promote the affordability and ubiquity of broadband Internet access services or to promote competition. Unfortunately, prior Commission efforts to improve market outcomes have unfortunately yielded many outcomes that were both unintended and unfortunate.

The regulation of wireline telecommunications under Title II basically amounted to over-pricing every output besides basic local residential service so that it could be priced at or below cost. For one thing, the pricing structure was insufficiently responsive to economic trends, and broke down in the late 1960s and early 1970s when state regulators were reluctant to allow rate increases that were urgently needed for keeping pace with inflation. The Bell System compensated by cutting costs and reducing

investment, eventually leading to a service quality crisis as the supply of installations and repairs couldn't keep up with demand.¹

The pricing structure was also highly discriminatory: Long distance and wireless customers were forced to pay inflated prices to balance the phone company's books and allow it to pay competitive returns to investors. Businesses of all sizes were also gouged. Innovation suffered. The Bell System didn't deploy transistors in the network for years as it worked through a huge inventory of vacuum tubes,² because regulators were reluctant to allow a write-off of the obsolete equipment.

For years, the computer industry demanded more bandwidth from the telecom providers,³ The deployment of fiber optic technology started out very slowly in part because the existing copper plant was subject to 40-50 year depreciation schedules in order to keep the price of phone service down.⁴

According to former Chairman Reed E. Hundt, by the early 1990s, the United States had "the worst cellular system of any developed country in the world."⁵ Again, that's because it was subsidizing local residential wireline service.

With the Commission's connivance, the local telephone company ... charged huge prices for connecting wireless calls to the existing network. Lack of competition and these high interconnection charges raised prices for mobile service to about ten times higher per minute than for wire-based service.⁶

Fortunately, Congress gave the Commission regulatory forbearance authority with respect to wireless service in 1993, and the Commission used it's authority to "totally deregulate" the wireless industry under Hundt's leadership.⁷

Since wireline residential local service wasn't profitable as a result of the efforts of this Commission as well as 50 state commissions, when Congress authorized competition in 1996 policymakers had to choose between "rate shock," (*i.e.*, allowing rates to rise to a level that would allow market participants to raise capital by paying investors a competitive return on their investment) or subsidizing new entrants by authorizing them to lease the existing network or reselling existing network services under a different brand at below-cost rates. Policymakers chose the latter. That regime was unsustainable and only lasted a few years. Most of the new entrants went bankrupt and investors lost billions of dollars. Investors poured billions of dollars into the network backbone—which was unregulated and

¹ Steve Coll, The Deal of the Century: The Breakup of AT&T (1986), 7-8 ("By 1970 ... the decline had reached crisis proportions in a number of major cities, including New York. The basic problem was one of supply and demand: too much demand for new phone service and not enough AT&T facilities to accommodate all the new customers. The result had been horrendous delays and breakdowns, especially in Manhattan, the nation's media and financial capital.")

² "The Department of the Internet," by Andy Kessler, *Wall Street Journal* (Nov. 10, 2014) ("Bell Laboratories—owned by AT&T—invented the transistor in 1947, the basic building block of today's telecommunications and computing. But AT&T was one of the last businesses to use the innovation. Why? Because the company had a 10-year supply of the old technology—vacuum tubes—and waited until they ran out before converting to using AT&T's own invention.").

³ See, e.g., George Gilder, Telecosm, (2000) (Kindle Location 2496) (quotes Intel CEO Andy Grove as complaining: "Bandwidth rises a hundred times more slowly than our ability to use it.").

⁴ George Gilder, Life After Television (1994), 94.

⁵ Reed E. Hundt, You Say You Want a Revolution? A Story of Information Age Politics (2000), 92.

⁶ *Id.*

⁷ *Id.*, 98 ("by auctioning spectrum with no rules attached and preempting all state regulation, we had totally deregulated the wireless industry.")

profitable—and almost nothing into upgrading the last mile connections. “The only reason for the so-called ‘fiber optics glut,’ according to an observer,

is the near deliberate starvation of connections to homes and small businesses. It is a classic socialist famine, where the warehouses are full but the people are starving for lack of market distribution systems.⁸

Even with below-cost wholesale and retail rates, new entrants couldn’t make money providing local residential wireline phone service.

Policymakers sought none of these outcomes. These events were the unintended consequences of a policy that prized affordability above all else, and either couldn’t conceive of innovation or assumed that innovation—if any—would take care of itself. Once Congress and the Commission set wireless and information services free, we have seen how wireless network architecture changes every ten or so years, and how there never seems to be enough network capacity to satisfy growing consumer demand for voice, video and data.

With this in mind, I expressed my opinion that restoring Internet freedom is of the highest importance, and certainly no less important than repealing the Fairness Doctrine was in 1987. Incidentally, the howls of protest the Commission is hearing today is reminiscent of the blowback it received in 1987. Speaking on the 20th anniversary of the repeal, former Chairman Dennis Patrick recalled:

As I said, we reached our decision on August 4. On August 5 all hell broke loose. House Commerce Chairman John Dingell held a press conference to call us all “lickspittles.” Senate Commerce Chairman Ernest Hollings called us “wrongheaded, misguided and illogical.”

And then it got nasty.

Oversight hearings were held. Investigations were conducted. Motives and processes were questioned.

But in the end, what the congress found was that four bureaucrats had complied with a court order to resolve a constitutional challenge to one of their own regulations, and that, in doing so, they had voted their consciences.⁹

“Of course,” Patrick added:

the fact that the Fairness Doctrine spurred an abundance of programming aimed squarely at our most important and controversial issues is no longer seriously debated.¹⁰

⁸ See, e.g., “Tumbling Into the Telechasm,” by George Gilder, *Wall Street Journal* (Aug. 6, 2001).

⁹ Remarks of Dennis Patrick as part of the George Mason University Information Economy Project at the National Press Club (Jul. 18, 2007); see also: “The Return of the Speech Police,” by Dennis Patrick and Thomas W. Hazlett, *Wall Street Journal* (Jul. 30, 2007).

¹⁰ *Id.*

Congress passed the Telecommunications Act of 1996 because it recognized that Title II is a mixed blessing. It created the “information” service classification for advanced services, and it created a path to deregulation for telecom services—which ought to be the Commission’s next order of business.

Sincerely,

Hance Haney

Hance Haney
Senior Fellow
Discovery Institute

3213 Duke Street #812
Alexandria, VA 22304