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TELECOMMUNICATIONS COMPETITION IN FLORIDA: A LOOK AT HOUSE BILL 1531

MARC W. DUNBAR

The Information Age requires a new regulatory policy that recognizes technological reality, and rejects the exclusion of otherwise qualified providers from any technology.¹

OVER the last twenty years, the telecommunications industry in the United States has undergone a dramatic evolution, which is the result, in part, of numerous judicial and regulatory decisions that have transformed America's telecommunications marketplace.² These decisions have opened the door to aggressive competition in some areas of the telecommunications industry, which, coupled with numerous technological advancements, has plunged the world into the "Information Age."

1. John P. Fons, *The Local Exchange Network in the Information Age — The Need for New Policy*, 125 PUB. UTIL. FORT. 20 (1990). Mr. Fons is currently an attorney and lobbyist with the law firm of Ausley, McMullen, McGehee, Carothers and Proctor, which represents local exchange telephone companies such as ALLTEL and CENTEL in Florida.

2. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom.* *California v. United States*, 464 U.S. 1013 (1983); *United States v. Western Elec. Co.*, 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985); *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988), *aff'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 498 U.S. 911 (1990); *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir. 1993); *First Computer Inquiry*, 28 F.C.C.2d 291 (1970) (Computer I Tentative Decision); *First Computer Inquiry*, 28 F.C.C.2d 267 (1971) (Computer I Final Decision), *aff'd in part and rev'd in part*, *GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980) (Computer II Final Decision); *Second Computer Inquiry*, 84 F.C.C.2d 50 (1980) (Computer II Reconsidered Decision); *Second Computer Inquiry*, 88 F.C.C.2d 512 (1981) (Computer II Further Reconsidered Decision), *aff'd sub nom.* *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Third Computer Inquiry*, 104 F.C.C.2d 958 (1986) (Phase I Order); *Third Computer Inquiry*, 2 F.C.C.R. 3035 (1987) (Phase I Reconsideration); *Third Computer Inquiry*, 2 F.C.C.R. 3072 (1987) (Phase II Order); *Third Computer Inquiry*, 3 F.C.C.R. 1135 (1988) (Phase I Further Reconsideration); *Third Computer Inquiry*, 3 F.C.C.R. 1150 (1988) (Phase II Reconsideration), *vacated and remanded sub nom.* *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Third Computer Inquiry*, 6 F.C.C.R. 7571 (1991) (Computer III Remand Proceeding), *petition for review pending*, *California v. FCC*, No. 92-70105 (9th Cir. filed Feb. 21, 1992).

While the arrival of this era in telecommunications history has been widely publicized, the true magnitude of the technology and its impact on the transmission of information within the United States has scarcely been realized. The emergence of cellular telephones, fax machines, and electronic mail ("E-mail") only scratches the surface of the advancements to come.³ The reasons for the lag in the actual user realization of this glorious "Information Age" span volumes of published material.⁴ Crucial questions must still be addressed by policy-makers at both the federal and state levels concerning how the technology will be implemented, who will implement it, how implementation will be financed, what role competition will have on implementation, and finally, how the technology will be regulated.

This Comment examines Florida's approach to these questions and the advancements of the "Information Age." This Comment focuses

3. Currently, telecommunications providers are scrambling to perfect interactive telecommunications networks that offer customers an unimaginable array of services. Time Warner Cable is leading the way and will reportedly unveil a Full Service Network that will allow its customers to select from hundreds of cable channels offering interactive educational programs, video games, movies on demand, and even picture telephones. *Business Digest*, ST. PETERSBURG TIMES, Jan. 27, 1993, at 1E. The network is anticipated to be on-line to 4000 residents in the Orlando area by mid-1994. *Id.* The network combines the expertise of computer and telecommunications companies such as AT&T, US West, IBM, and Microsoft and is expected to serve as many as 55,000 Orlando residents by 1996. Jay Hamburg, *Cities Tuning in to TV of Future*, ORLANDO SENTINEL, May 30, 1993, at A1. The Full Service Network is a combination of several experimental projects presently on-line throughout North America. Some examples of such interactive applications are as follows:

Montreal: sports fans can watch the Expos and Canadians on a special two-way cable-television channel that lets them choose camera angles or call up player statistics with a click of their remote controls.

San Diego: cable customers can write checks electronically and make travel reservations through their TV sets.

Birmingham, Michigan: fourth graders can participate in classes and school programs from their homes via their cable television system.

Georgia: doctors can consult about a patient's X-rays across the state via a medical imaging network.

Id. These advancements offer a glimpse into the twenty-first century. If regulations continue to relax, experts estimate that by the year 2000, 10 million homes will be connected to interactive telecommunications networks. *Id.*

4. See generally Alexander C. Larson & Douglas R. Mudd, *Collocation and Telecommunications Policy: A Fostering of Competition on the Merits?*, 28 CAL. W. L. REV. 263 (1992); Andrew C. Barrett, *The Telecommunications Infrastructure of the Future*, 23 U. TOL. L. REV. 85 (1991); Jane A. Strachan, *Untangling the Regulatory and Legal Wires to Telephone and Cable Television Technology*, 11 U. BRIDGEPORT L. REV. 599 (1991); Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COMM. L.J. 215 (1991); Warren G. Lavey, *Universal Telecommunications Infrastructure for Information Services*, 42 FED. COMM. L.J. 151 (1990); Craig D. Dingwall, *Imputation of Access Charges - A Prerequisite for Effective IntraLATA Toll Competition*, 40 ADMIN. L. REV. 433 (1988); Gail G. Schwartz & Jeffery H. Hoagg, *Virtual Divestiture: Structural Reform of an RHC*, 44 FED. COMM. L.J. 285 (1992).

primarily on what the Florida Legislature and the Florida Public Service Commission have done to prepare the state for the technology of the twenty-first century. In addition, this Comment addresses whether these efforts meet the growing needs of the state and whether they accommodate the nationwide trend toward deregulation and increased competition in the intrastate telecommunications marketplace.⁵

I. HISTORICAL AND REGULATORY BACKGROUND

Before embarking on an analysis of Florida's efforts, a brief historical review of telecommunications regulation is necessary to understand the emergence of the "Information Age" and the debate surrounding future telecommunications services.

The current communications era began with the creation of the telegraph and telephone. Since then, competition over the transmission of information has led to an innumerable amount of technological advancements. Today, information may be passed along twisted pairs of copper wire⁶ or along coaxial cable.⁷ This same information may also

5. Regulators at both the federal and state levels see the current market restrictions as impeding economic efficiency and innovation in the telecommunications marketplace. See generally Barrett, *supra* note 4; Schwartz & Hoagg, *supra* note 4. In calling for relaxations in these market restrictions, the FCC stated that competition has brought telecommunications consumers "increased service options, reduced rates, and faster implementation of new technologies." *In re Expanded Interconnection with Local Telephone Company Facilities*, 7 F.C.C.R. 7369, 7378 (1992).

6. Most telephone lines running into homes and businesses in the United States consist of two twisted copper wires known as the "twisted pair." Kevin Maney, *Cable, Phone Firms Wrangle over Future*, USA TODAY, Feb. 11, 1993, at 1B. The twisted copper pair uses one wire to transmit and the other wire to receive information. *Id.* A voice generally sounds different over these wires because they cannot carry all of the information which makes up that person's voice. *Id.* Due to the limited information that can travel across these wires, phone lines can only carry voice and data absent the use of any expensive compression technology. George Gilder, *Cable's Secret Weapon*, FORBES, Apr. 13, 1992, at 80, 81. The next generation of communications, however, may consist of an information exchange that can handle a myriad of information over and above a simple conversation. *Id.* This volume of information transfer is virtually impossible along the twisted copper pair. See Maney, *supra*, at 1B.

7. Coaxial cable, also known as "broadband pipe," is the thick white cable commonly used to connect television sets with cable television converter boxes. See Gilder, *supra* note 6, at 81. Over short distances, coaxial cable can carry as much information as fiber-optic cable. See *infra* note 8; see also Philip Elmer-Dewitt, *Take a Trip into the Future on the Electronic Superhighway*, TIME, Apr. 12, 1993, at 50, 54. Current cable systems have a bandwidth of one billion hertz (one gigahertz), whereas the twisted copper pair has a bandwidth of only four thousand hertz (four kilohertz). Gilder, *supra* note 6, at 81. The entire Library of Congress could be passed across coaxial cable in only eight hours. *Id.* Over the telephone company's "twisted copper pair," this same information transfer would take over 500 years! *Id.* While twisted copper pair can only carry voice and data, coaxial cable can carry full motion video, high resolution medical images, vivid educational simulations, and many other combinations of two-way voice, data, and video transfer. *Id.* For this reason, most new telecommunications systems utilize fiber-optic or coaxial cable to take advantage of this increased information capacity.

run through highways of light inside fiber-optic cables⁸ or be beamed from satellite to satellite.⁹ In addition, cellular, microwave, and radio technology enable transmission without the hindrances of cumbersome satellite dishes or "land-line" attachments.

With the increased interdependence between computer technology and the transfer of information, the spoken word is no longer the only form of communication that travels over this myriad of transmission equipment.¹⁰ Today, data transfer of documents and computer images is commonplace. With the emergence of fiber-optic technology and high-speed digital switching, data, voice, and video information may travel through the same mediums.¹¹ Computers can now communicate with like or unlike computers, and users may choose any number of ways to communicate by combining video, voice, and data transfer.¹²

Regulation of this transfer of information today depends upon the medium used and the location of the end user. Before 1983, the Federal Communications Commission (FCC) and state utility regulatory commissions divided the regulation of telephony according to local or long-distance phone calls.¹³ Today, however, regulation also depends upon who is transmitting the information, since federally regulated entities—including cable television, cellular, microwave, and radio transmission providers—may carry information to both interstate and intrastate users.¹⁴

A. AT&T & Information Services

With the divestiture of AT&T in 1984, the regulatory scheme for telecommunications services was further complicated.¹⁵ On January 1,

8. Fiber-optic cable is made up of hairlike strands of glass. Elmer-Dewitt, *supra* note 7, at 53-54. These strands of glass are said to be so pure that it would be possible to see through a window of them that is 70 miles thick! *Id.* This purity makes fiber-optic cable the most ideal carrier of information ever invented. A single strand of fiber-optic cable can handle 250,000 times more information than the standard telephone company's "twisted copper pair." *Id.* This unbelievable volume could carry the nation's entire radio and telephone traffic and still have room for more information. *Id.* Nevertheless, current uses take advantage of less than one percent of its theoretical capacity. *Id.*

9. ROBERT W. CRANDALL, *AFTER THE BREAK-UP* 75 (1991).

10. *Id.*

11. Mike Langberg & Rory J. O'Conner, *The Digital Revolution*, TALLAHASSEE DEMOCRAT, Nov. 1, 1992, at 1B.

12. CRANDALL, *supra* note 9, at 5. Voice service is generally thought of as the normal telephone service used everyday. Werner, *supra* note 4, at 230-31. Video service is largely used as a source of entertainment and information. *Id.* at 230. Data transfer, on the other hand, is primarily used by business consumers for high-speed transmission of computer manipulated information. *Id.* Experts predict the demand for these types of services will increase as video conferencing and high-speed document transfer become more popular. *Id.* at 230-31 n.65.

13. See CRANDALL, *supra* note 9, at 18.

14. See FLA. STAT. § 364.02(7) (1991); 47 U.S.C. §§ 521-559 (1988) (cable television); 47 C.F.R. § 22 (1991) (cellular).

15. Before the divestiture, AT&T and its Bell operating companies served approximately

1984, AT&T divested itself of its twenty-two local exchange telephone companies¹⁶—the Bell Operating Companies (BOCs)—as part of settlement of a 1974 antitrust suit between AT&T and the Department of Justice.¹⁷ The United States District Court for Washington, D.C. modified this settlement agreement, hereinafter referred to as the modified final judgment (MFJ).¹⁸ Judge Harold Greene, who presided over this matter, retained jurisdiction to approve the implementation of the MFJ, to enforce its terms, and to further modify the judgment as necessary depending upon the competitive climate of the telecommunications industry.¹⁹

Under the MFJ, AT&T retained its long-distance telephone operations, its customer-premises equipment²⁰ manufacturing business, and

eighty percent of the nation's telephone subscribers. CRANDALL, *supra* note 9, at 8. Furthermore, AT&T controlled virtually all of the long distance market. *Id.* Through this dominance, AT&T and its subsidiaries were able to control the entire telecommunications marketplace in the United States. For a more in depth discussion of AT&T's dominance of the American telephony which led to the MFJ, see *id.* at 16-42.

16. As defined in the MFJ, an "exchange" is a geographic area established by a BOC in accordance with the following criteria:

- 1) any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;
- 2) every point served by a BOC within a State shall be included within an exchange area;
- 3) no such area which includes part or all of one standard metropolitan statistical area . . . shall include a substantial part of any other standard metropolitan statistical area . . . unless the court shall otherwise allow; and
- 4) except with approval of the Court, no exchange area located in one State shall include any point located within another State.

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). Telephone exchange service is defined as: service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers inter-communicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

47 U.S.C. § 153(r) (1988). In less complicated terms, exchange service is generally thought of as the service provided by the local telephone company; for example, local telephone service. Because local telephone companies possess essentially the only link to consumers' telephones, it has been said that BOCs have "an unchallenged, rate-regulated monopoly to provide [their] service[s]." Werner, *supra* note 4, at 216.

17. See generally United States v. American Tel. & Tel. Co., 552 F. Supp. at 131; see also United States v. Western Elec. Co., 569 F. Supp. 990 (D.D.C. 1983); United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom.* California v. United States, 464 U.S. 1013 (1983).

18. See *American Tel. & Tel. Co.*, 552 F. Supp. at 226.

19. *Id.* at 231.

20. Customer premises equipment (CPE) means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines. *Id.* CPE includes all terminal equipment kept on subscriber premises, ranging from ordinary telephones to computerized switchboards. California v. FCC, 905 F.2d 1217, 1225 n.8 (9th Cir. 1990).

its research and development facility, known as Bell Laboratories.²¹ AT&T, now divested of the BOCs, was free to enter virtually all other facets of the marketplace, including data processing.²² Under the watchful eyes of Judge Greene, the United States Justice Department, and the FCC, AT&T now operates in a virtually deregulated competitive environment.

The divested BOCs, on the other hand, were generally restricted by the MFJ to providing local exchange telephone service and other "natural monopoly service[s] actually regulated by tariff."²³ Under the MFJ, the BOCs could not provide "interexchange telecommunications services,"²⁴ offer "information services," or engage in the manufacture of telecommunications equipment.²⁵ These restrictions ensured that the BOCs did not use their monopoly over local telephone facilities, as AT&T did, to gain a competitive advantage over other telecommunications providers.²⁶

The MFJ defined an "information service" as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.²⁷

For all practical purposes, information services are generally unregulated services where competition among telecommunications providers thrives.²⁸ Information services differ from what has become known as

21. *Id.* at 1226.

22. *Id.*

23. *See American Tel. & Tel. Co.*, 552 F.Supp. at 227-28.

24. An interexchange telecommunications service is a telecommunications service between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside the originating exchange area. *Id.* Basically, interexchange telephone service is thought of as traditional long distance service. This Comment will focus on intraexchange telecommunications service and the services offered by the BOCs and other local exchange carriers (LECs). While interexchange carriers are active participants in the advancements of the telecommunications industry, this limitation keeps this Comment within the confines of the State of Florida and the jurisdiction of Florida's Legislature and the Florida Public Service Commission.

25. *Id.* at 227.

26. *Id.* at 231; *see also* Strachan, *supra* note 4, at 602 n.11.

27. *American Tel. & Tel. Co.*, 552 F. Supp. at 229.

28. For a scholarly discussion of the current competitive climate of the national information services market, *see generally* Lavey, *supra* note 4. For an example of active competition within the State of Florida, *see generally In re* Request for approval of filing to introduce N11 service by Bellsouth Telecommunications, Inc., Docket Nos. 910049-TL, 920913-TL, & 920962-

“plain old telephone service” (POTS), which is basic telephone service provided by local exchange carriers as regulated common carriers to monopoly ratepayers.²⁹

The MFJ’s broad information services prohibition on the BOCs has gradually receded over the last ten years. After its first review of the prohibition, the district court relaxed the restrictions and allowed the BOCs to transmit these types of services generated by other independent entities.³⁰ A year later, the court clarified that BOCs may provide gateway circuits for videotext systems³¹ and voice storage services.³² Finally, in 1993, the district court lifted the ban altogether so that BOCs may now fully carry and offer consumers all types of information services.³³ With new forms of information services and new markets for the services developing daily, competition between the suppliers of information services has greatly increased.

B. FCC Computer Inquiries: Enhanced Services

The issue of which telecommunications services a Local Exchange Carrier (LEC) may provide in an unregulated market is further complicated by the FCC’s classification and interpretation of unregulated services. In the early 1970s, prior to the MFJ and its “information services” definition, the debate over which services should be regulated began with the emergence of computer technology and the transmission of computer signals across telephone lines.³⁴ The transmission of computer signals sparked a series of FCC inquiries as to how these services should be regulated.³⁵ These inquiries, which are known as the

TL (Fla. Pub. Serv. Comm’n.). These dockets are currently pending before the Florida Public Service Commission. They involve a debate between at least 10 potential providers of information service that would like to provide information, such as the latest news, via the telephone lines. While this is currently being provided in most local exchanges using seven digit calling numbers, these providers would like to use abbreviated numbers, such as 511, to provide their services to consumers.

29. California v. FCC, 905 F.2d 1217, 1223 n.3 (9th Cir. 1990).

30. United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987).

31. Videotext services allow consumers to engage in transactions or information searches through personal computers or video terminals connected to phone lines. CRANDALL, *supra* note 9, at 5. Westlaw and Lexis are forms of videotext services.

32. United States v. Western Elec. Co., 714 F. Supp. 1, 22 (D.D.C. 1988).

33. MFJ Modification Order, 993 F.2d 1572 (D.C. Cir. 1993).

34. See generally First Computer Inquiry, 28 F.C.C.2d 291 (1970) (Computer I Tentative Decision).

35. See generally First Computer Inquiry, 28 F.C.C.2d 267 (1971) (Computer I Final Decision), *aff’d in part and rev’d in part sub nom.* GTE Serv. Corp v. FCC, 474 F.2d 724 (2d Cir. 1973); Second Computer Inquiry, 77 F.C.C.2d 384 (1980) (Computer II Final Decision); Second Computer Inquiry, 84 F.C.C.2d 50 (1980) (Computer II Reconsidered Decision); Second Computer Inquiry, 88 F.C.C.2d 512 (1981) (Computer II Further Reconsidered Decision), *aff’d sub*

First Computer Inquiry, *Second Computer Inquiry*, and *Third Computer Inquiry*, continue today on the heels of the Ninth Circuit's remand of the FCC's most recent rulemaking for further consideration of this issue.³⁶

At the heart of these deliberations has been the FCC's classification of telecommunications services as either "enhanced" or "basic" for the purpose of regulation.³⁷ While the debate continues before the FCC, the distinction between these terms is generally analogous to the distinction between POTS and information services.³⁸ Basic services are generally provided by a common carrier to its monopoly ratepayers as a fundamental part of their basic telephone service.³⁹ These services are limited to the offering of transmission capacity for the movement of information and are said to comprise a "virtually transparent" communications path in terms of their interaction with customer-supplied information.⁴⁰

In contrast, enhanced services are those additional telecommunications services that are not necessary parts of basic telephone service.⁴¹ The FCC's interim definition of "enhanced service," adopted pending the conclusion of the *Third Computer Inquiry* proceedings, is found at Section 64.702(a) of the FCC rules and includes services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction

nom. *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Third Computer Inquiry*, 104 F.C.C.2d 958 (1986) (Phase I Order); *Third Computer Inquiry*, 2 F.C.C.R. 3035 (1987) (Phase I Reconsideration); *Third Computer Inquiry*, 2 F.C.C.R. 3072 (1987) (Phase II Order); *Third Computer Inquiry*, 3 F.C.C.R. 1135 (1988) (Phase I Further Reconsideration); *Third Computer Inquiry*, 3 F.C.C.R. Rcd 1150 (1988) (Phase II Reconsideration), *vacated and remanded sub nom.* *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Third Computer Inquiry*, 6 F.C.C.R. 7571 (1991) (Computer III Remand Proceeding), *petition for review pending*, *California v. FCC*, No. 92-70105 (9th Cir. filed Feb. 21, 1992).

36. See *California*, 905 F.2d at 1246; see also *Third Computer Inquiry*, 6 F.C.C.R. at 7571.

37. See *California*, 905 F.2d at 1223-24.

38. See generally *id.*

39. See *Third Computer Inquiry*, 104 F.C.C.2d at 968.

40. *Second Computer Inquiry*, 77 F.C.C.2d 384, 420 (Computer II Final Decision). The FCC inquiries point out that basic telephone service is not as "basic" as the name suggests. *Id.* at 419-20. Basic service was once classified as mere two-way voice communication via a telephone, substantively the definition of POTS. *Id.* at 418. With the emergence of computers, fax machines, and other sophisticated forms of customer premises equipment, the FCC noted that basic service may include more than the mere transmission of voice between two parties. *Id.* at 419.

41. *Third Computer Inquiry*, 104 F.C.C.2d at 968.

with stored information.”⁴² Due to the substantial consumer benefits stemming from competition in the enhanced services market,⁴³ all services falling under this definition may be provided by any and all telecommunications providers in an unregulated, competitive environment.⁴⁴

The distinction between POTS and information services, or basic and enhanced services,⁴⁵ is important because these terms draw the lines between “competitive” services and “monopoly” services. This debate, which has yet to be resolved by Judge Greene and the FCC, has also spilled over into the halls of the Florida Legislature and the hearing rooms of the Florida Public Service Commission (FPSC).⁴⁶ The outcome of these debates will determine how the services will be defined, who may engage in providing these services, and what regulations, if any, will govern their providers.

The MFJ and the FCC decisions resulted in the regulation of the transmission of telecommunications services within Florida by either the Federal District Court of Washington, D.C., the FCC, or the FPSC, depending on the provider.⁴⁷ Furthermore, the types of services that may be provided within this state and the regulation of these services, if any, depend upon the definition of the terms “monopoly,” “enhanced,” and “competitive” services.⁴⁸

42. 47 C.F.R. § 64.702(a) (1991). This definition overlaps the MFJ’s “information services” definition. See *California v. FCC*, 905 F.2d at 1226 n.13. Enhanced services are generally database services such as Westlaw and Lexis. *Id.* at 1223 n.3.

43. The FCC has stated that the present structure of regulated basic service and unregulated enhanced service is advancing the public interest by “promoting regulatory certainty and by comporting with the actual development of the enhanced services industry.” *Third Computer Inquiry*, 104 F.C.C.2d at 968.

44. *Second Computer Inquiry*, 77 F.C.C.2d at 420.

45. Presently, Florida has not adopted a definition for any of these terms. See discussion *infra* parts III, IV.

46. See generally Fla. HB 1531 (1993); *In re Investigation into which local exchange company services are effectively competitive in 1993*, No. 930046-TP (Fla. Pub. Serv. Comm’n, opened Apr. 2, 1993).

47. Three federal agencies regulate telecommunications, including the FCC, which regulates commercial airwaves and interstate common carrier services, the National Telecommunications and Information Administration, which regulates the government’s radio spectrum, and the Department of Justice, which enforces the antitrust laws and oversees the AT&T consent decrees. See Barrett, *supra* note 4, at 92-93 n.22. Furthermore, as the “Information Age” progresses, FCC Commissioner Barrett sees local municipal governments emerging as regulators responsible for franchising cable television systems. *Id.*

48. The Florida Legislature has defined “monopoly service” as “a telecommunications service for which there is no effective competition, either in fact or by operation of law.” FLA. STAT. § 364.02(2) (1991). Presently, neither the Florida Legislature nor the Florida Public Service Commission has provided any universal definition for the term “effectively competitive.” See discussion *infra* part IV. These two bodies have also failed to define the terms “enhanced service” and “competitive service” to govern the regulation on intrastate telecommunications. *Id.*

II. AN INDUSTRY OUTLOOK

Immediately after the issuance of the MFJ, the LECs offered the sole link for all consumers' telecommunications services.⁴⁹ Anyone, including long-distance carriers, wishing to provide any form of service first had to interconnect with the LECs, which offered the only network to consumers' phone lines.⁵⁰ In addition to their exclusive tie-in with consumers, the LECs also owned the only high-volume switching systems that allowed for routing of all forms of telecommunications.⁵¹ The local network controlled by the LECs became known as the local access "bottleneck," as all other telecommunications providers were forced to interconnect with this network to supply services to their prospective consumers.⁵² As technology advances, new telecommunications providers are slowly eroding the LEC stronghold over local access.⁵³

Some believe that the access charges imposed by the LECs upon other providers using and interconnecting with the "bottleneck" are one of the chief reasons for the low cost of local telephone service.⁵⁴ Many proponents of continued LEC domination of local telecommunications services and advocates of the protection of "universal service"⁵⁵ agree that these access charges ensure that basic telecommunications service will be available and affordable to all subscribers.⁵⁶ These advocates further assert, however, that the current

While Florida has avoided adopting such definitions, other governing and regulatory bodies throughout the nation have clearly delineated these terms. See generally *supra* text accompanying note 42 (defining "enhanced service"); 47 U.S.C. § 543 (defining "effective competition") (amended by the Cable Television Consumer Protection and Competition Act of 1992); MNN. STAT. § 237.57(2) (1992) (defining "competitive telecommunications service"); ILL. REV. STAT. ch. 220, para. 5/13-209 (1992) (defining "competitive telecommunications service").

49. See *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990). Today, the local telephone company industry is comprised of roughly 1300 companies that reach almost every U.S. home and garner more than \$90 billion a year in revenue. Peter Coy, *The Baby Bells Learn a Nasty New Word: Competition*, BUS. WEEK, Mar. 25, 1991, at 96. It is estimated that LECs control 99% of the local telephone market. *Id.* at 97.

50. Coy, *supra* note 49, at 97.

51. See CRANDALL, *supra* note 9, at 11-12; Strachan, *supra* note 4, at 610-11.

52. See *California*, 905 F.2d at 1224 n.5.

53. See generally Schwartz & Hoagg, *supra* note 4.

54. See Coy, *supra* note 49, at 96.

55. Universal service is the term used to denote the concept that a utility is required to supply all reasonable demands for service by those who can pay for it. Donald L. Bell, *Unbundling: An Alternative to the Current System of Cable Television Franchising*, 21 CUMB. L. REV. 43, 51-52 (1984). The ability to provide affordable and easily accessible basic telecommunications service is the ultimate goal of regulators at both the federal and state levels. See Valerie Hersch, *What Happens to Grandma Millie?*, FLA. TREND, Feb. 1992, at 34, 36. See generally Barrett, *supra* note 4.

56. Larson & Mudd, *supra* note 4, at 267 n.15.; Schwartz & Hoagg, *supra* note 4, at 289.

competitive trend in the local telecommunications markets will lead to a decline in the overall ubiquity of telecommunications.⁵⁷ However, this predicted decline has not materialized in Florida as universal service has continually strengthened over the past several years.⁵⁸

A. Competitive Access Providers

The LECs no longer exercise the exclusive link to consumers in today's telecommunications industry. With the emergence of fiber-optic and cellular technology, many providers have now equipped themselves with the technology to provide "bypass services," which allow consumers to circumvent the local access "bottleneck" controlled by the LECs.⁵⁹ "Competitive access providers" (CAPs), such as Intermedia, Inc., Time Warner AxS, Altnet, and Teleport, Inc., use fiber-optic cable systems to bypass local networks and reroute long distance calls directly from end users to their long-distance providers, thereby avoiding the costly access charges of the local network.⁶⁰

In addition to providing bypass service to long distance carriers, these same competitive providers are wiring entire metropolitan areas and enabling customers to bypass the local networks for local calls to other telecommunications consumers on the "loop."⁶¹ This practice is known as creating a "downtown loop" or "metropolitan access network."⁶² These fiber-optic networks offer all aspects of LEC basic or POTS service and are currently on-line in many major metropolitan areas, such as New York City.⁶³

These competitive networks currently offer many freedoms that are not available with the existing LEC networks. For example, CAPs can

57. Larson & Mudd, *supra* note 4, at 267-68.

58. By the end of 1990, 93% of Florida residents had access to telecommunications service, an increase of 4.3% since 1984. Hersch, *supra* note 55, at 36.

59. Larson & Mudd, *supra* note 4, at 274. By using fiber-optic cables and digital switching, CAPs employ more sophisticated networks than the LECs. While LECs use these superior technologies in their central offices, more often than not the last mile of cable to the customer consists of the "twisted copper pair," which severely limits the network's capacity. Hersch, *supra* note 55, at 35.

60. See Larson & Mudd, *supra* note 4, at 274.

61. See Schwartz & Hoagg, *supra* note 4, at 288; CRANDALL, *supra* note 9, at 52. At the end of 1991, 23 CAPs reported investing \$82.6 million in their networks and deploying 2,071 route miles of fiber to 5,891 customer locations. *In re Expanded Interconnection with Local Telephone Company Facilities*, 7 F.C.C.R. 7369, 7373 n.5 (1992).

62. *In re Expanded Interconnection*, 7 F.C.C.R. at 7373 n.5.

63. See Coy, *supra* note 49, at 97. CAPs report operating in various cities of various sizes throughout the country, including Atlanta, Boston, Chicago, Dallas, Detroit, Houston, Indianapolis, Los Angeles, Minneapolis, New York, Newark, Philadelphia, Pittsburgh, San Francisco, Seattle, and Washington, D.C., as well as Princeton, Cambridge, Orlando, Tampa, Portland, Rochester, Kansas City, Birmingham, Tulsa, Des Moines, and Grand Rapids. *In re Expanded Interconnection*, 7 F.C.C.R. at 7373 n.5.

negotiate contracts that offer unique terms, conditions, and prices depending on the needs and desires of their customers.⁶⁴ As most CAPs are not subject to the same regulatory restraint of LEC pricing, they can respond quickly and precisely to a customer's immediate needs and demands⁶⁵ and offer prices that are ten to twenty percent below competing LEC tariff rates.⁶⁶

Some opponents of CAP networks assert that the "downtown loops" are a superfluous network of local telecommunications distribution and a "threat" to universal basic service.⁶⁷ While these networks may, in fact, be duplicative of LEC networks, their existence offers security to consumers that have lost millions of dollars in business during accidental shut-downs of LEC networks.⁶⁸ Furthermore, these "unnecessary" networks permit increased volume and speed for

64. Larson & Mudd, *supra* note 4, at 274-75.

65. *Id.*

66. *Id.* at 275.

67. See generally Larson & Mudd, *supra* note 4. Critics of CAP networks assert that current regulations allow for "creamskimmer" entry into the local telecommunications markets. *Id.* at 268, 287-91. A creamskimmer is an economically inefficient market participant that can only enter a market and survive if regulation forces an incumbent market supplier to charge prices that are higher than those permitted by other participants. *Id.* at 286 n.16. While LECs are required by their tariffs to charge prices at certain levels, the FCC has, on numerous occasions, rejected the creamskimmer application to the competition in telecommunications markets. See, e.g., *In re* Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, 24 F.C.C.2d 318, 332-34 (1970) (Notice of Inquiry to Formulate Policy, Notice of Proposed Rule-making) (rejecting the creamskimming argument); *In re* Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, 29 F.C.C.2d 870, 914-15 (1971) (First Report and Order) (rejecting the creamskimming argument leveled against new entrants to the markets for point-to-point microwave radio service); *In re* the Applications of Cities Service Oil Co. for Authority to Construct an Earth Station on a Drilling Platform in the Gulf of Mexico, Western Union Telegraph Co. for Section 214 Authority to Provide Domestic Satellite Communication Services to Offshore Drilling Platforms and for Authority to Construct Additional Transmitters at its Glenwood, N.J., and Cedar Hill, Tex., Earth Stations, 51 F.C.C.2d 653, 664-67 (1975) (Memorandum Opinion, Order, and Authorization) (rejecting the creamskimmer argument raised by Offshore Telephone Company that prospective competitor Western Union be restricted from establishing channels of communications for the provision of domestic satellite communications services to offshore drilling platforms); *In re* International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes, 95 F.C.C.2d 627, 646 n.27 (1983) (Notice of Inquiry) (rejecting the argument that non-carrier cable indefeasible rights of users (IRUs) are a form of creamskimming).

68. In May 1988, a fire in an Illinois Bell central office caused 35,000 to 45,000 customers to lose telecommunications service for nearly a month. See Larson & Mudd, *supra* note 4. It was estimated that this loss of service cost United Airlines as many as 7,000 reservation calls a day! Hersch, *supra* note 55, at 34. In this regard, the ability to have more than one link to the outside world, that is, "redundancy," would be attractive, if not necessary. *Id.*

businesses handling millions of transactions daily.⁶⁹ To many customers, these networks offer the perfect complement, or back-up, to current telecommunications networks by providing the security of having two networks to accommodate increased traffic, to ensure against any loss in communication links, and to take advantage of the most advanced services offered by a variety of telecommunications providers.⁷⁰

As a policy matter, the minimal threat to universal basic service posed by "downtown loops" is counterbalanced by the societal benefits of greater efficiency and security in telecommunications systems. Furthermore, the threat to universal basic service is diminishing as LECs, such as Pacific Bell and New York Telephone, install their own downtown fiber loops in order to retrieve lost corporate clients and restore lost profits.⁷¹

Despite the above mentioned obstacles, CAP networks are blossoming throughout the country. In fact, since 1987, the CAP industry has expanded from only three networks in three cities to over forty networks in major cities across the country.⁷² Economic projections estimate that the competitive access industry will be one of the most profitable industries in the "Information Age."⁷³ By the end of this decade, CAPs could conceivably capture gross revenues in excess of \$40 billion nationwide due to their ability to provide new and useful services to the consumer that are not offered via many of the existing LEC networks.⁷⁴

B. Cable Television Systems

In addition to the services provided by CAPs, fiber-optic technology has enabled cable television providers to deliver telecommunica-

69. See Hersch, *supra* note 55, at 35.

70. *Id.* at 34-35.

71. Gary Slutsker, *What Should We Be?*, FORBES, Sept. 28, 1992, at 132, 136. Despite the emerging competition in the industry, LECs still control virtually all local access services. AT&T recently stated that 99.866% of their local access service is handled by local exchange carriers. *Competitors Ask Strict Rules on Determining Local Carrier Competition*, COMM. DAILY, Mar. 25, 1993, at 1.

72. Larson & Mudd, *supra* note 4, at 274. These estimates may be very conservative as Florida currently possesses 14 certified competitive access providers. FLA. PUB. SERV. COMM'N, DIRECTORY OF UTILITIES I (1993).

73. GOLDMAN SACHS, COMMUNICOPIA: A DIGITAL COMMUNICATION BOUNTY 21 (July 1992); see also, Maney, *supra* note 6, at 2B.

74. SACHS, *supra* note 73, at 21. Since 1987, the CAP industry's revenues have increased from nearly zero to over \$160 million earned from by-pass service alone. Coy, *supra* note 49, at 100.

tions services.⁷⁵ In fact, subsidiaries of companies such as Time-Warner, Adelphia, Comcast, Paragon, Selkirk, and Continental Cablevision, hold Florida CAP certificates, which allow them to compete with the LECs in providing telecommunications services.⁷⁶ The coaxial/fiber-optic networks used by cable systems to provide video to homes and businesses can also provide telecommunications services of higher quality than the antiquated LEC networks which rely on twisted-pairs of copper wire.⁷⁷ Along with the increase in quality, this combination of coaxial and fiber-optic cable employed by the cable companies allows them to incorporate a greater array of technological advances than the current LEC networks.⁷⁸

Through the use of fiber-optic technology and digital switching, cable systems such as Time-Warner are experimenting with advanced telecommunications networks that provide video telephones, medical imaging, interactive television, and other variations of high-speed data transfer.⁷⁹ These systems, called integrated broadband networks (IBNs) or integrated services digital networks (ISDNs), are being developed by both local exchange telephone companies and cable companies.⁸⁰ Many regulators see these "broadband" networks as the

75. SACHS, *supra* note 73, at 21. See generally, LELAND L. JOHNSON, TELEPHONE COMPANY ENTRY INTO CABLE TELEVISION (1992). Currently, cable television passes by 90% of the homes in the U.S. and could interconnect its home consumers with advanced telecommunications services. Strachan, *supra* note 4, at 608. Despite its abilities, legal commentators have noted that cable operators face significant barriers that may impede their ability to compete with LECs in voice and data markets. See Werner, *supra* note 4, at 231 n.67. Citing to the hand-in-glove cooperation between the state public service commissions and LECs, commentators have widely noted continued LEC opposition to cable company advancements into cooperative telecommunications markets. *Id.* Florida cable operators have also experienced this type of LEC/PSC opposition to their attempts to advance telecommunications competition. See discussion *infra* part IV.

76. See JOHNSON, *supra* note 75, at 10; see also FLA. PUB. SERV. COMM'N, *supra* note 72, at 1-4.

77. Gilder, *supra* note 6, at 81; JOHNSON, *supra* note 75, at 9. In fact, these twisted pairs of copper wire dramatically limit the quality and amount of information that can travel across LEC networks. Maney, *supra* note 6, at 2B. Some experts say the "twisted pair" places LECs at a "competitive disadvantage" with telecommunications providers that use coaxial or fiber-optic wires throughout their networks. *Id.* Put bluntly, the twisted pair can neither carry as much information nor offer the clarity of coaxial and fiber-optic wires.

78. See Maney, *supra* note 6, at 2B. One example of how cable companies are taking advantage of their networks is found in Queens, New York. Currently, over 10,000 customers of Time Warner Cable in Queens are receiving 150 channels, including 90 conventional cable channels and 60 pay-per-view movie channels. The cost of this increased service is only \$23.95 — the same as most basic cable services. Gilder, *supra* note 6, at 82.

79. See generally Time-Warner Press Release pp. 1-3 (on file with the author).

80. The FCC has defined these networks as communications networks with a minimum transmission rate of 150 Megabits per second, compiled of fiber-optic cable (or, to a lesser extent, coaxial cable) and capable of transmitting video, data, and voice on the same system. Werner, *supra* note 4, at n.58 (citing R. PEPPER, FEDERAL COMMUNICATIONS COMMISSION, THROUGH THE LOOKING GLASS: INTEGRATED BROADBAND NETWORKS, REGULATING POLICY AND INSTITUTIONAL CHANGE 5 (1988)).

future networks of the "Information Age," due to their wide range of telecommunications capabilities.⁸¹

C. Wireless Networks

Microwave, satellite, and cellular communications networks also add to the competitive environment of the telecommunications industry. These networks offer consumers the ability to communicate directly with others without the hindrances of the local access "bottleneck."⁸² In addition, these systems give consumers the advantage of "wireless" interconnection with long-distance providers as well as with LEC and CAP networks.⁸³

This "wireless" form of communication offers a competitive threat to LECs and CAPs as vast networks are set-up to offer a complete bypass of the current local communications networks.⁸⁴ Currently, total wireless networks, called personal communications networks (PCNs), are in the experimental phase.⁸⁵ Some suggest that these networks will "eventually render the wired local telephone monopolies passe."⁸⁶ Proponents envision these new telephone networks as using light, inexpensive handsets that will communicate via low-power antennas, much like cellular telephones.⁸⁷ LECs and CAPs are threatened by the idea that PCNs may rival the current wired systems in both cost and convenience⁸⁸ by providing communication at drastically reduced prices affordable to most Americans.⁸⁹

81. See JOHNSON, *supra* note 75, at 3; CRANDALL, *supra* note 9, at 4-5; see also Barrett, *supra* note 4, at 86, 95-97.

82. See CRANDALL, *supra* note 9, at 4, 75, 162; Gilder, *supra* note 6, at 83.

83. See generally Thomas A. Monheim, *Personal Communications Services: The Wireless Future of Telecommunications*, 44 FED. COMM. L.J. 335 (1992).

84. See also Peter Coy & Mark Lewyn, *Future Phone? The PCN is a Wireless to Watch*, BUS. WEEK, Mar. 25, 1991, at 101; Maney, *supra* note 6, at 2B; Monheim, *supra* note 83; Alexander C. Larson & Terrence J. Schroepfer, *New Telecommunications Technologies and Regulation: The Case of Personal Communications Services*, 6 HIGH TECH. L.J. 271 (1991).

85. Through 1991, the FCC had awarded approximately 40 two-year experimental authorizations to applicants seeking to develop technology associated with PCNs. Werner, *supra* note 4, at 232 n.68.

86. Coy & Lewyn, *supra* note 84, at 101.

87. *Id.* Currently, Time Warner Cable is testing a network which uses a 12-ounce phone that closely resembles current portable phones. Rene Stutzman, *Time Warner to Test Cable-Phone Service*, THE ORLANDO SENTINEL, June 15, 1993, at C4. The difference from other cellular phones is that these phones allow a person to be called at home, in the car, or at the office using only one phone number. *Id.*

88. See Stutzman, *supra* note 87, at C4. The PCN market will probably reach \$30 billion in revenues by the year 2000. Thomas McCarroll, *A Giant Tug-of-Wire*, TIME, Feb. 24, 1992, at 36, 41.

89. See Stutzman, *supra* note 87, at C4. These low costs should result from the use of technology currently employed by cable television companies, in that cable television systems are more efficient than current LEC systems in tying a PCN together in an urban center. Geraldine Fabrikant, *US West Will Buy into Time Warner*, WALL ST. J., at C5.

With the emergence of these new providers, the telecommunications marketplace harbors many alternatives to the current LEC networks, whose stronghold on even the basic telephone monopoly may be numbered.⁹⁰ In the face of this changing environment, regulatory bodies, such as the FPSC, must prepare to accommodate these new providers and to ensure a fair and competitive marketplace for their services.

III. THE FLORIDA EXPERIENCE: CHAPTER 364

As the industry grows more competitive, Florida lawmakers and regulators must deal with the technological advancements and emerging telecommunications service providers of the "Information Age." Florida's method of dealing with these new providers is found in chapter 364, *Florida Statutes*, and in the decisions and orders of the FPSC.

Since 1913, the Florida Legislature has provided the statutory foundation for the FPSC's intrastate regulation of the telecommunications industry dominated by the AT&T monopoly.⁹¹ In 1981, the Legislature made chapter 364 subject to mandatory sunset review every ten years,⁹² with the first such review to occur in 1990.⁹³ In 1991, the mandatory sunset review provisions were repealed;⁹⁴ accordingly, unless future legislatures choose to reevaluate the chapter's mandates, the 1990 sunset review will remain the only comprehensive review of chapter 364.

As previously mentioned,⁹⁵ wide-ranging changes took place in the telecommunications industry between 1980 and 1989. While state regulators strained to keep pace with technological breakthroughs, the country's regulatory scheme was also changing. The industry evolved from one dominated by the AT&T monopoly into a competitive industry with relaxed regulation for most segments. Throughout this decade of change, basic local exchange service, however, continued to remain an effective monopoly.⁹⁶

90. Despite this promise, to advance beyond existing LEC networks, these providers and their networks of the future require costly new technological breakthroughs in areas such as switching. Barrett, *supra* note 4, at 88-90.

91. Fla. Compiled Laws Title 3, ch. 2, Art. 7, §§ 2829-2829z (1914).

92. See generally FLA. STAT. § 364.01 n. 1 (1991).

93. Ch. 81-318, § 2, 1981 Fla. Laws 1490, 1497 (codified at FLA. STAT. § 11.6105(7)(a) (1981)).

94. Ch. 91-429, § 4(2)(h), 1991 Fla. Laws 83, 96.

95. See discussion *supra* notes 15-49 and accompanying text.

96. See generally FLA. STAT. § 364.337 (Supp. 1988); *In re* Intrastate access charges for toll use of local exchange services, Docket No. 820537, Order No. 13912 (Fla. Pub. Serv. Comm'n, Dec. 11, 1984); *In re* Intrastate telephone access charges for toll use of local exchange services, Docket No. 820537, Order No. 16343 (Fla. Pub. Serv. Comm'n, July 14, 1986).

Between 1980 and 1990, Florida's regulatory structure was changed in response to a national trend towards increased competition. The changes were piecemeal and limited to specific areas of the growing telecommunications industry in Florida.⁹⁷ While acknowledging the emergence of some competitive telecommunications services, amendments to chapter 364 were sporadic and did not represent the comprehensive review and revision of the chapter necessary to accommodate the significant technological developments occurring throughout the telecommunications industry.

In 1990, pursuant to the sunset review requirements, the Florida Legislature, by a near unanimous vote,⁹⁸ reenacted a revised chapter 364, with a host of changes that seemed to reflect the national trend toward deregulation and competition in the telecommunications marketplace.⁹⁹ Not since the creation of the Public Service Commission in

97. See Ch. 82-51, § 4, 1982 Fla. Laws 122, 124 (codified at FLA. STAT. § 364.337 (1983)) (parameters for certifying duplicate telephone services); Ch. 84-83, 1984 Fla. Laws 254 (amending FLA. STAT. § 364.337) (reevaluating regulatory assessment fees paid by interexchange carriers); Ch. 85-327, 1985 Fla. Laws 1969 (amending FLA. STAT. § 364.335) (allowing increased competition in the pay telephone docket); Ch. 86-270, 1986 Fla. Laws 2014 (codified at FLA. STAT. § 364.339 (1987)) (attempt to increase competition in the shared tenant services market); Ch. 89-163, 1989 Fla. Laws 574 (recognizing the emergence of competition and the changes throughout the telecommunications marketplace and requiring the FPSC to present a report summarizing the status of competition in the telecommunications industry to the 1990 Legislature during its sunset review of chapter 364).

98. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1990 REGULAR SESSION, HISTORY OF SENATE BILLS at 194, SB 2398. The bill passed the House by a vote of 115 Yeas, 1 Nay, and unanimously passed the Senate. *Id.*

99. See Ch. 90-244, 1990 Fla. Laws 1802 (codified at FLA. STAT. §§ 364.01 *et seq.* (1991)). The substantive changes, which reflected many of the national trends, were as follows: 1) references to telephone companies were changed to telecommunications companies in recognition of the emerging telecommunications providers that are not telephone companies; 2) broad intent language to provide direction to the FPSC for the regulation of telecommunications was added; 3) several terms such as "monopoly service," "private line service," "telecommunications company," and "telecommunications facility" were defined; 4) LECs were required to file information every four or five years to ascertain whether their rates and charges are reasonable and not unjustly discriminatory; 5) the FPSC was granted the freedom to establish alternative methods for regulating telecommunications providers and their services that will implement new technologies and promote efficiency and productivity in the telecommunications marketplace; 6) the FPSC's ability to monitor and investigate telecommunications companies for anticompetitive behavior such as cross-subsidization was expanded; 7) the FPSC was allowed to certify competitive access providers; 8) a regulatory scheme for PAT telephone service providers was outlined; 9) the FPSC was empowered to determine which telecommunications markets are competitive and should therefore be deregulated in accordance with the public interest; 10) the cross-subsidization of competitive markets with revenues from monopolistic telecommunications services was banned; and 11) the FPSC was required to report biannually to the Legislature on the advancement of competition in the telecommunications industry and the successes of alternative regulatory treatments of those markets.

1913 had the Florida Legislature expressed such clear fundamental intent with regard to telephone regulation. The legislative intent provisions of the bill recognized the emerging competition in the telecommunications industry and set forth umbrella principles for prospective Commission regulation of the industry in Florida.¹⁰⁰ The Legislature instructed the FPSC as follows:

(3) The commission shall exercise its exclusive jurisdiction in order to:

. . . .

(c) Encourage cost-effective technological innovation and competition in the telecommunications industry if doing so will benefit the public by making modern and adequate telecommunications services available at reasonable prices.

(d) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

(e) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services¹⁰¹

The Legislature also took note of the growing trend toward competition and deregulation in the industry partially caused by the MFJ and empowered the FPSC to determine the presence of "effective competition" in specific service markets within the state and to encourage competition among telecommunications providers when it was in the public interest.¹⁰²

(1) As a result of the court-ordered divestiture of the American Telephone and Telegraph Company and other changes in regulatory policies of the Federal Government, and due to technological advances in telecommunications equipment, the Legislature finds that competitive offerings of certain types of telecommunications services may under certain circumstances be in the best interest of the people of the state. It is the legislative intent that, where the commission finds that a telecommunications service is effectively competitive, market conditions be allowed to set prices so long as predatory pricing is precluded, monopoly ratepayers be protected

100. *Id.* § 1, 1990 Fla. Laws at 1804 (amending FLA. STAT. § 364.01 (1989)).

101. *Id.*

102. *Id.*

from paying excessive rates and charges, and both ratepayers and competitors be protected from regulated telecommunications services subsidizing competitive telecommunications services.

(2) A determination as to whether a specific service provided by a local exchange telecommunications company is subject to effective competition may be made on motion by the commission or on petition of the telecommunications company or any interested party.¹⁰³

The essence of this new provision is to empower the FPSC to determine where telecommunications competition exists and to what degree regulation of competitive services will benefit Florida telecommunications consumers.

In addition to supporting competition, the 1990 revision recognized a new classification of telecommunications services provider, the "alternative access vendor" (AAV).¹⁰⁴ Under Florida law, an AAV may be certified by the FPSC¹⁰⁵ to provide "private line service¹⁰⁶ between an entity and its facilities at another location or dedicated access service between an end-user and an interexchange carrier by other than a[n] [LEC]."¹⁰⁷

In Florida, AAVs or CAPs are permitted to create metropolitan access networks to which telecommunications consumers may subscribe for connection to their long-distance carrier.¹⁰⁸ Unlike their counterparts in other states, however, AAVs are not statutorily permitted to interconnect "unaffiliated entities" along their networks.¹⁰⁹ The FPSC's interpretation of what constitutes an "affiliated entity" has further narrowed the scope of the available customer base.¹¹⁰ As a re-

103. *Id.*

104. *Id.* § 34, 1990 Fla. Laws at 1823 (amending FLA. STAT. § 364.337(3)(a) (1989)). Under Florida law, an AAV is directly analogous to a competitive access provider (CAP), which is discussed *supra* part II.A.

105. FLA. STAT. § 364.337(3)(a) (1991). Certification is dependent upon an evaluation of whether such an award is in the "public interest." *Id.* Factors considered prior to certification include: the number of firms providing the service; the geographic availability of the service from other firms; the quality of service available from alternative suppliers; the effect on telecommunications service rates charged to customers of other companies; and any other factors the Commission considers relevant to the public interest. *Id.* § 364.337(2).

106. Private line service means "any point-to-point or point-to-multipoint service dedicated to the exclusive use of an end-user for the transmission of any public telecommunications service." FLA. STAT. § 364.335(3) (1991). This service, provided by CAPs or AAVs, travels along a line solely dedicated to a particular entity. It offers the greatest threat to the LECs since they are bypassed altogether. See discussion *supra* part II.A.

107. FLA. STAT. § 364.337(3)(a) (1991).

108. Hersch, *supra* note 55, at 34.

109. See FLA. STAT. § 364.337(3)(a) (1991).

110. The FPSC undertook an investigatory docket into AAV certification and service in

sult of this regulatory restraint, only large volume customers that have subsidiary companies may take full advantage of Florida's AAV networks.¹¹¹ Subsequently, AAVs in Florida offer unrestricted competition to LECs only in the area of long-distance access, not in private line service or switched local access.¹¹²

The Legislature gave the FPSC the limited power to define the scope of AAV service and to establish a regulatory climate to protect both the competitive market and universal service. Because Florida is one of the first states to legally recognize and certify this form of competitive access provider, it was initially thought to be on the cutting edge of telecommunications regulatory advancement.¹¹³ This sentiment has faded, however, as the FPSC, after three years, has failed to recognize any telecommunications service as "competitive" under the new chapter. Additionally, the progress of competitive telecommunications markets has slowed because the Commission has provided only limited protections for competitive telecommunications providers.

IV. THE FLORIDA PUBLIC SERVICE COMMISSION'S REACTION

The 1990 amendments to chapter 364 seemed to be a clear mandate for the FPSC to investigate and determine which areas of the telecommunications industry are competitive and to then foster competitive market conditions for telecommunications services and their providers in those areas. In commenting on her interpretation of the new law, Public Service Commissioner Susan Clark stated that "what the Legislature has said to the Commission is that where competition exists we can be assured that it will drive rates to cost and that consumers will have a quality variety of service at a reasonable price."¹¹⁴ Commissioner Clark added that she believed the law instructed the FPSC to "back away and no longer regulate [competitive] services and turn them over to competition and let it work."¹¹⁵ As discussed below,

1989. See generally *In re* Generic investigation into the operations of alternative access vendors, Docket No. 890183-TL, Order No. 24877 (Fla. Pub. Serv. Comm'n, Aug. 2, 1991). This docket was postponed and reevaluated after Section 364.337, *Florida Statutes*, was passed. The result of this investigation was to define the phrase "and its facilities" as affiliated entities or "those corporations, partnerships, proprietorships, or other groups that hold stock in excess of 50 percent of the stock of the entity which claims to be affiliated." *Id.* at 8. This definition severely limited the spectrum of AAV service.

111. See Hersch, *supra* note 55, at 34.

112. *Id.* at 37 (quoting ex-FPSC Commissioner Tom Beard).

113. *Id.*

114. Fla. H.R. Comm. on Bus. and Prof. Reg., tape recording of proceedings (Feb. 18, 1993) (on file with comm.) (testimony of Susan Clark).

115. *Id.*

however, during the three-and-one half years since the sunset review of chapter 364, the FPSC has neither identified any telecommunications service as "competitive," nor implemented any measures to assure the protection of providers.

The first opportunity for the Commission to formally address the issues of competition and competitive providers arrived three months after the Legislature completed its sunset review of chapter 364. On August 24, 1990, the Florida Pay Telephone Association (FPTA) and the Florida Cable Television Association (FCTA) petitioned¹¹⁶ the FPSC to "commence an investigatory proceeding to permit a comprehensive review of the revisions to chapter 364, Florida Statutes."¹¹⁷ In their petition, these associations, representing potential competitive telecommunications providers, suggested that the Commission "receive input from all interested persons and move forward expeditiously to

116. Formal proceedings before the FPSC are generally initiated by application, petition, complaint, or order. See generally FLA. ADMIN. CODE ANN. r. 25-22.036 (1993). A petition is appropriate when:

A person subject to Commission jurisdiction seeks authority to change its rates or service, or seeks some other Commission action not otherwise specified in these rules; or

A substantially affected person seeks Commission action to change the rates or service of a person subject to Commission jurisdiction, or seeks some other Commission action not otherwise specified in these rules.

Id. at r. 25-22.036(4). In acting on a petition, the FPSC may either: 1) deny the petition if it does not adequately state a substantial interest or if it is untimely; 2) issue a notice of proposed agency action allowing for time for responsive pleadings; 3) set the matter for hearing before the Commission or hearing officer; or 4) dispose of the matter as provided in section 120.57(2), *Florida Statutes*. *Id.* at r. 25-22.036(9)(b).

If the petition is accepted and a docket is opened, the Commission will set dates for workshops and prehearing conferences during which witnesses will be identified, basic positions outlined, and issues refined. *Id.* at r. 25-22.038(3). The FPSC staff generally uses these prehearing workshops and conferences to solidify the issues and arrive at acceptable stipulations with the parties. While most of these prehearing meetings are not mandatory, all parties must attend the final scheduled prehearing conference at which the parties must advise the prehearing officer as to issues known to be in dispute as well as the parties' positions on those issues. *Id.* at r. 25-22.036(4)(c). Following this final prehearing conference, the prehearing officer prepares a prehearing order that outlines the issues in the case, the positions of all parties, recommendations by the FPSC staff, and any other matters which may aid in the "efficient and fair disposition of the proceeding." *Id.* at r. 25-22.036(5).

After the prehearing order is issued, a hearing is held before the Commission, which includes witness testimony and the like. Each party is permitted to file post-hearing briefs that may include proposed findings of fact, conclusions of law, recommended orders, and legal dissertations on the issues of the case. *Id.* at r. 25-22.056(1)(b). A final order, which includes a statement of the issues, findings of fact, conclusions of law, and statement of final Commission action must be entered by the Commission within 90 days after the hearing. *Id.* at r. 25-22.059(1).

117. *In re* Petition of the Florida Pay Telephone Association and the Florida Cable Television Association to commence an investigatory proceeding to permit a comprehensive review of the revisions to Chapter 364, *Florida Statutes*, enacted during the 1990 Legislative session, Docket No. 900720-TP, Order No. 23958, at 1 (Fla. Pub. Serv. Comm'n, Jan. 4, 1991).

implement the new legislation in a coordinated manner designed to promote the broadest interests of all concerned with bringing quality telecommunications to the consumers of this State."¹¹⁸ Recognizing the novel approach to intrastate telecommunications regulation posed by chapter 364, the petitioners further requested that the FPSC "initiate a proceeding to evaluate: (1) all existing rules, and (2) all existing generic orders of prospective effect, to ascertain and effectuate their conformance with the ongoing forward intent" of the 1990 sunset revisions.¹¹⁹

The petitioners suggested, as one of their major concerns, that the commission safeguard emerging competitive telecommunications markets by preventing the LECs from engaging in certain anticompetitive behavior expressly forbidden by the Legislature.¹²⁰ The petition by FPTA and FCTA requested that the FPSC implement a cost methodology study, the results of which would assist the Commission in promulgating rules specifying methods of detecting and disciplining anticompetitive behavior.¹²¹ Recognizing the possibility that the LECs would use predatory tactics in competitive markets, the petitioners further requested an investigation into the possibility of LEC cross-subsidization of competitive markets and unfair concessions to competitive LEC subsidiaries in their use of the local exchange network.¹²²

The FPTA and FCTA filed this petition in hopes it would hasten the Commission's implementation of the new law and determination of the parameters of competition within the blossoming telecommunications market. The Commission, however, rejected the FPTA/FCTA initiative.¹²³ Citing limited time constraints, the Commission adopted

118. Joint Petition for investigation and implementation of *Florida Statutes* Chapter 364 1990 revisions, *In re* Petition of the Florida Pay Telephone Association and the Florida Cable Television Association to commence an investigatory proceeding to permit a comprehensive review of the revisions to Chapter 364, *Florida Statutes*, enacted during the 1990 Legislative session, Docket No. 900720-TP, at 2 (Fla. Pub. Serv. Comm'n, Aug. 24, 1990) [hereinafter Joint Petition].

119. *Id.* at 4.

120. *Id.* at 8. Regulators throughout the country believe that LECs, due to their market power and control over the local access bottleneck, have the power and incentive to engage in anticompetitive behavior in competitive markets. See Schwartz & Hoagg, *supra* note 4, at 286.

121. Joint Petition, *supra* note 118, at 9. Regulators use a uniform cost methodology to determine the cost of each individual telecommunications service provided by a regulated entity in order to evaluate whether each service is cost-justified or if certain services are being subsidized by other more profitable services. See *In re* Development of local exchange company cost study methodology, Docket No. 900633-TL, Order No. 23474 (Fla. Pub. Serv. Comm'n, Sept. 12, 1990) (general discussion of the importance of uniform cost methodologies); Alexander C. Larson, *Cost Allocations, Predation, and Cross-Subsidies in Telecommunications*, 14 J. CORP. L. 377 (1988).

122. Joint Petition, *supra* note 118, at 8-9.

123. *In re* Petition of the Florida Pay Telephone Association and the Florida Cable Televi-

the staff recommendation of dismissal and ruled that the generic investigatory docket proposed by the parties would provide few solutions to the questions raised by the new legislation.¹²⁴ Instead, the FPSC deferred the questions to an issue-by-issue analysis to be raised in a "proper contextual framework."¹²⁵

The first "proper contextual framework" arose in the LEC Cost Study Methodology docket opened by the FPSC on September 12, 1990.¹²⁶ In its order initiating the docket, the Commission noted that "[t]he introduction of competition in the telephone industry raises new issues such as anticompetitive pricing of end-user services and access services and the imputation of monopoly service element prices as a cost to LEC-provided competitive services."¹²⁷ Echoing the sentiments of the dismissed FPTA/FCTA petition, the Commission further stressed that "[p]rotection of ratepayers and competitors against predatory pricing now looms as an increasing concern."¹²⁸ As a tool to prevent such "predatory pricing," the FPSC recognized the need for a uniform cost methodology to be applied to LEC telecommunications services offerings.¹²⁹

Following a series of workshops, the FPSC expanded the scope of the proceeding and created a special task force "to investigate issues relating to cross-subsidization between monopoly and competitive services."¹³⁰ Based on recommendations from this task force, the Commission refined the issues of the docket to four key items:

- 1) the development of a costing methodology which generates cost results for individual services;
- 2) the definition of cross-subsidy of effectively competitive LEC services by monopoly LEC services consistent with the requirements of Chapter 364;
- 3) the appropriate means for detecting the presence of cross-subsidization; and

sion Association to commence an investigatory proceeding to permit a comprehensive review of the revisions to Chapter 364, *Florida Statutes*, enacted during the 1990 Legislative session, Docket No. 900720-TP, Order No. 23958, at 3 (Fla. Pub. Serv. Comm'n, Jan. 4, 1991).

124. *Id.*

125. *Id.*

126. *In re* Development of local exchange company cost study methodology, Docket No. 900633-TL, Order No. 24910 (Fla. Pub. Serv. Comm'n, Aug. 13, 1991).

127. *Id.* at 1.

128. *Id.*

129. *Id.* at 2.

130. *In re* Development of local exchange company cost study methodology, Docket No. 900633-TL, Order No. 24910, at 1 (Fla. Pub. Serv. Comm'n, Aug. 13, 1991).

4) the proper treatment of shared costs to ensure that they are recovered in a fair and equitable manner from the LEC's various services.¹³¹

Concerned that "meaningful progress in the docket will be hampered" by the broad issues raised by the task force, the Commission relegated the issues of cross-subsidization to a separate proceeding by opening another investigatory docket.¹³²

The FPSC opened this cross-subsidization docket on August 13, 1991, to address the definitional standards of competitive service offerings and the regulatory safeguards required to prevent cross-subsidization of such services by LECs.¹³³ Despite offering another early opportunity to address the competitive issues presented in the sunset review of chapter 364, no definitive policies emerged from this docket for almost two years.¹³⁴ While the cost-methodology and cross-subsidi-

131. *Id.* at 2.

132. *Id.* at 5. The FPSC has not yet rendered a formal order on cost methodology of LEC services. Despite a delay of over three years, the final order is not expected until late 1993. See Case and Scheduling Report, *In re* Development of local exchange company cost study methodology, Docket No. 900633-TL (Fla. Pub. Serv. Comm'n, June 15, 1993).

133. *In re* Investigation into the regulatory safeguards required to prevent cross-subsidization by telephone companies, Docket No. 910757-TP, Order No. 25816, at 1 (Fla. Pub. Serv. Comm'n, Feb. 27, 1992).

134. See Case and Scheduling Report, *In re* Investigation into the regulatory safeguards required to prevent cross-subsidization by telephone companies, Docket No. 910757-TP (Fla. Pub. Serv. Comm'n, Dec. 2, 1992). The cross-subsidization docket was decided on July 12, 1993, over three years after the 1990 sunset revision of chapter 364. *In re* Investigation into the regulatory safeguards required to prevent cross-subsidization by telephone companies, Docket No. 910757-TP, Order No. PSC-93-1015-FOF-TP (Fla. Pub. Serv. Comm'n, July 12, 1993). In its order, the FPSC stated that cross-subsidization exists "when competitive services are priced below their incremental costs, and the resulting revenue shortfall is recovered through the rates for monopoly services." *Id.* at 7. The FPSC added that "the presence of cross-subsidization can be determined by comparing the revenues generated from a service with the relevant costs of providing the service, or, equivalently, a service's price with its relevant unit cost." *Id.* at 8. While offering some promise for competitive telecommunications providers, the FPSC has still not declared any services as "competitive" to trigger the protections of section 364.3381, *Florida Statutes*. Furthermore, this order fails to protect potential competitive telecommunications markets from other abuses of LEC market powers. LECs may still: (1) pay more than fair market price for products or services received from their subsidiaries or affiliated companies; (2) accept less than fair market price for products or services provided to their subsidiaries or affiliated companies; (3) refuse to bear their share of the costs of providing the service, including a prorated share of overhead, by allowing the cost to be enveloped by revenues received from monopoly services; (4) provide services to their own competitive activity under rates, terms, and conditions more favorable than a competitor would pay; and (5) provide services to their own competitive services but refuse to provide their competitors with the same services. *Id.* at 13. These anticompetitive practices, which the FPSC has chosen not to prohibit, have prompted competitive pay telephone telecommunications providers to file a lawsuit. *Peoples Tel. Co. v. BellSouth Telecommunications, Inc.*, No. 93-1260 (S.D. Fla. filed July 1, 1993). These competitive pay telephone providers are seeking damages and injunctive relief pursuant to state and federal civil antitrust claims aris-

dization dockets languished, the FCTA filed a second petition on February 26, 1992, in an effort to prompt the Commission to take more immediate steps to implement the competitive elements of the 1990 sunset review of chapter 364.¹³⁵

In its second petition, the FCTA requested that the Commission require "each local exchange telecommunications company which offers both monopoly and competitive telecommunications services . . . to 'segregate its intrastate investments and expenses in accordance with allocation methodologies as prescribed by the Commission . . .'"¹³⁶ Citing to the direct language of the sunset review of chapter 364, the petitioner asked the Commission to respond to the mandates of the Legislature by requiring LECs to disclose segregated financial data with regard to competitive and monopoly services.¹³⁷

One of the chief concerns of opponents of the second FCTA petition was the unresolved issue of the appropriate definitions of "competitive" or "effectively competitive" services under chapter 364.¹³⁸

ing under section 2 of the Sherman Act, sections 4 and 16 of the Clayton Act, as well as sections 542.19, 542.22, and 542.23, *Florida Statutes*. The lawsuit arose from Southern Bell's alleged use of its monopoly power to gain and maintain its competitive advantage in Florida's pay telephone market by, in part, "not charging or imputing to its pay telephone business the same costs for its essential facilities which independent pay telephone providers . . . are charged for use of the same essential facilities." Plaintiff's Complaint and Demand for Jury Trial at 14, Peoples Tel. Co. v. Bell South Telecommunications, Inc., No. 93-1260 (S.D. Fla. filed July 1, 1993).

135. *In re* Petition by Florida Cable Television Association to institute annual reporting of allocations for investments and expenses of local exchange telecommunications companies, Docket No. 920178-TL, Order No. PSC-92-0317-FOF-TL, at 1 (Fla. Pub. Serv. Comm'n, May 8, 1992).

136. *Id.*; *In re* Petition by Florida Cable Television Association to institute annual reporting of allocations for investments and expenses of local exchange telecommunications companies, Docket No. 920178, Order No. PSC-92-0317-FOF-TL (Fla. Pub. Serv. Comm'n., Feb. 26, 1992).

137. *In re* Petition by Florida Cable Television Association to institute annual reporting of allocations for investments and expenses of local exchange telecommunications companies, Docket No. 920178-TL, Order No. PSC-92-0317-FOF-TL, at 2 (Fla. Pub. Serv. Comm'n, Feb. 26, 1992).

138. Despite being contrary to a basic tenet of statutory construction that a "statute should be so construed as to give a meaning to every word and phrase in it," *Vocelle v. Knight Bros. Paper Co.*, 118 So. 2d 664, 667 (Fla. 1st DCA 1960), the FPSC has stated that the terms "competitive," "effectively competitive," and "subject to effective competition" used in chapter 364 refer to the same thing. See *In re* Investigation to determine whether local exchange company pay telephone service (LEC PATS) is competitive and whether local exchange company pay telephone service (LEC PATS) should be regulated differently, Docket No. 920255-TL, Order No. PSC-93-0289-FOF-TL, at 10 (Fla. Pub. Serv. Comm'n, Feb. 23, 1993). Citing the Legislature's omission of differing definitions of these terms, the Commission stated that all three terms have identical meanings within the context of the Florida pay telephone market. *Id.* at 11. Accordingly, the Commission found that only two types of services exist: monopoly and effectively competitive services. *Id.* at 10-11. While inapposite to widely accepted precedent, this sentiment has been echoed by the FPSC staff and local exchange telephone companies as applicable to all

As pointed out by David Dowds, a senior communications analyst with the FPSC, "this Commission has not made any finding that any particular regulated services, in fact, are subject to competition."¹³⁹ This point was further reinforced by Commissioner Betty Easley who questioned, "if we haven't issued an order defining which is competitive and which is monopoly, how do you expect [us] to honor [the] petition?"¹⁴⁰ On this premise, the FPSC deemed the petition premature and, once again, denied the relief requested by the FCTA.¹⁴¹ The debate on the petition, however, did underscore the fact that, after over two years, the FPSC had failed to adopt any policy defining the nature of "competitive services," despite the legislative directives to categorize and encourage the competitive services marketplace.¹⁴²

In its recommendation to the Commission in the cross-subsidization docket on how and when the new law should be implemented, the FPSC staff stated:

[o]nce a service is found to be effectively competitive in accord with the provisions of Section 364.338, the cross-subsidization restraints of Section 364.3381 become operative. Cross-subsidization exists when effectively competitive services are priced below their relevant

telecommunications markets. See *In re* Investigation into the regulatory safeguards required to prevent cross-subsidization by telephone companies, Docket No. 910757-TP, Prehearing Order, at 23 (Fla. Pub. Serv. Comm'n, Feb. 27, 1993). While this interpretation may seem clear on its face, it does not change the fact that in the three-and-one-half years since the sunset review of chapter 364, no universal definition has been given to any of these terms to guide telecommunications providers or their regulators.

139. Agenda Conference Hearing Transcript at 14, *In re* Petition by Florida Cable Television Association to institute annual reporting of allocations for investments and expenses of local exchange telecommunications companies, Docket No. 920178-TL (Fla. Pub. Serv. Comm'n, May 5, 1992).

140. *Id.* at 18.

141. *In re* Petition by Florida Cable Television Association to institute annual reporting of allocations for investments and expenses of local exchange telecommunications companies, Docket No. 920178-TL, Order No. PSC-92-0317-FOF-TL, at 3 (Fla. Pub. Serv. Comm'n, May 8, 1992). The FPSC noted the FCTA's concerns and stated: "While we deny FCTA's petition, we acknowledge the Petitioner's concerns and direct our staff to investigate the matter in the upcoming rate cases and the cross subsidization docket." *Id.* at 121-30. Furthermore, no evidence was supplied by the staff on the issue of "competitive services." *Id.* at 121-24. The aspects of cost allocation reporting and "competitive services" were reasserted by the FCTA and the Commission dismissed them for lack of basis in the record. *Id.* at 122, 124-25. Thus, despite the FPSC's testament to deal with these issues "in upcoming rate cases," the FPSC avoided its first opportunity to follow through on its statement.

142. See Ch. 90-244, 1990 Fla. Laws 1802 (to be codified at FLA. STAT. § 364.338).

costs, and the resulting revenue shortfall is recovered through the rates for monopoly services.¹⁴³

Despite this relatively clear pronouncement and the emergence of numerous competitive telecommunications providers previously discussed,¹⁴⁴ the Commission has not found any telecommunications services "effectively competitive,"¹⁴⁵ nor has it provided any definitive

143. *In re* Investigation into the regulatory safeguards required to prevent cross-subsidization by telephone companies, Docket No. 910757-TP, Prehearing Order, at 15 (Fla. Pub. Serv. Comm'n, Feb. 27, 1993).

144. *See supra* notes 59-89 and accompanying text.

145. The Commission has only considered one telecommunications market to determine whether or not "effective competition" exists. In February of 1993, the FPSC rendered an order determining that the pay telephone market is not "effectively competitive" in the State of Florida. *In re* Investigation to determine whether local company pay telephone service is competitive and whether local exchange company pay telephone service should be regulated differently than it is currently regulated, Docket Nos. 920255-TL & 910590-TL, Order No. PSC-93-0289-FOF-TL, at 38 (Fla. Pub. Serv. Comm'n, Feb. 23, 1993). In its evaluation of the pay telephone market, the Commission considered the following factors:

1. whether market forces effectively constrain and determine pay telephone end user prices;
2. whether pay telephone service providers differentiate their products from one another through both price and other factors;
3. whether market forces effectively promote economic efficiencies among pay telephone providers;
4. whether market forces effectively suppress excess profits so that profits realized by pay telephone providers are near the firms' actual costs to provide a service;
5. whether low barriers to entry into the pay telephone market exist;
6. whether end users of pay telephone service are adequately presented with a choice of alternative suppliers and information about alternative suppliers;
7. whether end users of pay telephone service routinely exercise their option to choose among suppliers for pay telephone service;
8. whether operation in the pay telephone market by the LEC does not adversely affect the maintenance of basic local exchange service.

Id. at 4-6.

Section 364.338 explicitly states that:

In determining whether a specific service provided by a LEC is subject to effective competition, the commission *shall consider all of the following*:

(a) The effect, if any, on the maintenance of basic local exchange telecommunications service.

(b) The ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions.

(c) The ability of competitive providers in the relevant geographic or service market to make functionally equivalent or substitute services available at competitive rates, terms, and conditions.

(d) The overall impact of the proposed regulatory change on the continued availability of existing services.

(e) Whether the consumers of such service would receive an identifiable benefit from the provision of the service on a competitive basis.

(f) The degree of regulation necessary to prevent abuses or discrimination in the

direction in determining which markets are "effectively competitive."

The lack of policy on competitive services has not only prevented potential competitive telecommunications providers from entering the market, it has also allowed LECs to continue predatory pricing and cross-subsidization practices. In a recommendation to the Commission, the FPSC staff recently stated that the Commission must first determine which services are competitive before any safeguards provided by chapter 364 to LEC competitors may be instituted.¹⁴⁶ As a result, the three-and-a-half-year old mandates of the 1990 sunset revision have and will continue to be paralyzed until the Commission determines which markets are subject to effective competition.

The FPSC's actions have effectively upheld the status quo of LEC-dominated telecommunications markets.¹⁴⁷ At the end of 1992, the FPSC and its staff retreated from their original position and opened a generic docket to reevaluate the competitive/monopoly services dilemma.¹⁴⁸ This docket will determine which, if any, of the services provided by the LECs are effectively competitive and what type of regulation should govern these services.¹⁴⁹ The docket directly corresponds to the initial requests of potential competitors in September 1990. This new docket officially opened upon the receipt of material

provision of such service.

(g) Such other relevant factors as are in the public interest.

FLA. STAT. § 364.338(2) (1991) (emphasis added). The Commission categorically rejected this test stating that "[t]he characteristics in our definition incorporate all of the market behaviors considered in the statute: (a), (b), (c), and (e). The other statutory provisions, (d), (f), and (g), are not relevant to a definition of effective competition." *In re* Investigation to determine whether local pay telephone service is competitive and whether local exchange company pay telephone service should be regulated differently than it is currently regulated, Docket Nos. 920255-TL & 910590-TL, Order No. PSC-93-0289-FOF-TL, at 7 (Fla. Pub. Serv. Comm'n, Feb. 23, 1993). In other words, in its first attempt to determine whether a particular service is subject to effective competition, the FPSC did not follow the mandates of the 1990 Legislature. The Commission, using its test, stated that although "there is intense competition in the pay telephone market . . . for the purpose of securing select locations," there is not sufficient evidence that "end users shop for pay telephone service." *Id.* at 12, 14. Subsequently, the status quo was upheld because no "effective competition" was found to exist in the pay telephone market.

146. *Id.* at 27.

147. The FPSC recently told the FCC that "providers such as power and cable television companies could provide beneficial competitive services to residential or small business customers." *In re* Expanded interconnection with local telephone company facilities, 7 F.C.C.R. 7369, 7400 (1992). The FPSC's actions over the past four years clearly indicates otherwise as it has continued to prevent these and any other non-LEC telecommunications providers from providing any telecommunications services to these types of consumers.

148. See Memorandum from Florida Public Service Commission (Dec. 8, 1992) (requesting data to identify effectively competitive services); see also *In re* Investigation into which local exchange company (LEC) services are effectively competitive, Docket No. 930046-TP (Fla. Pub. Serv. Comm'n, opened April 2, 1993).

149. Memorandum from Florida Public Service Commission (Dec. 8, 1992).

from LECs and other affected parties on April 2, 1993.¹⁵⁰ The most optimistic Case and Scheduling Report for the docket does not envision a final order until sometime in 1994,¹⁵¹ which translates into at least four years of regulatory delay since the Legislature's mandate in chapter 364.

V. 1993 LEGISLATIVE EFFORTS: HOUSE BILL 1531

The FPSC's bureaucratic sluggishness has tempered the emergence of new telecommunications services made possible by technological advancements in the industry. In response to the perception of inactivity, new legislation was introduced in 1993 to provide further guidance and direction to the FPSC with regard to competitive services. Sponsored by Representatives Frederick Lippman,¹⁵² Steven A. Geller,¹⁵³ and Timothy S. Ireland,¹⁵⁴ House Bill 1531 addressed many of the regulatory questions that have remained unanswered since the passage of the 1990 sunset revisions.¹⁵⁵ Supporters of this legislation included a coalition of affected telecommunications providers and consumer groups, such as the FCTA, FPTA, American Association of Retired Persons (AARP), Intermedia Communications, Inc. (Florida's largest AAV), and the Florida Consumer Action Network.¹⁵⁶

The legislation, intending to definitively end Florida's regulatory indecision over the distinctions between enhanced and basic services and POTS and information services, offered concrete definitions for "basic local exchange telecommunications services," "competitive services," "effectively competitive services," "monopoly services," and "cross-subsidization."¹⁵⁷ By providing clear and concise definitions,

150. *Id.*

151. Case and Scheduling Report, *In re Investigation*, Docket No. 930046-TP.

152. Dem., Hollywood.

153. Dem., Hallandale.

154. Repub., Cape Coral/Ft. Meyers.

155. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF HOUSE BILLS at 171, HB 1531. The bill was also cosponsored by Representatives David L. Thomas, Republican, Sarasota, Luis E. Rojas, Republican, Hialeah, and Michael I. Abrams, Democrat, North Miami Beach.

156. John Kennedy, *Telecommunications Plan Rejected*, FT. LAUDERDALE SUN SENTINEL, Mar. 3, 1993, at 3D.

157. Fla. HB 1531, §§ 1, 2 (1993). These terms were defined by the bill as follows:

"Basic local exchange telecommunications service" means the telecommunications service which provides a local dial tone, line, and local usage necessary to place or receive a call within an exchange area and provides interconnection with an interexchange service provider;

"Competitive service" means a telecommunications service that is offered by a local exchange telecommunications company and one or more other providers;

"Cross-subsidization" means the providing of any service or benefit by a local ex-

the legislation provided the FPSC with direction in defining which markets are subject to the regulatory protections of sections 364.338 and 364.3381, *Florida Statutes*.¹⁵⁸

While establishing a concrete definitional structure to implement chapter 364, House Bill 1531 also expanded the authority of alternative access vendors by allowing them to offer private line services to unaffiliated entities,¹⁵⁹ which would have enabled AAVs to enjoy many of the competitive benefits currently realized by CAPs in other states. To facilitate competition, the bill also acknowledged the national policy of permitting competitors to interconnect with LEC networks to assist in providing competitive service offerings to telecommunications consumers.¹⁶⁰ As a deterrent to anticompetitive behavior, the bill provided penalties to any telecommunications provider that engaged in anticompetitive practices enumerated by the Legislature or the Commission.¹⁶¹

change telecommunications company to its competitive business that it does not provide to other providers, under the same terms and conditions and shall also include the pricing of a competitive or effectively competitive service offered by a local exchange telecommunications company below its fully distributed cost.

"Effectively competitive service" means a telecommunications service offered by two or more providers which compete under substantially similar terms and conditions;

"Monopoly service" means a telecommunications service for which there is no competitive or effectively competitive alternative, either in fact or by operation of law.

158. *Id.* Sections 364.338 and 364.3381, *Florida Statutes*, set forth the protections from "anticompetitive behavior" and "cross-subsidization" currently available under Florida law.

159. Fla. HB 1531, § 6 (1993).

160. *Id.* § 7. This form of interconnection is known as "collocation." For a scholarly discussion of the LEC interpretation of this issue, see generally Larson & Mudd, *supra* note 4. This concept has recently been adopted by the FCC. See *In re Expanded Interconnection with Local Telephone Company Facilities*, No. 91-141 (Fed. Comm. Comm'n, October 19, 1992). Furthermore, since the defeat of HB 1531, the FPSC has scheduled hearings to investigate the possibilities of collocation in Florida telecommunications networks. See *In re* Petition for expanded interconnection for alternate access vendors within local exchange company central offices by Intermedia Communications of Florida, Inc., Docket No. 921074-TP (Fla. Pub. Serv. Comm'n). Unfortunately for the telecommunications competitors and consumers of Florida, a final order on Phase I of this matter is not anticipated until January 1994. Case and Scheduling Report, *In re Expanded Interconnection*, No. 921074-TP (May 13, 1993).

161. See Fla. HB 1531, § 9 (1993). To clarify FPSC's purpose and role in facilitating a competitive telecommunications marketplace, the bill would have amended section 364.338(1) to read as follows:

Where the commission finds that a telecommunications service is competitive, the commission shall ensure that the service is effectively competitive by assuring that predatory pricing or other anticompetitive behavior is precluded, monopoly ratepayers are protected from paying excessive rates and charges, and both ratepayers and competitors are protected from monopoly telecommunications services subsidizing competitive services.

Id. Further, the bill would have amended section 364.3381(11) to read that "no local exchange telecommunications company shall make or give any undue preference or undue advantage to the competitive telecommunications service of one provider versus another or to itself, including,

To protect blossoming markets and preserve the equality between telecommunications providers, the legislation also recognized emerging competitive services and mandated that the FPSC classify every telecommunications service within the definitional parameters denoted in the bill, that is, competitive, effectively competitive, or a monopoly.¹⁶² By mandating this classification, the bill's sponsors sought to avoid a repeat of the regulatory delay currently paralyzing the competitive telecommunications markets.

By increasing the responsibilities of the FPSC and providing direction to solve the regulatory problems currently slowing the advancement of competitive markets, House Bill 1531 would have provided an effective catalyst for a regulatory framework that would have encouraged the development of blossoming competitive telecommunications industries within the state.¹⁶³ Despite addressing many of the regulatory questions left unanswered by the 1990 sunset revision to chapter 364 and the FPSC, House Bill 1531 was defeated.¹⁶⁴

Due to the enormous pressure of the LEC lobby¹⁶⁵ and the complexities of the legislation,¹⁶⁶ House Bill 1531 died in committee, never making it to the floor of the House of Representatives.¹⁶⁷ Although amendments were offered in committee in an attempt to save the substantive issues, they also failed due to the enormous LEC opposition and the time constraints of the remaining legislative session. Despite

but not limited to, billing collection, validation, physical collocation, and marketing services." *Id.* § 10. This mandate would have placed new telecommunications providers on level ground to compete with the established LEC monopolies and would have facilitated a more stable competitive marketplace.

162. *Id.* § 11. This classification and a report by the FPSC justifying each classification was to be completed by January 1, 1994 for review by the Legislature. *Id.*

163. Many statewide newspapers speculated that the passage of House Bill 1531 would have promoted competition in emerging technological markets, thereby benefitting many Florida consumers such as small businesses, banks, students, schools, and personal computer owners. See generally Kennedy, *supra* note 156, at 3D.

164. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF HOUSE BILLS at 172, HB 1531.

165. In order to combat House Bill 1531, the LECs added extra professional lobbyists to its lobbying team to portray the legislation as a threat to universal service and an attempt to circumvent the authority of the FPSC. Kennedy, *supra* note 156, at 3D.

166. The 1993 House Committee on Business and Professional Regulation included an unprecedented nine new members who were unfamiliar with the complexities of the Florida telecommunications marketplace. Despite five workshops on the issues of House Bill 1531, many of these new members felt that the issues were too complicated to be handled in the 1993 session. Steve Bousquet, *Telephone Companies Kill Bill Favorable to Cable TV*, MIAMI HERALD, March 3, 1993, at 3BR.

167. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF HOUSE BILLS at 171, HB 1531. The actual committee vote on House Bill 1531 was 27-2 with only Representative Frederick Lippman, Democrat, Hollywood, and Committee Chairman Jack Tobin, Democrat, Margate, supporting the measure. See Kennedy, *supra* note 156, at 3D.

the overwhelming defeat of House Bill 1531 before the House Committee on Business and Professional Regulation, the bill's Senate companion was narrowly defeated as time ran out for debate with the bill deadlocked in a 6-6 tie before the Senate Commerce Committee.¹⁶⁸

Notwithstanding its defeat, House Bill 1531 opened the eyes of the Legislature to the new technologies and services present in today's telecommunications marketplace. Furthermore, the legislation announced the presence of emerging competitive providers whose voice will most likely continue to be heard in the halls of the Legislature until the LEC monopoly is sufficiently relaxed to permit fair competition. The bill's sponsors also succeeded in pointing out many of the regulatory inefficiencies of the current system. The legislators' gradual realization of these inefficiencies will likely lead to further legislative attempts to update Florida's telecommunications regulatory structure.

Despite this promise for future reform, LEC-dominated telecommunications markets remain the status quo. With the failure of this legislation, Florida now lags dramatically behind other states that are pioneering the telecommunications industries of the future. Several states are spurring revolutionary telecommunications competition by implementing some of the ideas of House Bill 1531.

VI. HOUSE BILL 1531: IN USE THROUGHOUT THE NATION

While Florida continues to struggle with the regulatory advancement of the telecommunications industry, several other states are paving the way to a competitive telecommunications marketplace with regulatory mandates comparable to those contained in House Bill 1531. For example, many states have adopted detailed definitional structures to assist regulators in clarifying the legislative intent behind complex telecommunications laws. Legislators in some states have explicitly defined terms such as "basic local exchange service,"¹⁶⁹ "competitive service,"¹⁷⁰ "informational service,"¹⁷¹ and "unregulated

168. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF SENATE BILLS at 166, SB 1638; see also Kennedy, *supra* note 156, at 3D.

169. See MICH. COMP. LAWS § 484.2102(b) (1993) ("'Basic local exchange service' means the provision of an access line and usage within a local calling area for the transmission of high-quality 2-way interactive switched voice or data communication."); COLO. REV. STAT. § 40-15-102(3) (1992) ("'Basic local exchange service' means the telecommunications service which provides a local dial tone line and local usage necessary to place or receive a call within an exchange area.").

170. See MINN. STAT. § 237.57(2) (1992) ("'Competitive service' means a service that has been determined to be subject to effective competition or emerging competition."). To further clarify this definition for its regulatory commission, the Minnesota Legislature also added definitions for "effective competition" and "emerging competition." *Id.* §§ 237.57(3),(4). For a serv-

service”¹⁷² to give clear direction to their regulatory commissioners. While praised in these states, Florida’s Legislature rejected this form of classification in the defeat of House Bill 1531.

Another aspect of House Bill 1531 that is in effect in other states is a detailed framework of what constitutes anticompetitive behavior by an LEC. Again, more-advanced regulatory states, such as Michigan, have provided their regulatory commissioners with elaborate market protections to facilitate the emergence of telecommunications competition and advanced telecommunications services,¹⁷³ enabling Michigan

ice to be determined subject to “effective competition,” alternative service must be available to 50% of the company’s customers for that service. *Id.* § 237.59(5)(b). “Emerging competition,” on the other hand, occurs when alternative service is available to 20% of the customers for a given service. *Id.* § 237.59(5)(c).

171. See COLO. REV. STAT. § 40-15-102(10) (1992) (“‘Informational service’ means nonstandard services provided to customers by means of personnel and facilities which include personalized intercept, synthesized voice messages, specialized bill services, and personalized number services.”).

172. Michigan and Colorado have promulgated detailed lists of those services that are not regulated in their respective states, including enhanced services, paging, cellular, mobile and answering services, video, cable television, pay-per-view, shared tenant, private networks, financial services, networks, radio and television, WATS, personal communications networks, municipally owned telecommunication systems, 800 prefix services, and the reselling of a telecommunication service, centron and centron-like services, special access, and new products and services other than those necessary to provide basic local exchange service. See MICH. COMP. LAWS § 484.2401(1) (1993); COLO. REV. STAT. § 40-15-401(1) (1992).

173. For example, the Michigan Legislature has ordered that a basic local exchange service provider shall not do any of the following:

- (a) Discriminate against another provider by refusing or delaying access to the local exchange.
- (b) Refuse or delay interconnections or provide inferior connections to another provider.
- (c) Degrade the quality of access provided to another provider.
- (d) Impair the speed, quality, or efficiency of lines used by another provider.
- (e) Develop new services to take advantage of planned but not publicly known changes in the underlying network.
- (f) Refuse or delay a request of another provider for information regarding the technical design, equipment capabilities and features, geographic coverage, and traffic patterns of the local exchange network.
- (g) Refuse or delay access or be unreasonable in connecting another provider to the local exchange whose product or service requires novel or specialized access requirements.
- (h) Upon a request, fail to fully disclose in a timely manner all available information necessary for the design of equipment that will meet the specifications of the local exchange network.
- (i) Discriminate against any provider or any party who requests the information for commercial purposes in the dissemination of customer proprietary information. A provider shall provide without unreasonable discrimination or delay telephone directory listing information and related services to persons purchasing telephone directory listing information to the same extent and in the same quality as provided to the pro-

regulators to concentrate on other regulatory concerns. Classifying anticompetitive behavior this way could have saved the FPSC and its staff nearly three years of effort expended in the cross-subsidization docket¹⁷⁴ and would have likely prevented a pending lawsuit involving Southern Bell and Peoples Telephone Company.¹⁷⁵

Some states require that their regulatory commissions not only classify each service, but also file annual reports detailing the status of the telecommunications marketplace.¹⁷⁶ In California and Michigan, the public regulatory commissions must report to their respective state legislatures on substantive telecommunications issues, such as the impact of deregulation, the changes in the telecommunications marketplace, the emergence of competitive telecommunications markets, the status of market-share concentration, and the availability of alternative services.¹⁷⁷ These reports help educate legislators on telecommunications issues and advise them on necessary regulatory changes.

In Florida, the FPSC is required to prepare a biennial report "on competition in the telecommunications industry" and "a detailed exposition of any and all alternative regulatory treatments" implemented or planned during the preceding two years.¹⁷⁸ While these reports present an overview of some aspects of Florida's telecommuni-

vider, affiliates of the provider, or any other listing information purchaser.

(j) Refuse or delay access by any person to another provider.

(k) Sell, lease, or otherwise transfer an asset to an affiliate for an amount less than the fair market value of the asset.

(l) Buy, lease, or otherwise acquire an asset from an affiliate of the provider for an amount greater than the fair market value of the asset.

(m) Bundle unwanted services or products for sale or lease to another provider.

(n) Perform any act that has been prohibited by this act or an order of the commission.

(o) Except with the approval of the commission, jointly market or offer as a package, at a discounted rate, 1 or more unregulated services with a regulated service.

(p) Sell services or products, extend credit, or offer other terms and conditions on more favorable terms to an affiliate of the provider than the provider offers to other providers.

MICH. COMP. LAWS § 484.2305(1) (1993).

174. See *supra* notes 133-34 and accompanying text.

175. See *Peoples Tel. Co. v. BellSouth Telecommunications, Inc.*, No. 93-1260 (S.D. Fla., filed July 1, 1993).

176. See CAL. PUB. UTIL. CODE § 495.5 (West 1991); MICH. COMP. LAWS § 484.2202(f) (1993).

177. See CAL. PUB. UTIL. CODE § 495.5 (West 1991); MICH. COMP. LAWS § 484.2202(f) (1993).

178. FLA. STAT. § 364.386(1) (1991). In addition to this report filed by the FPSC, the Office of Public Counsel, the public's representative before the Commission, is also directed by statute to submit a report on competition in the telecommunications industry and how alternative regulatory methods have benefitted the ratepayers and consumers in Florida. FLA. STAT. § 364.386(2) (1991).

cations marketplace, they do not offer the complete outlook presented by other state regulatory commissions in guiding their legislators in evaluating complex telecommunications issues. Such detailed reports, like those prepared in Michigan and California, could have given the Florida legislators an in-depth, independent opinion to assist them in their evaluation of House Bill 1531 and its substantive issues.¹⁷⁹

In addition to providing definitive direction to their regulatory commissions comparable to those proposed in House Bill 1531, the more advanced states also grant regulators the freedom to assist in the development of advanced, competitive telecommunications services. Some states, such as Michigan, allow their commissioners to fully relax telecommunications regulations for experimental projects deemed to be in the public interest.¹⁸⁰ Such offerings, while generally on a six-month or one-year trial basis, assist companies and regulators in trouble-shooting new services without impacting universal service.

New York is paving the way in advanced telecommunications services and competition. The New York Public Service Commission (NYPSC) has earned the reputation of being the leading regulatory advocate of increased local telecommunications competition.¹⁸¹ Without broad legislative directives, the NYPSC has opened the doors to competition in all areas of telecommunications. The most pronounced area of competitive advancement, however, is in competitive access.

Since the mid-1980s, the NYPSC has initiated broad regulatory policies that have pioneered competitive access deregulation. New York became the first state in the nation to authorize the provision of intraexchange services by a CAP,¹⁸² the first to adopt a generic policy regarding "bypass" of the LEC network,¹⁸³ the first to require an LEC to collocate with the networks of its local competitor,¹⁸⁴ and the

179. With regard to HB 1531, the newest legislators did not have the advantage of a 1993 report prepared by the FPSC because the reports are required to be submitted by the FPSC and Office of Public Counsel on January 1 of even numbered years. FLA. STAT. § 364.386(1) (1991). Between the 1992 report and the 1993 legislative session, the competitive telecommunications marketplace changed dramatically as LEC competitors such as AAVs more than quadrupled in the State of Florida. See generally FLA. PUB. SERV. COMM'n, *supra* note 72, at 1-4.

180. See, e.g., MICH. COMP. LAWS § 484.2301(4) (1993).

181. See Schwartz & Hoagg, *supra* note 4, at 319-24.

182. Jean L. Kiddoo & Jonathan E. Canis, *Developments in the Local Exchange Market*, 352 PRAC. L. INST./PAT., COPYRIGHTS, TRADEMARKS, & LITERARY PROP. 393 (PLI Order No. G4-3894, Dec. 3-4, 1992).

183. Telephone Services that Bypass Local Exchange or Toll Networks, Case No. 28710, Opinion and Order Concerning Bypass, Opinion No. 85-16, 70 PUR 4th 1 (N.Y. Pub. Serv. Comm'n, Oct. 3, 1985).

184. Kiddoo & Canis, *supra* note 182 (citing Opinion and Order on Pooling, Collocation and Access Rate Design, Case No. 28425, Opinion No. 92-13 (N.Y. Pub. Serv. Comm'n, May 29, 1992), modified on rehearing, Opinion and Order Granting in Part and Denying in Part Petitions for Rehearing or Clarification, Opinion No. 92-13(A) (N.Y. Pub. Serv. Comm'n, Sept. 4, 1992)).

first to consider restructuring switched access transport pricing to create competition in that market.¹⁸⁵ Some of these thriving competitive policies, such as collocation, were incorporated in House Bill 1531.¹⁸⁶ Despite the proven successes of the New York regulatory structure, the Florida Legislature has chosen to continue the status quo of LEC-dominated, intrastate telecommunications.

House Bill 1531 was, in part, a culmination of the regulatory successes of New York and other states. Borrowing from the experiences of other states, this legislation could have vaulted Florida to the cutting edge of telecommunications regulation. In defeating this legislation, however, Florida has signaled that it will approach competition in the telecommunications industry with a more cautious tenor than its sister states. In order to protect the emerging telecommunications markets in Florida, this caution should also be tempered with the wisdom of insightful observation of the successes of other states.

VII. CONCLUSION

The defeat of House Bill 1531 resulted in preservation of the status quo in the Florida telecommunications markets. The efforts of Representatives Lippman and others did, however, open the eyes of the Legislature to current shortcomings of the system. House Bill 1531 pointed out the current regulatory restraint placed on the AAVs' abilities to connect unaffiliated entities. The bill also called attention to the limited regulatory freedom given to the FPSC to authorize experimental services and revolutionary forms of competition in areas such as switched local access service. By revealing such shortfalls in the present system and highlighting the current trends in other states, the Florida Legislature appears to be poised to revisit some of these issues and to reorganize the regulatory structure to grant the FPSC greater regulatory freedom to expand the competitive telecommunications markets in Florida.

While the FPSC has been slow to implement the mandates of the 1990 sunset review, House Bill 1531 appears to have spurred the Commission and its staff into reevaluating the competitive nature of Florida's local telecommunications markets.¹⁸⁷ Current pending dockets

185. *Id.*

186. *See, e.g.*, HB 1531 § 7 (1993) (allowing telecommunications providers to collocate).

187. Since the initial proposal of House Bill 1531, the FPSC and its staff have taken a more liberal approach toward telecommunications regulation. The FPSC and its staff are now considering dockets on the presence of competitive services and the possibility of allowing competitors to collocate with LEC networks, all of which were offered as part of House Bill 1531. *See In re* Investigation into which LEC services are effectively competitive, Docket No. 930046-TP (Fla.

appear to offer more opportunities for the FPSC to take steps toward the promises of the "Information Age." While only time will tell the impact of House Bill 1531 on Florida's telecommunications regulation, it appears that Florida is now slowly progressing toward the twenty-first century.

Pub. Serv. Comm'n); *In re* Petition for expanded interconnection for AAVs within LEC central offices, Docket No. 921074-TP (Fla. Pub. Serv. Comm'n). While these dockets will not be fully resolved until late 1994 or 1995, it appears that House Bill 1531 has spurred some regulatory action.

