
THE PUBLIC INTEREST AND THE INTRODUCTION OF COMPETITION INTO LOCAL TELEPHONE NETWORKS

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"Today our world is being remade . . . thanks to the scientific and entrepreneurial genius of American workers in this country, it has created vast, vast opportunities to enrich ourselves in body and in spirit . . . But the revolution has been held back by outdated laws, designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with the future. We will help create an open marketplace where competition and innovation can move as quickly as light."¹

The Telecommunications Act of 1996 ("1996 Act")² was enacted as a dramatic and thorough overhaul of the Communications Act of 1934.³ The 1996 Act was intended to promote competition and reduce regulation in order to secure lower prices for American telecommunications

customers and deploy new telecommunications technologies.⁴ In this endeavor, Congress solicited comments from the telecommunications industry, regulatory authorities and the public before enacting the 1996 Act.⁵ One hotly debated provision of the 1996 Act mandates the Federal Communications Commission ("FCC") to promulgate regulations within six months to promote interconnection between local exchange carriers ("LECs") and any requesting telecommunications carriers.⁶

Upon issuance of the FCC's August 8, 1996, First Report and Order⁷ on interconnection, more than thirty-five petitioners,⁸ led by the Iowa

¹ President Bill Clinton, Remarks at the signing of the Telecommunications Act of 1996 (Feb. 9, 1996).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)). The opening paragraph of the 1996 Act states it is "[a]n act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of telecommunications technologies." *Id.*

³ 47 U.S.C. § 151 (1994). The purpose of the Communications Act of 1934 was "to make available . . . to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communications service . . . for the purpose of securing a more effective, execution of this policy." *Id.*

⁴ See generally 47 U.S.C.A. § 151 (West Supp. 1996). See also Federal Communications Commission Chairman Reed Hundt, Speech at the *Antitrust Conference for Corporate General Counsels* at 1 (Nov. 8, 1996).

⁵ See, e.g., *A Hearing on H.R. 1555: Communications Act of 1995, Before the Subcomm. on Telecomm., House Comm. on Commerce*, 103rd Cong., 1st Sess., (statements of Bob Boaldin, President of Elkhart Telephone and first Vice-Chairman of the United States Telephone Association), No. 104-34, May 10-12, 1995. Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Commerce, and Bradley Stillman, Telecommunications Policy Director, Consumer Federation of America, at 180, 219, 336.

⁶ See 47 U.S.C.A. § 251(d)(1) (West Supp. 1996). Section 251 of the 1996 Act states that it is the general duty of each telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommu-

nications carriers; and not to install network features, functions or capabilities that do not comply with the guidelines and standards established pursuant to section 255 and 256." *Id.* at § 251(a)(1-2).

⁷ See generally Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15505 (1996) [hereinafter *First Report and Order*]. The introduction to the First Report and Order states that under the 1996 Act, the "[FCC] and the states [will] remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of customers through a regulated monopoly network. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition." *Id.* at para. 1.

⁸ The complete list of petitioners includes Iowa Utilities Board, The Southern New England Telephone Company, Bell Atlantic Corporation, Ameritech Corporation, U.S. West, Inc., GTE Service Corporation (consisting of GTE Alaska, Inc., GTE Arkansas, Inc., GTE California, Inc., GTE Florida, Inc., GTE Midwest, Inc., GTE South, Inc., GTE Southwest, Inc., GTE North, Inc., GTE Northwest, Inc., GTE Hawaiian Telephone Company, Inc., GTE West, Inc., Contel of California, Inc., Contel of Minnesota, Inc. and Contel of the South, Inc.), New York Telephone Company, Cincinnati Bell Telephone Company, The Public Service Commission of the State of New York, SBC Communications, Louisiana Public Service Commission, Florida Public Service Commission,

Utilities Board and joined by organizations as diverse as GTE, Bell Atlantic, BellSouth and the Florida and Louisiana Public Service Commissions, filed for a stay of the interconnectivity pricing provisions⁹ with the U.S. Court of Appeals for the Eighth Circuit. The stay was requested pending judicial review of the pricing provisions of the FCC's August 8, 1996 First Report and Order.¹⁰ Although each petitioner had particular reasons for joining the request for a stay the majority of their concerns centered around the pricing guidelines outlined by the FCC.¹¹ The petitioners believed that they would be unfairly burdened by inadequate compensation paid to them by competitors as directed by the new FCC pricing guidelines.¹²

After review of the petition, the Eighth Circuit granted the stay on October 15, 1996, finding for the petitioners that all requirements to grant a stay were satisfied.¹³ The stay applies only to provisions in the law regarding the FCC's pricing

rules and the "pick and choose" rule contained in the FCC's First Report and Order.¹⁴ The Eighth Circuit heard oral arguments on January 17, 1997, and a final decision date has yet to be announced.¹⁵ No matter how the Eighth Circuit rules, the case is widely expected to be appealed to the Supreme Court, where likely it will not be heard until 1998.¹⁶

In the meantime, while the various players are choose sides and allegiances, the public continues to wait for the improvements anticipated when the 1996 Act was passed – better telecommunications services with higher quality at better prices for American consumers.¹⁷ One year later, as basic parts of the 1996 Act are litigated, the status quo remains.¹⁸

In Section I, this Note will examine the history of competition in the telephone industry. Section II presents an overview of the debated interconnection provisions of the Telecommunications Act of 1996. Section III examines the FCC's First

South Dakota Public Utilities Commission, The Public Utilities Commission of the State of California, United States Telephone Association, Rural Telephone Coalition, Competitive Telecommunications Association and Mississippi Public Service Commission. *Iowa Util. Bd. v. FCC*, 4 Comm. Reg. (P & F) 1360 (8th Cir. 1996). All cases were consolidated by the September 11, 1996 order of the Judicial Panel Multidistrict Litigation Docket No. RTC-31, pursuant to Rule 24 of the rules of Procedure of the Judicial Panel on Multidistrict Litigation. See 28 U.S.C. § 2112(a)(3) (1994).

⁹ Section 251 of the 1996 Act requires incumbent local exchange carriers (incumbent LECs) to allow other telecommunications carriers to "interconnect" with the incumbent LECs existing infrastructure to facilitate competition for local telephone service. See 47 U.S.C.A. § 251 (West Supp. 1996). To this end, the FCC promulgated pricing rules which require that state commissions use the "total long run incremental cost" ("TELRIC") method to calculate the cost an incumbent LEC incurs in making its infrastructure available. See *First Report and Order*, 11 FCC Rcd. at 16217-18 (Appendix B-Final Rules §§ 51.503, 51.505). Using the TELRIC method, the state commissions then determine the price an incumbent LEC may charge its competitors. *Id.* Petitioners object to the TELRIC method on two grounds: (1) the method does not consider "historical" and "embedded" costs the incumbent LECs have incurred in the past and (2) it assumes that incumbent LECs are using the most efficient technology available regardless of what is actually being utilized resulting in prices that are artificially low. *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362; see also *First Report and Order*, 11 FCC Rcd. at 16218. (Appendix B-Final Rules, § 51.505(b)(1)); see also *supra* note accompanying text 148. Secondly, petitioners argue that the FCC's proxy rates which are to be utilized if state commissions choose not to dictate pricing guidelines based on the TELRIC method do not accurately reflect their costs. *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362; *First Report and Order*, *supra* note 7, at 16217-18, 21, 29 (Appendix B-Final Rules, §§ 51.503(b)(2), 51.513,

51.705(a)(2), 51.707). Lastly, petitioners argue that any negotiated agreements would never be finally binding because the FCC's "pick and choose" rule allows competitors to "pick and choose" among the lowest priced individual elements and services they need from a different approved agreements with other carriers. For example, if Carrier A and an LEC had reached an approved agreement and Carrier B made a similar agreement and Carrier B had negotiated a lower price for one of the elements or services provided by the LEC, then Carrier A would be able to demand that its agreement be modified to reflect the lower cost negotiated by Carrier B. *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362; *First Report and Order*, *supra* note 7, at 16,235 (Appendix B-Final Rules, § 51.809).

¹⁰ See generally *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) 1360. See also Leslie Cauley, *Court Delays Implementing FCC Rules To Break Up Local Telephone Monopolies*, WALL ST. J., Sept. 30, 1996, at A4.

¹¹ See *supra* text accompanying note 9.

¹² *Id.*

¹³ See *infra* text accompanying note 115.

¹⁴ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1355-56.

¹⁵ *Telecomm Roundtable*, *infra* note 89, at 33, Comments of William B. Barfield of BellSouth Corp.

¹⁶ Scott Ritter, *Courts Expected to Deny Bid for More Rivalry In the Local Markets*, WALL ST. J., Nov. 11, 1996, at B9 (explaining the comments of FCC Chairman Hundt that the FCC will appeal the decision if the Eighth Circuit affirms the stay provisions). See Frolio, *infra* note 78, at B14. The court's decision is not anticipated to resolve all of the issues arising under the 1996 Act leaving open the possibility that the losing party will seek certiorari. *Id.* at B15. AT&T and others have asserted that the FCC regulations on appeal are deserving of review by the Supreme Court. *Id.*

¹⁷ See generally 47 U.S.C.A. § 151 (West Supp. 1996).

¹⁸ Bob Starzynski, *Getting the Act Together, After Almost a Year, the Telecommunications Act of 1996 has Yet to Deliver on its Promise*, WASH. BUS. J., Jan. 17, 1997.

Report and Order including justifications for its actions. Section IV details the stay by the Eighth Circuit Court of Appeals, and Section VI debates the question of whether the public interest has been served by all of the preceding actions.

I. BRIEF HISTORY OF COMPETITION IN THE TELEPHONE INDUSTRY

Congress enacted the Communications Act of 1934 ("1934 Act") to regulate interstate communications and to assure universal provision of communications services both interstate and internationally.¹⁹ The 1934 Act incorporated the premise that telephone service was best served by a single firm who could provide better and lower cost services than competing suppliers.²⁰ It was also intended to ensure that AT&T, who provided the majority of telephone service, did not abuse its power.²¹ Regulatory protection, however, "also ensured that AT&T would remain a government-sanctioned monopoly."²²

The 1934 Act also created the FCC whose mis-

sion was to provide regulatory guidance over the emerging and increasingly specialized communications industry.²³ The FCC was given broad discretionary power over wire and radio communications.²⁴

Until 1984, the telephone system in the United States operated under the "regulated monopoly" concept.²⁵ Rates for business and residential customers were reserved for state and local governments.²⁶ Long distance fell under the purview of the FCC,²⁷ pursuant to authority granted by the Communications Act of 1934²⁸ and previously held by the Interstate Commerce Commission.²⁹ The FCC and the states together shared the responsibility of cost allocation between local and long distance use.³⁰

Not comfortable with AT&T's monopoly on telephone services, the United States Department of Justice ("DOJ") filed suit in 1949 in federal district court against AT&T and its subsidiary, Western Electric,³¹ for alleged violations of Sections 1, 2 and 3 of the Sherman Anti-trust Act.³² The DOJ sought to sever the connection between Western

¹⁹ See *supra* note 3

²⁰ See 141 CONG. REC. S7881 (daily ed. June 7, 1995) (Statement of Sen. Lott, R-Miss.).

²¹ See *id.*

²² *Id.*

²³ See *id.*

²⁴ See *American Broadcasting Co. v. FCC*, 191 F.2d 492, 498 (D.C. Cir. 1951). "In performing its functions under [the 1934] Act the Commission is given broad discretion . . . The purpose of Congress in establishing the Commission was to set up an agency capable of coping with the ever-changing and constantly-increasing problems of a booming industry." *Id.*

²⁵ See generally *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

²⁶ See 47 U.S.C. § 152(b)(1) (1994). See also Higgins and Rubin, *infra* note 51, at xiv. The Communications Act of 1934 regulated AT&T profits through a technique known as "continuing surveillance," which consisted of informal monitoring. This technique, born of an era in which rates were declining due to productivity gains was to the satisfaction of both AT&T and the FCC. The method changed in the late 1960s when the FCC prescribed a maximum allowed rate of return. Daniel Kelley, DEREGULATION AFTER DIVESTITURE, THE EFFECT OF THE AT&T SETTLEMENT ON COMPETITION (FCC Office of Plans and Policy Working Paper Series, 1982) at 16.

²⁷ See Kelly, *supra* note 26, at 12 (explaining federal regulation has focused on five broad areas: "rate of return, regulation, tariff regulation of individual services, entry policies, efforts to define the boundary between regulated and unregulated activities and deregulation of competitive carriers").

²⁸ See generally 47 U.S.C. § 151 (1994).

²⁹ The Interstate Commerce Commission was granted oversight of telephone regulation and other communications

carriers by the Mann-Elkins Act. See generally *Mann-Elkins Act of 1910*, ch. 309 § 7, 36 Stat. 544-45.

³⁰ See, e.g., Kelley, *supra* note 26, at 12-13 (explaining both state and federal regulators have an interest in the size of local facilities and its allocation, depreciation rates and the expenses of individual telephone companies allocated to the federal jurisdiction are determined by the "separations" process and allocation of local exchange investment).

³¹ See *United States v. AT&T*, 552 F. Supp. 131, 135 (D.D.C. 1982). Before the break-up of the AT&T monopoly in 1984, Western Electric was a wholly owned subsidiary of AT&T whose purpose was to manufacture telecommunications equipment for AT&T's other divisions. *Id.* at 135 n.3. Western Electric also provided telecommunications equipment and services to government agencies and to independent telephone companies. *Id.*

³² See *id.* at 135-36. The purpose of the Sherman Act is to prevent undue restraints of interstate commerce, to maintain the appropriate freedom in public interest, and to offer protection from subversive or coercive influences of monopolistic endeavor. See 15 U.S.C. §§ 1-3 (1994). The views of Senator Sherman (R-OH) are expressed in the following passage describing the case against monopolistic mergers and predatory practices: "The sole object of such a combination is to make competition impossible . . . [s]uch a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public . . . and the individuals engaged in it should be punished as criminals." 21 CONG. REC. 2457 (1890). See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), *Fedderson Motors v. Ward*, 180 F.2d 519, 521 (D.D.C. 1950) (explaining the interpretation by the court of the Sherman Act).

Electric and AT&T.³³ Significant pressure by AT&T and its allies in the United States Department of Defense³⁴ stalled resolution of the case.³⁵ A consent decree, which did not come until 1956, between AT&T and the DOJ allowed the monopoly to remain in place.³⁶

A series of antitrust lawsuits continued to be filed over the course of the 1960s and 1970s by various competitors who sought to compete with AT&T, particularly in the long-distance market.³⁷ The suits were generally resolved through injunctive relief which constrained some AT&T activity.³⁸ The petitioners enjoyed modest success, but AT&T's monopoly remained neatly intact.

On November 20, 1974, the DOJ again filed suit against AT&T, Western Electric and Bell Labora-

tories³⁹ alleging a violation of Section 2 of the Sherman Anti-trust Act by monopolizing activities within telecommunications services.⁴⁰ Among other things, the Justice Department sought complete divestiture of the Bell Operating Companies ("BOCs")⁴¹ from AT&T, thereby erasing AT&T's monopoly control of local service.

After several years of delay tactics and discovery motions, the trial was held in the District of Columbia on January 15, 1981, before United States District Court Judge Harold Greene.⁴² A proposed consent decree between the parties was submitted to the court in 1982, modified by Judge Greene, negotiated over the next two years and finally embodied as the Modified Final Judgment ("MFJ").⁴³ The MFJ separated the BOCs⁴⁴ from

³³ See *AT&T*, 552 F. Supp. at 136.

³⁴ *Id.* at 136-37. Then Secretary of Defense Robert A. Lovett and other members of the Department of Defense met with the president of Bell Laboratories, Dr. M. J. Kelly in February 28, 1952. Kelly sought their help in persuading the Justice Department to suspend prosecution until the end of the Korean War. Lovett requested the postponement in a letter to the Attorney General dated March 20, 1952. *Id.* at 136. "Indefinite postponement was requested by the Defense Department despite the fact that neither Mr. Lovett. . . nor anyone else in the Department had made an independent investigation to determine whether trial of the suit would actually impede the mobilization effort or whether Bell System personnel working on defense matters would actually be needed for preparation of trial of the case." *Id.* at 136 n.9 citing *Report of the Antitrust Subcommittee of the Department of Justice*, 86th Cong., 1st Sess., Jan. 30, 1959 at 47.

³⁵ *Id.* at 137.

³⁶ *Id.* at 137-138. As part of the consent decree, AT&T agreed to provide only common carrier communications services and Western Electric agreed to the manufacture of equipment other than that used by the Bell System (the local carrier for the AT&T network). *Id.* at 138.

³⁷ See, e.g., *Carterphone v. AT&T*, 13 F.C.C.2d 571 (1968). The Carterphone decision allowed interconnection of privately supplied terminal equipment directly to the network. See generally *id.* Entry restrictions in the interstate transmission market via microwave frequencies by companies other than AT&T were first reduced with the *Above 890* decree. See generally *Allocation of Frequencies in the Bands Above 890 Mc*, 27 F.C.C. 359 (1959). See *M.C.I. Telecomm. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977). New entrants were given authority to provide a full spectrum of interstate, interexchange services, including a shared private line service that resembled AT&T's MTS/WATS services. See also *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959). AT&T responded to these new entries into the long distance arena by lowering prices for private line services. The FCC's *First Computer Inquiry* held that new data communications should not be regulated. See generally *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 F.C.C.2d 267 (1971). The *Second Computer Inquiry* determined that all customer premises equipment should be unregulated; it also adopted certain accounting and structural

separation requirements and required AT&T to form a wholly separate subsidiary to offer any unregulated services or equipment. See generally *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384 (1980). *The Third Computer Inquiry* sought structural separation by classifying combined telecommunications and data processing services as "basic" or "enhanced." See generally *Third Computer Inquiry I*, 104 F.C.C.2d at 968.

³⁸ See Peter Temin, *The MFJ: An Imperfect Solution*, in *REGULATING COMMUNICATIONS, THE BABY BELLS CASE FOR COMPETITION 3* (Richard S. Higgins and Paul H. Rubin eds., 1995).

³⁹ Bell Telephone Laboratories was AT&T's telecommunications research and development facility which was jointly owned by AT&T and Western Electric, each owning 50% of the stock. See *United States v. AT&T*, 552 F. Supp. 131, 136 n.6 (D.D.C. 1982).

⁴⁰ *Id.* at 139. DOJ sued AT&T for: (1) exploitation of its "bottleneck" monopoly in local services to give it an advantage in long distance, equipment and information markets; (2) overcharging other firms for interconnection to the Bell System; and (3) cross-subsidizing its competitive services by shifting costs to noncompetitive regulated markets, thereby allowing it to set prices below costs in its competitive markets and to force rivals, including those with low costs, to withdraw. *Id.* at 139 n.18. See also *supra* note 32 and accompanying text.

⁴¹ See *AT&T*, 552 F. Supp. at 139. The Bell Operating Companies, the majority of which were wholly owned by AT&T, provide the means by which local telephone service is furnished. See *id.* at 139 n.19.

⁴² See *id.* at 140. After opening arguments, the trial was recessed for six weeks to afford an opportunity for a negotiated settlement. The negotiations yielded no useful result and the trial was resumed on March 4, 1981. *Id.* The magnitude of the evidence presented was immense. Between both parties, more than 350 witnesses and tens of thousands of pages of documents were offered into evidence. *Id.*

⁴³ *Id.* at 225-26. See also Higgins and Rubin, *infra* note 51, at xiv. The MFJ called for the following:

- (1) AT&T would divest itself of its of its twenty-two local BOCs which would be regrouped under seven regional holding companies (RBOCs) by January 1, 1984.
- (2) The BOCs would be allowed monopoly service within 161 newly formed local access and service areas

AT&T, and set specific paths to effect the transition from monopoly to a regulated environment including both AT&T and the BOCs.⁴⁵ Certain line-of-business restrictions were also imposed;⁴⁶ AT&T was prohibited from providing local exchange services and the BOCs were prohibited from offering long-distance service.⁴⁷

In approving the MFJ, Judge Greene clearly wanted to promote competition, and introduced it into areas he found technically feasible, most notably the long-distance market.⁴⁸ The BOCs (generally referred to as the local exchange carriers or LECs), however, controlled a network of in-

frastructure which at the time represented a prohibitive barrier to competition on the local level.⁴⁹ The MFJ was not intended to be permanent and Judge Greene retained jurisdiction over the matter to modify and enforce the MFJ and the reorganization plan.⁵⁰ The MFJ was meant only to remain in place long enough to allow competition to flourish and not beyond the date when the local exchange markets could be subject to competition.⁵¹ By 1994 conditions and technology had changed substantially, and several BOCs petitioned Judge Greene to vacate the MFJ in its entirety.⁵²

(LATAs). Inter-LATA service would be provided by long distance carriers (AT&T and any new competitors).

(3) AT&T would provide all other interexchange carriers and information providers access to its network of equal quality, type and price.

(4) The 22 BOCs and their respective RBOCs would not manufacture equipment nor would they discriminate in equipment procurement.

(5) AT&T would retain Bell Labs and Western Electric.

(6) The RBOCs would retain control of the Yellow Pages.

(7) The RBOCs would retain the "Bell" trademark rights, but AT&T could do so only in connection with Bell Labs.

(8) The RBOCs were allowed to enter unregulated competitive lines of business where the court determined they could not exercise their monopoly power.

(9) AT&T was allowed to enter information services and other markets outside of regulated communications.

Marcellus S. Snow, *The AT&T divestiture: a 10-year retrospective*, in *BEYOND COMPETITION: THE FUTURE OF TELECOMMUNICATIONS* at 211-12 (D. Lamberton ed. 1995).

⁴⁴ At the time the case was decided, the BOCs consisted of 22 entities: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell telephone Company, Pacific Northwest Bell Telephone Company, South Central Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, , The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Mountain States Telephone and Telegraph Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company and Wisconsin Telephone Company. *Id.* at 232 (Appendix A). These 22 entities were reorganized into seven regional BOCs (RBOCs): NYNEX, Pacific Telesis, SBC Communications, U.S. West, Bell South, Ameritech and Bell Atlantic. James E. Meadows, *Telecommunications Law in the Age of Convergence*, in *PRACTISING LAW INSTITUTE ANNUAL INSTITUTE ON COMPUTER LAW* 201, 205 (June 17, 1996).

⁴⁵ See *AT&T*, 552 F. Supp. at 223. The court mandated that not later than six months after the effective date of the MFJ, AT&T shall submit a plan that would include the follow-

ing steps:

(1) The transfer from AT&T and its affiliates to the BOCs or its new owners all facilities, information and personnel that would allow the BOC to perform independently of AT&T and meet the equal access requirements.

(2) The separation within the BOCs of all facilities personnel and books of account between those relating to the exchange telecommunications, exchange access functions and other functions provided that there shall be no joint ownership of facilities.

(3) The termination of the License Contracts between AT&T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries.

(4) The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT&T by means of a spin-off of stock of the separated BOCs to the shareholders of AT&T provided that nothing shall require or prohibit consolidation of ownership of the BOCs.

Id. at 226-227. The BOCs were also required to provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness. See *id.* at 227.

⁴⁶ See *supra* note 43 and accompanying text.

⁴⁷ See *AT&T*, 552 F. Supp. at 226-27 (Modification of Final Judgment).

⁴⁸ *Id.* at 223. Judge Green lifted previous line-of-business restrictions on AT&T and permitted them to enter the "growing computer, computer related, and information market." *Id.* He commented that all of the developments of the case were "plainly in the public interest." *Id.* AT&T was, however, prohibited from entering the electronic publishing industry due to the potential of AT&T to acquire a substantial monopoly over the generation of news which would strike at a principle which lies at the heart of the First Amendment. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 231.

⁵¹ Richard S. Higgins and Paul H. Rubin, *An Overview of the Costs and Benefits of the AT&T Antitrust Settlement*, in *DEREGULATING COMMUNICATIONS, THE BABY BELLS CASE FOR COMPETITION* (Richard S. Higgins and Paul H. Rubin eds. 1995).

⁵² *Id.* at xvi. The BOCs argued that there was a substantial cost to customers by not allowing the BOCs competitive entry into the long distance market and, on the other hand, there is no longer a significant risk of "monopoly leveraging" or "cross subsidization" by the BOCs. *Id.*

II. THE TELECOMMUNICATIONS ACT OF 1996

A. Overview of Local Interconnectivity Provisions

Congress enacted the Telecommunications Act of 1996 on February 8, 1996 ("1996 Act") "to promote competition and reduce regulation in order to secure lower prices, higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."⁵³ Where specified, the 1996 Act supersedes the Communications Act of 1934, which represented Congress' first attempt to provide for the installation and regulation of a widely accessible, reasonably priced communications infrastructure in the United States.⁵⁴ The 1996 Act is comprehensive, addressing everything from interconnection and the BOCs' entry into the long distance market⁵⁵ to number parity, broadcast services, cable services, regulatory reform, obscenity and violence in the media.⁵⁶

The 1996 Act specifically encouraged "rapid employment of new telecommunications technologies."⁵⁷ Congress acknowledges in the opening paragraph of the 1996 Act that the pace of technological developments and breakthroughs has created new markets, new products and services and that access should be easily obtained across the spectrum of providers and users.⁵⁸

In its discussion of developing competitive markets, the first substantive item addressed by Congress is interconnection.⁵⁹ The 1996 Act defines interconnection as the duty of every telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."⁶⁰ Specifically, the 1996 Act directs local exchange carriers ("LECs") to provide such interconnectivity with the same quality they enjoy and the same equipment they use, at rates which are just, reasonable and non-discriminatory.⁶¹ Interconnection is to be implemented through "the duty [of each LEC] to negotiate in good faith."⁶²

The second provision is the mandate for unbundled access, which is the duty of LECs to provide to any requesting telecommunications carrier access to any, or all, parts of its network as are technically feasible, so that the parts may be recombined by the requesting telecommunications carrier to provide its own telecommunications service.⁶³

The final disputed provision of the 1996 Act is the duty of the LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers.⁶⁴ They are obliged to offer these services to other telecommunications carriers at wholesale rates, excepting some oversight by state commissions where applicable.⁶⁵

⁵³ See generally 47 U.S.C.A. § 151 (West Supp. 1996).

⁵⁴ 47 U.S.C. § 151 (1994). Section 151 codifies the Communications Act of 1934 and creates the FCC whose purpose is "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and worldwide wire and communication service . . ." *Id.*

⁵⁵ See generally, Michael F. Finn, *The Public Interest and Bell Entry Into Long Distance Under Section 271 of the Communications Act*, 5 COMMLAW CONSPECTUS 203 (1997) (explaining the BOCs must meet a fourteen point checklist on competition before being allowed to compete in long-distance marketplace).

⁵⁶ See generally 47 U.S.C.A. § 151 (West Supp. 1996).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* § 251(c)(2). Specifically, interconnection means the duty for a local exchange carrier to provide connection with any requesting carrier's network transmission and routing of exchange service and access, "at any technically feasible point within the carrier's network," equal in quality to its own service or to service it provides others, and at rates which are "just, reasonable and nondiscriminatory." *Id.*

⁶⁰ *Id.* § 251(a)(1). This provision is further refined by the requirement to connect at "any technically feasible point within the carrier's network." See also *infra* note 148 and accompanying text.

⁶¹ *Id.* § 251(c)(2)(d). This provision also stipulates that the terms and conditions for interconnection set by carriers comply with Section 252, which outlines procedures to be used for negotiation of agreements, arbitration, and approval of agreements. *Id.* § 252.

⁶² *Id.* § 251(c)(1). Upon receiving a request for interconnection, services, or network elements pursuant to Section 251, an incumbent LEC may "negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers . . . the agreement shall be submitted to the State's commission." *Id.* § 252(a)(1).

⁶³ *Id.* § 251(c)(3). Unbundled access is to be provided at "rates, terms and conditions that are just, reasonable and nondiscriminatory" to any requesting telecommunications carrier, and also in accordance with the provisions of Section 252. *Id.*

⁶⁴ *Id.* §§ 251(c)(1)-(6). Not only must carriers provide their services to other telecommunications carriers at wholesale rates, but they may not thwart or limit the resale of such services to others, except as directed by a State commission regarding a particular category of subscribers. *Id.*

⁶⁵ *Id.* § 251(c)(4)(B). A State commission may prohibit a carrier which obtains services at wholesale rates from offering those services to a category of customers which previously only received them at retail rates, if such prohibition is consistent with the regulations by the FCC. *Id.*

B. Implementation and Role of Federal and State Commissions

Congress mandated the FCC to "complete all actions necessary to establish regulations to implement the requirements" of the law within six months of February 8, 1996.⁶⁶ The FCC was given specific authority to determine how to develop access standards,⁶⁷ but state access regulations were also recognized and upheld, wherever they do not conflict.⁶⁸ Pricing of various services is specifically not mentioned in this section of the 1996 Act.

Congress did, however, specify a rather intricate arrangement whereby carriers requesting interconnection services or network elements would negotiate voluntarily with the LECs to enter into a binding agreement covering itemized charges for interconnection and each service or network element included.⁶⁹ It also provided for compulsory arbitration by state commissions for disputes,⁷⁰ determining, among other things, time frames for responses.⁷¹ Under the section concerning "standards for arbitration," Congress clearly states that "[A] state commission shall . . . establish any rates for interconnection, services, or network elements."⁷²

Furthermore, when specifically discussing pricing standards, the 1996 Act refers to "determinations by a state commission of the just and reasonable rate for the interconnection of facilities and

equipment."⁷³ The references to "state commissions" and their authority continue under sections about "charges for transport and termination of traffic" and "wholesale prices for telecommunications services."⁷⁴ Ostensibly, the only way the states' commissions lose their authority is when they refuse to act within the specified time frame of ninety days.⁷⁵ At that point the FCC assumes the authority of the state commission not acting and the FCC being so notified.⁷⁶

Due to the rapid advances in technology and the need to secure lower prices and higher quality for American telecommunications consumers, Congress stated a clear intent to promote competition in enacting the Telecommunications Act of 1996.⁷⁷ Although it tasked the FCC with the 1996 Act's implementation, Congress also acknowledged the state commissions' continuing authority over pricing issues.⁷⁸

III. FIRST REPORT AND ORDER – THE FCC'S IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996

A. Overview

The FCC, in its First Report and Order,⁷⁹

nection or network elements, (2) are nondiscriminatory and (3) may include a reasonable profit.

⁶⁶ *Id.* § 251(d)(1).

⁶⁷ *Id.* § 251(d)(2). At a minimum, the FCC is to consider both the proprietary nature of the network elements involved, and whether failure to provide access would impair the requesting carrier's ability to provide services it wants to offer. *Id.*

⁶⁸ *Id.* § 251(d)(3). Wherever a State commission has proscribed access and interconnection obligations of a local exchange carrier, and the State commission's regulations are consistent with and do not prevent the implementation of the 1996 Act, its rules remain in effect. *Id.*

⁶⁹ *Id.* § 252(a)(1). Although the negotiation is voluntary, should a dispute arise, a State commission may mediate any differences, if requested by either party. *Id.* § 252(a)(2).

⁷⁰ *Id.* § 252(a)(2). Between the 135th and 160th day after the LEC has received a request for negotiation, any party to the negotiation may petition the State commission to arbitrate open issues. *Id.*

⁷¹ *Id.* § 252(b)(3). The non-petitioning party may respond within 25 days after petition has been made to the State commission. *Id.*

⁷² *Id.* § 252(b)(5)(c). The State commission is responsible to ensure that conditions of any dispute resolution meet the requirements of the law, including rates and implementation schedule. *Id.*

⁷³ *Id.* § 252(d)(1). The State commissions are directed to set rates which (1) are based on cost of providing intercon-

⁷⁴ *Id.* § 252(d)(2)-(3).

⁷⁵ *Id.* § 252(e)(5). Even when the FCC preempts the State commission because of the State commission's failure to respond within the time frame prescribed, the FCC's authority is limited to the particular proceeding or matter at hand, not the State commission's authority in other areas. *Id.*

⁷⁶ *Id.*

⁷⁷ See generally 47 U.S.C.A. § 151 (West Supp. 1996).

⁷⁸ David G. Frolio, *Phone Competition Order Gets Hung Up in Litigation; Mammoth 8th Circuit Suit May Foreshadow Long Wars Over FCC'S Interconnection Rules*, Jan. 20, 1997 NAT'L L.J. at B14. See *contra*, A bipartisan group of members from the House Commerce Committee (including John H. Dingell (D-MI) and incoming Telecommunications Subcommittee chairman Billy Tauzin, R-La.) filed an amicus curiae brief with the Eighth Circuit characterizing the FCC's interconnection order as "an act of extraordinary arrogance" and states the FCC "had taken a perfectly legible statute and turned it on its head." *Id.* The brief is especially critical of the FCC provisions allowing new entrants to "rebundle" network elements at wholesale prices into telecommunications services. *Id.*

⁷⁹ See *First Report and Order*, *supra* note 7.

promulgated rules to address the areas mandated by Congress in the 1996 Act⁸⁰ and discusses and defends the depth of change now legislated.⁸¹ The underlying concept is one of moving from a government-encouraged monopolistic structure for the local telephone industry to a competitive environment.⁸² The First Report and Order acknowledges the important roles that the state commissions have historically played in regulating the telecommunications industry, and then announces the creation of a "new partnership between state and federal regulators . . . [one] far better suited to the coming world of competition."⁸³ In outlining the new goals set out by Congress, the FCC assumes authority over areas specifically designated as within the purview of the states, although it "looks forward to the continuation of that cooperative working relationship in the coming months as each of [them] carries out the role assigned by the 1996 Act."⁸⁴ The areas of greatest contention are the interconnectivity provisions, the unbundling provisions, and most of all, the pricing provisions.⁸⁵

Among the FCC's principal goals for implementing Congress' mandate for telephone service are: (1) opening the local exchange and access markets to competitors, (2) promoting more competition in markets already open to competition, including long distance and (3) reconfiguring the market so that universal service is preserved and

advanced while the local markets transition from monopoly to competition.⁸⁶ The FCC contends that competition is desirable, not only because of the social and economic benefits competition brings to consumers of local service, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to control the local facilities and impede free market competition.⁸⁷

In addressing these goals, the FCC leapfrogs several steps in the process outlined in the 1996 Act by creating a new system of pricing, presumably in an effort to arrive at the desired competitive environment before either players or the technological infrastructure are in place.⁸⁸ The attempt is to simplify the pricing structure, but the FCC's methodologies have led to an unprecedented level of litigation in both state and, increasingly, federal courts.⁸⁹

B. Justification for FCC's Actions

The FCC sees itself as playing a critical role because the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets which, while necessary to foster competition, is not sufficient to ensure that competition will supplant the BOCs' monopolies.⁹⁰ An LEC enjoys a unique position with regard to the market it serves because its existing

⁸⁰ *Id.* at para. 1. The opening paragraph proclaims the 1996 Act as a new direction which fundamentally changes telecommunications regulation. Under the old regulatory scheme, government encouraged monopolies were encouraged. Under the new scheme, "we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress." *Id.*

⁸¹ See Frolio *infra* note 78. The FCC's First Report and Order is comprehensive and purports to regulate in fine detail all aspects of competition in the local-exchange market. *Id.* at 2. The text is massive, spanning over 700 pages and including a staggering 3,276 footnotes. *Id.*

⁸² See *First Report and Order*, *supra* note 7, at para. 1.

⁸³ *Id.* See Frolio, *infra* note 78. The petitioners in *Iowa Utilities Bd.* argue that intrastate rates historically were under the purview of the State commission and the FCC's pricing authority extends only to interstate communications and that the 1996 Act preserved this allocation of responsibility. *Id.* The FCC defends itself on statutory and policy grounds, that the 1996 Act supersedes the historical allocation of jurisdiction and that the 1996 Act encompasses the authority to set local rates. *Id.* The FCC contends that the 1996 Act also expands the applicability of state rules to historically interstate issues. See *First Report and Order*, *supra* note 7, at para. 24.

⁸⁴ *Id.* at para. 2. The FCC declares "this arrangement is

far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces." *Id.*

⁸⁵ See generally *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) 1360.

⁸⁶ *First Report and Order*, *supra* note 7, at para. 3.

⁸⁷ *Id.* The FCC's intent is to remove not only statutory and regulatory impediments to competition but also economic and operational impediments while maintaining and advancing universal service. *Id.*

⁸⁸ See generally 47 U.S.C.A. at §§ 251 and 252 (West Supp. 1996).

⁸⁹ Moderator Joseph R. Bankoff, *Telecom Act Forces Counsel to Toe the Line*, CORP. LEGAL TIMES 29 (Dec. 1996) [hereinafter *Telecomm Roundtable*]. "I use a matrix to keep track of who's filed and what's happening. Moving to intervene in all of them is a huge task. By my last count, more than 130 arbitration petitions had been filed against BOCs in all but six states." Comments of Ellen A. D'Amato, vice president, external affairs for Sprint Corp. *Id.* at 32. See also *Arbitration Filings Mount for Interconnection Under 1996 Communications Act*, 7 WORLD ARB. & MEDIATION 151 (1996).

⁹⁰ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking*, FCC 96-182, 61 Fed. Reg. (Apr. 25, 1996).

infrastructure allows it to service new customers at a lower cost than any new competitor to that local market could.⁹¹ The newcomer, without the help of the interconnection rules, would be forced to create its own infrastructure, in effect doubling what is already in place in the existing LEC's system.⁹² Furthermore, without interconnection between the two systems, calls placed in one competitor's system to a second competitor's system must be able to be completed in the second competitor's system.⁹³ The FCC correctly asserts an incumbent LEC has little economic incentive to help newcomers to enter its market and take away part of its market share; it would more than likely charge unreasonable rates or refuse to connect a competitor at all.⁹⁴ Despite these economic barriers, Congress directed that these barriers to competition be eliminated.⁹⁵

Having laid this groundwork, the FCC inserts itself, perhaps in ways unanticipated by Congress, by trying to level the playing field for new competitors to local markets. The FCC states that there will be several paths of entry into new markets by competitors – "construction of new networks, the use of unbundled elements of the incumbent's network, and resale."⁹⁶ The FCC outlines many of the specifics of how the 1996 Act is to be implemented and reserves the authority to review and update the rules as technology advances.⁹⁷

The provisions which have led to the majority of litigation are the pricing methodologies for in-

terconnection and unbundled elements. The first debated provision is the FCC determination that the Total Element Long-Run Incremental Cost ("TELRIC") method, plus a reasonable share of forward looking⁹⁸ joint and common costs was the most reasonable way for newcomers to compensate the LECs for interconnection.⁹⁹ Using this method, the state commissions should determine how risk-adjusted cost of capital and depreciation will affect rates.¹⁰⁰ However, where states are unable to make such a determination within the mandated statutory time frame, the FCC set "default" ceilings and ranges for states to use in the interim.¹⁰¹ These pricing elements have become de facto standards.¹⁰² The First Report and Order also establishes default ceiling for the other unbundled network elements.¹⁰³

Second, the FCC also expressly acted to reduce the possibility that LECs might "double recover" charges for universal access from its new competitors while selling that same access as part of the LECs' unbundling of network elements.¹⁰⁴ This was accomplished by setting a timetable to phase out the previously used access charges and phase in the unbundled network elements charges by June 30, 1997 or the date of final decisions by the FCC in the universal service and access reform proceedings.¹⁰⁵ It also specifies a similar timetable for ending the LEC's recovery of intrastate access charges and transport across their systems while transitioning to the newer unbundled local

⁹¹ See *First Report and Order*, *supra* note 7, at para. 10.

⁹² *Id.* (explaining that the incremental cost to a facilities-based entrant would be higher than the incumbent LEC because the newcomer would need to install its own switches, trunk and loops to serve customers).

⁹³ *Id.*

⁹⁴ *Telecomm Roundtable*, *supra* note 89, comments of Joseph R. Bankoff at 34. See *First Report and Order*, *supra* note 7, at § I(c)(10) (explaining that the incumbent LEC on its own initiative has the ability to discourage entry and therefore competition by either not interconnecting its network to the newcomer's network or by charging "supracompetitive" prices or unreasonable conditions for terminating calls from the entrant's customers).

⁹⁵ See *First Report and Order*, *supra* note 7, at para. 12.

⁹⁶ *Id.* at para. 12.

⁹⁷ *Id.* at para. 6. "Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to insure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them." *Id.*

⁹⁸ See generally *MCI Comm. Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983). MCI made a predatory pricing claim against AT&T. The 7th Circuit ruled against this claim by referring

with approval to AT&T's costs on a forward looking basis. "[I]t is current and anticipated cost, rather than historical cost, that is relevant in business decisions to enter markets and price products. The business manager makes a decision to enter a new market by comparing anticipated revenues (at a particular price) with anticipated additional costs . . . The historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are 'sunk' and unavoidable and are unaffected by new production decisions." *Id.* at 1116-17.

⁹⁹ See *supra* note 9 and accompanying text.

¹⁰⁰ See *First Report and Order*, *supra* note 7, at para. 29 (explaining that the FCC concluded that the State commissions should set arbitrated rates for interconnection and access to unbundled elements pursuant a forward looking cost pricing methodology).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at para. 30 (explaining that incumbent LECs will recover from new entrants for all intrastate minutes traversing in the incumbent LEC's local switches for which the new entrants pay unbundled network element charges).

¹⁰⁵ *Id.* at para. 30, 31.

switching elements.¹⁰⁶

Third, the FCC set a 17-25% discount range off retail prices for resale of telecommunications services to those who are not carriers.¹⁰⁷ The FCC notes that "resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market."¹⁰⁸ In establishing these so-called "interim" rates for states unable, or unwilling, to set their own rates, the FCC has created a protective ceiling for any competitor wanting to enter the market. Even in a negotiated settlement, no competitor will pay more than what any other competitor pays; in other words, a better (from the LEC's standpoint) settlement will never be attainable.¹⁰⁹

Taken together, these three major FCC goals have proven so controversial that arbitration is pending in every state in this country,¹¹⁰ with private companies and public commissions on the same side in many cases, because the FCC has seemingly overstepped its authority in attempting

to be responsive to Congress' intentions stated in the 1996 Act.¹¹¹

IV. APPEAL TO THE EIGHTH CIRCUIT

On September 27, 1996, the Eighth Circuit Court of Appeals granted a temporary stay of the pricing provisions issued by the FCC.¹¹² After oral arguments were heard October 3, 1996, the court granted a temporary stay of the contested provisions¹¹³ twelve days later based on its general acceptance of the arguments brought by the petitioners, mostly state commissions and LECs.¹¹⁴ The court agreed that the case presented had on its face sufficient merit and was persuaded that, absent a stay, the petitioners and the public might be harmed.¹¹⁵ The court heard oral arguments on January 17, 1997, but the stay remains in effect pending a final decision on the merits.

The court noted that despite the different approaches, the majority of petitioners' objections revolved around the FCC's pricing rules.¹¹⁶ One of the pricing rules was based on the TELRIC¹¹⁷

¹⁰⁶ *Id.*

¹⁰⁷ Leslie Cauley and Bryan Gruley, *Telecommunications: Baby Bells Win Possible Delay Of Competition*, WALL ST. J. Oct. 16, 1996, at B1, B9.

¹⁰⁸ See *First Report and Order*, *supra* note 7, at para. 32.

¹⁰⁹ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362, 1363. Negotiated agreements would never be finally binding because the FCC's "pick and choose" rule allows competitors to "pick and choose" among the lowest priced individual elements and services they need from a different approved agreements with other carriers. For example, if Carrier A and an LEC had reached an approved agreement and Carrier B made a similar agreement. If Carrier B had negotiated a lower price for one of the elements or services provided by the LEC, Carrier A would be able to demand that its agreement be modified to reflect the lower cost negotiated by Carrier B. *Id.*

¹¹⁰ See Cauley and Gruley *supra* note 107, at B9. More than 180 state arbitrations are under way which could potentially draw out the process considerably. *Id.*

¹¹¹ *Phone Firms' Bid Halt to New Rules Denied by FCC*, WALL ST. J., Sept. 18, 1996, at B8.

¹¹² *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1361. See generally, Leslie Cauley, *Court Delays Implementing FCC Rules To Break Up Local Phone Monopolies*, WALL ST. J., Sept. 30, 1996, at A4. Gene Kimmelman, co-director of Consumers Union, publisher of Consumer Reports magazine commented, "This potentially endangers whether consumers will get competition in the future A [permanent] stay at this point would put a wrench into the entire procedure of bringing competition to local phone markets." *Id.* See also Leslie Cauley, *Baby Bells, GTE to Fight Rules Aimed at Busting Local Phone Monopolies*, WALL ST. J., Aug. 29, 1996, at A3. "[P]hone companies wouldn't be able to make a fair return on their investment, perhaps forcing some to consider abandoning investment in their local-phone networks." *Id.*

¹¹³ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1361. The pricing provisions of the stay refer to "§§ 51.501-51.515 (inclusive), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive), and to the default proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996." *Id.* at n.3.

¹¹⁴ *Id.* at 1362. See also Leslie Cauley, *Telecom Law Faces Challenge in Court, Baby Bells, GTE to Fight Rules Aimed at Busting Local Phone Monopolies*, WALL ST. J., Aug. 29, 1996, at A3. "[F]ive of the seven Bells were planning to jointly challenge the FCC's rules, with only NYNEX Corp. and Ameritech Corp. still undecided." *Id.*

¹¹⁵ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1365. The court considered "the following four factors in determining whether a stay is warranted: (1) the likelihood that a party seeking the stay will prevail in the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Id.* at 1363. See *Arkansas Peace Ctr. v. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993).

¹¹⁶ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362.

¹¹⁷ See *First Report and Order*, *supra* note 7, at para. 674. The FCC uses the term TELRIC to describe their proposed pricing methodology. *Id.* The term "long run" refers to a period long enough so that all of a firm's costs become variable or avoidable. *Id.* "Incremental costs are the additional costs (usually expressed as a cost per unit) that a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of the good or service." *Id.* at para. 675. "Incremental costs are forward looking in the sense that costs are incurred as the output level changes by a given increment." *Id.* "For example the incremental cost of carrying an additional call from a residence that is

method to calculate the costs which an incumbent LEC incurs in making its facilities available to competitors.¹¹⁸ The petitioners argued that the TELRIC method underestimates their costs and results in prices that are too low.¹¹⁹ They maintained that the prices would effectively require them to subsidize their competitors and threaten the viability of the LEC's own business.¹²⁰ Furthermore, the petitioners contended that the TELRIC method does not consider or allow "embedded" or "historical" costs, that is, those costs incurred by the LEC in the past, when determining rates.¹²¹ The FCC pricing also assumes that the LECs are using the most efficient telecommunications technology available, not the technology and equipment that the LEC actually may be using.¹²²

A similar argument was persuasive to the court regarding the petitioners' objections to the FCC's proxy rates, the rates are to be used in the interest of time expediency, because again, the rates "do not accurately reflect [the incumbent LECs'] costs and are artificially low."¹²³

The last of the petitioners' disputes regarding the FCC's pricing methodology rests in the so-called "pick and choose" rule, because "again, price becomes a key issue."¹²⁴ Essentially, the pricing allows the LECs' competitors to "pick and choose" the lowest-priced individual elements and services among all prior approved agreements

and demand that that price for the individual elements be available across the board.¹²⁵ The court noted that the congressional preference for negotiated agreements would be undermined because an "agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized."¹²⁶

In granting its stay of the FCC's pricing methodologies and the "pick and choose" rule, the court agreed that the petitioner's arguments had merit. Even though it noted that in general "courts must give deference to an agency's reasonable interpretation of an unclear statute,"¹²⁷ the court held that "the petitioners have a better than even chance of convincing the court" that the FCC's pricing rules are in conflict with the plain meaning of the Act.¹²⁸ Moreover, the court was persuaded that the petitioners adequately demonstrated they would be harmed by the application of the FCC's proxy rates because competitors would ultimately hold out for the lowest rates – the FCC proxy rates.¹²⁹

The court directly disagreed with the FCC's argument that in granting a stay the court would be acting contrary to the public interest¹³⁰ and as stated by the intent of Congress in the 1996 Act, to promote competition.¹³¹ The court noted that prior to the FCC's intervention, several state commissions had successfully negotiated with incum-

already connected to the network to its end office is virtually zero." *Id.* Embedded or accounting costs are costs that firms incurred in the past for providing a good or service and are recorded as past operating expenses and depreciation. *Id.* "In competitive markets, the price of a good or service will tend towards its long-run incremental cost." *Id.* "Adopting a pricing methodology on forward looking, economic costs replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking methodology reduces the ability of an incumbent LEC to engage in anti-competitive behavior." *Id.* at para. 679. The FCC contends that in certain situations "it may not be possible for carriers to prepare, or the state commission to review economic cost studies within the statutory time frame for arbitration" and a proxy pricing method might provide a faster and less costly approach on an interim basis than a detailed forward looking cost study. *Id.* at para. 767. The proxy ranges established by the FCC will serve as presumptive ceilings and states may set prices below those ceilings if the record before them supports a lower price. *Id.*

¹¹⁸ See also, Scott Ritter, *FCC's Hundt Expresses Doubt On Phone Rules, Courts Expected to Deny Bid for More Rivalry In the Local Markets*, Wall St. J., Nov. 11, 1996, at B9D. Chairman Hundt "expressed optimism the states would adopt interconnection policies not unlike those in the FCC's rules. The FCC guidelines were based on forward-looking costs, rather than historical, embedded costs that local phone companies

argued were a more appropriate gauge for figuring pricing." *Id.*

¹¹⁹ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1363.

¹²⁷ *Id.* citing *Chevron U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 843-45 (1984). "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* at 842-43.

¹²⁸ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1365 (explaining that the court would not be bound by the *Chevron* decision under these circumstances).

¹²⁹ *Id.* at 1364. The court was persuaded by the petitioner's evidence that the type of negotiations preferred by Congress were breaking down due to the competitors' desire to hold out for the FCC proxy rates. *Id.* Furthermore, due to the time constraints of the 1996 Act, State commissions had already felt obliged to impose the FCC's proxy rates on their arbitration proceedings. *Id.*

¹³⁰ *Id.* at 1365.

¹³¹ See generally 47 U.S.C.A. § 151 (West Supp. 1996).

bent LECs to achieve acceptable access rates to begin to allow competitors into the local market.¹³² The court believed a stay would preserve the "continuity and stability of [the] regulatory system – a system that has initially proved to be successful."¹³³ It dismissed the FCC's contention that without its pricing regulations in effect, the incumbent LECs would have superior bargaining power in any negotiations.¹³⁴

V. IS THE PUBLIC INTEREST BEING SERVED BY THE TELECOMMUNICATIONS ACT OF 1996?

Any discussion about the public interest must begin with a definition of who or what comprises the public and what constitutes the "public interest." In the context of telephone service, the public is composed of diverse markets. On one end of the spectrum there are end users spread across rural, thinly populated areas. At the other end is the business community which drives the thriving economy of this country, requiring a variety of dependable and seamless telecommunications services to provide goods and services in both the national and global economy. As a general rule, businesses tend to be located where the population is able to support a work force. As one kind of "public" served by the telecommunications industry, it differs from the general public in terms of having a larger need for basic services, but also in terms of demanding economies of scale, cost efficiencies and timely responses to particular needs.¹³⁵

It was Congress' clear intent in the Communications Act of 1934 to give the FCC sweeping authority to regulate "a field of enterprise the dominant characteristic of which was the rapid pace of

its unfolding."¹³⁶ The FCC was given a broad mandate to regulate wire and radio communications in the "public interest, convenience and necessity."¹³⁷ The power to legislate in the public interest was described early on as "a supple instrument for the exercise of discretion" by the FCC which Congress charged to carry out its legislative policy.¹³⁸ In 1934 the Supreme Court affirmed the constitutionality of the FCC's power to legislate in the public interest as providing sufficient judicial constraints as to be judicially enforceable.¹³⁹ The Court found that power to be constrained by the requirement of adapting their rules to the nation's needs in a "volatile changing economy."¹⁴⁰ The FCC is required to provide a reasonable analysis that indicates prior policies and standards are being "deliberately changed, not casually ignored."¹⁴¹

The 1996 Act mandated that competition be brought to the local telephone communications network.¹⁴² In promulgating rules to expedite Congress' mandate, on the surface, the FCC has met the legal requirements of acting in the public interest. The BOCs, like AT&T until 1984, are not going to want to give up their monopoly easily.

A. Competition

Now that much of the deregulatory dust has settled following the court-ordered break-up of the AT&T long distance monopoly in 1982, it has become generally accepted that competition for all telecommunications services is both desirable and necessary, even on the local level. Competition is held out as the answer to provide of the variety of goods and services the public has come to expect and want, at competitive prices.¹⁴³ Congress mandated the promotion of competition in the Tele-

¹³² Iowa Util. Bd., 4 Comm. Reg. (P & F) at 1365. The court noted that some states, "Connecticut, Florida and Iowa have established rates based on local conditions and are already opening up their local markets to competition under both the federal Act and state statutes which foreshadow the new federal law. Moreover, the FCC-imposed rate for Iowa is substantially higher than the state-set rate which was based on the full record from a contested case proceeding, while in Florida, the FCC proxy rate is substantially lower than the state-set rate. *Id.* at n.7.

¹³³ *Id.* at 1365.

¹³⁴ *Id.*

¹³⁵ See generally *supra* note 89, Comments of Joseph R. Bankoff of King and Spalding.

¹³⁶ Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1942) (describing the scope of the FCC's power).

¹³⁷ See *supra* note 3.

¹³⁸ FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (lacking judicially enforceable constraints on the FCC's authority would render the "public interest" sufficiently vague as to be unconstitutional).

¹³⁹ Nat'l Broad. Co., 319 U.S. at 219.

¹⁴⁰ American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe R.R. Co., 387 U.S. 397, 416 (1966).

¹⁴¹ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (10th Cir. 1971). (explaining that the court will scrutinize closely the analytical bases for the choices made and that the Commission provide sufficient analysis and explanation for its decision).

¹⁴² See 47 U.S.C.A. § 151 (West Supp. 1996).

¹⁴³ See *First Report and Order, supra* note 7, para. 3.

communications Act of 1996 with specific instructions about what markets should be opened up and in a particular time frame.¹⁴⁴ In promulgating rules to expedite congressional intent, the FCC acted in the public interest by deliberately changing prior policies and standards in response to changing technologies. The BOCs, by contrast, are not interested in competition and want to maintain their competitive advantage as long as possible. The desire to maintain control of that monopoly is driving the litigation before the Eighth Circuit.

The sheer quantity of litigation engendered by the interconnectivity provisions of the 1996 Act point out serious flaws in its implementation.¹⁴⁵ The fact that the Eighth Circuit stayed several key provisions, and that the stay has now been upheld by Supreme Court Justices Clarence Thomas and Ruth Bader Ginsburg,¹⁴⁶ suggests one of the most basic tenets of the 1996 Act, the interconnectivity order, will be delayed for a substantial period of time and competition on the local level will not occur for at least several more years.¹⁴⁷

The FCC based its controversial pricing provisions on assumptions that do not accurately reflect current conditions within the LECs, namely state-of-the-art switching and record keeping.¹⁴⁸ At least several of the petitioners in the Eighth Circuit argued that they cannot provide the services for the prices set by the FCC because they simply do not generate the efficiencies on which the FCC based its pricing.¹⁴⁹

A second disputed area concerns the "embedded" costs, which are the costs that the incumbent LECs originally incurred in building their networks.¹⁵⁰ In its regulations, the FCC is allowing competitors to come in, use an incumbent LEC's equipment, and pay only for the immediate service, not for the original investment the LEC incurred in building its network.¹⁵¹ On its face, this practice seems to border on a regulatory taking of the incumbent LEC's property, but more importantly creates a strong disincentive for the LEC to improve their networks or their technology.¹⁵²

It appears that the FCC, in anticipating the technological future,¹⁵³ sought to encourage that future by regulating the lower prices based on the expected high efficiencies. In its discussion of whether Congress intended national pricing rules, the FCC justifies its position by carefully crafting an argument about how the LECs have no incentive, absent national rules, to encourage competitors' entries into their local markets.¹⁵⁴ In addressing the types of negotiation which would facilitate interconnection, the FCC again discussed how "state arbitration of interconnection agreements now and in the future will be expedited and simplified by a clear statement of terms,"¹⁵⁵ that statement being a minimum national price structure.¹⁵⁶ The FCC continues to emphasize the point that "more efficient competition will, in turn, benefit consumers."¹⁵⁷ The FCC was aware that litigation would ensue and tried crafting arguments specifically to prevent that sit-

¹⁴⁴ See 47 U.S.C.A. § 151 (West Supp. 1996).

¹⁴⁵ *Telecomm Roundtable*, *supra* note 89, Comments of William B. Barfield of BellSouth Corp. (explaining that, "[t]he FCC has turned this Bill on its ear.")

¹⁴⁶ *FCC v. Iowa Util. Bd.*, 117 S.Ct. 378 (1996). The FCC made application to Justice Thomas and Justice Ginsburg to lift the stay issued by the United States Court of Appeals for the Eighth Circuit; both requests were denied. *Id.* *FCC v. Iowa Util. Bd.*, 117 S.Ct. 429 (1996).

¹⁴⁷ *Telecomm Roundtable*, *supra* note 89, at 33, Comments of William R. Barfield of BellSouth Corp.

¹⁴⁸ The new international standard is Signaling System 7 (SS7), a digital packet-switched network that is connected to a telephone carrier's telephone switches that controls the routing and accounting of calls, manages network resources and supports the supply of information services. By 1991, 53.4% of BOC access lines were connected to SS7 equipped switches and the conversion schedules project that BOCs and major independent companies will serve almost all lines in urban areas by SS7 switching by 1995. Bridger M. Mitchell and Ingo Vogelsang, *Expanded Competitiveness and Regulatory Safeguards in Local Telecommunications Markets* in *DEREGULATING COMMUNICATIONS, THE BABY BELLS CASE FOR COMPETITION* AT 178 (Richard S. Higgins and Paul H. Rubin eds.

1995).

¹⁴⁹ Leslie Cauley and Bryan Gruley, *Telecommunications: Baby Bells Win Possible Delay Of Competition*, WALL ST. J., Oct. 16, 1996, at B1.

¹⁵⁰ *Iowa Util. Bd.*, 4 Comm. Reg. (P & F) at 1362.

¹⁵¹ *Id.*

¹⁵² *Telecomm Roundtable*, *supra* note 89, at 34, Comments of Joseph R. Bankoff of King and Spalding.

¹⁵³ *United States v. AT&T*, 552 F. Supp. 131, 194-195 (D.D.C. 1982). "It is probable that, over time, the Operating Companies will lose the ability to leverage their monopoly power into the competitive markets from which they must now be barred. This change could occur as a result of technological developments which eliminate the Operating Companies' local exchange monopoly or from changes in the structures of competitive markets. In either event, the need for the restrictions . . . will disappear, and the decree should therefore contain a mechanism by which they may be removed." *Id.*

¹⁵⁴ See *First Report and Order*, *supra* note 7, at para. 55.

¹⁵⁵ *Id.* at para. 56.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

uation from occurring in every state.¹⁵⁸

Unfortunately, because the FCC tried to jumpstart competition before ensuring that all incumbent LECs possessed the assumed state-of-the-art technology baseline,¹⁵⁹ it has fostered litigation which has effectively brought the interconnection process to a halt.¹⁶⁰ In this situation, no one benefits¹⁶¹ by delays in achieving competition while the finer points of the law are litigated. In a more general sense, the FCC has acted contrary to the public interest by allowing the legislation to be stonewalled in the court system.

Although the regulatory process concerning interconnection has been halted pending the outcome of the Eighth Circuit's final decision, technological advances achieving competition continue apace. The barrier to competition based on interconnection at the local level appears to have been broken by AT&T's widely anticipated announcement of its entry into local markets based on wireless technology.¹⁶² According to AT&T, the consumer interface would remain unchanged, but the connection from the consumer's home or place of business would be through the airwaves which will effectively cover 93% of the nation's population effectively replacing local phone links.¹⁶³ In creating its wireless infrastructure, AT&T will undoubtedly invest significant capital into placing this system into every consumer's hands. This process, however, will still be less costly than installing a hardwired system. AT&T admits that putting this new infrastructure in place will take some time, but Congress' basic intent to introduce competition at the local level will somehow prevail despite the Eighth Circuit, because it appears that technology does have answers and solutions heretofore unimagined.¹⁶⁴

B. The Incumbent LEC

Nevertheless, concern has been expressed by various parties about what level of competition they want to achieve, based on the 1996 Act.¹⁶⁵ If a newcomer to a particular market were to become the dominant carrier based on market share, it would likely then be redesignated as the incumbent LEC, a status that no company, new or otherwise, would want.¹⁶⁶ In fact, anticipating that such a situation might happen, Congress provided for such redesignation in the 1996 Act.¹⁶⁷ This part of the law itself provides a new, perhaps unanticipated, barrier to competition, or at least against a company's being too successful.¹⁶⁸

The possible trend against competitive pressures being brought about by deregulation could also be illustrated through a comparison to other industries which have been deregulated. In the trucking, airline and power industries, initial responses to deregulation led to many new players.¹⁶⁹ Over the long term, however, many newcomers failed, and were acquired by their competitors, who became bigger and more dominant than before deregulation.¹⁷⁰ Therefore, it is quite conceivable that Congress, in its attempt to introduce more competition by deregulating the telecommunications industry, will have actually reduced competition in any particular market, creating de facto monopolies which are subject to less regulation than before the 1996 Act.

C. Global Access – Possible New Markets

Another area of competitive entry to LECs' markets, with players who have enough capital to invest heavily on infrastructure, is dependent

¹⁵⁸ *Id.*

¹⁵⁹ *Supra* note 116.

¹⁶⁰ *Supra* note 109.

¹⁶¹ *Telecomm Roundtable, supra* note 89, at 35, Comments of W. Douglas Hickey of US West Inc.

¹⁶² Mike Mills, *Paving the Way With Wireless, Long-Distance Giant AT&T Unveils Its Local-Market Strategy*, WASH. POST, Feb. 26, 1997, at C11.

¹⁶³ *Id.* AT&T purchased 222 licenses to use a small segment of the radio spectrum in federal auctions. At the time, most analysts assumed AT&T would be using the licenses for a new personal communications services. *Id.* at C12.

¹⁶⁴ *Id.*

¹⁶⁵ *Telecomm Roundtable, supra* note 89, at 34, Comments of William B. Barfield of BellSouth Corp.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* ". . . [U]nder the 1996 law, you'd be wary of the degree of your own success as a competitive local exchange carrier, because the last thing you'd want to do is obtain sufficient market share and be reclassified as an incumbent." *Id.*

¹⁶⁸ See 47 U.S.C.A. at § 251(h)(1)(b) (West Supp. 1996).

¹⁶⁹ *Telecomm Roundtable, supra* note 89, at 39, comments of William E. Eason, Jr. of Scientific-Atlanta Inc. .

¹⁷⁰ *Id.*

upon the global marketplace and economy.¹⁷¹ Already alliances are forming with international companies¹⁷² which are expected to open the telecommunications markets overseas, and which also represent newly available resources for domestic carriers who need to upgrade their own networks and services continuously.¹⁷³ These alliances will provide American companies which conduct international business with a seamless international telecommunications interface.¹⁷⁴ Presumably this would help such internationally oriented companies generate American jobs and thereby help add to the U.S. economy.¹⁷⁵ Many companies have expressed the need to have strategic alliances with international suppliers for just these reasons.

D. Costs of Public Interest

The United States itself spends almost \$200 billion a year for long distance and local exchange telecommunications services.¹⁷⁶ Once the long distance market was deregulated, a remarkable transformation occurred in the long-distance industry. The general trend was expansion of the overall market; as long-distance became cheaper through deregulation, more people used it, and used it more often. This model has inspired today's fascination with introducing competition at the local exchange level.

In one sense, the general public is already convinced that increased local exchange usage is necessary. The demand for additional telephone lines to accommodate ubiquitous fax machines and computer modems has led to new area codes

being added all over the country, because in many places the available numbers keep being exhausted. Consumers, both individually and in business, need more and better services.

VI. THE INTRODUCTION OF COMPETITION FOR LOCAL EXCHANGE SERVICES

Irrespective of whether the FCC will prevail in overturning the Eighth Circuit stay, will the benefits Congress envisioned when it legislated the 1996 Act come to pass? Will the benefits of competition result in the creation of competitive markets, reduce prices for telecommunications services and further spur economic growth and technological developments?¹⁷⁷ Will sustained competition in the local exchange market bring about increased choices and a proliferation of advanced services waiting on the horizon?

Because of their great financial resources and expertise, the largest telephone service providers will be the first to enter the local exchange market. In order for BOCs to enter the market, they must first comply with an FCC fourteen point competitive checklist.¹⁷⁸ The desire to exploit the \$100 billion-a-year local exchange market will facilitate compliance with the checklist and as a result, AT&T, Sprint, MCI and the BOCs will be the first providers to enter the market.¹⁷⁹

During the transition period to a competitive environment, federal and state regulators must remove the subsidies that have allowed millions of Americans access to local service at less than it costs the LECs to provide it.¹⁸⁰ Although the FCC

¹⁷¹ See generally Mike Mills, *U.K. Firm Near a Deal To Buy MCI; \$20 Billion Merger Would Create Global Communications Titan*, WASH. POST, Nov. 2, 1996, at A1.

¹⁷² Christopher Boam, *Giving the Phoenix Wings: The Deutsche Telekom/France Telecom/Sprint Alliance*, 5 COMM'LAW CONSP'CTUS 73, 82-83 (1997) (explaining that British Telecom would invest \$4.3 billion in MCI in exchange for 20% of the company along with appropriate board representation. A second joint-venture company called Concert would be created, 75.1% owned by BT and 24.9% owned by MCI. The creation of Concert would allow BT and MCI to offer global service quickly and cheaply.)

¹⁷³ *Id.* "The MCI-BT merger . . . would mean a huge cash infusion for MCI, which has all but completed investing the \$4.3 billion it got from BT in 1994. MCI could use the money to more aggressively build local phone networks, as well as upgrade its Internet and long distance fiber-optic networks." *Id.*

¹⁷⁴ *Telecomm Roundtable*, *supra* note 89, at 35, Comments of Sharon R.B. Case of Coca-Cola.

¹⁷⁵ *Id.*

¹⁷⁶ *MCI's Earnings Climbed 17 Percent in the 4th Quarter*, WASH. POST, Jan. 31, 1996 at F3. MCI and AT&T share the \$70 billion long distance industry. *Id.* Mike Mills, *Paving the Way With Wireless, Long-Distance Giant AT&T Unveils Its Local-Market Strategy*, WASH. POST, Feb. 26, 1997 at C11. AT&T bets on wireless technology to enter the \$100 billion a year local telephone market. *Id.*

¹⁷⁷ *Supra* note 53.

¹⁷⁸ See *supra* 55, at 116 (explaining that BOCs must comply with a competitive checklist in order to be granted § 271 authority to enter the long distance market).

¹⁷⁹ Shannon Henry, *Telecom Supercarriers Set to Battle for your Business*, WASH. TECH., Mar., 7, 1996. (explaining the potential outcomes of the 1996 Act).

¹⁸⁰ Mark Lander, *Rising Phone Bills Are Likely Result of Deregulation*, N.Y. TIMES, Mar. 30, 1977, at A1. (explaining that Federal and state regulators must strip away subsidies that for decades have allowed millions of Americans to get local service at or below cost).

is dedicated to maintaining the status quo during the transitional period, some experts believe a temporary rate increase is an unavoidable first step toward lower prices competition will bring in the long run.¹⁸¹

The second step will be rate reductions on the order of 15-20% in the next three years accompanied by a richer variety of services.¹⁸² Along with the lowering of rates, there will be a greater willingness to customize services accompanied by better customer service.¹⁸³ Customers will choose among telecommunications packages that include local and long distance service, cellular phone services, paging, Internet access and cable television.¹⁸⁴ Competition will be fierce at first with the carrier's offerings bundled precisely to customer's needs.¹⁸⁵ The offerings would be cross discounted not only to lure the price conscious but also those with complex communications needs.¹⁸⁶

Initially there will be a flurry of mergers, buyouts and reselling as a expedient means of gaining access to valuable services, the net result being the formation of a handful of "supercarriers."¹⁸⁷ Another concurrent development and source of viable competition is the emergence of the Internet Service Providers ("ISPs") and the use of the Internet for telecommunications.¹⁸⁸ ISPs are currently exempt from paying access charges to local phone companies, and the LECs want the ISPs to pay for this privilege.¹⁸⁹ The FCC has suggested that it will not impose access charges on the new market.¹⁹⁰ Aside from the BOCs and the major long distance carriers, there are at least five hundred other long distance prov-

iders, cable companies, satellite and electric utility companies which have shown an interest in competing for market share.¹⁹¹ With no infrastructure in place, reselling will be the basic mode of entry to begin a strong facilities-based competition.¹⁹² The introduction and ability to launch a wireless infrastructure as proposed by AT&T has added yet another competitive force to an already complex equation.¹⁹³

Many consumers do not understand the differences between the long-distance choices and will have much the same reaction with the introduction of competition at the local level. To this end, many competitors will concentrate on increased name recognition bringing with it the aura of reliability that the newcomers will be lacking.¹⁹⁴ In an attempt to preserve market share, the United States Telephone Association, collectively representing the local telephone exchanges, has launched a \$7 million campaign praising the virtues of "home town" service.¹⁹⁵

VII. CONCLUSION

The reforms and goals of the Telecommunications Act of 1996 will bring about competition to the local telephone monopoly. Because of the inherent advantages of the BOCs and major long distance providers, that future will result in a handful of "supercarriers" that each provide all the telecommunications services any end-user could envision. The first effects will mirror what happened in the airline, banking and long distance industries after deregulation producing a handful of supercarriers and the death of once

¹⁸¹ *Id.* (explaining that the F.C.C. is left with a dilemma. It can simply end the subsidies for the local phone companies and risk a jarring disruption of the "universal service" tradition that enables 93% of American households to afford a telephone or it can allow the phone companies to ease into the world of pay-as-you-go competition by replacing a portion of the subsidies with higher rates).

¹⁸² *Telecomm Roundtable*, *supra* note 89, at 30, Comments Timothy C Reis of United Parcel Service (explaining the effects of the 1996 Act).

¹⁸³ *Telecomm Roundtable*, *supra* note 89, at 30, Comments of Sharon R.B. Case of Coca-Cola.

¹⁸⁴ Katia Hetter, *Dialing for Dollars Benefits*, U.S. NEWS & WORLD REP., Feb. 12, 1996 at 51.

¹⁸⁵ *Supra* note 179.

¹⁸⁶ *Id.*

¹⁸⁷ In February of 1996, one week after the passage of the 1996 Act, there was merger of U.S. West Media Group with Continental Cablevision. *Id.* Continental is the nation's third largest cable company and U.S. West one of the BOC.

Together they serve 18.1 million customers. *Id.*

¹⁸⁸ Mark Rockwell, *Acting on reform: FCC is put to the test*, COMM. WK., Jan. 6, 1997 (explaining that the LECs want to get the ISPs to pay for calls).

¹⁸⁹ *Id.* (explaining access charges were waived in the mid-80s to allow the ISPs, then called "enhanced service providers" to develop).

¹⁹⁰ *See supra* note 4.

¹⁹¹ *Supra* note 179.

¹⁹² *Telecomm Roundtable*, *supra* note 89, at 33, Comments of Ellen A. D'Amato of Sprint Corp. (explaining that to obtain core business in the local exchange market you have to resell. Immediately investing billions of dollars into a new infrastructure isn't a sound method of entry).

¹⁹³ *Supra* note 162.

¹⁹⁴ *Telecomm Roundtable*, *supra* note 89, at 35-36, Comments of Sharon R.B. Case (explaining that Coca-Cola will probably go with known names due to reliability issues.)

¹⁹⁵ Carolyn Hirschman, *Waging War, Public Opinion Becomes A Battleground for LECs*, TELEPHONY, Mar. 11, 1996, at 58.

successful companies. As the industry recovers from this first round of competition, another crop of "boutique" carriers will emerge providing more unique and diversified services for customers whose needs extend into other areas, for example, carriers that provide a complement of banking services, stock transactions, recorded music, radio, newspaper and magazine subscriptions along with basic local and long distance services for a monthly fee.

Congress and the FCC probably considered these types of future uses when they directed the industry to continue to move towards a more competitive environment. In the future, we will need to reconsider whether these newly combined functions will properly be overseen by the FCC as currently structured.

If competition is the answer, the FCC has served the public interest well in promulgation of its regulations. It has created a framework that encourages competition. Whether or not the BOCs are successful in temporarily staying the pricing provisions of Sections 251 and 252, will not stop competition with a \$100 billion market waiting to be exploited. As new and unimagined technologies and markets develop, the law will move and change with it. Perhaps new monopolies will develop and need to be dismantled as a result. But at the heart of any legislation will be the idea that legislated competition is a basic economic necessity.

