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COMPETITION IN TELEPHONY: PERCEPTION OR REALITY? CURRENT BARRIERS TO THE TELECOMMUNICATIONS ACT OF 1996*

*Aimee M. Adler***

INTRODUCTION

On February 8, 1996, President Clinton signed into law one of the most unprecedented changes in the telecommunications industry since the Communications Act of 1934 ("1934 Act").¹ Both the executive and legislative branches heralded the Telecommunications Act of 1996 as revolutionary and groundbreaking.² The Telecommunications Act of 1996 ("1996 Act") was established "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."³ The focal point of the 1996 Act is the deregulation of the telephone industry, which encompasses the best

* Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151-614).

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¹ 47 U.S.C. § 151 (1994).

² See, e.g., Remarks on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215 (Feb. 8, 1996) [hereinafter President's Remarks]; 142 CONG. REC. E204-02 (daily ed. Feb. 1, 1996) (statement of Rep. Forbes). According to President Clinton, the information revolution has been held back by outdated laws, designed for an age comprised of one phone company, three TV networks, and no personal computers. President's Remarks, *supra*, at 216.

³ Pub. L. No. 104-104, 110 Stat. 56, 56.

developed and most regulated services within the telecommunications sector.⁴

This Note examines the 1996 Act's effect on the telephone industry and highlights reasons for the Act's failure to increase competition and promote deregulation in that industry. Part I provides an overview of the Telecommunications Act of 1996. Part II analyzes three main reasons for the failure of the Act. First, an increase in the number of mergers has overwhelmed the industry and thereby decreased competition.⁵ Second, a conflict of laws between the federal government and the states has raised preemption issues, thereby causing considerable litigation.⁶ Third, targeting of the Bell Operating Companies ("BOCs")⁷ embodied

⁴ George J. Alexander, *Antitrust and the Telephone Industry after the Telecommunications Act of 1996*, 12 COMPUTER & HIGH TECH. L.J. 227, 229 (1996). In comparison with other areas addressed in the 1996 Act, the telephone industry is the oldest and has been regulated the longest. *Id.* Telephone-based services are the most regulated in an economic, rather than political sense. *Id.* Although the local service market is inherently monopolistic, Congress has intervened in order to forcibly control the market so that it is unable to operate in a natural fashion. *Id.* By instituting deregulation, the market is free to operate more efficiently. *Id.*

⁵ The mergers which have been most closely followed as a result of the passage of the Act include the SBC/Pacific Telesis merger and the Bell Atlantic/NYNEX merger. See Stephen Labaton, *Three Proposed Telecommunications Mergers Draw Challenges at an F.C.C. Hearing*, N.Y. TIMES, Dec. 15, 1998, at C8. See also Part II.A, discussing mergers in the telephone industry. Additionally, the SBC/Ameritech, Bell Atlantic/GTE and AT&T/TCI mergers, pending approval from the FCC, are being closely scrutinized. *Id.*

⁶ Among the more notable cases that address this issue are *Iowa Utilities Board v. FCC*, 135 F.3d 535 (8th Cir. 1998) and *AT&T Communications of the Southwest v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998), *injunction granted*, 1998 U.S. Dist. LEXIS 10297 (N.D. Tex. July 4, 1998). See also *City of Abilene v. FCC*, 164 F.3d 49, 50 (D.C. Cir. 1999); *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 563 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1361 (1998); *AT&T Communications of the Southwest v. City of Austin*, 975 F. Supp. 928, 938-40 (W.D. Tex. 1997).

⁷ The term "Bell Operating Company" includes all of the following companies:

Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph

in the 1996 Act has contributed to litigation and a lack of desire to foster competition.⁸ Part III offers solutions intended to assist in cultivating increased competition and decreased regulation. This Note concludes that the 1996 Act will continue to be a failure with respect to the telephone industry until these issues are resolved.

I. HISTORY OF THE TELECOMMUNICATIONS ACT OF 1996

An evaluation and analysis of the Telecommunications Act of 1996 should be viewed in conjunction with the legislation and legal activity which preceded it. Comparison of the 1934 Act and the 1996 Act, including information about the antitrust issues in the industry, reveals both the changes in technology and the issues Congress had to address in revamping the legislation. Such a comparison is necessary as the 1996 Act builds on the 1934 Act in some ways, while addressing new issues.⁹ The evaluation and analysis clarifies why the 1996 Act failed.

Company, New Jersey Bell Telephone Company, New York Telephone Company, US West Communications Company, South Central Bell Telephone Company, Southern 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 Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and . . . includes any successor or assign of any such company that provides wireline service telephone exchange service.

47 U.S.C. § 153(4)(A)-(B) (Supp. II 1996).

⁸ See e.g., *BellSouth v. FCC*, 162 F.3d 678 (D.C. Cir. 1998); *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996, 1002-07 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226, 233 (5th Cir. 1998).

⁹ See Part I.C, discussing the 1996 Act.

A. *The Communications Act of 1934*¹⁰

Due to the growing concern over the success of AT&T,¹¹ Congress passed the Communications Act of 1934 to regulate interstate and international communications and to ensure the universal provision of communications services.¹² The 1934 Act aimed at clarifying the jurisdictional boundaries of wireline and radio communications.¹³ The legislation was premised on the notion that telephony was a natural monopoly and, as a result, allowing competition would be both futile and inefficient.¹⁴ Functionally, the most important features of the 1934 Act were the creation of a dual system of communications regulation, where the states and the FCC would both be given authority to act,¹⁵ and the Federal Communications Commission ("FCC").

A pivotal part of the 1934 Act was the establishment of the FCC, which was created to execute and enforce the provisions of

¹⁰ 47 U.S.C. §§ 151-613 (1994).

¹¹ JAMES SHAW, *TELECOMMUNICATIONS DEREGULATION* 30 (1998). Competitors began to lobby the federal government to strengthen restraints placed on the telephone giant. *Id.* As the value of communications became further recognized, various industries became concerned about the reliance on a single provider. *Id.* However, despite the attempts to control AT&T's position, the 1934 Act appeared to consolidate its position. CONSTANTINE RAYMOND KRAUS & ALFRED W. DUERIG, *THE RAPE OF MA BELL* 32 (1988). *See infra* note 84 (providing a brief history of AT&T). The Act was viewed as supporting the BOC's use of subsidies to achieve universal service. KRAUS & DUERIG, *supra*, at 32.

¹² 47 U.S.C. § 151 (1994). The purpose of the chapter is to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." *Id.*

¹³ SHAW, *supra* note 11, at 32. By clarifying jurisdictional boundaries, rules for such things as technical safety standards, broadcasting provisions, and interstate commerce would be available nationwide instead of on a state-by-state basis. SHAW, *supra* note 11, at 32.

¹⁴ Gregory L. Rosston, *The 1996 Telecommunications Act Trilogy*, 5-WTR. MEDIA L. & POL'Y 1, 1-2 (1996). As a natural monopoly, no amount of regulation would allow new providers into the market. *Id.*

¹⁵ *See infra* Part II.B, discussing the federal/state power struggle.

the Act, as well as to implement the intent of federal communications laws.¹⁶ The FCC was given the authority to ensure that no telephone carrier constructed a new interstate line unless the FCC first issued a certificate of public convenience and necessity.¹⁷ Despite the seemingly expansive scope of the FCC's power, the 1934 Act explicitly reserved regulatory control over intrastate toll and local exchange telephone services to the states,¹⁸ thereby creating the dual system.

¹⁶ Specifically, section 151 of the Act states that the Federal Communications Commission was created

[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication.

47 U.S.C. § 151 (1994). The 1934 Act was incorporated into the 1996 Act.

¹⁷ According to Section 214 of the Act:

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the [FCC] a certificate that the present or future public convenience and necessity require or will require construction, or operation, or construction and operation, of such additional or extended line.

47 U.S.C. § 214(a) (1994). The intent was to prevent wasteful duplication of facilities and more capacity than necessary. See KRAUS & DUERIG, *supra* note 11, at 32.

¹⁸ 47 U.S.C. § 152(b) (1994). According to section 152(b), "nothing in this chapter shall be construed to apply or give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." *Id.* Congress did not intend the Act to preempt the field of state telecommunications regulations. See *id.*

Under the 1934 Act's dual system, the FCC "had the power to control [interstate] rates and entry, while state regulatory commissions had similar statutory power over intrastate services."¹⁹ The main goals of federal and state regulation were to encourage universal service, while preventing the imposition of excessive prices for services and undue discrimination in service provision.²⁰

As years passed, the 1934 Act was periodically modified by Congress in response to changes in the telecommunications industry.²¹ The FCC occasionally revisited Congress to request additional legislative authority due to advances in technology, trends in mergers and acquisitions, transformations of industry infrastructure, and other changes which warranted revisions in the law.²² The most significant event that took place prior to the enactment of the 1996 Act was the landmark *United States v. American Telephone and Telegraph* case. The outcome changed the nature of the telephone industry in a profound way by dismantling the monopoly that AT&T had erected. Therefore, it is important to examine the results of the case.

¹⁹ Rosston, *supra* note 14, at 2. The FCC inherited regulatory authority over interstate wire and radio communications that had previously been regulated by the Interstate Commerce Commission. John T. Soma et al., *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 BERKELEY TECH. L.J. 565, 567 (1998).

²⁰ Rosston, *supra* note 14, at 2. In addition, section 157 stated that:

It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

47 U.S.C. § 157 (1994).

²¹ SHAW, *supra* note 11, at 32.

²² SHAW, *supra* note 11, at 32-33. The FCC's main objective during World War II was to ensure national defense. SHAW, *supra* note 11, at 33. Following the war, the invent of commercial television lead the FCC to consider future uses of wireline and wireless services. SHAW, *supra* note 11, at 33. The rapid growth in basic telephone service also resulted in changes. SHAW, *supra* note 11, at 33.

B. *The Modification of Final Judgment in United States v. American Telephone & Telegraph Co.*²³

In 1974, the Department of Justice ("DOJ") initiated a lawsuit under the Sherman Antitrust Act,²⁴ asserting that AT&T monopolized service offered in both local-exchange and long-distance telephone markets in the United States.²⁵ The Government sought the divestiture of the BOCs from AT&T, as well as the divestiture and dissolution of Western Electric.²⁶ The trial began in January 1981 but was immediately recessed for six weeks in order to afford the parties an opportunity to negotiate a settlement.²⁷ The proposed decree, filed with the court on January 8, 1982, signaled the end of the conflict and resolution of the issues.

The core of the Modified Final Judgment provided that AT&T would be permitted to keep its holdings, including Western

²³ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

²⁴ 15 U.S.C. §§ 1-7 (1994). The Sherman Antitrust Act regulates monopolization and restriction of trade. 15 U.S.C. §§ 1-2.

²⁵ *American Tel. & Tel.*, 552 F. Supp. at 139. However, the attack directed at AT&T actually began much earlier. In 1949, the DOJ filed suit in federal district court in New Jersey against AT&T and its subsidiary Western Electric. *Id.* at 135. The suit alleged that AT&T violated the Sherman Act by monopolizing and conspiring to constrain "trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies." *Id.* at 135. The case lay dormant until 1956 when the parties agreed to a consent decree, which did not include any of the changes to AT&T that the DOJ originally pursued. *Id.* at 137.

²⁶ *Id.* at 139. AT&T succeeded in ending the litigation without divesting Western Electric. An injunction was issued precluding AT&T from engaging in any business other than common carrier communications services, precluding Western Electric from manufacturing equipment other than that used by the Bell System, and requiring the defendants to license their patents to all applicants upon the payment of appropriate royalties. *American Tel. & Tel.*, 552 F. Supp. at 139.

²⁷ *Id.* at 140. Negotiations, however, proved futile and the trial continued with the Government and AT&T both producing substantial cases. Before the anticipated closure of the case, the court was advised in January 1982 of a proposed decree. *Id.*

Electric,²⁸ Bell Telephone Laboratories,²⁹ and its long distance operations.³⁰ Further, AT&T was permitted to enter new areas of business previously forbidden.³¹ The agreement consolidated the BOCs into seven independent regional companies.³² Due to fear of AT&T leveraging its monopolies, the Modified Final Judgment limited AT&T to providing only long-distance services,³³ while the BOCs were limited to supplying only local service.³⁴ The Modified Final Judgment also stated that the restrictions would be removed if evidence was presented that there was “no substantial

²⁸ Western Electric is a wholly owned subsidiary of AT&T, manufacturing equipment for AT&T and the BOCs. *Id.* at 136 n.3. Additionally, Western Electric provides equipment and services to government agencies as well as to the independent telephone companies in some cases. *Id.*

²⁹ Bell Telephone Laboratories, more commonly referred to as Bell Labs, was AT&T's telecommunications research and development facility. *American Tel. & Tel.*, 552 F. Supp. at 136 n.6. Bell Labs then became part of Lucent Technologies which encompasses the manufacturing and research operations of AT&T. Mike Mills, *A Giant Takes to Its Feet, Year's Efforts Finally Carve Lucent Technologies Out of AT&T*, WASH. POST, Oct. 1, 1996.

³⁰ SHAW, *supra* note 11, at 35.

³¹ SHAW, *supra* note 11, at 35. AT&T was permitted to become a competitor in emerging areas of communications. Specifically, entry was permitted into the growing computer industry, which was not regulated by the government. SHAW, *supra* note 11, at 35.

³² The regional BOCs include Ameritech, Bell Atlantic, BellSouth, Pacific Telesis, Southwestern Bell and NYNEX. Pacific Telesis and Southwestern Bell are now part of SBC Communications. SBC Communications is comprised of Southwestern Bell, Pacific Bell, Nevada Bell, Cellular One and SNET. *See About SBC Communications* (visited Feb. 28, 1999) <<http://www.sbc.-com/About/Home.html>>.

The breakup was finalized on January 1, 1984. AT&T was required to transfer to the BOCs “sufficient facilities, personnel systems, and rights to technical information to permit [them] to perform independently of AT&T, exchange telecommunications and exchange access functions.” *American Tel. & Tel.*, 552 F. Supp. at 200-01.

³³ *See id.* at 165. AT&T was also prohibited from engaging in electronic publishing. *See id.* at 183.

³⁴ *See id.* at 186. In addition, the BOCs were denied the opportunity to engage in the provision of information services, manufacture of telecommunications products and customer equipment, marketing of such equipment and directory advertising. *See id.*

possibility that an Operating Company could use its monopoly power to impede competition in the relevant market."³⁵

It is important to examine the Modified Final Judgment to see how it led to the telephone service market that existed prior to the 1996 Act. The Modified Final Judgment in the *AT&T* case played a vital role in the telecommunications industry between the 1934 and the 1996 Acts, filling the regulatory gap between the provisions of the two statutes. It assisted in ensuring that the market would not remain a complete monopoly and that other providers would have a chance in the market. It was an initial step in breaking down the monolithic providers in the telephone industry, thereby allowing in new providers. As a result of the Modified Final Judgment, BOCs were kept out of the long-distance market and providers such as AT&T were kept out of local service markets.³⁶ Thereby, no one provider controlled both the long-distance and local service markets. Both occurrences proved to be a focal point of the modifications contained in the 1996 Act, as it sought to further introduce competition in the market.

C. *The Telecommunications Act of 1996*³⁷

Although the Modified Final Judgment was the beginning of legal changes in the industry further deregulation was still to come. Following three years of debate, Congress enacted, and the

³⁵ *American Tel. & Tel.*, 552 F. Supp. at 195. However, the standard differs with respect to the restrictions against AT&T participating in electronic publishing since different considerations were taken into account. *Id.* at 195. With respect to the removal of restrictions, the court further indicated that, "to avoid any question about the appropriate test the standard for removal of the restrictions should be explicitly incorporated into the decree." *Id.* A divested BOC interested in engaging in an unrelated industry could petition the court for removal of the restriction as it pertains to that industry, and if abuse of monopoly power did not appear likely, the court could grant the petition. *See id.* at 195 n.267. The court appeared optimistic that monopolistic power could be tempered by technological developments or changes in the structures of the competitive markets. *See id.* at 194.

³⁶ *American Tel. & Tel.*, 552 F. Supp. at 165.

³⁷ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151-614).

President approved, the Telecommunications Act of 1996 in February 1998.³⁸ Although the bill was thought to be lacking in certain areas, there was general agreement that restructuring of the communications industry was necessary and inescapable.³⁹ The 1996 Act sought to rely principally on market forces in a competitive setting to achieve a competitive, deregulated industry.⁴⁰

The Telecommunications Act of 1996 was revolutionary because it was the unique result of decades of bipartisan effort to transform the industry from a nationwide monopoly to a more diverse and competitive industry.⁴¹ In particular, President Clinton noted,

[the Act] will bring the future to our doorstep. . . . [T]his historic legislation in my way of thinking really embodies what we ought to be about as a country and what we ought to be about in this city. It clearly enables the age of possibility in America to expand to include more Americans. It will create many, many high wage jobs. It will provide more information and more entertainment to virtually every home.⁴²

In general, the 1996 Act received favorable reactions from various groups⁴³: consumers were optimistic about lower costs and the possibility of one-stop-shopping;⁴⁴ economists and policy-makers were eagerly anticipating increased efficiency in

³⁸ See SHAW, *supra* note 11, at 38.

³⁹ See SHAW, *supra* note 11, at 39. New technologies such as the Internet and wireless communications are areas not addressed by the 1934 Act.

⁴⁰ THOMAS J. DUESTERBERG & KENNETH GORDON, *COMPETITION AND DEREGULATION IN TELECOMMUNICATIONS—THE CASE FOR A NEW PARADIGM* 1 (1997).

⁴¹ See *id.*

⁴² President's Remarks, *supra* note 2, at 215.

⁴³ DUESTERBERG & GORDON, *supra* note 40, at 1.

⁴⁴ DUESTERBERG & GORDON, *supra* note 40, at 1. "One-stop shopping" refers to consumers being able to go to one provider for such services as local and long distance telephone service, wireless service, and Internet connections. See Richard E. Wiley, *The Telecommunications Act of 1996*, in *THE TELECOMMUNICATIONS ACT OF 1996* 303, 309 (Practicing Law Institute ed., 1996).

telecommunications services;⁴⁵ inventors and entrepreneurs were seeking new accessible markets for cutting edge technology and services;⁴⁶ and the Government was optimistic about the creation of new American jobs resulting from the Act.⁴⁷

⁴⁵ DUESTERBERG & GORDON, *supra* note 40, at 1.

⁴⁶ DUESTERBERG & GORDON, *supra* note 40, at 1.

⁴⁷ DUESTERBERG & GORDON, *supra* note 40, at 1. Some key features of the 1996 Act, specifically dealing with the telephone industry, are codified as Title I (Telecommunication Services), Subtitle A (Telecommunications Services), Part II (Development of Competitive Markets). These features include the interconnection requirement, removal of barriers to entry, and universal service.

The interconnection requirement is codified in section 251 of the Act. According to subsection (a) addressing general duties, “[e]ach telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.” 47 U.S.C. § 251(a)(1)-(2) (Supp. II 1996). In addition, local exchange carriers are obligated to comply with the following duties: resale, number portability, dialing parity, access to rights-of-way and reciprocal compensation. 47 U.S.C. § 251(b)(1)-(5). Further, incumbent local exchange carriers are also obligated to conform with the following duties: duty to negotiate, interconnection, unbundled access, resale, notice of changes, and collocation. 47 U.S.C. § 251(c)(1)-(6).

The removal of barriers to entry requirement is codified in section 253 of the Act, which states that in general “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a) (Supp. II 1996).

The universal service requirement is codified in section 254 of the Act, which provides procedures to review universal service requirements, universal service principles, as well as other details with regard to this requirement. Further, section (c) provides that:

[t]he Joint Board in recommending, and the [FCC] in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services are essential to education, public health or public safety; have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; are being deployed in public telecommunications networks by telecommunications carriers; and are consistent with the public interest, convenience and necessity.

47 U.S.C. § 254(c)(1)(A)-(D) (Supp. II 1996).

The 1996 Act sought to address areas which had previously remained untouched, such as the Internet and wireless communications, as well as those areas already considered in the 1934 Act. The 1934 Act was enacted in an age when telephone, cable and broadcasting technologies were separate industries that addressed differing customer needs.⁴⁸ As technology expanded, however, the potential for competition became clearer.⁴⁹ Consequently, the 1996 Act had to accommodate the changing nature of the communications industry. The 1996 Act augmented the areas considered in the

In addition, under Subtitle B (Special Provisions Concerning Bell Operating Companies), Part III (Special Provisions Concerning Bell Operating Companies), specific rules were enacted for the incumbent local exchange carriers ("ILECs"). Incumbent local exchange carriers are defined as the local exchange carriers that:

[O]n February 8, 1996, provided telephone exchange service in such area; and on February 8, 1996, [were] deemed to be [] member[s] of the exchange carrier association pursuant to section 69.601(b) of the [FCC's] regulations (47 C.F.R. 69.601(b)); or [are] person[s] or entit[ies] that, on or after February 8, 1996, became [] successor[s] or assign[s] of a member described in clause (i).

47 U.S.C. § 251(h)(1)(A)-(B).

The most contentious section pertaining specifically to ILECs is section 271, entitled "Bell operating company entry into interLATA services." *See* 47 U.S.C. § 271 (Supp. II 1996). Most importantly, this section contains the fourteen point checklist which BOCs must adhere to before being allowed into the interLATA market. *See infra* note 139 and accompanying text (outlining the fourteen point checklist).

LATA is an abbreviation for local access and transport area for communication services. DAVID E.M. SAPPINGTON AND DENNIS L. WEISMAN, *DESIGNING INCENTIVE REGULATION FOR THE TELECOMMUNICATIONS INDUSTRY* 349 (1996). Pursuant to the Act, a LATA is more specifically defined as:

[A] contiguous geographic area established before February 8, 1996, by a Bell operating company such that no exchange area includes points within more than [one] metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or established or modified by a Bell operating company after February 8, 1996, and approved by the [FCC].

47 U.S.C. § 153(25)(A)-(B) (Supp. II 1996). The term interLATA is defined as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21) (Supp. II 1996).

⁴⁸ Wiley, *supra* note 44, at 303.

⁴⁹ Wiley, *supra* note 44, at 303.

1934 Act with five initiatives: redefinition and deregulation of telephone service,⁵⁰ development of Internet and related computer services,⁵¹ revised procedures for radio and television broadcasting,⁵² cable television services,⁵³ and the manufacturing of telecommunications equipment and related standards.⁵⁴ The 1996 Act attempted to address the realities of today's marketplace; a task the 1934 Act was unable to accomplish.

The 1996 Act also undertook some significant initiatives which differentiate it from the 1934 Act. For example, the Act preempted all state laws that prevented, inhibited or restricted competition in both local and long distance telephone service.⁵⁵ Additionally, the 1996 Act obviated the Modified Final Judgment,⁵⁶ and bestowed the FCC with the power to define competition in all areas of the industry.⁵⁷ In sum, the 1996 Act sought to fill the statutory gap,

⁵⁰ See 47 U.S.C. §§ 213-276 (Supp. II 1996).

⁵¹ See 47 U.S.C. § 157 (Supp. II 1996).

⁵² See 47 U.S.C. §§ 302a-382 (Supp. II 1996).

⁵³ See 47 U.S.C. §§ 532-537 (Supp. II 1996).

⁵⁴ See 47 U.S.C. §§ 544-549 (Supp. II 1996). SHAW, *supra* note 11, at 39.

The 1934 Act addressed "the development of the telephony and radio broadcasting industries and combined features of universal service with national defense and other policy considerations." SHAW, *supra* note 11, at 39.

⁵⁵ The Act goes as far as stating that:

[i]f, after notice and an opportunity for public comment, the [FCC] determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b) of this section, the [FCC] shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(d) (Supp. II 1996).

⁵⁶ According to section 601:

[a]ny conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

47 U.S.C. § 601(a)(1) (Supp. II 1996). Congress did this in order to remove the existing barriers to competition that the Modified Final Judgment established.

⁵⁷ SHAW, *supra* note 11, at 39.

beyond that already filled by the Modified Final Judgment, created by advances in technology between 1934 and the present day.

II. REASONS FOR FAILED DEREGULATION AND LACK OF COMPETITION

Commentators have noted that federal deregulation in the telecommunications industry is necessary for three reasons. First, consumers benefit from increased competition.⁵⁸ Second, timely and efficient introduction of new technology creates significant economic benefits.⁵⁹ Third, sluggish competition and decreased regulation may have a substantial negative impact on the American economy.⁶⁰ Despite these needs, observers of the 1996 Act have generally agreed that, despite expectations of near-term benefits by its authors, the statute has fallen short of its goals of increased competition and decreased regulation.⁶¹ Although a plethora of benefits were anticipated, there has been little obvious competition in many local telephone markets.⁶² However, there has been a modest increase in the number of service providers in long distance markets.⁶³

⁵⁸ DUESTERBERG & GORDON, *supra* note 40, at 4. Increased competition brings new products into the marketplace. These new products provide enhanced service and assist consumers who live in remote areas. DUESTERBERG & GORDON, *supra* note 40, at 4.

⁵⁹ DUESTERBERG & GORDON, *supra* note 40, at 5. Lengthy delays in introduction of new technology or distortions in investment due to price regulation can result in the economy functioning at less than optimal efficiency. Additionally, hindering the full deployment of new technologies may reduce the industry, as well as the total economic growth rate. DUESTERBERG & COHEN, *supra* note 40, at 5.

⁶⁰ DUESTERBERG & GORDON, *supra* note 40, at 11. "[C]onstant improvement in the telecommunications sector is a key to maintaining the worldwide leadership and [the] high standard of living the U.S. now enjoys." DUESTERBERG & GORDON, *supra* note 40, at 11.

⁶¹ DUESTERBERG & GORDON, *supra* note 40, at 2.

⁶² DUESTERBERG & GORDON, *supra* note 40, at 2.

⁶³ Examples of new long distance carriers include 10-10-345 (Lucky Dog Phone Co.), 10-10-321 (Telecom USA) and 10-10-220 (Telecom USA). See Andrew Kupfer, *AT&T Gets Lucky*, FORTUNE, Nov. 9, 1998, at 108. Although these may seem to be new market entrants, 10-10-345 is owned by AT&T, while

Failure of the 1996 Act can be attributed to fundamental faults in its structure and consequences. Specifically, the 1996 Act has failed with respect to the telephone industry for a number of reasons. Increased mergers have failed to produce any increased competition and savings to consumers. Additionally, the power struggle between the FCC and the states have put the effectiveness of the 1996 Act in question and yielded considerable litigation. Further, the Act's manner of targeting the BOCs has had a substantive deleterious effect on the ability to increase competition and foster deregulation.

A. *Merger Mania*

As a result of the Telecommunications Act of 1996, telephone providers were given more freedom. One of these freedoms included the ability to engage in mergers with providers servicing other LATA regions, a right previously forbidden under the Modified Final Judgment.⁶⁴ Based on the statutory scheme established in the 1996 Act, industry observers believed that many existing providers would have to merge in order to survive in the increased competitive environment.⁶⁵ As a result, providers

10-10-321 is owned by MCI. *Id.* Nonetheless, the new entrants may be the reason that the percentage of AT&T's long distance market share has seen a 10 percent drop to 50 percent in the last three years. Jean-Louis Doublet, *AT&T Moves to Stop Decline in Market Share*, AGENCE FR.-PRESSE, Jan. 27, 1998, available in 1998 WL 2208904.

⁶⁴ The Modified Final Judgment limited the BOCs upon divestiture to the business of supplying only local service. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 186. They were further denied the opportunity to provide interexchange services. *Id.* The court held that restrictions of that type could be validly "imposed if they are necessary to prevent the occurrence or recurrence of anticompetitive conduct." *Id.* See also Part I.B *supra* (discussing the Modification of Final Judgment).

⁶⁵ Daniel G. Bergstein & Michelle W. Cohen, *Mega-Deals in Communications Trends Established in 1996 Are Expected to Continue*, N.Y.L.J., Dec. 9, 1996, at 7. With a more challenging environment, existing companies would have to merge in order to gain greater capabilities for consumers to possibly combat lower prices offered by new market entrants, who have less overhead costs.

merged to benefit from lower costs, improved efficiency and expanded services.⁶⁶

Some of the more notable mergers approved by the DOJ, FCC and Federal Trade Commission ("FTC") include the SBC/Pacific Telesis ("PacTel") and the Bell Atlantic/NYNEX mergers,⁶⁷ as well as the AT&T/TCI⁶⁸ merger. SBC/Ameritech,⁶⁹ Bell Atlantic/GTE,⁷⁰ and AT&T/SBC⁷¹ have announced plans to merge.

⁶⁶ Stanley M. Gorinson & Martin L. Stern, *Much of the Transactional Activity Following the Telecommunications Act of 1996 Flows from the Elimination of Entry Barriers and Outmoded Regulations*, NAT'L L.J., Feb. 10, 1997, at B7.

⁶⁷ See *In re Applications of NYNEX Corporation, Transferor, and Bell Atlantic, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985 (1997) [hereinafter *NYNEX/Bell Atlantic Order*]; *In re Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 2624 (1997) [hereinafter *PacTel/SBC Order*].

⁶⁸ After scrapping merger plans with SBC, AT&T turned to TCI (Telecommunications, Inc.). The FCC subsequently approved that merger, subject to certain conditions. See *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, No. 98-178, 1999 WL 76930 (1999).

⁶⁹ SBC Communications, Inc. ("SBC") announced the merger on May 11, 1998, which is still subject to shareholder and regulatory approvals. See Jeannine Aversa, *Whiteacre Confronts Merger Skeptics*, THE JOURNAL RECORD (Okla. City), May 20, 1998, available in 1998 WL 11954026. The merger would create the nation's largest local phone company, with a "national-local" focus, and expand SBC's power in local markets to the Midwest. Consumer groups, who want the merger blocked, are concerned that should the merger be approved, the merger trend will not cease. *Id.*

⁷⁰ Bell Atlantic announced the merger with GTE on July 28, 1998. *Bell Atlantic and GTE Agree to Merge* (July 28, 1998) <<http://www.ba.com/nr/1998/Jul/19980728001.html>>. The merger will give Bell Atlantic the long-distance power it needs through GTE. *Id.* The new company will be able to provide both local and long distance services. *Id.* According to Bell Atlantic CEO Ivan Seidenberg, "[t]he transaction also means more competition. The combined enterprise will have the financial, operational and technological resources to compete effectively against the strategies of AT&T/TCI, SBC/Ameritech, WorldCom/MCI and others both current and future." *Id.*

⁷¹ AT&T and SBC discussed merging in 1997; however, since June 1997, discussions have terminated. Eric Auchard, *AT&T, SBC Communications \$50-bn*

None of these mergers, however, have been formally approved by the appropriate governmental agencies. Mergers of telephone providers require FTC, DOJ and FCC approval.⁷² Although all

Merger Put in Cold Storage (June 29, 1997) <<http://www.expressindia.com/fe/daily/19970629/18055333.html>>. The AT&T/SBC merger, had it been pursued, would have faced numerous regulatory hurdles. Further, the merger was expected to encounter problems because some observers believe that AT&T desired the merger in order to enter local calling service in the SBC market. See Marianne Lavelle, *A Monopoly or Global Competitor? Rumored AT&T Deal May Shift Focus of Antitrust Laws*, NAT'L L.J., June 9, 1997, at B1. Since the merger had been put on hold, AT&T has instituted a campaign against SBC, filing reports with the FCC requesting that SBC's other mergers be rejected. See generally *AT&T Press Releases* (visited Nov. 2, 1998) <<http://www.att.com/press>>.

⁷² The FCC is afforded authority to review such mergers pursuant to sections 214(a) and 310(d) of the Communications Act of 1934. 47 U.S.C. §§ 214(a), 310(d) (1994); see also *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 19987. Both sections set forth a public interest standard for determining whether a merger should be allowed. Section 214(a) provides that no common carrier shall acquire any line "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" the operation of the line. 47 U.S.C. § 214(a). Section 310(d) provides that no construction permit or station license may be transferred, assigned or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby." 47 U.S.C. § 310(d). This standard is a broad and flexible standard encompassing the "broad aims of the Communications Act." *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 19987 (citing *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953); *Washington Utils. and Transp. Comm'n v. FCC*, 513 F.2d 1142, 1147 (9th Cir. 1976); *Western Union Div., Commercial Telegrapher's Union, AFL v. United States*, 87 F. Supp. 324, 335 (D.D.C.), *aff'd*, 338 U.S. 864 (1949)). The "broad aims" include the implementation of Congress' "pro-competitive, de-regulatory national policy framework" for telecommunications, "preserving and advancing" universal service, and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services." *Id.* at 19987.

The FCC also has authority under the Clayton Act to review transfers of service. 15 U.S.C. §§ 18, 21a (1994). In effect, the Clayton Act empowers the FCC to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy . . . where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly." *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 20005 (quoting 15 U.S.C. §§ 18,

three agencies or departments regulate mergers, the latter two appear to have the most impact on the final outcomes.⁷³ Although the DOJ and FCC both have authority to review mergers and acquisitions, their jurisdiction extends to different areas.⁷⁴ As an independent agency, the FCC has broad authority and expertise regarding telecommunications issues; hence it focuses on setting and promoting public policy goals.⁷⁵ On the other hand, the DOJ concentrates more on legal, rather than public policy, issues.⁷⁶ These differing perspectives are highlighted when mergers are being considered. It is interesting to observe how each department or agency views the proposed merger and how this impacts the pending merger. Although, they generally take similar approaches to merger review,⁷⁷ this is not always the case. Consequently, the outcomes can be unpredictable, as the following case studies illustrate.⁷⁸

21a). Courts have construed these statutory provisions to mean that the FCC has discharged its antitrust responsibilities "when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors." *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc). The FCC has the discretion to act under the Clayton Act. *Id.* In the *PacTel/SBC Order*, the FCC chose not to exercise the authority because the Commission found sufficient jurisdiction under the 1934 Act to address all the competitive effects of the proposed transfer, including the issue of whether the proposed transfer may substantially lessen competition or tend to create a monopoly. *PacTel/SBC Order*, 12 FCC Rcd. at 2629.

The FTC and DOJ assume reviewing authority under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. §§ 15c-h, 18a, 66 (1994).

⁷³ In its decision, the FCC makes little or no mention of the FTC.

⁷⁴ James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 197 (1998).

⁷⁵ *Id.* at 197.

⁷⁶ *Id.*

⁷⁷ *Id.* at 201.

⁷⁸ *Id.* at 205. *See infra* notes 94-95 (discussing pending mergers under review by the FCC).

1. General Effect of Mergers in the Telephone Industry

In light of the recent increase in mergers,⁷⁹ it is important to analyze the reasons for merging, as well as the subsequent results. Mergers have two possible results: a price reduction for customers due to reduced market entry costs, or elevated costs due to the reduced competition in a market. While some analysts believe that mergers are detrimental because they lead to monopoly or oligopoly in the market, others believe that mergers are advantageous because they “shake up the market” and spawn new services.⁸⁰ For these reasons, the DOJ, FCC and FTC intervene in order to evaluate the effect such mergers will have on the market and to determine whether the mergers are increasing or decreasing competition.⁸¹ If two merging companies are not competitors nor

⁷⁹ See *supra* Part II.A, discussing the impact of mergers on the telecommunications industry.

⁸⁰ Tim Greene & Denise Pappalardo, *Telecom Mega-Mergers Not All Bad*, NETWORK WORLD, Sept. 28, 1998, at 31. See also Sherri Cruz, *Merging to Compete or to Dominate*, LAS VEGAS BUS. PRESS, Aug. 10, 1998, at 19 (discussing whether mergers increase or decrease competition). Mark Jamison, Director of Telecommunications Studies at the University of Florida in Gainesville, remarked, “[w]ithout mergers, markets will look very much like they do today.” Greene & Pappalardo, *supra*, at 31. On the other hand, David Norton, a network architect at American Stand Companies, a Piscataway, New Jersey company, stated “[t]he idea behind the Telecommunications Act was to increase competition, and the more these mergers happen, the more the industry becomes an oligopoly.” Greene & Pappalardo, *supra*, at 31.

⁸¹ Before a merger can be consummated, the parties to the merger must obtain the approval of the FCC pursuant to the Communications Act of 1934 for the deemed transfer of control. See 47 U.S.C. §§ 214(a); 310(d). See also *supra* note 72 (discussing the agency’s authority to review applications for transfer).

For an example of the process, in the case of the proposed merger of SBC and Ameritech, the Board of Directors of SBC agreed to the planned merger on May 10, 1998, SBC and Ameritech filed transfer of control applications with the FCC on July 24, 1998, and shareowners are set to vote December 10, 1998. Proxy statement, SBC Communications, Inc., to shareowners (Oct. 15, 1998) (on file with the *Journal of Law & Policy*).

in contiguous LATA regions, the FCC has tended to allow the merger.⁸²

As a result of their possible negative economic effects, mergers tend to be closely scrutinized. Moreover, despite the legitimate arguments made by the prospective merging companies that their combinations are in the public interest and not a hindrance to the market,⁸³ there is considerable fear of the return of "Ma Bell."⁸⁴

⁸² In such a situation, a merger is allowed since the two parties are not direct competitors in a specific market, and there is no clear threat that competition is being, or may be, suppressed as a result of the merger. *See In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Transferee, Memorandum Opinion and Order, 13 FCC Rcd. 21292 (1998) [hereinafter SNET/SBC Order].*

⁸³ 47 U.S.C. §§ 214(a), 310(d) require that the transaction is in the public interest, convenience and necessity.

⁸⁴ *See* Lisa Stein, *Heading Back to Ma Bell?*, NAT'L L.J., July 27 1998, at A1. The name "Ma Bell" stems from the telephone's creator, Alexander Graham Bell, who founded the Bell Telephone Company. *See* KRAUS & DUERIG, *supra* note 11, at 19. The subsequent combination of Bell Telephone and the Western Union phone interests prior to this century became the American Bell Telephone Company. KRAUS & DUERIG, *supra* note 11, at 23. With the creation of the new service came the question of how to best distribute it to the general public. It was determined that the creation of local phone companies would assist in distributing the service to everyone. KRAUS & DUERIG, *supra* note 11, at 26. These local subsidiaries were relatively independent but were overseen by the parent company. KRAUS & DUERIG, *supra* note 11, at 26.

In 1885, a further component was added to the Bell System—the American Telephone and Telegraph Company—a long distance subsidiary. KRAUS & DUERIG, *supra* note 11, at 26. Fourteen years later, the long distance subsidiary merged with the parent company and the new entity took the name American Telephone and Telegraph ("AT&T"). KRAUS & DUERIG, *supra* note 11, at 26. The AT&T structure, referred to as "Ma Bell," was established with AT&T headquarters at the top of the organizational structure, then Western Electric, AT&T long distance and 24 local BOCs stemming from it. KRAUS & DUERIG, *supra* note 11, at 36. Western Electric was the manufacturer, supplier and installer of equipment. KRAUS & DUERIG, *supra* note 11, at 37. The BOCs provided local and intrastate long distance services. KRAUS & DUERIG, *supra* note 11, at 36. To a substantial degree, the local operating companies were autonomous, although they were required to operate within AT&T guidelines. KRAUS & DUERIG, *supra* note 11, at 37.

Additionally, the fear of a reduced number of BOCs is frequently noted in the FCC's memorandum orders and opinions.⁸⁵ The FCC indicated specifically in the *SBC/PacTel* decision that reduction in the number of BOCs was not a currently justifiable reason to reject the application for merger.⁸⁶ Thus, it will be interesting to see how the agency reacts should other BOCs seek merger approval.⁸⁷

Although the providers claim that they are working in compliance with the Telecommunications Act of 1996, the "merger

In reaction to claims made by the applicants, opponents present vigorous rebuttals that generally include the claim that mergers are not in the public interest or that they will impair competition. For each merger that goes before the FCC, parties are allowed to file petitions and comments to deny transfers. These comments are usually tailored to the specific merger and focus on the hindrance of competition that the merger may yield. *See, e.g., PacTel/SBC Order*, 12 FCC Rcd. 2624; *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. 19985.

⁸⁵ The FCC specifically noted in the *NYNEX/Bell Atlantic* opinion that they are concerned about the impact of the declining number of large incumbent LECs, on [the FCC's] ability to carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation.

NYNEX/Bell Atlantic Order, 12 FCC Rcd. at 19994. The term Local Exchange Carrier ("LEC") is defined as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26) (Supp. II 1996).

⁸⁶ *PacTel/SBC Order*, 12 FCC Rcd. at 2639. The FCC noted that while the proposed transfer would reduce the number of BOCs by one, nothing in the Communications Act or the antitrust laws requires the current number of BOCs, or any particular number of them. *Id.* at 2639-40.

⁸⁷ In the recent *SBC/SNET* merger approval, the FCC reiterated its concern over the reduction in the number of large LECs on local exchange and exchange access markets. *SNET/SBC Order*, 13 FCC Rcd. 21302. The FCC specifically stated, "[w]e remain concerned about the consolidation among large LECs as a general matter, and we will closely review mergers involving large LECs on a case-by-case basis." *Id.* at 21302. However, the *SBC/SNET* merger wasn't expected to have approval problems, based on the small size of *SNET*'s market penetration, as well as the fact that *SBC* and *SNET* are not truly comparable companies. *See generally id.* Therefore, the FCC's reaction in this case may not be truly indicative of how the agency would react when "comparable companies" seek merger approval. *See also infra* notes 94-95 (discussing mergers pending before the FCC).

mania”⁸⁸ appears to provide a backdoor to enter new markets.⁸⁹ Instead of complying with the requirements of the 1996 Act, as required to enter new markets, providers simply merge with a provider in a market they are seeking to enter, thereby avoiding the statutory requirements. Further, by creating these new opportunities, existing providers place themselves in a better financial position in the more challenging environment.⁹⁰ Backdoor methods have become important modes of facilitating entry into the market,⁹¹ because they allow BOCs to circumvent strict FCC regulations. Because the costs of entering new markets can be prohibitive, without alternative methods of entry, BOCs would be forced to remain in their current markets with little room to expand. Consequently, some of the mergers are not created with the intent to increase competition, but rather they are established to expand BOCs market penetration by infiltrating markets which they normally would not be able to enter. An example of the use of the backdoor method is the previously proposed, and now defunct, AT&T/SBC merger proposal. In that situation, AT&T was well positioned to compete against SBC in SBC’s local service markets.⁹² However, in order to preclude competition, the providers could simply merge. Therefore, if the merger were to be completed and subsequently approved, it would possibly eliminate a viable

⁸⁸ The term “merger mania” has been used by many observers in telecommunications industry. See Dominic Bencivenga, *Telecom Act in Action—Vision of Competition Blurred by Consolidation*, N.Y.L.J., Sept. 10, 1998, at 5; see also Stein, *supra* note 84, at A18.

⁸⁹ Bergstein & Cohen, *supra* note 65, at 7. See also Daniel G. Bergstein, *Mega-Mergers on Information Superhighway*, N.Y.L.J., Dec. 11, 1995, at 7 (discussing mergers in the telecommunications industry); Gail Lawyer, *Give and Take . . . And Take the Terrible Twos*, TELE.COM, Feb. 1, 1998, available in 1998 WL 10874231 (discussing the results of the 1996 Act).

⁹⁰ Bergstein & Cohen, *supra* note 65, at 7.

⁹¹ See Cruz, *supra* note 80, at 19. Alan Roth, an attorney for Bryan Cave LLP in Washington, D.C., stated “[s]ome of these companies have decided they’re just going to merge their way into one-stop shopping and are finding that easier than dealing with the FCC.” Cruz, *supra* note 80, at 19.

⁹² See Auchard, *supra* note 71.

competitor for SBC—a contradiction to the set goals of the Telecommunications Act of 1996.⁹³

This merger mania has not gone unnoticed by federal regulators. Due to the increase in mergers, and fearful of the implications of the consolidation, the FCC questioned six top telecommunications executives on the rise in mergers in October 1998.⁹⁴ In December 1998, the FCC also held a second set of hearings.⁹⁵ This set of hearings, providing a different focus, were aimed at helping the agency's commissioners determine whether three

⁹³ *AT&T Chief Builds Case for SBC Deal*, THE JOURNAL RECORD (Okla. City), June 11, 1997, available in 1997 WL 14394525.

⁹⁴ *In re: FCC Merger En Banc* (visited April 10, 1999) <<http://www.fcc.gov/enbanc/102298/eb102298.html>>. See also John Simons, *FCC to Question Telecom Executives About Industry's Recent Merger Wave*, WALL ST. J., Oct. 22, 1998, at B7. Those participating in the hearing included Michael Armstrong, chief executive of AT&T, Leo Hindery, president of TCI, Edward E. Whitacre, Jr. CEO of SBC, Richard C. Notebaert, CEO of Ameritech, Ivan Seidenberg, CEO of Bell Atlantic, and Charles R. Lee, CEO of GTE. *Id.*

⁹⁵ *In Re: ILEC Merger En Banc Hearing*, (visited April 10, 1999) <<http://www.fcc.gov/enbanc/121498/eb121498.html>>. On December 14, 1998, SBC, Bell Atlantic and AT&T were challenged by consumer groups and rival companies at a hearing to address the issue of competition and deregulation in the industry. *Id.* See also Labaton, *supra* note 5, at C8. As a result of growing concerns in the industry, the FCC has suggested that it may ultimately recommend that severe conditions be imposed on future mergers. Labaton, *supra* note 5, at C8. But it is not clear whether there will be the required number of votes either to impose onerous terms or to take the ultimate step of blocking the deal. Labaton, *supra* note 5, at C8. Blocking the deal would be controversial because the DOJ appears unlikely to bar the transaction on antitrust grounds. Bryan Gruley & Stephanie N. Mehta, *FCC Officials Signal Concerns with Baby Bell Mergers*, WALL ST. J., Dec. 9, 1998, at A2. The FCC seems more intent on blocking the SBC and Bell Atlantic deals while permitting the AT&T deal to pass with conditions. *Id.* at A2.

Meanwhile, on December 10, 1998, SBC shareowners met to consider and vote on the Agreement and Plan of merger with Ameritech. Should the merger be approved, Ameritech will become a wholly owned subsidiary of SBC. Letter from Edward E. Whiteacre, Jr., Chairman of the Board and Chief Executive Officer, SBC Communications, Inc., to SBC shareowners (Oct. 15, 1998) (on file with *Journal of Law & Policy*). This is, of course, conditional upon FCC approval. See *id.* Subsequently the shareholders overwhelmingly approved the \$56 billion acquisition of Ameritech Corp. *SBC Shareholders Clear Purchase*, WALL ST. J., Dec. 11, 1998, at C22.

planned mergers are in accordance with the goals of the 1996 Act.⁹⁶ The hearings were a result of growing concern at the federal level that the 1996 Act has failed to yield competition between telephone and cable companies.⁹⁷ The noticeable conflict between consumers' fears of consolidation and the industry leaders' claims that consolidation is "a natural outcome of competing in a world market" has led the FCC to more closely scrutinize pending mergers.⁹⁸ Unlike previous mergers, the FCC will not be so quick to approve the current round of consolidations.⁹⁹

In sum, it is evident that the hurdles which have been established both for the BOCs to enter the interLATA market, and the long distance providers to enter the intraLATA market, have yielded an increase in the number of mergers. These mergers have been instituted, to some degree, to avoid the difficult market entry criteria established by the 1996 Act.¹⁰⁰ As a result, however, they

⁹⁶ Labaton, *supra* note 5, at C8. The three planned mergers include SBC/Ameritech, AT&T/TCI and Bell Atlantic/GTE. Stephen Labaton, *supra* note 5, at C8.

⁹⁷ Simons, *supra* note 94, at B7.

⁹⁸ Simons, *supra* note 94, at B7.

⁹⁹ See Simons, *supra* note 94, at B7. In fact, the FCC announced that it is considering imposing stringent conditions on two of the planned mergers, including requiring that the deals be contingent on the BOCs first opening their networks to rival carriers in at least one state. Kathy Chen & Stephanie N. Mehta, *Bell Deals May Face Tough Conditions*, WALL ST. J., Mar. 23, 1999, at B8. The mergers targeted include the SBC/Ameritech deal and the Bell Atlantic/GTE deal. *Id.* Any market-opening requirement would likely mirror the fourteen point checklist required by the 1996 Act. *Id.* The tougher conditions are based on the concern that the continued mergers fail to serve the public interest. *Id.*

Moreover, the FCC Chief announced that he has "serious concerns" about the SBC/Ameritech merger. Kathy Chen, *FCC Chief Kennard to Seek Conditions On the Merger of SBC and Ameritech*, WALL ST. J., Apr. 2, 1999, at B2. However, despite this gloomy foreboding, the DOJ announced that it approved the merger, conditioned upon the sale of their overlapping wireless licenses. *Bells and Whistle-blowers*, THE ECONOMIST, Mar. 27, 1999, at 64.

¹⁰⁰ The criteria include the interconnection and universal service requirements. See *supra* note 47 and accompanying text (discussing the interconnection requirement codified in section 251 and the universal service requirement codified in section 254). Some argue that the large number of mergers suggests that operation of the local service network is a natural monopoly and that the

have not necessarily produced increased competition and decreased regulation. Unfortunately, as the Act continues to make specific demands of market participants, such as interconnectivity and universal service, the mergers will most likely continue, but will be closely scrutinized.¹⁰¹

2. SBC/PacTel Merger

The SBC/PacTel merger was one of the first mergers announced after the enactment of the 1996 Act.¹⁰² Despite the arguments that the proposed transfers might reduce competition, the FCC determined that the SBC/PacTel merger would serve the “public interest, convenience and necessity,” and thus, granted the application.¹⁰³ The FCC’s reasoning in this merger is of great importance because it set a precedent for how subsequent mergers would be reviewed in the post-1996 Act merger frenzy.

The agency stated four reasons for its conclusion.¹⁰⁴ First, the opponents to the merger failed to establish the elements needed to

forces of this monopoly are causing the industry to integrate. A. Michael Noll, *Don’t Call Us, We’ll Call You Communications: Lack of Competition in Local Phone Service Suggests That a Monopoly May Be the Natural Order*, L.A. TIMES, Nov. 14, 1997, at B9.

¹⁰¹ Interconnectivity and universal service are some of the requirements of the 1996 Act for intraLATA providers to enter the interLATA market. 47 U.S.C. § 271(c)(2)(B)(i)-(xiv) (Supp. II 1996). If they fail to meet these requirements, along with many others, they are barred from entering new markets. 47 U.S.C. § 271(c)(1). However, in their drive to enter new markets, a number of the BOCs have chosen to merge, rather than open up their markets to new participants.

To further emphasize the point, on October 26, 1998, SBC and Southern New England Telephone Corp. announced the completion of their merger. *Telephony*, COMM. DAILY, Oct. 27, 1998, available in 1998 WL 10697539. The merger was finalized following the FCC’s ruling approving the merger. *Id.* See also *SNET/SBC Order*, 13 FCC Rcd. at 21293.

¹⁰² Jason E. Friedrich, *Thinkable Mergers: The F.C.C.’s Evolving Public Interest Standard*, 6 COMMLAW CONSPECTUS 261, 267 (1998). Under the terms of the merger, PacTel would merge with, and become a wholly-owned subsidiary, of SBC. *PacTel/SBC Order*, 12 FCC Rcd. at 2629.

¹⁰³ *Id.* at 2626.

¹⁰⁴ *Id.* at 2626-27.

satisfy the doctrine of actual potential competition.¹⁰⁵ Second, the proposed merger would only slightly, if at all, increase the dangers to competition.¹⁰⁶ Third, although opponents claimed that the merger should not be permitted because of SBC's anti-competitive behavior in Texas, the FCC felt that such conduct would not be repeated in California or Nevada, areas over which SBC would gain control upon completion of the merger.¹⁰⁷ Finally, the merger could result in some modest improvements to the competitiveness and performance of some markets.¹⁰⁸ Further, it was permitted because the merged company, with its enhanced revenues and additional resources, would be able to compete more

¹⁰⁵ *Id.* at 2626. The doctrine of actual potential competition commences "when a firm proposes to enter a concentrated market by merging with a company that is already in the market and, but for the merger, the firm likely would have entered in another way." *Id.* at 2633. When the doctrine's requirements are fulfilled, the merger eliminates a pro-competitive entry by the firm that would have occurred otherwise. *PacTel/SBC Order*, 12 FCC Rcd. at 2634. The FCC outlines the five elements of actual potential competition:

- (1) the market in question ("the target market") is highly concentrated;
- (2) few other potential entrants are "equivalent" to the company that proposes to enter the target market by merger (SBC);
- (3) the company entering the target market by merger would have entered the market but for the proposed merger;
- (4) that company had other feasible means of entry; and
- (5) such alternative means of entry offer a substantial likelihood of ultimately producing deconcentration in the target market or other significant pro-competitive effects.

Id. Upon application of the doctrine, the FCC held that the commenters and petitioners failed to show at least two of the doctrine's five elements. *Id.*

¹⁰⁶ *Id.* at 2626. The FCC found that there were more than a few other potential entrants into the markets in question. *Id.*

¹⁰⁷ *PacTel/SBC Order*, 12 FCC Rcd. at 2626. SBC was accused of lobbying, political, regulatory and litigation activity in Texas, resulting in anti-competitive acts. *Id.* at 2641. Despite these contentions, the FCC concluded that the acts were not a violation of any law. *Id.* at 2642. Although the FCC did not believe that such actions would be repeated, it stated that if there were any violations of the Act, they would be ready to use the "enforcement tools" provided by Congress in the 1934 Act. *Id.* at 2642-43.

¹⁰⁸ *Id.* at 2627. These markets include wireless mobile services, long distance and local exchange. *PacTel/SBC Order*, 12 FCC Rcd. at 2657-59. Improvements include savings in overhead and support systems and the offering of one-stop-shopping. *Id.* at 2661.

effectively with new competition in the SBC and PacTel markets.¹⁰⁹ There was little concern that the two companies would have been potential competitors.¹¹⁰ However, the FCC was quick to note that it was not the benefits of the proposed transfer, but rather its lack of any “significant and foreseeable anti-competitive effects,” that led the agency to approve the merger.¹¹¹ Additionally, since the DOJ did not file any objection to the merger, the FCC was further convinced that the proposed merger would not substantially reduce competition. Furthermore, any particular anti-competitive conduct could be removed by the use of the agency’s conditioning authority.¹¹² These bases for allowing the SBC/PacTel merger would resurface in subsequent mergers, providing other companies with a rationale for approval of their mergers.¹¹³

3. Bell Atlantic/Nynex Merger

The next major merger announced was that of Bell Atlantic/NYNEX, which was also deemed a favorable merger that would enable two companies to combine complementary services and holdings.¹¹⁴ Despite approving the merger, the FCC remarked

¹⁰⁹ *Id.* at 2661. The savings in overhead and support systems would translate into lower costs to consumers and allow the company to run more efficiently. *Id.*

¹¹⁰ Friedrich, *supra* note 102, at 267.

¹¹¹ *PacTel/SBC Order*, 12 FCC Rcd. at 2661.

¹¹² *Id.* The FCC specifically said:

We conclude that the proposed transfer will result in pro-competitive effects, efficiencies, and other public interest benefits that could be real but, if they occur, will not likely be dramatic. We emphasize that it is not these benefits of the proposed transfer, but rather its lack of any significant and foreseeable anti-competitive effects, that has led us to approve it.

Id.

¹¹³ See generally *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. 19985.

¹¹⁴ *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 19990. A merger will be pro-competitive if the harms to competition are outweighed by the benefits. *Id.* at 19987. “In demonstrating that the merger will enhance competition, applicants carry the burden of showing that the proposed merger would not eliminate potentially significant sources of competition . . .” *Id.* at 19988. The FCC also

that the merger would produce two predictable effects.¹¹⁵ First, the merger would likely strengthen NYNEX's market force against competition.¹¹⁶ Second, the merger would increase the likelihood of coordinated interaction among the significant remaining market participants to increase prices, reduce quality or restrict output.¹¹⁷ Further, the FCC noted that NYNEX and Bell Atlantic had not demonstrated that the possible additional entry and expansion in response to the exercise of market power was likely to be rapid or substantial enough to mitigate the concern that the merger would have an adverse effect on consumers.¹¹⁸ However, Bell Atlantic's pro-competitive public interest commitments, which were a condition of the approval, mitigated the concerns harbored by the FCC regarding the likely competitive effects of the merger.¹¹⁹ The FCC seemed unwilling to allow the merger. The FCC approval appeared to be more a result of the failure of the opponents to provide substantial and convincing proof of the dangers of the merger, than the Applicants' argument.¹²⁰ It is also interesting to note that, again, the DOJ did not challenge the merger.¹²¹ In fact,

stated its concern about mergers by remarking that they are especially disconcerting at this initial period of implementation of the 1996 Act. *Id.*

¹¹⁵ *Id.* at 20057.

¹¹⁶ *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 20057.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 20058.

¹¹⁹ *Id.*

¹²⁰ Some of the parties who filed timely comments or petitions to deny or impose conditions on the grant of transfer included AT&T, MCI and other smaller providers. *Id.* at 19998.

¹²¹ Weiss & Stern, *supra* note 74, at 195. Such inaction is of interest because of the circumstances surrounding the merger. As two of the largest local service providers in adjacent regions, the merger of Bell Atlantic and NYNEX would place a substantial portion of the Northeast and Mid-Atlantic under one provider. Weiss & Stern, *supra* note 74, at 202. Further, the merger would eliminate the possibility that either company could compete in the other's local service market. Weiss & Stern, *supra* note 74, at 202. Despite this, the DOJ decided not to block or place any conditions on the merger, finding no likelihood of adverse competitive impact. Weiss & Stern, *supra* note 74, at 202.

this inaction on the part of the DOJ was criticized while the FCC's decision was lauded.¹²²

FCC approval of the Bell Atlantic/NYNEX merger was contingent upon the companies complying with eight "enforceable conditions."¹²³ The eight conditions of the Bell Atlantic/NYNEX agreement were: (1) providing detailed performance monitoring reports to carriers purchasing interconnection from Bell Atlantic/NYNEX, that would also be made available to the FCC and state commissions; (2) negotiating performance standards covering five aspects of its Operational Support Systems ("OSS"); (3) developing uniform OSS interfaces in thirteen states within fifteen months; (4) providing OSS testing for any carrier that requests it; (5) using forward-looking economic costs for setting rates for unbundled network elements; (6) offering shared transport priced on a per minute basis, routed the same way its own traffic is routed; (7) adopting an installment payment plan for non-recurring charges imposed on competitors; and (8) offering payment plans for common construction costs and other costs

¹²² Weiss & Stern, *supra* note 74, at 195. The FCC's decision was lauded by many critics of the DOJ decision, and was described as the action "where [the] Justice [Department] failed to act." Weiss and Stern, *supra* note 74, at 195. Further, the DOJ's decision outraged many on Capitol Hill, and contributed to a hostile reception of then-acting DOJ Antitrust Chief Joel Klein by Congress at his confirmation hearing. Weiss & Stern, *supra* note 74, at 203. Klein defended the decision on the following terms:

Based on a year-long decision of millions of documents including, significantly, the non-public business plans of many of the affected players as well as lots of deposition testimony, interviews, expert commentary, and advice, I believed, then, and continue to believe, that the merger was not anticompetitive. In fact, the evidence indicated that real efficiencies were likely to result from the merger some of which have already been realized—and that, over time, those efficiencies would lead to better service in the affected areas.

Weiss & Stern, *supra* note 74, at 203.

¹²³ *FCC Approves \$21-billion Bell Atlantic-Nynex Merger with 8 Conditions*, COMM. DAILY, Aug. 15, 1997, available in 1997 WL 3946917. These conditions were developed by the parties in light of the FCC's concerns over limiting competition. See *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 20069.

related to collocation.¹²⁴ Although the FCC allowed the merger contingent upon the conditions, it emphasized that the granting of the application for the transfer of control, subject to conditions, did not mean applicants would always be able to propose pro-competitive public interest commitments that would offset potential harm to competition.¹²⁵ Moreover, each proposal would be considered on an ad hoc basis, as would the conditions that the applicants would set forth.¹²⁶

Based on the potential competitive harms noted by the FCC and the lack of mitigating arguments, the FCC was prepared to conclude that Bell Atlantic and NYNEX had not demonstrated that the transaction was pro-competitive.¹²⁷ However, the parties submitted an ex parte filing proffering a number of specific commitments they would undertake as conditions of the approval of the transfer of licenses.¹²⁸ The eight conditions were specially aimed at remedying the potential competitive harms in LATA 132 and the New York metropolitan area, as well as the concern over reduced diversity and quality in the market.¹²⁹ With these conditions offered, the FCC's fears were pacified, and it was compelled to permit the transfer, barring any limitations to serving the public interest.

B. Federal/State Power Struggle

Another reason for the 1996 Act's failure is the struggle for regulatory control between the federal government and the states. This struggle has resulted in a deleterious effect on the success of the Telecommunications Act of 1996 because courts have

¹²⁴ *Id.* Collocation is defined as "the act or result of placing or arranging especially with something else." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 446 (1981).

¹²⁵ *NYNEX/Bell Atlantic Order*, 12 FCC Rcd., at 20069.

¹²⁶ *Id.* at 20069-70.

¹²⁷ *Id.* at 20069.

¹²⁸ *Id.*

¹²⁹ *Id.* LATA 132 is the area encompassing New York City, Long Island and portions of Westchester County. *NYNEX/Bell Atlantic Order*, 12 FCC Rcd. at 19990 n.13.

attempted to erect a new regulatory model while interpreting the Act.¹³⁰ This judicial inconsistency has yielded a considerable amount of litigation and confusion.¹³¹ Additionally, there is uncertainty as to whether the FCC, the state governments, or local governments have the authority to regulate the various service areas. Both the judicial and regulatory confusion stems from the lack of legislative history on the 1996 Act.¹³²

The 1934 Act established a dual regulatory model, which the 1996 Act left intact.¹³³ Under this model, the FCC regulates interstate communications and the states regulate intrastate communications.¹³⁴ However, the central aim of the 1996 Act was to create a national policy agenda for the telecommunications industry.¹³⁵ Accordingly, under the 1996 Act, the FCC was granted a supervisory role in local service.¹³⁶ Within this role, the FCC has the power to establish interconnection rules and to preempt the states that fail to carry out the arbitration process or

¹³⁰ The 1996 Act created a new model that differs slightly from the obvious dual regulatory model established by the 1934 Act.

¹³¹ Duane McLaughlin, *FCC Jurisdiction over Local Telephone under the 1996 Act: Fenced Off?*, 97 COLUM. L. REV. 2210, 2212 (1997) (discussing the debate over jurisdiction).

¹³² See 141 CONG. REC. S7881-02 (daily ed. June 7, 1995). The legislative history is devoid of statements of legislative purpose that might clarify the roles of the states and the FCC. See, e.g., H.R. CONF. REP. NO. 104-458 (1996); H.R. REP. NO. 104-204(I) (1995); S. REP. NO. 104-23 (1995). Despite this, Senator Pressler, the sponsor of the bill in the Senate believed that the roles were clearly defined: the federal government would have a supervisory role and the majority of the daily regulation would be maintained by the states. 141 CONG. REC. at S7888. According to Senator Pressler, "[i]f you read all the provisions of the bill in context, you will see that there simply is no broad grant of discretion to the Federal or State regulators here." *Id.*

¹³³ 47 U.S.C. § 151 (Supp. II 1996). See also *supra* Part I.A, discussing the 1934 Act and the dual system.

¹³⁴ 47 U.S.C. § 151. This grant of authority was promulgated in several controversial sections where the new Act preempts the states, including section 251 (Interconnection), section 252 (Arbitration), section 253 (Entry Regulation), and section 254 (Universal Service). See also *supra* note 47 and accompanying text (discussing sections 251, 253, and 254).

¹³⁵ DUESTERBERG & GORDON, *supra* note 40, at 36.

¹³⁶ 47 U.S.C. §§ 251-253 (Supp. II 1996). These sections address interconnection, arbitration and removal of barriers to entry.

that adopt anti-competitive measures.¹³⁷ Under this new framework, states have jurisdiction so long as their laws do not conflict with the national agenda.¹³⁸ As a result, state and local laws regulating local exchange competition were preempted—eschewing the traditional dual regulatory model.

Although the FCC has the more dominant role in the dual regulatory model under the 1996 Act, the states have not been completely preempted. For example, states have secured a “consultant” role, which grants them the ability to certify that a BOC has met the fourteen point checklist for entry into the long distance market.¹³⁹ Some have argued that Congress has overstepped its

¹³⁷ McLaughlin, *supra* note 131, at 2229. Section 252, concerning arbitration, sets forth procedures for negotiation, arbitration and approval of agreements. 47 U.S.C. § 252(e)(1) (Supp. II 1996). State commissions must have the opportunity to approve or reject any interconnection agreement adopted by negotiation or arbitration. However, if the state fails to act, the FCC may act. 47 U.S.C. § 252(e)(5).

¹³⁸ Joe Estrella & Linda Haugsted, *States Made Out Fine in Act*, MULTICHANNEL NEWS 6, Feb. 12, 1996, available in 1996 WL 8833210.

¹³⁹ Estrella & Haugsted, *supra* note 138. Section 271(c)(2)(B), the fourteen point checklist, states:

[a]ccess or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: (i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title. (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title. (iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title. (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services. (vi) Local switching unbundled from transport, local loop transmission, or other services. (vii) Nondiscriminatory access to—(I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services. (viii) White pages directory listings for customers of the other carrier's telephone exchange service. (ix) Until the date by which

boundaries in bestowing such control in the FCC, because rather than merely defining federal parameters for the industry, the 1996 Act controls the procedure by which states govern purely intrastate services.¹⁴⁰ However, the federal government does have broad authority to act under the Commerce Clause of the Constitution.¹⁴¹ Since intrastate telecommunications have a direct and substantial effect on interstate commerce, and the activities of telecommunications providers affect the economic well-being of the nation as a whole, regulation of the industry clearly falls under the

telecommunications numbering administration guidelines, plan or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan or rules. (x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion. (xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations. (xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title. (xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title. (xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

47 U.S.C. § 271(c)(2)(B) (Supp. II 1996)

Under section 271(d)(2)(B) of the Act, entitled Consultation with State Commissions, "[b]efore making any determination under this subsection the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section." 47 U.S.C. § 271(d)(2)(B). This section at least entitles the States to some minor role in the process.

¹⁴⁰ Dan Waggoner & Patricia Raskin, *The Telecommunications Act of 1996: Model for Federal-State Conflict or Cooperation*, 14-SUM COMM. LAW 26 (1996).

¹⁴¹ U.S. CONST. art. I, § 8, cl. 3.

Commerce Clause.¹⁴² The federal/state conflict arising from the Commerce Clause relating to telephony is most clearly brought to light in *Iowa Utilities Board v. FCC*¹⁴³ and *American Telephone & Telegraph Co. v. City of Dallas*.¹⁴⁴ These cases address the issue of the FCC's authority to govern in areas previously set aside for the states, such as pricing.

1. *Iowa Utilities Board v. FCC*

In *Iowa Utilities Board*, the issue was whether the FCC had exceeded its authority in promulgating certain pricing and non-pricing rules.¹⁴⁵ The Iowa Utilities Board and the BOCs argued that the FCC exceeded its jurisdiction in setting local intrastate service prices,¹⁴⁶ and that the pricing rules violated the terms of the Telecommunications Act of 1996.¹⁴⁷

¹⁴² Waggoner & Raskin, *supra* note 140, at 26. Although there has been a trend toward limiting Congress' power under the Act, intrastate telecommunications may be distinguished from those areas not covered by the Clause. Waggoner & Raskin, *supra* note 140, at 26. The Supreme Court has, in some cases, held that types of activities regulated by the Act have a direct and substantial effect on interstate commerce, and that public utilities activities are related to the nation's economic well being. Waggoner & Raskin, *supra* note 140, at 26. See *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (upholding Congress' authority to enact the Public Utilities Regulatory Policies Act); *FPC v. Florida Power & Light*, 404 U.S. 453 (1972) (finding that interstate commerce is affected if any power of an electric utility reaches another state or if the utility uses any power from another state). Further, service providers sell services in interstate commerce and offer reciprocal services to carriers in other states. Waggoner & Raskin, *supra* note 140, at 26.

¹⁴³ 120 F.3d 753 (8th Cir. 1997), *aff'd*, 135 F.3d 535 (8th Cir. 1998), *aff'd in part, rev'd in part*, 119 S. Ct. 721 (1999).

¹⁴⁴ 8 F. Supp. 2d 582 (N.D. Tex. 1998).

¹⁴⁵ *Iowa Utils. Bd.*, 119 S. Ct. 721, 726. Also at issue was whether the FCC's rules governing unbundled access and "pick and choose" negotiation are consistent with the statute. *Id.* See *infra* note 148 and accompanying text (discussing unbundled access) and note 151 and accompanying text (discussing the "pick and choose" rule).

¹⁴⁶ *Iowa Utils. Bd.*, 119 S. Ct. at 728.

¹⁴⁷ *Id.*

At issue specifically was an FCC order containing rules regarding the prices that incumbent Local Exchange Carriers (“LECs”) could charge their new competitors for interconnection, unbundled access and resale, as well as rules related to prices for the transport and termination of local traffic.¹⁴⁸ The BOCs, supported by the states, argued that the FCC exceeded its power by instituting the pricing scheme.¹⁴⁹ The FCC, in response, contended that the 1996 Act empowered the agency to implement such measures, even if the authority was to be shared with the states.¹⁵⁰ The U.S. Court of Appeals for the Eighth Circuit, after reading the language of the 1996 Act and considering the arguments, concluded that the FCC had exceeded its jurisdiction.¹⁵¹

¹⁴⁸ *Iowa Utils. Bd.*, 120 F.3d at 792. The requirement of unbundled access means that telecommunications carriers have a

duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3) (Supp. II 1996).

Incumbent LECs are required to provide access to the elements of its network on an unbundled, rather than combined basis. *Id.* The section does not permit a new entrant to purchase the assembled platform of combined network elements in order to offer competitive services. *Id.* See also *Iowa Utils. Bd.*, 120 F.3d at 813.

¹⁴⁹ *Id.* at 793.

¹⁵⁰ *Id.* at 793-94.

¹⁵¹ *Id.* at 794. Other issues raised in the initial case included the FCC’s “pick and choose” rule, rural exemptions, the FCC’s authority under section 208, review of preexisting agreements, section 251(d)(3) and state compliance with FCC rules, the FCC’s unbundling rules, and the scope of the ILEC’s resale obligations. *Id.* at 800-19. The court eventually declined the petitioner’s request to vacate the entire First Report and Order, but did deem certain parts overturned. *Iowa Utils. Bd.*, 120 F.3d at 819.

The FCC interpreted the so-called “pick and choose” rule to allow requesting carriers to “pick and choose” among individual provisions of other

interconnection agreements that have been negotiated between an incumbent LEC and other requesting carriers, without being required to accept the terms and conditions of their agreements. *Id.* at 800. Iowa Utilities Board argued that such a rule is unduly burdensome and will negatively affect negotiations. *Id.* The court found the FCC's "pick and choose" rule "an unreasonable construction of the Act" and as a result, vacated it. *Id.* at 801.

The rural exemption allows a rural telephone company to not be subject to subsection (c) of section 251 "until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commissions determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title." 47 U.S.C. § 251(f)(1)(A) (Supp. II 1996). With respect to this argument, the court held that the FCC had, again, exceeded its jurisdiction. *Iowa Utils. Bd.*, 120 F.3d at 801.

Section 208 addresses complaints to the FCC, by stating:

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to [the FCC] by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the [FCC] to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the [FCC].

47 U.S.C. 208(a) (1994). The FCC claimed that its general authority to hear complaints under section 208 empowers it to review agreements approved by state commissions under the Act, and to enforce the terms of such agreements. *Iowa Utils. Bd.*, 120 F.3d at 803. However, the court held that "the complete absence of any reference to section 208 in the Act bolsters [the] conclusion that Congress did not intend to allow the FCC to review the decisions of state commissions." *Id.*

Based on subsection 251(d)(3), entitled "Preservation of State access regulations," the FCC claimed to preempt any state policy that conflicts with an FCC regulation promulgated pursuant to section 251. *Iowa Utils. Bd.*, 120 F.3d at 806. This subsection states:

In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3) (Supp. II 1996).

However, on appeal, the Supreme Court held that the FCC had, in fact, not exceeded its jurisdiction.¹⁵²

The Supreme Court opinion began with the overriding issue of jurisdiction,¹⁵³ explaining the Eighth Circuit's reasoning for holding that the FCC exceeded its authority before explaining why the Court believed that view was incorrect.¹⁵⁴ The Court turned to section 201(b) for support for its holding.¹⁵⁵ Relying on section 201(b), the Court held that "[s]ince Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the [1934 Act], the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions."¹⁵⁶ Further, the Court was not willing to limit the authority provided to the FCC via section 201(b).¹⁵⁷ That section, in the eyes of the majority, clearly states

However, the court concluded that "the FCC's belief that merely an inconsistency between a state rule and a Commission regulation under 251 is sufficient for the FCC to preempt the state rule, is an unreasonable interpretation of the statute in light of subsection 251(d)(3) and the structure of the Act." *Iowa Utils. Bd.*, 120 F.3d at 807.

¹⁵² *Iowa Utils. Bd.*, 119 S. Ct. at 730.

¹⁵³ *Id.* at 728.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 729-30. Section 152(b) states "nothing in this chapter [with specific exceptions] shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. 152(b) (Supp. II 1996). See also *supra* note 18 and accompanying text (discussing section 152). Alternatively, the conclusion of section 201(b) states "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. 201(b) (1994). This section was carried over from the 1934 Act.

¹⁵⁶ *Iowa Utils. Bd.*, 119 S. Ct. at 729.

¹⁵⁷ *Id.* at 730. The Court specifically remarked

Respondents argue, however, that § 201(b) rulemaking authority is limited to those provisions dealing with purely interstate and foreign matters, because the first sentence of § 201(a) makes it 'the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor' It is impossible to understand how this use of the qualifier "interstate or foreign" in § 201(a), which limits the class of common carriers with the duty of providing communication

that the FCC has rulemaking authority to carry out the provisions of the 1996 Act, including interconnection and arbitration.¹⁵⁸ The Court gave section 201(b) superseding power over section 152(b), despite the fact that section 201(b) was enacted in 1938 and section 152(b) is part of the more recent 1996 Act, evidencing Congress' current view on the subject. Moreover, contrary to conventional legal reasoning, the Court gave more authority to a general statutory section over a specific one.¹⁵⁹

Despite relying on an weak textual basis for the holding, the majority concedes that the 1996 Act is less than clear.¹⁶⁰ In addition, if relying on section 201(b) was not sufficient, the Court gave deference to the FCC's implementation of the 1996 Act.¹⁶¹

Before arriving at the Supreme Court, the case became contentious in the Eighth Circuit.¹⁶² A mandate was issued by the court that became the focus of a subsequent action within the circuit.¹⁶³ The original decision ordered the FCC to refrain from

service, reaches forward into the last sentence of §201(b) to limit the class of provisions that the [FCC] has authority to implement.

Id.

¹⁵⁸ *Id.* at 729.

¹⁵⁹ *Id.* at 743-44. Justice Thomas' dissent specifically states "[w]e have made it clear that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" *Iowa Utils. Bd.*, 119 S. Ct. at 745 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).

¹⁶⁰ *Id.* at 738. The majority specifically notes that the 1996 Act is "a model of ambiguity or indeed even self-contradiction." *Id.*

¹⁶¹ *Id.* According to the majority, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency [citing *Chevron v. NRDC*, 467 U.S. 837,842-43 (1984)]. We can only enforce the clear limits that the 1996 Act contains, which in the present case invalidate only Rule 319." *Id.* Rule 319 deals with unbundling rules. *Iowa Utils. Bd.*, 119 S. Ct. at 728-29.

¹⁶² *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd*, 135 F.3d 535 (8th Cir. 1998). After the FCC released its First Report and Order ("Order"), many BOCs filed motions to stay the Order. *Iowa Utils. Bd.*, 120 F.3d at 792. The Order contained the FCC's findings and rules regarding local competition provisions of the Act. *Id.* at 792. Specifically the BOCs protested against the pricing rules. *Id.*

¹⁶³ On October 14, 1997, motions for panel rehearing were granted. *Iowa Utils. Bd.*, 135 F.3d at 537. The court then amended the July 18, 1997 decision

subsequent attempts to directly or indirectly apply its vacated pricing policies regarding interconnection, unbundled access, resale, and transport and termination of local traffic.¹⁶⁴ In that decision, the court held that the FCC has no jurisdiction to issue pricing regulations for the aforementioned services under section 252(d) of the Telecommunications Act of 1996.¹⁶⁵ The court reasoned that the FCC lacks authority to prescribe a national pricing methodology to implement that section's requirements because this is an area governed by the states.¹⁶⁶

The Eighth Circuit also affirmed that the 1996 Act vests exclusive authority to the states to establish the pricing requirements of this section.¹⁶⁷ The court again determined that the FCC had no authority to act under section 271(d)(3)(A) or 271(d)(3)(C).¹⁶⁸ It ordered the FCC to confine its pricing role

(120 F.3d 735) and issued the mandate. *Id.* The mandate vacated the national pricing rules that the FCC has established. *Id.* at 538.

¹⁶⁴ *Iowa Utils. Bd.*, 120 F.3d at 819.

¹⁶⁵ *Iowa Utils. Bd.*, 135 F.3d at 537.

¹⁶⁶ *Id.* at 537. Section 252(d) entitled "pricing standards" establishes interconnection and network element charges, charges for transport and termination of traffic and wholesale prices for telecommunications services. 47 U.S.C. § 252(d)(1)-(3) (Supp. II 1996). Section 271(c)(2)(B), the fourteen point checklist, merely requires compliance with sections 251(c) and 252(d). *Iowa Utils. Bd.*, 135 F.3d at 539. *See also supra* note 139 and accompanying text (outlining the fourteen point checklist).

The FCC's role in this area is, in fact, simpler. *Id.* at 540. According to the court, the FCC must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of application. *Id.* In addition, the FCC is explicitly barred from extending the checklist. *Id.* Moreover, FCC is bound to follow the mandate that the court had previously set forth. *Id.*

¹⁶⁷ *Iowa Utils. Bd.*, 135 F.3d at 537.

¹⁶⁸ *Id.* Section 271(d)(3)(A) states that:

[n]ot later than 90 days after receiving an application under paragraph (1), the [FCC] shall issue a written determination approving or denying the authorization requested in the application for each State. The [FCC] shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented

under section 271(d)(3)(A).¹⁶⁹ This ruling limits the FCC to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the states in which such BOCs seek to provide interLATA services.¹⁷⁰

The court further limited the agency's authority to act on complaints seeking preemption of state actions on the grounds that they violate section 251 of the Act.¹⁷¹ The *Iowa Utilities Board* decision illustrates one judicial view that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state pricing rules.¹⁷² The Eighth Circuit concluded that "the [1996] Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act."¹⁷³ As a result, the court vacated the national pricing rules that the FCC had promulgated.¹⁷⁴

The *Iowa Utilities Board* Court also dealt with section 252¹⁷⁵ of the 1996 Act and its relationship to section 271(d)(3),¹⁷⁶ which

the competitive checklist in subsection (c)(1)(B) of this section or with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (C)(2)(B) of this section. Section 271(d)(3)(C) states that the requested authorization is consistent with the public interest, convenience and necessity.

47 U.S.C. § 271(d)(3)(A), (C) (Supp. II 1996).

¹⁶⁹ *Iowa Utils. Bd.*, 135 F.3d at 543.

¹⁷⁰ *Id.*

¹⁷¹ *Eighth Circuit's Order May Imperil FCC Enforcement, Triggers Call to Revive Rules*, TELCO COMPETITION REPORT, July 31, 1997, available in 1997 WL 8585273 [hereinafter *Eighth Circuit's Order*]. See also *supra* note 47 and accompanying text (discussing section 251—the interconnection requirement).

¹⁷² *Eighth Circuit's Order*, *supra* note 171.

¹⁷³ *Iowa Utils. Bd.*, 135 F.3d at 537.

¹⁷⁴ *Id.* at 538.

¹⁷⁵ 47 U.S.C. § 252 (Supp. II 1996). See *supra* note 137 and accompanying text (discussing section 252—procedures for negotiation, arbitration and approval of agreements).

¹⁷⁶ 47 U.S.C. § 271(d)(3) (Supp. II 1996). See *supra* note 168 and accompanying text (discussing section 271(d)(3)—the written determination

requires the FCC to determine whether an applicant has implemented the competitive checklist of section 271(c)(2)(B).¹⁷⁷ Although the FCC conceded that it does not have power to institute a national pricing methodology, the FCC also stated that it would not grant a section 271 application unless the rates were based on the system previously vacated by the court.¹⁷⁸ Such action violates the Eighth Circuit's mandate. Consequently, the court articulated its frustration and annoyance with the FCC in noting that "[t]he FCC's disagreement with this court's decision is 'simply an academic exercise that possesses no authoritative effect.'"¹⁷⁹ The Eighth Circuit challenged the FCC to appeal to the Supreme Court for reversal of its decision, which subsequently occurred.¹⁸⁰

The Eighth Circuit forcefully attempted to limited the power of the FCC.¹⁸¹ However, despite the circuit court's vigorous limitation on the agency's authority, the Supreme Court upheld the Federal rules designed to expand the local telephone market to competition.¹⁸² Judging from reaction, however, it is difficult to determine who really won.¹⁸³

pertaining to an entry application by a BOC to provide interLATA service).

¹⁷⁷ *Iowa Utils. Bd.*, 135 F.3d at 538-39. See *supra* note 139 and accompanying text (outlining the 14 point checklist).

¹⁷⁸ *Iowa Utils. Bd.*, 135 F.3d at 539.

¹⁷⁹ *Id.* at 540.

¹⁸⁰ *Id.* See also *Iowa Utilities Board v. FCC*, 119 S. Ct. 721, 738 (1999).

¹⁸¹ This limitation by the court was supported by 47 U.S.C. § 152(b), which the court determined created a presumption in favor of preserving state authority over intrastate communications. *Iowa Utilities Bd.*, 120 F.3d at 796. See also *supra* note 18, 155 (quoting 47 U.S.C. § 152(b)). The court found nothing in the 1996 Act to overcome the presumption. *Iowa Utils. Bd.*, 120 F.3d at 800.

¹⁸² *Iowa Utils. Bd.*, 119 S. Ct. at 728.

¹⁸³ Michael M. Weinstein, *Economic Scene*, N.Y. TIMES, Jan. 28, 1999, at C2. Long-distance carriers, as well as the FCC claimed victory, but according to economists, the big winners are consumers. *Id.* Interestingly enough, some of the losing BOCs even tried to claim a quantum of victory based on the part of the decision that would require the Commission to reconsider part of its rule making. *Id.*

2. *AT&T Communications of the Southwest, Inc.*
v. City of Dallas

Another case highlighting the power struggle between the federal and state government is *AT&T Communications of the Southwest, Inc. v. City of Dallas*.¹⁸⁴ In this case, AT&T planned to compete by using its existing fiber optic facilities to provide a new local telephone service known as “AT&T Digital Link” to Dallas customers.¹⁸⁵ The City of Dallas instituted various requirements that AT&T would have to meet before it could enter the market.¹⁸⁶ AT&T argued that regulation of local service was given to the states, not municipalities.¹⁸⁷ Consequently, the argument followed, Dallas exceeded its powers and violated section 253(a) of the 1996 Act.¹⁸⁸ Dallas, however, countered that its controversial franchise requirement was in compliance with section 253(c)’s requirement that the city manage its rights-of-way and obtain fees in a “competitively neutral and nondiscriminatory” manner.¹⁸⁹

¹⁸⁴ 8 F. Supp. 2d 582 (N.D. Tex. 1998).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 585. The city claimed that AT&T was required to complete a lengthy franchise application, agree to pay a fee equaling four percent of its revenue from business conducted in Dallas, and other requirements. *Id.*

¹⁸⁷ *Id.* at 588.

¹⁸⁸ *Id.* at 590. *See supra* note 47 and accompanying text (discussing section 253(a)—removals of barriers to entry). The city “does not have the authority under state or federal law to require a wide-ranging franchise application, to impose conditions on a franchise that are unrelated to the telecommunications provider’s use of the City’s rights-of-way, or to impose fees that are unrelated to use of the rights-of-way.” *AT&T Communications of the Southwest*, 8 F. Supp. 2d at 586.

¹⁸⁹ *Id.* at 590. Section 253(c), entitled “State and Local Government Authority” states:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The court held that, although Dallas may require AT&T to meet some of the requirements, the city does not have the authority to impose conditions unrelated to the telecommunications provider's use of the city's rights-of-way on a franchise.¹⁹⁰ Despite Dallas' argument, the court additionally held that absent explicit delegation by the state, the plain language of the 1996 Act prohibits cities from regulating local services in order to protect public safety and welfare.¹⁹¹ Accordingly, municipalities have a limited role in telecommunications regulation.¹⁹²

These two cases illustrate the confusion over who has statutory authorization to regulate. This confusion has played a major role in delaying full application and effect of the Act. Such delay reduces the timely effect of the Act, which, in turn hinders promotion of competition and results in continued regulation. Until courts interpret the confusing language of the statute, specifically pertaining to preemption issues and federal and state authority, and make official determinations of Congressional intent, the possible beneficial effects of the Act will continue to be limited.

47 U.S.C. § 253(c) (Supp. II 1996).

¹⁹⁰ *AT&T Communications of the Southwest*, 8 F. Supp. 2d at 592-93. In 1985, Dallas adopted Ordinance No. 18613, granting a fifteen year license to AT&T to use certain portions of the City right-of-way for physical facilities to support its long-distance services. *Id.* at 585. A right of way is defined as "the right to pass over property owned by another party." THE AMERICAN COLLEGE DICTIONARY 1175 (3d ed. 1993).

¹⁹¹ *AT&T Communications of the Southwest*, 8 F. Supp. 2d at 591. According to the court, "[l]egislative history reveals that Congress' intent was to remove all barriers to entry in the provision of telecommunications services by preempting all state and local legal requirements that directly or indirectly prohibit market entry." *Id.*

¹⁹² *Id.* This role is limited to managing public rights-of-way and receiving fees for use of those rights of way. *Id.* As a result, the city's actions were outside of the narrow grant of authority given. *Id.* at 592. "The city does not . . . have the authority to grant or deny [the] franchise based on its own discretion." *Id.* It also does not have to authority to require a comprehensive application and consider various factors. *Id.* at 593. The city is not bestowed with the authority to institute conditions on a franchise for such services, other than those related to use of the right-of-way. *Id.*

C. *Burdening the Regional Bell Operating Companies*

Although the Telecommunications Act of 1996 attempts to establish rules which equally affect interLATA and intraLATA providers, it appears to more seriously place burdens on the BOCs. In fact, treatment has been so skewed that the BOCs have used this seemingly unfair treatment as a basis of litigation.¹⁹³ Since some industry experts agree that competition in the local service area is the key to increased competition in the entire industry, this facet of the 1996 Act is quite important.¹⁹⁴ The requirements outlined in the fourteen point checklist are deemed necessary in order to prevent a recurrence of the uncompetitive use of local service market power that occurred under the Bell System. Further, less cumbersome requirements have been imposed on new entrants than are imposed on BOCs in order to encourage competition in the industry.¹⁹⁵ Although such asymmetries can be useful, continued implementation can result in social costs.¹⁹⁶

¹⁹³ In reaction, some incumbent local exchange carriers have engaged in delaying tactics for competitive interconnection at the local level. Noll, *supra* note 100, at B9. According to the 1996 Act, local exchange carriers are defined as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26) (Supp. II 1996). The reason for this may be because they have learned that their local monopoly is more profitable than long distance and they no longer want to lose their monopoly in order to enter the long distance market. Noll, *supra* note 100, at B9.

Other litigation in this area includes the BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998). See *infra* note 205 (discussing the BellSouth litigation).

¹⁹⁴ See *infra* Part III.D (discussing competition in the local service area as a possible key to increasing competition in the industry).

¹⁹⁵ SAPPINGTON & WEISMAN, *supra* note 47, at 202.

¹⁹⁶ SAPPINGTON & WEISMAN, *supra* note 47, at 202. Social costs are defined as "[t]he sum of the private cost of an activity and the additional cost incurred by others who are not the primary parties to the activity." SAPPINGTON & WEISMAN, *supra* note 47, at 353. Continued assistance may end up limiting the ability of the new entrant to fully blossom in the market, thereby requiring that assistance become a permanent fixture in the marketplace. SAPPINGTON & WEISMAN, *supra* note 47, at 212. This would then result in subsidies in the market that would prevent it from operating properly and efficiently. Some of the social costs from asymmetries result from inefficiencies in the market which

The BOCs argue that the fourteen step checklist with which they must comply before the FCC will grant entry into the long-distance service market is a probative burden.¹⁹⁷ The FCC reviews the checklist in order to ensure that the BOCs cannot use their controlling power in the local market to keep out possible new entrants.¹⁹⁸ While the FCC has responsibility for reviewing the checklist, the state commissions must verify BOC compliance with the list and the DOJ must view the application for antitrust violations.¹⁹⁹ No BOC, despite their desire to enter new markets, has been able to meet the checklist requirements as yet.²⁰⁰ In fact, even those BOCs which seem to have fully complied, or had been thought to be a successful candidate, have been denied entry.²⁰¹

result in higher prices for consumers. SAPPINGTON & WEISMAN, *supra* note 47, at 217. In addition, asymmetric regulation can foster imitation and hinder innovation. SAPPINGTON & WEISMAN, *supra* note 47, at 219.

¹⁹⁷ This checklist is found in section 271(c)(2)(B) of the Act, entitled "Bell Operating Company Entry into InterLATA Services, requirements for providing certain in-region interLATA services, competitive checklist." See *supra* note 47 and accompanying text (discussing section 271(c)(2)(B)—the competitive checklist).

¹⁹⁸ 47 U.S.C. § 271(d) (Supp. II 1996). This section states that "[o]n and after February 8, 1996 a Bell operating company or its affiliate may apply to the [FCC] for authorization to provide interLATA services originating in any in-region State." 47 U.S.C. § 271(d)(1). The FCC then notifies the Attorney General of any application made pursuant to subsection (1). 47 U.S.C. § 271(d)(2). Before making any determination, the FCC consults with the state commission of any state that is the subject of the application in order to verify compliance with the requirements under subsection (c) of this section. 47 U.S.C. § 271(d)(2)(B). Not later than ninety days after receipt of the application, the FCC produces a written determination regarding the application. 47 U.S.C. § 271(d)(3).

¹⁹⁹ Deonne L. Bruning, *The Telecommunications Act of 1996: The Challenge of Competition*, 30 CREIGHTON L. REV. 1255, 1280 (1997).

²⁰⁰ As of November 6, 1998, the FCC had rejected five Bell applications—the most recent being BellSouth's application to enter the Louisiana's interLATA market. Mark Suzman, *BellSouth's Long-distance Plans Rebuffed*, FINANCIAL TIMES, Oct. 14, 1998, at 4. Despite the FCC's rejection, it commended BellSouth on its attempt, noting that it had improved since the last application. *Id.* However, BellSouth had only fulfilled six of the fourteen conditions. *Id.*

²⁰¹ *Id.*

There appears to be no end in sight, as the FCC continues to require the BOCs to provide more access to new entrants.²⁰²

The *SBC Communications, Inc. v. FCC*²⁰³ case provides some substantive proof that Congress sought to unfairly attack BOCs in the Act; this case also vividly displays the problems inherent in the section 271 requirements. As previously discussed, the most oppressive hurdle established by the FCC is the fourteen point checklist that BOCs must fulfill before entering into long distance markets. By setting forth an unduly onerous and competitive checklist, BOCs are targeted and required to go to great lengths in order to facilitate competition, while new entrants can easily move into their markets without being subjected to the same difficult requirements.²⁰⁴ In *SBC Communications*, the plaintiffs advocated that portions of the Act are unconstitutional on three bases: first, that it is a violation of the principles of separation of powers;

²⁰² The FCC is expected to adopt rules requiring the BOCs to provide more options to new market entrants that want to install equipment in Bell offices. Kathy Chen, *FCC Is Seen Adopting Rules Requiring Bells to Provide More Choices to Rivals*, WALL. ST. J., Mar. 18, 1999, at B7. This move is claimed to be indirectly beneficial to the Bells. *Id.* According to Robert Blau, vice president for executive and regulatory affairs at BellSouth Corp, "Making it easier for competitors to take your business is always a bit problematic. But if it accelerates our entry into the long-distance business, it would be a lot more palatable." *Id.* Some incumbent phone companies were less enthusiastic. *Id.* According to Scott Randolph, director of regulatory affairs for GTE Service Corp., these new rules raise concerns about network security and the ability to recover costs. *Id.*

²⁰³ 981 F. Supp. 996 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

²⁰⁴ Specifically, plaintiffs argued that it is "not lawful or fair to take away the state sanctioned franchised protected status for local service while at the same time continuing to not allow only them to compete in other telephone business, particularly long distance." *SBC Communications*, 981 F. Supp. at 1001. Further, they argued that the "proverbial carrot has been removed but they are still receiving the stick." *Id.* ILECs are required essentially to provide new market entrants with their facilities to use, without the new entrants having to set up a system on their own. Thereby, they are able to unfairly avoid some of the hefty market entry costs which the ILECs were required to bear. *See supra* note 139 and accompanying text (detailing some of the requirements as proscribed by section 271—the 14 point checklist).

second, that it is a bill of attainder;²⁰⁵ and third, that it is a violation of the Equal Protection Clause.²⁰⁶ Of the three, the bill of attainder argument is the strongest argument and the one the district court highlighted. Although the district court agreed with SBC Communications, holding that sections 271-275 of the Act was an unconstitutional bill of attainder,²⁰⁷ a three judge court of appeals panel reversed the decision.²⁰⁸ The court of appeals held that the relevant sections were “nonpunitive in character” and, thus, not a bill of attainder.²⁰⁹ The court of appeals provided several reasons why the special provisions were not considered “punitive.”²¹⁰ First, the special provisions are not punitive because

²⁰⁵ A bill of attainder is defined as “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” BLACK’S LAW DICTIONARY 165 (6th ed. 1990). BellSouth also filed a similar suit claiming that the 1996 Act is a bill of attainder. *See* BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998). However, the circuit court upheld the governmental requirement that BOCs first open their local phone markets to competitors before being allowed into the long distance market. *Id.* at 680. *See* John Simons, *Court Upholds Federal Rules for Bell Companies*, WALL ST. J., Dec. 23, 1998, at A16.

²⁰⁶ *SBC Communications*, 981 F. Supp. at 999.

²⁰⁷ *Id.* at 1008.

²⁰⁸ *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997), *rev’d*, 154 F.3d 226 (5th Cir. 1998) (holding the provisions were not punitive in nature and not a bill of attainder), *cert. denied*, 119 S. Ct. 889 (1999). The district court gave numerous reasons for its finding that the sections constituted a bill of attainder. First, Judge Kendall reasoned that, “[g]iven that a bill of attainder is trial by legislature, with penal consequences, the Court can think of no reason why the clause should be read so narrowly to exclude corporations.” *SBC Communications, Inc.*, 981 F. Supp. at 1003. Second, the sections identified a specific individual or group for punishment. *Id.* at 1004. In this case, the sections specified that certain requirements applied to the BOCs that they provide their customers with all of their telecommunications needs, consequently yields economic losses on behalf of the BOCs. *Id.* at 1005. Although the holding has been seriously criticized, it indicates that there are substantial problems with the Act; problems the courts are not willing to condone.

²⁰⁹ *SBC Communications*, 154 F.3d at 229.

²¹⁰ *Id.* at 242. Punitive is defined as “relating to punishment; having the character of punishment or penalty; inflicting punishment or penalty.” BLACK’S LAW DICTIONARY, *supra* note 205, at 1234.

“they do not impose a perpetual bar on the BOCs entry into any of life’s avocations.”²¹¹ Second, they serve the non-punitive purpose of attempting to guarantee fair competition in local, long distance and other telecommunications service markets.²¹² Third, there was no proof of punitive intent in the terms nor in the legislative history, which would establish a bill of attainder.²¹³ Fourth, the special provisions “were part of a larger quid pro quo.”²¹⁴ Further, the court found that such economic restrictions were considered permissible and not a form of castigation.²¹⁵

Although there appear to be flaws and inconsistencies in the Act, the Supreme Court is unwilling to give credence to this fact, especially in connection with the *Iowa Utilities Board* and *SBC Communications* cases.²¹⁶ However, despite their unwillingness to closely examine the issues and criticize the FCC’s actions under the Act, the 1996 Act remains a failed piece of legislation. In light

²¹¹ *SBC Communications*, 154 F.3d at 242-43.

²¹² *Id.* at 243.

²¹³ *Id.* at 243.

²¹⁴ *Id.* at 244. In exchange for being freed from the restrictions on their ability to offer incidental and out-of-region long distance service, as imposed by the Modified Final Judgment, BOCs were required to open their markets. *Id.*

²¹⁵ *SBC Communications*, 154 F.3d at 247. Specifically the court of appeals stated:

Although the Special Provisions may well constitute a legislative judgment that the BOCs currently have an inherent and natural potential to restrain competition by virtue of their local market power, the Act does not declare them monsters or otherwise seek to punish them on the basis of past conduct, and thus does not run afoul of the Bill of Attainder Clause.

Id. at 247. See also *Bells Bumped Off Long-Distance Fast Track Regional Bell Companies Cannot Enter Long-Distance Market Until They Open Their Networks up to Competitors*, an Appeals Court Ruled, *ORLANDO SENTINEL*, Sept. 9, 1998, available in 1998 WL 18548010. Despite these arguments, Judge Jerry Smith dissented and accused the other judges of ignoring relevant precedent. *SBC Communications*, 154 F.3d at 248-49. He further noted that “[t]hanks to the prophylactic exception, Congress may now single out individuals for punishments that were, until today, routinely held unconstitutional.” *Id.* at 250.

²¹⁶ See *supra* Part II.B.1, discussing *Iowa Utilities Board v. FCC* and Part II.C, discussing *SBC Communications v. FCC*.

of these failures, it is important to examine possible solutions that may achieve the goals of the Act.

III. SOLUTIONS

There are fundamental faults in the structure of the Telecommunications Act of 1996 preventing the comprehensive competition and deregulation the 1996 Act sought to achieve. However, the question is whether it is too soon to effectively assess the effects of the Act. Because it is certain that time alone will not resolve all the issues, there are certain steps which should be taken to achieve the goals that the 1996 Act was drafted to achieve, goals which have failed to come to fruition. This section introduces four possible solutions or alternatives to the problems inherent in the 1996 Act—antitrust laws, incentive regulation, competition in the local exchange and alteration of the FCC.

A. *Antitrust Laws*

Antitrust laws are perceived to better serve the purpose of deterring anti-competition in the local exchange than the 1996 Act.²¹⁷ Antitrust laws would not require some of the more contentious requirements, rather, they would only apply to those service providers dominating the market and trying to establish a monopoly.²¹⁸ Otherwise, the market would be allowed to operate freely and efficiently.²¹⁹ Proponents of this method believe that the threatened or actual enforcement of antitrust laws will cultivate negotiation between dominant local service providers and new

²¹⁷ Elizabeth A. Nowicki, *Competition in the Local Telecommunications Market: Legislate or Litigate?*, 9 HARV. J.L. & TECH. 353 (1998). Congress enacted antitrust laws to promote economic efficiency. Soma et al., *supra* note 19, at 581. Congress has acknowledged the role antitrust could play in the telecommunications industry. Soma et al., *supra* note 19, at 581. However, instead it created a highly complex regulatory environment. Soma et al., *supra* note 19, at 581.

²¹⁸ Nowicki, *supra* note 217, at 354.

²¹⁹ Nowicki, *supra* note 217, at 354.

market entrants.²²⁰ Antitrust laws should only apply to market providers dominating the essential facilities of the local exchange and creating a monopoly.²²¹ Otherwise, other providers would not be encumbered by the laws, and would be allowed to operate unrestrained in a free market.²²²

Despite the fact that it was the intent of the drafters to let the market function on its own—to remove the barriers to competition with the belief that market forces would then lead to increased consumer choice and lower prices—the end result was not this envisioned free market but rather a system with requirements.²²³ By establishing local exchange requirements, Congress is ensuring that the faster and more economic route for new market entrants is to free-ride on the investment of incumbent LECs.²²⁴ With the implementation of antitrust laws instead of the system established, Congress could have selected a less onerous and more economic route to market competition.

B. Incentive Regulation

Alternatively, there is also the belief that incentive regulation, rather than competition policy, is integral to increasing competition and solving the problem of the conflicting goals of state and federal regulators.²²⁵ Incentive regulation is useful in industries

²²⁰ Nowicki, *supra* note 217, at 353-54.

²²¹ Nowicki, *supra* note 217, at 354. The essential facilities doctrine subjects a monopolist, who denies a competitor access to an essential resource, to liability. Soma et al., *supra* note 19, at 580.

²²² Nowicki, *supra* note 217, at 354.

²²³ See Bruning, *supra* note 199, at 1284.

²²⁴ Nowicki, *supra* note 217, at 354.

²²⁵ SAPPINGTON & WEISMAN, *supra* note 47, at 54. Incentive regulation is defined by the authors as “the implementation of rules that encourage a regulated firm to achieve desired goals by granting some, but not complete, discretion to the firm.” See SAPPINGTON & WEISMAN, *supra* note 47, at 2. Three aspects of the definition are important: first, regulatory goals must be specified clearly before incentive regulation is designed; second, the regulated firm has some discretion under this method of regulation; third, the discretion granted is not complete discretion. SAPPINGTON & WEISMAN, *supra* note 47, at 2.

where competition alone is insufficient to inspire market participants to pursue social goals, the regulated firm is better informed than the regulating agency about the market environment, and the goals of the firm and society are not aligned.²²⁶ The aforementioned industry conditions exist in the telephone industry.

The concept of incentive regulation is purported to be the mandate of the 1996 Act.²²⁷ Although this type of regulation is well suited for the telecommunications industry, results are conditional upon utilization of the correctly implemented form.²²⁸ Since the favorable results anticipated by incentive regulation have not been realized, it is possible that the plan selected by Congress was not the one best suited for the conditions of the industry.²²⁹

Incentive regulation is viewed as an alternative to the previously predominant form of regulation—rate of return regulation. SAPPINGTON & WEISMAN, *supra* note 47, at 1. Rate of return regulation is defined as “[a] form of cost-plus regulation in which prices are set for the firm’s products to generate revenues that are just sufficient to cover the firm’s estimated operating costs plus a reasonable return on its invested capital.” SAPPINGTON & WEISMAN, *supra* note 47, at 352.

²²⁶ SAPPINGTON & WEISMAN, *supra* note 47, at 4.

²²⁷ SAPPINGTON & WEISMAN, *supra* note 47, at xi. Sappington and Weisman claim that the 1996 Act mandates incentive regulation. SAPPINGTON & WEISMAN, *supra* note 47, at xi.

²²⁸ Some forms of incentive regulation include rate case moratoriums, banded rate of return regulation, earnings sharing, revenue sharing and price cap regulation. SAPPINGTON & WEISMAN, *supra* note 47, at 91. A rate case moratorium is “an agreement to suspend for a specified time period investigations of a regulated firm’s earnings and the associated revision of prices to return earnings to authorized levels.” SAPPINGTON & WEISMAN, *supra* note 47, at 352. Under banded rate of return regulation, a range of authorized earnings is specified. SAPPINGTON & WEISMAN, *supra* note 47, at 73. Earnings sharing provides the regulated firm with expanded earnings flexibility but requires the firm to share extra earnings with customers. SAPPINGTON & WEISMAN, *supra* note 47, at 75. Under a revenue sharing plan, the company retains all of the revenues it generates up to the specified target level of revenue. SAPPINGTON & WEISMAN, *supra* note 47, at 79. Price cap regulation is “a form of regulation that sets a limit on the average price a firm is permitted to charge for its products.” SAPPINGTON & WEISMAN, *supra* note 47, at 351.

²²⁹ However, since the concept of incentive regulation is new and there has been limited experience with it, it is difficult to determine which plans are best suited to a given setting. SAPPINGTON & WEISMAN, *supra* note 47, at 273. In

C. Competition in the Local Exchange

In addition, there has been some indication that it is vital to the industry to develop competition at the local level—something the 1996 Act has failed to achieve.²³⁰ There has been an increased dependence on markets, rather than regulation at the local level, to resolve the interconnection problem.²³¹ By providing a less hostile environment for BOCs, the problem of competition in the local service market may be solved.²³² Without a significant incentive for BOCs to open their facilities, such as making entry into the long distance market easier, competition at the local level will undoubtedly continue to stagnate. As it stagnates, competition in the entire industry is thwarted.

However, significant obstacles must be overcome before effective competition can be introduced to the local exchange.²³³

addition, despite the studies dictating that incentive regulation is the key to increased competition, strong evidence that it has reduced the costs of providing telephone service have not yet materialized. SAPPINGTON & WEISMAN, *supra* note 47, at 4. Thus, perhaps this is a weak solution until more empirical data is produced to evidence the substantive benefits of this type of regulation.

²³⁰ DUESTERBERG & GORDON, *supra* note 40, at 24. However, there is not great optimism about obliterating the natural monopoly existing in the local exchange. BAUMOL & SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 6 (1994). The market must determine which activities in the local arena are truly monopolies and which are “naturally competitive.” *Id.* at 6. Further, incumbent LECs argue that such competition would make it difficult to retain intraLATA toll charges as a source of cross-subsidy to keep local service rates low, and to promote the goal of universal service. *Id.* at 125. However, the cross subsidy argument is quickly dismissed by economists, given the evidence suggesting that low income household subscribers are not relatively lower users of long distance services than are wealthier subscribers. *Id.* at 125-26.

²³¹ DUESTERBERG & GORDON, *supra* note 40, at 24.

²³² Although new market entrants into the local exchange are encouraged, those providers such as cable companies, who were deemed viable competitors, have failed to pursue entry into the new market opened under the 1996 Act. Increased competition may never come to pass in the local exchange due to the regulatory system in place, as well as the probative costs and lack of return on investment.

²³³ Gregory L. Rosston, *FCC Moving Toward Competition in Telephony*, 3 CABLE TV & NEW MEDIA L. & FIN. 1, 2 (1997).

The obstacles include allowing entrants to achieve some of the same economies of scale and scope, network effects enjoyed by BOCs, making universal service programs compatible with competitive markets, and encouraging all states to adopt the goal of competition in local markets.²³⁴ Integral to overcoming these obstacles is easing the requirements for BOCs to enter the inter-LATA market. Once the local problem is solved, the industry will be able to acquire the benefits of competition and deregulation.

D. Alter the Role of the FCC

Another solution is to phase out or decrease the authority of the FCC, which appears to be at the center of many of the problems with the 1996 Act.²³⁵ Although the FCC fulfills an important function in providing a national framework for deregulation, the states should perform such functions at local levels, as they are in a better position to address problems and more apt to recognize local needs.²³⁶ This adheres to the earlier point that one solution to deregulation should be increased competition at the local level.²³⁷

Ostensibly, there are various solutions to the problem which vary from no regulation whatsoever to a specified regulation in areas that most require it. However, as the FCC argues, it may just be a matter of time before the Act proves itself. As Commissioner Susan Ness commented,

[c]ompetition isn't like carrots or tomatoes. To prepare the soil, plant the seeds, let them sprout, grow and flower takes years, not weeks Telephone competition hasn't flowered yet, but the soil has been carefully prepared, the seeds have been planted, and the first sprouts are

²³⁴ *Id.* at 2.

²³⁵ DUESTERBERG & GORDON, *supra* note 40, at 92.

²³⁶ DUESTERBERG & GORDON, *supra* note 40, at 94.

²³⁷ *See supra* Part III.C. While competition is sought in both the interLATA and intraLATA areas, the dynamics of the two arenas differs and focus has been on the intraLATA, since more competition has been produced in the interLATA area and the intraLATA markets are more inherently monopolistic.

appearing. If we continue to cultivate the right environment, the harvest will be bountiful.²³⁸

CONCLUSION

Although the Telecommunications Act of 1996 is premised on the need for competition, questions remains as to whether competition is really necessary.²³⁹ Despite the general view that it is required, few can agree on how to implement it.²⁴⁰ Further, there is no basis in law or economics for assuming that any increase in competition is to be preferred to the status quo.²⁴¹ In fact, certain policy goals are not served by promoting competition.²⁴²

Whether or not competition is beneficial, the Act sought to break new ground in the telecommunications industry by promoting competition. This Note demonstrates that it has thus far fallen short of its goals. Even FCC Commissioners have admitted that the Act has not produced the desired effects as yet.²⁴³ Despite the criticisms contained in this Note, there has been some increased competition. Of particular significance is the broadening of the market with respect to long distance service. The failures, however, have tended to outweigh the successes. If Congress, the DOJ, FCC and FTC are able to acknowledge the flaws inherent in the 1996 Act, they will be in a position to resolve them. However, until they are able to accept the failure of the 1996 Act as presently codified,

²³⁸ Bruning, *supra* note 199, at 1285

²³⁹ See *Are We Just Fighting for Competition for Competition's Sake?*, TELECOMPETITION REPORT, July 16, 1998, available in 1998 WL 8888897.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* An example is that there is some uncertainty about the extent of innovation introduced in an environment promoting competition. *Id.* Only firms with market power may have the capability to engage in innovation. *Id.*

²⁴³ Bruning, *supra* note 199, at 1282. See also FCC Chairman Reed Hundt, Address delivered to the American Enterprise Institute (Aug. 14, 1997), available in LEXIS (discussing the lack of local competition and the problems with deregulation). "The pace of investment and new entry is too slow; the success of our country's national deregulatory effort is jeopardized by the delays, missteps, and complexities of our legal culture." *Id.*

the goals will not be achieved and the consumers will be unable to reap the fruits of a competitive telecommunications market.

