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

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 But the revolution has been held back by outdated laws, designed for a time when there was one phone company, three TV networks, no such thing as a personal computer.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

The Telecommunications Act of 1996 ("1996 Act")2 was enacted as a dramatic and thorough overhaul of the Communications Act of 1934.3 The 1996 Act was intended to promote competition and reduce regulation in order to secure lower prices for American telecommunications customers and deploy new telecommunications technologies.4 In this endeavor, Congress solicited comments from the telecommunications industry, regulatory authorities and the public before enacting the 1996 Act.5 One hotly debated provision of the 1996 Act mandates the Federal Communications Commission ("FCC") to promulgate regulations within six months to promote interconnection between local exchange carriers ("LECs") and any requesting telecommunications carriers.6

Upon issuance of the FCC’s August 8, 1996, First Report and Order7 on interconnection, more than thirty-five petitioners,8 led by the Iowa...
Utilities Board and joined by organizations as diverse as GTE, Bell Atlantic, BellSouth and the Florida and Louisiana Public Service Commissions, filed for a stay of the interconnectivity pricing provisions\(^9\) with the U.S. Court of Appeals for the Eighth Circuit. The stay was requested pending judicial review of the pricing provisions of the FCC's August 8, 1996 First Report and Order.\(^10\) Although each petitioner had particular reasons for joining the request for a stay the majority of their concerns centered around the pricing guidelines outlined by the FCC.\(^11\) The petitioners believed that they would be unfairly burdened by inadequate compensation paid to them by competitors as directed by the new FCC pricing guidelines.\(^12\)

After review of the petition, the Eighth Circuit granted the stay on October 15, 1996, finding for the petitioners that all requirements to grant a stay were satisfied.\(^13\) The stay applies only to provisions in the law regarding the FCC’s pricing rules and the “pick and choose” rule contained in the FCC’s First Report and Order.\(^14\) The Eighth Circuit heard oral arguments on January 17, 1997, and a final decision date has yet to be announced.\(^15\) No matter how the Eighth Circuit rules, the case is widely expected to be appealed to the Supreme Court, where likely it will not be heard until 1998.\(^16\)

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

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

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\(^9\) Section 251 of the 1996 Act requires incumbent local exchange carriers (incumbent LECs) to allow other telecommunications carriers to “interconnect” with the incumbent LECs existing infrastructure to facilitate competition for local telephone service. See 47 U.S.C.A. § 251 (West Supp. 1996). To this end, the FCC promulgated pricing rules which require that state commissions use the “total long run incremental cost” ("TELRIC") method to calculate the cost an incumbent LEC incurs in making its infrastructure available. See First Report and Order, 11 FCC Rcd. at 16217-18 (Appendix B-Final Rules §§ 51.503, 51.505). Using the TELRIC method, the state commissions then determine the price an incumbent LEC may charge its competitors. Id. Petitioners object to the TELRIC method on two grounds: (1) the method does not consider “historical” and "embedded” costs the incumbent LECs have incurred in the past and (2) it assumes that incumbent LECs are using the most efficient technology available regardless of what is actually being utilized resulting in prices that are artificially low. Iowa Util. Bd., 4 Comm. Reg. (P & F) at 1362; see also First Report and Order, 11 FCC Rcd. at 16218. (Appendix B-Final Rules, § 51.505(b)(1)); see also supra note accompanying text 148. Secondly, petitioners argue that the FCC’s proxy rates which are to be utilized if state commissions choose not to dictate pricing guidelines based on the TELRIC method do not accurately reflect their costs. Iowa Util. Bd., 4 Comm. Reg. (P & F) at 1362; First Report and Order, supra note 7, at 16217-18, 21, 29 (Appendix B-Final Rules, §§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707). Lastly, petitioners argue that any negotiated agreements would never be finally binding because the FCC’s “pick and choose” rule allows competitors to “pick and choose” among the lowest priced individual elements and services they need from a different approved agreements with other carriers. For example, if Carrier A and an LEC had reached an approved agreement and Carrier B made a similar agreement and Carrier B had negotiated a lower price for one of the elements or services provided by the LEC, then Carrier A would be able to demand that its agreement be modified to reflect the lower cost negotiated by Carrier B. Iowa Util. Bd., 4 Comm. Reg. (P & F) at 1362; First Report and Order, supra note 7, at 16,235 (Appendix B-Final Rules, § 51.809).


\(^11\) See supra text accompanying note 9.

\(^12\) Id.

\(^13\) See infra text accompanying note 115.


\(^15\) Telecom Roundtable, infra note 89, at 33, Comments of William B. Barfield of BellSouth Corp.

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


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

I. BRIEF HISTORY OF COMPETITION IN THE TELEPHONE INDUSTRY

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

The 1934 Act also created the FCC whose mission was to provide regulatory guidance over the emerging and increasingly specialized communications industry. The FCC was given broad discretionary power over wire and radio communications.

Until 1984, the telephone system in the United States operated under the "regulated monopoly" concept. Rates for business and residential customers were reserved for state and local governments. Long distance fell under the purview of the FCC, pursuant to authority granted by the Communications Act of 1934 and previously held by the Interstate Commerce Commission. The FCC and the states together shared the responsibility of cost allocation between local and long distance use.

Not comfortable with AT&T's monopoly on telephone services, the United States Department of Justice ("DOJ") filed suit in 1949 in federal district court against AT&T and its subsidiary, Western Electric, for alleged violations of Sections 1 and 3 of the Sherman Anti-trust Act. The DOJ sought to sever the connection between Western carriers by the Mann-Elkins Act. Generally Mann-Elkins Act of 1910, ch. 309 § 7, 36 Stat. 544-45.

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

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

The purpose of the Sherman Act is to prevent undue restraints of interstate commerce, to maintain the appropriate freedom in public interest, and to offer protection from subversive or coercive influences of monopolistic endeavor. See 15 U.S.C. §§ 1-3 (1994). The views of Senator Sherman (R-OH) are expressed in the following passage describing the case against monopolistic mergers and predatory practices: "The sole object of such a combination is to make competition impossible . . . [s]uch a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public . . . and the individuals engaged in it should be punished as criminals." 21 CONG. REC. 2457 (1890). See, e.g., Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), Fedderson Motors v. Ward, 180 F.2d 519, 521 (D.D.C. 1950) (explaining the interpretation by the court of the Sherman Act).
Electric and AT&T. Significant pressure by AT&T and its allies in the United States Department of Defense stalled resolution of the case. A consent decree, which did not come until 1956, between AT&T and the DOJ allowed the monopoly to remain in place.

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

On November 20, 1974, the DOJ again filed suit against AT&T, Western Electric and Bell Laboratories alleging a violation of Section 2 of the Sherman Anti-trust Act by monopolizing activities within telecommunications services. Among other things, the Justice Department sought complete divestiture of the Bell Operating Companies ("BOCs") from AT&T, thereby erasing AT&T's monopoly control of local service.

After several years of delay tactics and discovery motions, the trial was held in the District of Columbia on January 15, 1981, before United States District Court Judge Harold Greene. A proposed consent decree between the parties was submitted to the court in 1982, modified by Judge Greene, negotiated over the next two years and finally embodied as the Modified Final Judgment ("MFJ"). The MFJ separated the BOCs from separation requirements and required AT&T to form a wholly separate subsidiary to offer any unregulated services or equipment. See generally In re Amendment of Sections 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384 (1981). The Third Computer Inquiry sought structural separation by classifying combined telecommunications and data processing services as "basic" or "enhanced." See generally Third Computer Inquiry I, 104 F.C.C.2d at 968.

Bell Telephone Laboratories was AT&T's telecommunications research and development facility which was jointly owned by AT&T and Western Electric, each owning 50% of the stock. See United States v. AT&T, 592 F. Supp. 131, 136 n.6 (D.D.C. 1982).

The MFJ separated the BOCs from

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38 See AT&T v. F.C.C., 552 F. Supp. at 136.
39 Id. at 136-37. Then Secretary of Defense Robert A. Lovett and other members of the Department of Defense met with the president of Bell Laboratories, Dr. M.J. Kelly in February 28, 1952. Kelly sought their help in persuading the Justice Department to suspend prosecution until the end of the Korean War. Lovett requested the postponement in a letter to the Attorney General dated March 20, 1952. Id. at 136. "Indefinite postponement was requested by the Defense Department despite the fact that neither Mr. Lovett . . nor anyone else in the Department had made an independent investigation to determine whether trial of the suit would actually impede the mobilization effort or whether Bell System personnel working on defense matters would actually be needed for preparation of trial of the case." Id. at 136 n.9 citing Report of the Antitrust Subcommittee of the Department of Justice, 86th Cong., 1st Sess., Jan. 30, 1959 at 47.

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

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

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

41 See AT&T v. F.C.C., 552 F. Supp. at 139. The Bell Operating Companies, the majority of which were wholly owned by AT&T, provide the means by which local telephone service is furnished. See id. at 139 n.19.
42 See id. at 140. After opening arguments, the trial was recessed for six weeks to afford an opportunity for a negotiated settlement. The negotiations yielded no useful result and the trial was resumed on March 4, 1981. Id. The magnitude of the evidence presented was immense. Between both parties, more than 350 witnesses and tens of thousands of pages of documents were offered into evidence. Id.
43 Id. at 226-26. See also Higgins and Rubin, infra note 51, at xiv. The MFJ called for the following: (1) AT&T would divest itself of its of its twenty-two local BOCs which would be regrouped under seven regional holding companies (RBOCs) by January 1, 1984.
44 The BOCs would by allowed monopoly service within 161 newly formed local access and service areas
AT&T, and set specific paths to effect the transition from monopoly to a regulated environment including both AT&T and the BOCs.\(^4^5\) Certain line-of-business restrictions were also imposed;\(^4^6\) AT&T was prohibited from providing local exchange services and the BOCs were prohibited from offering long-distance service.\(^4^7\)

In approving the MFJ, Judge Greene clearly wanted to promote competition, and introduced it into areas he found technically feasible, most notably the long-distance market.\(^4^8\) The BOCs (generally referred to as the local exchange carriers or LECs), however, controlled a network of infrastructure which at the time represented a prohibitive barrier to competition on the local level.\(^4^9\) The MFJ was not intended to be permanent and Judge Greene retained jurisdiction over the matter to modify and enforce the MFJ and the reorganization plan.\(^5^0\) The MFJ was meant only to remain in place long enough to allow competition to flourish and not beyond the date when the local exchange markets could be subject to competition.\(^5^1\) By 1994 conditions and technology had changed substantially, and several BOCs petitioned Judge Greene to vacate the MFJ in its entirety.\(^5^2\)

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

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

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

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

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

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

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

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


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

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

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

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

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

See supra note 43 and accompanying text.

Judge Green lifted previous line-of-business restrictions on AT&T and permitted them to enter the "growing computer, computer related, and information market." Id. He commented that all of the developments of the case were "plainly in the public interest." Id. AT&T was, however, prohibited from entering the electronic publishing industry due to the potential of AT&T to acquire a substantial monopoly over the generation of news which would strike at a principle which lies at the heart of the First Amendment. Id.\(^4^9\) Id.\(^5^0\) Id. at 231.

Richard S. Higgins and Paul H. Rubin, An Overview of the Costs and Benefits of the AT&T Antitrust Settlement, in Deregulating Communications, The Baby Bell's Case For Competition (Richard S. Higgins and Paul H. Rubin eds. 1995).\(^5^1\) Id. at xvi. The BOCs argued that there was a substantial cost to customers by not allowing the BOCs competitive entry into the long distance market and, on the other hand, there is no longer a significant risk of "monopoly leveraging" or "cross subsidization" by the BOCs. Id.
II. THE TELECOMMUNICATIONS ACT OF 1996

A. Overview of Local Interconnectivity Provisions

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

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

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

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

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

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54 47 U.S.C. § 151 (1994). Section 151 codifies the Communications Act of 1934 and creates the FCC whose purpose is "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and worldwide wire and communication service . . . ." Id.
55 See generally, Michael F. Finn, The Public Interest and Bell Entry Into Long Distance Under Section 271 of the Communications Act, 5 COMMLAW CONSPECTUS 203 (1997) (explaining the BOCs must meet a fourteen point checklist on competition before being allowed to compete in long-distance marketplace).
57 Id.
58 Id.
59 Id. § 251(c)(2). Specifically, interconnection means the duty for a local exchange carrier to provide connection with any requesting carrier’s network transmission and routing of exchange service and access, "at any technically feasible point within the carrier’s network," equal in quality to its own service or to service it provides others, and at rates which are "just, reasonable and nondiscriminatory." Id.
60 Id. § 251(a)(1). This provision is further refined by the requirement to connect at "any technically feasible point within the carrier's network." See also infra note 148 and accompanying text.
61 Id. § 251(c)(2)(d). This provision also stipulates that the terms and conditions for interconnection set by carriers comply with Section 252, which outlines procedures to be used for negotiation of agreements, arbitration, and approval of agreements. Id. § 252.
62 Id. § 251(c)(1). Upon receiving a request for interconnection, services, or network elements pursuant to Section 251, an incumbent LEC may "negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers. . . . the agreement shall be submitted to the State's commission." Id. § 252(a)(1).
63 Id. § 251(c)(3). Unbundled access is to be provided at "rates, terms and conditions that are just, reasonable and nondiscriminatory" to any requesting telecommunications carrier, and also in accordance with the provisions of Section 252. Id.
64 Id. §§ 251(c)(1)-(6). Not only must carriers provide their services to other telecommunications carriers at wholesale rates, but they may not thwart or limit the resale of such services to others, except as directed by a State commission regarding a particular category of subscribers. Id.
65 Id. § 251(c)(4)(B). A State commission may prohibit a carrier which obtains services at wholesale rates from offering those services to a category of customers which previously only received them at retail rates, if such prohibition is consistent with the regulations by the FCC. Id.
B. Implementation and Role of Federal and State Commissions

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

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

Furthermore, when specifically discussing pricing standards, the 1996 Act refers to "determinations by a state commission of the just and reasonable rate for the interconnection of facilities and equipment."73 The references to "state commissions" and their authority continue under sections about "charges for transport and termination of traffic" and "wholesale prices for telecommunications services."74 Ostensibly, the only way the states' commissions lose their authority is when they refuse to act within the specified time frame of ninety days.75 At that point the FCC assumes the authority of the state commission not acting and the FCC being so notified.76

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


A. Overview

The FCC, in its First Report and Order,79
promulgated rules to address the areas mandated by Congress in the 1996 Act\textsuperscript{80} and discusses and defends the depth of change now legislated.\textsuperscript{81} The underlying concept is one of moving from a government-encouraged monopolistic structure for the local telephone industry to a competitive environment.\textsuperscript{82} The First Report and Order acknowledges the important roles that the state commissions have historically played in regulating the telecommunications industry, and then announces the creation of a "new partnership between state and federal regulators . . . [one] far better suited to the coming world of competition."\textsuperscript{83} In outlining the new goals set out by Congress, the FCC assumes authority over areas specifically designated as within the purview of the states, although it "looks forward to the continuation of that cooperative working relationship in the coming months as each of [them] carries out the role assigned by the 1996 Act."\textsuperscript{84} The areas of greatest contention are the interconnectivity provisions, the unbundling provisions, and most of all, the pricing provisions.\textsuperscript{85}

Among the FCC's principal goals for implementing Congress' mandate for telephone service are: (1) opening the local exchange and access markets to competitors, (2) promoting more competition in markets already open to competition, including long distance and (3) reconfiguring the market so that universal service is preserved and advanced while the local markets transition from monopoly to competition.\textsuperscript{86} The FCC contends that competition is desirable, not only because of the social and economic benefits competition brings to consumers of local service, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to control the local facilities and impede free market competition.\textsuperscript{87}

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

B. Justification for FCC's Actions

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

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

\textsuperscript{81} See Frolio infra note 78. The FCC's First Report and Order is comprehensive and purports to regulate in fine detail all aspects of competition in the local-exchange market. Id. at 2. The text is massive, spanning over 700 pages and including a staggering 3,275 footnotes. Id.

\textsuperscript{82} See First Report and Order, supra note 7, at para. 1.

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

\textsuperscript{84} Id. at para. 2. The FCC declares "this arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces." Id.


\textsuperscript{86} First Report and Order, supra note 7, at para. 3.

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


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

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

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

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

Second, the FCC also expressly acted to reduce the possibility that LECs might "double recover" charges for universal access from its new competitors while selling that same access as part of the LECs' unbundling of network elements. This was accomplished by setting a timetable to phase out the previously used access charges and phase in the unbundled network elements charges by June 30, 1997 or the date of final decisions by the FCC in the universal service and access reform proceedings. It also specifies a similar timetable for ending the LEC's recovery of intrastate access charges and transport across their systems while transitioning to the newer unbundled local with approval to AT&T's costs on a forward looking basis. "[I]t is current and anticipated cost, rather than historical cost, that is relevant in business decisions to enter markets and price products. The business manager makes a decision to enter a new market by comparing anticipated revenues (at a particular price) with anticipated additional costs . . . . The historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are 'sunk' and unavoidable and are unaffected by new production decisions."
switching elements. 106

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

Taken together, these three major FCC goals have proven so controversial that arbitration is pending in every state in this country, 110 with private companies and public commissions on the same side in many cases, because the FCC has seemingly overstepped its authority in attempting to be responsive to Congress' intentions stated in the 1996 Act. 111

IV. APPEAL TO THE EIGHTH CIRCUIT

On September 27, 1996, the Eighth Circuit Court of Appeals granted a temporary stay of the pricing provisions issued by the FCC. 112 After oral arguments were heard October 3, 1996, the court granted a temporary stay of the contested provisions 113 twelve days later based on its general acceptance of the arguments brought by the petitioners, mostly state commissions and LECs. 114 The court agreed that the case presented had on its face sufficient merit and was persuaded that, absent a stay, the petitioners and the public might be harmed, 115 The court heard oral arguments on January 17, 1997, but the stay remains in effect pending a final decision on the merits.

The court noted that despite the different approaches, the majority of petitioners' objections revolved around the FCC's pricing rules. 116 One of the pricing rules was based on the TELRIC. 117

106 Id.


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

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

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


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

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

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

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


117 See First Report and Order, supra note 7, at para. 674. The FCC uses the term TELRIC to describe their proposed pricing methodology. Id. The term "long run" refers to a period long enough so that all of a firm's costs become variable or avoidable. Id. "Incremental costs are the additional costs (usually expressed as a cost per unit) that a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of the good or service." Id. at para. 675. "Incremental costs are forward looking in the sense that costs are incurred as the output level changes by a given increment." Id. "For example the incremental cost of carrying an additional call from a residence that is
method to calculate the costs which an incumbent LEC incurs in making its facilities available to competitors. The petitioners argued that the TELRIC method underestimates their costs and results in prices that are too low. They maintained that the prices would effectively require them to subsidize their competitors and threaten the viability of the LEC’s own business. Furthermore, the petitioners contended that the TELRIC method does not consider or allow “embedded” or “historical” costs, that is, those costs incurred by the LEC in the past, when determining rates. The FCC pricing also assumes that the LECs are using the most efficient telecommunications technology available, not the technology and equipment that the LEC actually may be using.

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

The last of the petitioners’ disputes regarding the FCC’s pricing methodology rests in the so-called “pick and choose” rule, because “again, price becomes a key issue.” Essentially, the pricing allows the LECs’ competitors to “pick and choose” the lowest-priced individual elements and services among all prior approved agreements already connected to the network to its end office is virtually zero.”

The court directly disagreed with the FCC’s argument that in granting a stay the court would be acting contrary to the public interest and as stated by the intent of Congress in the 1996 Act, to promote competition. The court noted that prior to the FCC’s intervention, several state commissions had successfully negotiated with incumbents and demand that that price for the individual elements be available across the board. The court noted that the congressional preference for negotiated agreements would be undermined because an “agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized.”

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

The court argued that the FCC's intervention, several state commissions had successfully negotiated with incumbents were a more appropriate gauge for figuring pricing.
bent LECs to achieve acceptable access rates to begin to allow competitors into the local market. The court believed a stay would preserve the "continuity and stability of [the] regulatory system - a system that has initially proved to be successful." It dismissed the FCC's contention that without its pricing regulations in effect, the incumbent LECs would have superior bargaining power in any negotiations.

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

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

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

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

A. Competition

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

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132 Iowa Util. Bd., 4 Comm. Reg. (P & F) at 1365. The court noted that some states, "Connecticut, Florida and Iowa have established rates based on local conditions and are already opening up their local markets to competition under both the federal Act and state statutes which foreshadow the new federal law. Moreover, the FCC-imposed rate for Iowa is substantially higher than the state-set rate which was based on the full record from a contested case proceeding, while in Florida, the FCC proxy rate is substantially lower than the state-set rate. Id. at n.7.
133 Id. at 1365.
134 Id.
135 See generally supra note 89, Comments of Joseph R. Bankoff of King and Spalding.
137 See supra note 3.
141 Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (10th Cir. 1971), (explaining that the court will scrutinize closely the analytical bases for the choices made and that the Commission provide sufficient analysis and explanation for its decision).
143 See First Report and Order, supra note 7, para. 3.
communications Act of 1996 with specific instructions about what markets should be opened up and in a particular time frame.144 In promulgating rules to expedite congressional intent, the FCC acted in the public interest by deliberately changing prior policies and standards in response to changing technologies. The BOCs, by contrast, are not interested in competition and want to maintain their competitive advantage as long as possible. The desire to maintain control of that monopoly is driving the litigation before the Eighth Circuit.

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

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

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

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

145 Telecom Roundtable, supra note 89, Comments of William B. Barfield of BellSouth Corp. (explaining that, “[t]he FCC has turned this Bill on its ear.”)
147 Telecom Roundtable, supra note 89, at 33, Comments of William R. Barfield of BellSouth Corp.
148 The new international standard is Signaling System 7 (SS7), a digital packet-switched network that is connected to a telephone carrier’s telephone switches that controls the routing and accounting of calls, manages network resources and supports the supply of information services. By 1991, 53.4% of BOC access lines were connected to SS7 equipped switches and the conversion schedules project that BOCs and major independent companies will serve almost all lines in urban areas by SS7 switching by 1995. Bridge M. Mitchell and Ingo Vogelsang, Expanded Competitiveness and Regulatory Safeguards in Local Telecommunications Markets in DEREGULATING COMMUNICATIONS, THE BABY BELLS CASE FOR COMPETITION AT 178 (Richard S. Higgins and Paul H. Rubin eds. 1995).
151 Id.
152 Telecom Roundtable, supra note 89, at 54, Comments of Joseph R. Bankoff of King and Spalding.
153 United States v. AT&T, 552 F. Supp. 131, 194-195 (D.D.C. 1982). “It is probable that, over time, the Operating Companies will lose the ability to leverage their monopoly power into the competitive markets from which they must now be barred. This change could occur as a result of technological developments which eliminate the Operating Companies’ local exchange monopoly or from changes in the structures of competitive markets. In either event, the need for the restrictions ... will disappear, and the decree should therefore contain a mechanism by which they may be removed.” Id.
154 See First Report and Order, supra note 7, at para. 55.
155 Id. at para. 56.
156 Id.
157 Id.
vation from occurring in every state.¹⁵⁸

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

Although the regulatory process concerning interconnection has been halted pending the outcome of the Eighth Circuit’s final decision, technological advances achieving competition continue apace. The barrier to competition based on interconnection at the local level appears to have been broken by AT&T’s widely anticipated announcement of its entry into local markets based on wireless technology.¹⁶² According to AT&T, the consumer interface would remain unchanged, but the connection from the consumer’s home or place of business would be through the airwaves which will effectively cover 95% of the nation’s population effectively replacing local phone links.¹⁶³ In creating its wireless infrastructure, AT&T will undoubtedly invest significant capital into placing this system into every consumer’s hands. This process, however, will still be less costly than installing a hardwired system. AT&T admits that putting this new infrastructure in place will take some time, but Congress’ basic intent to introduce competition at the local level will somehow prevail despite the Eighth Circuit, because it appears that technology does have answers and solutions heretofore unimagined.¹⁶⁴

B. The Incumbent LEC

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

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

C. Global Access – Possible New Markets

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

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¹⁵⁸ Id.
¹⁵⁹ Supra note 116.
¹⁶⁰ Supra note 109.
¹⁶¹ Telecom Roundtable, supra note 89, at 85, Comments of W. Douglas Hickey of US West Inc.
¹⁶³ Id. AT&T purchased 222 licenses to use a small segment of the radio spectrum in federal auctions. At the time, most analysts assumed AT&T would be using the licenses for a new personal communications services. Id. at C12.
¹⁶⁴ Id.
¹⁶⁵ Telecom Roundtable, supra note 89, at 34, Comments of William B. Barfield of BellSouth Corp.
¹⁶⁶ Id.
¹⁶⁷ Id. “... [U]nder the 1996 law, you’d be wary of the degree of your own success as a competitive local exchange carrier, because the last thing you’d want to do is obtain sufficient market share and be reclassified as an incumbent.” Id.
¹⁶⁹ Telecom Roundtable, supra note 89, at 39, comments of William E. Eason, Jr. of Scientific-Atlanta Inc.
¹⁷⁰ Id.
upon the global marketplace and economy.\textsuperscript{171} Already alliances are forming with international companies \textsuperscript{172} which are expected to open the telecommunications markets overseas, and which also represent newly available resources for domestic carriers who need to upgrade their own networks and services continuously.\textsuperscript{173} These alliances will provide American companies which conduct international business with a seamless international telecommunications interface.\textsuperscript{174} Presumably this would help such internationally oriented companies generate American jobs and thereby help add to the U.S. economy.\textsuperscript{175} Many companies have expressed the need to have strategic alliances with international suppliers for just these reasons.

D. Costs of Public Interest

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

In one sense, the general public is already convinced that increased local exchange usage is necessary. The demand for additional telephone lines to accommodate ubiquitous fax machines and computer modems has led to new area codes being added all over the country, because in many places the available numbers keep being exhausted. Consumers, both individually and in business, need more and better services.

VI. THE INTRODUCTION OF COMPETITION FOR LOCAL EXCHANGE SERVICES

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

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

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

\begin{itemize}
\item \textsuperscript{172} Christopher Boam, \textit{Giving the Phoenix Wings: The Deutsche Telekom/France Telecom/Sprint Alliance}, 5 \textit{CommLaw Conspectus} 73, 82-83 (1997) (explaining that British Telecom would invest $4.3 billion in MCI in exchange for 20% of the company along with appropriate board representation. A second joint-venture company called Concert would be created, 75.1% owned by BT and 24.9% owned by MCI. The creation of Concert would allow BT and MCI to offer global service quickly and cheaply.)
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Telecomm Roundtable, supra note 89, at 35, Comments of Sharon R.B. Case of Coca-Cola.}
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} MCI’s Earnings Climbed 17 Percent in the 4th Quarter, \textit{Wash. Post}, Jan. 31, 1996 at F3. MCI and AT&T share the $70 billion long distance industry. \textit{Id.}
\item \textsuperscript{177} Mike Mills, \textit{Paving the Way With Wireless, Long-Distance Giant AT&T Unveils Its Local-Market Strategy}, \textit{Wash. Post,} Feb. 26, 1997 at C11. AT&T bets on wireless technology to enter the $100 billion a year local telephone market. \textit{Id.}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} See supra note 55, at 116 (explaining that BOCs must comply with a competitive checklist in order to be granted § 271 authority to enter the long distance market).
\item \textsuperscript{180} Mark Lander, \textit{Rising Phone Bills Are Likely Result of De-regulation}, \textit{N.Y. Times}, Mar. 30, 1977, at A1. (explaining that Federal and state regulators must strip away subsidies that for decades have allowed millions of Americans to get local service at or below cost).
\end{itemize}
is dedicated to maintaining the status quo during the transitional period, some experts believe a temporary rate increase is an unavoidable first step toward lower prices competition will bring in the long run.\textsuperscript{181}

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

Initially there will be a flurry of mergers, buyouts and reselling as a expedient means of gaining access to valuable services, the net result being the formation of a handful of "supercarriers."\textsuperscript{187} Another concurrent development and source of viable competition is the emergence of the Internet Service Providers ("ISPs") and the use of the Internet for telecommunications.\textsuperscript{188} ISPs are currently exempt from paying access charges to local phone companies, and the LECs want the ISPs to pay for this privilege.\textsuperscript{189} The FCC has suggested that it will not impose access charges on the new market.\textsuperscript{190} Aside from the BOCs and the major long distance carriers, there are at least five hundred other long distance providers, cable companies, satellite and electric utility companies which have shown an interest in competing for market share.\textsuperscript{191} With no infrastructure in place, reselling will be the basic mode of entry to begin a strong facilities-based competition.\textsuperscript{192} The introduction and ability to launch a wireless infrastructure as proposed by AT&T has added yet another competitive force to an already complex equation.\textsuperscript{193}

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

\section{VII. CONCLUSION}

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

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

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

\textsuperscript{183} Telecomm Roundtable, supra note 89, at 30, Comments of Sharon R.B. Case of Coca-Cola.


\textsuperscript{185} Supra note 179.

\textsuperscript{186} Id.

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

\textsuperscript{188} Id. (explaining access charges were waived in the mid-80s to allow the ISPs, then called "enhanced service providers" to develop).

\textsuperscript{189} See supra note 4.

\textsuperscript{190} Supra note 179.

\textsuperscript{191} Telecomm Roundtable, supra note 89, at 33, Comments of Ellen A. D'Amato of Sprint Corp. (explaining that the LECs want to get the ISPs to pay for calls).

\textsuperscript{192} Id. (explaining that Coca-Cola will probably go with known names due to reliability issues.)

\textsuperscript{193} Carolyn Hirschman, Waging War, Public Opinion Becomes A Battleground for LECs, TELEPHONY, Mar. 11, 1996, at 58.
successful companies. As the industry recovers from this first round of competition, another crop of "boutique" carriers will emerge providing more unique and diversified services for customers whose needs extend into other areas, for example, carriers that provide a complement of banking services, stock transactions, recorded music, radio, newspaper and magazine subscriptions along with basic local and long distance services for a monthly fee.

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

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