The Magnificent Seven: American Telephony's Deregulatory Shootout

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by

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I. High Noon

The Telecommunications Act of 1996⁴ promised the world. It has
delivered considerably less. The Act's preamble promised that the Act would “promote competition and reduce regulation,” “secure lower prices and higher quality services... and encourage the rapid deployment of new telecommunications technologies.” On its first occasion to review the Act's provisions on local and long-distance telephony, the Supreme Court spoke in far less glamorous terms. “[M]ost unfortunate,” lamented the Justices, “for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars,” the Telecommunications Act “is in many important respects a model of ambiguity or indeed self-contradiction.”

The most vociferous critics of telecommunications deregulation argue that the Act has produced nothing but a cascade of megamergers. Consumers Union, for instance, protests that as “telephone monopolies continu[e] to merge rather than compete,” the Act “will not deliver on its promise of broad-based competition and lower telephone prices.” Implicit in this cry is the assumption that the telecommunications mergers that have occurred since 1996 have done little or nothing to reduce prices, spur innovation, or otherwise enhance consumer welfare.

This Article will address questions of law and policy raised by these megamergers. The very fact that I will be discussing “telecommunications” as an industry distinct from broadcasting and other forms of mass communications is a signal that the Act has not succeeded in “opening all telecommunications markets to competition.” Most of the commentary still focuses on “[t]he two most noteworthy and most controversial changes in the status quo, authorizing competition in local telephone markets and, reciprocally, authorizing Bell operating company... entry into long distance.”

Part II of this Article will describe the most important changes in the competitive landscape since 1996. In particular, it will recount the rise of the seven firms that now dominate American telecommunications. The Magnificent Seven, as I shall call them, are SBC Communications, Bell Atlantic, BellSouth, Qwest (heir apparent to US West), AT&T, MCI WorldCom, and Sprint. The first four are

2. Id. at 56 (preamble); cf., e.g., 47 U.S.C.A. § 257(b) (West Supp. 1999) (instructing the FCC “to promote... policies and purposes... favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity”).
Bell Operating Companies (BOCs); the last three are interexchange carriers (IXCs) with increasingly diversified business portfolios. Minor players from the parallel worlds of cable television and wireless telephony have remained just that, minor players. The only change is that the leading IXCs have incorporated these lines of business into larger strategies for cracking the BOCs’ grip on local telephone markets.

Part III describes certain provisions of the Telecommunications Act and key decisions interpreting those provisions. These statutory, administrative, and judicial mileposts effectively built the Magnificent Seven by dictating the merger strategies that American telephony’s largest players would pursue. Part IV outlines and analyzes the merger strategies that have emerged. Three strategies—horizontal mergers between BOCs, BOC acquisitions of independent local exchange companies (LECs), and IXC mergers of all stripes—have accounted for most of the restructuring in this industry since 1996. A fourth strategy, which accounts for BOC acquisitions of non-LEC assets, has largely failed.

Part V draws some tentative conclusions from merger mania in telecommunications. Telephony and video programming simply do not mix. Convergence between the worlds of entertainment and broadcasting—between content providers and conduit owners in mass communications—is proceeding without regard to developments in telephony. The cable industry has contributed to telecommunications reform since 1996, but not in the leading role that the Act’s framers anticipated. Neither the Act nor the opening round of mergers, however, exhausts the competitive possibilities in telephony. Three avenues of competitive attack remain: the Internet, wireless telephony, and overseas investment. By Net, by air, or by sea, potential challengers to the Magnificent Seven may yet emerge. In the meanwhile, the FCC, responding ad hoc to numerous unanticipated legal and economic twists since 1996, has made merger policy an important and workable component of its implementation of the Telecommunications Act.

II. The Gunslingers, Then and Now

Radical changes in market structure or industrial organization can upset, even undermine, the competitive assumptions on which deregulation proceeds. The Telecommunications Act is no exception; the marketplace in which the Act took effect no longer exists. As of 1996, three large IXCs were prepared to square off against eight large LECs—seven BOCs and one independent—for all the local and long-distance carriage that the traffic could bear. Competitive access providers (CAPs), multiple cable system operators (MSOs), and wireless operators added spice and potentially significant ingredients to
the competitive stew.7

Since 1996, however, the American telecommunications industry has rushed toward combination and concentration. Industry-wide reshuffling after comprehensive legislative reform has reduced these eleven major players and their smaller cohorts to the Magnificent Seven. Four of the seven original BOCs have been absorbed, either by their more aggressive cohorts or, in one case, by a company that made its initial public offering nearly a year and a half after the enactment of the 1996 Act.8 Mergers have catapulted WorldCom and Qwest, two firms that scarcely attracted attention in 1996, into dominant positions. The number seven is even more volatile than it is arbitrary: as this Article churned through the editing process, MCI WorldCom beat BellSouth in a bidding war for Sprint. Nevertheless, at least for the moment, the Magnificent Seven rule this market.

A. The Opening Round

On the eve of the 1996 Act, the Bell breakup decree9 still cast a long shadow. The heirs of the Bell system constituted no fewer than eight of the leading players in American telecommunications. Seven of these firms—NYNEX, Bell Atlantic, BellSouth, Ameritech, Southwestern Bell, US West, and Pacific Telesis—were the original BOCs created on January 1, 1984, by the Modification of Final Judgment (MFJ).10 The MFJ not only separated the BOCs from AT&T and from each other but also barred the BOCs from most long-distance carriage. Presumably “a corporation that enjoyed a monopoly on local calls would ineluctably leverage that bottleneck control in the interexchange (long distance) market.”11 The eighth firm, of course, was AT&T itself, shorn of its local exchange (LX) affiliates but still armed with its formidable Western Electric and Bell Labs subsidiaries.12

Tempting though the analogy might be, Ma Bell and her seven

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12. See AT&T, 552 F. Supp. at 166-67 (declining to order the divestiture of Western Electric and Bell Telephone Laboratories from AT&T).
daughters bore little resemblance to Snow White and the Seven Dwarves. These firms dominated the markets left open to them under the MFJ. Far from confining itself to interexchange (IX) carriage, AT&T in the 1980s would become a conglomerate with additional interests in computing, telecommunications equipment manufacturing, and consumer finance. For their part, the seven BOCs commanded most of the LX business in the United States. As of 1996, the BOCs still "controlled" over 80 percent of the [nation's] local telephone network.13

The largest independent LEC in 1996 was GTE. Thanks to an extremely generous antitrust consent decree,14 GTE was able to unite "Sprint's long distance and GTE's local telephone operations" under a single corporate umbrella.15 Although the 1984 consent decree barred GTE from acquiring another IXC for ten years,16 GTE unloaded Sprint without serious efforts to replace its "money-losing" IX operations.17

MCI, heir to the company that originally cracked the Bell system's long-distance monopoly in 1969,18 joined AT&T and Sprint in dividing much of the IX market. Additional victories on the eve of AT&T's breakup19 enhanced MCI's reputation as the company that beat Bell.20 In fact, however, MCI and Sprint were the beneficiaries of a conscious federal policy of assessing AT&T's IX competitors a lower share of the common costs of maintaining Bell's LX networks.21 Throughout the predivestiture period, the Federal Communication Commission (FCC) gave MCI, Sprint, and other nondominant carriers a substantial price advantage over AT&T by manipulating access charges for the completion of IXCs' calls on the "last mile" of the LECs' networks.22

15. Id. at 733.
16. See id. at 739-40.
22. See GERALD W. BROCK, TELECOMMUNICATION POLICY FOR THE INFORMATION
Beyond the wireline world of LECs and IXCs, there was little actual competition but plenty of anticipation. “Competitive access” was little more than a mirage; CAP services provided by such firms as MFS and Teleport were limited to “a number of fortunately situated business customers.” These firms nevertheless established a competitive beachhead in the local market; in 1994, for instance, MFS secured permission from the Maryland Public Service Commission to offer LX services to business and residential customers.

Wireless telephony and the cable industry completed the competitive picture. Optimistic commentators speculated that “[r]adio” and other wireless technologies, with “the potential to be cheaper than copper in the local loop,” might eventually “put a final end to the local exchange monopoly.” The independence of cellular telephony from the BOCs was hotly contested throughout the history of the MFJ. Regulatory hostility to BOC involvement in the cellular industry spurred Pacific Telesis to divest AirTouch Communications. A similar concern prompted the government’s challenge to AT&T’s acquisition of McCaw Cellular, at that time the largest wireless carrier in the United States. Meanwhile, the digital alternative of personal communications

AGE: FROM MONOPOLY TO COMPETITION 208 (1994).

23. Lawrence Sullivan, Elusive Goals Under the Telecommunications Act: Preserving Long Distance Competition upon Baby Bell Entry and Attaining Local Exchange Competition: We’ll Not Preserve the One Unless We Attain the Other, 25 SW. U. L. REV. 487, 501 (1996); see also WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 17 (1994) (describing the CAPs’ business as “concentrated in major office buildings and main switching locations for interexchange carriers”).


25. KELLOGG, supra note 17, at 3 (1995 Supp.); see also Mark Landler, An Aerial Assault on the Wired Nation, N.Y. TIMES, Feb. 26, 1996, at C1 (describing widespread agreement, but not unanimity, among telecommunications executives that local competition would proceed through a wireless rather than a landwire strategy).

26. Compare United States v. Western Elec. Co., 673 F. Supp. 525, 551 (D.D.C. 1987) (declining to lift IX restrictions on the BOCs’ cellular operations based on a finding that discrimination against customers of the BOCs’ competitors was “not only possible but probable”) with United States v. Western Elec. Co., 890 F. Supp. 1, 9-10 (D.D.C. 1995) (granting, with limiting conditions, the BOCs’ motion to allow the provision of IX carriage to the BOCs’ cellular customers), vacated as moot, 84 F.3d 1452 (D.C. Cir. 1996).


services (PCS) was emerging as a direct competitor of analog cellular.\textsuperscript{29} Congress nevertheless downplayed the competitive potential of wireless telephony. The legislative history of the Telecommunications Act explicitly rejected the possibility that wireless service could qualify as "facilities-based" competition against the incumbent LECs.\textsuperscript{30}

The cable industry, by contrast, harbored many a competitive dream. Congress identified the availability of cable television "to more than 95\% of United States homes" as strong evidence "that meaningful facilities-based competition" for LX carriage was "possible."\textsuperscript{31} The leading MSOs were investing in CAPs; most saliently, an alliance consisting of TCI, Cox Enterprises, Continental Cablevision, and Comcast had by 1996 acquired a majority stake in Teleport, a leading CAP.\textsuperscript{32} Hopeful commentators eagerly anticipated the deployment of "hybrid coax" technology that would allow cable operators to carry switched voice messages.\textsuperscript{33}

The opposite scenario had also become part of the dream of reform: some observers anticipated that LECs might eventually be able to transmit video programming through hybrid coax or some other broadband medium. In its 1992 "Video Dialtone Order,"\textsuperscript{34} the FCC presaged telephone company carriage of audiovisual content; a flurry of judicial decisions in 1994 and 1995 fell just short of facilitating immediate, full-blown LEC entry into video programming as well as carriage.\textsuperscript{35}

\textsuperscript{29} See, e.g., Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995) (invalidating FCC rules that restricted cross-ownership of existing cellular operations and newly allocated PCS spectrum); see also Omnipoint Corp. v. FCC, 78 F.3d 620, 626-27 (D.C. Cir. 1996) (describing a scheme for auctioning broadband PCS spectrum).


\textsuperscript{31} Id. at 148, reprinted in 1996 U.S.C.C.A.N. 124, 160; see also HOUSE REPORT, supra note 13, at 77, reprinted in 1996 U.S.C.C.A.N. 10, 43. But cf. SBC Communications Inc. v. FCC, 138 F.3d 410, 420 (D.C. Cir. 1998) ("[W]e see no indication that Congress believed [in 1996] that cable companies, or anyone else, had... near term capability" to "provide meaningful facilities-based competition.").

\textsuperscript{32} See Teleport Communications-New York, 7 F.C.C.R. 5986 (1992); BAUMO & SIDAK, supra note 23, at 17.


\textsuperscript{35} See US West, Inc. v. United States, 48 F.3d 1092, 1106 (9th Cir.) (invalidating 47 U.S.C. § 533(b) (1994), a subsequently repealed provision that banned any common carrier from providing video programming to subscribers), vacated, 516 U.S. 1155 (1996); Pacific Telesis Group v. United States, 48 F.3d 1106, 1107 (9th Cir. 1994) (same); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 185 (4th Cir. 1994) (same), vacated, 516 U.S.
The Act took little or no account of a new telecommunications medium that was only beginning to take shape in 1996: the Internet. Beyond passing the Communications Decency Act, Congress had little to say about the Internet, but soon even that legislative effort soon lay in ruins. The early stages of implementing the Telecommunications Act have exposed Congress's shortsightedness in this regard. Internet access has emerged as both a secure part of the strategies that could crack the local exchange bottleneck and as the likeliest avenue by which cable assets in any form will contribute to the evolution of this industry.

B. The Magnificent Seven

(1) POTS and PANS, Hedgehogs and Foxes

American telephony has become considerably more concentrated since the passage of the Telecommunications Act. Four of the eight major LECs that existed in 1996 have either disappeared in mergers or stand on the verge of being absorbed. One BOC (US West) and one major IXC (MCI) were overtaken and acquired by more aggressive upstarts. Two of America's three largest long-distance companies are preparing to merge, pending FCC review. The survivors of this deregulatory shootout—Bell Atlantic, SBC, BellSouth, Qwest, AT&T, Sprint, and MCI WorldCom—deserve the title of "The Magnificent Seven."

In the immediate aftermath of the 1996 Act, Bell Atlantic's acquisition of NYNEX and SBC's acquisition of Pacific Telesis reduced the number of BOCs to five. These leading BOCs, vastly more aggressive than BellSouth or the formerly independent US West, have expanded even further. SBC's acquisition of Ameritech has united the assets and service territories of three formerly independent Baby Bells within a single BOC. Likewise, FCC approval of Bell Atlantic's proposed acquisition of GTE would complete GTE's journey from its post-MFJ status as "[t]he largest integrated telephone company in the

1155 (1996); Southern New England Tel. Co. v. United States, 886 F. Supp. 211, 219-20 (D. Conn. 1995) (same); Bell South Corp. v. United States, 868 F. Supp. 1335, 1344 (N.D. Ala. 1994) (same); Ameritech Corp. v. United States, 867 F. Supp. 721, 737 (N.D. Ill. 1994) (same); see also GTE California, Inc. v. FCC, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) ("[Section 533] is an irrational obstruction to the exercise of free speech."); cf. Nynex Corp. v. FCC, 153 F.R.D. 1, 3 (D. Me. 1994) (permitting a cable operator to intervene in an action challenging § 533(b)).


United States” to corporate extinction.\(^{39}\) Even without the GTE merger, Bell Atlantic has become a player in the global wireless market.

The bidding war that yielded MCI WorldCom effected the most dramatic change among IXCs between 1996 and 1999. The MCI acquisition was far from the final chapter in this story. A Mississippi-based firm once called LDDS Communications is threatening to combine the second and third largest American long-distance companies under the WorldCom banner. The crucial point is that the surviving IXCs—AT&T, Sprint, and MCI WorldCom—look radically different not only from each other but also from the form each assumed in 1996. These companies’ strategies now include Internet access, “one-stop shopping,” and other objectives that scarcely bore names in 1996. AT&T in particular has made major acquisitions in each of the non-IXC sectors that had been expected in 1996 to challenge the LX monopoly: wireless, cable, and competitive access. AT&T’s bids for Tele-Communications, Inc. (TCI), and MediaOne Group, two leading cable operators, may represent the most significant step by any carrier toward facilities-based LX entry.

Some things have not changed. The traditional distinction between the local exchange and long distance still matters. The longstanding divide between local and interexchange carriage now splits the Magnificent Seven into two distinct camps. In order better to distinguish the BOCs from the IXCs, let us mix one pair of metaphors drawn from telecommunications shop talk with another pair drawn from the work of the late political philosopher, Isaiah Berlin.\(^{40}\) Telecommunications mavens speak of POTS and PANS, while Berlin distinguished between hedgehogs and foxes.

The BOCs as POTS hedgehogs know one great thing: plain old telephone service. During its twelve-year ascendancy, the Bell breakup decree confined the BOCs primarily to the business of “providing telephone service among parties within each local exchange and granting access to the exchanges to [independent] long-distance carriers.”\(^{41}\) Old habits die hard; years of progressively intense deregulation have not changed the essential character of the BOCs as LX specialists. “The seven independent BOCs [really] are not the old AT&T”;\(^{42}\) Ma Bell had a Long Lines Division, which today’s BOCs most emphatically do not have and cannot develop without regulatory

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39. KELLOGG, supra note 17, § 8.1, at 401.
cooperation. There never really was more than an “amorphous” and overstated “risk that the Bell companies, in their zeal to diversify, will neglect relatively pedestrian . . . operations” in favor of “more glamorous, albeit more speculative, business[es].”

By contrast, and with apologies to Lillian Hellman, the transformed IXCs as the “big foxes” of PANS know many little things: not just interexchange carriage but also the full range of pretty amazing new services. Wireless telephony, video programming, and Internet access are now essential elements of the major IXCs’ competitive strategy. In short, BOCs as hedgehogs and IXCs as foxes are preparing for the same battle with radically different perspectives and arsenals.

(2) Lord Low Everything Else

The Seven have become truly Magnificent because the first round of mergers after 1996 has dwarfed every other source of competition in the telecommunications industry. The other players on the scene as of 1996 have, at least for now, dropped far into the competitive background. Formerly independent CAPs are now IXC subsidiaries. Nor has explosive growth liberated wireless telephony, a field still dominated by wireline carriers.

In the initial stages of the Telecommunications Act’s implementation, the greatest disappointment may be the dismal performance of the cable industry in penetrating the LX market. If so, the LECs’ failure to enter the market for video programming delivery must rank a close second. None of the nation’s MSOs have invaded the LX markets in their service territories. Nor have LECs offered any meaningful resistance to the cable industry, whether in the form of open video systems or in the more modest guise of video dialtone. The FCC’s 1998 report on competition in markets for video programming delivery spoke of LEC entry in the same breath as it spoke of entry by electric and gas utilities.

Instead, the round of mergers that made the Magnificent Seven has given cable an altogether different role in telecommunications reform. The cable operators’ sunk coaxial network is unlikely to carry a significant number of voice messages, but it adds high-speed Internet access to the IXCs’ arsenal against the entrenched BOCs. “[T]he one area where cable operators and telephone companies have started to

compete is in the provision of Internet access."\(^{46}\)

It is therefore no longer meaningful to treat CAPs, wireless
carriers, and cable companies as if they represented independent,
credible threats to enter the LX market. Instead, there are only two
economically and legally significant classes of players: competitive local
exchange companies (CLECs) and incumbent local exchange
companies (ILECs). Despite their name, the most important CLECs
are anything but small. AT&T is a CLEC, as are Sprint and MCI
WorldCom. ILECs, at least until the round of horizontal mergers
among LECS reaches its logical conclusion, include both BOCs and
independent LECS such as GTE. It is yet another measure of the
Magnificent Seven's hegemony that the boundary between ILECs and
major CLECs tracks the boundary between BOCs and major IXCs.

### III. The Legal Mothers of Merger Mania

At its theoretical core, the Telecommunications Act of 1996
conducted a three-way experiment in the form of imperfect competition
most commonly associated with Harold Demsetz.\(^{47}\) The Act sought to
unleash three of the most deeply entrenched monopolists in the
American economy—local exchange carriers, interexchange carriers,
and cable system operators—on each other's markets in the hope that
competition among the large would dissolve these industrial giants.\(^{48}\)
"LX service, the last of the great natural monopolies, would succumb to
a technologically sophisticated, intermodal assault."\(^{49}\) Even if each
combatant eventually achieved only "rather modest" "inroads," the
mere presence of "new entrant[s]" in each of these "tight oligopoly
industr[ies]" could "shake things up a great deal."\(^{50}\) In the battle royale
that Congress anticipated, IXCs and MSOs would lead the charge into
the local exchange, while BOCs would be allowed to breach the MFJ-era
firewalls that had kept them out of long-distance carriage\(^{51}\) and


\(^{50}\) Donald F. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 HARV. L. REV. 1313, 1383 (1964); accord BOC Int'l Ltd. v. FTC, 557 F.2d 24, 27 (2d Cir. 1977).

video programming. In statutory implementation no less than any other endeavor, the devil lies in the details. "It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity." Four crucial aspects of the 1996 Act have dictated the terms on which the biggest players in American telecommunications have combated and combined. First, the Act imposes a battery of obligations on incumbent LECs. In particular, it requires ILECs to offer interconnection, collocation, and unbundled access to their competitors. Second, the Act sets specific—and so far unsatisfied—conditions on BOC access to IX markets. Third, the Act prescribes the structural separation of cable programming from local telephony. Finally, the Act channels, tempers, and arguably limits FCC jurisdiction over telecommunications mergers.

Among these provisions, sections 251 and 271 of the Act have spurred intense FCC activity and an even more vigorous flurry of litigation. The BOCs have done most of the suing. In conjunction, these statutory provisions effectively pose the single legal question that has driven telecommunications merger activity since 1996: Under what legal conditions may a local exchange company offer long-distance carriage? I will therefore follow an examination of the Act’s provisions with a look at the FCC’s implementation of sections 251 and 271 and at the parallel lines of litigation lodged by the BOCs in response to those regulatory actions.

A. Statutory Starters

The telephonic provisions of the Telecommunications Act address three broad regulatory objectives: ending the IX franchise, ending line-of-business quarantines on the BOCs, and comprehensively reinventing command-and-control regulation of telephony. Like many other contemporary transformations of traditional public utility law, the Telecommunications Act prescribes “complete detariffing, elimination of all entry restrictions, and [even] outright abolition” of regulatory supervision. In the local exchange, one of the few remaining “market


54. See generally PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, THE TELECOMMUNICATIONS ACT OF 1996, §§ 1.1-1.3.7, at 5-62 (1996); see also id. § 1.1, at 3-4 (describing “the old paradigm of telecommunications regulation” as resting on these “three basic pillars”).

55. Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated
segments that have natural monopoly characteristics," the Act imposes a "new set of regulatory obligations—including the duty to interconnect, to lease unbundled network elements, and to sell services for resale"—in order to prevent incumbents from using their control of "bottleneck facilities . . . to discriminate against competitors."56

Ending the LX franchise is easy enough to declare, if not to achieve. Section 253(a) of the Act flatly preempts any "State or local statute or regulation, or other State or local legal requirement" that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."57 Howard Shelanski argues that this provision alone carries enough legal weight to force the eventual deregulation of telecommunications.58 The Act goes well beyond preempting state franchising laws, however, in prescribing an elaborate set of duties for incumbent carriers during what now appears to be a long transition from the command-and-control era.

(1) Section 251 and Allied Provisions

Section 251 imposes a cascading set of obligations on increasingly narrow classes of telecommunications carriers. Section 251(a) broadly orders every telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."59 No carrier may "install network features, functions, or capabilities" that frustrate interconnection.60

Section 251(b) then imposes certain unique obligations on local exchange companies, as distinct from IXCs and other carriers. LECs must guarantee resale, number portability, dialing parity, telephone pole access, and reciprocal compensation arrangements for the transport and termination of telecommunications traffic.61 Transport and termination "is the process whereby a call that is initiated by a customer of one telecommunications carrier is routed to a customer of a different telecommunications carrier and completed by that carrier."62 Typically the carrier "that 'terminates' or completes the call to its customer . . . charges for the cost of terminating the call."63 Number

56. Id. at 1364.
58. See generally Howard Shelanski, A Comment on Local Competition and Controversy in Local Telecommunications, 50 HASTINGS L.J. 1617 (1999).
60. Id.
61. See id. at § 251(b).
63. Id.; accord Indiana Bell Tel. Co. v. Smithville Tel. Co., 51 F. Supp. 2d 628, 632 n.3
portability enables customers “to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching” between carriers.64  Dialing parity is the term of art for what most consumers understand as “1+” dialing, or the ability to make calls “without the use of any access code.”65

Finally, under section 251(c), “incumbent” LECs—that class now felicitously known as ILECs—owe three additional duties to their competitors: (1) interconnection to the existing local network, (2) unbundled, nondiscriminatory access to basic network functions previously offered by the incumbent LEC on a bundled basis, and (3) resale at wholesale rates of any telecommunications service offered by the incumbent LEC to its retail customers.66  If necessary for interconnection or unbundled access, the incumbent must permit physical or virtual collocation of facilities.67

Section 254 imposes an additional substantive obligation on “[e]very telecommunications carrier that provides interstate telecommunications services”: the duty to “contribute, on an equitable and nondiscriminatory basis,” to federally established “mechanisms . . . [for] preserv[ing] and advanc[ing] universal service.”68  Section 254 is striking in its inclusion of “advanced services” within the universal

64. 47 C.F.R. § 52.21(k) (1999).
65. 47 C.F.R. § 51.5 (1999); see also HOUSE REPORT, supra note 13, at 72, reprinted in 1996 U.S.C.C.A.N. 10, 38 (“Dialing parity means the ability to dial the same digits in calling another number, regardless of who provides the service . . . . [f]or toll or ‘short haul’ long distance service, it is known as . . . ‘1+’ dialing.”); HUBER ET AL., supra note 54, § 1.1.5, at 16-17 (“Requiring all consumers to choose, in a single balloting period, between the BOC and their current interexchange carrier for all 1+ calls, rather than splitting traffic between them, could shake up the long distance business more thoroughly than any single development since the breakup of the Bell System in 1984.”).
In stark contrast with the rest of the Act, the universal service provision consciously subordinates competition to overtly redistributive objectives. To put it bluntly, the Act seeks "to limit state rate and entry but not universal service regulation." Section 252 prescribes the terms for enforcement of the substantive obligations that section 251(c) imposes on incumbent LECs. Although the exact scope of this provision became the subject of the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, the basic structure of section 252 lies beyond serious dispute. Under section 252, ILECs must pass a stringent procedural gauntlet for negotiating the terms by which they provide interconnection or unbundled access to their competitors. ILECs must negotiate comprehensive agreements with would-be competitors. If an ILEC and a CLEC cannot reach an agreement on their own, either party may petition the appropriate state public utility commission for compulsory arbitration. The state commission must approve "[a]ny interconnection agreement," whether "adopted by negotiation or arbitration." If the state commission "fails to carry out its responsibility" in a proceeding of this sort, the Act orders the FCC to "issue an order preempting the State commission's jurisdiction" and to "assume ... responsibility" for arbitrating and approving an interconnection agreement.

After Iowa Utilities Board, the real source of controversy surrounding section 252 involves federal jurisdiction over the state commissions charged with implementing that provision. Although the

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69. See id. § 254(b)(2), (6) (including "access to advanced telecommunications and information services" within a list of "universal service principles"); id. § 254(h)(2) (directing the FCC to "establish competitively neutral rules" for "enhanc[ing] ... access to advanced telecommunications and information services"); cf. id. § 254(e) (defining universal service as "an evolving level of telecommunications services" that "take[s] into account advances in telecommunications and information technologies and services").


71. Cellular Telecommunications Indus. Ass'n v. FCC, 168 F.3d 1332, 1337 (D.C. Cir. 1999); see also Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044, 1047-49 (D.C. Cir. 1997).


74. See id. § 252(b).

75. Id. § 252(e)(1).

76. Id. § 252(e)(6).
1996 Act allows “any party aggrieved by” a state commission’s section 252 “determination[s]” to file an “action in an appropriate federal district court,” 77 at least one federal district court has held that the eleventh amendment bars Congress from using this provision to waive the states’ immunity to suit. 78

(2) Section 271: BOC Entry into InterLata Carriage

The Act’s BOC provisions must be viewed in light of “the big prize” that the most formidable of ILECs sought in the 1996 reform: “access to the lucrative IX market.” 79 To be sure, the MFJ had allowed the BOCs to engage in two types of long-distance carriage. First, the MFJ defined the ban on BOC involvement in IX carriage as a prohibition on carrying “interLATA” calls—or calls traversing largely arbitrary local access and transport areas (LATAs). 80 Toll calls within a LATA, however, remained fair game. 81 Indeed, intraLATA long-distance revenues were expected to “augment[]” the newly independent BOCs’ “financial viability,” largely because of the generous pricing policies of the state public utility commissions. 82 Even GTE, not otherwise bound by the MFJ, derived 44 percent of its total revenues for

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77. Id. § 252(e)(6); see also Illinois Bell Tel Co. v. WorldCom Techs., Inc., 157 F.3d 500, 501 (7th Cir. 1998) (“Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts.”); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 & n.24 (8th Cir. 1997) (“We believe that the enforcement decisions of state commissions would...be subject to federal district court review under subsection 252(e)(6).”), aff’d in part and rev’d in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

78. See AT&T Communications of the South Cent. States, Inc. v. BellSouth Telecommms., Inc., 43 F. Supp. 2d 593 (M.D. La. 1999). But see MCI Telecommms. Corp. v. Illinois Commerce Comm’n, 183 F.3d 558, 564-67 (7th Cir.) (holding that a state commission’s participation in the implementation of the 1996 Act via § 252 operates as a waiver of sovereign immunity), vacated, 183 F.3d 567 (7th Cir. 1999); cf., e.g., US West Communications, Inc. v. FMS Intelenet, Inc., 35 F. Supp. 2d 1221, 1229-30 (D. Or. 1998) (finding that a state commission and its commissioners waived whatever eleventh amendment immunity they might have held).


its California operations in 1994 from intraLATA toll traffic.83

The BOCs' longstanding ability to carry long-distance calls within a LATA has invited the BOCs and sympathetic state regulators to attempt a clever flanking maneuver. The larger a LATA, the more toll calls a BOC can carry. In 1997, and again in 1999, US West and the Arizona Corporation Commission attempted to redefine the entire state of Arizona as a single LATA. On both occasions the FCC repelled the attempt and reasserted exclusive federal jurisdiction over the definition and modification of LATAs.84

Even before receiving regulatory relief in the 1996 Act, the BOCs had the right to carry a second type of long-distance call. In 1986 the D.C. Circuit recognized that the BOCs could offer interLATA carriage outside their LX service regions.85 The 1996 Act merely confirmed what the BOCs had already achieved under the MFJ: as of the date of the Act's passage, any BOC could immediately offer "interLATA services originating outside its in-region States."86

The Act promises the BOCs their long-awaited opportunity to enter the lucrative interLATA market, but only upon certain conditions. Demonstrating persistent concerns over cross-subsidies and self-preference, Congress conditioned full interLATA relief upon a showing of significant competition in the relevant BOC's LX market. Under section 271 of the 1996 Act, the petitioning BOC must show that some competitor stands ready to provide LX services "either exclusively over [its] own telephone exchange service facilities or predominantly over [its] own . . . facilities in combination with the resale of the telecommunications services of another carrier."87 Competition offered merely through resale of an incumbent BOC's LX services or based solely on wireless carriage "does not suffice to meet the requirement" of facilities-based competition.88

Alternatively, if "no [competing] provider" in any given state "has requested . . . access [to] and interconnection" with a BOC's LX network within "10 months after February 9, 1996," the BOC may

87. 47 U.S.C.A. § 271(c)(1)(A) (West Supp. 1999); see also CONFERENCE REPORT, supra note 30, at 147-48 ("The competitor must offer telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service."); reprinted in 1996 U.S.C.C.A.N. 124, 160.
receive interLATA relief in that state by filing "a statement of the terms and conditions" by which it "generally offers to provide . . . access and interconnection" to its Lx network. 89 That statement of terms and conditions must be approved by the appropriate state commission. 90 In all section 271 applications, a BOC must also satisfy a fourteen-step "competitive checklist," including "[n]ondiscriminatory access to . . . poles, ducts, conduits, and rights-of-way"; "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services"; nondiscriminatory access to 911, directory assistance, and operator call completion services; and nondiscriminatory assignment and transportation of phone numbers. 91 New interLATA service, no matter how it is authorized, must be provided through a structurally separate affiliate. 92

(3) The Cable/Telephone Firewall

Section 652 of the 1996 Act, codified at 47 U.S.C. § 572, presumptively bans the cross-ownership of cable and telephone companies. This prohibition arose from Congress's apparent hope that the forcible separation of LECs and cable operators would keep each group as a potential competitive check on the other. 93 Congress evidently wanted to temper telephone company entry into cable more than the reverse. This much is clear from the Act's extensive restrictions on "open video systems" by which telephone companies may deliver video programming to their customers. 94 Among other requirements, an operator seeking open video system certification must comply with special antidiscrimination rules designed to curb self-preference and cross-subsidization, 95 including a rule limiting the "operator . . . and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on [the] system" whenever "demand exceeds the [system's] channel capacity." 96 In its 1998 review of the video

90. See id.
91. Id. § 271(c)(2)(B).
92. See id. § 272(a)(2)(B); cf. California v. FCC, 39 F.3d 919, 927-30 (9th Cir. 1994) (refusing to allow the FCC to lift a requirement that BOCs provide enhanced services through a structurally separate affiliate), cert. denied, 514 U.S. 1050 (1995).
93. Cf., e.g., FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967) (justifying the invalidation of a merger between the United States' largest soap and detergent manufacturer and the country's largest bleach manufacturer partly on evidence that the soap and detergent manufacturer "was the most likely entrant" into bleach manufacturing); United States v. El Paso Natural Gas Co., 376 U.S. 651, 661 (1964) ("Unsuccessful bidders are no less competitors than the successful one.").
95. See id. § 573(a), (b).
96. Id. § 573(b)(1)(B). See generally In re Implementation of Section 302 of the
programming delivery market, however, the FCC acknowledged that “[m]ost of the firms receiving [open video system] certification are not LECs.”

Under section 652, a telephone company may not acquire “more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service” in the same service area. The reverse is also true; no cable operator may acquire a comparable stake in a telephone company within its franchise area. Moreover, the Act bans joint ventures between cable and telephone companies. Cable-telco mergers and joint ventures are legal, _inter alia_, when they involve small cable systems in nonurban areas, in rural areas generally, in putatively “competitive” markets, and whenever the FCC waives section 652’s presumptive prohibition.

Section 652, however, does not “apply to any situation where an existing cable company initiates telephone service within the cable company’s franchise area.” To provide otherwise would undermine Congress’s hope of fostering “a technological convergence that would permit the use of the same facilities for the provision of telephone and cable service.”

“[M]ergers, acquisitions, or other ... alliances” between cable and local telephone companies are arguably quite safe, especially when one considers in hindsight the cable industry’s sorry performance in penetrating LX markets. The FCC has long recognized that a “telephone company investment in cable television outside its region is likely to increase competition for traditional telephone services and to expand consumer choices.” Nevertheless, the Telecommunications Act “effectively directs enforcers of federal antitrust laws to presume that geographically overlapping cable-telco combinations are

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97. _In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming_, 14 Communications Reg. (P&F) 10,923, ¶ 12 (Dec. 23, 1998); see also id. (noting that Bell Atlantic “is transitioning away” from one of the only three “operating open video systems” in the United States and “plans to ask customers to switch to its joint venture with DirecTV”).

98. 47 U.S.C.A. § 572(a) (West Supp. 1999); see also 47 C.F.R. § 76.505(a) (1999).
100. See id. § 572(c).
101. See id. § 572(d).
102. _In re Southeast Tel., Ltd._, 12 F.C.C.R. 2561, ¶ 2, at 2561 (1996).
104. Botein, _supra_ note 33, at 604.
anticompetitive until proven otherwise.”

Surprisingly enough for a line of business that is at most a “nice new cash cow[,]” for incumbent LECs, the cable-telephone provisions imposed one of the strongest forms of structural separation in the entire 1996 Act. Congress did not presumptively ban even a merger between a BOC and a major IXC. As a result, section 652 gave the FCC direct authority to review US West’s acquisition of Continental Cablevision, while SBC and AT&T were able to explore merger possibilities in the absence of explicit statutory barriers.

An arguably more substantial threat to competition lies in the acquisition of many cable systems in what has become the standard post-1996 merger strategy for cracking the local exchange. As I discuss below in Part IV.D.(3), AT&T’s acquisition of TCI and pending bid for MediaOne bring this concern to the forefront. The salient point for now is that neither section 652 nor any other provision in the 1996 Act anticipated the problem.

(4) FCC Review of Telecommunications Mergers

At least in theory, the FCC stands roughly in the place of the Federal Trade Commission in reviewing mergers that involve at least one telecommunications carrier. The Clayton Act empowers the FCC to review and to reject telecommunications mergers that “may tend substantially to lessen competition.” The FCC once had a limited power to immunize certain telecommunications mergers from antitrust scrutiny, but the 1996 Act repealed the Commission’s authority in this regard.

In practice, the FCC usually reviews telecommunications mergers under the “public interest, convenience, and necessity” standard that pervades the Communications Act of 1934, so construed as to secure

108. See CONFERECE REPORT, supra note 30, at 389 (noting that the House-Senate
conference committee on the Telecommunications Act accepted “the most restrictive
provisions of both the Senate bill and the House amendment in order to maximize
competition between local exchange carriers and cable operators within local markets”).
for the public the broad aims of" the statute. For instance, in approving WorldCom's acquisition of MCI, the FCC relied on its power under sections 214(a) and 310(d) of the Communications Act to authorize new service, to allow the curtailment or abandonment of old service, and to approve the transfer of previously granted licenses. In approving US West's acquisition of Continental Cablevision, the FCC stood on even firmer jurisdictional ground. As described above in Part III.A.(3), the FCC must approve any petition to waive the 1996 Act's presumptive ban on the cross-ownership of cable and telephone companies.

In reviewing the FCC's actual record in regulating mergers, two observers conceded that they had "not found a case in the last forty years where the Commission proceeded under the Clayton Act." The FCC frequently invokes its Clayton Act jurisdiction, but it never squarely rests on that authority. In most cases, the Commission readily "find[s] [its] jurisdiction under the Communications Act to be sufficient to address all competitive effects" of a proposed merger, "including the [Clayton Act] issue of whether [a] proposed transfer [of licenses] may substantially lessen competition or tend to create a monopoly." Instead of invoking its Clayton Act jurisdiction, the FCC apparently prefers to review telecommunications mergers under a public interest standard. This should not come as a surprise. The FCC, after all, is the federal agency "entrusted with the responsibility to determine when and to what extent the public interest would be served by competition." It is not, strictly speaking, an antitrust agency, for

114. See In re WorldCom, Inc. & MCI Communications Corp., 13 F.C.C.R. 18,025, ¶¶ 1, 8, 9, at 18,026, 18,030-31 (1998) (citing 47 U.S.C. §§ 214(a), 310(d) (1994)).
115. See id.
120. See Weiss & Stern, supra note 118, at 198.
121. E.g., PacTel & SBC, 12 F.C.C.R. at 2631; see also In re McCaw & American Tel. & Tel. Co., 9 F.C.C.R. 5836, 5843-44 & n.25 (1994), aff'd sub nom. SBC Communications, Inc. v. FCC, 56 F.3d 1484 (D.C. Cir. 1995).
123. See id.
the "public interest" standard "necessarily subsumes and extends beyond the traditional parameters [of]... the antitrust laws."124 Whatever responsibility the FCC has in enforcing the antitrust laws is deemed to be discharged when the Commission "seriously considers the antitrust consequences of a propos[ed] [merger] and weighs those consequences with other public interest factors."125 If anything, the public interest standard often contradicts the procompetitive policy underlying the antitrust laws: "Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as [telecommunications], is not enough."126

Although the public interest standard is presumably broader than the antitrust standard underlying section 7 of the Clayton Act, the FCC has not invalidated a single major telecommunications merger since 1996. The Commission has amassed this surprisingly inactive record during an era of relatively aggressive antitrust enforcement. Even Richard Posner, in a comparable span from 1986 to 1990, invalidated two hospital mergers.127 As the FCC has weighed successive petitions proposing horizontal LEC mergers, however, it has continually tightened the terms and conditions under which it will approve a merger. As I discuss below in Part IV.A.(1), the Commission's new practice of extracting concessions from telecommunications carriers during a merger review may help the Commission jumpstart long-awaited competition across the boundary separating LECs from IXCs.

The Justice Department augments but does not displace the FCC in reviewing BOC petitions under section 271. Before authorizing a BOC to provide in-region interLATA services, the FCC must consult with the Attorney General and with affected state regulators. In advising the FCC on the petition's merits, the Attorney General may "us[e] any [appropriate] standard" of antitrust scrutiny.128 The legislative history of the Telecommunications Act specifically mentions the standard used to assess attempted monopolization under section 2 of the Sherman Act129 and the standard articulated in the Bell breakup

124. In re NYNEX Corp. & Bell Atlantic Corp., 12 F.C.C.R. 19,985, 19,987 (1997); see also Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992) (contrasting the impermissibility of "allow[ing] a trade off [of] a reduction in competition" under the antitrust laws with the FCC's authority "to make such a tradeoff" under "the nebulous public interest standard").


127. See United States v. Rockford Mem'l Corp., 898 F.2d 1278 (7th Cir. 1990); Hospital Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986).


129. Compare CONFERENCE REPORT, supra note 30, at 149 ("whether there is a dangerous probability that the BOC or its affiliates would successfully use market power to
litigation. Although the FCC "shall give substantial weight" to the resulting evaluation, the Attorney General has no power to "preclud[e] ... any Commission decision" to approve or deny a section 271 petition. This reversal of the FCC's and the Justice Department's traditional responsibilities in antitrust enforcement effectively "relegate[s] the DOJ to an influential but supplementary role." B. Decisions, Decisions

BOC entry into the long-distance market has been deferred so long that it has become "regulation's rendition of Waiting for Godot." But the 1996 Act chose to give conditional rather than immediate interLATA relief. In exchange for "access to tantalizingly rich markets for interexchange ... carriage," Congress demanded that the BOCs acquiesce in the "rude disruption of their traditionally protected markets." InterLATA relief for the BOCs under section 271 requires either full-fledged entry based on wireline facilities or successful implementation of section 251. The former possibility is impractical in the short run; the latter depends on the BOCs' cooperation. Short of the prohibitively expensive all-or-nothing strategy of building a competing network from scratch, competitive entry into the BOCs' LX markets hinges on whether CLECs can secure interconnection with and unbundled access to the BOCs' LX networks. "[T]wo interconnection prices" in particular spark most of the controversy: "the prices for completion of long-distance messages and the prices for rental of local telephone facilities." In other words, absent a technological


132. Weiss & Stern, supra note 118, at 201.


breakthrough, the FCC will not permit full BOC participation in IX markets until interconnection and unbundled access become routine.

BOC-initiated litigation has drastically altered the interplay between sections 251 and 271. The FCC's efforts to implement section 251 remain in legal doubt. Although the Commission complied with a six-month deadline for promulgating regulations to implement the local competition provisions of the 1996 Act, the BOCs kept those rules from taking effect for more than two years by contesting the scope of the FCC's jurisdiction vis-à-vis that of the states. A challenge on the merits of those rules still lies ahead. Meanwhile, a few incipient controversies involving the interplay of section 251 with the universal service provisions of section 254 mark the emergence of Internet service providers as significant players in telecommunications reform.

On the other hand, the BOCs have failed to pierce section 271's theoretically permeable firewall. The FCC rejected the first five BOC petitions under section 271 to offer interLATA carriage to home-region LX customers. This frustration has spurred an astounding counterattack by the BOCs: a string of cases assailing section 271 and the other BOC provisions of the 1996 Act as unconstitutional bills of attainder. Nearly four years after putatively comprehensive telecommunications reform, the tantalizing prospect of IX entry remains unrealized.

(1) Section 251: August and Everything After

The very existence of sections 251 and 271 tells us that Congress rejected the most aggressive pleas for the complete and immediate repeal of the Bell decree's line-of-business restrictions. Faced with
the challenge of conferring widely distributed benefits at staggering expense to a concentrated few, Congress gave the FCC a "broad and ambiguous mandate... to issue regulations." Congress directed the Commission to "complete all actions necessary to establish regulations to implement the requirements" of section 251 within an astonishing six months of the Telecommunication Act's passage.

"Moving... with" a newfound and "admirable dispatch," the agency quickly seized that mandate. On August 6, 1996, the FCC launched the first stage of its self-described "competition trilogy" of proposed rules on interconnection and unbundled access, universal service, and access charge reform. Chairman Reed E. Hundt lauded the Commission's accomplishment as "the most pro-competitive action of government since the break-up of the Standard Oil Trust." In one stroke, the battle to deregulate American telecommunications shifted from the legislative front to the administrative.

In implementing the interconnection and unbundled access requirements of section 251, the FCC adopted the TELRIC methodology—Total Element Long-Run Incremental Cost—for determining the prices at which incumbent LECs would sell unbundled network elements to their competitors. TELRIC posed three profound threats to incumbent LECs. First, in "calculating... the forward-looking economic cost of a[] [basic network] element," the FCC scope and other efficiency gains that could be realized from BOC entry into interLATA markets).

expressly excluded "[e]mbedded costs... that the incumbent LEC incurred in the past" and "[o]pportunity costs includ[ing] the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition."

Second, the Commission computed costs on the basis of "the most efficient telecommunications technology currently available" rather than the technology actually used by an ILEC or proposed by a CLEC. Finally, in prescribing proxy prices for state public utility commission proceedings, the FCC allegedly depressed the rates that ILECs could collect from competitors requesting interconnection and unbundled access.

The BOCs and other ILECs immediately contested the FCC's jurisdiction to issue TELRIC. In the early stages of the Iowa Utilities Board litigation, the Eighth Circuit observed that TELRIC might "require" incumbent LECs "to subsidize their competitors and thereby threaten the viability of the LECs' own businesses." On this basis the court stayed the FCC's local competition rules. Without reaching TELRIC's merits, the Eighth Circuit eventually held that jurisdiction over network element pricing rested with the public utility commissions of the states rather than the FCC. The logic of that decision compelled the court of appeals to invalidate the FCC's dialing parity rules.

The Supreme Court reversed both decisions in relevant part. Writing for the Court, Justice Scalia held that the general power to "prescribe... rules and regulations" concerning "interstate or foreign communication by wire or radio"—a mandate that the Commission received in 1938—permitted the FCC to promulgate TELRIC. The

149. Id. § 51.505(b)(1).
150. See id. §§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707.
153. See id. at 427.
Court explicitly noted that the question of TELRIC's merits remained open on remand.\textsuperscript{160}

The FCC prevailed on almost every other issue before the Court. The eight participating Justices unanimously upheld three aspects of the Commission's rules governing unbundled access: (1) the inclusion of operator services and directory assistance, operational support systems, and vertical switching functions within its definition of "network element[s],"\textsuperscript{161} (2) the omission of a facilities-ownership requirement that would otherwise preclude "competitors [from] provid[ing] local phone service relying solely on the elements in an incumbent's network,"\textsuperscript{162} and (3) the decision to forbid ILECs from separating already combined network elements before leasing them to competitors.\textsuperscript{163} The Court also upheld the FCC's "pick and choose" rule, which effectively renders any "interconnection, service or network element arrangement...automatically...available to every [other] potential entrant."\textsuperscript{164}

Meanwhile, as the Supreme Court pondered \textit{Iowa Utilities Board}, the Eighth Circuit upheld the FCC's decision to define shared transport as a "network element" that ILECs must make available to entrants on an unbundled basis.\textsuperscript{165} Although the Supreme Court granted certiorari, vacated, and remanded for further consideration in light of \textit{Iowa Utilities Board},\textsuperscript{166} it is hard to envision how the shared transport order conflicts with the high court's construction of the controlling statutory provision.\textsuperscript{167}

The Court did reverse the FCC's effort to define the extent to which CLEC "access to such network elements as are proprietary is necessary" and the extent to which "the failure to provide access...would impair the ability" of a new carrier "to provide the services it seeks to offer."\textsuperscript{168} Consistent with the Eighth Circuit's opinion,\textsuperscript{169} a battery of similar statutory controversies resolved by the Supreme Court,\textsuperscript{170} one of Justice Scalia's opinions on the freedom of speech,\textsuperscript{171}

\textsuperscript{160} See \textit{id.} at 728 n.3.
\textsuperscript{161} See \textit{id.} at 733-34 (upholding 47 C.F.R. § 51.319(f)-(g) (1997)).
\textsuperscript{162} Iowa Util. Bd., 119 S. Ct. at 736.
\textsuperscript{163} See \textit{id.} at 736-38 (upholding 47 C.F.R. § 51.315(b) (1997)).
\textsuperscript{164} Id. at 738 (quoting and upholding 47 C.F.R. § 51.809 (1997)).
\textsuperscript{166} See Ameritech, 119 S. Ct. at 2016.
\textsuperscript{170} See, e.g., Commissioner v. Tellier, 383 U.S. 687, 689 (1966) ("Our decisions have consistently construed the term 'necessary' [in I.R.C. § 162(a)] as imposing only the minimal
and even *McCulloch v. Maryland*, the FCC interpreted the word "necessary" rather loosely, more in the sense of "helpful" rather than in the sense of "indispensable." Justice Scalia and six other Justices disagreed; Justice Souter alone dissented. Relying on this aspect of *Iowa Utilities Board*, a federal district court has invalidated the Commission's rule on physical collocation.

The high court's endorsement of FCC jurisdiction to issue TELRIC may prove a hidden blessing for ILECs. Thanks to the FCC's influence, "most state commissions" had already "issued interim pricing orders... that mirrored... TELRIC['s] methodology and proxy rates." Their "loss" in *Iowa Utilities Board* will enable ILECs to challenge TELRIC on the merits in a single federal proceeding. And that proceeding will be heard by a court that once described the illusory barrier to FCC jurisdiction as "hog tight, horse high, and bull strong." The conditions are ripe for a constitutional showdown over TELRIC as a "deregulatory taking," a violation of the government's "regulatory contract" with the formerly sheltered LECs.

requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business.'" (quoting Welch v. Helvering, 290 U.S. 111, 113 (1933)).

171. See Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 476-77 (1989) (Scalia, J.) ("[T]he word 'necessary' is sometimes used more loosely.").

172. 17 U.S. (4 Wheat.) 316, 413 (1819) (noting that the word "necessary" "frequently imports no more than that one thing is convenient, or useful, or essential to another"); accord National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 419 (1992) (relying on *McCulloch* to adopt a permissive reading of "required").

173. See *Iowa Utils. Bd.*, 119 S. Ct. at 739-41 (Souter, J., concurring in part and dissenting in part) (defending the Commission's interpretation of the statutory terms "necessary" and "impair").


175. SIDAK & SPULBER, supra note 67, at 558.


Section 254: Masters of Universal Service

The implementation of sections 251 and 254 has generated three distinct disputes that are straining incumbent LECs' relationship with one of the newest segments of the telecommunications industry, Internet service providers (ISPs). First, ILECs have been rebuffed in an effort to evade their reciprocal compensation obligations vis-a-vis their LX competitors. An ILEC owes reciprocal compensation to CLECs for calls characterized as local carriage, but not for calls that are deemed long distance. Otherwise "local" nontoll calls to an ISP can be characterized as long distance to the extent that the ISP connects a customer to a website at a remote location outside the LEC's service area. Or so ILECs have argued. In February 1999, the FCC issued a declaratory ruling that endorsed the ILECs' description of such calls. At the same time, however, because the Commission has yet to issue its own regulations on reciprocal compensation for calls to ISPs, the FCC has allowed state public utility commissions to reimpose reciprocal compensation obligations that might otherwise not fall due. The Seventh Circuit has upheld the FCC's decision to defer to its state-law counterparts on this issue.

Two other disputes pit ISPs not only against ILECs but also against all other players in the telecommunications industry. Both of these disputes involve universal service. On one hand, the Eighth Circuit has upheld the FCC's decision to grant ISPs an exemption from interstate access charges. This decision stands in contrast with a contemporaneous district court ruling that the imposition of access charges on intrastate toll calls completed by an IXC constitutes an "implicit universal service subsidy" at odds with section 254. At the same time, the FCC has decided to allow ISPs to receive Universal Service Fund reimbursement for the below-cost component of prices charged to schools, libraries, and rural health-care providers for Internet access. Subsidies for ISPs come at the expense of LECs, IXCs, and all other "providers of telecommunications services" required to make

178. See Illinois Bell Tel. Co. v. WorldCom Techs., Inc., 179 F.3d 566, 569 (7th Cir. 1999).
179. See Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3697-99 (1999) (characterizing ISP traffic for "jurisdictional purposes" as "a continuous transmission from the end user to a distant Internet site").
180. See id. at 3703-06.
182. See Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 541-44 (8th Cir. 1998).
“equitable and nondiscriminatory contribution[s] to the preservation and advancement of universal service.” The Fifth Circuit has upheld this FCC ruling.

(3) Section 271: The Firewall Still Stands

The Iowa Utilities Board litigation is “just the first salvo in what promises to be a prolonged battle ... over the terms and pace of new competition.” In the tussle over TELRIC, the BOCs have been playing defense as the country’s leading ILECs. Successfully fending off section 251 will preserve the BOCs’ LX networks from CLEC intrusion. But section 271 gives the BOCs a chance to play offense. As ferociously as the BOCs have opposed the implementation of section 251, one would expect these eager would-be entrants into long-distance markets to show even greater vigor in attacking section 271’s barrier to in-region interLATA carriage.

Yet no BOC has successfully penetrated the section 271 firewall. The 1996 Act, after all, left the BOCs with the burden of proof on overcoming the presumptive barrier to interLATA entry. So far the FCC has considered six BOC petitions for authorization to offer in-region interLATA service. The Commission denied the first five petitions: SBC in Oklahoma, Ameritech in Michigan, BellSouth


187. Robinson, supra note 6, at 308 n.54.


in South Carolina,\textsuperscript{192} and two BellSouth petitions covering Louisiana.\textsuperscript{193} The sixth, a Bell Atlantic petition covering New York, was pending as of December 1, 1999.\textsuperscript{194} The FCC has also used section 271 to invalidate a "teaming" arrangement under which Ameritech and US West proposed to package their own vertical switching services (caller ID, call waiting, last call redial, and the like) with long-distance service by Qwest.\textsuperscript{195}

The BOCs can find one glimmer of hope in the FCC's section 271 decisions. The earlier denials rested on the BOCs' failure to show that "no [competing] provider" of LX service "ha[d] requested . . . access and interconnection."\textsuperscript{196} The D.C. Circuit upheld the FCC's view that this path to section 271 authorization "was foreclosed the moment a provider requested interconnection so long as [the FCC] could predict that the carrier would . . . provide competitive service to both residential and business customers, at least predominantly over its own facilities."\textsuperscript{197} A single qualifying request for access and interconnection from a CLEC within three months would prevent the BOC in question from filing a section 271 petition under this provision. In BellSouth's second Louisiana petition, however, the Commission found that the BOC had satisfied six of the fourteen items on section 271's competitive checklist and partially fulfilled a seventh.\textsuperscript{198}

Spurned in their efforts to pierce section 271 on its own terms, the BOCs pursued a radically different tactic. The BOCs complained that the Telecommunications Act's BOC provisions, including section 271, were invalid in their entirety as an unconstitutional bill of attainder. On the last day of 1997, one week after the FCC denied a section 271 petition for the third and final time that year,\textsuperscript{199} SBC actually persuaded a federal district court in Texas to accept this theory.\textsuperscript{200} The Fifth

\textsuperscript{192} See In re BellSouth Corp., 13 F.C.C.R. 539 (1997), aff'd sub nom. BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998).


\textsuperscript{197} SBC Communications, Inc. v. FCC, 138 F.3d 410, 417 (D.C. Cir. 1998); accord BellSouth Corp. v. FCC, 162 F.3d 678, 693 (D.C. Cir. 1998).


\textsuperscript{199} The FCC denied BellSouth's South Carolina petition on December 24, 1997. See In re BellSouth Corp., 13 F.C.C.R. 539 (1997), aff'd sub nom. BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998).

Circuit reversed this rogue decision. Likewise, the D.C. Circuit has twice declined to invalidate the BOC provisions as bills of attainder. The BOCs simply cannot argue that section 271 singles them out for punishment. "Section 271, at worst, provides the BOCs with the possibility of immediate entrance into the in-region long distance service market, by following a clearer path than that provided under the MFJ." The denial of certiorari in all of these cases ends this constitutional frolic and detour. In all likelihood, the implementation of section 271 will return to the relatively quotidian consideration of BOC petitions for interLATA relief.

The fate of the section 271 process remains clouded. Bell Atlantic's pending section 271 application, the sixth filed with the FCC since the passage of the 1996 Act, exposed an intriguing split between state regulators and the United States Department of Justice. Soon after Bell Atlantic filed its petition in September 1999, the chairwoman of the New York Public Service Commission informally announced her support in light of the "tremendous amount of progress by [Bell Atlantic] in opening its local market to competition." Within a month, the PSC formally supported Bell Atlantic's petition to provide interLATA service in New York. In its legally mandated evaluation of the petition, however, the Justice Department disagreed, expressing doubts about Bell Atlantic's ability to "provide access to unbundled local loops, either for traditional voice services or for digital subscriber line... technology." The Department also observed that "Bell Atlantic's systems for handling the unbundled network element 'platform'... rely to a disturbing extent on manual processes that are prone to error and delay."

202. See BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998) (upholding § 271), cert. denied, 119 S. Ct. 1495 (1999); BellSouth Corp v. FCC, 144 F.3d 58 (D.C. Cir. 1998) (upholding § 274, which blocks the BOCs from engaging in electronic publishing), cert. denied, 119 S. Ct. 1495 (1999).
203. BellSouth, 162 F.3d at 691.
207. See 47 U.S.C.A. § 271(d)(2) (West Supp. 1999) (requiring the FCC to consult with the Department of Justice in considering a BOC's petition to provide in-region interLATA service).
209. Id. (expressing "significant doubt that Bell Atlantic has provided... stable and efficient electronic systems" essential to "a competitive market").
Curiously enough, the BOCs' strategies in litigating sections 251 and 271 contradict each other. The *Iowa Utilities Board* litigation and the bill of attainder cases have wrecked the delicate balance between these two crucial provisions of the Telecommunications Act. Every BOC, of course, would prefer to receive permission to offer interLATA carriage within its local service region without waiting for at least one competitor to undertake the exorbitant project of completing a redundant wireline LX network. Because competition via resale of an ILEC's services or via wireless facilities "does not suffice to meet the [statutory] requirement" of facilities-based competition,210 interLATA relief under section 271 will depend heavily on the BOCs' ability to fulfill the competitive checklist. But the BOCs' fierce resistance to section 251 retards their efforts to satisfy this very checklist, dependent as section 271 is on evidence that CLECs have "nondiscriminatory access" to ILEC facilities. By contesting the FCC's interconnection and unbundled access rules by any means necessary, the BOCs are raising the costs of their rivals' plans to offer LX carriage.211 Full compensation for the BOCs' sunk investment in their wireline networks would substantially increase the cost of any piecemeal LX entry strategy.

This dynamic explains the infuriating pattern of litigation over sections 251 and 271 since 1996. The BOCs contested the FCC's authority to implement section 251 and are girding to challenge the agency's signature policy, the TELRIC rule, on the merits. Just as steadfastly, the Commission has refused to grant any BOC permission under section 271 to provide in-region interLATA carriage. The BOCs' frustration over the failure of their section 271 petitions clarifies the otherwise baffling decision to assault the 1996 Act's BOC provisions as bills of attainder. As of December 1, 1999, the *Iowa Utilities Board* litigation had returned to the Eighth Circuit for a consideration of TELRIC on the merits, and the FCC was pondering its sixth section 271 petition. Throughout it all the Commission and the BOCs had contested the local competition provisions of the 1996 Act to a bitter standstill.

C. The $90 Billion Question

This elaborate trip through the Telecommunications Act and the


first stages of its implementation concludes with a single, crucial legal question: When may a local exchange company offer long-distance carriage? The answer to this question, worth roughly $90 billion in annual revenues, has dictated almost all of the merger strategies on the BOC side of the Magnificent Seven.

Until the FCC begins granting section 271 petitions, the BOCs can do no more than carry interLATA calls that originate outside their LX service regions. Now that the desperate bill of attainder attack on that provision has expired, the BOCs must engage the FCC in a gritty state-by-state battle to breach section 271's interLATA firewall. But section 271's very presence also carries great legal significance for LECs not governed by that provision. Expressio unius est exclusio alterius. An independent—such as GTE or the Southern New England Telephone Corporation (SNET)—may offer IX carriage anytime, anywhere. This is precisely the sort of competitive difference that invites regulatory evasion. In the post-1996 world of American telecommunications, the frustrated BOCs have reacted by acquiring independent LECs.

The $90 Billion Question has a comparably lucrative flip side, worth roughly $100 billion in annual revenues: When will America's ILECs acquiesce in the opening of their networks to liberal interconnection, unbundling, and resale? Just as the FCC's reluctance to grant section 271 relief explained the BOCs' merger strategy in the first years after the passage of the Telecommunications Act, BOC intransigence on section 251 has shaped the CLECs' counterstrategy. After years of watching the BOCs wage massive resistance to TELRIC and the rest of the FCC's local competition agenda, the Magnificent Seven's IXCs have pursued a merger and acquisition strategy that assumes an indefinitely negative answer. Three years after Congress passed the 1996 Act and the FCC launched the first of its rules implementing the statute's local competition provisions, the FCC painted a bleak picture of the local exchange. From the end of 1997 to the end of 1998, CLECS increased their revenue from $2.2 billion to


214. Cf., e.g., National Rural Telecom Ass’n v. FCC, 988 F.2d 174, 179-80 (D.C. Cir. 1993) (observing that the transition from conventional rate-of-return regulation to price caps presents “cost shifting” concerns similar to those that affect the supervision of diversified utilities with “regulated and unregulated affiliates”).

$3.6 billion. But ILECs retain 96 percent of all LX revenues. Unbundling and interconnection have made the barest of contributions to CLECs' modest share of this market. By a ratio of ten to one, CLECs still rely on resold ILEC lines in favor of unbundled local loops.

Section 251 was meant to spare CLECs the prohibitive expense of building new LX networks from scratch. Chronic litigation over section 251, however, has taught aspiring CLECs not to wait. And there are no more than three CLECs in the United States that can hope to amass the resources for such an extravagant stunt: the major IXCs called AT&T, MCI WorldCom, and Sprint. Even these companies have not chosen to enter the fray alone. AT&T has enlisted two of the country's largest cable companies for the fight, while MCI WorldCom and Sprint are seeking to merge.

Having completed this selective tour of the 1996 Act and the leading cases decided under that statute, I now turn to an analysis of the merger strategies driven by these legal developments.

IV. Merger Mania: A Succinct Strategic Scorecard

On February 27, 1996, exactly three weeks after the passage of the Telecommunications Act, US West declared that it would purchase Continental Cablevision for $10.8 billion. It was the first major merger announced under the new statutory regime. On January 16, 1999, roughly three weeks shy of the Act's third anniversary, AirTouch agreed to be acquired for $56 billion by Vodafone, a British wireless concern seeking to expand from its northern European base into North America.

As bookends on the first three years of merger mania under the Telecommunications Act, the US West/Continental and Vodafone/AirTouch deals were oddly unrepresentative. Neither of these mergers followed the most prominent strategies that have unfolded since February 6, 1996. US West has followed neither of the strategies by which some of its fellow BOCs have flourished. As for AirTouch, the identity of the losing bidders—Bell Atlantic and MCI WorldCom—sheds substantial light on the legal and economic dynamics underlying telecommunications mergers.

216. See Federal Communications Comm'n, Common Carrier Bureau, Local Competition 1, 12 (Aug. 1999).
217. See id.
218. See id. at 2, 22-23.
The balance of Part IV will describe five distinct merger strategies. The first three involve BOCs. Bell Atlantic and SBC have successfully pursued two types of mergers: horizontal, "bigger is better" combinations with fellow BOCs and acquisitions of independent LECs not bound by the BOC provisions of the 1996 Act. By contrast, the US West/Continental Cablevision merger stands as a singularly impressive example of the BOCs' failure to exploit the putative benefits of deregulation and convergence.

On the other side of the Magnificent Seven, IXC-centered strategies are as varied as the three leading long-distance carriers. But a pattern can be discerned in the acquisitions that built AT&T, MCI WorldCom, and Sprint. These companies consider IX carriage, wireless, and Internet access as complements of, even prerequisites to, competitive LX entry. If Qwest's bid for US West clears all regulatory hurdles, it may suggest that CLECs will invade the BOCs' domain by merger and acquisition rather than competition. In other words, if you can't build your own LX network or secure interconnection to someone else's, perhaps you would be best advised to buy one outright. "If you can't beat 'em," so it seems, "buy 'em."

The differences in these strategies reflect the stark legal and economic separation of the BOCs from their rivals. Telecommunications mergers since 1996 have responded to the legal peculiarities arising from the interplay between sections 251 and 271. The BOCs are trying simultaneously to defend their LX turf against intrusions under section 251 and to gain an IX foothold in spite of the section 271 firewall. In mergers as in litigation, the mightiest incumbents in American telecommunications have devoted the greater part of their efforts to defending their traditional markets.

Conversely, the leading IXCs' simultaneous expansion into wireless, cable, and Internet access is designed to propel these companies into LX markets with a minimal amount of ILEC cooperation. Section 251 is most noteworthy for its relative insignificance; IXC-centered mergers since 1996 have proceeded apace even though the Telecommunications Act's local competition provisions remain incompletely implemented. If anything, AT&T's efforts to reassert its dominance of this industry have exposed a new, distinct source of legal controversy over the integration of the telecommunications and Internet industries. We may be witnessing the passage of the Telecommunications Act from one generation of implementation disputes to the next, well before the statute reaches its fifth anniversary.

A fifth and final strategy bypasses the Magnificent Seven. It has two dimensions, wireless telephony and transnational investment. Both may be inferred from the battle over AirTouch. Vodaphone's victory over Bell Atlantic and MCI WorldCom, a triumph by a foreign wireless
carrier over two American landwire giants, suggest the world of telecommunications is far from exhausting all of its competitive possibilities.

A. Strategy No. 1: Horizontal BOC Mergers

Despite the original seven BOCs’ common parentage and raison d’être, the reshuffling of American telecommunications after 1996 exposed a schism in corporate culture and strategy. Two BOCs, SBC and Bell Atlantic, emerged as aggressive empire-builders. Of the other five Bell companies, only BellSouth has retained its independence. In so doing, it arguably has missed its window of opportunity to expand through merger and thereby to stay viable in an industry ruled by titans. Three other BOCs have been absorbed into the coastal empires, while US West stands on the verge of becoming the first major ILEC in the United States to be acquired by a non-LEC.

(1) The Bicoastal Squeeze

SBC and Bell Atlantic have made themselves America’s most powerful local telephone companies by acquiring sister BOCs. SBC completed its acquisition of Pacific Telesis in January 1997221 and won regulatory approval for its acquisition of Ameritech in October 1999.222 The resulting empire connects San Antonio, San Francisco, and Sault Ste. Marie. Similarly, purchasing NYNEX made Bell Atlantic the beast of the East;223 the combined company boasts a continuous LX service area stretching from Maine to Virginia, excluding an SBC enclave in Connecticut.

These three horizontal BOC mergers—SBC/PacTel, Bell Atlantic/NYNEX, and SBC/Ameritech—have dramatically transformed the FCC’s approach in reviewing telecommunications mergers. As noted above in Part III.A.(4), the FCC’s application of the public interest standard—more precisely described as the review of petitions under sections 214(a) and 310(d) of the Communications Act to transfer licenses—“is informed by antitrust principles, but not limited by the antitrust laws.”224 FCC merger review therefore begins but does not end with the Clayton Act’s prohibition of mergers whose effect “may be substantially to lessen competition or to tend to create a

224. Id. at 20,003 (footnote omitted).
monopoly." More than any other contemporaneous legal development, horizontal BOC merger reviews since 1996 have stretched the public interest standard well beyond core antitrust principles.

In Clayton Act cases, the federal courts have developed an “actual potential competition doctrine” for mergers “that will leave competition in the market exactly as it was, neither hurt nor helped, and that [are] challengeable under § 7 only on grounds that the company could, but did not, enter de novo or through ‘toe-hold’ acquisition.” Under this doctrine, a merger eliminating a potential competitor may be criticized as anticompetitive upon a demonstration of three factors. First, the market must be concentrated. Second, the acquiring firm must have been among those firms that were likely and uniquely well situated to enter. Finally, but for the acquisition, such entry would have deconcentrated the market or resulted in other procompetitive effects. The Supreme Court has explicitly declined, however, to decide whether this doctrine operates “solely on the ground that such a [market-extension] merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a de novo undertaking or through the acquisition of a small existing entrant.”

(a) SBC/PacTel

Announced on April 1, 1996, SBC's bid for Pacific Telesis gave the FCC its first opportunity under the newly amended Communications Act to review a merger involving two major LECs. Finding an absence of actual potential competition for PacTel, the Commission approved the merger. First, the FCC reasoned that there were “more than a few other potential entrants into [PacTel's] markets.” At that time, SBC looked no more likely than any other major LEC or IXC to encroach on PacTel's turf. Second, the FCC found no evidence “that SBC would enter or would have entered” those markets “but for the proposed merger.” Thereupon the Commission concluded its analysis under the actual potential competition doctrine without

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228. Marine Bancorporation, 418 U.S. at 625.
230. Id. at 2637.
231. See id.
232. Id.
reaching a discussion of the merger's purported benefits.233

For the moment, it seemed as if FCC merger review would effectively equate the public interest test with Clayton Act standards. If ever this position represented FCC policy, it reached its high water mark in the SBC/PacTel order.

(b) Bell Atlantic/NYNEX

Although the FCC ultimately approved Bell Atlantic's proposed acquisition of Nynex, that proceeding represented a significant turning point in the Commission's approach to telecommunications mergers.234 This merger, announced exactly three weeks after the SBC/PacTel merger, commanded an additional six months of the Commission's attention. The FCC found that each of these companies, unlike their western counterparts, was a potential entrant in the other's service territories. The Commission found that Bell Atlantic had formulated concrete plans to enter Nynex markets235 and that Nynex was at least "a possible entrant into Bell Atlantic territories."236 By contrast, SBC and PacTel, which lacked geographically contiguous territories and did not enjoy significant goodwill or name recognition in each other's markets, could not be distinguished from "a large number of . . . [other] significant market participants."237

The Bell Atlantic/NYNEX proceeding imparted a peculiar twist to the otherwise familiar Clayton Act maneuver of extolling competition from nearby geographic markets.238 In this instance, a single geographic market loomed large. The merging firms cast a menacing shadow across LATA 132, a market encompassing New York City, Long Island, and part of Westchester County.239 In the battle for what is probably the most lucrative local telephone market in the western hemisphere, a combined Bell Atlantic-NYNEX behemoth would prove too powerful even for what were then the three major IXCs: AT&T, MCI, and Sprint.240 The ongoing consolidation of LECs would also increase the

233. See id. at 2638 ("[W]e do not analyze the proposed merger under the other elements of the actual potential competition doctrine.").
236. Id. at 19,991.
237. Id. at 20,024.
239. See Nynex & Bell Atlantic, 12 F.C.C.R. at 19,990 & n.13.
240. See id. at 20,035.
risk of coordination among the surviving firms.\textsuperscript{241}

The Bell Atlantic/NYNEX merger also raised a regulatory concern over benchmarking. Rooted in the "comparable earnings" standard articulated in such classic cases as \textit{Bluefield Water Works},\textsuperscript{242} benchmarking matured as a centerpiece of regulatory policy toward the end of the MFJ era. Regulators, competitors, and even incumbent LECs themselves have learned to set baselines according to the performance of existing regulated monopolists.\textsuperscript{243} A "reduction in the number of separately owned firms engaged in similar businesses" would compromise the "Commission's ability to identify, and therefore to contain, market power."\textsuperscript{244} The FCC feared especially that it might lose the ability to use the uncoordinated conduct of a sufficiently large number of unrelated LECs as "regulatory 'benchmarks' for evaluating the conduct of other carriers or the industry as a whole."\textsuperscript{245}

The FCC nevertheless approved the merger. The decisive factor was a set of commitments that Bell Atlantic and NYNEX accepted as a condition of approval. Among other things, the merging companies agreed to cooperate in the monitoring of its operating support systems, especially "with respect to resold services, unbundled network elements and combinations of unbundled network elements."\textsuperscript{246} "Bell Atlantic and NYNEX also agree[d] to offer, in interconnection negotiations and arbitrations, payment mechanisms . . . consistent with the Commission's decision in its \textit{Second Physical Collocation Order}."\textsuperscript{247} Most of all, the firms "commit[ted] to offer interconnection, unbundled network elements and transport and termination at rates based on forward looking economic cost."\textsuperscript{248}

It bears remembering that neither TELRIC nor the collocation

\textsuperscript{241} \textit{See id.} at 19,991-92, 20,046-48.


\textsuperscript{244} \textit{Id.} at 20,058.

\textsuperscript{245} \textit{Id.; see also id.} at 19,994 ("As diversity among carriers declines, both this Commission and state commissions may lose the ability to compare performance between similar carriers that have made different management or strategic choices.").

\textsuperscript{246} \textit{NYNEX & Bell Atlantic}, 12 F.C.C.R. at 19,992. Operating support systems comprise "pre-ordering, ordering, provisioning, repair and maintenance, and billing." \textit{Id.}

\textsuperscript{247} \textit{Id.} at 19,993 (citing Local Exch. Carriers' Rates, Terms & Conditions for Expanded Interconnection Through Physical Collocation for Special Access & Switched Transport, 12 F.C.C.R. 18,730 (1997)).

\textsuperscript{248} \textit{Id.} at 19,992.
order has rested on firm legal ground. *Iowa Utilities Board* clouded rather than clarified the validity of these orders. Though the Supreme Court approved FCC jurisdiction over TELRIC, *Iowa Utilities Board* did not validate that rule as a reasonable exercise of the Commission’s discretion. Moreover, in light of the nonjurisdictional elements of the Supreme Court’s decision, at least two lower courts have taken issue with the FCC’s interpretation of the word “necessary” in its physical collocation order. In other words, in exchange for FCC approval of their merger, Bell Atlantic and NYNEX acceded in two legally contested FCC orders at the heart of the Commission’s plan for restructuring local telephone competition.

(c) SBC/Ameritech

The FCC’s approval of the SBC/Ameritech merger extended the practice of extracting commitments from merging firms as a condition for regulatory approval. On July 24, 1998, SBC and Ameritech requested FCC approval of their merger. On April 1, 1999, the third anniversary of the announcement of the SBC/PacTel merger, FCC chairman William Kennard expressed five “serious concerns” that “potential public interest harms” flowing from the proposed merger might outweigh its “claimed competitive and consumer benefits”:

How can the Commission be assured that the merger will not interfere with the companies’ willingness and ability to fully open their markets to competition...?

How can the Commission be assured that the merger would... encourage competition in all telecommunications markets?

How can the Commission be assured that the public will promptly receive the claimed benefits from the [merging companies’] proposed “national/local strategy”...?

How can the Commission be assured that the merger will not adversely affect the Commission’s ability to fulfill its responsibilities under the Communications Act by reducing its ability to “benchmark” the performance and capabilities of telecommunications carriers?

How can the Commission be assured that the proposed combination will serve the Communications Act’s public interest mandate by improving overall consumer welfare?

249. See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 728 n.3 (1999) (declining to address the merits of the TELRIC rule).
254. Id. Coincidentally, Chairman Kennard’s letter interrupted an otherwise triumphant...
Three months later, on July 1, 1999, SBC and Ameritech responded to Chairman Kennard's concerns by proposing five sets of voluntary conditions. First, the companies pledged "to make the in-region local telephone markets of SBC/Ameritech ... the most open and competitive in the country." Among other concessions, the combined company would guarantee CLECs the same unbundling and interconnection terms that any SBC/Ameritech affiliate might obtain as a CLEC in an out-of-region LX market. Second, the companies promised "to offer carrier-to-carrier promotions and to pay substantial penalties to CLECs if SBC/Ameritech do not provide them with nondiscriminatory service." Third, the post-merger SBC/Ameritech committed "to roll out facilities-based local service, as a CLEC, in 30 markets selected from the 50 largest out-of-region U.S. markets." The failure to meet its own "specified rollout schedule" would cost the combined company "$40 million per market, with a total potential exposure of up to $1.2 billion." Fourth, in response to Chairman Kennard's "benchmarking" concerns, the combined company pledged to continue reporting its performance data on an individualized basis for each of its local affiliates. Finally, the combined company promised to eschew "any minimum monthly charges for long distance service," to enhance the "universal service assistance Lifeline plans" already existing in its service regions, and to implement "a plan for rolling out advanced services equitably to lower-income urban and rural areas." While awaiting FCC approval, SBC and Ameritech proceeded with other formalities, such as the transfer of overlapping cellular licenses to a third party.

On October 8, 1999, the FCC approved the SBC/Ameritech merger. The Commission identified three threats to the public

256. See id.
257. Id.
258. Id.
259. Id.
260. See id.
261. Id.
interest. First, the merger would "significantly decrease[] the potential for competition in local telecommunications markets by large incumbent LECs" by eliminating SBC and Ameritech as competitors in each other's LX markets.264 The FCC also expressed concern for competition "in out-of-region markets," where the BOCs could "offer wireline local exchange services, potentially bundled with cellular and other offerings," to customers of their wireless affiliates.265

Second, by further diluting the effectiveness of "comparative practice analyses (or 'benchmarking')," a merger of "two of the six remaining major incumbent LECs" would presumably "frustrate[] the ability of the Commission (and state regulators) to implement the local market-opening provisions" of the 1996 Act.266 This merger added a new wrinkle to the Commission's increasingly familiar concern over benchmarking: the "elimination of Ameritech as an independently-owned RBOC," said the FCC, "is likely to reduce significantly the amount of innovation that regulators and competitors could observe and analyze."267 Just as Bell divestiture sparked "an unprecedented flowering of innovation,"268 its reversal through horizontal BOC mergers could smother the inventive spirit in telecommunications.

Third and finally, the SBC/Ameritech merger "would increase the incentives and ability" of the combined firm "to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC."269 The sheer size of SBC's enlarged empire would expand the number of geographic markets where raised costs could cripple a rival.270 The FCC expressed "particular concern" over this effect "in the retail market for advanced services."271

The FCC reasoned that the merger offered little in the way of competitive benefits. SBC and Ameritech, the Commission wrote, had overstated the impact of their merger on the combined firm's incentive to enter out-of-region markets.272 Indeed, the firms' activities before the announcement of their merger—especially SBC's 1998 purchase of SNET—showed that the unmerged BOCs already had ample incentive and opportunity to expand their geographic reach.273

264. Id. ¶ 56.
265. Id.
266. Id. ¶ 57.
267. Id. ¶ 59 (emphasis added); cf. 47 U.S.C. § 157(a) (1994) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").
269. Ameritech & SBC, 1999 WL 809551, at ¶ 60.
270. See id.
271. Id. ¶ 61.
272. See id. ¶ 296.
273. See id. ¶ 299.
The FCC nevertheless approved the merger. The conditions that SBC and Ameritech had proposed in response to Chairman Kennard proved decisive: the Commission concluded that the firms’ "package of voluntary commitments . . . [had] alter[ed] the public interest balance in their favor." The FCC cautioned, however, that the acceptance of these conditions had no bearing on the merged company’s compliance with other provisions of the Communications Act, especially section 271.

Far from providing precedential support for later mergers, especially the Bell Atlantic/GTE deal, the FCC's approvals of the horizontal BOC mergers have progressively toughened what had once been a relatively low regulatory barrier. In the SBC/PacTel proceeding, the Commission explicitly warned that its approval of that merger "should not be taken as an indication that [it would] approve all subsequent proposed combinations of major carriers." In the Bell Atlantic/NYNEX proceeding, the FCC warned that applicants might not always be able to deflect regulatory attention merely by "propos[ing] pro-competitive public interest commitments." The SBC/Ameritech merger rested squarely on such conditions. The Commission had concluded that the merger's "significant harms" outweighed the merger's otherwise "speculative and small" benefits.

(2) "Somewhere in Middle America"

The consolidation of BOCs along the Pacific and Atlantic seaboard has isolated SBC and Bell Atlantic's surviving inland sisters, US West and BellSouth. These smaller BOCs have not responded with significant mergers of their own. Instead, US West became a takeover target and eventually accepted a hostile bid from Qwest Communications. For its part, BellSouth lost a fight for Sprint and has nothing to show after nearly four years of merger mania except a ten percent stake in Qwest.

(a) Qwest/US West

As the third anniversary of the Act rolled by, US West seemed especially ripe for an unsolicited offer. (In light of Global Crossing's
and Qwest’s bids for US West, this observation fully benefited from 20/20 hindsight.) Though the union of SBC and Ameritech has surrounded US West on all sides, that merger never directly jeopardized the independence of the smallest BOC. Absorption of US West into the SBC empire would have created a megafirm dominating every LX market in the western continental United States, excluding only Louisiana and GTE’s patchwork of largely rural service areas. This is precisely the sort of geographic hegemony that brought the Bell Atlantic/NYNEX and SBC/Ameritech deals to the brink of FCC disapproval.

On the other hand, as the smallest of the BOCs, US West appeared a good candidate for the sort of combination that former FCC chairman Reed Hundt once thought “unthinkable”: a BOC/IXC merger. With Qwest’s bid for US West, the unthinkable has come to pass. Of course, Qwest is no AT&T, and US West’s post-1996 history showed that this BOC was hardly SBC or Bell Atlantic.

Even the most astute observer would have had great difficulty predicting that Qwest would join the Magnificent Seven. Qwest stock was not even publicly traded until 1997. Nor did Qwest initiate the precise chain of events that culminated in its winning bid for US West. In March 1999, Global Crossing, a Bermuda-based company specializing in laying undersea cables for broadband carriage, made a $10.8 billion bid for Frontier Corporation. Frontier, formerly known as Rochester Telephone, had served as the incumbent LEC in Rochester, New York, throughout this century. In 1995, Rochester became the first American city to open up its local phone market. Frontier actively supported the local deregulation effort so “that it could be freed from the traditional approach to rate regulation.” Although Frontier retained its LX foothold and had grown into the country’s fourth largest IXC, Global Crossing’s primary interest in Frontier was the target company’s one-third stake in Qwest’s advanced


281. See Mark Landler, In Unusual Move, FCC Chief Criticizes a Possible Deal, N.Y. TIMES, June 19, 1997, at C1 (reporting Chairman Hundt’s reaction to rumors of merger negotiations between AT&T and SBC); FCC Sees Obstacles to an AT&T Merger, N.Y. TIMES, June 13, 1997, at C2 (same).

282. See Richard Waters, Strong Demand for Qwest in First-Day Trading, FIN. TIMES, June 25, 1997, at 38; Seth Schiesel, Qwest Set to Acquire LCI for $4.4 Billion in Stock, N.Y. TIMES, March 10, 1998, at D2 (observing that Qwest “offered stock to the public for the first time” in 1997).


286. Landler, supra note 284, at C6.
fiber optic communications network.\textsuperscript{287}

In May 1999, two months after offering to buy Frontier, Global Crossing also made a $37 billion bid for US West.\textsuperscript{288} The BOC agreed. The following month, Qwest made uninvited counteroffers for both Frontier and US West.\textsuperscript{289} Although the announcement of these unexpected takeover bids lowered the price of its stock,\textsuperscript{290} Qwest won the battle for US West by July.\textsuperscript{291} As a consolation prize, Global Crossing accepted a breakup fee from US West and settled for Frontier.\textsuperscript{292} The Qwest/US West merger now awaits FCC approval;\textsuperscript{293} the Commission approved Global Crossings’ acquisition of Frontier in September 1999.\textsuperscript{294}

(b) BellSouth

Since 1996 BellSouth has led all BOCs in section 271 petitions—its three petitions to date match the three filed by all the other BOCs combined—but lagged behind its counterparts in mergers. Unlike MCI and US West, relative smallness and inertness have never made BellSouth a likely takeover target. If anything, BellSouth has taken affirmative steps to boost its share price, perhaps in a conscious effort to stave off a hostile acquisition. In 1998 alone, it split its stock, launched an aggressive buyback of its own shares, and increased its dividend.\textsuperscript{295} These are hardly the sorts of corporate maneuvers that entice buyers. Not coincidentally, these very tactics can help sweeten a stock-based merger offer.

Instead, as the third anniversary of the 1996 Act approached, BellSouth appeared to be contemplating a purchase of its own, perhaps

\textsuperscript{287} See id.


\textsuperscript{289} See \textit{Two Phone Companies Get $55 Billion Bid}, \textit{N.Y. Times}, June 14, 1999, at A1 (announcing Qwest’s surprise move to bid for both US West and Frontier).


\textsuperscript{292} See id.; see also \textit{Frontier Accepts Revised Offer from Global Crossing}, \textit{N.Y. Times}, Sept. 3, 1999, at C3 (“Frontier accepted a revised $10.5 billion acquisition offer from Global Crossing, thus salvaging a purchase that was threatened by a plunge in Global Crossing’s shares”).

\textsuperscript{293} See \textit{In re US West, Inc. & Qwest Communications Int’l Inc.}, CC Docket No. 99-272, 1999 WL 1041448 (Nov. 17, 1999) (adopting a protective order in connection with the merging companies’ merger approval petition).

\textsuperscript{294} See \textit{In re Global Crossings Ltd. & Frontier Corp.}, 14 F.C.C.R. 15,911 (1999).

of a smaller IXC. Such a purchase would give BellSouth access to interLATA markets outside its LX service region and prepare the BOC for full-blown IX entry if it ever penetrates the section 271 barrier. It would also enable the BOC to pursue the high-speed network strategies that are more typical of companies not centered around incumbent LECs. In April 1999, BellSouth finally announced plans to buy a 10 percent stake in Qwest, its first purchase in five years.296 When a new round of merger mania sprung up in September 1999, BellSouth flirted with a bid for Sprint. Initial reports estimated that MCI WorldCom had bid $90 billion for Sprint.297 BellSouth countered with an unsolicited $100 billion offer, which MCI WorldCom ultimately eclipsed.298 Only time will tell whether BellSouth will suffer the fate that befell GTE, another smaller incumbent LEC that tried to acquire an IXC but ultimately lost.

B. Strategy No. 2: Absorbing Independent LECs

Unlike US West and BellSouth, SBC and Bell Atlantic have acquired independent LECs as well as sister BOCs since 1996. SBC has acquired SNET.299 Bell Atlantic is awaiting approval of its pending $52.8 billion purchase of GTE.300

Unlike the horizontal BOC mergers, these acquisitions lack obvious geographic economies of scale and scope. SNET’s Connecticut base is far removed from SBC’s western empire. At the time of their merger, the two firms did not even share overlapping wireless service territories.301 Likewise, one is tempted to ask what advantage Bell

296. See Michael E. Kanell, BellSouth Is Buying 10 Percent of Qwest, ATLANTA J., April 19, 1999, at A1 (describing the BOC’s “conservative fiscal management” as one that had sought “strong and steady growth” instead of “foolish marriages or profit-diluting combinations” before agreeing to acquire the Qwest stake); see also Michael E. Kanell, BellSouth Adds Qwest to Its Puzzle, ATLANTA CONST., April 20, 1999, at F1.

297. See Rebecca Blumenstein & Nicole Harris, Investors Support Sprint Deal, WALL ST. J., Sept. 27, 1999, at A1; cf. Michael E. Kanell, BellSouth Considers Outbidding MCI to Take over Sprint, PALM BEACH POST, at 7B (assuming that BellSouth would have to amass “nearly $90 billion” in order “to outbid—or outbluff—MCI WorldCom”).


300. See In re GTE Corp. & Bell Atlantic Corp., 13 F.C.C.R. 22,751 (1998) (adopting a protective order covering confidential documents filed in connection with the review of the Bell Atlantic/GTE merger); Seth Schiesel & Laura M. Holson, Reshaping the Phone Business: Two Phone Giants Reported Merging in $52 Billion Deal, N.Y. TIMES, July 28, 1998, at A1 (reporting Bell Atlantic’s $52.8 billion bid for GTE); see also U.S. Regulator Okays Bell Atlantic Buyout of GTE, NAT’L POST, May 8, 1999, at D02 (reporting that the Department of Justice had endorsed the Bell Atlantic/GTE merger).

301. See SNET & SBC, 13 F.C.C.R. at ¶ 3, 21,294.
Atlantic can have expected from acquiring GTE, a carrier with a more heavily rural clutch of service areas, many of them far removed from Bell Atlantic's geographic base along the Eastern seaboard.

Section 271 supplies the impetus for these mergers. Independent LECs such as SNET and GTE have been free to offer interLATA carriage to their own customers. And with great success: SNET's long-distance affiliate "captured 35 percent of SNET's local customers within two years of entry," while GTE in 1997 enrolled 6,000 long-distance customers per day. Ready access to local customers as a market for interLATA carriage stresses just how sharply sections 271 and 272 distinguish between BOCs and other incumbent LECs. Furthermore, because section 271 applies only in "State[s] in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service" under the MFJ "as in effect on the day before the enactment of the Telecommunications Act," a merger between a BOC and a previously independent LEC does not affect the combined company's ability to provide interLATA service in the independent LEC's former local service region. To the extent that the acquired LEC provides interLATA carriage, however, it must do so as a structurally separate affiliate of the acquiring BOC. What the merger does require is that the combined company retreat from the interLATA market in the BOC's original local service region. Although this adjustment unavoidably reduces consumers' long-distance options within the BOC's service region, the FCC sharply


304. Cf. In re Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, 12 F.C.C.R. 15,668, ¶ 20, at 15,685 (1997) (acknowledging that the structural separation requirements of §§ 271 and 272 provide "evidence of Congressional intent to treat independent LECs and the BOCs differently"). Despite this difference, however, the FCC ultimately decided to require that all LECs, whether BOCs or independents, may enter CMRS only by way of a structurally separate affiliate.


308. See SNET, 13 F.C.C.R. at ¶ 37, 21,310.
discounted the significance of this shrinkage when it approved SBC's acquisition of SNET.\footnote{309}

The FCC's progressively greater reluctance to approve horizontal LEC mergers after the SBC/PacTel merger provides a measure of suspense for the Bell Atlantic/GTE merger. If anything, the Commission's approvals of the PacTel, NYNEX, and Ameritech acquisitions counsel against approving the Bell Atlantic/GTE merger, for "a trend toward concentration in an industry, whatever its causes, is highly relevant in deciding how substantial the anti-competitive effect of a merger may be."\footnote{310} Reducing the number of large LECs from eight to four increases the likelihood of collusion, erodes regulatory benchmarks, and aggravates the loss of actual potential competitors against incumbent LECs. "The existence of an aggressive well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market [is] a substantial incentive to competition which cannot be underestimated."\footnote{311}

The relative ease with which the Commission allowed SBC to absorb SNET provides little or no comfort for Bell Atlantic as that firm awaits approval of its bid for GTE. SNET is a small LEC, long subject to a lighter regulatory hand than GTE and the BOCs. For instance, when the FCC required large LECs to move to price cap regulation, it gave small LECs such as SNET the option of remaining under traditional cost-of-service ratemaking if they chose.\footnote{312} (This decision was but a variation on the regulatory benchmarking theme developed in the horizontal BOC merger proceedings.)

GTE, by contrast, once faced the sort of antitrust scrutiny that eventually cracked the Bell System into pieces of eight.\footnote{313} Bell Atlantic and GTE have no assurance that they will escape the regulatory arm-twisting that characterized the FCC's review of the SBC/Ameritech merger. Even if Bell Atlantic is not an especially likely entrant in GTE's geographically remote LX markets, the imminent halving in the number of major American LECs exacerbates regulatory concerns over collusion and benchmarking. As the FCC noted in its SBC/Ameritech order, major ILECs are uniquely valuable for benchmarking

\footnote{309. See id. ¶ 22, at 21,303.}
\footnote{312. See Policy & Rules Concerning Rates for Dominant Carriers, 5 F.C.C.R. 6786, 6787, 6818-20 (1990); see also National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 179 (D.C. Cir. 1993) (reporting that the FCC had made the shift from rate-of-return regulation to price caps "optional for all but the Bell and GTE LECs").}
Suffice it to say that the fate of the Bell Atlantic/GTE merger is far more path-dependent than that of any other horizontal LEC merger proposed since 1996. The FCC's previous merger approvals may be the crucial factor. The FCC might plausibly disallow the Bell Atlantic/GTE merger, not because it is more menacing than the horizontal BOC mergers, but simply because it happened last.

C. Strategy No. 3: Avoiding BOC Missteps

The PacTel, NYNEX, Ameritech, SNET, and GTE acquisitions have one element in common: they are all purchases of one LEC by a larger, more aggressive BOC. No other merger initiated by a BOC since 1996 has succeeded. The pattern suggests that BOCs should stick with what they know. Their primary asset, perhaps their lone source of business acumen, is the local exchange.

The paradigmatic example of a misguided BOC foray outside the comfortable LX world is US West's 1996 acquisition of Continental Cablevision. This $12 billion purchase was meant to catapult US West into video carriage and programming. US West evidently believed, as Congress did in adopting section 652 of the 1996 Act, that these industries shared common costs and enjoyed substantial economies of scope. As a condition of FCC approval, US West had to shed crucial parts of the Continental empire: all cable systems within US West's LX service region as well as Continental's stake in Teleport (which in turn would be divested by WorldCom when it bought MFS).

The section 652 firewall proved fatal. Stripped of Continental's geographically overlapping cable properties, US West enjoyed none of the synergy it had sought. In November 1995 the company developed a "tracking stock" for the US West Media Group, partly to aid shareholders who had invested in a conventional LEC rather than a diversified communications and media conglomerate. Within two

319. See Mark Landler, As Shares Slip, So Do Phone Deals' Worth, N.Y. TIMES, Oct. 8, 1996, at C1 (describing the use of US West Media Group tracking stock to finance the Continental Cablevision merger); MediaOne Group, Inc., Who We Are (available at
years, US West announced plans to divide its Media Group and its Communications Group into separate companies in anticipation of a complete divestiture.\textsuperscript{320} In January 1998 US West sold the American wireless holdings of its Media Group to AirTouch for $4.3 billion in stock and assumption of $1.4 billion in debt.\textsuperscript{321} Later that year, the renamed MediaOne Group became independent of US West.\textsuperscript{322}

So disastrous was the Continental Cablevision merger that the BOCs should forever forswear the video programming delivery market. Video programming delivery has never fulfilled its promise as a stepping stone into—or out of—the telephone business. Does anyone remember the interactive television project in Orlando? This heavily hyped “full-service network” was supposed to give Time Warner and its partners, including AT&T, a chance at “grabbing local telephone revenues from . . . BellSouth.”\textsuperscript{323} Perhaps it would be better just to ask whether anyone remembers what interactive TV was supposed to be. In 1995, on the eve of comprehensive telecommunications reform, “three LECs [made] major investments in two wireless [cable] operators.”\textsuperscript{324} Who cares today?\textsuperscript{325} Dim though the memory seems now, Bell Atlantic desperately sought Tele-Communications, Inc., in 1993.\textsuperscript{326} In light of US West’s fiasco, that failed merger is probably best regarded as a fortunate close call.

\textbf{D. Strategy No. 4: From IX Dominance to LX Entry}

The strategies that built the three CLEC members of the Magnificent Seven are as diverse as the three major IXCs of the post-

\textsuperscript{320} See Seth Schiesel, Two Regional Bells Take Different Paths to Growth, N.Y. TIMES, Oct. 28, 1997, at CI2.

\textsuperscript{321} See Seth Schiesel, AirTouch Renews Deal for US West Unit, N.Y. TIMES, Jan. 30, 1998, at D2. The parties had reached a deal in 1997, but that agreement collapsed because Congress closed a crucial tax loophole. See id.

\textsuperscript{322} See MediaOne History, supra note 318.


MFJ era—MCI WorldCom, AT&T, and Sprint. What these companies share is a desire to break into the LX business, regardless of how quickly or successfully the FCC implements section 251. Their portfolios have also converged; the combination of a fiber optic IX network with cable, wireless, and Internet assets appears, at least in the short run, to be the preferred formula for launching a credible challenge against the ILECs.

Bigger indeed is better. Whereas AT&T was able to assemble these disparate pieces on its own, neither MCI nor Sprint could mount an independent challenge to the Baby Bells or to AT&T. These smaller IXCs became takeover targets and may eventually unite. WorldCom acquired MCI after a three-way bidding war in November 1997. In October 1999, the combined MCI WorldCom outbid BellSouth for Sprint.

One further facet of IXC-based mergers since 1996 bears special notice. Tremors from the Bell breakup can still be felt. Whereas WorldCom’s acquisition of MCI raised relatively few legal concerns, AT&T’s effort to acquire TCI and MediaOne have raised the specter of Ma Bell reborn as Ma Cable. The regulatory concerns arising from that prospect may in due course eclipse the local competition disputes that so far have dominated the implementation of the Telecommunications Act.

(1) MCI WorldCom

WorldCom was the first company besides GTE, the seven original BOCs, and the IXCs of the MFJ era (AT&T, MCI, Sprint) to join the Magnificent Seven. Like Qwest after it, WorldCom made a splashy acquisition of an older, larger firm. And like Qwest, WorldCom did not strike the first blow in the merger battle that catapulted it to prominence.

In the years leading to the passage of the Telecommunications Act, British Telecommunication plc amassed a 35 percent stake in MCI. In 1997 British Telecom bid for MCI in its entirety, valuing the carrier

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327. See Seth Schiesel, In MCI-WorldCom Theory, New Views of Competition, N.Y. TIMES, Nov. 12, 1997, at D1 (predicting, correctly, that the MCI/WorldCom merger would be approved with relative ease).


329. See MCI Communications Corp. & British Telecommunications plc, 9 F.C.C.R. 3960, 3964 (1994) (allowing British Telecom to take a 28% stake in MCI); In re MCI Communications Corp., 10 F.C.C.R. 8697 (1995) (allowing British Telecom to expand that stake to 35%).
at $21 billion. The deal went so far as to secure FCC approval. A surprising $500 million loss for fiscal year 1997, attributable to MCI's lack of success in its earliest efforts at LX entry, nearly scuttled the British Telecom deal. GTE then tried to thwart British Telecom's ambitions by tendering a $28 billion all-cash offer. But neither of these suitors would win MCI. WorldCom beat both of its more established competitors in November 1997 with a $37 billion bid.

Solid preparation enabled WorldCom to seize the nation's second largest IXC. The fourth largest long-distance carrier in the United States as of the Telecommunication Act's passage, WorldCom had astutely bid $14 billion for MFS, at that time one of the country's two leading CAPs, in August 1996. In September 1997, on the eve of its MCI bid, WorldCom offered to buy CompuServe. These purchases, especially the MFS acquisition, put WorldCom in position to win the battle royale for MCI, at least as a matter of anticipated synergies, if not as a matter of cash flow.

In 1998 the FCC approved the WorldCom/MCI merger. WorldCom's ownership of UUNet, the leading provider of Internet backbone services in the United States, provided the only element of suspense. WorldCom acquired this property through its merger with MFS. In April 1996, MFS had bought UUNet Technologies, Inc., for $2 billion; at the time UUNet provided Internet access for the Microsoft Network, America OnLine, and CompuServe. MCI's agreement to sell its own Internet assets to Cable & Wireless, a British firm, defused the FCC's concerns over the combined firm's potential acquisition of an Internet bottleneck.

331. See In re MCI Communications Corp. & British Telecommunication plc, 12 F.C.C.R. 15,351 (1997).
333. See Mark Landler, MCI and British Telecom Discuss Renegotiating Terms of Merger, N.Y. Times, Aug. 21, 1997, at C1.
335. See Mark Ribbing, Upstart Wins Battle for MCI, BALTIMORE SUN, Nov. 11, 1997.
341. See WorldCom & MCI, 13 F.C.C.R. at 18,103-04.
At least one other merger combined an IXC and a CAP in a marriage of fiber-optic networks; Qwest, at that time a minor CAP, bought LCI, a minor IXC, for $4.4 billion in early 1998. This merger, a technological and commercial mirror image of the WorldCom/MFS combination, made Qwest a leader in high-speed access and eventually enabled that company to acquire US West. Qwest and WorldCom thus took similar paths toward joining telecommunications' elite ranks.

Among the three IXCs in the Magnificent Seven, MCI WorldCom has the least diversified portfolio. All of WorldCom's merger activity failed to secure a substantial foothold in wireless telephony. Having lost the bidding war for AirTouch to Vodaphone, MCI WorldCom prepared to make an offer for Nextel. This overture failed in May 1999.

(2) Sprint

Until MCI WorldCom outbid BellSouth for Sprint in September 1999, Sprint had been the lone IXC among the Magnificent Seven to remain untouched by merger mania. True to its roots as the long-distance unit of a fully integrated telecommunications carrier, Sprint had been quietly building a smaller version of the pre-divestiture AT&T. The origins of Sprint's diversified portfolio lay in its 1993 acquisition of Centel Corporation. This merger, worth $3 billion when it was announced in May 1992, added 1.6 million LX customer lines and a substantial cellular presence to Sprint's holdings. By 1997, Sprint had amassed 7.4 million local phone lines and become America's seventh largest LEC, trailing only GTE and what were then the five BOCs. The Sprint PCS and SprintNet divisions have enabled Sprint


345. See Nicole Harris, MCI WorldCom Ends Negotiations to Acquire Nextel, WALL ST. J., May 6, 1999, at B4.


to become a leading player in mobile phone access to the Internet.\textsuperscript{349}

For five years, Sprint was the potential American beachhead for a European telecommunications invasion that never quite materialized. In June 1995, Sprint, France Télécom, and Deutsche Telekom announced the formation of the Global One joint venture. France Télécom and Deutsche Telekom would each take a 10 percent stake in Sprint; the foreign companies’ combined share of America’s third-largest IXC was believed to be worth between $3.5 and $4.2 billion.\textsuperscript{350} Statutory restrictions on foreign ownership of FCC licenses did not pose a serious hurdle;\textsuperscript{351} the Commission had already allowed British Telecommunications to acquire a 28 percent stake in MCI\textsuperscript{352} and then to expand that stake to 35 percent.\textsuperscript{353} The FCC readily approved the European partners’ proposal to take a 20 percent stake in Sprint\textsuperscript{354} and eventually allowed those partners to hold a combined 35 percent stake, comparable to BT’s share of MCI.\textsuperscript{355} These transactions, which preceded the passage of the 1996 Act, formed the backbone of relatively liberal FCC policies on foreign participation in the American telecommunications industry.\textsuperscript{356}

Global One evolved into a potential platform for French and German entry into the American long-distance market. Sprint and its partners met no regulatory resistance. The FCC lifted the conditions it had originally placed on Global One. In 1997 the FCC granted Sprint two additional long-distance circuits connecting Germany to the United

\textsuperscript{349} See Katie Hafner, \textit{Web Phone: The Next Big Thing?}, N.Y. TIMES, April 15, 1999, at GI; \textit{Sprint to Offer Wireless Access to Internet}, N.Y. TIMES, Aug. 12, 1999, at C3; \textit{cf.} Stuart Elliott, \textit{The Marketing Implications of the Bidding War for Sprint Are the Buzz of Madison Avenue}, N.Y. TIMES, Oct. 5, 1999, at C14 (noting the “fantastic brand equity” that Sprint would bring to any alliance, merger, or acquisition “in the intensely competitive global telecommunications industry”).


\textsuperscript{351} See 47 U.S.C. § 310(b)(4) (1994) (permitting the FCC, in furtherance of “the public interest,” to refuse or revoke a “broadcast or common carrier ... license” that would “be granted to or held by ... any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country”); \textit{id.} § 310(d) (requiring FCC approval of the transfer of any “construction permit or station license”).

\textsuperscript{352} See MCI Communications Corp. & British Telecommunications plc, 9 F.C.C.R. 3960, 3964 (1994).

\textsuperscript{353} See \textit{In re} MCI Communications Corp., 9 F.C.C.R. 8697, 8698 (1995).


the following year, Sprint won two additional circuits to France. By June 1998, the FCC declared Sprint a nondominant carrier on both the French and the German routes and removed all remaining special reporting requirements stemming from its original approval of the Global One joint venture. But internal disagreements doomed the alliance. Deutsche Telekom eventually balked at converting its 10 percent stake into a controlling interest. The European retreat from Global One set the stage for an all-American battle between WorldCom and BellSouth for control of Sprint.

In October 1999 MCI WorldCom outbid BellSouth with a stock swap valued at $108 billion. Among other benefits, the acquisition would give MCI WorldCom "a crucial tool in competing with AT&T": the "nationwide wireless operation" it has long coveted. FCC chairman William Kennard, however, issued a curt response:

American consumers are enjoying the lowest long distance rates in history and the lowest Internet rates in the world for one reason: competition. Competition has produced a price war in the long distance market. This merger appears to be a surrender. How can this be good for consumers? The parties will bear a heavy burden to show how consumers would be better off.

The union of the United States’ second- and third-largest long-distance carriers is, to say the least, far from certain. Nevertheless, in the immediate aftermath of Chairman Kennard’s preemptive strike against the MCI WorldCom/Sprint merger, “an FCC official close to” the chairman conceded that “it is unlikely that [the FCC] will block the transaction outright.” At this distance, it appears that the Commission may resort again to bluff and bluster, followed by a round of voluntary commitments and the eventual approval of the merger. In other words, the FCC may return to the tactics it perfected in the cycle of horizontal BOC merger proceedings from SBC/PacTel to SBC/Ameritech.

More than perhaps any other member of the Magnificent Seven,

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362. Id. at C13.
AT&T has reinvented itself several times. Even as Congress debated the bills that would become the 1996 Act, AT&T was repositioning itself for competition after comprehensive legislative reform. Not entirely coincidentally, perhaps, the company in 1994 formally adopted the name “AT&T” in place of the traditional “American Telephone and Telegraph Company.” The FCC declared in 1995 that AT&T was no longer a “dominant” IX carrier. At roughly the same time, AT&T reorganized itself into three companies: long-distance, telecommunications equipment manufacturing, and computers. The reorganization enabled AT&T to unload NCR, a big albatross, but it also launched Bell Laboratories on an independent and highly profitable trajectory as Lucent Technologies. In December 1997, AT&T sold its Universal Card business to Citibank for $4 billion.

Having shed its ancillary businesses, AT&T set about the business of reasserting dominion over telecommunications. To be sure, AT&T did abruptly end talk of a merger with SBC in 1997 when then-FCC chairman Reed Hundt vehemently objected. By 1998, AT&T reoriented and reinvigorated its merger strategy. That year, AT&T expanded along every line of the IX-cable-wireless-Internet strategy that now separates the major CLECs from the ILECs. AT&T acquired Teleport, by then the largest independent CAP. It reinforced its wireless holdings, traceable to its 1994 acquisition of McCaw Communications, with the purchase of Vanguard Cellular.

365. See William Safire, My Old Flame, N.Y. TIMES, June 19, 1994, § 6, at 14 (lamenting the elimination of the word telegraph from AT&T’s official corporate name).
366. See Reclassification of AT&T Corp. as a Nondominant Interexchange Carrier, 11 F.C.C.R. 3271, 3292, 3356 (1995); see also In re Revisions to Price Cap Rules for AT&T Corp., 10 F.C.C.R. 3009, 3014 (1995) (finding sufficient competition among IXCs to justify AT&T’s reclassification); cf. MCI Communications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 221 (1994) (describing the distinction “between dominant carriers... and nondominant carriers... in the long distance market” as effectively “a distinction between AT&T and everyone else”); MACAVOY, supra note 133, at 62 (describing how the FCC’s tariffing decisions had “left AT&T in a class... by itself”).
368. See AT&T Names a Unit It Plans to Spin Off, N.Y. TIMES, Feb. 6, 1996, at C4 (announcing the name Lucent Technologies as the name for AT&T’s equipment manufacturing spinoff).
372. See Seth Schiesel, AT&T Buying Vanguard to Extend Reach, N.Y. TIMES, Oct. 6, 1998, at C2 (announcing AT&T’s agreement to buy Vanguard for roughly $900 million in
bought IBM's global communications system for $5 billion and entered a $10 billion joint venture with British Telecom.

(a) AT&T/TCI

But the true turning point in AT&T's evolution after 1996 came in July 1998, when the carrier announced its $31.6 billion bid for Tele-Communications, Inc. (TCI). "At last," one journalist concluded, "a new strategy for AT&T." This deal included TCI's stake in @Home and, derivatively, in Excite, which @Home had acquired before AT&T bought TCI. The FCC's approval of the TCI deal coincided roughly with AT&T's announcement of an aggressive plan to price all of its telephone services at a dime a minute. Coast-to-coast, flat-rate pricing for wireless calls, an innovation that originated with Sprint and Nextel, places extreme pressure on the BOCs. Unlike AT&T and the other national wireless carriers, the BOCs' wireless affiliates do not have a nationwide PCS network; their customers must use technologically clumsy dual-mode phones in order to take advantage of a flat-rate plan.

In February 1999 the FCC approved the AT&T/TCI merger. The most serious objection to this merger was arguably the prospect that an enlarged AT&T "could bundle its bottleneck broadband transmission service with any or all of the numerous residential services under its wide corporate umbrella—cable television, long distance voice, local voice, and wireless, as well as Internet services." Though acknowledging that AT&T might enjoy monopoly or market power over cable in certain locations, the Commission declined "to impose a

stock and cash).

373. See Mark Leibovich & Mike Mills, AT&T to Purchase IBM Data Network, WASH. POST, Dec. 9, 1998, at C11.
377. See Amy Harmon, Excite and @Home Confirm $6.7 Billion Merger, N.Y. TIMES, Jan. 20, 1999, at C1 (announcing @Home's merger with Excite and describing TCI as @Home's primary shareholder).
379. See AT&T Completes the Acquisition of TCI, N.Y. TIMES, March 10, 1999, at C6 (announcing the completion of AT&T's $55 billion acquisition of TCI and "creating a one-stop shop for phone service, Internet access and cable television").
380. See Michael E. Kanell, BellSouth Tries Flat-Rate Plan, ATLANTA CONST., April 17, 1999, at D1.
382. Id. ¶ 124, at 3218.
blanket rule prohibiting the bundling of cable services with other services in which a cable operator might have a financial interest."\(^{383}\)

Nor did section 652 of the 1996 Act impede AT&T's acquisition of TCI. AT&T's 1998 acquisition of Teleport had raised the possibility that section 652 would "prohibit[] AT&T from acquiring any TCI systems in areas served by Teleport."\(^{384}\) The timing of Teleport's entry into LX markets proved decisive: because Teleport had not begun providing "telephone exchange service" as of January 1, 1993,\(^{385}\) section 652 did not require AT&T to divest any cable systems it acquired from TCI or to seek a waiver from the FCC.\(^{386}\)

Meanwhile, the AT&T-TCI merger has sparked a potential blockbuster of a dispute over concurrent state-law regulation of cable television and Internet access. As a condition of approving the transfer of TCI's franchise agreements to AT&T, city and county officials in Portland, Oregon, adopted "open access" measures requiring AT&T to permit unaffiliated ISPs to interconnect directly with AT&T's cable modem platform. This requirement would allow independent ISPs to bypass Excite@Home, the proprietary cable-based ISP that AT&T acquired in the TCI merger. A federal district court has held that these open access measures do not conflict with the Communications Act, the first amendment, the commerce clause, or the contract clause.\(^{387}\) In an amicus brief filed in the Portland appeal, the FCC has asked the Ninth Circuit to uphold the Commission's claim of exclusive jurisdiction over this matter.\(^{388}\) Internet access via cable, the Commission suggested, should not be treated as "cable service," but rather simply as Internet access.\(^{389}\) The former is susceptible to state regulation; the latter, according to the FCC, has benefited from a longstanding policy of "unregulation."\(^{390}\)

(b) AT&T/MediaOne

In March 1999, Comcast and MediaOne, the successor to US West Media Group, began merger talks.\(^{391}\) Comcast announced a $53 billion

\(^{383}\) Id. ¶ 126, at 3219.

\(^{384}\) See id. ¶ 130, at 3221.

\(^{385}\) See 47 U.S.C.A. § 652(e) (West Supp. 1999) (defining "the term 'telephone service area'" for purposes of § 652's presumptive ban on cable-telco combinations as "the area within which [a] carrier provided telephone exchange service as of January 1, 1993").\(^{386}\)


\(^{387}\) See AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999).


\(^{389}\) See id.

\(^{390}\) See id.

offer for MediaOne in an effort to "create the third-largest cable television company in the nation." 392 The deal evidently had little to do with television and much to do with Internet access. 393 AT&T made an unsolicited offer for MediaOne, outbidding Comcast by $5 billion. 394 Despite early speculation that Microsoft would help Comcast fight AT&T, 395 Microsoft eventually entered an alliance with AT&T to supply television set-top boxes. 396 In anticipation of FCC review of its MediaOne purchase, AT&T has filed a protective order with the Commission. 397

AT&T's acquisitions of the second and fourth largest cable companies in the United States have resurrected a dormant FCC rule designed to foster diversity in video programming. The MediaOne merger, if consummated, would make AT&T the owner of cable systems serving more than 40 percent of all homes in the United States. Section 11(c) of the 1992 Cable Act 398 directed the FCC to "establish[] reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person." 399 The FCC in 1993 promulgated rules prohibiting any entity from owning an attributable interest in cable systems "reach[ing] more than 30 percent of all homes... nationwide," plus an additional margin of five percent "provided [that] the additional cable systems... are minority-controlled." 400 A federal district court struck down section 11(c) as an

392. Geraldine Fabrikant, Huge Cable TV Companies to Unite in $53 Billion Deal, N.Y. TIMES, March 23, 1999, at A1; see also Harry Berkowitz, Comcast Corp. Buys MediaOne Group in a $48.5 Billion Stock Swap, NEWSDAY, March 23, 1999, at A42; Rebecca Cantwell, Comcast to Buy MediaOne, ROCKY MTN. NEWS, March 23, 1999, at 1B (valuing the proposed merger between $48 billion and $60 billion).

393. See Fabrikant, supra note 391, at A14 ("What is driving this deal is the cable industry's race with telephone companies to offer superfast access to the Internet.").

394. See Geraldine Fabrikant & Seth Schiesel, AT&T Makes Competing Bid for MediaOne, N.Y. TIMES, April 23, 1999, at Cl (announcing AT&T's offer to acquire MediaOne for $58 billion in cash and stock).

395. See Geraldine Fabrikant, Comcast Is Seen as Unlikely to Raise Bid for MediaOne, N.Y. TIMES, April 24, 1999, at Cl (speculating that Microsoft, having already invested $1 billion in Comcast, might help Comcast fight AT&T's bid). MCI WorldCom briefly considered joining Comcast's battle against AT&T for MediaOne. See Seth Schiesel & Geraldine Fabrikant, MCI Is Said to Weigh Bid for MediaOne, N.Y. TIMES, May 4, 1999, at Cl.


unconstitutional infringement of the freedom of speech.401 Pending appellate review of that decision,402 the FCC stayed enforcement of its horizontal ownership rules.403

In October 1999 the FCC revised its horizontal cable ownership rules.404 The Commission simplified the rules in two significant respects. First, the 30 percent ceiling would “be based on cable subscribers served rather than on cable homes passed.”405 Second, the FCC eliminated the additional five percent allowance for minority-controlled systems.406 Most critically, the FCC changed the denominator used in computing the horizontal ownership limit. Instead of basing the limit on merely cable subscribers, the new rules would cap ownership at 30 percent of the market consisting of all multichannel video programming distributors in the United States.407 This rule change eases the potential threat to the AT&T/MediaOne merger, for AT&T’s market share drops if one counts direct broadcast satellite (DBS) subscribers as well as cable subscribers. Quite fortuitously, AT&T had abandoned its stake in DirecTV in 1998 and thereby ended its brief flirtation with DBS technology.408 AT&T and MediaOne are nevertheless working with the FCC to determine whether their proposed merger would transgress the revised horizontal ownership rules.409

E. One If by Air, Two If by Sea

The fight for AirTouch in early 1999 came at a convenient point for


402. See Implementation of Sections 11 & 13, 8 F.C.C.R. at 8609; see also Time Warner, 93 F.3d at 979-80 (deferring a decision on this issue until the court could hear a consolidated appeal involving the district court decision that struck down § 11(c)’s “subscriber limitation” provision as well as a direct attack on the FCC’s horizontal ownership rules); In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 F.C.C.R. 4358, 4424 n.372 (1997) (noting that the FCC had suspended its horizontal ownership rules). As of December 1, 1999, this appeal remained before the D.C. Circuit.

403. See Implementation of Sections 11 & 13, 8 F.C.C.R. at 8567, 8609.


405. Id.

406. See id.

407. See id.


409. See AT&T Corp. & MediaOne Group, Inc. File Submission on Compliance with New Cable Ownership Rules, No. DA 99-2661, 1999 WL 1072448 (Nov. 30, 1999).
a triennial review of the telecommunications market. Its outcome suggests two possible ways in which this industry can move beyond the Magnificent Seven. To misquote Henry Wadsworth Longfellow: one if by air, two if by sea.

(I) Air

First, by air. AirTouch commanded an offer of $56 billion, at that time more than had been bid for any other telecommunications firm except Ameritech. By comparison, AT&T's subsequent bid for MediaOne barely eclipsed the price for AirTouch, while Qwest offered a similar amount for US West and Frontier combined. The biggest bid of all, MCI WorldCom's $108 billion offer for Sprint, was nearly twice the size of any previous offer for a telecommunications company.

The sheer size of the Vodaphone/AirTouch merger effectively signals the emergence of wireless as an economically significant platform in its own right, independent of its historical ties to landwire communications. As the year 1998 came to a close, it became clear that Bell Atlantic was negotiating to buy PacTel's old wireless company. The East's lone BOC was willing to pay $45 billion for a belated boost to its relatively thin wireless holdings. Despite its deep financial resources, Bell Atlantic was outbid by Vodaphone, a British company with extensive wireless holdings in northern Europe. And even MCI WorldCom briefly joined the fray for a full complement of major players in wireless telephony: domestic BOCs/IILECs, domestic IXC/CLECs, and foreign carriers.

A sideshow to the SBC/Ameritech and the Bell Atlantic/GTE mergers may profoundly affect American wireless markets. In


411. For insight into AirTouch's relationship with Pacific Telesis, a BOC that once owned it, and with Bell Atlantic, a BOC that bid unsuccessfully for it, see Andrew Pollack, To Chief of AirTouch, a Deal Seizes a "Bell Opportunity," N.Y. TIMES, Jan. 18, 1999, at C6.


anticipation of its merger with SBC, Ameritech agreed to sell 20 of its wireless properties, including the Chicago and St. Louis markets, to a partnership consisting of GTE and Georgetown Partners for $3.27 billion. The licenses sold to GTE presumably will come to rest in Bell Atlantic's hands, if in fact the BOC can successfully absorb America's last significant independent LEC. These wireless properties overlap many of GTE's existing LX service areas and, pending FCC approval of the Bell Atlantic/GTE merger, will give the combined company a strong wireless presence in two-thirds of the largest markets in the United States. Meanwhile, Bell Atlantic eventually reached a compromise with Vodafone, which agreed to sell AirTouch's former properties in North America—precisely what the BOC had coveted all along in its failed bid for AirTouch. Unless the FCC bars the GTE merger or forces of partial divestiture of wireless properties, Bell Atlantic will emerge as a wireless giant, straddling a $70 billion wireless network that combines North American properties once held separately by AirTouch, Bell Atlantic, and GTE.

(2) Sea

The Vodaphone/AirTouch deal also exposes a competitive lane that operates by sea. Transnational investment, often anticipated but rarely observed, is a convenient deus ex machina in telecommunications analysis. It rivals "[n]ew technology" as "the easy answer to everything." As France Télécom and Deutsche Telekom discovered in retreating from the Global One alliance, international synergy isn't always what it's cracked up to be. But Vodaphone did win the


416. See GTE Agrees to $3.27 Billion Purchase of Ameritech Wireless Assets, WIRELESS TODAY, April 5, 1999.


AirTouch bidding war, after all, and Global Crossing walked away with Frontier after an unsuccessful effort to capture US West. The resulting combination of Global Crossing and Frontier commands a worldwide broadband network. Recall, too, the brief moment in which British Telecom appeared to have captured MCI. Finally, AT&T and British Telecom are beginning to convert their joint venture into something really substantial. These companies are planning to link their global wireless operations in a strengthened alliance called “Advance,” which would offer both companies’ customers the novel experience of “roaming” across international borders.421 For the moment, it is enough to ponder how not one but two members of the Magnificent Seven tasted defeat at foreign hands in American telecommunications’ merger wars.422

V. After the Gold Rush

Though “[p]rophecies in telecommunications are as treacherous as they are foolish,”423 I shall draw a few conclusions from this survey. First, telecommunications law appears to be entering a period of significant transition. The legal fury over an emerging cluster of disputes over Internet access, universal service, and cable ownership restrictions may soon match the fuss that has attended disputes over unbundling, interconnection, and interLATA relief. Second, the very resilience of the FCC’s merger policy has rescued comprehensive legislative reform from premature obsolescence. Regulatory “muddling through” may yet overcome Congress’s failure to predict the technological and economic trajectory of this industry. Finally, insights from nearly four years of merger mania should help us predict “what the courts”—and the FCC—“will do in fact” in two crucial contexts:424 the major mergers that the Commission has yet to approve and the unfinished business of implementing the local competition provisions of the 1996 Act.

A. The Bell Scar

The Telecommunications Act never meant “the end of government intervention.” Rather, it marked “a new beginning” for American public utility law’s regulatory tradition, “with new rules, new players,

421. See Seth Schiesel, AT&T and British Telecom Plan Global Wireless Link, N.Y. TIMES, Sept. 17, 1999, at C2; see also Seth Schiesel, One Nation, Unplugged: The Titans of Wireless Are Tearing Down Regional Fences, N.Y. TIMES, Jan. 11, 1999, at C1 (describing AT&T’s plans to eliminate roaming fees for calls within the United States).
423. Chen, supra note 106, at 873.
424. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 461 (1897).
and new opportunities to capture decision-making rents." Nor did the Act guarantee that the industry would restructure itself in any way remotely resembling the perfectly competitive markets found only in undergraduate microeconomics courses. Not even the United States Congress would dare to make such an extravagant, unattainable promise. Even a casual glance at the network effects and "the notorious economies of scale and scope that define this industry" should lead us to "expect only one type of [competitor]: big." The Magnificent Seven are the corporate winners who parlayed the sweetest opportunities that arose from the early implementation of the Telecommunications Act. Their emergence, standing alone, is neither a basis for celebration nor cause for alarm. *Laissez les gros cons jouer.*

The rise of the Magnificent Seven has exposed some relatively stable truths about competition and legal reform in telecommunications. Rapid change, ironically, ranks high among these truths. "Accelerating technological change has shortened the transitions between ages of telecommunications law." As the BOCs' competitors pursue wireless and cable-based strategies for bypassing the landwire local exchange, the litigation that has driven and sometimes overshadowed merger mania since 1996—*Iowa Utilities Board*, the BOCs' section 271 petitions, the bill of attainder litigation—will become increasingly irrelevant. Interconnection and unbundling, to date among the prime movers in telecommunications merger strategy, are already beginning to yield in significance to the other legs of the FCC's "competition trilogy": access charge reform and universal service. These orders underlie seething disputes over the regulatory treatment of Internet service providers. AT&T's acquisitions of TCI and MediaOne have triggered another pair of issues involving Internet access and national

427. In rough translation, "Party on, fat cats." *See supra* note *(noting that this article was initially presented in New Orleans).*
429. *See* Texas Office of Public Util. Counsel v. FCC, 183 F.3d 393, 445-46 (5th Cir. 1999) (upholding the FCC's decision in *In re* Federal-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776, 9002 (1997), to grant ISPs reimbursement from the Universal Service Fund); Illinois Bell Tel. Co. v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. 1999) (reciprocal compensation for ISP-bound calls), aff'g Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999); Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 541-44 (8th Cir. 1998) (upholding the FCC's decision to grant ISPs an exemption from interstate access charges); *cf* AT&T Communications of the Pac. Northwest, Inc. v. US West Communications, Inc., 31 F. Supp. 2d 861, 863-64 (D. Or. 1998) (holding that the imposition of access charges on intrastate toll calls completed by an IXC constitutes an unlawful "implicit universal service subsidy"). For a fuller discussion of these disputes, see Part III.B.(2) above.
cable television policy: the litigation over Portland's ISP access rule and the FCC's horizontal cable ownership rule. Many of these issues will involve state regulators. Jurisdictional conflicts will surely arise, and the FCC's stance in City of Portland suggests that the Commission will soon encounter the Telecommunications Act's savings clause for state-law regulations that are "consistent" with the FCC's own rules on local competition.430

Cable quite obviously dominates this transition in telecommunications law between the POTS-based disputes of the preceding generation and the PANS-based disputes of the coming age, but not in the way that the 1996 Act anticipated. Head-to-head combat between MSOs and LECs never took place. This phenomenon arose in part from purely technological considerations. The cable operators' coaxial networks are not easily converted to a switched system. Likewise, the telephone companies' embedded copper and fiber optics networks have far too little bandwidth to accommodate multichannel, audiovisual programming. Cable does excel in providing high-speed Internet access, and that technological advantage goes a long way toward explaining why AT&T stalked TCI and MediaOne.

But we should not overlook economic and institutional considerations. We now know that one of the 1996 Act's primary premises was dead wrong: telephony and video programming simply do not mix. Heralding "convergence" among communications "technologies and media" has become worse than a "trivial ritual."431 The misguided belief that cable and telephone carriage have anything to do with each other besides rights-of-way has inflicted serious regulatory harm. Sections 652 and 653 of the 1996 Act are a dead letter; neither cable companies nor ILECs are likely to stray outside their home markets, at least without a huge boost from IXCs.

Much of the blame also lies with the incumbent LECs' unmatched aptitude for mismanaging new technology—that dreaded "first gift [of] making stone out of everything."432 Two examples drawn from the ILECs' ill-starred efforts to enter the video programming delivery market illustrate the trouble that these monopolists have encountered in competing against cable-based Internet access.

Consider first the ILECs' erratic efforts to roll out digital subscriber line (DSL) technologies. DSL is a legacy of the "video dialtone" era; this cluster of high-bandwidth technologies grew out of the ILECs' failed efforts to supply video on demand.433 Ironically, DSL

underperforms switched copper wire in supplying plain old telephone service. DSL's packet-switching digital technology promises greater bandwidth but remains a step behind conventional means of carrying voice messages.434

To make matters worse, the LECs may be losing control of their own technology. Even though DSL portends new life for the ILECs' embedded networks, the ILECs have packaged their DSL offerings for residential customers.435 They are evidently trying to keep their business customers on older, more expensive T1 lines, even as CLECs are aggressively marketing DSL service to business customers.436 The experience of America's most aggressively acquisitive LEC is illustrative. In October 1999, SBC announced plans to spend $6 billion in three years in a plan to extend DSL technology to 80 percent of its customers.437 But as of that date, the nation's incumbent LECs combined had "deployed DSL to fewer than 100,000 customers," roughly a tenth of the households receiving high-speed Internet connections through cable companies.438

Wireless cable, the other avenue by which LECs have historically attempted video programming delivery,439 is also shaping up as a technological embarrassment for the telephone industry. Technologies such as MMDS (multichannel multipoint distribution service) and SMATV (satellite master antenna television),440 once on the cutting edge of the video programming delivery market, now contribute to Internet access strategies, which themselves are largely the domain of IXCs.441 Cisco Systems, a manufacturer of Internet networking equipment, has taken the lead in using vectored orthogonal frequency division multiplexing to transform MMDS into an all-purpose wireless broadband medium.442 Once again, a firm wholly unconnected with local telephony's sheltered world is taking the technological lead.

434. See Jon Van, Promise of Change by the Bundle, CHI. TRIB., Sept. 19, 1999, § 5, at 1, 12.
435. See Jon Van, For Ameritech, the Technology Is a Threat—and an Opportunity, CHI. TRIB., Sept. 20, 1999, § 4, at 1, 5.
436. See id. at 5.
437. See Seth Schiesel, SBC Communications to Offer High-Speed Internet Connections, N.Y. TIMES, Oct. 18, 1999, at C10.
438. Id.
439. See supra text accompanying notes 323-324.
The welcome fading of legislative intransigence on direct broadcast satellite may finally ameliorate the LECs’ failure to enter the cable industry. Long barred from carrying local broadcast television signals, DBS providers now enjoy roughly equal footing in this regard with conventional cable systems. The passage of this legislation, roughly a month after the revision of the FCC’s horizontal cable ownership rules, will probably do more to foster competition in the video programming delivery market than the entire Telecommunications Act of 1996. Recovering the satellites, indeed.

B. All the Commission’s Ken

The Telecommunications Act of 1996 ignored the Internet, the most important technological development in this industry since wireless telephony. The Act also took little account of mergers, which would prove to be the industry’s most significant economic response during the first half-decade under the new legislation. Congress anticipated exactly one type of merger, the LEC/cable combination. The Act’s preemptive strike against this incipient threat, section 652, proved too effective. US West’s botched acquisition of Continental Cablevision, the only LEC/MSO merger attempted since 1996, stands as an object lesson on the limits of convergence, synergy, and deregulatory fervor. Meanwhile, the major mergers that did take place—SBC’s acquisitions of PacTel and Ameritech, Bell Atlantic’s acquisitions of NYNEX and GTE, WorldCom’s acquisitions of MCI and Sprint, and AT&T’s acquisitions of TCI and MediaOne—have given rise to an FCC merger policy based on ad hoc applications of the notoriously nebulous “public interest, convenience and necessity” standard underlying sections 214 and 310 of the Communications Act.

Perhaps more than any other legal development since 1996, the FCC’s willingness to augment antitrust law’s actual potential competition doctrine has rescued telecommunications law from regulatory failure. Nothing in administrative law’s ubiquitous public interest standard binds agencies “to analyze proposed mergers under the same standards that the Department of Justice ... must apply” under section 7 of the Clayton Act. Fortunately, the FCC has invoked its “wide discretion” and dared to engage in “imaginative interpretation.”

447. FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953); see also FCC v. Pottsville
After the SBC/Ameritech order, arguably the most comprehensive of the FCC's merger review decisions since 1996, the Commission's public interest analysis proceeds in the following four steps:  

1. Will the transaction result in a violation of the Communications Act or other applicable statute?  
2. Will the transaction result in a violation of applicable FCC rules?  
3. Will the merger "substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act"?  
4. Does the merger confer affirmative "public interest" benefits, including the potential to "enhance competition"?  

Not surprisingly, much of this analysis arose in response to the three horizontal BOC mergers that have come before the FCC since 1996. These mergers have required the FCC to balance three related regulatory concerns against three goals at the heart of the Commission's local competition initiatives. Actual potential competition, natural safeguards against collusion, and benchmarking all become increasingly tenuous with each merger that is approved. In allowing the horizontal BOC mergers, the FCC did concede substantial amounts of ground on these matters. By the same token, however, the Commission persuaded Bell Atlantic to accede in the legally embattled rules on physical collocation and the TELRIC pricing methodology as the price for its acquisition of NYNEX. It also secured competitive entry commitments from the combined SBC/Ameritech.

This point warrants further elaboration. As demonstrated in the Bell Atlantic/NYNEX and SBC/Ameritech orders, the public interest standard in the telecommunications context includes now the FCC's signature tactic of extracting concessions from and imposing conditions on merging parties. This aspect of the FCC's merger policy did not exist in 1996. Quite arguably, it arose out of necessity. Far from serving as a

Broadcasting Co., 309 U.S. 134, 138 (1940) (describing the public interest standard as "supple" and "as concrete as the complicated factors for judgment in such a field of delegated authority permit").


450. See TCI & AT&T, 14 F.C.C.R. at 3207-08 & n.287, 3177-81.


truce after the twelve-year MFJ, the Telecommunications Act became a legal battleground dominated by defensive litigation initiated by the BOCs. The BOCs effectively declared war on the FCC; implementation of the 1996 Act has turned out to be MFJ litigation continued and carried out on statutory rather than equitable terrain. Only in the third year after the Act’s passage did federal courts finally resolve a jurisdictional attack on section 251 and a constitutional attack on section 271. The aftermath of the Iowa Utilities Board litigation leaves both TELRIC and the Commission’s physical collocation rule in legal doubt. Finally, the very deployment of mergers as a business tactic changed the structure of the relevant markets and forced concomitant shifts in regulatory strategy.

The FCC’s earliest merger approvals assumed the full and proper implementation of sections 251 and 252. This assumption having collapsed, the practice of extracting regulatory concessions may now be defended as sound policy. Section 271 petitions and merger approvals provide the FCC its only defense against the BOCs’ attacks on local competition reform. As soon as the Commission begins granting section 271 petitions, as it inevitably will, conditions expressed in merger approval orders will take on even greater importance. The FCC surely regards BOC accession in TELRIC as an unmitigated good (except perhaps for BOC shareholders), and implementation of the embattled physical collocation order is a nice bonus. The only drawback is that it took a merger approval to accomplish what should never have become a full-blown Supreme Court decision in Iowa Utilities Board. In light of the Magnificent Seven’s collective inability to spark competitive LX entry, it may be just as well that SBC and Ameritech have made a concrete, contractually enforceable commitment to enter 30 out-of-region markets as CLECs. This single regulatory decision has sparked a significant amount of interest in smaller CLECs, which the newly expanded SBC can acquire in order to fulfill its competitive entry commitments.

Most remarkably of all, the Commission has been perfecting this policy under conditions of rapid technological change and predictive uncertainty. Throughout the merger mania of the late 1990s, the FCC “could not read the depth of [its own] thought[s], but stared down into it as into a deep well where a little light glimmers on the dark water.” It

454. See In re NYNEX Corp. & Bell Atlantic Corp., 12 F.C.C.R. 19,985, 20,126 (1997) (separate statement of Chong, Comm’r) ("[W]e [have] made some assumptions that the most critical provisions of Sections 251 and 252 of the 1996 Act are being implemented").

455. Cf. id. ("If it turns out we were wrong, the next Commission may wish to be less optimistic about such assumptions if another BOC merger comes its way.").


may be just as well that the FCC has developed its merger policy over a period of years, without conscious forethought, and in response to rather than in anticipation of market events. Telecommunications regulation, like so many other exercises in a complex administrative regime, is a vexatious learning experience.458

The FCC’s experience since 1996 finds an instructive parallel from the Commission’s earliest days. In response to the Congress’s first request for an investigation of the telephone industry,459 the FCC concluded that the “fundamental problem” of regulating interstate telephony “consist[ed] largely of developing ways and means ... for continuous acquisition of basic factual data” on the industry.460 The Commission thus developed and pursued a policy of “constant or continuing surveillance” of IX rates through “informal negotiation.”461 Constant surveillance allowed the FCC to patrol long-distance rates without interminable hearings or the antagonistic atmosphere of command-and-control regulation, all the while gathering more knowledge of telephony’s underlying market structure.462 The Commission not only stumbled onto the aptly named regulatory strategy of “muddling through”463 but also anticipated the “modern” technique of negotiated rulemaking by a half century.464

In this fashion the Commission crafted a workable approach to telecommunications deregulation. As a matter of market realities, the intermodal battle royale that the Telecommunications Act’s framers anticipated never materialized. Incumbent LECs have launched no meaningful attacks on cable monopolies, and no MSO has yet emerged as a leading CLEC (at least without massive help from a leading IXC). The FCC has no firm statutory basis for grappling with the one truly

460. FEDERAL COMMUNICATIONS COMM’N, INVESTIGATION OF THE TELEPHONE INDUSTRY 596 (1939).
461. FEDERAL COMMUNICATIONS COMM’N, FINAL REPORT OF THE TELEPHONE RATE AND RESEARCH DEPARTMENT 68 (1938).
important development since 1996: the thirst for Internet access as the driving force in growing demand for telecommunications services. Nor did the law develop according to design. Implementation of sections 251, 252, and 253 of the 1996 Act, in any frictionless regulatory environment an ideal tool for bringing competition to the local exchange, has stalled. As a result, merger policy, at most an afterthought in the 1996 Act, has become a major part of telecommunications reform. The market moved unpredictably, and the FCC was fortunate enough to respond in a reasonably flexible way.\textsuperscript{465} The web of interrelated events leading to the Magnificent Seven's megamergers has also dictated the terms of the FCC's merger policy.

In short, accusations that lax enforcement has made the FCC a tool of incumbent telecommunications companies are overstated. The FCC since 1996 has been anything but "a lazy no-good [sheriff], prone to take [its] ease with a bottle of liquor, and ... let trouble-makers and thieves, even the most dangerous type of cutthroats, run free and wild."\textsuperscript{466}

C. Other Voices, Other Rooms

Among the many types of mergers that have altered the telecommunications landscape since 1996, three warrant significant regulatory concern: the horizontal union of leading incumbent LECs, the rapid hoarding of cable properties by AT&T, and the impending reduction in the number of major IXCs from three to two. The first category comprises four mergers, all involving SBC or Bell Atlantic: SBC/PacTel, Bell Atlantic/NYNEX, SBC/Ameritech, and Bell Atlantic/GTE. AT&T's successive purchases of TCI and MediaOne constitute the second category. WorldCom's acquisition of MCI and pending bid for Sprint account for the third. Only two other mergers since 1996 have rivaled these deals in size: the Qwest/US West merger and Vodaphone's purchase of AirTouch.

Four of these mergers remained in legal limbo as of December 1, 1999: Qwest/US West, Bell Atlantic/GTE, AT&T/MediaOne, and MCI WorldCom/Sprint. Quite fortuitously, each of these pending mergers will probably turn on legal principles developed by the FCC during these early years of merger mania. At the risk of making further mistakes in projecting the future of telecommunications,\textsuperscript{467} I offer the following predictions:

1. The Qwest/US West merger is a practical replay of the

\textsuperscript{465} Cf. Daniel A. Farber, \textit{Legal Pragmatism and the Constitution}, 72 \textit{MINN. L. REV.} 1331, 1347 (1988) ("Like all other questions, the question of how to promote a flourishing society [should] be answered as much by experience [as by] theory.").

\textsuperscript{466} \textit{TRUMAN CAPOTE, OTHER VOICES, OTHER ROOMS} 17 (1948).

\textsuperscript{467} Cf. \textit{NANCI GRIFFITH, Can't Help But Wonder Where I'm Bound}, on \textit{OTHER VOICES, OTHER ROOMS} (WEA/Elektra Entertainment 1993).
SBC/PacTel merger. Neither partner is an actual potential competitor in the other's home market, and the synergies achieved through this union will likely benefit consumers in a rapidly consolidating market.

2. Bell Atlantic/GTE may be the least likely merger among these four to emerge unscathed from FCC review, not because it would be the most objectionable \textit{ex ante}, but simply because it came after the first three major horizontal LEC mergers. Nevertheless, the FCC will probably approve this merger as well, but only after extracting the sort of competitive entry commitments that SBC and Ameritech made as a condition of their merger.

3. AT&T's pursuit of MediaOne is eerily reminiscent of Bell Atlantic's merger with NYNEX. Both mergers hinge on FCC rules that the parties might otherwise challenge. In exchange for its approval of the Bell Atlantic/NYNEX merger, the FCC convinced these BOCs to waive their objections to TELRIC and the second physical collocation order. Likewise, a leading condition in the FCC's eventual approval of the AT&T/MediaOne merger will be the combined firm's putatively voluntary compliance with the newly revised 30 percent horizontal ownership limit on multichannel video programming distributors.

4. WorldCom's sweep of IXCs—MCI and Sprint—faces tough regulatory review. That is the just and predictable fate of any merger that proposes to reduce the number of major long-distance carriers from three to two. What may save the first major horizontal merger of IXCs, ironically enough, is a loosening of the FCC's grip on section 271. In an IXC world that consists solely of AT&T and WorldCom, allowing a BOC to offer interLATA carriage would give local customers a choice among three major long-distance carriers—as many as they have enjoyed since the Bell breakup.

Of course, the wireless assault on landwire telephony may suddenly accelerate, thanks to a technological breakthrough involving MMDS or an unexpectedly rapid integration of the Internet into PCS technology. This is exactly the sort of dynamism that prevents "[e]conomic analysis and market predictions" from being "an exact science."\textsuperscript{468} I dare not project the outcome of a battle royale involving AT&T (with or without British Telecom's helping hand), a united WorldCom, and a north Atlantic wireless alliance revolving around Bell Atlantic and Vodafone.

But let us not get too far of the legal, economic, and technological curve. One matter of unfinished business remains.

Congress plainly intended the opening of the local exchange to be the centerpiece of the Telecommunications Act. The FCC's privilege of

"regulatory flexibility" under the 1996 Act—a precious and hard-fought power to "forbear" from enforcing obsolete or unreasonable portions of its statutory mandate—does not extend to the incumbent LEC provisions of section 251 or to section 271. InterLATA relief for the BOCs is surely imminent. Peaceful resolution of the FCC's efforts to implement section 251 is not.

There is now substantial competition in every aspect of telephony except LX carriage. It is a close call whether law or technology will facilitate the eventual breakthrough. The legal alternative depends heavily on the litigation strategy adopted by the BOCs. The last and most deeply entrenched of natural monopolists have been fighting a two-front war since 1996. The BOCs have played excellent defense on the section 251 front. In the *Iowa Utilities Board* litigation, they fought the FCC to a standstill on the basis of a flimsy jurisdictional argument. They will fight tenaciously in what I predict (or at least hope) will be a losing effort to defeat TELRIC on its merits.

But the very success of the BOCs' section 251 strategy has weakened their offensive posture in securing section 271 authorization to provide in-region interLATA carriage. With the welcome passing of the bill of attainder folly, the BOCs must now decide whether they would rather continue to repel interconnection and unbundled access under section 251, or whether they like to puncture the long-distance firewall after a decade and a half of restrictions under the MFJ and section 271 of the 1996 Act.

At least temporarily, the BOCs hold the key to the further evolution of the Magnificent Seven. They have mismanaged that position since 1996. These monopolists have repeatedly upset the legislative deal that became the Telecommunications Act. The BOCs lobbied vociferously for the legislation that eventually became the 1996 Act. They then had the perfidy to challenge section 271 and the other BOC provisions of the Act as bills of attainder. With a palpable sense of bewilderment, two federal courts of appeals noted how readily the BOCs condemned a statute they had raised and praised, once the regulatory tables had turned and the constitutional imperative of the day made betrayal potentially profitable. The record supports

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470. Cf. MCI Telecommunications Co. v. American Tel. & Tel. Co., 512 U.S. 218, 224-27 (1994) (refusing to allow the FCC to treat its power to "modify" requirements of the Communications Act as a general forbearance power).
473. See BellSouth Corp. v. FCC, 162 F.3d 678, 691 (D.C. Cir. 1998), *cert. denied*, 119 S.
Assistant Attorney General Joel Klein's observation that the BOCs have stalled on opening their networks under section 251 even as they have attacked section 271 in order to reach the interLATA market.\textsuperscript{474} The whole affair reeks of the "sham" exception to the \textit{Noerr-Pennington} doctrine of antitrust immunity.\textsuperscript{475} In spirit if not in technical legal detail, the BOCs have pursued the sort of anticompetitive litigation that deserves condemnation under the Sherman Act.

There is, of course, the theoretical possibility that the IXCs rather than the BOCs are the parties that have been manipulating the relationship between sections 251 and 271. To the extent that the IXCs expect to lose more from BOC entry into interLATA carriage than they can gain from their own entry into the BOCs' LX markets, the IXCs "have an incentive to argue that [the BOCs] have forestalled IXC entry into local exchange markets."\textsuperscript{476} Section 271, however, gave the BOCs expedited access to interLATA relief if "no [competing] provider" in any given state "requested ... access [to] and interconnection" with a BOC's LX network within "10 months after February 9, 1996."\textsuperscript{477} In other words, the Act anticipated and actively discouraged stalling by IXCs. Even the critics of IXC conduct in the post-1996 era concede that "[n]o RBOC [has] failed to receive requests for access and interconnection from prospective entrants."\textsuperscript{478} Therefore, the bulk of the responsibility for the Telecommunications Act's failure to spur serious LX competition continues to rest on the BOCs' shoulders.

Nor will the BOCs acquit themselves in their attack on TELRIC in the merits phase of the \textit{Iowa Utilities Board} litigation.\textsuperscript{479} In an era when

\textsuperscript{474} See Joel Klein, \textit{Bells' Strategy at Fault for InterLATA Failings}, 64 TELECOM. REP. 37, 47 (Nov. 23, 1998).


\textsuperscript{477} 47 U.S.C.A. § 271(c)(1)(B) (West Supp. 1999) (allowing the BOC to qualify for interLATA relief merely by filing "a statement of the terms and conditions" by which it "generally offers to provide ... access and interconnection" to its LX network and by securing state commission approval of those terms and conditions).

\textsuperscript{478} Larson & Mudd, supra note 475, ¶ 29.

\textsuperscript{479} For a criticism of the BOCs' jurisdictional argument in this litigation, see Chen, \textit{supra} note 49. For an assessment of the BOCs' likely challenge to TELRIC's merits, see Chen, \textit{supra} note 177.
a leading rhetoric strain in telecommunications scholarship speaks in terms of a mythical "regulatory contract" and constitutional protection for reasonable investment-backed expectations, it is easy to forget that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." The BOCs' backward-looking attempt to hijack contracts clause and takings clause principles is a jurisprudential mirage; their attack on TELRIC, an unpersuasive effort to indemnify incumbent firms in legally restructured industries "against the risks of changing technology and new entrants." Wherever the road to innovation leads, it surely does not begin along the path of unwarranted compensation for American law's most sheltered monopolists.

In earlier articles on telecommunications reform, I expressed unequivocal support for the immediate release of the BOCs onto the interLATA market. I even confessed my belief that LECs and cable companies would quickly and effectively invade each other's markets. Although the latter misstep undercuts any claim I might make to clairvoyance in this field, I am on balance relieved that the BOCs were excluded from the interLATA market long enough for the FCC to develop a workable merger policy. Despite all regulatory hope, meaningful local competition has not yet emerged, and I see no point in coddling the BOCs until it does. Perhaps the rebirth of AT&T as Ma Cable and the impending union of MCI and Sprint under the WorldCom banner will alter the calculus. So might the long-awaited opening of section 271's interLATA floodgates. For the moment, though, I dismiss any support I might have lent the BOCs as an insubstantial "fanfare blowing to the sun." I do not rue either my inaccuracy or my inconsistency. No less than the "regulatory measures" we criticize, the observations we academics offer "are temporary

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480. See, e.g., SIDAK & SPULBER, supra note 67, at 106-07; cf. US West Communications, Inc. v. Arizona Corp. Comm'n, 1999 WL 308563 (Ariz. Ct. App. May 18, 1999) (rejecting the argument that an incumbent LEC "provides telephone service within Arizona as the result of a regulatory contract with the State").


482. See Hovenkamp, supra note 177, at 805-21.


484. See Chen, supra note 106, at 872 ("[I]t is high time to unleash the last of public utility law's pampered wards").

485. See Chen, supra note 324, at 1510 (predicting BOC preeminence in a mass media market characterized by "interactive, 'on-demand' information services and audiovisual programming delivered over phone lines"); Chen, supra note 79, at 563 ("[T]he LX and cable markets have merged, and thereby competition will likely flourish."). In case the point is not sufficiently salient in text, I repeat: I was wrong.

486. NEIL YOUNG, After the Gold Rush, on AFTER THE GOLD RUSH (Broken Arrow Music 1970); hear also NATALIE MERCHANT, After the Gold Rush, on LIVE IN CONCERT (WEA/Elektra Entertainment 1999).
expedients, not eternal verities." Write today, regret tomorrow, renounce mañana.

### Appendix A: Major U.S. Telecommunications Mergers Since 1996

<table>
<thead>
<tr>
<th>Acquiring firm</th>
<th>Acquired firm</th>
<th>Date of merger announcement; estimated value as of that date</th>
<th>Date of FCC approval (if applicable)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sprint</td>
<td>Centel</td>
<td>May 27, 1992 $3 billion</td>
<td>March 4, 1993</td>
</tr>
<tr>
<td>France Télécom/</td>
<td>Sprint (10% take)</td>
<td>June 14, 1995 $3.5-4.2 billion</td>
<td>Jan. 11, 1996</td>
</tr>
<tr>
<td>Deutsche Telekom</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SBC Communications</td>
<td>Pacific Telesis</td>
<td>April 1, 1996 $16.5 billion</td>
<td>Jan. 31, 1997</td>
</tr>
<tr>
<td>Bell Atlantic</td>
<td>NYNEX</td>
<td>April 22, 1996 $22 billion</td>
<td>Aug. 15, 1997</td>
</tr>
<tr>
<td>MFS Communications</td>
<td>UUNet Technologies</td>
<td>April 30, 1996 $2 billion</td>
<td>N/A</td>
</tr>
<tr>
<td>WorldCom</td>
<td>CompuServe</td>
<td>Sept. 7, 1997</td>
<td>N/A</td>
</tr>
<tr>
<td>WorldCom</td>
<td>MCI</td>
<td>Nov. 10, 1997 $37 billion</td>
<td>Sept. 14, 1998</td>
</tr>
<tr>
<td>AirTouch</td>
<td>US West wireless properties</td>
<td>Jan. 29, 1998 $5.7 billion</td>
<td>April 6, 1998</td>
</tr>
<tr>
<td>Qwest</td>
<td>LCI International</td>
<td>March 10, 1998 $4.4 billion</td>
<td>June 1, 1998</td>
</tr>
<tr>
<td>Alltel</td>
<td>360° Communications</td>
<td>March 16, 1998 $4.1 billion</td>
<td>June 23, 1998</td>
</tr>
<tr>
<td>Company 1</td>
<td>Company 2</td>
<td>Date 1</td>
<td>Date 2</td>
</tr>
<tr>
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<td>------------------</td>
</tr>
<tr>
<td>SBC</td>
<td>Ameritech</td>
<td>May 10, 1998</td>
<td>Oct. 8, 1999</td>
</tr>
<tr>
<td>AT&amp;T</td>
<td>TCI</td>
<td>June 24, 1998</td>
<td>Feb. 18, 1999</td>
</tr>
<tr>
<td>Bell Atlantic</td>
<td>GTE</td>
<td>July 28, 1998</td>
<td>Pending</td>
</tr>
<tr>
<td>AT&amp;T</td>
<td>Vanguard</td>
<td>Oct. 5, 1998</td>
<td>Pending</td>
</tr>
<tr>
<td>AT&amp;T</td>
<td>IBM (global communications system)</td>
<td>Dec. 8, 1998</td>
<td>N/A</td>
</tr>
<tr>
<td>Vodaphone</td>
<td>AirTouch</td>
<td>Jan. 16, 1999</td>
<td>N/A</td>
</tr>
<tr>
<td>BellSouth</td>
<td>Qwest (10% stake)</td>
<td>April 19, 1999</td>
<td>N/A</td>
</tr>
<tr>
<td>AT&amp;T</td>
<td>MediaOne</td>
<td>May 5, 1999</td>
<td>Pending</td>
</tr>
<tr>
<td>Microsoft</td>
<td>AT&amp;T (2 to 3% stake)</td>
<td>May 5, 1999</td>
<td>N/A</td>
</tr>
<tr>
<td>Global Crossing</td>
<td>Frontier</td>
<td>March 17, 1999</td>
<td>Sept. 21, 1999</td>
</tr>
<tr>
<td>Qwest</td>
<td>US West</td>
<td>July 18, 1999</td>
<td>Pending</td>
</tr>
<tr>
<td>MCI WorldCom</td>
<td>Sprint</td>
<td>Oct. 4, 1999</td>
<td>Pending</td>
</tr>
</tbody>
</table>
Appendix B: Major Legal Developments Affecting U.S. Telecommunications Mergers Since 1996

<table>
<thead>
<tr>
<th>Statutes*</th>
<th>Decisions, rules, and orders</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Category 1: “First generation”/POTS issues—LX competition and interLATA entry</strong></td>
<td></td>
</tr>
<tr>
<td>§§ 251, 252 Local competition</td>
<td><strong>Iowa Utilities Board:</strong> unbundled access and interconnection</td>
</tr>
<tr>
<td></td>
<td>1999 Supreme Court decision: jurisdiction to promulgate TELRIC rule</td>
</tr>
<tr>
<td></td>
<td>Pending 8th Cir. case on remand: merits of the TELRIC rule</td>
</tr>
<tr>
<td></td>
<td>Physical collocation order and pending takings challenges</td>
</tr>
<tr>
<td>§ 271-274 BOC provisions</td>
<td>§ 271 interLATA entry petitions: five down, one pending</td>
</tr>
<tr>
<td></td>
<td>Bill of attainder litigation</td>
</tr>
<tr>
<td><strong>Category 2: “Second generation”/PANS issues—Internet access</strong></td>
<td></td>
</tr>
<tr>
<td>§ 253, 541 Cable franchising</td>
<td>Portland ISP access order (9th Cir. appeal pending)</td>
</tr>
<tr>
<td>§ 254; see also § 251 Universal service and other issues in the “ISP trilogy”</td>
<td>Reciprocal compensation for ISP-bound calls</td>
</tr>
<tr>
<td></td>
<td>Access charge exemption</td>
</tr>
<tr>
<td></td>
<td>Universal Service Fund eligibility</td>
</tr>
<tr>
<td>§§ 652, 653; 1992 Cable Act § 11(c) Limits on cable ownership</td>
<td>Horizontal cable ownership rules</td>
</tr>
</tbody>
</table>

*All statutes refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996, unless specified otherwise.
### Category 3: FCC merger policy as such

Ad hoc merger policy, combining Clayton Act § 7 and "public interest" factors, as expressed through four broad categories of merger approval orders:

<table>
<thead>
<tr>
<th>Category</th>
<th>BOC</th>
<th>Other LEC SNET GTE</th>
<th>Cable MSO Continental TCI MediaOne</th>
<th>IXC MCI Sprint</th>
</tr>
</thead>
<tbody>
<tr>
<td>§214(a), 310(d) Public interest, convenience, and necessity</td>
<td>NYNEX PacTel Ameritech US West</td>
<td>Other LEC SNET GTE</td>
<td>Cable MSO Continental TCI MediaOne</td>
<td>IXC MCI Sprint</td>
</tr>
<tr>
<td>§310(b)(4) Foreign ownership</td>
<td>BT/MCI orders; Global One orders</td>
<td>Foreign participation, market entry, affiliate guidelines</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>