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Telecommunications Reform and the Death of the Local Exchange Monopoly

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TELECOMMUNICATIONS REFORM AND THE DEATH OF THE LOCAL EXCHANGE MONOPOLY

Miles W. Hughes

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TELECOMMUNICATIONS REFORM AND THE DEATH OF THE LOCAL EXCHANGE MONOPOLY*

MILES W. HUGHES**

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I. INTRODUCTION

Telecommunications in the United States is a \$700 billion industry that comprises approximately one-sixth of our nation's economy.¹ A subset of this industry is the \$90 billion local telephone exchange market.² Until recently, this enormously profitable market operated as a natural monopoly³ in which a small

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** The author thanks Mr. Dubose Ausley for his financial support. This Comment is dedicated to the memory of the author's father, Dr. William O. Hughes.

1. Michael E. Kanell, *New Era of Telecommunications: Who'll Survive Storm of Competition?*, ATLANTA J. & CONST., Feb. 11, 1996, at F5.

2. Leo Rennert, *Clinton Dials in New Era, Signs Telecom Bill, Touts Services, Jobs*, SACRAMENTO BEE, Feb. 9, 1996, at A1.

3. A natural monopoly is "[o]ne which is created from circumstances over which the monopolist has no power. For example, a market for a particular product may be so limited

number of regional telephone companies provided local exchange services within exclusive territories.⁴ The federal government and many states such as Florida endorsed this anti-competitive environment.⁵ However, recent telecommunications reforms aim to dismantle the local exchange monopoly.⁶ With the reforms, Congress and the Florida Legislature hope to create a competitive local exchange market in which hundreds of telecommunications companies provide consumers with a broad array of advanced telecommunications services at reasonable prices.⁷ This Comment explores whether the telecommunications reforms will successfully achieve their goal.

This Comment provides the reader with a general understanding of the telecommunications industry and the regulation of the local exchange market. Part II describes the historical efforts of the federal government and the Florida Legislature to control the adverse effects of the local exchange monopoly. Part III depicts the developments within the telecommunications industry that influenced lawmakers to open the local exchange market to competition. Part IV summarizes those provisions of the Telecommunications Act of 1996 particular to the deregulation of the local exchange market. Part V outlines the provisions of the 1995 Florida telecommunications reform that relate to local exchanges and were not preempted by the federal Act. Part VI attempts to predict the likely impact the federal and state reforms will have on consumers, the telecommunications industry, and the local exchange market. Finally, part VII concludes that telecommunications reform will benefit consumers by bringing competition to the local exchange market.

II. THE TRADITION OF REGULATING TELECOMMUNICATIONS MONOPOLY

A. The History of Federal Regulation

On the national level, the history of the development of the telecommunications industry has been one of continual tension between monopoly and competitive market structures. For decades,

that it is impossible to profitably produce such except by a single plant large enough to supply the whole demand." BLACK'S LAW DICTIONARY 1007 (6th ed. 1990).

4. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 141 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

5. See discussion *infra* part II.

6. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.); 1995 Fla. Laws ch. 95-403.

7. See sources cited *supra* note 6.

each of the three branches of the federal government has battled monopoly in the nationwide telecommunications industry. Congress, federal courts, the Department of Justice, and the Federal Communications Commission have participated in the campaign to break down anti-consumer behavior. The federal government's confrontation with monopoly in the telecommunications industry originated with the Communications Act of 1934.⁸ The following section explores the federal regulation of telecommunications before the enactment of the 1996 Telecommunications Act.

1. The Communications Act of 1934

In 1934, Congress passed the Communications Act.⁹ The purpose of the Act is to regulate interstate and international communications to ensure the universal provision of communications services.¹⁰ To achieve this purpose, the Act created the Federal Communications Commission (FCC)¹¹ and vested it with the regulatory powers necessary to encourage uniform and constructive growth within the telecommunications industry.¹²

Congress intended the FCC to serve as an independent expert agency capable of regulating an increasingly complex and dynamic industry.¹³ Accordingly, Congress granted the FCC broad jurisdiction and regulatory authority over telephone and telegraph companies, broadcasting, and telegraph communications.¹⁴ The FCC's jurisdiction does not extend to the regulation of many intrastate communications services, however.¹⁵ For example, the Communications Act explicitly reserves regulatory control over intrastate toll and local exchange telephone services to the states.¹⁶

8. Ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-613 (1994)).

9. *Id.*

10. 47 U.S.C. § 151 (1994).

11. *Id.*

12. See *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 658 (D. Ohio 1968).

13. See *American Broadcasting Co. v. F.C.C.*, 191 F.2d 492, 498 (D.C. Cir. 1951).

14. 47 U.S.C. § 151 (1994); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968). The broad jurisdiction of the FCC resulted from the consolidation of various regulatory functions of the Interstate Commerce Commission, the Federal Radio Commission, and the Postmaster General. See Robert B. Friedrich, Note, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC Can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, 648 (1995).

15. 47 U.S.C. § 152(b) (1994). Congress did not intend the Communications Act to preempt the field of state telecommunications regulations. *Ceracche Television Corp. v. Kelly*, 364 N.Y.S.2d 276, 280 (Sup. Ct. 1974), *aff'd*, 376 N.Y.S.2d 217 (App. Div. 1975).

16. 47 U.S.C. § 152(b) (1994).

2. The Federal Courts

Federal courts maintain a vital role in the regulation of the telecommunications industry. The courts' predominant purpose is to interpret telecommunications legislation and review the FCC's actions.¹⁷ Additionally, the courts have jurisdiction to resolve antitrust disputes filed by the Department of Justice against telecommunications companies.¹⁸ These disputes frequently result in the filing of consent decrees that require the courts to monitor the parties' compliance with the agreements.¹⁹ The two telecommunications antitrust decisions of greatest impact are the 1956 Consent Decree and the Modified Final Judgment (MFJ); combined, they destroyed the largest monopoly the world has ever known, American Telephone & Telegraph (AT&T).²⁰

a. The 1956 Consent Decree

In 1949, the Department of Justice filed an antitrust action in federal district court in New Jersey against AT&T and its subsidiary, Western Electric,²¹ for alleged violations of sections 1, 2, and 3 of the Sherman Antitrust Act.²² The government alleged "that [AT&T and Western Electric] had monopolized and conspired to restrain trade in the manufacture, distribution, sale, and installation of telephones, telephone apparatus, equipment,

17. Patricia Diaz Dennis & Gary M. Epstein, Panel Discussion: The Future of Telecommunications, in PRACTICING LAW INST., 12TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS: POLICY AND REGULATION 1994 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3930) (Dec. 1994), available in WESTLAW, PLI Database, at *93.

18. See *id.*; see also discussion *infra* parts II.A.2.a-b.

19. Friedrich, *supra* note 14, at 649.

20. *Id.* at 655. Before 1983, "[t]he combined operations of AT&T . . . exercised monopoly power over nearly every sector of the telecommunications industry within the United States." *Id.* In 1980, AT&T's operating revenues equalled approximately two percent of the country's gross national product. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 152 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

21. At the time of the lawsuit, Western Electric manufactured telecommunications equipment exclusively for AT&T. *American Tel. & Tel. Co.*, 552 F. Supp. at 135 n.3.

22. *Id.* at 135-36 (citing 15 U.S.C. § 1-3). The purpose of the Sherman Antitrust Act of 1890 is to pursue unimpeded competition as a means of advancing consumer prosperity:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958).

materials, and supplies.”²³ To combat the monopoly, the government sought structural relief by completely divesting Western Electric from AT&T.²⁴

From 1949 to 1956, the case lay virtually dormant in the district court.²⁵ Meanwhile, AT&T exerted substantial influence in Washington, D.C., to bring the action to a favorable conclusion. AT&T enlisted the assistance of the Department of Defense to persuade the Justice Department to postpone prosecution of the suit and reduce the severity of the requested sanctions.²⁶ Officers from AT&T and the Defense Department repeatedly met with Justice Department officials, eventually securing the pledge of the Attorney General to conclude the case with no significant injury to AT&T.²⁷ By December 1955, the Justice Department and AT&T had arrived at an agreement.²⁸ The resulting consent decree did not include any of the structural changes to AT&T that the Justice Department had originally sought.²⁹ Most importantly, AT&T did not have to divest Western Electric.³⁰ Its monopoly escaped intact.

b. The Modification of Final Judgment

During the 1960s and 1970s, Microwave Communications, Inc. (MCI) and other companies attempted to compete with AT&T in the long-distance and other telecommunications markets.³¹ Their

23. American Tel. & Tel. Co., 552 F. Supp. at 135.

24. *Id.*

25. *Id.*

26. *Id.* at 136. A number of AT&T executives were involved with national defense projects and thus the Department of Defense assisted AT&T because it feared that prosecution of the case would impede the Korean War effort. *Id.* at 136 n.8.

27. *Id.* at 137. In 1959, the House of Representatives Committee on the Judiciary appointed the Antitrust Subcommittee to investigate the negotiation process that led to the 1956 Consent Decree. *Id.* at 136. The subcommittee reported that the willingness of the Attorney General to forego the original goals of the antitrust action demonstrated “partiality toward the defendants incompatible with the duties of his public office.” *Id.* at 137 n.11. The Antitrust Subcommittee also was dismayed by the unwillingness of the Justice Department to disclose information necessary for the investigation. The subcommittee reported that the Justice Department’s defiance was the result of its “desire to cover up those facts which the Department considered to be embarrassing.” *Id.* The Department’s obstinacy forced the subcommittee to obtain the needed information from other sources. *Id.* at 136-37.

28. *Id.* at 137.

29. *Id.* at 137-38. The consent decree imposed upon AT&T certain minimal line-of-business restrictions that permitted the company to provide only telecommunications services. *Id.* at 138.

30. *Id.* at 137. Through the district court’s ratification of the 1956 Consent Decree, AT&T agreed to engage in only common carrier communications services, and Western Electric agreed to manufacture equipment solely for use by AT&T. *Id.* at 138.

31. PUBLIC SERV. COMM’N, TELECOMMUNICATIONS POLICY: YESTERDAY AND TODAY 5-9 (1994) (on file with the Florida Public Service Commission).

efforts culminated in a series of antitrust lawsuits charging AT&T and its subsidiaries with unlawfully hindering competition.³² Although they resulted in modest victories for the various petitioners, these actions never seriously threatened the core AT&T monopoly.³³

By the early 1970s, the government concluded that the 1956 Consent Decree had failed to facilitate meaningful competition within the telecommunications industry.³⁴ As a result, on November 20, 1974, the Justice Department filed a second antitrust lawsuit against AT&T, Western Electric, and Bell Laboratories.³⁵ For the second time, the government alleged that the defendants had violated section 2 of the Sherman Antitrust Act through the monopolization of a broad spectrum of telecommunications services.³⁶ The government sought the total divestiture of the Bell Operating Companies (BOCs) from AT&T and the dissolution of Western Electric.³⁷

After extensive pretrial proceedings, discovery, and failed settlement negotiations, the trial finally began on January 15, 1981, before U.S. District Court Judge Harold Greene in the District of Columbia.³⁸ In January 1982, a proposed consent decree between the parties was submitted to the court for its approval.³⁹ Following modification by Judge Greene, the consent decree was approved as a Modified Final Judgment (MFJ).⁴⁰ In sum, the plan of

32. *Id.* The antitrust actions included the "Above 890" decision of 1959, *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959); the *Carterphone* decision of 1968, *Carterphone v. American Tel. & Tel. Co.*, 13 F.C.C.2d 571 (1968); the *Specialized Common Carrier* decision of 1971, *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Servs.*, 24 F.C.C.2d 318 (1970); and the *Excunet* decision of 1975, *M.C.I. Telecommunications Corp. v. F.C.C.*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). *PUBLIC SERV. COMM'N*, *supra* note 31, at 7-9.

33. *PUBLIC SERV. COMM'N*, *supra* note 31, at 5-11.

34. *American Tel. & Tel. Co.*, 552 F. Supp. at 139.

35. *See id.* at 131.

36. *Id.* at 139.

37. *Id.* The 22 BOCs were wholly-owned subsidiaries of AT&T that provided local telephone services throughout the United States. *Id.* at 139 n.19. By 1983, approximately 80 percent of the nation's telephone subscribers received local and long-distance services from AT&T and the BOCs. Marc W. Dunbar, Comment, *Telecommunications Competition in Florida: A Look at House Bill 1531*, 21 FLA. ST. U. L. REV. 663, 666-67 (1993).

38. *American Tel. & Tel. Co.*, 552 F. Supp. at 139-40. The scope of the trial proceedings was enormous. *Id.* at 140. The case was initially divided into 82 segments. *Id.* The government presented over 250 witnesses and many thousands of pages of documents in its case-in-chief. *Id.* The trial record contained over 24,000 pages of transcripts. *Id.*

39. *Id.* at 140.

40. *Id.* at 225. Judge Greene retained jurisdiction over the matter to enforce and modify the MFJ and plan of reorganization. *Id.* at 231. The MFJ was reviewed triennially to allow the regional Bell operating companies to seek entry into other telecommunications markets. Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 27 (1995).

reorganization that implemented the MFJ divested the twenty-two BOCs from AT&T, prohibited AT&T from providing local exchange services, and banned the BOCs from specific lines of business, including equipment manufacturing, long-distance services, and information services.⁴¹ Thus, the 1982 MFJ granted the relief the government had originally sought in 1949—structural changes to AT&T necessary to defeat the company's anti-competitive grip on the telephone industry.

Judge Greene recognized that AT&T's ability to monopolize the telecommunications market was primarily grounded in its exclusive control of local telephone services through the BOCs.⁴² The BOC networks—comprised of enormously expensive wires, cables, switches, and transmission facilities—operated as “bottlenecks” for the interconnection of telephone subscribers.⁴³ The only means by which a telecommunications carrier could provide services to homes and businesses was through BOC network access, which AT&T controlled with a tight fist.⁴⁴

Judge Greene wanted to terminate AT&T's exclusive control over access to the BOC networks, but he did not find competition in the local exchange market a viable alternative.⁴⁵ He thought that the enormous capital costs of constructing local exchange networks to compete with the existing BOC networks were a prohibitive barrier to market entry for any potential local exchange competitors.⁴⁶ Therefore, in lieu of competition, Judge Greene ordered the divestiture of AT&T to sever the economically unhealthy relationship between the monopolistic local exchange services provided by the BOCs and the more competitive long-distance services of AT&T.⁴⁷

41. American Tel. & Tel. Co., 552 F. Supp. at 222-32.

42. *Id.* at 223.

43. *Id.*; see also Friedrich, *supra* note 14, at 659.

44. American Tel. & Tel. Co., 552 F. Supp. at 223; see also Friedrich, *supra* note 14, at 659 (describing BOC networks as “natural monopolies” because of prohibitively high capital costs necessary for market entry and rapidly declining average costs of operating networks in long-term). AT&T provided its long-distance competitors with more inferior and costly connection to the BOCs than it saved for its subsidiaries. Spulber, *supra* note 40, at 29. This practice was known as “discriminatory access.” *Id.*

45. See American Tel. & Tel. Co., 552 F. Supp. at 223.

46. *Id.*

47. *Id.* The MFJ mandated that divestiture of the BOCs from AT&T was to occur through the following steps:

1. The transfer from AT&T and its affiliates to the BOCs . . . of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications and exchange access functions . . . ;
2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange

The MFJ authorized AT&T to provide services and equipment in those telecommunications arenas Judge Greene found were competitive.⁴⁸ Accordingly, the MFJ eliminated the 1956 Consent Decree restrictions that limited AT&T solely to the provision of telecommunications services.⁴⁹ Judge Greene found that allowing a technologically advanced company like AT&T to compete in arenas such as the computer and information markets would further the public interest.⁵⁰

Pursuant to the MFJ, the twenty-two BOCs were either dissolved or consolidated into seven Regional Bell Operating Companies (RBOCs)—Ameritech, BellSouth,⁵¹ Bell Atlantic, NYNEX, Pacific Telesis, Southwestern Bell, and US West.⁵² The territories of the RBOCs were geographically divided into 158 local access transport areas (LATAs).⁵³ LATAs defined the territory within which only one local exchange carrier (LEC) was authorized to operate.⁵⁴ Thus, no RBOC or other LEC could provide inter-LATA local exchange services.

access functions and those relating to other functions . . . provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

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

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT&T by means of a spin-off of stock of the separated BOCs to the shareholders of AT&T, or by other disposition . . .

Id. at 226-27.

48. Id. at 223. The MFJ sanctioned the broad provision of computer and information services and equipment by AT&T with one exception: AT&T was precluded from participating in electronic publishing until Judge Greene determined the field was competitive and incapable of monopolization. Id. Judge Greene feared that allowing AT&T to participate in both the transmission of information by providing telephone services and the generation of information by providing electronic publishing services could lead to a news media monopoly. Id. "Such a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information." Id. at 223.

49. Id.

50. Id.

51. BellSouth, the nation's largest RBOC upon enactment of the Telecommunications Act of 1996, provides local exchange services to Florida telephone subscribers through its subsidiary, Southern Bell. Southern Bell provides service within seven LATAs. Fla. H.R. Comm. on Com., CS for SB 1554 (1995) Staff Analysis 2 (final May 18, 1995) (on file with comm.) [hereinafter Fla. H.R. Staff Analysis]; Kanell, *supra* note 1, at F5 (describing size of BellSouth).

52. Spulber, *supra* note 40, at 27.

53. See *United States v. Western Elec. Co., Inc.*, 569 F. Supp. 990, 1011, 1016, 1026-27, 1035, 1048-49 (D.D.C. 1983) (LATA Opinion).

54. See *id.* at 993-94; see also *United States v. Western Elec. Co., Inc.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied sub nom. *Ameritech Corp. v. American Tel. & Tel. Co.*, 507 U.S. 951 (1993).

The MFJ also prohibited the new RBOCs from engaging in the telecommunications lines of business in which AT&T was authorized to compete, namely information services, long-distance services, and equipment manufacturing markets.⁵⁵ Judge Greene imposed these line-of-business restrictions because of the risk that the RBOCs would abuse the available competitive advantages previously used by AT&T to gain a monopoly over certain telecommunications services.⁵⁶ As a result, the MFJ confined the RBOCs to the provision of local exchange services, customer premises equipment, telephone directories containing paid advertisements, and other products and services related to their natural monopolies.⁵⁷

3. The FCC Computer Inquiries

The FCC's most significant contributions toward the regulation of monopoly in the telecommunications industry came in the form of three "computer inquiries." The FCC initiated its inquiries to determine which of the emerging services arising from the combination of computer and telecommunication technologies should be subject to government antitrust regulations.⁵⁸ The continuing difficulty of deciding which of these combined services must be regulated eventually contributed to the nearly total deregulation of the telecommunications industry.⁵⁹

The FCC inquiries pursued the policy goal of "structural separation," through which communications companies were not to avoid required regulation through the merger of regulated communications services with unregulated data processing services.⁶⁰ In *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facil i-*

55. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

56. *Id.*

57. *Id.*; Dunbar, *supra* note 37, at 668.

58. See generally *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) (First Computer Inquiry); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986) (Third Computer Inquiry I); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 F.C.C.R. 3072 (1987) (Third Computer Inquiry II).

59. See Fla. S. Comm. on Com., CS for SB 1554 (1995) Staff Analysis 1 (Apr. 6, 1995) (on file with comm.) [hereinafter Florida Senate Staff Analysis].

60. PUBLIC SERV. COMM'N, *supra* note 31, at 9.

ties (First Computer Inquiry),⁶¹ the FCC determined that if the “primary purpose” of a combined service was the provision of communications, the service would be regulated.⁶² Fittingly, if the primary purpose of the combined service was to provide data processing, it would remain unregulated.⁶³

In re Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)⁶⁴ and the two orders in In re Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)⁶⁵ effectively abolished the ruling of First Computer Inquiry and pursued structural separation by classifying combined telecommunications and data processing services as either “basic” or “enhanced.”⁶⁶ The FCC regulated “basic services” because they concerned the simple communication of information.⁶⁷ For example, the FCC classified the “plain old telephone service” (POTS) common carriers traditionally provided as a basic service.⁶⁸ The FCC recognized that POTS and other basic services were not available in competitive markets and that regulation was necessary to control the adverse impacts of monopoly.⁶⁹ “Enhanced services” remained unregulated, however, because they primarily concerned the use of data processing applications available in competitive markets.⁷⁰ Because the FCC determined that there was no danger of monopoly, it did not restrict enhanced services; rather, the FCC authorized any telecommunications company, including AT&T and the RBOCs, to provide them.⁷¹

B. The History of Florida Regulation

In 1913, the Florida Legislature vested the Florida Public Service Commission (PSC) with exclusive regulatory authority

61. 28 F.C.C.2d 267 (1971), *aff’d* in part and *rev’d* in part sub nom. GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

62. *Id.* at 305.

63. *Id.*

64. 77 F.C.C.2d 384 (1980).

65. 104 F.C.C.2d 958 (1986); 2 F.C.C.R. 3072 (1987).

66. See Second Computer Inquiry, 77 F.C.C.2d at 387; Third Computer Inquiry I, 104 F.C.C.2d at 968; Third Computer Inquiry II, 2 F.C.C.R. at 3074. Second Computer Inquiry was decided before the MFJ, while Third Computer Inquiry I and Third Computer Inquiry II were decided after the MFJ.

67. See Second Computer Inquiry, 77 F.C.C.2d at 387; Third Computer Inquiry I, 104 F.C.C.2d at 968; Third Computer Inquiry II, 2 F.C.C.R. at 3074.

68. See Dunbar, *supra* note 37, at 670.

69. See *id.* at 671; PUBLIC SERV. COMM’N, *supra* note 31, at 9-10.

70. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 138 n.17 (D.D.C. 1982), *aff’d* sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

71. See Second Computer Inquiry, 77 F.C.C.2d at 420.

over intrastate telecommunications services.⁷² The statutory charge to the PSC is contained in chapter 364, Florida Statutes. The Florida Legislature dramatically amended the scope and purpose of chapter 364 during the 1995 Regular Session.⁷³

Before 1995, the Florida Legislature controlled the adverse effects of the telecommunications monopoly through regulation rather than competition. To provide local exchange services, the Legislature authorized the PSC to grant virtual monopolies to certain telecommunications companies.⁷⁴ The companies awarded the monopolies are known as "incumbent" LECs.⁷⁵ Thirteen incumbent LECs essentially controlled the entire Florida local exchange market.⁷⁶ Florida law expressly prohibited cellular communication systems, radio communications systems, and cable television companies from providing local exchange services.⁷⁷ The statute allowed the PSC to certify a nominal amount of competition, however. Those "alternative" LECs authorized to compete with the incumbent LECs were shared tenant service providers,⁷⁸ alternative access vendors,⁷⁹ and pay telephone providers.⁸⁰

Before its recent amendment, chapter 364 controlled the prices charged by the incumbent LEC monopolies through rate-of-return regulation.⁸¹ The PSC established reasonable rates of return for each incumbent LEC and subsequently set rates at levels that enabled the companies to earn the targeted amounts.⁸² The PSC

72. 1914 Fla. Laws ch. 2, §§ 2829-2829z (codified as amended in scattered sections of FLA. STAT. ch. 364); see also *Florida Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248, 251 (Fla. 1993).

73. See 1995 Fla. Laws ch. 95-403. For a discussion of the 1995 revision of chapter 364, Florida Statutes, see *infra* part V.

74. See FLA. STAT. ch. 364.01 (1993) (amended 1995).

75. Florida H.R. Staff Analysis, *supra* note 51, at 2.

76. *Id.* Incumbent LECs come in "large" and "small" varieties. The four large incumbent LECs are Southern Bell, GTE, Sprint United, and Sprint Centel. The nine small incumbent LECs are ALLTEL, Florida, Gulf, Indiantown, Northeast, Quincy, St. Joseph, Southland, and Vista-United. *Id.* at 7.

77. FLA. STAT. § 364.02(7) (1993) (amended 1995).

78. *Id.* § 364.339 (amended 1995). STS providers were limited to offering services to commercial tenants located within a single building. *Id.*

79. *Id.* § 364.337(3) (amended 1995). AAVs were restricted to providing private line service between a facility and its other buildings at separate locations. *Id.* These private lines are colloquially known as "tie lines."

80. *Id.* § 364.3375 (amended 1995).

81. See *id.* §§ 364.03-.3381 (amended 1995).

82. See Fla. H.R. Staff Analysis, *supra* note 51, at 2, 3; Florida Senate Staff Analysis, *supra* note 59, at 2, 3; see also Charles W. Murphy, Public Service Commission Practice, 69 FLA. B.J. 30, 31 (1995) (describing required and recommended method of practice for utility appearing before PSC); *United Tel. Co. of Fla. v. Mayo*, 345 So. 2d 648, 653 (Fla. 1977) (holding that company's rate of return cannot be so low as to confiscate its property, nor so high as to be unreasonable).

examined the incumbent LECs' operating expenses and capital investments in computing the appropriate rates.⁸³ Once the PSC had promulgated the rates, the incumbent LECs could not change them without the express approval of the PSC.⁸⁴

In 1990, in response to the national trend toward deregulating the telecommunications industry, the Legislature significantly amended chapter 364 to encourage competition within the local exchange market.⁸⁵ The Legislature instructed the PSC to "[e]ncourage cost-effective technological innovation and competition[,] . . . [e]nsure that all providers of telecommunications services are treated fairly, . . . [and] [r]ecognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services. . . ."⁸⁶ To empower the PSC to achieve its command, the Legislature delegated to the commission the authority to eliminate rate-of-return regulation and allow market conditions to control prices when the PSC determined that effective competition existed.⁸⁷ Unfortunately, the PSC seldom employed the alternative provisions and, despite the intent of the Legislature, the incumbent LEC monopolies continued to thrive.⁸⁸

III. THE CALL FOR REFORM

As discussed earlier, the MFJ's divestiture of the BOCs from AT&T was based upon the theory that a complete vertical severance of the companies' business relationship would prevent AT&T from monopolizing the various established and emerging telecommunications markets.⁸⁹ The MFJ allowed AT&T to compete for long-distance and other competitive services while the RBOCs and other LECs retained a monopoly over local exchange services.⁹⁰ However, a variety of post-divestiture developments rendered the MFJ's underlying logic hollow and raised the call for deregulation of the entire telecommunications industry. These developments included the notable success of competition in the long-distance market, the erosion of the RBOCs' line-of-business

83. FLA. STAT. § 364.05 (1995).

84. FLA. STAT. § 364.035 (1993) (amended 1995).

85. See 1990 Fla. Laws ch. 90-244.

86. FLA. STAT. § 364.01(3)(c)-(e) (1993) (amended 1995).

87. *Id.* § 364.01 (amended 1995).

88. See Dunbar, *supra* note 37, at 682-91 (criticizing PSC's inaction as contributing to continued monopolization of local exchange services).

89. See discussion *supra* part II.A.2.b.

90. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 222-24 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

restrictions, advancements in telecommunications technology, the existence of potentially viable competition for local exchange services, and the ability of regulators to ensure universal service and consumer protection in a competitive local exchange environment.

A. The Competition for Long-Distance Services

At the time of the divestiture, two major corporations and a host of other telecommunications companies were primed to compete against AT&T in the long-distance market.⁹¹ The ensuing battle between AT&T, MCI, Sprint Corporation, and nearly 500 other companies resulted in substantial benefits to consumers.⁹² These benefits included a dramatic decline in long-distance rates and technological advancements in the telecommunications infrastructure.⁹³

The most recognizable benefit to consumers attributable to competition was the initial decrease of approximately forty percent in long-distance rates in the decade following divestiture.⁹⁴ The fact that this decrease occurred concurrently with an increase in consumer long-distance calls underscores the significance of the statistic.⁹⁵ Since 1992, however, basic rates have slowly increased as AT&T, MCI, and Sprint have separated from the other long-distance companies to capture ninety percent of the market.⁹⁶ Therefore, following a period of competition between many companies, an effective oligopoly has come to dominate the long-distance market. Congress believes that the infusion of new competitors—namely the RBOCs and cable companies—into the

91. Joseph A. Pantoja, *Desirable Economic Cooperation Among High-Technology Industries: A Look at Telephone and Cable*, 1994 COLUM. BUS. L. REV. 617, 651 (1994).

92. *Antitrust Issues in Telecommunications Legislation: Hearings Before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1995) (statement of Howard H. Baker, U.S. Senator from Tennessee) [hereinafter Baker Statement].

93. Michael Schrage, *Let the Baby Bells Ring in Some Long-Distance Rivalry*, WASH. POST, Aug. 20, 1993, at B3 (describing decrease in long-distance basic rates); Dennis & Epstein, *supra* note 17, at *44 (describing expensive advancements to telecommunications infrastructure).

94. Pantoja, *supra* note 91, at 651; Schrage, *supra* note 90, at B3. Senator Howard H. Baker said the decrease in long-distance rates following divestiture was almost 70 percent. Baker Statement, *supra* note 92.

95. See Schrage, *supra* note 93, at B3 (noting that “[p]eople are making more calls for less money”).

96. Gautam Naik, *Costs of Control: Long-Distance Rates, After Falling for Many Years, Have Started Heading Higher*, WALL ST. J., Mar. 20, 1995, at R10. AT&T’s share of the long-distance market is approximately 60 percent, MCI’s is about 20 percent, and Sprint’s is roughly 10 percent. *Id.*

long-distance market will again result in substantial benefits to consumers.⁹⁷

Consumers also will benefit because competition results in exorbitantly expensive upgrades by the long-distance companies to their telecommunication infrastructures.⁹⁸ Indeed, the major companies have invested billions of dollars in the installation of all-digital and fiber-optic networks.⁹⁹ These advanced networks have the capacity to transmit voice, video, and data with amazing clarity and speed.¹⁰⁰ Consumers stand to benefit because these systems pave the way to an information superhighway without speed limits. Notably, consumer long-distance rates have continued to fall despite the remarkably high capital costs absorbed by the competing long-distance companies.¹⁰¹

Congress noticed the effect competition had in the long-distance market and wagered that the deregulation of the local exchange market would result in analogous consumer benefits.¹⁰² As noted by Senator Howard W. Baker, “[t]here is a big lesson in the long-distance story—competition works and monopoly doesn’t.”¹⁰³

B. The Erosion of the RBOC Line-of-Business Restrictions

As previously discussed, the MFJ imposed three line-of-business restrictions on the RBOCs.¹⁰⁴ It prohibited the RBOCs from providing long-distance services, manufacturing telecommunications equipment, and furnishing information services.¹⁰⁵ The restrictions were premised upon the belief that the provision of local exchange services was a natural monopoly, and that the RBOCs and other LECs, as possessors of the monopoly, should not be permitted to gain an unfair advantage in competitive markets by providing discriminatory access to the local networks.¹⁰⁶ Although Judge Greene sanctioned the LEC monopolies, he also recognized that, “over time, the Operating Companies will lose

97. See Baker Statement, *supra* note 92.

98. Dennis & Epstein, *supra* note 17, at *44.

99. *Id.*

100. See KEVIN MANEY, MEGAMEDIA SHAKEOUT 108-09 (1995).

101. Basic rates for long-distance service decreased from 1983 to 1991, while AT&T began building fiber-optic networks in 1984. See Dennis & Epstein, *supra* note 17, at *44-45 (discussing years of construction for advanced networks); Naik, *supra* note 96, at R10 (discussing years that long-distance rates began to increase).

102. See Baker Statement, *supra* note 92.

103. See *id.*

104. See discussion *supra* part II.A.2.b.

105. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

106. *Id.*

the ability to leverage their monopoly power into the competitive markets from which they must now be barred."¹⁰⁷

The MFJ required a triennial review during which the RBOCs could petition the court for modification of the line-of-business restrictions.¹⁰⁸ These reviews resulted in endless litigation as the RBOCs attempted to enter the restricted telecommunications markets.¹⁰⁹ Accordingly, the information services restriction gradually eroded as the RBOCs demonstrated that there was no substantial possibility they would or could use their monopoly power to impede competition.¹¹⁰ During the first triennial review in 1987, Judge Greene modified the restriction on the provision of information services to allow the RBOCs to transmit information generated by non-RBOC sources.¹¹¹ In 1988, the court explained that the ruling of the previous year allowed the RBOCs to provide voice storage systems and the circuits needed for videotext systems such as WESTLAW and LEXIS.¹¹² Finally, in 1993, the court entirely abolished the information services restriction and authorized the RBOCs to provide such services on a fully competitive basis.¹¹³

The line-of-business restrictions regarding long-distance services and the manufacture of telecommunications equipment continued to survive.¹¹⁴ However, commentators called for the elimination of these restrictions, arguing that advancements in technology and the emergence of viable competition for local exchange services were incongruous with the notion that the LECs were natural monopolies.¹¹⁵ Eventually, the elimination of the information services restriction and the erosion of the natural monopoly rationale contributed to Congress's deregulation of local exchange services.¹¹⁶

C. New Technologies and Viable Competition

The exclusive right to provide local exchange services given to the RBOCs and other LECs by the MFJ was based partially upon the theory that other telecommunications companies could not

107. *Id.* at 194.

108. *Id.* at 231.

109. Spulber, *supra* note 40, at 27.

110. See *American Tel. & Tel. Co.*, 552 F. Supp. at 224-25.

111. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 587 (D.D.C. 1987).

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

113. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1578 (D.C. Cir. 1993); see Spulber, *supra* note 40, at 227.

114. See Spulber, *supra* note 40, at 227.

115. See, e.g., *id.*; Friedrich, *supra* note 14, at 684-88; William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 *YALE J. ON REG.* 171 (1994).

116. See *The Telecommunications Agreement*, 104-8 CONG. Q. HOUSE ACTION REP. 3 (1996).

replicate the local networks.¹¹⁷ Judge Greene theorized that the enormous costs necessary to construct the local networks were an all-powerful barrier to market entry for potential local exchange competitors.¹¹⁸ Consequently, in lieu of competition, the MFJ sanctioned government regulation of the local exchange monopolies and authorized the LECs to charge fees to the various telecommunications companies desiring access to homes and businesses.¹¹⁹

The concept that local exchange network construction costs prohibited competition arose during a time when there was only one telecommunications technology.¹²⁰ The telecommunications systems of the early 1980s consisted of twisted pairs of copper wire for voice-grade transmissions, rudimentary central switching equipment, and basic customer premises equipment.¹²¹ Today's technology has advanced to the point where there are numerous forms of telecommunications systems that can facilitate cost-effective competition for local exchange services.¹²²

The copper wire networks used by the LECs for voice transmissions now appear completely incapable of meeting modern society's telecommunications demands.¹²³ Today's consumers require systems with the ability to rapidly send and receive voice, data, and video transmissions.¹²⁴ These needs can presently be satisfied through a variety of technologies, including coaxial cable, fiber-optic cable, microwave, satellite, and cellular communications networks.¹²⁵ Furthermore, modern digital switching equipment can efficiently serve consumers' interconnection needs to a much greater extent than the LECs' antiquated, centrally located switching equipment.¹²⁶

The myriad technologies presently possessed by potential local exchange competitors offer a variety of means to avoid the LEC network bottleneck. Potential competitors can use coaxial and fi-

117. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 223 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

118. *Id.*

119. See *id.* at 131.

120. Spulber, *supra* note 40, at 34-38.

121. *Id.* at 34-35.

122. See *infra* note 122 and accompanying text .

123. Spulber, *supra* note 40, at 35.

124. *Id.* at 35.

125. *Id.* The needs of modern consumers cannot be satisfied through a single best telecommunications technology, but instead require an array of technologies. *Id.* Thus, the competing telecommunications companies of the future will provide a variety of telecommunications services, as opposed to the traditional and rudimentary services of telephone, television, and data. *Id.* at 35-36.

126. *Id.* at 35.

ber-optic cable systems to "bypass" the local exchange networks.¹²⁷ As of 1993, approximately ninety-one million homes were wired with coaxial or fiber-optic cable lines as a means of receiving cable television.¹²⁸ In addition to basic voice-grade transmissions, these lines permit the rapid, high-quality, two-way transmission of data and video communications.¹²⁹ With the addition of modern switching equipment, cable operators such as Tele-Communications Inc. (TCI), Comcast, and Time Warner could effectively compete with the local exchange monopolies.¹³⁰ Although the required switching equipment is expensive,¹³¹ cable companies should nevertheless be able to offset the costs with returns on their television services. Consequently, cable companies will be in a position to compete efficiently with the LECs.

Another type of bypass technology is the alternative local fiber-optic network employed by competitive access providers ("CAPs"). CAPs, such as Teleport Communications and Metropolitan Fiber Systems, construct their own local telephone infrastructures in regions where the LEC networks already exist.¹³² The CAP networks allow consumers to avoid the LEC bottlenecks by connecting directly to the networks of long-distance and other telecommunications carriers.¹³³ Because of the high capital costs of building redundant local networks, CAPs achieve profits by serving commercial facilities with high-volume communications needs.¹³⁴

127. *Id.* at 39; Dunbar, *supra* note 37, at 675-77.

128. Spulber, *supra* note 40, at 38. Cable television companies were originally humble operations that were limited to providing community antenna television services (CATV). Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 *FED. COMM. L.J.* 215, 217-18 (1991). In those early years, the FCC feared that predatory telephone companies had the ability to monopolize the emerging industry. *Id.* Accordingly, the FCC passed rules in the 1970s restricting telephone companies from entering the market. *Id.* Congress later codified most of the FCC rules as part of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.).

129. Spulber, *supra* note 40, at 39. A coaxial cable modem hooked to a personal computer can transmit data at a rate up to 1,000 times faster than a phone line. MANEY, *supra* note 100, at 109.

130. Pantoja, *supra* note 91, at 650-57; Friedrich, *supra* note 14, at 674.

131. MANEY, *supra* note 100, at 108.

132. See Alexander C. Larson & Douglas R. Mudd, *Collocation and Telecommunications Policy: A Fostering of Competition on the Merits?*, 28 *CAL. W. L. REV.* 263, 265 n.5 (1993); Friedrich, *supra* note 14, at 675; Spulber, *supra* note 40, at 44; Dennis & Epstein, *supra* note 17, at *46.

133. See Larson & Mudd, *supra* note 132; Friedrich, *supra* note 14, at 675; Spulber, *supra* note 40, at 44; Dennis & Epstein, *supra* note 17, at *46.

134. Thus, the goal of the CAP is known as "cream skimming." Larson & Mudd, *supra* note 132, at 287-91.

Finally, a variety of wireless networks allow consumers to communicate directly with one another and avoid the wired LEC networks.¹³⁵ These wireless systems enjoy special advantages over not only the LEC systems, but all wire-based systems. One advantage of the wireless technologies (i.e., radio, cellular, microwave, and satellite telecommunications) is that they are cheaper because their providers are not required to construct and maintain extensive hard-wired systems.¹³⁶ Additionally, wireless technologies make communications portable.¹³⁷

Two types of wireless technologies are cellular systems¹³⁸ and personal communications services (PCS).¹³⁹ These technologies provide mobile radio communications services that are not dependent upon hardwire technologies.¹⁴⁰ Both technologies compete with the various broadcasting media for portions of the radio frequency spectrum.¹⁴¹ Until recently, the scarcity of radio frequencies allotted to the cellular and PCS networks by the FCC resulted in higher prices for such telecommunications services.¹⁴² In 1993, however, the FCC set aside a larger portion of the radio spectrum for wireless services and began auctioning the frequencies.¹⁴³ Upon completion of the auctions, cellular and PCS networks

135. See Friedrich, *supra* note 14, at 667-78; Spulber, *supra* note 40, at 40-41.

136. See Friedrich, *supra* note 14, at 673; Dunbar, *supra* note 37, at 677 n.89.

137. MANEY, *supra* note 100, at 53. "Portability" refers to the capability of consumers to access telecommunications services anywhere and at all times, free from a wire-based system. *Id.* The most fantastic example of a portable wireless telephone system is Motorola's proposed Iridium satellite phone system, which will "allow calls to be made from absolutely anywhere in the world, even in the middle of the Sahara Desert." *Id.* This system will consist of 66 low-orbit satellites that possess the combined ability to convey a signal to any point on the globe. *Id.* Special antennae constructed around the earth will receive the satellites' signals. *Id.* Thus, to complete the Iridium venture, Motorola will need the consent and cooperation of the governments of hundreds of countries. Needless to say, "Iridium is an unbelievably huge undertaking." *Id.* at 294.

138. Cellular networks consist of a series of interlocking cells, each of which contains one radio transceiver for telecommunications transmissions. Friedrich, *supra* note 14, at 662. Central switching services link these transceivers to wired telephone systems. *Id.* at 663. Thus, cellular technology is an extension of wire-based technology. *Id.* at 663-64.

139. PCSs employ microcellular technology, which is less expensive than cellular technology but also less powerful. *Id.* at 671. PCS companies shoulder large capital costs to install their networks. *Id.* However, once a PCS network is in place, these capital costs rapidly decrease as the marginal costs of adding subscribers to a PCS network are significantly lower than the costs of adding subscribers to the traditional local exchange network. *Id.* at 672-73.

140. See Richard E. Wiley, *The Telecommunications Act of 1995?*, in PRACTICING LAW INST., COMMUNICATIONS LAW: 1995 (Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G4-3945) (Nov. 1995), available in WESTLAW, PLI Database, at *50-53.

141. Friedrich, *supra* note 14, at 662-63.

142. *Id.*

143. *Id.* at 671.

will be able to provide telephone services to consumers at reduced rates and will thus effectively compete with the LECs.¹⁴⁴

Many commentators think that the efficient and convenient wireless technologies will ultimately dominate telecommunications services as the hardwire networks find themselves unable to meet consumer demands.¹⁴⁵ Underscoring this belief is the fact that wireless communication services had 15 million subscribers in 1994, and are expected to have 80 million subscribers by 1997 and 145 million subscribers by 2002.¹⁴⁶ One confident observer believes that “[i]n the near future, wireless technology will be the clear choice for local communications.”¹⁴⁷

D. Universal Service and Consumer Protection

The central purposes underlying the regulation of telecommunications historically have been the provision of universal communications services and the protection of consumers.¹⁴⁸ The universal service policy goal ensures that consumers receive a minimum level of telephone services at a reasonable price, regardless of their location.¹⁴⁹ Consumer protection policies guard against unjust and discriminatory practices within the telecommunications industry.¹⁵⁰ Mindful of the fundamental nature of each of these policies, Congress amended the Communications Act to require that any deregulation of the local exchange market preserve the provision of universal service and the protection of consumers.¹⁵¹

Before 1996, federal and state telecommunications regulations funded universal service by subsidizing the LEC services provided to rural and other economically undesirable areas.¹⁵² In reforming the telecommunications laws, however, legislators

144. *Id.*

145. See, e.g., Gail Garfield Schwartz & Jeffrey H. Hoagg, *Virtual Divestiture: Structural Reform of an RHC*, 44 *FED. COMM. L.J.* 285, 294 (1992); Spulber, *supra* note 40, at 38-40; Friedrich, *supra* note 14, at 669-74.

146. Spulber, *supra* note 40, at 40.

147. Friedrich, *supra* note 14, at 674.

148. See 47 U.S.C. §§ 151-613 (1994); see also *WOKO, Inc. v. FCC*, 109 F.2d 665, 671 (D.C. Cir. 1939) (holding that the policy of the Communications Act of 1934 is the public's protection).

149. Wiley, *supra* note 140, at *12.

150. *MCI Comm. Corp. v. American Tel. and Tel. Co.*, 462 F. Supp. 1072, 1087 (D. Ill. 1978).

151. See H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 130-34 (1996).

152. Dennis & Epstein, *supra* note 17, at *59. These subsidies commonly came in two forms. First, the federal government allowed the LECs to charge fees the long-distance companies seeking access to the local exchange network. *Id.* at *60. Second, state governments had the ability to allocate a portion of the costs of maintaining the local exchange network to the long-distance companies operating within the state. *Id.* at *60-61.

faced the problem of how to continue universal service in an era of deregulation.¹⁵³ To harmonize the seemingly incompatible goals of deregulation and universal service, lawmakers proposed two mechanisms. First, the contributions of all local exchange service providers could create a "universal fund," with the proceeds delivered to those companies operating in locations that require subsidization.¹⁵⁴ Second, Congress could require the LECs to remain in rural areas as carriers of last resort and authorize them to charge other telecommunications companies with interconnection access fees.¹⁵⁵

Before 1996, universal services consisted of single-line, voice-grade telephone services, long-distance carrier connections, and 911 access.¹⁵⁶ However, the advent of competition brings the technological ability to provide consumers with a wide array of telecommunications services.¹⁵⁷ Thus, a second problem faced by the lawmakers who desired to eliminate the LECs' monopoly was deciding what type of local exchange services must be provided universally.¹⁵⁸ One proposed solution was to allow the federal and/or state governments to continually assess which telecommunications services could be provided universally and then mandate the provision of such services.¹⁵⁹

The deregulation of the local exchange market also prompted lawmakers to consider additional consumer protection measures. Some proposals placed disclosure requirements on the competing telecommunications companies to facilitate the informed selection of local exchange providers by consumers.¹⁶⁰ Other proposals mandated that companies supply to consumers general information concerning the deregulation of the local exchange market.¹⁶¹ The latter measures were thought to be necessary because of the

153. Wiley, *supra* note 140, at *12; Dennis & Epstein, *supra* note 17, at *62.

154. Wiley, *supra* note 140, at *13; FLA. S. COMM. ON COM. & ECON. OPP., A REVIEW OF TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, 14-15 (1994) (on file with comm.) [hereinafter TELECOMMUNICATIONS TECHNOLOGY AND REGULATION].

155. TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, *supra* note 154, at 14.

156. *Id.* at 15; Dennis & Epstein, *supra* note 17, at *64-65.

157. Dennis & Epstein, *supra* note 17, at *65.

158. For example, should public policy dictate that LECs provide all consumers the telecommunications technology necessary for the transmission of video, data, and interactive services? Wiley, *supra* note 140, at *12.

159. *Id.* at *13 (stating that congressional proposals divided the task between federal and state "joint boards"); TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, *supra* note 154, at 15 (recommending that the task be performed by state commissions).

160. TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, *supra* note 154, at 15.

161. *Id.*

considerable confusion among consumers following deregulation of the long-distance market in 1984.¹⁶²

IV. CONGRESS REACTS: THE TELECOMMUNICATIONS ACT OF 1996

Today our world is being remade . . . by an information revolution, changing the way we work, the way we live, the way we relate to each other. Already the revolution is so profound that it is changing the dominant economic model of the age. And already, thanks to the scientific and entrepreneurial genius of American workers in this country, it has created vast, vast opportunities for us to grow and learn and enrich ourselves in body and in spirit.

. . . But this revolution has been held back by outdated laws, designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light.¹⁶³

The call to reform telecommunications regulation resulted in the passage of the Telecommunications Act of 1996.¹⁶⁴ This legislation represents Congress's first comprehensive revision of telecommunications law since the passage of the Communications Act of 1934. Congress generally intended the 1996 Act to stimulate further competition and technological advancements in the telecommunications industry and to provide the public with a greater variety of telecommunications services.¹⁶⁵

The scope of the legislation is enormous. The Act abolishes the legal obstructions that prevented the various telecommunications companies from competing in other markets.¹⁶⁶ It also eliminates

162. *Id.*

163. President Bill Clinton, Remarks at the Signing Ceremony for the Telecommunications Act Conference Report of 1996 (Feb. 9, 1996). The signing ceremony was appropriately located at the Library of Congress. *Id.*

164. Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.). The Act is the product of a conference agreement between the Senate and the House of Representatives. The Senate passed its bill (S. 652) in June 1995, by a vote of 81 to 18. Edmund L. Andrews, Senate Approves Far-Reaching Bill on Media Industry, *N.Y. TIMES*, June 15, 1995, at A1. The House passed its version of the measure (H.R. 1555) in August 1995, by a vote of 305 to 117. Mark Landler, House Passes Bill Curtailing Rules on Phones and TV, *N.Y. TIMES*, Aug. 4, 1995, at 1. President Clinton signed the resulting conference agreement into law on February 8, 1996. Edmund L. Andrews, Communications Bill Signed, And the Battles Begin Anew, *N.Y. TIMES*, Feb. 9, 1996, at A1.

165. See 142 CONG. REC. E204 (daily ed. Feb. 1, 1996) (statement of Rep. Forbes); 142 CONG. REC. S686, S686-87 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler); 142 CONG. REC. S1172 (daily ed. Feb. 9, 1996) (statement of Sen. Lott).

166. See 47 U.S.C.A. §§ 251-61 (West Supp. 1996).

the remaining line-of-business restrictions that precluded RBOCs from providing long-distance services and manufacturing telecommunications equipment.¹⁶⁷ The legislation deregulates the cable television industry¹⁶⁸ and removes all restrictions relating to the ownership of television and radio stations.¹⁶⁹ It censors obscenity and violence on television and computer networks.¹⁷⁰ Furthermore, the Act abolishes all consent decrees regarding the regulation of telecommunications, including the MFJ.¹⁷¹ Finally, the Act preempts all state and local laws that impede the congressional goal of competition in the telecommunications industry.¹⁷²

This Comment explores only those provisions of the Act which implicate the breakdown of the local exchange monopolies. The Act generally seeks to foster local exchange competition by requiring the incumbent LECs to allow competing alternative LECs to use to their networks¹⁷³ and prohibiting state and local governments from inhibiting competition.¹⁷⁴ The following section will detail the Act's equal access requirements, the measures that ensure continued provision of universal service, the abolition of the MFJ, and the preemption of state and local regulations that operate as barriers to market entry.

A. Equal Access Requirements

To facilitate competition for all telecommunications services, the Act imposes a general duty of network interconnection upon telecommunications carriers.¹⁷⁵ Carriers must provide this network interconnection on a nondiscriminatory basis and may not impose features that would inhibit the seamless transmission of

167. *Id.* §§ 271-74. The line-of-business restrictions that bar the incumbent LECs from providing long-distance services and equipment manufacturing are continued until actual competition is present within the local exchange. *Id.*

168. *Id.* § 521-573.

169. Pub. L. No. 104-104, 110 Stat. 56, 110-112 (1996) (uncodified directive to FCC to amend their broadcasting regulations).

170. 47 U.S.C.A. §§ 223, 303. (West Supp. 1996). This Comment does not explore the Act's patent infringement upon the freedom of expression guaranteed by the First Amendment. See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (preliminarily enjoining Department of Justice from enforcing sections 223(a)(1)(B), 223(a)(2), and 223(d)(1)-(2) of Act).

171. Pub. L. No. 104-104, 110 Stat. 56, 143-144 (1996) (uncodified elimination of various consent devices).

172. 47 U.S.C.A. § 253 (West Supp. 1996).

173. *Id.* § 251.

174. *Id.* § 253.

175. *Id.* § 251(a)(1). Essentially, "interconnect" refers to the interface of telecommunications systems.

information across networks.¹⁷⁶ The Act authorizes the FCC to promulgate rules to effectuate “coordinated network planning.”¹⁷⁷

The Act also imposes certain pro-consumer requirements upon all LECs.¹⁷⁸ Coincident to the provision of telecommunications services, local carriers must ensure “number portability.”¹⁷⁹ Number portability refers to the ability of consumers to change their carrier while retaining their unique telecommunications identifier (i.e., telephone number).¹⁸⁰ The local carriers also must provide “dialing parity,” which ensures that the customers of competing alternative LECs are not required to dial more numbers to access other telecommunication networks than the customers of the incumbent LECs.¹⁸¹

Additionally, all LECs must meet certain minimum requirements designed to advance local exchange competition. First, local carriers must provide their services for “resale” to competing carriers.¹⁸² This measure allows the competing carriers to purchase bundled or consolidated telephone services at wholesale prices and resell them to individual customers at retail rates.¹⁸³ The local carriers must provide equal access to competing carriers that need the use of the local carrier’s poles, ducts, conduits, and rights-of-way to connect with the existing local network.¹⁸⁴ Finally, the competing carriers must provide “reciprocal compensation” agreements with local carriers to ferry and terminate telecommunications traffic.¹⁸⁵

The Act places additional requirements solely upon incumbent LECs. Congress designed these measures to prevent incumbent LECs from engaging in anti-competitive practices.¹⁸⁶ An incumbent LEC must allow the nondiscriminatory interconnection of an alternative LEC’s equipment and facilities to the existing local exchange network at reasonable rates.¹⁸⁷ Furthermore, an incum-

176. *Id.* §§ 251(a)(2), 256(a).

177. *Id.* § 256(b).

178. *Id.* §§ 251(b)-(c).

179. *Id.* § 251(b)(2).

180. *Id.* § 153(30).

181. *Id.* §§ 251(b)(3), 153(15).

182. *Id.* § 251(b)(1).

183. See *id.* § 251(c)(4) (explaining analogous resale requirement placed specifically upon incumbent LECs). For example, an alternative LEC can purchase switching services from the incumbent LEC and resell those services to its customers. This facilitates competition by enabling the alternative LEC to provide switched-access services such as call-waiting without having to purchase multi-million dollar switching equipment.

184. *Id.* § 251(b)(4).

185. *Id.* § 251(b)(5).

186. See Wiley, *supra* note 140, at *10-12.

187. 47 U.S.C.A. § 251(g) (West Supp. 1996).

bent LEC must permit an alternative LEC to physically "collocate" its equipment directly on the premises of the incumbent LEC's central office at a reasonable rate.¹⁸⁸ If physical collocation is not feasible, a state commission may authorize the "virtual" collocation of an alternative LEC's equipment at some other locale.¹⁸⁹ Finally, an incumbent LEC must offer an alternative LEC access to individual or "unbundled" telephone services on reasonable, nondiscriminatory terms and conditions.¹⁹⁰

B. Universal Services

As previously stated, the goal of universal service has historically been to ensure that consumers are not denied certain basic telephone services merely because they live in areas deemed by the telecommunications companies to be economically undesirable.¹⁹¹ The deregulation of the telecommunications industry and the ostensible end of government mandates complicated the achievement of this policy goal.¹⁹² Which services should be provided universally? How should Congress guarantee universal service in a deregulated environment? Who should pay for the provision of services to those locations where profits cannot be earned? Congress addressed these questions in section 254 of the 1996 Act.¹⁹³

Recognizing the dynamic nature of the telecommunications industry, the Act defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically . . . taking into account advances in telecommunications and information technologies and services."¹⁹⁴ In delineating the services to be provided universally, the FCC must consider four factors beyond the widespread availability of basic telephone services: (1) the extent to which telecommunications services are integral to public education, health, or safety;¹⁹⁵ (2) the range of services that are provided to a majority of residential consum-

188. *Id.* § 251(c)(6).

189. *Id.*

190. *Id.* § 251(c)(3).

191. See discussion *supra* part III.D.

192. *Id.*

193. 47 U.S.C.A. § 254 (West Supp. 1996).

194. *Id.* § 254(c)(1). FCC Commissioner Andrew Barrett suggested that the industry costs associated with such an expansive definition of universal service could be onerous. FCC Launches Universal Service Joint Board, Rulemaking Proceeding, COMM. TODAY, Mar. 11, 1996, available in WESTLAW, COMTD Database, at *3.

195. 47 U.S.C.A. § 254(e)(1)(A) (West Supp. 1996).

ers;¹⁹⁶ (3) the range of services offered by the various telecommunications carriers;¹⁹⁷ and (4) the extent to which telecommunications services can serve society's interests, convenience, and needs.¹⁹⁸

Instead of enacting express mandates to provide universal services, Congress created the "Federal-State Joint Board on Universal Service" (Joint Board) to work with the FCC in studying the attendant issues.¹⁹⁹ The Act charges the Joint Board with considering public comment on the implementation of the universal services goals and proposing recommendations to the FCC to promulgate by rule.²⁰⁰ The Act also outlines various consumer protection principles that must be incorporated into the FCC's universal service rules.²⁰¹ These principles include the provision of services at reasonable rates,²⁰² nondiscriminatory universal access to advanced services in all locations,²⁰³ and such other consumer protection principles as the Joint Board and FCC deem necessary.²⁰⁴ In summing up the goals of the Joint Board, FCC Chairman Reed Hundt stated that success "will be measured by whether, five years from now, American citizens . . . have a greater choice of communications providers and services than ever before."²⁰⁵

C. The Abolition of the AT&T Consent Decree

Statutory amendment could not, in itself, achieve true competition for local exchange services. It was necessary that any reforms also address enduring judicial pronouncements. Thus, to be successful, the reforms needed to effectively eliminate the MFJ maintained by the federal district court in the District of Columbia. This was a dangerous task. If Congress classified the MFJ as a final judgment, it would risk unconstitutionally encroaching upon the power of the judiciary if it eliminated the order's retro-

196. *Id.* § 254(c)(1)(B).

197. *Id.* § 254(c)(1)(C).

198. *Id.* § 254(c)(1)(D).

199. *Id.* § 254(a).

200. *Id.*

201. *Id.* § 254(b).

202. *Id.* § 254(b)(1).

203. *Id.* § 254(b)(2)-(4).

204. *Id.* § 254(b)(7).

205. Hundt Seeks State Input on Universal Service Notice, WASH. TELECOM NEWS, Mar. 4, 1996, available in WESTLAW, ALLNEWS Database, at *2.

active effect.²⁰⁶ If Congress determined that the MFJ was a continuing injunction, however, it could constitutionally eliminate the order's prospective effect.²⁰⁷

Therefore, to prevent the MFJ from hindering the goals of telecommunications reform, Congress demonstrated its belief that the MFJ was an injunction rather than a final judgment by referring to it throughout the Act as the "AT&T Consent Decree."²⁰⁸ As an injunction, Congress eliminated only the prospective impact of the MFJ, thus avoiding any potential constitutional problems.²⁰⁹ Eventually, Judge Greene gladly abolished the retroactive impact of the MFJ upon motions by the Department of Justice and the seven RBOCs.²¹⁰

D. Preemption

The final means by which Congress encouraged competition for local exchange services concern the express preemption of restrictive state laws.²¹¹ Before passage of the Act, approximately half of the states maintained laws that strictly forbade any competition for local exchange services.²¹² These obstructive laws are now preempted. The Act provides that no state or local law may prevent any entity from providing local telephone services.²¹³ However, the Act preserves the ability of states to enact laws that ensure, among other things, the provision of universal services, the protection of the public welfare, and the preservation of the quality of telecommunications services.²¹⁴ Additionally, state and local governments may continue to manage access and compensation issues related to public rights-of-way.²¹⁵

206. H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 198 (1996) (citing *Plaut v. Spenthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)).

207. *Id.* (citing *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992)).

208. *Id.*

209. *Id.* at 91.

210. See DOJ and Bells Agree MFJ is Moot; Fight Over Documents Begins, COMM. TODAY, Mar. 1, 1996, available in WESTLAW, COMTD Database, at *1. Judge Greene reportedly supports the federal Act and believes it will successfully bring competition to local exchange and long-distance markets. However, he fears that the recent avalanche of mergers and acquisitions in the telecommunications industry could result in a monopolistic concentration of ownership. Ma Bell Judge Backs Telecommunications Bill, NEWSDAY, Feb. 18, 1996, at 5.

211. Congress did not intend for the Act to preempt implicitly any federal, state, or local regulations. H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 92 (1996).

212. See The Telecommunications Agreement, 104-8 CONG. Q. HOUSE ACTION REP. 8 (1996).

213. 47 U.S.C.A. § 253(a) (West Supp. 1996).

214. See *id.* § 253(b); see also *id.* § 254(f) (describing the ability of states to promulgate universal service regulations); *id.* § 253(b) (describing the ability of states to impose regulations concerning quality of service and consumer protection).

215. *Id.* § 253(c).

The Act does not specifically describe which types of state or local law risk preemption. Instead, Congress authorized the FCC to identify and suspend the enforcement of any state or local law that hinders competition for local exchange services.²¹⁶ Once identified, the FCC will afford state or local governments notice and an opportunity to respond before preemption.²¹⁷ However, some state officials are concerned that an aggressive use of the preemptive power delegated to the FCC could stifle the ability of states to facilitate competition and protect consumers.²¹⁸ To ease these concerns, FCC Chairman Reed Hundt assured the states that the FCC will use its preemptive authority with restraint and on a case-by-case basis.²¹⁹

V. THE LEFTOVERS: NONPREEMPTED FLORIDA TELECOMMUNICATION REFORMS

Before Congress addressed the issue, the Florida Legislature had answered the call to reform the regulation of the local exchange market.²²⁰ On June 17, 1995, a bill amending chapter 364, Florida Statutes, became law without the signature of Governor Lawton Chiles.²²¹ The legislative intent of the Florida Act is to encourage competition for local exchange services and streamline government regulation.²²² In general, the Florida Act seeks to achieve these goals by authorizing the PSC to certify alternative LECs to compete with incumbent LECs and allowing prices to be regulated by market forces rather than the government.²²³

As previously discussed, certain express provisions of the federal Act preempt state law with respect to the regulation of local exchange markets.²²⁴ For example, the Florida Act provides that no alternative LEC may be certified by the PSC to compete with

216. *Id.* § 253(d).

217. *Id.*

218. Preemption Concerns Remain, But States View FCC Outreach as Sincere, COMM. TODAY, Feb. 29, 1996, available in WESTLAW, COMTD Database, at *1.

219. *Id.*

220. See discussion *supra* part III.

221. 1995 Fla. Laws ch. 95-403. This bill easily passed each house of the Florida Legislature. Vicki McCash, *New Law Opens the Lines to Local Phone Competitors*, FT. LAUD. SUN-SENT., June 18, 1995, at 11A. Governor Chiles opposed the bill, fearing that it did not contain enough consumer protection measures. *Id.* The Governor allowed the bill to become law without his signature, however, because he believed the Legislature would override his veto. *Id.*

222. Fla. H.R. Staff Analysis, *supra* note 51, at 2. Upon enactment, Florida became one of only nine states to open its local exchange market to competition. McCash, *supra* note 221, at 11A.

223. FLA. STAT. § 364.337 (1995) (alternative LEC certification section); *id.* § 364.051 (1995) (price regulation section).

224. See discussion *supra* part IV.D.

a “small” incumbent LEC until January 1, 2001, unless the small incumbent LEC elects price regulation or offers cable television services.²²⁵ This provision is undoubtedly subject to preemption by the FCC because the Florida law has “the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”²²⁶ Aside from such an obvious example, it unclear what other sections of the Florida Act may be subject to preemption by the federal Act.²²⁷ The FCC will address the preemption of perceived obstructive state laws on a case-by-case basis.²²⁸

Should any provision of the Florida Act be preempted, a severability clause will prevent the invalidation of any nonpreempted provisions.²²⁹ Moreover, the federal Act specifically states that certain pro-consumer state laws will not be preempted.²³⁰ The following section will discuss the various nonpreempted, pro-consumer sections of the Florida Act.

A. Universal Service

Congress created the Joint Board to study universal service issues and make recommendations for the FCC to promulgate by rule.²³¹ In contrast, the Florida Legislature chose to codify specific measures designed to ensure universal service.²³² These measures will not be subject to preemption if they are perceived by the FCC to “preserve and advance universal service.”²³³

Like the federal Act, the Florida Act adopts a definition of universal service intended to evolve with technology and the extent of competition within the local exchange market.²³⁴ Unlike the federal Act, the Florida Act defines the scope of the basic services to be provided universally. “Basic local telecommunications service[s]” means the voice-grade transmission of local exchange services, and access to long-distance services, emergency services operator assistance, directory assistance, and a telephone number directory.²³⁵ The Florida Act requires all LECs to supply such ba-

225. FLA. STAT. § 364.337(1) (1995).

226. 47 U.S.C.A. § 253(a) (West Supp. 1996).

227. See discussion *supra* part IV.D.

228. See *id.*

229. 1995 Fla. Laws ch. 95-403, § 37, at 3350.

230. See discussion *supra* part IV.D.

231. See discussion *supra* part IV.B.

232. FLA. STAT. § 364.025 (1995).

233. 47 U.S.C.A. § 253(b) (West Supp. 1996).

234. FLA. STAT. § 364.025(1) (1995).

235. *Id.* § 364.02(2).

sic services to any person within the LECs' service areas during the four years following enactment.²³⁶

The Florida Act authorizes the PSC to create a temporary mechanism to fund the provision of universal service for four years following enactment.²³⁷ Before the end of this period, the Legislature will codify a permanent funding mechanism designed to reasonably and equitably guarantee the provision of basic local exchange services to the greatest number of consumers at a fair price.²³⁸ Traditionally, consumers subsidized universal service.²³⁹ Florida law now requires the PSC's temporary mechanism to ensure that alternative LECs contribute their "fair share" to this subsidization.²⁴⁰ In creating a permanent funding mechanism, the Legislature may opt to avoid the use of subsidies.²⁴¹ If the Legislature deems subsidies to be necessary, however, telecommunications service providers will supply the funds.²⁴²

B. Consumer Protection

Opponents of the Florida Act believe the Legislature has failed to adequately protect consumers from rapidly escalating rates and unscrupulous business practices.²⁴³ The Legislature and other supporters of the law argue that the Act will lower consumer rates, improve customer service, and increase access to beneficial technology.²⁴⁴ Accordingly, Representative Scott Clemons, chairman of the Florida House Committee on Telecommunications and Utili-

236. Id. § 364.025(1).

237. Id. § 364.025(2).

238. Id. § 364.025(4).

239. Fla. H.R. Staff Analysis, *supra* note 51, at 10.

240. FLA. STAT. § 364.025(2) (1995).

241. Id. § 364.025(4)(a).

242. Id. § 364.025(4)(d).

243. Opponents to the Florida Act include Attorney General Robert A. Butterworth, the Public Service Commission, the Florida Consumer Action Network, the American Association of Retired Persons, and the Consumer Federation of America. See John Kennedy, *Phone Deregulation Rife with Uncertainty*, ORLANDO SENT., Nov. 20, 1995, at 10 [hereinafter Kennedy, *Phone Deregulation*]; John Kennedy, *Groups Oppose Phone Measure*, ORLANDO SENT., May 19, 1995, at C3 [hereinafter Kennedy, *Groups Oppose Phone Measure*]; Rene Stutzmand & Michael Griffin, *Communications Bill Gets a Pass—The Law is Expected to Give Floridians a Choice of Local Phone Service Providers, Better Service and Lower Bills*, ORLANDO SENT., June 17, 1995, at A10. Surprisingly, AT&T, soon to be an alternative LEC, also opposed the Florida Act. McCash, *supra* note 221, at 11A. AT&T believed the Act did not fully open the local exchange market to competition. Id. Their concern now appears to be unwarranted because the preemptive federal Act goes further in seeking a fully competitive market. See *id.*

244. See Kennedy, *Groups Oppose Phone Measure*, *supra* note 243, at 11A.

ties, stated, “[p]oint by point, we addressed [the opponents’] issues . . . [and] put in the strongest consumer protections of any state.”²⁴⁵

One method by which the Florida Act protects consumers is through the capitation of basic local exchange service rates until 1999.²⁴⁶ The purpose of rate capitation is to protect consumers from rapidly escalating prices by allowing local exchange competition the time necessary to emerge and establish efficient rate levels.²⁴⁷ The basic rates for incumbent LECs that elected to be subject to price regulation by January 1, 1996, are capped for three years at the rate levels in effect on July 1, 1995.²⁴⁸ The incumbent LECs that elect to be subject to price regulation after January 1, 1996, will have the rates in place on that date frozen until January 1, 1999.²⁴⁹ Finally, the rates of any incumbent LEC owning over three million local service access lines will be capped until January 1, 2001.²⁵⁰ Southern Bell is the only incumbent LEC large enough to fall within the ambit of the last provision.²⁵¹

The Florida Act instructs the PSC to analyze the extent to which competition exist in the local exchange markets.²⁵² Based upon its analysis, the PSC must present to the Legislature by December 1, 1997, an exchange-by-exchange recommendation on whether there is a need to continue the capitation of rates.²⁵³ The Legislature may then extend the rate caps an additional two years or abolish them and impose an alternative means of ensuring reasonable and affordable rates.²⁵⁴ Irrespective of this process, an LEC may petition the PSC for a rate increase if that provider believes a substantial change in circumstances justifies such an action.²⁵⁵

Because multiple companies offering local exchange services possibly may confuse the public,²⁵⁶ a second consumer protection provision requires the PSC to establish a “consumer information program.”²⁵⁷ This program appraises local exchange subscribers of the availability of alternative providers, the rights of consumers

245. McCash, *supra* note 221, at 11A.

246. FLA. STAT. § 364.051(2) (1995).

247. See Fla. H.R. Staff Analysis, *supra* note 51, at 9.

248. FLA. STAT. § 364.051(2)(a) (1995).

249. *Id.* § 364.051(2)(b).

250. *Id.* § 364.051(2)(a).

251. See Fla. H.R. Staff Analysis, *supra* note 51, at 9.

252. FLA. STAT. § 364.051(3)(b) (1995).

253. *Id.* § 364.051(3)(a).

254. *Id.* § 364.051(3)(c).

255. *Id.* § 364.051(5)(c).

256. See discussion *supra* part III.D.

257. 1995 Fla. Laws ch. 95-403, § 32, at 3348.

under the new law, the role of the PSC in regulating the provision of local exchange services, and any other relevant information.²⁵⁸ The consumer information likely will be disseminated in the form of telephone bill inserts.²⁵⁹

The Florida Act offers an assortment of other consumer protections. Certain local exchange providers must provide a "Lifeline Assistance Plan" to eligible consumers.²⁶⁰ Furthermore, no LEC employee may intentionally disclose customer information without customer authorization or a subpoena or court order requiring such disclosure.²⁶¹ Any employee who violates this provision commits a second-degree misdemeanor.²⁶² Finally, the Florida Act requires the PSC to submit annual reports to the Legislature describing whether consumers are receiving quality local exchange services at reasonable rates.²⁶³

VI. THE FUTURE OF COMPETITION FOR LOCAL EXCHANGE SERVICES

The enactment of federal and Florida telecommunications reforms have spurred a nationwide debate over the acts' probable outcomes. Supporters proclaim that the reforms will create competitive markets, reduce prices for telecommunications services, generate economic growth, encourage technological advancements, and create high-wage jobs.²⁶⁴ Opponents fear the acts were designed solely to benefit big business at the expense of consumer protection.²⁶⁵

The central issue in the debate concerns the probable impact upon consumers and the telecommunications industry of deregulating the local exchange monopolies.²⁶⁶ Will consumers benefit

258. *Id.*

259. *Id.*

260. FLA. STAT. § 364.10(2) (1995).

261. *Id.* § 364.24(2).

262. *Id.*

263. *Id.* § 364.386(1)(d).

264. *E.g.*, President Bill Clinton, Remarks at the Signing Ceremony for the Telecommunications Act of 1996 (Feb. 9, 1996); United States Representative Thomas J. Bliley, Jr., Remarks on the Occasion of the President's Signing of the Telecommunications Act of 1996 (Feb. 9, 1996); 142 CONG. REC. H1145-06, H1146 (daily ed. Feb. 1, 1996) (statement of Rep. Linder); 142 CONG. REC. S1172-01 (daily ed. Feb. 9, 1996) (statement of Sen. Lott).

265. *E.g.*, Robert W. McChesney, Telecommunications Law: Corrupt, Disastrous, CAP. TIMES, Feb. 12, 1996, at 1C; Eli M. Noam, Congress Sweeps it All Under One Big Top, L.A. TIMES, Feb. 15, 1996, at 9.

266. *See, e.g.*, Kanell, *supra* note 1, at F5; McChesney, *supra* note 265, at 1C; Noam, *supra* note 265, at 9; Robert Reno, Expect Some Potholes on the Road to Telecommunica-

from lower local exchange rates, an increased number of service providers, and advanced beneficial services? Will the reforms result in the death of the local exchange monopoly and the birth of true and sustained competition? Which companies will be the most successful competitors in the local exchange market? Will the federal and Florida acts require substantial amendment in the future? Although the dynamic nature of the telecommunications industry makes predictions very difficult, the following section analyzes these questions and attempts to provide answers.

A. The Customer is King

The first noticeable impact of the federal and Florida telecommunications reforms will be a rush of competition by those companies with the near-current ability to provide local exchange services.²⁶⁷ This competition will result in lower rates and impressive telecommunications packages as the various local exchange companies vie for subscribers.²⁶⁸ Many commentators expect the "cutthroat" competition to result in rate reductions of twenty to fifty percent from 1996 to 1999.²⁶⁹ In the event the competition does not result in rate reductions, the rate capitation measures within the Florida Act will prevent the incumbent LECs from raising prices until 1999.²⁷⁰

In addition to lowering their rates, competing companies will bundle various telecommunications services and provide subscribers with "one-stop shopping."²⁷¹ Consumers will have the ability to receive all their telecommunications needs—including local and long-distance telephone services, cellular services, cable television, Internet access, and other on-line services—from a single carrier.²⁷² Moreover, the competing companies will package

tions Reform, MINN. STAR-TRIB., Feb. 19, 1996, at 12A; Edwin Yoder, Feeling Wary About Telecommunications Act; GREENSBORO NEWS & REC., Feb. 7, 1996, at A9.

267. See discussion *infra* part VI.B.

268. Neal Weinberg, Telco Managers Dial for Reform Dollars, COMPUTERWORLD, Feb. 5, 1996, at 1A; Katia Hetter, Dialing for Dollars Consumers Benefits, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 51. The first consumers to experience these benefits will be corporations and individuals residing in areas of high subscriber concentration. Luther Turmelle, Law Gives AT&T Boost in Local Phone Market, COURIER-NEWS, Feb. 9, 1996, at A1 (describing which customers will be among the first to benefit from competition); Shannon Henry, Telecom Supercarriers Set to Battle for Your Business, WASH. TECH., Mar. 7, 1996, available in WESTLAW, WASHTECH Database, at *4 (predicting that businesses will benefit the most from competition).

269. Weinberg, *supra* note 268, at 1A (quoting James Georgakis, assistant vice president of NatWest Bank); Hetter, *supra* note 268, at 51; Turmelle, *supra* note 268, at A1.

270. See FLA. STAT. § 364.051(2) (1995).

271. Henry, *supra* note 268, at *1.

272. Hetter, *supra* note 268, at 51.

these services economically to attract consumers.²⁷³ For example, AT&T recently offered a bundled package of Internet and telephone services, through which its current telephone subscribers received five hours of free access to its WorldNet Internet service.²⁷⁴ The carrier's goal in offering such discounted bundled services will be to create customer loyalty.²⁷⁵ One AT&T official stated that "[t]here will be a range of offerings this industry has never seen before . . . [a]s much or as little as the consumer wants."²⁷⁶ Clearly, the valued customer will be king.

B. Survival of the Fittest

The competing local exchange companies will include long-distance carriers, cable companies, and RBOCs willing to journey into the once-forbidden territories of other LECs. Within only one month of the enactment of the federal Act, AT&T submitted applications to all fifty state telecommunications commissions to provide local exchange services in their respective states.²⁷⁷ Time Warner Communications applied to provide local exchange services throughout Ohio.²⁷⁸ Comcast developed plans to offer local exchange services in Florida, California, and New Jersey.²⁷⁹ BellSouth announced it will expand its operations in Orlando, Florida, to compete with Sprint United, an incumbent LEC.²⁸⁰ These examples are only the beginning. Fostering competition for local exchange services was the cornerstone of the federal and Florida acts,²⁸¹ and the legislation initially will achieve the desired effect.

Once a company such as AT&T or Comcast has received authorization from a state commission to provide local telephone services, most of the new alternative LECs will negotiate with the incumbent LECs for interconnection and collocation with the

273. Henry, *supra* note 268, at *2.

274. *Id.*

275. *Id.*; Hetter, *supra* note 268, at 51.

276. Henry, *supra* note 268, at *3.

277. AT&T Tries for Local Service, ARIZ. REP., Mar. 5, 1996, at C1. AT&T plans to offer local telephone services in some locations by as early as the summer of 1996.*Id.*

278. Alan Johnson, Ameritech Hits Ruling by PUCO, COLUMBUS DISPATCH, Mar. 2, 1996, at 1A.

279. Christopher Stern, Cable Has Uphill Road to Telco Entry, BROADCASTING & CABLE, Feb. 19, 1996, at 58.

280. BellSouth Files to Offer Local Service in Orlando, COMM. TODAY, March 5, 1996, available in WESTLAW, COMTD Database, at *1.

281. See Noam, *supra* note 265, at 9.

existing local exchange network.²⁸² Interconnection and collocation negotiations between the incumbent LECs and their competitors promise to be highly contentious processes.²⁸³ The recent legal reforms will not ameliorate the difficulty of these processes because the federal Act merely requires incumbent LECs to negotiate in "good faith."²⁸⁴ Congress left the specific legal mandates to the FCC to promulgate by rule.²⁸⁵ However, no matter how arduous the interconnection and collocation negotiations, they will not prevent the onslaught of local exchange competition.²⁸⁶ Therefore, incumbent LECs are likely to successfully complete the negotiations because the federal Act does not permit them to enter the long-distance market until effective competition exists within their local exchange territory.²⁸⁷

With the advent of local exchange competition, the telecommunications industry should experience an incredible era of consolidation, resulting in the birth of multi-billion dollar "telecommunications supercarriers."²⁸⁸ Two great rewards will prompt acquisitions and mergers among the telecommunications companies. First, consolidation will allow the supercarriers to offer consumers an attractive and diversified package of telecommunications services.²⁸⁹ Second, the supercarriers will be able to provide their new packages to the combined subscriber populations of the previously independent companies.²⁹⁰ Such rewards already have influenced a series of high profile, multi-billion dollar mergers. For example, US West, an RBOC, completed the purchase of the nation's third largest cable company, Continental Cablevision, for \$10.8 billion shortly after the federal Act was signed into law.²⁹¹ This acquisition gave US West the instant

282. See Stern, *supra* note 279, at 58. Of course, an alternative LEC has the option to construct its own highly expensive local infrastructure to provide local telephone services.

283. *Id.* (discussing difficult negotiation process cable companies will have with incumbent LECs). One jaded cable official predicted the incumbent LECs will only open their markets to competition after "[n]egotiation, regulation, [and] litigation."*Id.*

284. 47 U.S.C.A. § 251(c)(1) (West Supp. 1996).

285. *Id.*

286. See Stern, *supra* note 279, at 58.

287. See 47 U.S.C.A. § 271 (West Supp. 1996).

288. A.T. KEARNEY, AN ASSESSMENT OF THE TELECOMMUNICATIONS ACT OF 1996 AND ITS IMPACT ON COMPETITION AND THE CONVERGING COMMUNICATIONS, INFORMATION, AND ENTERTAINMENT INDUSTRIES 2 (1996) (predicting the Telecommunications Act of 1996 will result in "\$100 billion plus 'convergence companies' "); Henry, *supra* note 268, at *2; Kanell, *supra* note 1, at F5; McChesney, *supra* note 265, at 1C.

289. See Henry, *supra* note 268, at *2.

290. *Id.*

291. US West Pursues Cable Strategy with \$10.8 Billion Continental Cablevision, ELECTRONIC MARKETPLACE REP., Mar. 5, 1996, available in WESTLAW, ELMKTPR Data-

ability to provide a broad range of cable and telephone services to 13.9 million subscribers.²⁹²

Unfortunately, the deregulation of the local exchange market may eventually result in an oligopoly of a small number of telecommunications supercarriers.²⁹³ The competition for local telephone subscribers will be so fierce, and the need to consolidate so strong, that a Darwinian world where only the strongest telecommunications entities survive may indeed become a reality.²⁹⁴ The deregulation of the telecommunications industry could therefore mirror that of the deregulated airline, banking, and long-distance telephone industries.²⁹⁵ For example, airline deregulation in the early 1980s eventually resulted in a major consolidation of the industry and the death of once-successful companies such as Eastern and Pan American Airlines.²⁹⁶ Additionally, the deregulated long-distance market today is dominated by three long-distance giants.²⁹⁷ This oligopoly will be the future of the local exchange market without effective regulation by the FCC and continuing oversight by Congress.²⁹⁸ One congressman, mindful of his continuing duty, stated: "If instead of unleashing full blown competition, [telecommunications deregulation] starts us on the path of having seven monopolies dominate local and long-distance service, we must intervene."²⁹⁹

C. Heirs to the Empire

The telecommunications companies that will emerge from the initial burst of competition to inherit the local exchange market

base, at *1; Henry, *supra* note 268, at *5. Another huge consolidation in the industry occurred when SBC Communications Inc. purchased Pacific Telesis Group for approximately \$16 billion. SBC and PacTel Merge to Create Second Largest Telecom Company, *COMM. TODAY*, Apr. 2, 1996, available in WESTLAW, COMTD Database, at *1-2. Upon the acquisition, SBC Communications became the second largest telecommunications company in the world, behind AT&T. *Id.* Other recent telecommunications consolidations include the Walt Disney Corporation's acquisition of Capital Cities/ABC and the Westinghouse Electric Corporation's acquisition of CBS Inc. *Telecom Mergers Feared*, *TULSA WORLD*, Sept. 14, 1995, at B6.

292. Henry, *supra* note 268, at *5.

293. See Reno, *supra* note 266, at 12A; Kanell, *supra* note 1, at F5; McChesney, *supra* note 263, at 1C.

294. See Reno, *supra* note 266, at 12A; Kanell, *supra* note 1, at F5; McChesney, *supra* note 263, at 1C.

295. See Reno, *supra* note 266, at 12A.

296. *Id.*

297. See Naik, *supra* note 96, at R10.

298. See Reno, *supra* note 266, at 12A (observing that Congress and the FCC must carefully mind progress of telecommunications deregulation).

299. 142 CONG. REC. E204-02 (daily ed. Feb. 23, 1996) (statement of Rep. Forbes).

must possess certain competitive advantages over their rivals. First, the companies must have respected reputations and well-known names.³⁰⁰ Brand names give new products and services legitimacy.³⁰¹ In an environment where competition had not previously existed, consumers will flock to companies they know and trust.³⁰² Second, each of the companies must have the ability to quickly secure a share of the local exchange market.³⁰³ Thus, the more successful companies will be those with local networks already in place or the financial resources available to quickly access or build those networks.³⁰⁴ Third, each of the companies must possess tremendous wealth.³⁰⁵ Companies will require enormous amounts of investment capital to maintain the technology necessary to compete. The following sections briefly describes those companies with the qualities necessary to dominate the local exchange market.

1. AT&T

Shortly following the enactment of the Telecommunications Act of 1996, AT&T Chairman Robert Allen stated that the company expects to control at least thirty percent of the local exchange market within ten years.³⁰⁶ This prediction is certain to prove true for a number of reasons. First, AT&T has the most extensive telecommunications network in the world.³⁰⁷ Through this network, AT&T presently provides long-distance services to approximately sixty percent of the subscribers in the United States.³⁰⁸ AT&T could quickly convert these subscribers to receive its local exchange services as well. Second, the company is incredibly rich. In 1994, AT&T had over \$70 billion in revenue, \$6 billion in operating income, and \$7 billion in cash flow.³⁰⁹ Thus, AT&T can purchase everything it needs to effectively dominate the local exchange market.³¹⁰ Third, AT&T is ultra-competitive.³¹¹

300. MANEY, *supra* note 100, at 348-49; Henry, *supra* note 265, at *4.

301. See MANEY, *supra* note 100, at 348 (describing Nextel Communications' association with MCI as a design to attract consumers).

302. *Id.* at 348.

303. Kanell, *supra* note 1, at F5 (predicting that the companies that will thrive in the local exchange market are those that currently have wires in subscribers' homes and businesses).

304. *Id.*

305. See Pantoja, *supra* note 91, at 660.

306. Turmelle, *supra* note 268, at A1.

307. MANEY, *supra* note 100, at 186.

308. Naik, *supra* note 96, at R10.

309. MANEY, *supra* note 100, at 186.

310. *Id.*

311. *Id.*

In anticipation of telecommunication deregulation, the company laid off many employees for efficiency and invested billions of dollars in state-of-the-art technologies.³¹² Fourth, AT&T quickly positioned itself to compete for local exchange services in all fifty states.³¹³ As discussed above, once the negotiations for interconnection and collocation conclude, AT&T will immediately begin to provide local telephone services.³¹⁴ To summarize AT&T's position following the recent reforms, "[u]nless it royally screws up, AT&T is the only company that really can't lose."³¹⁵

2. Bell Atlantic, BellSouth, SBC Communications, and US West

The RBOCs clearly have the most to lose by deregulation of the local exchange market. With scores of companies prepared to provide local telephone services, the RBOCs, unfamiliar with the art of competition, are certain to lose significant portions of their once-monopolistic empires.³¹⁶ However, for three primary reasons, the larger and wealthier RBOCs—such as Bell Atlantic, BellSouth, SBC Communications, and US West—will remain major providers of local exchange services. First, the RBOCs almost exclusively possess the most valuable assets of any of the telecommunications carriers: the local telephone networks. RBOC competitors will need to either construct more comprehensive local networks or access the RBOCs' networks. As mentioned, constructing a local network is expensive, and access to the RBOCs' networks will not occur without a prolonged and costly fight.³¹⁷ Second, the local exchange markets are the RBOCs' to lose. Almost every local telephone subscriber in the United States is a customer of an RBOC.³¹⁸ Many nervous consumers likely will prefer to maintain the status quo and remain with their regional telephone company rather than switch to a carrier that has never before offered local telephone services. Third, the RBOCs are extremely wealthy. The regional telephone companies have a combined annual revenue of over \$95 billion,³¹⁹ cash flow of over \$32

312. *Id.*

313. AT&T Tries for Local Service, *supra* note 277, at C1.

314. See discussion *supra* part VI.B.

315. MANEY, *supra* note 100, at 186.

316. "[W]hen you have 100 percent of the local dial-tone (business) in the market, there's only one way to go, and that's down." Rene Stutzman, Phone-Service Providers Plan to Answer Call for Competition; Change Expected to Expand Industry by Adding Jobs, *ORLANDO SENT.*, Jan. 8, 1996, at 29 (quoting Sprint/United vice president of finance Rick McRae).

317. Stern, *supra* note 279, at 58.

318. MANEY, *supra* note 100, at 66.

319. Pantoja, *supra* note 91, at 660.

billion,³²⁰ and assets of over \$200 billion.³²¹ This money would be well-spent by the RBOCs to rapidly update their antiquated copper wire networks into more desirable advanced fiber-optic networks.

3. TCI, Time Warner, and Comcast

The nation's largest cable companies, such as TCI, Time Warner, and Comcast, possess three main advantages that will permit them to compete with the telephone companies for local exchange subscribers. First, cable companies currently own more technologically advanced wired networks than their competitors.³²² Compared to the telephone companies' primitive copper wire networks, coaxial cable and fiber-optic cable networks have more desirable transmission capabilities.³²³ Second, approximately sixty percent of American households are currently wired for cable television.³²⁴ With the addition of switching equipment, cable companies will quickly possess the ability to compete in the local exchange arena.³²⁵ Third, cable companies are wealthy, albeit not as wealthy as the RBOCs or major long-distance carriers. The annual revenues of the cable companies are approximately \$24 billion, and their assets roughly total \$50 billion.³²⁶ These funds will be necessary to continue to build fiber-optic networks, pay interconnection and collocation fees, and purchase advanced switching equipment.

VII. CONCLUSION

The recent telecommunications reforms will achieve the goal of bringing competition to the local exchange market. No longer will consumers be forced to receive antiquated local exchange services from a single carrier. In the future, competing global supercarriers will not only provide advanced local exchange services, but also the full array of consumers' telecommunications needs. Be-

320. MANEY, *supra* note 100, at 65-66.

321. Pantoja, *supra* note 91, at 660.

322. MANEY, *supra* note 100, at 112. The major telephone companies do not consider cable companies a threat in the competition for local exchange services. Speaking before a cable television conference, one commentator noted that "cable should remember that 'telephone companies don't look at cable companies as equals. . . . Don't even question [the telephone companies'] manhood.'" Marcia H. Pounds, *Cable's Tough Fight Starts at the Bells*, FT. LAUD. SUN-SENT., Mar. 15, 1996, at 1D.

323. Pantoja, *supra* note 91, at 662.

324. *Id.* at 661.

325. See discussion *supra* part V.C.

326. Pantoja, *supra* note 91, at 661.

cause of the consolidation of the industry and the competitive advantages shared by the major telecommunications companies, however, an era of effective oligopoly eventually will emerge, in which a small number of supercarriers dominate each of the nation's telecommunications markets. Should this state of oligopoly adversely impact consumers and the development of beneficial technologies, Congress must again act. The nation's telecommunications laws must evolve with the telecommunications industry. The Telecommunications Act of 1996 may well need to give way to the Telecommunications Act of 2010.