

# ARTICLE

## THE ECHOES OF FORGOTTEN FOOTFALLS: TELECOMMUNICATIONS MERGERS AT THE DAWN OF THE DIGITAL MILLENNIUM

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\* Cf. T.S. ELIOT, *Burnt Norton*, in *FOUR QUARTETS* 13, 13, ll. 11-14 (1971) (“Footfalls echo in the memory / Down the passage which we did not take / Towards the door we never opened / Into the rose-garden.”).

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I. THE DECEPTION OF THE THRUSH

American telephony's first legal era spanned 120 years, a period that may be called a "long century" or "great century."<sup>1</sup> Almost exactly 120 years passed between the February 14, 1876, filing of Alexander Graham Bell's application for a patent on "certain new and useful Improvements in Telegraphy"<sup>2</sup> and the February 8, 1996, passage of the Telecommunications Act of 1996.<sup>3</sup> The passage of the Communications Act of 1934<sup>4</sup> marked the halfway point of this great century. The signature legal event of this era, however, was the entry of the Modification of Final Judgment (MFJ) in the Department of Justice's monumental antitrust case against American Telephone and Telegraph (AT&T), colloquially known as the "Bell breakup decree."<sup>5</sup> Until February 8, 1996, the forced separation of the Bell system's local exchange, interexchange, and equipment manufacturing divisions represented the paramount achievement of telecommunications law and perhaps even of antitrust enforcement in the United States.<sup>6</sup>

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1. A traditional unit of measurement called the "long hundred" or the "great hundred" actually denoted 120. See R.S. Radford, Essay, *Going to the Island: A Legal and Economic Analysis of the Medieval Icelandic Duel*, 62 S. CAL. L. REV. 615, 619 n.19 (1989) (questioning the proper interpretation of "hundreds" in medieval Icelandic ransoms reported in BRUCE E. GELSINGER, *ICELANDIC ENTERPRISE: COMMERCE AND ECONOMY IN THE MIDDLE AGES* 33-34 (1981); David D. Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399, 411-14 (1979)); cf. *Smith v. Wilson*, (1832) 3 B. & Ad. 728, 732, 110 Eng. Rep. 266 (K.B.) (defining a "thousand" as 1,200).

2. *The Telephone Cases*, 126 U.S. 1, 6 (1887). See generally MICHAEL K. KELLOGG ET AL., *FEDERAL TELECOMMUNICATIONS LAW* § 1.2.1, at 5-6 (1992) (providing an historical account of the race between Elisha Gray and Alexander Graham Bell to build the world's first fully operative telephone).

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

4. Communications Act of 1934, Pub. L. No. 416, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-614).

5. See *United States v. W. Elec. Co.*, 569 F. Supp. 1057 (D.D.C.), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983); *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *superseded by Telecommunications Act of 1996*, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143, *reprinted in* 47 U.S.C. § 152 (2000) (comprising the antitrust case and its legislative result).

6. See generally ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 222 (1989) (referring to the breakup of

The Telecommunications Act of 1996 promised to “promote competition and reduce regulation, . . . secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies.”<sup>7</sup> One decade later, many observers have argued that the Act in practice fell far short of the expectation that legislative reform would “open[] all telecommunications markets to competition.”<sup>8</sup> The record of mergers within the telecommunications industry since 1996 has drawn especially bitter criticism. Consumers Union, for instance, complained in 1998 that the propensity of “telephone monopolies . . . to merge rather than compete” would prevent the Telecommunications Act from “deliver[ing] on its promise of broad-based competition and lower telephone prices.”<sup>9</sup> In announcing 1999 hearings on “why the Act has promoted mergers instead of competition,” Senator John McCain treated the record of telecommunications mergers as conclusive evidence of the Act’s failure: “The 1996 Telecommunication Act has failed miserably and has left us with results that are the exact opposite of what was intended . . . . Rather than promoting competition in the industry, the Act has led to a flood of megamergers.”<sup>10</sup>

Courts have assigned much of the blame to the Act’s failure to be “a model of clarity.”<sup>11</sup> “[M]ost unfortunate,” the Supreme Court

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American Telephone and Telegraph (AT&T) as “the most consequential piece of telecommunications deregulation”); Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1396 (1999) (suggesting that the “enactment of the Telecommunications Act was the most important transformative event in telecommunications law . . . since . . . the Bell System was broken up”).

7. Telecommunications Act of 1996, Pub. L. No. 104-104, pmb., 110 Stat. 56; *cf.*, e.g., 47 U.S.C. § 257(b) (2000) (instructing the Federal Communications Commission (FCC or “Commission”) “to promote . . . policies and purposes . . . favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity”).

8. S. REP. NO. 104-230, at 1 (1996) (Conf. Rep.).

9. *Consolidation in the Telecommunications Industry: Has It Gone Too Far?: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition of the S. Comm. on the Judiciary*, 105th Cong. 24 (1998) (testimony of Gene Kimmelman, Codirector, Consumers Union).

10. Press Release, Senate Comm. on Commerce, Science, and Transp., McCain Announces Hearing on Mergers & Consolidation in Commc’ns Indus. (May 7, 1999), available at <http://commerce.senate.gov/press/106-57.htm>.

11. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) (describing the Act’s lack of clarity as a “gross understatement”); *accord*, e.g., Mich. Bell Tel. Co. v. MCI Metro Access Transmission Servs., Inc., 323 F.3d 348, 352 (6th Cir. 2003) (quoting the Supreme Court’s “not a model of clarity” statement); MCI Telecomms. Corp. v. U.S. W. Commc’ns, 204 F.3d 1262, 1266 (9th Cir. 2000) (citing *Iowa Utils. Bd.*, 525 U.S. at 397); Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd., 189 F.3d 1, 19 (1st Cir. 1999) (quoting *Iowa Utils. Bd.*, 525 U.S. at 397); Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 449 (5th Cir. 1999) (“It is difficult to disagree with the Supreme Court’s assessment that the Act is ‘a model of

has lamented, this Act, “is in many important respects a model of ambiguity or indeed even self-contradiction. . . . that profoundly affects a crucial segment of the economy worth tens of billions of dollars.”<sup>12</sup> Dissatisfaction with the Telecommunications Act may be measured by the sheer number of law firm partnerships and tenured academic positions granted in response to the legislation’s flaws.<sup>13</sup> As Joseph Farrell has complained, “How can an Act that says ‘shall’ 2,036 times be deregulatory?”<sup>14</sup>

Among the gauges by which critics have weighed the Telecommunications Act of 1996 and found it wanting,<sup>15</sup> the record of mergers among telecommunications firms since the law’s passage figures prominently as evidence of legislative failure. The very sort of merger that former Federal Communications Commission (FCC or “Commission”) Chairman Reed Hundt once called “unthinkable”<sup>16</sup>—a reunification of AT&T with one of the former Bell operating companies (BOCs)—is on the verge of completion. After nearly eight years of courtship, SBC has consummated its \$16 billion acquisition of AT&T, thereby “creat[ing] a company that largely resembles but does not equal the monopoly popularly known as Ma Bell.”<sup>17</sup> The SBC/AT&T merger, however, was not even the most prominent telecommunications merger announced during the winter of 2004–05. In February 2005, Verizon announced its plans to acquire MCI for \$6.6 billion;

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ambiguity . . . .” (quoting *Iowa Utils. Bd.*, 525 U.S. at 397)); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 641 (2d Cir. 1999).

12. *Iowa Utils. Bd.*, 525 U.S. at 397; cf. Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired*, 22 YALE J. ON REG. 315, 341 (2005) (asserting that “the language of [the Telecommunications Act] does not speak with magnificent clarity”).

13. Cf. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2721 (2005) (Scalia, J., dissenting) (“It is indeed a wonderful new world[,] . . . one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.”); Martin D. Begleiter, *Material Participation Under Section 2032A: It Didn’t Save the Family Farm But It Sure Got Me Tenure*, 94 DICK. L. REV. 561, 561–62 (1990) (addressing analogous complexity and ambiguity issues found in the Tax Code).

14. Joseph Farrell, Chief Economist, Federal Communications Commission, *Creating Local Competition*, Speech Before an Open Audience at the FCC (May 15, 1996), in 49 FED. COMM. L.J. 201, 211 (1996).

15. See generally DALE E. LEHMAN & DENNIS L. WEISMAN, *THE TELECOMMUNICATIONS ACT OF 1996: THE “COSTS” OF MANAGED COMPETITION* 4–6 (2000) (providing a laundry list of problematic issues arising from the Telecommunications Act and suggesting that the “massive consolidation” in the telecom sector “is fueling additional fears about the future of competition in the industry”).

16. See *F.C.C. Sees Obstacles to an AT&T Merger*, N.Y. TIMES, June 13, 1997, at D2 (reporting Chairman Hundt’s reaction to rumors of merger negotiations between AT&T and SBC); Mark Landler, *In Unusual Move, F.C.C. Chief Criticizes a Possible Deal*, N.Y. TIMES, June 19, 1997, at D1 (same).

17. Ken Belson, *SBC Is near a Deal to Acquire AT&T for \$16 Billion*, N.Y. TIMES, Jan. 31, 2005, at A18.

ever since, Verizon has successfully engaged Qwest, a fellow BOC, in a battle over MCI.<sup>18</sup> A few weeks before these announcements, Sprint and Nextel announced a merger that would create a wireless communications company worth roughly \$35 billion, with 35 million subscribers and \$40 billion in annual revenue.<sup>19</sup>

At a certain level, the mere presence of these mergers and the amounts of money at stake demonstrate a creeping stability in the American telecommunications industry. In their magnitude, these mergers were modest by the standards of the mergers that took place in the immediate aftermath of the 1996 Act.<sup>20</sup> Though the AT&T that SBC hoped to acquire in 2005 has been shorn of its wireless and long-distance divisions and specialized almost exclusively in the provision of cable television and broadband, the \$16 billion purchase price that it fetched seems very modest relative to the \$16.5 billion—in 1996 dollars—that SBC paid for Pacific Telesis in the first horizontal BOC merger of the post-1996 era.<sup>21</sup> Verizon paid less than one-fifth of the \$37 billion that WorldCom paid for MCI in 1997. Valued at \$35 billion, the Sprint/Nextel merger is worth roughly 50% more than the combined value of AT&T and MCI. In other words, the country's third-largest wireless company is worth half again as much as the remnants of AT&T and MCI. Those companies are not only two of the most venerable companies rooted in long-distance telephony; their epic legal battles, from the 1969 FCC order in *In re Microwave Communications, Inc.*<sup>22</sup> to the 1994 Supreme Court case, styled *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,<sup>23</sup> once defined the essence of telecommunications law and policy in the United States. That both companies would be takeover targets less than a decade after the passage of the Telecommunications Act and that their combined purchase price would be dwarfed by the value of a contemporaneous merger among wireless carriers, testify to epochal changes in

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18. See *Regulators Approve Phone Company Mergers, with Terms*, N.Y. TIMES, Nov. 1, 2005, at C8 (discussing the takeover of AT&T by SBC and the Verizon purchase of MCI).

19. For a journalistic summary of these transactions and for background information, see Ken Belson, *Dial M for Merger*, N.Y. TIMES, Jan. 28, 2005, at C1.

20. For an account of the post-1996 telecom megamergers, see Jim Chen, *The Magnificent Seven: American Telephony's Deregulatory Shootout*, 50 HASTINGS L.J. 1503, 1505 (1999).

21. At the time, this deal was the third-largest merger in U.S. history. See *SBC Completes \$16.7 Billion Merger with Pacific Telesis*, N.Y. TIMES, Apr. 2, 1997, at D4.

22. *In re Microwave Commc'ns, Inc.*, 18 F.C.C.2d 953, 966 (1969) (concluding "that the public interest will be served by a grant of MCI's application" for a common carrier license).

23. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994) ("Like most cases involving the role of [AT&T] in our national telecommunication system, these have a long history.").

telecommunications and the law governing the industry's structure.

The legal fate of these mergers is at once a historical mirror and a harbinger of American telecommunications law beyond the first decade under the 1996 Act. No serious observer expects the SBC/AT&T, Verizon/MCI, and Sprint/Nextel mergers to encounter insuperable legal obstacles. Though "[t]he conditions set—or brushed aside—by regulators in deciding whether to approve each of [these] three big deals . . . will be among the most significant policy decisions for the industry since Congress rewrote telecommunications rules" in 1996,<sup>24</sup> the FCC and Department of Justice's record on mergers within the telecommunications industry is likely to remain unchanged. In the post-MFJ era, no significant telecommunications merger has failed to receive regulatory approval in the United States.<sup>25</sup> The 1996 Act and its implementation have signaled that federal authorities will remain content to extract concessions in exchange for their approval of even the largest mergers within the telecommunications industry. The prospect that the Commission or the Justice Department would actually bar a merger, however, has diminished to a historic nadir.

A decade after comprehensive legislative reform of telecommunications, all three significant segments of the industry are highly concentrated. The local exchange and wireless sectors

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24. Stephen Labaton, *With Huge Proposed Mergers, the Regulatory Maze Ahead for a Recast F.C.C.*, N.Y. TIMES, Feb. 15, 2005, at C6.

25. MCI WorldCom's abortive effort to acquire Sprint in 1999 stands out as the only significant telecommunications merger of the past decade to have failed on legal grounds. That failure cannot be attributed to American communications law. FCC Chairman William Kennard reacted quickly and curtly to MCI WorldCom's proposed purchase of Sprint:

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

Statement of FCC Chairman William E. Kennard on Proposed Merger of MCI WorldCom, Inc. & Sprint Corp., 1999 WL 787485 (Oct. 5, 1999). Chairman Kennard's preemptive strike notwithstanding, the FCC probably would have approved the MCI WorldCom/Sprint merger: "an FCC official close to" the chairman conceded that "it is unlikely that [the FCC] will block the transaction outright." Elizabeth Douglass & Jube Shiver, Jr., *Telecom Deal Fans Concerns for Consumers*, L.A. TIMES, Oct. 6, 1999, at C1. The previous year, the FCC had approved WorldCom's purchase of MCI on the relatively modest condition that the merged firm divest MCI's Internet access assets to the British firm Cable & Wireless. *See In re WorldCom, Inc.*, 13 F.C.C.R. 18,025, 18,104 (1998). The European Union's objections eventually scuttled the proposed MCI WorldCom/Sprint merger, which would have united what were then the second- and third-largest interexchange carriers in the United States. *See* Decision 2003/790, Case COMP/M.1741-MCI WorldCom/Sprint, 2003 O.J. (L 300) 1 (EC). Europe's rejection of this merger lies beyond the scope of this Article.

alike are dominated by three firms. Miniature versions of the old Bell system have emerged on each coast, as Verizon and SBC perfect their geographic division of the United States. The cable industry is only slightly less concentrated, and nothing stands between further consolidation and integration in that industry except provisions of the 1996 Act that had been designed to protect competition within media rather than telecommunications markets. If, as appears increasingly likely, Voice over Internet Protocol (VoIP) overcomes every other form of terrestrial telecommunications technology, control of telecommunications will be divided between providers of broadband Internet access and wireless network operators. Firms that are most facile in integrating wireless and wireline services, for residential and business customers alike, will dominate the industry.

Part II of this Article reviews the mergers that have reshaped the telecommunications industry since the Bell breakup decree and, in particular, since the passage of the 1996 Act. It analyzes the legal framework that has developed in response to the 1996 Act and its implementation. Much of the FCC's merger policy has grown out of its response to horizontal mergers involving incumbent telecommunications carriers. The Telecommunications Act's cable provisions and certain legal tools independent of the 1996 legislative reform have facilitated an alternative approach to merger policy. That alternative path has assumed ever greater importance as the Internet and access to it via cable-based platforms have achieved greater prominence within the market for telecommunications services.

Part III explores why the Act accelerated rather than retarded the trend toward consolidation and concentration in telecommunications. Having devoted most of its energy toward legal issues whose technological and economic roots lay deep in the Bell breakup decree, the Act failed altogether to deal with the Internet. This oversight was merely one of several profoundly mistaken technological assumptions underlying the Telecommunications Act. It also explores possible avenues for reform that remain open under the 1996 Act—or in some cases in spite of it—should the federal government ever conclude that anticompetitive potential of telecommunications mergers outweighs their salutary effects.

## II. THE EVOLUTION OF FCC MERGER POLICY

Mergers tend to come in waves. The telecommunications industry since 1996 represents a classic instance of contemporaneous merger activity among related firms. Merger

waves may arise as a reaction to some source of “exogenous shock to . . . industry structure,” attributable to sudden shifts in demand, technological innovation, or deregulation.<sup>26</sup> The 1996 Act may have provided precisely the sort of institutional spur to a telecommunications industry whose preexisting oligopolistic structure inherently favored mergers by raising the benefits from increased concentration relative to free-riding gains accrued by nonmerging firms.<sup>27</sup> Excessively optimistic projections of profitability in Internet-based services and businesses during the stock market bubble of the late 1990s almost surely compounded telecommunications firms’ marginal propensity to merge.<sup>28</sup>

Part II of this Article will examine in detail the contribution of the 1996 Act to the wave of mergers in telecommunications that has reshaped the industry in the first decade after comprehensive legislative reform. After outlining the basic statutory framework for FCC review of telecommunications mergers, this Article will focus on two large classes of mergers: horizontal mergers between former local exchange affiliates of the Bell system and cable mergers covered by the media concentration provisions of the Communications Act.

A. *The Statutory Framework for FCC Review of Telecommunications Mergers*

All mergers affecting interstate commerce are subject to section 1 of the Sherman Act, which bars “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”<sup>29</sup> Section 7 of the Clayton Act imposes an independent and specifically targeted ban on mergers that “may [tend] substantially to lessen competition” or “tend to create a monopoly.”<sup>30</sup> The Clayton Act authorizes the FCC to review and to reject mergers involving at least one “common carrier[] engaged in wire or radio communication or radio transmission of energy.”<sup>31</sup>

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26. Gilles Le Blanc & Howard Shelanski, *Telecommunications Mergers in the EU and US: A Comparative Institutional Analysis*, in MERGER REMEDIES IN AMERICAN AND EUROPEAN UNION COMPETITION LAW 172, 177 (François Lévêque & Howard Shelanski eds., 2003).

27. See generally Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSPS. 103, 108 (2001) (claiming that deregulation is often the shock that creates merger activity).

28. See Le Blanc & Shelanski, *supra* note 26, at 178–80.

29. 15 U.S.C. § 1 (2000).

30. 15 U.S.C. § 18 (2000).

31. 15 U.S.C. § 21(a) (2000).

Unlike the Sherman Act's emphasis on mature conspiracies and monopolies, the Clayton Act was designed to deter anticompetitive acts in their "incipiency," before the onset of irreparable economic harm.<sup>32</sup> The legislative history of the Clayton Act stated that the statute would seek "[b]roadly . . . to prohibit and make unlawful certain trade practices" outside the immediate reach of the Sherman Act and thereby "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."<sup>33</sup> Certain mergers allegedly present such "anticompetitive potential" that regulators should patrol the market "even in the absence of incipient monopoly" and even when the "merging[] of resources may . . . lead to efficiencies that benefit consumers."<sup>34</sup> The Sherman Act's inability to reach conspiracies between firms under common corporate control<sup>35</sup> arguably places a premium on effective enforcement of the Clayton Act, which constitutes the last line of defense before the consummation of a potentially anticompetitive merger.

Although the Clayton Act's "incipiency" theory did inspire the Communications Act of 1934 approach to the FCC's broadcast licensing standards,<sup>36</sup> the Communications Act did not give the FCC "the power to decide antitrust issues as such."<sup>37</sup> Conversely, "Commission action was not intended to prevent enforcement of the antitrust laws in federal courts."<sup>38</sup> To be sure, section 221 of the

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32. See, e.g., *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 277-78 (1975) (citing *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957)); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170-71 (1964) ("The grand design of the original § 7 . . . was to arrest incipient threats to competition"); *E.I. du Pont de Nemours & Co.*, 353 U.S. at 589, 597 (interpreting the intent of the Act as aimed at arresting the formation of monopolies and conspiracies in their infant stages); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356 (1922) ("The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency . . .").

33. S. REP. NO. 63-698, at 1 (1914), reprinted in 2 *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1744* (Earl W. Kutner ed., 1978).

34. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984); accord, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) ("[T]he Commission has power . . . to arrest trade restraints in their incipiency without proof that they amount to an outright violation of . . . the Clayton Act . . ."); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (interpreting the Act to allow a prediction about the anticompetitive impact a given merger may have in the future); *FTC v. Cement Inst.*, 333 U.S. 683, 693 (1948) ("All of the committee reports . . . reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which . . . might lead to . . . restraint if not stopped in its incipient stages.").

35. See *Copperweld*, 467 U.S. at 772-73 (refusing to apply § 1 of the Sherman Act to so-called "intra-enterprise conspirac[ies]").

36. See 47 U.S.C. § 314 (2000) (allowing mere "purpose" to reduce competition to suffice).

37. *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959).

38. *Id.*

Communications Act originally did authorize the FCC to immunize certain telecommunications mergers from antitrust scrutiny,<sup>39</sup> but the 1996 Act repealed the Commission's authority in this regard.<sup>40</sup> Other comparably "detailed regulatory scheme[s] . . . ordinarily" shield the entities subject to them "from antitrust scrutiny altogether."<sup>41</sup> Section 601(b)(1) of the 1996 Act, however, provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."<sup>42</sup> The Supreme Court has held that section 601 "bars a finding of implied immunity" from "claims that satisfy established antitrust standards."<sup>43</sup>

In reviewing the FCC's record in regulating mergers since 1958, two observers conceded that they had "not found a case . . . where the Commission proceeded under the Clayton Act."<sup>44</sup> The FCC does frequently invoke its Clayton Act jurisdiction,<sup>45</sup> but it never squarely rests on that authority.<sup>46</sup> Instead, the FCC usually reviews telecommunications mergers under the "public convenience, interest, or necessity" standard that pervades the Communications Act of 1934,<sup>47</sup> "so construed as to secure for the

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39. See 47 U.S.C. § 221(a) (1994) (repealed 1996) (allowing the Commission to provide immunity from congressional antitrust action to certain consolidations through discretionary certification procedures).

40. See Telecommunications Act of 1996 § 601(b)(2), 47 U.S.C. § 152 (2000). See generally Douglas B. McFadden, Essay, *Antitrust and Communications: Changes After the Telecommunications Act of 1996*, 49 FED. COMM. L.J. 457, 460-62 (1997) (discussing the impact of the repeal of the FCC's authority to immunize mergers).

41. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004); see also *United States v. Nat'l Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694, 734 (1975) (suggesting that a "federal agency entrusted with regulation in the public interest [should] carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws"); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 691 (1975) (holding that an "[i]mplied repeal of the antitrust laws" is required to enable the legislative intent behind the Exchange Act).

42. Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 56, 143.

43. *Trinko*, 540 U.S. at 406 (internal quotation marks omitted).

44. James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMMLAW CONSPPECTUS 195, 198 (1998).

45. See, e.g., *In re WorldCom, Inc.*, 13 F.C.C.R. 18,025, 18,031-33 (1998) (asserting that although the Commission could use its Clayton Act authority, it was sufficient to rely on its power under the Communications Act); *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 20,001 (1997) (discussing the Commission's authority pursuant to the Clayton Act but finding that the Commission's public interest review was sufficient to make a proceeding under the Clayton Act unnecessary); *In re Pac. Telesis Group*, 12 F.C.C.R. 2,624, 2,631 (1997) (laying out the Commission's Clayton Act authority but ultimately choosing to rely on its jurisdiction under the Communications Act).

46. See Weiss & Stern, *supra* note 44, at 198 ("In numerous Commission decisions reviewing communications industry mergers, the FCC mentions the Clayton Act, but never uses the Clayton Act as its basis for proceeding.").

47. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47

public the broad aims of” the statute.<sup>48</sup> For instance, in approving WorldCom’s 1998 acquisition of MCI,<sup>49</sup> the FCC relied on its power under sections 214(a) and 310(d) of the Communications Act.<sup>50</sup> Section 214(a) requires the FCC to certify that new service, the curtailment or abandonment of old service, or the transfer of previously granted licenses to common carriers will serve the public interest.<sup>51</sup> Section 310(d) requires the same certification with respect to wireless licenses.<sup>52</sup> The Commission usually “find[s] [its] jurisdiction under the Communications Act to be sufficient to address all the competitive effects” of a proposed merger, “including the [Clayton Act] issue of whether [a] proposed transfer [of licenses] may substantially lessen competition or tend to create a monopoly.”<sup>53</sup>

It is unsurprising that the FCC routinely reviews telecommunications mergers under the Communications Act’s public interest standard instead of invoking its Clayton Act jurisdiction.<sup>54</sup> The FCC, after all, is “entrusted with the responsibility to determine when and to what extent the public interest would be served by competition.”<sup>55</sup> It is not, strictly speaking, an antitrust agency,<sup>56</sup> for the “public interest standard necessarily subsumes and extends beyond the traditional parameters of . . . the antitrust laws.”<sup>57</sup> The “public interest,” as

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U.S.C. §§ 151–614 (2000)).

48. *W. Union Div., Commercial Telegraphers’ Union v. United States*, 87 F. Supp. 324, 335 (D.D.C.), *aff’d mem.*, 338 U.S. 864 (1949).

49. *See In re WorldCom, Inc.*, 13 F.C.C.R. at 18,027, 18,153 (concluding that the merger would serve the “public interest, convenience, and necessity”).

50. *See id.* at 18,026, 18,030–31 (citing 47 U.S.C. §§ 214(a), 310(d) (1994)) (explaining the Commission’s broad authority and the many factors that it must take into account when considering a proposed merger).

51. 47 U.S.C. § 214(a) (2000).

52. 47 U.S.C. § 310(d) (2000). *See generally* Howard A. Shelanski, *From Sector-Specific Regulation to Antitrust Law for US Telecommunications: The Prospects for Transition*, 26 TELECOMM. POL’Y 335, 338 (2002) (stating that section 310(d) requires the Commission to find that a transfer meets the public interest standard).

53. *E.g., In re Pac. Telesis Group*, 12 F.C.C.R. 2624, 2631 (1997); *see also In re McCaw*, 9 F.C.C.R. 5836, 5843–44 & n.25 (1994) (finding that the regulatory remedies available to the Commission under the Communications Act were enough to effectuate any necessary pro-competitive changes), *aff’d sub nom. SBC Commc’ns, Inc. v. FCC*, 56 F.3d 1484, 1497 (D.C. Cir. 1995).

54. *See In re WorldCom, Inc.*, 13 F.C.C.R. at 18,030–33 (identifying the authority the Commission has under the Communications Act and concluding that the use of such broad power made it unnecessary to invoke the Commission’s Clayton Act jurisdiction).

55. *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

56. *See id.* (declaring that the FCC is “not strictly bound by the dictates of the antitrust laws; rather, [it] is entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry”).

57. *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 19,987 (1997); *see also In re Teleport Commc’ns Group, Inc.*, 13 F.C.C.R. 15,236, 15,242–43 (1998) (treating the public interest

defined in the Communications Act, undoubtedly treats “competition [as] a relevant factor,”<sup>58</sup> and the Commission may quite properly consider a licensee’s anticompetitive conduct or other issues sounding of antitrust while performing its fundamental statutory mandate.<sup>59</sup> Such responsibility as the FCC bears in antitrust enforcement is deemed to be discharged when the Commission “seriously considers the antitrust consequences of a propos[ed] [merger] and weighs those consequences with other public interest factors.”<sup>60</sup> If anything, the public interest standard often contradicts the pro-competitive policy underlying the antitrust laws: “Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as [telecommunications], is not enough.”<sup>61</sup>

The public interest standard is presumably broader than the antitrust standard underlying section 7 of the Clayton Act. If the FCC were to confine its analysis to matters addressable under the antitrust laws, such an approach might well fail to discharge the Commission’s statutory obligation to uphold the public interest.<sup>62</sup> Despite the potentially deeper reach of the public interest standard, however, “the FCC has not invalidated a single major telecommunications merger since 1996.”<sup>63</sup> The Commission has amassed this surprisingly inactive record during a period of relatively aggressive antitrust enforcement.<sup>64</sup> Even Richard Posner,

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test as a “flexible” legal standard); *cf.* *Schurz Commc’ns, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (contrasting the impermissibility of “allow[ing] [a] tradeoff [of] a reduction in competition” under the antitrust laws with the FCC’s authority “to make such a tradeoff” under “the nebulous public interest standard”).

58. *FCC v. RCA Commc’ns, Inc.*, 346 U.S. 86, 94 (1953).

59. *See, e.g.*, *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795–96 (1978) (indicating that the Commission is authorized to consider antitrust issues when analyzing a proposed merger under the public interest standard); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 222–23 (1943) (“[T]he Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws . . .”).

60. *United States v. FCC*, 652 F.2d at 88; *accord, e.g.*, *In re NYNEX*, 12 F.C.C.R. at 20,003 n.68; *In re OTI Corp.*, 6 F.C.C.R. 1611, 1612 (1991).

61. *RCA Commc’ns*, 346 U.S. at 97; *accord, e.g.*, *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

62. *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 351–52 (1959) (“[I]n a given case the Commission might find that antitrust considerations alone would keep the [public interest] standard from being met.”); *cf.* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that judicial review under 5 U.S.C. § 706(2)(A) of agency action that is allegedly “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” demands consideration of “whether the [administrative] decision was based on a consideration of the relevant [statutory] factors and whether there has been a clear error of judgment” (quoting 5 U.S.C. § 706(2)(A) (Supp. V 1964))).

63. *Chen, supra* note 20, at 1525.

64. *See Robert T. Pitofsky, Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN’S L. REV. 583, 588–89 & nn.24–25 (2002) (arguing that antitrust enforcement in the latter part of the 1990s was aggressive, based on evidence

from 1986 to 1990, presided over appellate court panels that invalidated *two* hospital mergers.<sup>65</sup> As the FCC has weighed successive petitions proposing telecommunications mergers, however, it has continually tightened the terms and conditions under which it will approve a merger.<sup>66</sup> The Commission's practice of extracting concessions from telecommunications carriers during a merger review represents the FCC's primary tool for shaping telecommunications mergers.

*B. Horizontal BOC Mergers and the Development of the FCC's Merger Policy*

1. *Saints Alive: Transcending Clayton Act Doctrine.* Far more so than their sister BOCs, SBC and Bell Atlantic (now Verizon) took aim at horizontal expansion through acquisitions of sister BOCs. SBC completed its acquisition of Pacific Telesis in January 1997<sup>67</sup> and won regulatory approval for its acquisition of Ameritech in October 1999.<sup>68</sup> The resulting empire connected San Antonio, San Francisco, and Sault Ste. Marie. The FCC's 1997 approval of Bell Atlantic's purchase of NYNEX gave that carrier comparable geographic hegemony along the Atlantic seaboard.<sup>69</sup>

The FCC's approval of these three horizontal BOC mergers—SBC/PacTel, Bell Atlantic/NYNEX, and SBC/Ameritech—effectively established the Commission's approach to telecommunications mergers. The FCC's application of the public

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that the Antitrust Division of the Department of Justice brought in unprecedented amounts of money from fines).

65. See *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1286 (7th Cir. 1990) (holding that the merger violated section 1 of the Sherman Act); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (affirming the Commission's conclusion that the merger was a violation of section 7); see also Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 912–13 (2004) (discussing the inadequacies of Judge Posner's opinions in two merger cases).

66. See, e.g., *In re WorldCom, Inc.*, 13 F.C.C.R. 18,025, 18,031–32 (1998) (indicating the many factors the Commission may consider in deciding whether to approve a merger and discussing the Commission's ability to attach conditions to such an approval); *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 20,001–02 (1997) (noting that the Commission has a great deal of discretion in deciding whether to approve a merger); cf. 47 C.F.R. § 1.110 (2005) (construing the Commission's partial or conditional grant of a request as effective absent the applicant's active rejection of the grant in that form).

67. See *In re Pac. Telesis Group*, 12 F.C.C.R. 2624, 2626, 2665 (1997) (noting the Commission's approval of the merger).

68. See *In re Ameritech Corp.*, 14 F.C.C.R. 14,712, 14,856 (1999) (approving the merger between SBC and Ameritech).

69. See *In re NYNEX*, 12 F.C.C.R. at 19,994–96, 20,007–08 (indicating that the merger would create a connection between NYNEX's territories, which included New York, New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, and Connecticut, and Bell Atlantic's service areas, which consisted of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and Washington, D.C.).

interest standard—more precisely described as the review of petitions under sections 214(a) and 310(d) of the Communications Act to extend new service, to curtail or abandon old service, and to transfer licenses—“is informed by antitrust principles, but not limited by the antitrust laws.”<sup>70</sup> FCC merger review therefore begins but does not end with the Clayton Act’s prohibition of mergers, whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>71</sup> More than any other contemporaneous legal development, horizontal BOC merger reviews since 1996 have stretched the public interest standard beyond core antitrust principles.

In Clayton Act cases, the federal courts have developed an “actual potential competition doctrine” for mergers “that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that [are] challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through ‘toe-hold’ acquisition.”<sup>72</sup> A merger eliminating a potential competitor may be criticized as anticompetitive upon a demonstration of three factors. First, the market must be concentrated.<sup>73</sup> Second, the acquiring firm must have been among those firms that were likely and uniquely well-situated to enter.<sup>74</sup> Finally, but for the acquisition, such entry would have deconcentrated the market or yielded other pro-competitive effects.<sup>75</sup> The Supreme Court has explicitly declined, however, to decide whether this doctrine operates “solely on the ground that such a [market-extension] merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were

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70. *Id.* at 20,003 (footnote omitted).

71. 15 U.S.C. § 18 (2000).

72. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973).

73. *See Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 638 F.2d 1255, 1264 (5th Cir. 1981) (explaining that if a strong carrier acquires a firm within a concentrated market, the merger may not cause pro-competitive effects).

74. *See In re Pac. Telesis Group*, 12 F.C.C.R. 2624, 2637 (1997) (explaining that SBC was just as likely to enter the market as five other major carriers and that all the potential entrants had equivalent “competitive capabilities”).

75. *See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974) (stating that in order to establish a violation of section 7 of the Clayton Act, the government must find that an entity’s entrance into the market would result in a substantial likelihood of deconcentration of the market or other pro-competitive effects); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (explaining that the Commission must show that “entry by Tenneco carried a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects”); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) (requiring that the potential entry must be shown to have had a “substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects”); *Mercantile Tex. Corp.*, 638 F.2d at 1264 (noting that if a potential entrant is prevented from merging with a company already inside the market, the outsider might decide to enter independently, which could cause pro-competitive effects).

forbidden to enter except through a *de novo* undertaking or through the acquisition of a small existing entrant.”<sup>76</sup>

The FCC’s approach to telecommunications mergers has transcended these Clayton Act doctrines. Nothing in the Communications Act’s ubiquitous “public interest” standard binds the FCC “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply” under section 7 of the Clayton Act.<sup>77</sup> Especially in its review of horizontal BOC mergers, the “wide discretion” afforded to the Commission has inspired “imaginative interpretation” of the public interest.<sup>78</sup> Although the public interest standard is as “supple” and “as concrete as the complicated factors for judgment in such a field of delegated authority permit,”<sup>79</sup> this statutory “criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.”<sup>80</sup> Far from providing “a mere general reference to public welfare without any standard to guide determinations,” the Communications Act’s public interest standard requires the FCC to consider “[t]he purpose of the Act, the requirements it imposes, and the context of the [specific] provision[s]” at issue in a concrete dispute.<sup>81</sup>

2. *For Whom the Bell Told.* Announced on April 1, 1996, a mere eight weeks after the passage of the Telecommunications Act, SBC’s bid for Pacific Telesis (“PacTel”) gave the FCC its first opportunity under the Act to review a horizontal merger of major local exchange carriers. Finding an absence of actual potential competition for PacTel, the Commission approved the merger.<sup>82</sup> First, the FCC reasoned that there were “more than a few other potential entrants into [PacTel’s] markets.”<sup>83</sup> At that time, SBC looked no more likely than any other major local exchange or interexchange carrier to encroach on PacTel’s turf.<sup>84</sup> Second, the

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76. *Marine Bancorporation*, 418 U.S. at 625.

77. *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993).

78. *FCC v. RCA Commc’ns, Inc.*, 346 U.S. 86, 90 (1953).

79. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); *accord FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (emphasizing that the public-interest standard is flexible in that it allows the Commission to use broad discretion in considering proposed mergers).

80. *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

81. *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932).

82. *See In re Pac. Telesis Group*, 12 F.C.C.R. 2624, 2626, 2636–37, 2640 (1997) (finding that two of the five elements required to prove actual potential competition were not sufficiently established).

83. *Id.* at 2637.

84. *See id.* (observing that there were at least five other major providers, some with

FCC found no evidence “that SBC would enter or would have entered” those markets “but for the proposed [merger].”<sup>85</sup> Thereupon the Commission concluded its analysis under the actual potential competition doctrine without discussing the merger’s purported benefits.<sup>86</sup>

The FCC’s review of the SBC/PacTel merger effectively equated the Communications Act’s traditional public interest test with Clayton Act merger standards. The Commission abruptly and decisively changed course in its 1997 approval of Bell Atlantic’s acquisition of NYNEX.<sup>87</sup> This merger, announced exactly three weeks after the SBC/PacTel merger, commanded an additional six months of the Commission’s attention. The FCC found that each of these companies, unlike their western counterparts, was a potential entrant in the other’s service territories.<sup>88</sup> The Commission found that Bell Atlantic had formulated concrete plans to enter NYNEX markets<sup>89</sup> and that NYNEX was at least “a possible entrant into Bell Atlantic territories.”<sup>90</sup> By contrast, SBC and PacTel, which lacked geographically contiguous territories and did not enjoy significant goodwill or name recognition in each other’s markets, could not be distinguished from “a large number of . . . [other] significant market participants.”<sup>91</sup>

The Bell Atlantic/NYNEX proceeding imparted a peculiar twist to the otherwise familiar Clayton Act maneuver of extolling competition from nearby geographic markets.<sup>92</sup> In this instance, a single geographic market loomed large. The merging firms cast a menacing shadow across “LATA 132[, a market] encompassing New York City, Long Island and portions of Westchester County.”<sup>93</sup>

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more assets than SBC, which could have invaded PacTel’s area).

85. *Id.*

86. *See id.* at 2638 (“[W]e do not analyze the proposed merger under the other elements of the actual potential competition doctrine.”).

87. *See In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 20,097 (1997) (approving the merger between NYNEX Corp. and Bell Atlantic Corp.).

88. *Id.* at 20,020–28.

89. *Id.* at 19,990–91, 20,025–28.

90. *Id.* at 19,991.

91. *Id.* at 20,024.

92. *See, e.g.*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964) (considering as relevant the impact of a potential competitor located 550 miles away); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 359–60 (1963) (noting that the area of effective competition includes “the market area in which the seller operates and to which the purchaser can practically turn for supplies” (emphasis omitted) (internal quotation marks omitted)); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *cf.* *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549–50 (1966) (holding that section 7 of the Clayton Act governs mergers affecting either a regional market within the United States or the domestic market as a whole).

93. *In re NYNEX*, 12 F.C.C.R. at 19,990 n.13.

In the battle for what probably was and still remains the most lucrative telephone market in the western hemisphere, a combined Bell Atlantic-NYNEX behemoth threatened to overwhelm all potential competitors.<sup>94</sup> The ongoing consolidation of BOCs would also increase the risk of unlawful coordination among the surviving firms, if only by reducing the number of potential conspirators.<sup>95</sup>

The Bell Atlantic/NYNEX merger also raised a regulatory concern over benchmarking. Rooted in the “comparable earnings” standard articulated in such classic cases as *Bluefield Water Works*,<sup>96</sup> benchmarking matured as a centerpiece of regulatory policy toward the end of the MFJ era. Regulators, competitors, and even incumbent carriers themselves have learned to set baselines according to the performance of existing regulated monopolists.<sup>97</sup> “A reduction in the number of separately owned firms engaged in similar businesses” would compromise the “Commission’s ability to identify, and therefore to contain, market power.”<sup>98</sup> In particular, the FCC feared that it might lose the ability to treat the uncoordinated activities of a sufficiently large number of unrelated local exchange carriers (LECs) as regulatory “benchmarks” for evaluating the conduct of other carriers or the industry as a whole.<sup>99</sup>

In the immediate wake of the Bell Atlantic/NYNEX merger, the FCC made heavy use of benchmarking. Periodically revised local telephone rates set by states established critical baselines against which the Commission assessed its own rates.<sup>100</sup>

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94. See *id.* at 20,035 (concluding that “NYNEX, AT&T, MCI, Sprint, and Bell Atlantic . . . [were] the most significant market participants”).

95. See *id.* at 19,991–92, 20,046–48 (“As the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial equilibria, to the detriment of consumers.”).

96. *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 692–93 (1923). See generally Harold Leventhal, *Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy*, 74 YALE L.J. 989, 1011–14 (1965) (hypothesizing that commissions, whether expressly or not, “have in fact used their own rough-and-ready awareness of comparable earnings”).

97. See *California v. FCC*, 39 F.3d 919, 927 (9th Cir. 1994) (“[R]egulators . . . [can] use the seven [Bell operating companies (BOCs)] as benchmarks . . . to detect predatory pricing.”); *United States v. W. Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993) (“[T]he existence of seven BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing . . . in evaluating compliance with equal access requirements . . .”); *United States v. W. Elec. Co.*, 900 F.2d 283, 299 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

98. *In re NYNEX*, 12 F.C.C.R. at 20,058.

99. *Id.* at 19,994, 20,058 (“As diversity among carriers declines, both this Commission and state commissions may lose the ability to compare performance between similar carriers that have made different management or strategic choices.”); see also Chen, *supra* note 20, at 1543.

100. See *WorldCom, Inc. v. FCC*, 308 F.3d 1, 5 (D.C. Cir. 2002) (allowing the FCC to

The identification of benchmarking as a component of the public interest represented the most innovative aspect of the FCC's Bell Atlantic/NYNEX order. Benchmarking is a peculiar, even bureaucratic, concern. It focuses on the government's ability to measure (and ultimately to discipline) a regulated firm's performance as distinct from the classic economic concern that dominant firms can influence prices by controlling output instead of having to take such prices as prevail in a competitive market.<sup>101</sup> This is one of the strongest ways in which the Bell Atlantic/NYNEX order purportedly took the FCC's merger policy beyond "the realm of general competition law."<sup>102</sup>

The FCC nevertheless approved the Bell Atlantic/NYNEX merger.<sup>103</sup> The decisive factor was a set of commitments that these firms accepted as a condition of approval. Among other things, the merging companies agreed to cooperate in the monitoring of its operating support systems, especially "with respect to resold services, unbundled network elements and combinations of unbundled network elements."<sup>104</sup> "Bell Atlantic and NYNEX also agree[d] to offer, in interconnection negotiations and arbitrations, payment mechanisms . . . consistent with the Commission's decision in its *Second Physical Collocation Order*."<sup>105</sup> Most of all, the firms "commit[ted] to offer interconnection, unbundled network

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rely on the states' periodic rate revision processes as a means of correcting flaws in the Commission's own determinations of whether incumbent local exchange carrier (ILEC) rates for unbundled network elements comply with the total element long-run incremental cost (TELRIC) standard for authorizing in-region long-distance carriage by the ILEC under 47 U.S.C. § 271); *Sprint Commc'ns Co. v. FCC*, 274 F.3d 549, 561 (D.C. Cir. 2001) (allowing the FCC to consult rates in a neighboring state in determining whether another state utility commission's rates for unbundled network elements complied with TELRIC).

101. For classic definitions of market-power and their shortcomings, see, for example, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 469-70 & nn.15-16 (1992); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 36-37 (1984) (O'Connor, J. concurring); *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 & n.13 (1977); *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503-04 (1969); *United States v. Loew's Inc.*, 371 U.S. 38, 45, 48 n.5 (1962); and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6-7 (1958). See generally GEORGE F. STIGLER, *THE THEORY OF COMPETITIVE PRICE* 149 (1942) (explaining the interplay between output and price in competitive markets); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806-13 (1990) (surveying and analyzing the various definitions of a market and assessing their success in the merger area).

102. Shelanski, *supra* note 52, at 340-41.

103. *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 20,097 (1997).

104. *Id.* at 19,992. For a definition of operating support systems comprising "pre-ordering, ordering, provisioning, repair and maintenance, and billing," see *id.*

105. *Id.* at 19,993 (citing *In re Local Exch. Carriers' Rates, Terms & Conditions for Expanded Interconnection Through Physical Collocation for Special Access & Switched Transp.*, 12 F.C.C.R. 18,730, 18,753-56 (1997)).

elements and transport and termination at rates based on forward looking economic cost.”<sup>106</sup>

This final set of commitments represented a very significant concession on the part of the merging firms. As the effective price for FCC approval of its acquisition of NYNEX, Bell Atlantic conceded significant amounts of legal ground in two of its most fiercely contested battles against the Commission’s program for introducing competition into local telephony: physical collocation of competitive local exchange carriers’ equipment within incumbents’ central offices<sup>107</sup> and the total element long-run incremental cost (TELRIC) methodology used to price unbundled network elements to competitors seeking interconnection with incumbent local carriers.<sup>108</sup> Each of these controversies has drawn the ire of critics who would invalidate much of the Telecommunications Act on constitutional grounds<sup>109</sup> and warrants some separate discussion.

The Telecommunications Act requires an incumbent local exchange carrier (ILEC) to permit physical or virtual collocation of facilities if necessary for interconnection or unbundled access.<sup>110</sup> The prospect that the Act would compel a physical invasion of ILEC property exposes this requirement to the “physical takings” doctrine outlined in cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>111</sup> *Loretto* provides that “a permanent physical occupation authorized by government” automatically effects “a taking without regard to the public interests that it may serve.”<sup>112</sup> Courts struck down the FCC’s pre-1996 collocation rules

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106. *In re NYNEX*, 12 F.C.C.R. at 19,992.

107. *See Local Exch. Carriers’ Rates*, 12 F.C.C.R. at 18,733 (noting that in a series of Commission orders, local exchange carriers (LECs) were required to “offer expanded interconnection”).

108. *See Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 470–71 (2002) (upholding the FCC’s use of TELRIC to assess telecommunication rates); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 383–85 (1999) (rejecting the argument that the FCC does not have the power to establish telecommunications rates).

109. *See generally* J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES* 232–40 (1997) (“Mandatory interconnection and unbundling constitute a government-ordered, physical invasion of the property of the incumbent regulated firm.”); Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 947–59 (2003) (arguing that FCC regulations are a constitutional taking); Jennifer L. Worstell, Note, *Section 253 of the Telecommunications Act of 1996: A Permanent Physical Appropriation of Private Property That Must Be Justly Compensated*, 50 FED. COMM. L.J. 441, 467–74 (1998) (arguing that section 253 of the Telecommunications Act is unconstitutional because it amounts to a taking under the Fifth Amendment).

110. *See* 47 U.S.C. § 251(c)(6) (2000) (establishing that incumbent local exchange carriers (ILECs) have the duty to allow collocation of equipment on their premises).

111. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

112. *Id.* at 426; *see also* *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951);

insofar as the Commission lacked the power to reassign LEC property to a competitor.<sup>113</sup> Although the FCC's post-1996 collocation rules have encountered judicial resistance based on disagreements over the definition of the statutory term "necessary,"<sup>114</sup> the per se takings doctrine of *Loretto* has not felled those rules.<sup>115</sup> Nor does takings doctrine, as most recently expounded in *Kelo v. City of New London*,<sup>116</sup> absolutely bar the government from pursuing the indisputably public purpose of enhancing competition within telecommunications by transferring network property for the "benefit [of] individual private parties."<sup>117</sup>

For its part, TELRIC has a storied history. The Telecommunications Act requires incumbent local exchange carriers to permit competitors to interconnect<sup>118</sup> and to offer unbundled network elements for sale.<sup>119</sup> Rates for unbundled elements must be "just, reasonable, and nondiscriminatory."<sup>120</sup> Those rates "may include a reasonable profit" and "shall be based on the cost . . . of providing the interconnection or network element."<sup>121</sup> But cost must be "determined without reference to a

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United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

113. See *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994) (holding that "[t]he Commission's power to order 'physical connections'" does not validate its "decision to mandate physical co-location"); *GTE Nw. Inc. v. Pub. Util. Comm'n*, 900 P.2d 495, 504 (Or. 1995) (holding that the PUC does not have authority to order physical collocation).

114. See *U.S. W. Commc'ns, Inc. v. Jennings*, 46 F. Supp. 2d 1004, 1026 (D. Ariz. 1999) (invalidating 47 C.F.R. § 51.323 insofar as that rule rested on the FCC's definition of "equipment necessary for interconnection or access to unbundled network elements" (emphasis added)); *MCI v. Bell-Atl.*, 36 F. Supp. 2d 419, 428 & n.10 (D.D.C. 1999) (noting the incongruity between *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389-91 (1999) and the physical collocation rule, without invalidating the rule); *U.S. W. Commc'ns, Inc. v. AT&T Commc'ns, Inc.*, 31 F. Supp. 2d 839, 854 n.9 (D. Or. 1998) ("The court's dictionary defines 'necessary' as 'essential' . . . . Apparently, the FCC consulted a different dictionary." (citation omitted)).

115. See *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 694 (2001) (rejecting the application of *Loretto* and holding instead that "[t]here is no precedent for finding that the compulsory lease of [unbundled network elements] . . . constitutes a 'physical taking' of" telephone company equipment); *GTE S. Inc. v. Morrison*, 6 F. Supp. 2d 517, 530 (E.D. Va. 1998).

116. *Kelo v. City of New London*, 125 S. Ct. 2655, 2661-62, 2664 (2005).

117. *Id.* at 2666; see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."); cf. *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.")

118. See 47 U.S.C. § 251(c)(2) (2000) (imposing a duty on LECs to provide facilities and equipment in order to effectuate interconnection with their networks).

119. See 47 U.S.C. § 251(c)(3) (2000) (imposing a duty to provide any requesting telecommunications carrier with "nondiscriminatory access to network elements on an unbundled basis").

120. *Id.*

121. 47 U.S.C. § 252(d) (2000).

rate-of-return . . . proceeding.”<sup>122</sup> The FCC has elected to price unbundled network elements according to a definition of “forward-looking economic cost” comprising “the sum of (1) [t]he total element long-run incremental cost of the element . . . and (2) [a] reasonable allocation of forward-looking common costs.”<sup>123</sup> TELRIC excludes all “opportunity costs” such as “the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition.”<sup>124</sup>

Thanks to the concessions extracted as conditions on approval of the Bell Atlantic/NYNEX merger, the FCC could proceed with TELRIC-based pricing of unbundled network elements offered for sale to the combined firm’s competitors. Nearly a decade of subsequent litigation has not enabled the Commission to implement TELRIC on an industry-wide basis.<sup>125</sup> In 1999, the Supreme Court upheld the FCC’s authority to “design a pricing methodology”<sup>126</sup> that could bind state public utility commissions, but remanded the case to the FCC for failing to take proper account of the statutory term “impair.”<sup>127</sup> In the 2002 case of *Verizon Communications Inc. v. FCC*, the Supreme Court upheld TELRIC against a battery of challenges sounding of the “confiscatory ratesetting” doctrine in takings law.<sup>128</sup> TELRIC remains the subject of fierce litigation, most of it addressed to the Commission’s interpretation of the terms “necessary” and “impair”<sup>129</sup> and its abortive attempt to delegate determinations of impairment to state public utility commissions.<sup>130</sup>

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122. *Id.*

123. 47 C.F.R. § 51.505(a) (2005).

124. 47 C.F.R. § 51.505 (d)(3) (2005).

125. *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 557 (2002) (“[N]o evidence [suggests] that, prior to the promulgation of the rules at issue [in the case], any State had successfully implemented the FCC’s version of TERLIC”).

126. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999).

127. *Id.* at 387, 397.

128. *See Verizon*, 535 U.S. at 483–84, 524–25. *See generally* Michael J. Legg, *Verizon Communications, Inc. v. FCC—Telecommunications Access Pricing and Regulator Accountability Through Administrative Law and Takings Jurisprudence*, 56 FED. COMM. L.J. 563, 568–74 (2004) (arguing that administrative regulation in the telecommunications sector has led to unaccountability and that continued unguided use of TELRIC will lead to further ratesetting lawsuits).

129. *See U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 418–19 (D.C. Cir. 2002) (holding that the FCC did not adequately consider the word “impair” when it required incumbent local exchange carriers to lease unbundled network elements to other local exchange carriers).

130. *See U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565–68 (D.C. Cir. 2004) (holding unlawful the FCC’s sub-delegation to state commissions “the authority to determine whether [competitive LECs] are impaired without access to network elements”).

A year after its approval of the Bell Atlantic/NYNEX merger, the FCC extended its practice of extracting commitments from merging firms as a condition for regulatory approval. On July 24, 1998, SBC and Ameritech requested FCC approval of their merger.<sup>131</sup> On April 1, 1999, the third anniversary of the announcement of the SBC/PacTel merger, FCC Chairman William Kennard expressed five “serious concerns” that “potential public interest harms” flowing from the proposed merger might outweigh its “claimed competitive and consumer benefits”.<sup>132</sup>

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

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

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

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

How can the Commission be assured that the proposed combination will serve the Communications Act’s public interest mandate by improving overall consumer welfare?<sup>133</sup>

Three months later, on July 1, 1999, SBC and Ameritech responded to Chairman Kennard’s concerns by proposing five sets of voluntary conditions. The FCC heralded “[t]hese conditions [as] go[ing] well beyond the requirements of the Telecommunications

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131. See *SBC Commc’ns, Inc.*, 13 F.C.C.R. 25,297, 25,297 (1998) (considering a merger request).

132. See Letter from William E. Kennard, FCC Chairman, to Richard Notebaert, Chairman, Ameritech Corp., and Edward Whiteacre, Chairman, SBC Commc’ns, Inc. (Apr. 1, 1999), available at 1999 WL 179045 (expressing concerns that the merger may be more harmful than beneficial).

133. *Id.* Chairman Kennard’s letter interrupted an otherwise triumphant ten-day span in which the SBC/Ameritech merger won regulatory approval in two of Ameritech’s in-region states. See *In re SBC Commc’ns Inc.*, 193 PUR4th 86, 86 (Ohio Pub. Utils. Comm’n, Apr. 8, 1999) (ordering approval of the merger); *In re SBC Commc’ns Inc.*, 1999 WL 287710, at \*61 (Ill. Commerce Comm’n, Mar. 29, 1999) (same). Ah, April “is the cruellest month.” T.S. Eliot, *The Waste Land*, l. 1 (1922) (emphasis added).

Act.”<sup>134</sup> First, the companies pledged “to make the in-region local telephone markets of SBC/Ameritech . . . the most open and competitive in the country.”<sup>135</sup> The combined company would guarantee competitive local exchange carriers (CLECs) the same unbundling and interconnection terms that any SBC/Ameritech affiliate might obtain as a CLEC in an out-of-region market.<sup>136</sup> Second, the companies promised “to offer carrier-to-carrier promotions and to pay substantial penalties to CLECs if SBC/Ameritech do not provide them with nondiscriminatory service.”<sup>137</sup> Third, the post-merger SBC/Ameritech committed “to roll out facilities-based local service, as a CLEC, in 30 markets selected from the 50 largest out-of-region U.S. markets.”<sup>138</sup> The failure to meet its own “specified rollout schedule” would cost the combined company “\$40 million per market, with a total potential exposure of up to \$1.2 billion.”<sup>139</sup> Fourth, in response to Chairman Kennard’s “benchmarking” concerns, the combined company pledged to continue reporting its performance data on an individualized basis for each of its local affiliates.<sup>140</sup> Finally, the combined company promised to eschew “any minimum monthly charges for long distance service,” to enhance the “universal service assistance Lifeline plans” already existing in its service regions, and to implement “a plan for rolling out advanced services equitably to lower-income urban and rural areas.”<sup>141</sup>

On October 8, 1999, the FCC approved the SBC/Ameritech merger.<sup>142</sup> The Commission identified three threats to the public interest. First, the merger would “significantly decrease[] the potential for competition in local telecommunications markets by large incumbent LECs” by eliminating SBC and Ameritech as competitors in each other’s local exchange markets.<sup>143</sup> The FCC also expressed concern for competition “in out-of-region markets,”

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134. Pleading Cycle Established for Comments on Conditions Proposed by SBC Commc’ns Inc. & Ameritech Corp., 14 F.C.C.R. 14,592, 14,595 (1999).

135. *Id.* (recognizing the merger’s commitment to competition in the local market).

136. *See id.* at 14,596 (noting that competitive local exchange carriers (CLECs) will receive the same treatment by the merged company as they would in an out-of-region market).

137. *Id.* at 14,596–97.

138. *Id.* at 14,597 (recognizing the merger’s commitment to facilities-based local service).

139. *Id.* (describing penalties for not following the schedule).

140. *See id.* (remedying benchmarking concerns).

141. *Id.* (identifying methods to prevent negative consequences).

142. *See In re Ameritech Corp.*, 14 F.C.C.R. 14,712, 14,716 (1999) (approving the SBC/Ameritech merger).

143. *Id.* at 14,741 (noting that the merger of two large telecommunications companies will reduce market competition).

where the BOCs could “offer wireline local exchange services, potentially bundled with cellular and other offerings,” to customers of their wireless affiliates.<sup>144</sup>

Second, by further diluting the effectiveness of “comparative practice analyses (or ‘benchmarking’),” a merger of “two of the six remaining major incumbent LECs” would presumably “frustrate[] the goals of the 1996 Act and th[e] Commission of opening markets and easing regulation.”<sup>145</sup> This merger added nuance to the Commission’s deepening concern over benchmarking: the “elimination of Ameritech as an independently-owned RBOC,” said the FCC, “is likely to reduce significantly the amount of *innovation* that regulators and competitors could observe and analyze.”<sup>146</sup> Just as the Bell divestiture sparked “an unprecedented flowering of innovation,”<sup>147</sup> the FCC feared that the effective restoration of the Bell system through horizontal mergers among Bell operating companies could smother telecommunications’ inventive spirit.<sup>148</sup>

Third and finally, the SBC/Ameritech merger allegedly “would increase the incentives and ability” of the combined firm “to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC.”<sup>149</sup> The sheer size of SBC’s enlarged empire would expand the number of geographic markets where raised costs could cripple a rival.<sup>150</sup> The FCC expressed “particular concern” over this effect “in the retail market for advanced services.”<sup>151</sup>

The FCC reasoned that the merger offered little in the way of competitive benefits. SBC and Ameritech, the Commission wrote, had overstated the impact of their merger on the combined firm’s incentive to enter out-of-region markets.<sup>152</sup> Indeed, the firms’ activities before the announcement of their merger—especially

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144. *Id.* (expressing concern about competition in the wireless market).

145. *Id.* at 14,741–42 (discussing the potentially negative impact of the merger on FCC goals).

146. *Id.* at 14,742 (emphasis added); *cf.* 47 U.S.C. § 157(a) (2000) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”).

147. *United States v. W. Elec. Co.*, 890 F. Supp. 1, 9 (D.D.C. 1995), *vacated as moot*, 84 F.3d 1452 (D.C. Cir. 1996).

148. *Id.* at 9–10 (fearing that the restoration of the Bell system would be a “giant step backward” in competition encouragement efforts).

149. *In re Ameritech Corp.*, 14 F.C.C.R. at 14,742 (recognizing the ability of the merged entity to discriminate against rivals in retail markets).

150. *See id.* at 14,742–43 (noting that SBC’s geographic expansion would allow efficiencies that would give it a cost advantage over rivals).

151. *Id.* at 14,743.

152. *See id.* at 14,840 (noting that SBC and Ameritech cannot provide sufficient evidence of a combined firm’s incentive to enter out-of-region markets).

SBC's 1998 purchase of Southern New England Telephone<sup>153</sup> — showed that the unmerged carriers already had ample incentive and opportunity to expand their geographic reach.<sup>154</sup>

The FCC nevertheless approved the merger.<sup>155</sup> The conditions that SBC and Ameritech had proposed in response to Chairman Kennard proved decisive: the Commission concluded that the firms' "package of voluntary commitments . . . [had] alter[ed] the public interest balance in their favor."<sup>156</sup> The FCC cautioned, however, that the acceptance of these conditions did not excuse the merged company from complying with other provisions of the Communications Act, especially section 271 of the 1996 Act.<sup>157</sup>

### 3. *The BOC Merger Approvals as a Regulatory Progression.*

Seen as a coherent progression, the FCC's approvals of the horizontal BOC mergers progressively toughened what had once been a relatively low regulatory barrier.<sup>158</sup> In the SBC/PacTel proceeding, the Commission explicitly warned that its approval of that merger "should not be taken as an indication that [it would] approve all subsequent proposed combinations of major carriers."<sup>159</sup> In the Bell Atlantic/NYNEX proceeding, the FCC warned that applicants might not always be able to deflect regulatory attention merely by "propos[ing] pro-competitive public interest commitments."<sup>160</sup> The SBC/Ameritech merger rested squarely on such conditions.<sup>161</sup> The Commission had concluded that the merger's "significant harms" outweighed the merger's otherwise "speculative and small" benefits.<sup>162</sup>

This expansion in the FCC's merger policy did not escape political controversy. The SBC/Ameritech merger, in particular, sparked a debate within the Commission and in Congress over the proper deployment of the public interest standard in

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153. See *In re S. New England Telecomms. Corp.*, 13 F.C.C.R. 21,292, 21,293 (1998).

154. See *In re Ameritech Corp.*, 14 F.C.C.R. at 14,841 (concluding that the two firms' prior out-of-region activities demonstrate that each had an incentive to expand even without the merger).

155. See *id.* at 14,717.

156. *Id.* at 14,854–55 (justifying the FCC's decision to allow the merger with the combined entity's responses to the FCC's concerns).

157. *Id.* at 14,857.

158. See *In re Pac. Telesis Group*, 12 F.C.C.R. 2624, 2640 (1997) (cautiously approving a merger on a case specific basis); *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 19,993 (1997) (scrutinizing the FCC's own approach of allowing mergers based on public interest commitments).

159. *In re Pac. Telesis Group*, 12 F.C.C.R. at 2640.

160. *In re NYNEX*, 12 F.C.C.R. at 19,993.

161. *In re Ameritech Corp.*, 14 F.C.C.R. at 14,856–57 (identifying public interest conditions that led to approval of the SBC/Ameritech merger).

162. *Id.* at 14,717–18.

telecommunications mergers.<sup>163</sup> At a minimum, the SBC/Ameritech order expanded the scope of the FCC's merger policy beyond the strict confines of conventional Clayton Act doctrine.<sup>164</sup> The FCC's application of the actual potential competition doctrine to the SBC/Ameritech merger easily exceeded the standard applied by other antitrust authorities.<sup>165</sup> This basis for objecting to a merger is rarely invoked, and when it does arise, it is usually accompanied by "concrete evidence . . . that the merging parties would in fact have entered each [other's] markets."<sup>166</sup> Indeed, the Department of Justice had already approved this merger "on grounds that the carriers were not competitors and that the consolidation would not reduce the competition to serve any given consumer."<sup>167</sup> Conventional antitrust analysis, in other words, had reached a conclusion similar to the FCC's reaction to the SBC/PacTel merger. The intervening absorption of two additional local exchange carriers evidently changed the FCC's assessment of the competitive landscape.

In separate statements attached to the FCC's SBC/Ameritech order, Commissioner Harold W. Furchtgott-Roth and Chairman Michael K. Powell objected to the FCC's maturing strategy of subjecting merger approvals to extensive conditions.<sup>168</sup> The merging firms' putatively voluntary commitments to contest other local exchanges and to open their own markets to outside competition, said these objecting commissioners, could not have been extracted under the antitrust laws.<sup>169</sup> These conditions lay beyond the FCC's enforcement powers, and they were not amenable to judicial review.<sup>170</sup> Commissioner Furchtgott-Roth's and Chairman Powell's

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163. See 142 CONG. REC. H1158 (1996) (statement of Rep. Hyde) (debating the proper use of the public interest standard in telecommunications mergers).

164. Chen, *supra* note 20, at 1523-25.

165. See *id.* at 1524-25 (describing the FCC's review standard in relation to other antitrust standards).

166. Shelanski, *supra* note 52, at 340.

167. *Id.* at 341 (noting that the Department of Justice had already determined that SBC and Ameritech were not competitors).

168. See *In re Ameritech Corp.*, 14 F.C.C.R. 14,712, 15,174 (1999) (Furchtgott-Roth, Comm'r, concurring in part and dissenting in part) (determining that there are no authorities or standards for subjecting the combined firm to extensive conditions); *id.* at 15,197 (Powell, Chairman, concurring in part and dissenting in part) (expressing long-standing concern with the FCC's license transfer process).

169. See *id.* at 15,174 (Furchtgott-Roth, Comm'r, concurring in part and dissenting in part) (stating that conditions imposed cannot be inconsistent with other laws); *id.* at 15,197 (Powell, Chairman, concurring in part and dissenting in part) (noting the conditions are surrogates for general policies not supported by specific rules).

170. See *id.* at 15,174, 15,186 (Furchtgott-Roth, Comm'r, concurring in part and dissenting in part) (determining that involuntary conditions are not subject to judicial review); *id.* at 15,197 (Powell, Chairman, concurring in part and dissenting in part) (noting

protests represented a far cry from the earliest objections to FCC review of telecommunications mergers. During the legislative debates leading to passage of the 1996 Act, Congressman Henry Hyde asserted that “public interest review by the FCC simply is not a strong enough tool to prevent [telecommunications] giants from destroying competition and recreating a monopoly system through a series of megamergers.”<sup>171</sup> Though categorically contradictory in their underlying political motivations, these sentiments inspired two bills proposing to enact the Telecommunications Merger Review Act.<sup>172</sup> The SBC/Ameritech proceeding had pushed Congress to the verge of concluding that “the duplication of effort, inconsistency, and delay resulting from the Federal Communication Commission’s review of telecommunications industry mergers is unnecessary” and “imposes unwarranted costs on industry, on the Commission, and on the public.”<sup>173</sup>

Perceiving a palpable threat to its merger policy, the FCC responded by issuing a so-called “Issues Memorandum” on March 1, 2000, that defended the Commission’s independent role in reviewing telecommunications mergers.<sup>174</sup> In addition to emphasizing the substantive difference between the public interest standard of the Communications Act and the antitrust standard,<sup>175</sup> the FCC identified a crucial process-based difference between its approach and that of other antitrust enforcement agencies. Whereas “the process of review by these agencies . . . is an investigation largely hidden from public view” and privileged by

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the conditions are not subject to judicial review).

171. 142 CONG. REC. H2219 (1996) (statement of Rep. Hyde); accord Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 293 (2001) (restating Rep. Hyde’s belief that public interest review cannot adequately protect against the anticompetitive effects of megamergers).

172. Telecommunications Merger Review Act of 2000, H.R. 4019, 106th Cong. (2d Sess. 2000) (requiring the FCC to impose conditions only as necessary to ensure mergers are in compliance with existing rules and regulations); Telecommunications Merger Review Act of 1999, S. 1125, 106th Cong., 145 CONG. REC. 10984 (1999) (proposing legislation that will clarify reviews of telecom industry mergers); see also Shelanski, *supra* note 52, at 341 (describing legislation that limited the FCC’s authority to review mergers); cf. Fairness in Telecommunications License Transfers Act, H.R. 2533, 145 CONG. REC. 16338–39 (1999) (expressing concern over the treatment of mergers in the telecommunications industry).

173. Telecommunications Merger Review Act of 1999, H.R. 3186, 106th Cong. § 2(2)–(9) (1999); cf. H.R. 4019 (proposing a Congressional finding that FCC “review of telecommunications industry mergers often results in undue delay and introduces uncertainty into the marketplace”).

174. See Issues Memorandum, Transactions Team Public Forum on Streamlining FCC Review of Applications Relating to Mergers (Mar. 1, 2000), available at <http://www.fcc.gov/transaction/issuesmemo.html> (defending the FCC’s role in reviewing telecommunications mergers).

175. See *id.* (distinguishing the public interest standard from the antitrust standard).

“prosecutorial discretion” and the absence of any obligation to explain the failure to take enforcement action, “the FCC review process is a public adjudication, with full opportunity for public participation” and a corresponding obligation to “explain [the] basis [for decision] and address the arguments made by the parties.”<sup>176</sup> Neither of the proposed Telecommunications Merger Review Act bills became law.<sup>177</sup> Although the FCC’s power over telecommunications mergers has survived these political challenges to its authority, these controversies have eroded “any presumption that sector-specific expertise” over telecommunications mergers “is necessary” and heightened the Commission’s susceptibility to complaints over the “duplication of effort or inconsistency of analysis” among antitrust enforcement agencies.<sup>178</sup>

The mere existence of earlier telecommunications mergers, especially horizontal unions involving incumbent carriers, counsels ever closer scrutiny of all downstream mergers in this industry. After almost summarily approving the SBC/PacTel merger, the FCC became increasingly reluctant to approve horizontal mergers.<sup>179</sup> The Commission’s successive approvals of the PacTel, NYNEX, Ameritech, and GTE acquisitions made it progressively difficult for the FCC to endorse further consolidation. “[A] trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be.”<sup>180</sup> Reducing the number of BOCs from seven to three and eliminating the two largest, independent LECs in the United States have increased the likelihood of collusion, eroded regulatory benchmarks, and aggravated the loss of actual potential competitors who might challenge these carriers and other established (and entrenched) telecommunications companies.<sup>181</sup> “The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an

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176. *Id.* (distinguishing the closed review process used by other agencies from the open process used by the FCC); see also Shelanski, *supra* note 52, at 342 (reporting the content of the Issues Memorandum).

177. David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 757 (2002) (noting that the Telecommunications Merger Review Acts of 1999 and 2000 never became law).

178. Shelanski, *supra* note 52, at 342 (noting that criticisms against the FCC eroded its authority in merger review even though the Commission did not lose its power).

179. See Chen, *supra* note 20, at 1552 (noting the FCC’s disinclination to approve mergers after the SBC/PacTel merger).

180. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).

181. See Chen, *supra* note 20, at 1552 (commenting on the negative effects resulting from a reduction in the number of large carriers in the industry).

oligopolistic market [is] a substantial incentive to competition which cannot be underestimated.”<sup>182</sup>

The SBC/Ameritech order enabled the FCC to rationalize its approach to reviewing telecommunications mergers under the Communications Act’s public interest standard.<sup>183</sup> This approach consists of four distinct inquiries:

First, will the transaction result in a violation of the Communications Act or other applicable statute?<sup>184</sup> For instance, a BOC’s authorizations to provide long-distance telephone service may overlap with its post-merger local service area, in violation of the presumptive ban on the BOC provision of interexchange service to local exchange customers under 47 U.S.C. § 271.<sup>185</sup>

Second, will the transaction result in a violation of applicable FCC rules?<sup>186</sup> For instance, FCC rules implementing sections 11 and 13 of the Cable Act of 1992 bar any entity from owning cable facilities reaching more than 30% of the nationwide audience.<sup>187</sup> Absent waiver, those rules would bar the consummation of a merger that threatens to consolidate so large a share of the nation’s cable infrastructure within a single firm.

Third, will the merger “substantially frustrate or impair the Commission’s implementation or enforcement of the Communications Act?”<sup>188</sup> This open-ended factor provides the most flexible channel by which the FCC may apply traditional doctrines of public utility law asserting that competition alone “is not

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182. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964); *accord United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559 (1973) (Marshall, J., concurring) (discussing the anticompetitive effect a “[p]erceived [p]otential [e]ntrant” has on an oligopolistic market).

183. *See In re Ameritech Corp.*, 14 F.C.C.R. 14,712, 14,737–38 (1999) (requiring that the proposed transfer meet the four requirements of the public interest standard in order to gain approval).

184. *See In re Tele-Comm’ns, Inc.*, 14 F.C.C.R. 3160, 3221–24 (1999) (determining whether the parties violated section 652 of the Telecommunications Act); *In re S. New England Telecomms. Corp.*, 13 F.C.C.R. 21,292, 21,309–10 (1998) (requiring compliance with section 271 of the Telecommunications Act before granting approval of the merger).

185. 47 U.S.C. § 271 (2000).

186. *See In re Tele-Comm’ns, Inc.*, 14 F.C.C.R. at 3177–81, 3207–08 & n.287 (discussing compliance with the FCC’s program access and spectrum cap rules).

187. *See* 47 C.F.R. § 76.503(a) (2005).

188. *In re MediaOne Group, Inc.*, 15 F.C.C.R. 9816, 9912 n.3 (2000) (Powell, Chairman, concurring), *suspended*, 16 F.C.C.R. 5835, 5836 (2001); *accord In re Tele-Comm’ns, Inc.*, 14 F.C.C.R. at 3224–26 (addressing whether the proposed merger furthers the Communications Act’s universal service goal of providing access to consumers on a nondiscriminatory basis); *In re WorldCom, Inc.*, 13 F.C.C.R. 18,025, 18,130–34 (1998) (discussing whether the proposed merger is in the public interest).

enough” to protect the public interest in “industr[ies] so regulated and so largely closed” as telecommunications.<sup>189</sup>

Fourth, does the merger confer affirmative “public interest” benefits,<sup>190</sup> including the potential to “enhance competition”?<sup>191</sup> This final factor distinguishes the FCC’s inquiry into “whether a merger produces affirmative benefits” from the conventional antitrust inquiry into “whether a merger will produce harms.”<sup>192</sup>

Horizontal mergers between incumbent carriers, more than any other combination of telecommunications companies, have required the FCC to balance three related regulatory concerns against three goals at the heart of the Commission’s local competition initiatives. Actual potential competition, natural safeguards against collusion, and benchmarking all become increasingly tenuous with each merger that is approved.<sup>193</sup> In allowing every horizontal BOC merger that has come before it, the FCC has conceded substantial amounts of ground on these matters. By the same token, however, the Commission persuaded Bell Atlantic to withhold its attacks on two of the most contentious policies underlying the FCC’s post-1996 plan to induce competition in local telephony: physical collocation and the use of TELRIC in pricing unbundled network elements sold to competitors requesting interconnection.<sup>194</sup> It also secured competitive entry commitments from the combined SBC/Ameritech.<sup>195</sup>

This point warrants further elaboration. As demonstrated in the Bell Atlantic/NYNEX and SBC/Ameritech orders, the FCC’s interpretation of the Communications Act’s public interest standard in the context of telecommunications mergers includes the signature tactic of extracting concessions from and imposing conditions on merging parties.<sup>196</sup> The Commission approaches every

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189. *FCC v. RCA Commc’ns, Inc.*, 346 U.S. 86, 97 (1953); *accord, e.g.*, *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

190. *See In re Tele-Commc’ns, Inc.*, 14 F.C.C.R. at 3229–30 (addressing whether the proposed merger will produce “tangible public interest benefits”); *In re Puerto Rico Tel. Auth.*, 14 F.C.C.R. 3122, 3149 (1999) (determining that the proposed merger satisfies the public interest requirement based on “acquisition-specific benefits”).

191. *See In re WorldCom, Inc.*, 13 F.C.C.R. at 18,032–33 (discussing the interplay between competition and the public interest); *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 19,987 (1997) (requiring that the proposed merger “enhance competition” in order to satisfy the public interest requirement).

192. Shelanski, *supra* note 52, at 341.

193. Chen, *supra* note 20, at 1572.

194. *Id.*

195. *Id.*

196. *Id.*; *see In re Ameritech Corp.*, 14 F.C.C.R. 14,712, 14,856, 14,964–66 (1999) (conditioning approval on the parties’ agreement to deploy advanced services, encourage open local markets, foster out-of-region competition, and improve residential phone service); *see also In re NYNEX*, 12 F.C.C.R. at 20,070, 20,107–12 (requiring the parties to agree to

proposed merger with bluff and bluster regarding the potential threat to competition, but eventually secures voluntary commitments as the price for its eventual approval of the merger.<sup>197</sup> This technique arose out of the FCC's adaptation to incumbent carriers' litigation tactics.<sup>198</sup> The FCC's earliest merger approvals assumed the full and proper implementation of the local competition provisions of the 1996 Act.<sup>199</sup> For years after the Act's passage, incumbent carriers waged all-out warfare on TELRIC, the collocation requirement, and other aspects of the FCC's program for introducing local competition into the telecommunications industry.<sup>200</sup> The earliest lawsuits against the FCC's original local competition rules, in retrospect, were "just the first salvo in what promise[d] to be a prolonged battle . . . over the terms and pace of new competition."<sup>201</sup> Once incumbent carriers succeeded in delaying implementation of the Act's local competition provisions through seemingly ceaseless litigation, the FCC rightfully responded by tightening its merger policy and extracting concessions from parties seeking regulatory approval of their proposed mergers.<sup>202</sup>

One branch of the BOCs' litigation strategy depicts the interplay between incumbent resistance to competitive restructuring and the FCC's merger policy. The BOCs had coveted permission to enter the long-distance market for so long, and with so little success, that this quest became "regulation's rendition of *Waiting for Godot*."<sup>203</sup> The 1996 Act finally gave the BOCs what these formidable incumbents wanted most: access to the in-region markets for long-distance

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prepare "Performance Monitoring Reports," provide uniform interfaces for carriers and operational testing, and propose interconnection negotiations and arbitrations as a condition of approval).

197. *In re Ameritech Corp.*, 14 F.C.C.R. at 14,856, 14,964-66; *In re NYNEX*, 12 F.C.C.R. at 20,070, 20,107-12.

198. Chen, *supra* note 20, at 1572-73.

199. *See In re NYNEX*, 12 F.C.C.R. at 20,126 (separate statement of Chong, Comm'r) ("[W]e [have] made some assumptions that the most critical provisions of Sections 251 and 252 of the 1996 Act are being implemented.").

200. *See* Chen, *supra* note 20, at 1572-73 (commenting on the years of intense litigation initiated by BOCs following the passage of the Act).

201. Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 308 n.54 (1996).

202. *Cf. In re NYNEX*, 12 F.C.C.R. at 20,126 (separate statement of Chong, Comm'r) ("If it turns out we were wrong, the next Commission may wish to be less optimistic about such assumptions if another BOC merger comes its way.").

203. PAUL W. MACAVOY, *THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES* 176 (1996).

carriage.<sup>204</sup> Of course, even under the Bell breakup decree, the BOCs had been allowed to carry long-distance calls originating *outside* their local service regions.<sup>205</sup> Moreover, toll calls within largely arbitrary local access and transport areas (LATAs),<sup>206</sup> or intra-LATA long-distance, “augment[ed]” the BOCs’ “financial viability,” thanks to generous pricing by state public utility commissions.<sup>207</sup>

The effect of section 271 of the 1996 Act was to offer “the possibility of immediate [BOC] entrance into the in-region long distance services market.”<sup>208</sup> Section 271 gave the BOCs *conditional* access to this final, lucrative segment of the inter-LATA market. A BOC must show that some competitor stands ready to provide local carriage “either exclusively over [its] own telephone exchange service facilities or predominantly over [its] own . . . facilities in combination with the resale of the telecommunications services of another carrier.”<sup>209</sup> Such a “‘competing provider’ must offer ‘an actual commercial alternative to the BOC[’s local services].”<sup>210</sup> Alternatively, if “no [competing] provider” in any given state “has requested . . . access [to] and interconnection” with a BOC within “10 months after February 8, 1996,” the BOC may provide inter-LATA service in that state by filing “a statement of the terms and conditions” by which it “generally offers to provide . . . access and interconnection” to local competitors.<sup>211</sup> On either of these tracks, section 271 requires a petitioning

204. See *AT&T Corp. v. FCC*, 220 F.3d 607, 611–12 (D.C. Cir. 2000) (observing how after the 1996 Act, BOCs were granted access to the in-region long-distance market provided the BOCs satisfy the conditions of section 271).

205. See *United States v. W. Elec. Co.*, 797 F.2d 1082, 1085 (D.C. Cir. 1986) (holding that the decree does not prevent providing service outside the local service region).

206. See *United States v. W. Elec. Co.*, 569 F. Supp. 990, 993–95 (D.D.C. 1983) (explaining the concept of local access and transport areas (LATAs)); see also 47 U.S.C. § 153(25) (2000) (codifying the judicial definition of a LATA).

207. See *W. Elec. Co.*, 569 F. Supp. at 995 & n.23 (noting that large LATAs are proportionate to generation of revenue); see also J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 859 (1996) (noting that even prior to the Communications Act, several states already “removed all statutory entry barriers” into LATAs).

208. *BellSouth Corp. v. FCC*, 162 F.3d 678, 691 (D.C. Cir. 1998).

209. 47 U.S.C. § 271(c)(1)(A) (2000); see also H.R. REP. NO. 104-458, at 147–48 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 124, 160 [hereinafter CONFERENCE REPORT] (“The competitor must offer telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier’s service.”).

210. *SBC Commc’ns, Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (quoting *In re SBC Commc’ns Inc.*, 12 F.C.C.R. 8685, 8695 (1997), *aff’d sub nom.* *SBC Commc’ns, Inc. v. FCC*, 138 F.3d 410, 411 (D.C. Cir. 1998)).

211. 47 U.S.C. § 271(c)(1)(B) (2000).

BOC to bear the burden of proof<sup>212</sup> and to satisfy a fourteen-step “[c]ompetitive checklist.”<sup>213</sup>

For three years after the passage of the 1996 Act, section 271 imposed an impenetrable firewall against BOC entry into inter-LATA carriage. From 1997 through 1998, the Commission denied the first five section 271 petitions: SBC in Oklahoma,<sup>214</sup> Ameritech in Michigan,<sup>215</sup> BellSouth in South Carolina,<sup>216</sup> and two BellSouth petitions covering Louisiana.<sup>217</sup> Acting under section 271, the FCC in 1998 also invalidated a “teaming” arrangement under which Ameritech and US West proposed to package their own vertical switching services—caller ID, call waiting, last call redial, and the like—with long-distance service by Qwest.<sup>218</sup> In 1999, however, the FCC approved Bell Atlantic’s petition for New York;<sup>219</sup> the following year, the FCC allowed SBC to provide inter-LATA service in Texas.<sup>220</sup> These approvals roughly coincided with the approval of

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212. See 47 U.S.C. § 271(d)(3) (2000) (providing that the “Commission shall not approve the authorization requested in a [ ] § 271 application . . . unless it” makes three specific findings); see also Procedures for Bell Operating Co. Applications Under New Section 271 of the Communications Act, 11 F.C.C.R. 19,708, 19,709 (1996) (stating that the requirements set forth in section 271(d)(3) must be satisfied before approval will be authorized by the Commission).

213. 47 U.S.C. § 271(c)(2)(B) (2000). Items on that checklist include “[n]ondiscriminatory access to . . . poles, ducts, conduits, and rights-of-way”; “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services”; “[n]ondiscriminatory access to . . . 911, . . . directory assistance, . . . and operator call completion services”; and nondiscriminatory assignment and transportation of phone numbers. *Id.*

214. See *In re SBC Commc’ns Inc.*, 12 F.C.C.R. at 8725 (denying petitioner’s section 271 petition).

215. See *In re Ameritech Mich.*, 12 F.C.C.R. 20,543, 20,751 (1997) (denying petitioner’s section 271 petition). This order became the subject of an extraordinary mandamus order, which construed the FCC’s denial of Ameritech’s section 271 petition as a “plain-faced” and unlawful “reassertion of section 252(d) pricing authority over the local competition provisions of the [1996] Act.” *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 542 (8th Cir. 1998), *vacated*, 525 U.S. 1133 (1999).

216. See *In re BellSouth Corp.*, 13 F.C.C.R. 539, 541 (1997) (denying petitioner’s section 271 petition), *aff’d sub nom.* *BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998).

217. See *In re BellSouth Corp.*, 13 F.C.C.R. 6245, 6247 (1998) (denying petitioner’s section 271 petition); *In re BellSouth Corp.*, 13 F.C.C.R. 20,599, 20,603 (1998) (denying petitioner’s second section 271 petition and urging “applicants to remedy deficiencies identified in prior orders before filing a new section 271 application”). See generally Eric M. Swedenburg, Note, *Promoting Competition in the Telecommunications Markets: Why the FCC Should Adopt a Less Stringent Approach to Its Review of Section 271 Applications*, 84 CORNELL L. REV. 1418, 1438–55 (1999) (reviewing the FCC’s denials of these section 271 petitions, excluding BellSouth’s second Louisiana petition).

218. See *AT&T Corp. v. Ameritech Corp.*, 13 F.C.C.R. 21,438, 21,441, 21,447–48 (1998) (concluding that parties’ inter-LATA service arrangement violated section 271), *aff’d sub nom.* *U.S. W. Commc’ns, Inc. v. FCC*, 177 F.3d 1057, 1061 (D.C. Cir. 1999).

219. See *In re Bell Atl. N.Y.*, 15 F.C.C.R. 3953, 3955 (1999) (granting petitioner’s section 271 petition), *aff’d sub nom.* *AT&T Corp. v. FCC*, 220 F.3d 607, 610 (D.C. Cir. 2000).

220. See *In re SBC Commc’ns, Inc.*, 15 F.C.C.R. 18,354 (2000).

the SBC/Ameritech merger, which, in retrospect, marked the practical breach of the section 271 firewall. Section 271 approvals began to issue more or less routinely.<sup>221</sup>

BOC impatience with section 271, however, sparked a brief but illustrative episode in the path of telecommunications reform after 1996. Spurned in their initial efforts to pierce section 271 on its own terms, the BOCs attacked the Telecommunications Act's BOC provisions in their entirety, including section 271, as an unconstitutional bill of attainder.<sup>222</sup> In 1997, SBC actually persuaded a federal district court in Texas to accept this theory.<sup>223</sup> The Fifth Circuit reversed this rogue decision.<sup>224</sup> Likewise, the D.C. Circuit twice declined to invalidate the BOC provisions as bills of attainder.<sup>225</sup> These lawsuits, especially when coupled with BOC-supported litigation against the FCC's TELRIC and collocation initiatives, upset the legislative "deal" that forged the Telecommunications Act of 1996.<sup>226</sup> Incumbent carriers lobbied vociferously for the legislation that eventually became the 1996 Act.<sup>227</sup> The BOCs' betrayal of the legislative bargain underlying the 1996 Act was at its most perfidious in the attack on section 271, insofar as that provision promised a prime source of income that might have offset potential ILEC losses from section 251's provisions requiring interconnection, unbundled access, resale, and collocation. Seen in this light, the FCC's policy of extracting regulatory concessions as conditions on merger approvals did not unduly extend the agency's authority beyond its statutory limits, but rather gave the Commission no more power than it would have exerted if incumbent carriers had not stalled the Commission's agenda for reform through repetitive litigation.

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221. See, e.g., *In re Verizon Pa. Inc.*, 16 F.C.C.R. 17,419, 17,420 (2001) (granting petitioner's section 271 petition in Pennsylvania), *aff'd sub nom. Z-Tel Commc'ns, Inc. v. FCC*, 333 F.3d 262, 263-64 (D.C. Cir. 2003); *In re SBC Commc'ns Inc.*, 16 F.C.C.R. 20,719, 20,720 (2001) (granting petitioner's section 271 petition in Arkansas and Missouri).

222. Chen, *supra* note 20, at 1534.

223. See *SBC Commc'ns, Inc. v. FCC*, 981 F. Supp. 996, 1002-08 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226, 229 (5th Cir. 1998).

224. See *SBC Commc'ns, Inc. v. FCC*, 154 F.3d 226, 229 (5th Cir. 1998).

225. See *BellSouth Corp. v. FCC*, 162 F.3d 678, 680 (D.C. Cir. 1998) (upholding section 271); *BellSouth Corp. v. FCC*, 144 F.3d 58, 67, 71 (D.C. Cir. 1998) (upholding 47 U.S.C. § 274, which bars the BOCs from engaging in electronic publishing).

226. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544-52 (1983) (positing that a statute's interpretation should be restricted to those "cases anticipated by its framers and expressly resolved in the legislative process"); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446-50 (1989) (discussing the public choice theory approach to statutory interpretation, whereby statutes "reflect unprincipled 'deals' and not intelligible collective 'purposes'").

227. See, e.g., Kearney, *supra* note 6, at 1454 (noting that extensive lobbying efforts for legislation existed as early as the mid-1980s).

### C. *The Special Case of Cable Mergers*

1. *Section 652.* The 1996 Act did add a specific merger-related tool to the FCC's legal arsenal. Section 652 of the Act, codified at 47 U.S.C. § 572, presumptively bans the cross-ownership of cable and telephone companies.<sup>228</sup> This prohibition arose from Congress's apparent hope that the forcible separation of LECs and cable operators would keep each group as a potential competitive check on the other.<sup>229</sup>

Although section 652 applies equally to cable operators' acquisitions of telephone companies and to telephone companies' acquisitions of cable operators, Congress evidently wanted to temper telephone company entry into cable more than the reverse—this much is clear from the Act's extensive restrictions on “open video systems” by which telephone companies may deliver video programming to their customers.<sup>230</sup> Among other requirements, an operator seeking open video system certification must comply with special antidiscrimination rules designed to curb self-preference and cross-subsidization,<sup>231</sup> including a rule limiting the “operator . . . and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on [the] system” whenever “demand exceeds the [system's] channel capacity.”<sup>232</sup> In its 1998 review of the

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228. 47 U.S.C. § 572(a) (2000) (“No local exchange carrier . . . may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest . . . in any cable operator . . . .”); 47 U.S.C. § 572(b) (2000) (“No cable operator . . . may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest . . . in any local exchange carrier . . . .”).

229. *Cf., e.g.,* FTC v. Procter & Gamble Co., 386 U.S. 568, 580–81 (1967) (justifying the invalidation of a merger between the U.S.'s largest soap and detergent manufacturer and the country's largest bleach manufacturer partly on evidence that the soap and detergent manufacturer “was the most likely entrant” into bleach manufacturing); United States v. El Paso Natural Gas Co., 376 U.S. 651, 661 (1964) (“Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice.”).

230. *See* 47 U.S.C. § 571(a)(3) (2000) (“[S]uch carrier shall be subject to the requirements of this subchapter, unless such programming is provided by means of an open video system for which the Commission has approved a certification under section 573 . . . .”); 47 U.S.C. § 573 (2000) (describing the regulatory requirements with which carriers must comply in order to “provide cable service to its cable service subscribers in its telephone service area through an open video system”).

231. *See* 47 U.S.C. § 573(a)–(b) (2000) (“[The regulations] prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information . . . .”).

232. 47 U.S.C. § 573(b)(1)(B) (2000); *see also* *In re* Implementation of Section 302 of the Telecomms. Act of 1996, 11 F.C.C.R. 18,223, 18,248–50 (1996) (“[The] provisions generally prohibit an open video system operator from discriminating among video programming providers . . . and provide that if demand for carriage exceeds the system's channel capacity, the open video system operator may select the programming services on no more than one-

video programming delivery market, however, the FCC acknowledged that “[m]ost of the firms receiving [open video system] certification are not LECs.”<sup>233</sup> The FCC’s 2005 report acknowledged that open video systems, based on “a regulatory framework originally intended for local exchange carriers,” had become principally the domain of broadband service providers, “entities that compete with existing cable systems using state-of-the-art networks that are capable of providing a package of video and nonvideo service[.]” and of facilitating their owners’ “operat[ion] as competitive LECs.”<sup>234</sup>

Under section 652, a telephone company may not acquire “more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service” in the same service area.<sup>235</sup> The reverse is also true; no cable operator may acquire a comparable stake in a telephone company within its franchise area.<sup>236</sup> Moreover, the Act bans joint ventures between cable and telephone companies.<sup>237</sup> Cable-telco mergers and joint ventures are legal, *inter alia*, when they involve small cable systems in nonurban areas, in rural areas generally, in putatively “competitive” markets, and whenever the FCC waives section 652’s presumptive prohibition.<sup>238</sup> Section 652, however, does not “apply to any situation where an existing cable company initiates telephone service within the cable company’s franchise area.”<sup>239</sup> To provide otherwise would undermine Congress’s hope of fostering “a

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third of the activated channel capacity.”); Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1024–29 (1997) (examining the legal requirements governing open video systems).

233. *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 F.C.C.R. 24,284, 24,290 (1998) (noting that Bell Atlantic “is transitioning away” from one of the only three “operating open video systems” in the United States and “plans to ask customers to switch to its joint venture with DirecTV”).

234. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 F.C.C.R. 2755, 2761 (2005) (observing that, as of June 2004, broadband service providers “served approximately 1.4 million subscribers, representing 1.5% of all . . . households” receiving multichannel video programming).

235. 47 U.S.C. § 572(a) (2000); *see also* 47 C.F.R. § 76.505(a) (2005) (establishing a maximum telephone company ownership interest in a cable operator of 10%).

236. *See* 47 U.S.C. § 572(b) (2000) (“No cable operator . . . [may acquire] more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator’s franchise area.”).

237. *See* 47 U.S.C. § 572(c) (2000) (“A local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership . . .”).

238. *See* 47 U.S.C. § 572(d)(1), (3)–(6) (2000) (listing the qualification requirements for small and exempt cable systems, rural areas, competitive markets, and waivers).

239. *In re Southeast Tel., Ltd.*, 12 F.C.C.R. 2561, ¶¶ 2, 4, 7 (1997) (stating that the buy-out provisions of section 652 do not apply because the cable company did not purchase or acquire an LEC).

technological convergence that would permit the use of the same facilities for the provision of telephone and cable service.”<sup>240</sup>

An early observer of the 1996 Act broadly endorsed “mergers, acquisitions, or other . . . alliances” between cable and local telephone companies.<sup>241</sup> The FCC has long recognized that a “telephone company investment in cable television outside its region is likely to increase competition for traditional telephone services, and to expand consumer choices.”<sup>242</sup> Nevertheless, the Telecommunications Act effectively directs federal antitrust enforcement to presume that geographically overlapping combinations of cable and telephone companies are anticompetitive until proven otherwise.<sup>243</sup>

The cable-telephone provisions imposed one of the strongest forms of structural separation in the entire 1996 Act.<sup>244</sup> Congress did not presumptively ban any other type of telecommunications merger.<sup>245</sup> As a result, section 652 gave the FCC direct authority to review US West’s acquisition of Continental Cablevision,<sup>246</sup> in retrospect a fairly insignificant merger, while other mergers proceeded under the Communications Act’s more nebulous public interest standard in the absence of more explicit statutory bases for regulatory review.<sup>247</sup> This \$5.3 billion purchase was meant to

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240. *In re* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 F.C.C.R. 13,044, 13,050 (1998).

241. Michael H. Botein, *Cable/Telco Mergers and Acquisitions: An Antitrust Analysis*, 25 SW. U. L. REV. 569, 604 (1996).

242. *In re* Time Warner Entm’t Co., L.P. & U.S. W. Commc’ns, Inc., 8 F.C.C.R. 7106, 7107 (1993).

243. See Botein, *supra* note 241, at 570 (“[M]any policymakers . . . assume that cable/telco mergers or acquisitions are anticompetitive.”).

244. See CONFERENCE REPORT, *supra* note 209, at 174 (noting that the House–Senate conference committee on the Telecommunications Act accepted “the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets”).

245. See generally 47 U.S.C. § 572 (2000) (containing the only section of the Communications Act of 1996 banning specific types of mergers and applying only to cable–telephone mergers).

246. See *In re* U.S. W., Inc. & Cont’l Cablevision, Inc., 11 F.C.C.R. 13,260, 13,262–64 (1996) (stating that the authority to review the merger resulted from the need for a waiver of the section 652 requirements in order to allow U.S. West a period of time after the merger to divest its interests in Continental’s conflicting assets once the merger had taken place), *modified*, 11 F.C.C.R. 14,391, 14,392 (1996) (altering the divestiture schedule only); *In re* U.S. W., Inc. & Cont’l Cablevision, Inc.: Competitive Impact Statement, 61 Fed. Reg. 58,703, 58,704 (Nov. 18, 1996) (stating that the court has jurisdiction over the parties and subject matter).

247. See 47 U.S.C. § 214(a) (2000) (“No carrier shall undertake the construction . . . [or] extension of any line, or shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the . . . addition or extended line . . . .”); 47 U.S.C. § 310(d) (2000) (“No . . . station license, or any rights

catapult US West into video carriage and programming.<sup>248</sup> US West evidently believed, as Congress did in adopting section 652, that these industries shared common costs and enjoyed substantial economies of scope.<sup>249</sup> Though the FCC did approve US West's acquisition of Continental Cablevision, the section 652 firewall doomed this merger. As a condition of FCC approval, US West had to shed crucial parts of the Continental empire:<sup>250</sup> all cable systems within US West's local exchange service region as well as Continental's stake in Teleport (which in turn would be divested by WorldCom when it bought MFS).<sup>251</sup>

Stripped of Continental's geographically overlapping cable properties, US West enjoyed none of the synergy it had sought. Evidently seduced by the illusory allure of "one-stop shopping" for bundles of communications services, US West bought Continental primarily to diversify its holdings and gave little explicit thought to the firms' product markets or underlying technologies.<sup>252</sup> Within two years, US West announced plans to divide its holdings between a Media Group and a Communications Group in anticipation of

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thereunder, shall be transferred, assigned, or disposed of . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."); *In re MFS Commc'ns Co. & WorldCom, Inc.*, 11 F.C.C.R. 21,164, 21,167 (1996) ("[U]nder Section 310(d) of the Communications Act, no earth station license shall be transferred to any person except upon a finding by the Commission that the transfer would serve the public interest, convenience, and necessity.").

248. See Mark Landler, *Rivals Yawn at US West Cable Deal*, N.Y. TIMES, Feb. 29, 1996, at D4 ("With Continental's 4.2 million subscribers . . . US West will have access to a potential market of 16.3 million cable households.").

249. See Sylvia M. Chan-Olmsted, *Mergers, Acquisitions, and Convergence: The Strategic Alliances of Broadcasting, Cable Television, and Telephone Services*, J. MEDIA ECON., 1998, at 33, 37 (discussing the benefits of the Continental Cablevision/U.S. West merger as having "economies of scope and diversification of a common core of strategic resources"); Kuo-Feng Tseng & Barry Litman, *The Impact of the Telecommunications Act of 1996 on RBOCs and MSOs: Case Study: The Merger of US West and Continental Cablevision*, J. MEDIA ECON., 1998, at 47, 53-57.

250. See *In re U.S. W. Inc. & Cont'l Cablevision, Inc.*, 11 F.C.C.R. at 14,391 (requiring U.S. West to divest itself of certain interests according to a schedule set by the Commission); see also *In re U.S. W., Inc.*, 13 F.C.C.R. 4402, 4402-03 (1998) (granting U.S. West more time to divest its cable holdings in Minnesota, which it had acquired through the Continental merger).

251. See *In re MFS Commc'ns Co.*, 11 F.C.C.R. at 21,164 (authorizing Worldcom to acquire MSF's interests); *In re U.S. W.*, 11 F.C.C.R. at 14,391 ("[The court's] grant of the requested relief was conditioned upon the requirement that US WEST divest itself of the in-region systems . . ."); *In re U.S. W., Inc. & Cont'l Cablevision, Inc.: Competitive Impact Statement*, 61 Fed. Reg. 58,703 (Nov. 18, 1996) (stating that under the proposed final judgment, U.S. West must divest itself of all of Continental's interest in Teleport Communication Group).

252. See Chan-Olmstead, *supra* note 249, at 37 (describing benefits that could be achieved by the Continental Cablevision/US West merger); Tseng & Litman, *supra* note 249, at 53-57.

complete divestiture.<sup>253</sup> In January 1998, US West sold the American wireless holdings of its Media Group to AirTouch for \$4.3 billion in stock and assumption of \$1.4 billion in debt.<sup>254</sup> Later that year, the renamed MediaOne Group became independent of US West.<sup>255</sup>

## 2. *The Reinvention of AT&T.*

a. **Horizontal Cable Ownership Limits.** MediaOne would eventually become a vital part of AT&T's strategy to shift from its historic roots in interexchange carriage and its once-dominant position in wireless telephony to a purely cable-based business model. The first step in AT&T's transformation predated that company's acquisition of MediaOne. The FCC's 1999 approval of AT&T's \$31.8 billion merger with Tele-Communications, Inc. (TCI), marked a significant turning point in the development of merger policy in telecommunications.<sup>256</sup> The most serious objection to the AT&T/TCI merger was the prospect that an enlarged AT&T "could bundle its bottleneck broadband transmission service with any or all of the numerous residential services under its wide corporate umbrella—cable television, long distance voice, local voice, and wireless, as well as Internet services."<sup>257</sup> Though acknowledging that AT&T might enjoy monopoly or market power over cable in certain locations, the Commission declined "to impose a blanket rule prohibiting the bundling of cable services with other services in which a cable operator might have a financial interest."<sup>258</sup>

Notably, section 652 of the 1996 Act did not impede AT&T's acquisition of TCI. AT&T's 1998 acquisition of Teleport, at that time the largest independent competitive local exchange company

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253. See Seth Schiesel, *Two Regional Bells Take Different Paths to Growth*, N.Y. TIMES, Oct. 28, 1997, at D12 ("US West, conceding that its five-year effort to integrate the worlds of telephones and cable television service had failed, said it would split those operations into two independent publicly traded companies . . .").

254. See Seth Schiesel, *Airtouch Renews Deal for US West Unit*, N.Y. TIMES, Jan. 30, 1998, at D2 (noting that the parties had reached a deal in 1997, but that agreement collapsed because Congress closed a crucial tax loophole).

255. *US West Splits, Becomes 2 Companies*, BOULDER DAILY CAMERA, June 13, 1998, at 1B ("[A]fter the split, US West will handle telecommunications operations, and MediaOne Group will handle a cable television business . . .").

256. See *In re Tele-Comm'ns, Inc.*, 14 F.C.C.R. 3160, 3161 (1999) (approving the merger subject to conditions on the divestiture of certain other telecommunication interests); *TCI's Cable Revenue Fell by 7% in 1998*, N.Y. TIMES, Mar. 17, 1999, at C8 ("TCI, based in Englewood, Colo., became a unit of AT&T Broadband and Internet Services after its \$31.8 billion purchase was completed . . .").

257. *In re Tele-Comm'ns, Inc.*, 14 F.C.C.R. at 3218 (internal quotation marks omitted).

258. *Id.* at 3219.

in the United States,<sup>259</sup> had raised the possibility that section 652 would “prohibit[] AT&T from acquiring any TCI systems in areas served by Teleport.”<sup>260</sup> The timing of Teleport’s entry into local exchange markets proved decisive: because Teleport had not begun providing “telephone exchange service” as of January 1, 1993,<sup>261</sup> section 652 did not require AT&T to divest any cable systems it acquired from TCI or to seek a waiver from the FCC.<sup>262</sup>

At least initially, AT&T’s acquisition of MediaOne faced few regulatory obstacles. The FCC found an affirmative consumer benefit in “the merged entity’s ability” to deliver “facilities-based local telephony and other new services to residential customers.”<sup>263</sup> Cognizant of the merger’s impact on the cable broadband market, the FCC did condition its approval on the completion of open access agreements with unaffiliated Internet service providers (ISPs).<sup>264</sup>

The AT&T/MediaOne merger did trigger anticoncentration measures that predated the 1996 Act. Section 11(c) of the 1992 Cable Act directed the FCC to “establish[] reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person.”<sup>265</sup> Combining MediaOne with AT&T’s cable holdings would have enabled AT&T to reach 51.3% of cable subscribers in the United States,<sup>266</sup> well beyond the 30% cap imposed by the FCC’s horizontal cable ownership rules.<sup>267</sup> While the AT&T/MediaOne petition lay before

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259. See *In re Teleport Commc’ns Group Inc.*, 13 F.C.C.R. 15,236, 15,239 (1998) (describing Teleport which “operates in 83 markets in the United States, including 29 of the largest 30” as the “nation’s largest . . . CLEC”).

260. See *In re Tele-Commc’ns, Inc.*, 14 F.C.C.R. at 3221.

261. See 47 U.S.C. § 572(e) (2000) (defining “the term ‘telephone service area’ for purposes of the presumptive ban on cable–telco combinations as “the area within which [a] carrier provided telephone exchange service as of January 1, 1993”).

262. See *In re Tele-Commc’ns, Inc.*, 14 F.C.C.R. at 3223–24 (“[S]ince Teleport [did] not have a ‘telephone service area’ for purposes of the section 652(a) buy out prohibition, the statutory restriction does not apply to the instant proceeding.”).

263. *In re MediaOne Group, Inc.*, 15 F.C.C.R. 9816, 9820 (2000), *suspended*, 16 F.C.C.R. 5835, 5836 (2001).

264. See *id.* at 9866–67 (finding that “the proposed merger conceivably could undermine competition and diversity in the emerging broadband Internet arena” but “those harms will be avoided if . . . unaffiliated [Internet service providers] are permitted access to the merged firm’s cable network”).

265. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 11(c), 106 Stat. 1460, 1487 (codified as amended at 47 U.S.C. § 533(f)(1)(A) (2000)).

266. See *In re MediaOne Group, Inc.*, 15 F.C.C.R. at 9819 (stating that in addition to the large percentage of cable subscribers, the merged firm would have access to a “significant number of video programming networks”).

267. The FCC in 1993 promulgated rules prohibiting any entity from owning an attributable interest in cable systems “reach[ing] more than 30% of cable homes . . . nationwide,” plus an additional margin of 5%, “provided such additional cable

it, the FCC revised those horizontal cable ownership rules in 1999.<sup>268</sup> The simplified rules based the 30% ceiling on “cable subscribers served rather than on cable homes passed”<sup>269</sup> and eliminated the additional 5% allowance for minority-controlled systems.<sup>270</sup> Most critically, the FCC changed the denominator used in computing the horizontal ownership limit. Instead of basing the limit on cable subscribers alone, the new rules capped ownership at 30% of the market consisting of *all* multichannel video programming distributors in the United States.<sup>271</sup> Practically speaking, the rule change eased the barrier to any major merger among cable companies insofar as the merged firm’s market share would drop once direct broadcast satellite subscribers as well as cable subscribers are considered.

The horizontal cable ownership rules, long a subject of bitter litigation,<sup>272</sup> remain in limbo after *Time Warner Entertainment Co. v. FCC*, a 2001 D.C. Circuit decision remanding the horizontal cable ownership rules for further development.<sup>273</sup> In striking the 30% horizontal limit on the number of cable subscribers that any set of commonly owned and operated cable systems may reach nationwide, the D.C. Circuit complained that “the Commission has pointed to nothing in the record supporting a nonconjectural risk of anticompetitive behavior” among either affiliated cable systems, “by collusion or other means.”<sup>274</sup> The appeals court likewise struck down vertical limits on the number of channels that any cable operator may assign to programmers in which the operator holds an attributable interest: “The FCC has failed to justify its vertical

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systems are minority-controlled.” *In re* Implementation of Sections 11 & 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 8565, 8577–78 (1993) (codified at 47 C.F.R. § 76.503 (2005)).

268. *See In re* Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992, 14 F.C.C.R. 19,098, 19,101 (1999) (explaining that the rule was changed in order to make it easier to understand and implement).

269. *Id.*

270. *See id.* (“The minority-control allowance is being deleted in light of the fact that no party filed comments on this issue to argue that the allowance is effective, should be retained or might be beneficial, and in light of the possible constitutional issues that the allowance raised.”).

271. *See id.* (“The limit should include consideration of all [multichannel video programming distributor] subscribers rather than just cable subscribers.”).

272. A federal district court struck down section 11(c) as an unconstitutional infringement of the freedom of speech. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993). The D.C. Circuit then deferred a decision on the constitutional issue pending a consolidated appeal involving the district court decision that struck down section 11(c)’s “subscriber limitation” provision as well as a direct attack on the FCC’s horizontal ownership rules. *See Time Warner Entm’t Co., L.P. v. FCC*, 93 F.3d 957, 979–80 (D.C. Cir. 1996).

273. *Time Warner Entm’t Co., L.P. v. FCC*, 240 F.3d 1126, 1130, 1136 (D.C. Cir. 2001).

274. *Id.* at 1136.

limit as not burdening substantially more speech than necessary.”<sup>275</sup>

In the wake of *Time Warner*, the FCC suspended its divestiture conditions on the AT&T/MediaOne merger.<sup>276</sup> This decision had the practical effect of approving the AT&T/MediaOne merger outright. The horizontal cable ownership rules themselves are still pending.<sup>277</sup> With those rules in suspended animation, AT&T consummated an even bigger acquisition in 2002; it purchased Comcast for \$72 billion.<sup>278</sup> At a projected 28.9% of the market for multichannel video programming distribution, the combined AT&T/Comcast fell just under the 30% threshold imposed by the horizontal cable ownership rules.<sup>279</sup> The FCC approved the merger as one “likely to result in some public interest benefits associated with accelerated deployment of broadband services.”<sup>280</sup>

b. Open Access to Cable-Based Broadband Platforms. For its part, the AT&T/TCI merger sparked an ongoing dispute over open access to cable-based platforms providing Internet access. As a condition of approving the transfer of TCI’s franchise agreements to AT&T, city and county officials in Portland, Oregon, adopted open access measures requiring AT&T to permit unaffiliated ISPs to interconnect with AT&T’s cable modem platform.<sup>281</sup> In 2000, a federal district court held that open access measures under state or local law do not conflict with the Communications Act, the First Amendment, the Commerce Clause, or the Contract Clause.<sup>282</sup> In a complex opinion, styled

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275. *Id.* at 1139.

276. *See In re MediaOne Group, Inc. & AT&T Corp.*, 16 F.C.C.R. 5835, 5836 (2001) (suspending the deadline for compliance “to determine the relationship, if any, between the Court’s decision on the ownership rules and the ownership conditions adopted in this proceeding”); *In re MediaOne Group, Inc. & AT&T Corp.*, 16 F.C.C.R. 20,587, 20,588–89, 20,591–92 (2001) (same).

277. *See In re Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992*, 16 F.C.C.R. 17,312, 17,320–21, 17,334–38 (2001) (announcing further rulemaking and seeking further comment on the horizontal limit rules).

278. *See News Release, AT&T, AT&T Broadband to Merge with Comcast Corporation in \$72 Billion Transaction* (Dec. 19, 2001), *available at* <http://www.corp.att.com/news/2001/12/19-4135>.

279. *See In re Comcast Corp.*, 17 F.C.C.R. 23,246, 23,248 (2002) (concluding that the new entity, AT&T Comcast, would serve “28.9% of all U.S. [multichannel video programming distributor] subscribers”).

280. *Id.* at 23,249.

281. *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154–55 (D. Or. 1999), *rev’d*, 216 F.3d 871, 876 (9th Cir. 2000).

282. *Id.* at 1154–55.

*AT&T Corp. v. City of Portland*, the Ninth Circuit reversed.<sup>283</sup> The appeals court concluded, in effect, that broadband Internet access over cable should be regarded as an amalgam of “telecommunications service” and “information service” within the meaning of the Telecommunications Act.<sup>284</sup> To the extent that a cable-based ISP “controls all of the transmission facilities between its subscribers and the Internet,” the court concluded “Internet transmission over [that] cable broadband facility [provides] a telecommunications service.”<sup>285</sup> That classification promised to unite regulatory treatment of cable broadband with equivalent services offered by local telephone companies, which remained subject to the common carrier provisions of Title II of the Communications Act of 1934 and to the incumbent carrier provisions of the Telecommunications Act of 1996.

The FCC, however, has never imposed open access on cable broadband platforms, either industry-wide or in response to a specific merger. Instead, the mission of experimenting with open access fell to the Federal Trade Commission (FTC), which approved America Online’s (AOL) purchase of Time Warner in January 2001.<sup>286</sup> At the time, this merger threatened to suffocate further deployment of infrastructure, enabling broadband Internet access to the extent that the acquisition of Time Warner would have blunted AOL’s preexisting incentives to promote digital subscriber line (DSL) services and other high-speed alternatives to cable broadband.<sup>287</sup> Under the competition order that granted this merger, AOL/Time Warner agreed to allow its subscribers a choice of at least three nonaffiliated ISPs from 2001 through 2006, offering Internet access over a cable broadband platform. The order’s five-year term, described by FTC chairman Robert Pitofsky as “the shortest duration of [any] competition order,” reflects “the uncertainty of developments in” broadband markets and “the

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283. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 873 (9th Cir. 2000). See generally Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable*, 16 BERKELEY TECH. L.J. 677, 688–92 (2001) (discussing in greater detail the appeals court’s analysis and decision to reverse the lower court’s holding).

284. *Portland*, 216 F.3d at 876–78.

285. *Id.* at 878.

286. See *In re America Online, Inc. & Time Warner Inc.*, No. C-3989, 2000 WL 1843019 (F.T.C. Dec. 14, 2000) (approving the AOL and Time Warner merger on the condition that steps are implemented to ensure open access to subscribers and continued growth in areas such as digital subscriber line services); see also Public Notice, FCC, Subject to Conditions, Commission Approves Merger Between America Online, Inc. and Time Warner, Inc. (Jan. 11, 2001), available at [http://www.fcc.gov/Bureaus/Cable/Public\\_Notices/2001/fcc01011.pdf](http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011.pdf).

287. See Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011, 1041 (2000) (noting that the absence of AOL “as a driver of DSL” will allow alternate modes of connection to gain dominance).

dynamic quality of innovation.”<sup>288</sup> The combined firm also committed to continue offering DSL as an alternative mode of broadband access and not to interfere in the delivery of Internet content or interactive television by independent suppliers.<sup>289</sup> The FTC did not hesitate to fashion an open access rule when confronted with a combination of Time Warner’s media and cable empire with AOL’s dominant posture in the market for online services.<sup>290</sup>

Meanwhile, one year after the FTC extracted a commitment to open access as a condition of approval of the AOL/Time Warner merger, the FCC reaffirmed its policy of insulating cable broadband from open access obligations. In 2002, the FCC ruled that cable companies offering broadband Internet access do not offer telecommunications services.<sup>291</sup> Instead, the Commission reasoned, such cable companies “merely us[e] telecommunications to provide end users with cable modem service.”<sup>292</sup> This conclusion effectively excluded cable broadband from regulation under the common carrier provisions in Title II of the Communications Act (although it did leave room for the FCC to impose open access requirements on cable broadband operators as providers of “information service” within the meaning of the Telecommunications Act of 1996).<sup>293</sup> In litigation, styled *Brand X Internet Services v. FCC*,<sup>294</sup> the Ninth Circuit invalidated the FCC’s order on cable broadband to the extent that the Commission failed to treat the provision of Internet access over cable as a “telecommunications service.”<sup>295</sup> The court of appeals held that the FCC’s interpretation could not stand insofar as *Portland’s*

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288. Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L.J. 535, 555 (2001).

289. See *In re America Online, Inc.*, 2000 WL 1843019.

290. *Id.*

291. *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 F.C.C.R. 4798, 4824 (2002).

292. *Id.*

293. The Telecommunications Act defines

[t]he term “information service” [as] . . . the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20) (2000).

294. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *vacated sub nom.* Nat’l Cable & Telecomms. Ass’n v. *Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

295. See *id.* at 1132 (affirming in part the Commission’s “conclusion that cable broadband service is not ‘cable service’” but vacating in part the Commission’s ruling to the extent that it failed to realize that cable broadband is also “part ‘telecommunications service’”).

interpretation of the Telecommunications Act foreclosed a competing interpretation of the term “telecommunications service.”<sup>296</sup>

In vacating the Ninth Circuit’s decision, the Supreme Court reinstated the FCC’s interpretation of “telecommunications service” as excluding broadband Internet access over cable.<sup>297</sup> The Supreme Court’s resolution of *Brand X* presumably restores what had been the FCC’s posture *vis-à-vis* cable broadband before the Ninth Circuit vacated the Commission’s order. Despite its refusal to subject cable broadband to the common carrier provisions of the Communications Act, the FCC in 2002 invited comment on whether cable broadband operators *should* be subjected to open access as an “information service” within the meaning of the Telecommunications Act.<sup>298</sup>

What truly rankles cable broadband’s chief competitors is that the FCC has ruled that DSL services offered over the legacy wireline telephone network *are* subject to common carrier regulation, including open access obligations.<sup>299</sup> In its 2000 opinion in the *Portland* litigation, the Ninth Circuit pinpointed the source of competitive discomfort in the market for broadband Internet access when it praised the FCC for regulating “DSL service, a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier

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296. See *id.* at 1130–31 (discussing the requirements for deference to an administrative agency’s interpretation of a statute, determining that those requirements were not met, and concluding that “*Portland*’s construction of the Communications Act remains binding precedent”).

297. See *Brand X*, 125 S. Ct. at 2702–10 (agreeing with the Commission’s analysis distinguishing a telecommunications service from an information service).

298. See *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 F.C.C.R. 4798, 4839 (2002) (seeking comment on those statutory means that could be used to ensure universal access to cable modem service).

299. See 47 U.S.C. § 251(c)(3) (2000) (requiring ILECs to provide access to network elements on an unbundled basis); *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,689 (1996) (including the local loop within this open access obligation); *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability & Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 14 F.C.C.R. 20,912, 20,916 (1999) (defining the high-frequency portion of the loop used for residential DSL as a network element to which an ILEC must provide unbundled access); *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 F.C.C.R. 385, 390–92, 400–02 (1999) (finding that “xDSL-based advanced services are exchange access or telephone exchange services” requiring ILECs to provide open access), *vacated sub nom.* *WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001); *cf. In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,011, 24,037–38 (1998) (requiring an ILEC, upon request from another carrier, to prepare the local loop for DSL carriage). See generally James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 67–69 (2000) (detailing the legal obligation of ILECs to deal with competing DSL carriers).

obligations.”<sup>300</sup> The D.C. Circuit has blocked aspects of the FCC’s open access regime for DSL on multiple occasions.<sup>301</sup> The Commission, however, has clearly declared its comfort with an asymmetrical regulatory regime under which cable broadband operators have remained free of open access obligations,<sup>302</sup> while their telephone company counterparts are at least nominally obliged to offer DSL-enabling elements of their networks at cost to their competitors.<sup>303</sup> In its restoration of the FCC’s policy on cable

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300. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) (citing *GTE Operating Cos. Tariff No. 1*, 13 F.C.C.R. 22,466 (1998)).

301. *See U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 428–29 (D.C. Cir. 2002) (asserting that there exist limitations on unbundling); *WorldCom, Inc. v. FCC*, 246 F.3d 690, 690–95 (D.C. Cir. 2001) (finding the Commission’s application of open access provisions on LECs reasonable on the condition that LECs actually offer exchange access or telephone exchange services); *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5–8 (D.C. Cir. 2000) (remanding the Commission’s conclusion, which allowed for state imposition of reciprocal compensation in the absence of federal regulation, on the ground that the Commission failed to adequately explain its reasoning used to arrive at such a conclusion). *See generally* James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 *LOY. U. CHI. L.J.* 15, 26–28 (2003) (commenting on the likelihood that a common law approach to establishing the Commission’s authority to regulate the Internet would “create significant uncertainties” as a result of the court’s willingness to disagree with the Commission’s policy decisions).

302. The FCC has touted its official policy of “unregulation” of the Internet as a purported way of vindicating “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,” 47 U.S.C. § 230(b)(2) (2000); *see, e.g., In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion*, 14 F.C.C.R. 2398, 2423–24 (1999) (predicting the absence of monopolies in the consumer market for broadband as a result of the market’s ability to support different technologies); *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 15 F.C.C.R. 19,287, 19,294 (2000) (inviting comment on how a proposed classification would affect the Commission’s goal of establishing a uniform national policy for high-speed services); *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 6795–96 (1998) (discussing the Commission’s obligation to ensure that rates are just and reasonable in the context of pole attachments); Jason Oxman, *The FCC and the Unregulation of the Internet* 6 (FCC Office of Plans and Policy, Working Paper No. 31, 1999) (attributing the success and growth of the Internet to the FCC’s data policies fostering a deregulatory environment). *Compare* *Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (“[D]ecisionmakers sometimes dodge hard questions when easier ones are dispositive; and we cannot fault the FCC for taking this approach.”), *with id.* at 349 (Thomas, J., concurring in part and dissenting in part) (observing that the FCC may lack the statutory discretion “to avoid . . . question[s] of this sort).

303. *See In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 F.C.C.R. 4798, 4825 (2002) (noting that prior unbundling obligations were applied to traditional wireline services, such as telephone networks, and not to cable facilities), *vacated sub nom.* *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *vacated sub nom.* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,011, 24,031 (1998) (describing ILECs’ obligation to offer DSL capacity on an unbundled basis as a “continuing obligation”), *vacated sub nom.* *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

broadband, the Supreme Court took pains not to disturb the FCC's unbalanced treatment of DSL *vis-à-vis* cable modem service.<sup>304</sup>

3. *Cable Merger Policy Through Regulatory Adaptation, Not Legislative Design.* Among the types of telecommunications mergers that Congress could have predicted and regulated in 1996, the only type of merger that the Telecommunications Act specifically banned (absent FCC waiver) was the cable-telephone company combination targeted by section 652.<sup>305</sup> Among the different branches of the FCC's merger policy that have emerged since 1996, the Commission's approach to mergers involving cable companies has deviated the most from the statutory template laid down in 1996. Section 652 of the Telecommunications Act simply failed to add a significant, useful weapon to the FCC's merger arsenal. By contrast, the two collateral issues that arose in connection with AT&T's acquisition of cable operators give rise to significant checks against concentration and other anticompetitive consequences of cable mergers.

One of the tools at issue, section 11(c) of the 1992 Cable Act and the horizontal cable ownership rules, promulgated under the Cable Act's authority, arose before 1996. Like section 652 of the 1996 Act, the horizontal ownership rules were designed to target the distinct regulatory concern of media concentration. The FCC attempted to adapt both section 652 and the horizontal ownership rules as tools for responding to the emerging problem of concentration in the market for broadband Internet access, especially over the technologically superior cable platform. The fact remains, however, that these provisions arose in response to a distantly related or even irrelevant regulatory concern—namely, concentration among firms offering multichannel video programming delivery. Once the horizontal cable ownership rules failed to survive judicial review in the 2001 *Time Warner* decision, the FCC lost much of the leverage it had evidently expected to exploit in reviewing significant mergers among cable operators. As a result, AT&T was able to absorb MediaOne and Comcast in rapid succession, with minimal regulatory resistance.<sup>306</sup>

The second legal tool—namely, open access obligations on cable broadband operators—retains an uncertain status after

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304. See *Brand X*, 125 S. Ct. at 2711 (refusing to compel the FCC to apply common-carrier regulations equally to cable modem service providers and DSL providers).

305. Telecommunications Act of 1996, Pub. L. No. 104-104, § 652, 110 Stat. 56, 119–21 (codified at 47 U.S.C. § 572 (2000)).

306. See *supra* notes 276–80 and accompanying text.

*Brand X*. Even as the FCC continues to treat DSL capacity as part of the local telephone network that incumbent carriers must offer—on unbundled terms and at a forward-looking price to competitors requesting interconnection—the Commission has refrained from imposing any sort of open access requirement on cable broadband operators. It is also worth noting that the courts have endorsed the FCC’s decision to tackle what is, after all, the industry-wide problem of equal access to cable platforms through rulemaking rather than ad hoc conditions on merger approvals.<sup>307</sup> In all likelihood, the sharp contrast with the FCC’s exuberant use of conditions in horizontal mergers between BOCs and between local exchange carriers of all kinds arises from a basic statutory difference. Whereas open access to DSL is a natural outgrowth of the common carrier regime that the Communications Act historically imposed on companies providing wireline telecommunications services,<sup>308</sup> that statute and its subsequent amendments painstakingly insulate “cable system[s] . . . [from] regulation as a common carrier or utility by reason of providing any cable service.”<sup>309</sup>

There is no assurance that the FCC’s asymmetrical treatment of cable broadband and DSL will endure. On one hand, growing concentration in the cable sector—the very phenomenon that neither section 652 of the 1996 Act nor the ill-starred horizontal cable ownership rules have been able to obstruct—heightens the prospect that the FCC may exercise its authority to require open access to cable-based Internet access as an “information service.” On the other hand, intermodal competition between cable broadband, DSL, and its nascent wireless alternatives tempers, and perhaps undermines altogether, the urge to subject all of these modes of transmission to open access requirements. The continuing growth of “robust competition”<sup>310</sup> in the race to provide “residential high-speed access to the Internet,” especially as that contest “evolv[es] over multiple electronic platforms, including wireline,

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307. See *Consumer Fed’n of Am. v. FCC*, 348 F.3d 1009, 1013 (D.C. Cir. 2003) (recognizing that the Commission has the power to forgo addressing broad issues of open access during adjudication proceedings); cf. *SBC Commc’ns, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (agreeing with the Commission’s decision to conduct a separate proceeding to consider industry wide issues in lieu of examining such issues during a review of an individual merger).

308. See *supra* note 299 (providing sources cited).

309. 47 U.S.C. § 541(c) (2000).

310. *U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002); accord *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2711 (2005) (noting that continuous change in market conditions permits the Commission to treat facilities-based cable companies differently with regard to open access obligations).

cable, terrestrial wireless and satellite,<sup>311</sup> suggests that all of these platforms will eventually be freed of regulatory open access obligations. Once facilities-based competition emerges, especially for a market as technologically volatile as that for broadband Internet access, it makes no sense to shackle any of those modes of carriage, let alone a single mode, on behalf of competitors who may have ample resources with which to wage battle on an intermodal basis.

### III. REGULATORY MISMATCHES AND ALTERNATIVE PATHS TO TELECOMMUNICATIONS REFORM<sup>312</sup>

FCC merger policy has followed a tortuous path that bears little or no resemblance to the trajectory charted by the Telecommunications Act of 1996. Comprehensive legislative reform in 1996 has made it no easier to “draw our bearings from the legal landscape, and chart a course by the law’s words.”<sup>313</sup> Indeed, the leading tools for shaping merger policy within contemporary telecommunications law are at best tenuously connected to the 1996 Act. The FCC’s authority to grant conditional approval of mergers stems from the public interest franchising standard of the Communications Act of 1934.<sup>314</sup> The horizontal cable ownership rules arise from 1992 legislation aimed at curbing concentration in mass media, not in telecommunications.<sup>315</sup> A potentially vital tool for checking concentration in the industry that holds a commanding lead in the market for broadband Internet access thus owes its legal impetus to a statute designed to ensure diversity in news and entertainment. Although the FCC has refused to adopt open access rules for cable Internet platforms, rules of that sort would rest on a contentious and mostly unforeseen application of the 1996 Act’s definition of “information services.” At least with respect to mergers, such success as the FCC has enjoyed in shaping

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311. *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 F.C.C.R. 4798, 4802 (2002), *vacated sub nom.* *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *vacated sub nom.* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

312. *Cf.* Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979) (setting forth a three-part framework for analysis of economic regulations).

313. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

314. Communications Act of 1934, ch. 652, § 221, 48 Stat. 1064, 1080.

315. *See Time Warner Entm’t Co., L.P. v. FCC*, 240 F.3d 1126, 1128–29 (D.C. Cir 2001) (discussing the horizontal limit set forth in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, which imposed “a 30% limit on the number of subscribers that may be served by a multiple cable system operator”).

competition within telecommunications has come not because of the 1996 Act, but in spite of it.<sup>316</sup>

Legislative shortsightedness bears much of the blame.<sup>317</sup> The 1996 Act notoriously ignored the Internet,<sup>318</sup> except as a transmission vector for pornography.<sup>319</sup> Title V of the Act, better known as the Communications Decency Act of 1996 (CDA),<sup>320</sup> fell under the constitutional knife in the 1997 case of *Reno v. ACLU*.<sup>321</sup> Subsequent litigation<sup>322</sup> over the CDA's statutory successor, the Child Online Protection Act of 1998,<sup>323</sup> has had no bearing on the market structure and industrial organization of the telecommunications industry, the putative focus of the 1996 Act. Having failed to anticipate "the fastest growing new medium of all time" and "the information medium of first resort for its users,"<sup>324</sup> the Telecommunications Act gave the FCC no tools for responding cogently to VoIP or any other Internet application that might affect the traditional work of the Common Carrier Bureau.<sup>325</sup> Even after

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316. *Cf., e.g.*, *Vacco v. Quill*, 521 U.S. 793, 802 (1997) (applying similar reasoning in the assisted-suicide context and noting that "[t]he law has long used actors' intent or purpose to distinguish between two acts that may have the same result"); *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (applying similar reasoning in the discriminatory purpose context); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (same).

317. *Cf. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 777 (1996) (Souter, J., concurring) (acknowledging that "changes in [communications] technologies will enormously alter the structure of regulation itself" and confessing "the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong'" (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995))).

318. *See generally* John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093 (1996) (predicting the outcomes from the Telecommunications Act and the ramifications of the Internet on debate surrounding the Act).

319. *See Reno v. ACLU*, 521 U.S. 844, 857 (1997) ("The major components of the [Telecommunications Act] have nothing to do with the Internet."); Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 55 (1999) (noting that Congress paid more attention to the Internet's pornographic potential than any other aspect of that medium).

320. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (codified as amended at 47 U.S.C. § 223 (2000)).

321. *Reno*, 521 U.S. at 885.

322. *See Ashcroft v. ACLU*, 535 U.S. 564, 585-86 (2002) (expressing no view on whether the Child Online Protection Act (COPA) is unconstitutionally overbroad for First Amendment purposes and holding the reasoning for such an assertion insufficient); *Ashcroft v. ACLU*, 542 U.S. 656, 665-73 (2004) (finding that COPA likely violates the First Amendment and that less restrictive means exist).

323. Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-736.

324. PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003, at 11, available at [http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable\\_report.pdf](http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf).

325. *See generally In re IP-Enabled Servs.*, FCC 04-28, WC Docket No. 04-36 (Mar. 10, 2004) (providing notice of proposed rulemaking regarding telephone calls made via Voice over Internet Protocol (VoIP)); Voice over Internet Protocol, <http://www.fcc.gov/voip> (last visited Jan. 10, 2007) (offering a definition of VoIP and information on the technology's

the technological shortcomings of the 1996 Act became undeniably clear, Congress continued to regulate the Internet as a conduit for sexually explicit speech, secondarily as a duty-free shopping zone,<sup>326</sup> and barely as the dominant communications medium of what Congress in a different context has designated the “Digital Millennium.” In short, “[t]he drafters of the 1996 Act systematically underestimated the rate of technological innovation in the industry.”<sup>327</sup>

Those portions of the Telecommunications Act that did address competition policy focused on “[t]he two most noteworthy and most controversial changes in the status quo, authorizing competition in local telephone markets and, reciprocally, authorizing Bell operating company . . . entry into long distance.”<sup>328</sup> Much of the considerable legal energy devoted to the first decade of enforcement of and compliance with the Telecommunications Act of 1996 has been spent on bruising and ultimately inconsequential battles over incumbent carriers’ pricing of unbundled network elements and BOC petitions under section 271 to offer in-region interexchange services to local exchange customers. As early as 1998, facilities-based competition began to take root. By 2000, facilities-based entry eclipsed entry based on unbundled network elements and resale of ILEC service—the categories of competitive entry dependent on section 251 and the other local competition provisions of the 1996 Act.<sup>329</sup> The enormous amount of legal effort poured into sections 251 and 271 have coincided with those provisions’ slide into technological irrelevance. The legal obsessions that dominated the first few years under the Telecommunications Act of 1996 now smack of “old, unhappy, far-off things, / And battles long ago.”<sup>330</sup>

The deregulatory model contemplated by the Telecommunications Act of 1996 was not altogether demented or inherently defective. Its roots can be traced to Harold Demsetz’s work on imperfect competition.<sup>331</sup> “The Act sought to unleash three

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operation).

326. See Internet Tax Freedom Act, Pub. L. No. 105-277, § 1100, 112 Stat. 2681-719 (1998) (prohibiting states from imposing taxes on Internet access).

327. Epstein, *supra* note 12, at 320.

328. Robinson, *supra* note 201, at 289.

329. See Shelanski, *supra* note 52, at 353 (analyzing in greater detail the implications of the growing trend of facilities-based competition).

330. WILLIAM WORDSWORTH, *The Solitary Reaper*, in THE COMPLETE POETICAL WORKS OF WILLIAM WORDSWORTH 192, ll. 19-20 (1905); accord *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

331. See generally Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968) (analyzing market conditions that give rise to monopolistic and uncertain competition in public utility industries and arguing against regulation). For a flavor of work following

of the most deeply entrenched monopolists in the American economy—local exchange carriers, interexchange carriers, and cable system operators—on each other's markets in the hope that competition among the large would dissolve these industrial giants.<sup>332</sup>

Even if each combatant achieved only modest "inroads," the mere presence of "new entrant[s]" in each of these "tight oligopoly industr[ies]" promised to "shake things up a great deal."<sup>333</sup> The Act especially relished the prospect that local carriage, "the last of the great natural monopolies, would succumb to a technologically sophisticated, intermodal assault."<sup>334</sup> The Act contemplated a battle royale in which interexchange carriers and cable companies would lead the charge into the local exchange, while BOCs would breach the MFJ-era firewalls that had kept them out of long-distance carriage<sup>335</sup> and video programming.<sup>336</sup>

These head-to-head battles over what had been the leading telecommunications markets of the 1980s never materialized. Incumbent local exchange carriers never successfully invaded the

Demsetz's proposal that public utility regulation yield in favor of competitive bidding, see Richard A. Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MGMT. SCI. 98, 98-102, 123-27 (1972), which characterizes regulatory alternatives in the cable television context as "unattractive," and Mark A. Zupan, *The Efficacy of Franchise Bidding Schemes in the Case of Cable Television: Some Systemic Evidence*, 32 J.L. & ECON. 401, 401-03, 407-08, 439-40 (1989). See Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. & MGMT. SCI. 426, 426-27, 431, 435-36, 444-46 (1976), and Oliver E. Williamson, *Franchise Bidding for Natural Monopolies—In General and with Respect to CATV*, 7 BELL J. ECON. & MGMT. SCI. 73, 73-78, 81-82, 90-91, 101-03 (1976), for exemplary instances of scholarship contradicting this view.

332. Chen, *supra* note 20, at 1514; *accord* MCI Telecomms. Corp. v. Public Serv. Comm'n, 216 F.3d 929, 933 (10th Cir. 2000) (noting the possibility of competition among local service providers as a result of the Telecommunications Act); Qwest Broadband Servs., Inc. v. City of Boulder, 151 F. Supp. 2d 1236, 1241 (D. Colo. 2001) (same).

333. Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1383 (1965); *accord* BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 27 (2d Cir. 1977) (stating that "typically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects"); *cf.* *In re Microwave Commc'ns, Inc.*, 18 F.C.C.2d 953, 978 (1969) (statement of Johnson, Comm'r) (celebrating the introduction of "a little salt and pepper of competition to" traditional public utility law's "rather tasteless stew of regulatory protection").

334. Jim Chen, *TELRIC in Turmoil, Telecommunications in Transition: A Note on the Iowa Utilities Board Litigation*, 33 WAKE FOREST L. REV. 51, 56 (1998).

335. See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 188-91 (D.D.C. 1982) (explaining why operating companies would have incentives to subvert these obstacles), *aff'd mem. sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983), *superseded by* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143, *reprinted in* 47 U.S.C. § 152 (2000).

336. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613, 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (2000)) (restricting the provision of video programming by common carriers), *repealed by* 47 U.S.C. § 533(b) (2000).

cable operators' core business of multichannel video programming and delivery. Erstwhile, buzzwords such as "video dialtone" and "open video systems" are now relics, bearing mute legal testimony to the failed aspirations of policymakers who had envisioned telephone companies as the video programming providers of choice. Nothing ever came of the "hybrid fiber coax" technology once thought to be the conduit by which cable operators would carry switched voice messages.<sup>337</sup> In truth, video dialtone and hybrid fiber coax were the same technology,<sup>338</sup> and it failed.

Superior solutions to the related but distinct problem of competition in mass media have been available throughout the reign of the Telecommunications Act.<sup>339</sup> The federal government's longstanding and arguably fanatical devotion to "free TV"—advertiser-financed television on a local footprint available to anyone with a receiver<sup>340</sup>—negated policy options that might have had more beneficial impact on competition in mass media. As the "first video technology with a national footprint" and the corresponding opportunity "to exploit the cost efficiencies that accompany national distribution" of programming, direct broadcast satellite "represents the first technology capable of breaking" the grip of "local cable monopolies" over "the market for multichannel video program distribution."<sup>341</sup> Congress grudgingly lifted the

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337. See, e.g., DANIEL MINOLI, VIDEO DIALTONE TECHNOLOGY 129 (1995).

338. See Botein, *supra* note 241, at 581–82 (explaining how the two technologies are essentially the same).

339. See generally, e.g., Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 586–92 (2000) (describing deregulatory actions that existed before, during, and after the passage of the 1996 Act); Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 690–91 (2005) (discussing the Telecommunication Act's elimination of cross-ownership rules and the Act's raised thresholds on horizontal ownership restrictions). On the specific question of mergers among mass media firms, see R.G. Picard, *The Rise and Fall of Communication Empires*, J. MEDIA ECON., 1996, at 23, 37–38, which suggests that large media firms appear, decline, and disappear in capitalistic economies not unlike any other large business organization, and mergers among these firms are a natural course taken to sustain viable enterprises.

340. See generally Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1656–62 (2003) (providing a comprehensive analysis of localism and the FCC's preferences for free over pay television, incumbents over entrants, and single-channel over multichannel technologies). Compare Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233, 253 (2004) (concluding that less regulation would stimulate private investment and lead to efficient markets and advanced wireless technologies), with Christopher S. Yoo, *The Role of Politics and Policy in Television Regulation*, 53 EMORY L.J. 255, 272–75 (2004) (arguing that regulators' failure to understand the underlying principles of localism stymies technological advancement and undermines the very goals they seek to achieve).

341. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 343 (2003); see also Spulber & Yoo, *supra* note 109,

longstanding bar on satellite broadcasters' carriage of local stations,<sup>342</sup> but only after it doubled the amount of spectrum given to each incumbent broadcast station as part of its policy to move broadcast television to a high-definition standard.<sup>343</sup>

Meanwhile, for all the hope that the 1996 Act lodged in facilities-based competition, the 104th Congress grossly underestimated the competitive potential of wireless telephony.<sup>344</sup> The legislative history of the Telecommunications Act explicitly rejected the possibility that wireless service could satisfy the statute's definition of "facilities-based competition."<sup>345</sup> Ironically, under the state of communications technology that prevailed in 1996, wireless telephony promised the most economically robust, facilities-based platform by which competitive carriers could undermine incumbent carriers' wireline legacy networks.<sup>346</sup> Especially in rural areas, where wireless telephony could most effectively remedy a wireline network's difficulty in overcoming dispersed populations, forbidding climates, and "unaccommodating" terrain,<sup>347</sup> telecommunications law's bias

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at 901 n.37 (contrasting satellite broadcasting's nationwide reach with cable's intrinsically local footprint and describing satellite as "uniquely well suited to take advantage of the economies inherent in national distribution of video programming").

342. See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-523 (codified at scattered sections of Titles 17 and 47 of U.S.C.); *Satellite Broad. & Comm'n Ass'n v. FCC*, 275 F.3d 337, 354-55 (4th Cir. 2001).

343. See *In re Advanced Television Sys. & Their Impact upon the Existing Television Broad. Serv.*, 12 F.C.C.R. 12,809, 12,820-21 (1997) (requiring "broadcasters to provide on their digital channel the free over-the-air television service on which the public has come to rely").

344. Cf. Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 982-83 (1997) (describing and criticizing telecommunications law's conventional distinction between wireline and wireless communications).

345. See CONFERENCE REPORT, *supra* note 209, at 147 (noting that neither cellular service nor resale of a BOC's local exchange services would satisfy the statutory "facilities-based competitor requirement"); H.R. REP. NO. 104-204, at 77 (1996) (same), *reprinted in* 1996 U.S.C.C.A.N. 10, 43.

346. See, e.g., Lisa M. Warner, *Wireless Technologies Creating Competition in the Local Exchange Market: How Will Local Exchange Carriers Compete?*, 4 COMMLAW CONSPECTUS 51, 52 (1996) (describing how wireless technology would compete with BOCs and contribute to decline in BOCs' profitability); Eric Thoreson, Comment, *Farewell to the Bell Monopoly? The Wireless Alternative to Local Competition*, 77 OR. L. REV. 309, 336 (1998) (arguing that due to the rate at which wireless technology was advancing, it would displace a "significant portion of landline calls within the next decade . . . providing a model for effective competition in the local exchange market").

347. *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 617 (5th Cir. 2000) ("Rural areas where telephone customers are dispersed and terrain is unaccommodating are . . . the most expensive to serve."). See generally Seamus Grimes & Gerard Lyons, *Information Technology and Rural Development: Unique Opportunity or Potential Threat?*, 6 ENTREPRENEURSHIP & REGIONAL DEV'T 219 (1994).

against wireless telephony has been perverse and unremitting.<sup>348</sup> This bias has no historical justification. In the first decades of telephony, AT&T and independent carriers so fiercely contested local markets that more than half of the American population had a choice of carriers,<sup>349</sup> and rural markets were the markets where most of this competition took place.<sup>350</sup>

In retrospect, the FCC's October 8, 1999, approval of the SBC/Ameritech merger marked a legal and technological turning point in American telecommunications policy. That proceeding marked the last of the significant horizontal BOC mergers. Bell Atlantic's acquisition of GTE, approved eight months later,<sup>351</sup> seemed legally anticlimactic despite involving a purchase price of \$52.8 billion.<sup>352</sup> The merged firms' commitment to divest GTE's Internet backbone holdings<sup>353</sup> and overlapping wireless properties in ninety-six overlapping markets<sup>354</sup> effectively cleared all regulatory hurdles to the absorption of the country's largest independent local exchange carrier by the mightiest of the BOCs. "We believe that the voluntary merger conditions proposed by the Applicants . . . will not only substantially mitigate the potential public interest harms of the merger," wrote the FCC, "but also provide public interest benefits that extend beyond those resulting from the proposed transaction."<sup>355</sup> In a long but legally inconsequential order, the FCC blessed the creation of Verizon, the most formidable telephonic behemoth since the dismantling of the Bell system.

The divestiture of Internet backbone associated with the birth of Verizon would eventually affect the telecommunications industry

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348. See generally Jim Chen, *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 J. ON TELECOMM. & HIGH TECH. L. 307, 343-46 (2003) (describing the telecommunications law's inherent bias against wireless technology in spite of wireless telephony's natural superiority in serving rural customers).

349. Shelanski, *supra* note 52, at 344; see also Warren G. Lavey, *The Public Policies That Changed the Telephone Industry into Regulated Monopolies: Lessons from Around 1915*, 39 FED. COMM. L.J. 171, 178 (1987) (noting that by 1902, 45% of "cities having telephone services and populations greater than 4,000 . . . were served by two or more separate phone systems").

350. See Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, 17 TELECOMM. POL'Y 352, 359-60 (1993) (describing how competition prompted the establishment of exchanges in the medium and small town markets). See generally MILTON L. MUELLER, *UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM* (1999).

351. *In re GTE Corp.*, 15 F.C.C.R. 14,032, 14,232 (2000).

352. See Seth Schiesel & Laura M. Holson, *Reshaping the Phone Business*, N.Y. TIMES, July 28, 1998, at A1 (citing the \$52 billion stock deal).

353. *In re GTE Corp.*, 15 F.C.C.R. at 14,037.

354. *Id.* at 14,039.

355. *Id.* at 14,036.

in unanticipated ways. One seemingly insignificant aspect of the SBC/Ameritech proceeding had the incidental effect of giving the future Verizon the breakthrough in wireless markets that Bell Atlantic had long-coveted. A divestiture associated with the SBC/Ameritech merger effectively launched what would eventually become Verizon's dominant position in wireless communications. In anticipation of its merger with SBC, Ameritech agreed to sell twenty of its wireless properties, including the Chicago and St. Louis markets, to a partnership consisting of GTE and Georgetown Partners for \$3.27 billion.<sup>356</sup> At the time, the divestiture of these wireless properties by Ameritech was noted primarily for its impact on FCC Chairman William Kennard's goal of increasing minority participation in telecommunications management. Georgetown Partners, a minority-owned "private investment firm . . . [with] no telecommunications experience," took part in a \$3.3 billion deal that GTE could have easily managed alone.<sup>357</sup>

Those licenses, however, signaled a far broader shift in the nature of competition within American telecommunications. The licenses acquired by GTE came to rest in Verizon's hands upon Bell Atlantic's absorption of America's last significant independent local exchange carrier. Meanwhile, Bell Atlantic eventually reached a compromise with Vodafone, which agreed to sell AirTouch's former properties in North America—precisely what the BOC had coveted in its failed 1999 bid for AirTouch.<sup>358</sup> By unifying the geographically comprehensive wireless assets that once belonged to Bell Atlantic, AirTouch, Ameritech, and GTE, Verizon forged a wireless empire worth an estimated \$70 billion at the time of the Bell Atlantic/GTE merger.<sup>359</sup> As of its creation in 2000, Verizon commanded a dominant position in wireless telephony across the entire United States. The era of wireline dominance in telephony had begun its inexorable decline.

Federal communications policy has long favored wireline over wireless infrastructure. On an annual basis, historic delays in the rollout of wireless capacity inflict roughly \$33 billion in lost

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356. *In re Ameritech Corp.*, 15 F.C.C.R. 6667, 6667, 6673 (1999); Seth Schiesel, *Ameritech to Sell Half of Wireless Business to GTE*, N.Y. TIMES, Apr. 6, 1999, at C1.

357. Schiesel, *supra* note 356; see also Seth Schiesel, *How One Man Used Corporate Affirmative Action in Ameritech Deal*, N.Y. TIMES, Apr. 12, 1999, at C1 (describing SBC's desire to involve Georgetown Partners in order to "curry favor" with FCC Chairman Kennard pending approval of the Ameritech acquisition).

358. See Laura M. Holson, *Bell Atlantic and Vodafone, Once Enemies, Are Now Allies*, N.Y. TIMES, Sept. 13, 1999, at C1 (noting that the compromise "would give [Bell Atlantic] the national cellular footprint it has craved for several years").

359. See Laura M. Holson, *Deal to Create Biggest U.S. Wireless Network*, N.Y. TIMES, Sept. 22, 1999, at C1 (noting that the merger created the largest wireless network in the United States).

productivity across the American economy.<sup>360</sup> The FCC initially assigned two 25-megahertz (MHz) cellular licenses in the 800-MHz band in each local market, reserving one for the incumbent wireline carrier.<sup>361</sup> In 1995, the FCC opened 120 MHz of spectrum in the 1900-MHz band for broadband personal communications services (PCS).<sup>362</sup> This action, which predated comprehensive statutory reform of the Communications Act by a single year, may have had a greater competitive impact than the Telecommunications Act of 1996. The first broadband PCS auction triggered an epochal change in American wireless telephony. The old cellular duopoly gave way to a thoroughly competitive national marketplace. Between 2000 and 2004, the percentage of the U.S. population having access to three or more different choices in mobile telephony increased from 88% to 97%.<sup>363</sup> By 2004, six mobile operators operated nationwide networks: AT&T Wireless, Cingular Wireless, Nextel, T-Mobile, Sprint, and Verizon Wireless.<sup>364</sup> Along with market structure, the technological basis for wireless telephony changed dramatically. From the end of 1998, roughly contemporaneous with the horizontal BOC mergers, to 2004, the portion of mobile telephone subscribers using digital rather than analog cellular technology rose from 30% to more than 90%.<sup>365</sup>

The wireless industry's pronounced absence from the most important FCC merger proceedings of the past decade teaches a deeper lesson about the impact of telecommunications law on this facet of the industry. In retrospect, neither comprehensive legislative reform in 1996 nor the first decade of experience with the altered legal regime in telecommunications has significantly changed the impact of mergers in this industry. AT&T's 1993 acquisition of McCaw Cellular Communications arguably still sets the baseline by which the law's impact on telecommunications

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360. Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1, 23 (Martin Neil Baily et al. eds., 1997).

361. *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Commercial Mobile Servs., 19 F.C.C.R. 20,597, 20,632 (2004) [hereinafter Ninth CMRS Report].

362. *Id.* at 20,632-33. Congress authorized competitive bidding in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-88 (codified at 47 U.S.C. § 309(j) (2000)).

363. *In re* AT&T Wireless Servs., 19 F.C.C.R. 21,522, 21,553 (2004).

364. *Id.* at 21,554.

365. See Ninth CMRS Report, *supra* note 361, at 20,669 (citing Cellular Telecomms. & Internet Ass'n, Digital Migration Keeps a Steady Pace (2004), [http://files.ctia.org/img/survey/2003\\_endyear/752x571/Digital\\_Migration\\_Dec03.jpg](http://files.ctia.org/img/survey/2003_endyear/752x571/Digital_Migration_Dec03.jpg) (illustrating the increase in digital subscribers as of the end of 2003)).

mergers can be measured. This is true even though the 1996 Act terminated the consent decree governing the AT&T/McCaw merger.<sup>366</sup> Touted as one of the most significant developments in telecommunications before 1996,<sup>367</sup> AT&T's acquisition of McCaw's wireless network terrorized the BOCs by threatening to recreate "the only facilities based national and local end-to-end service in the country since divestiture."<sup>368</sup> At the time, the union of AT&T and McCaw tantalizingly promised full-service telecommunications based on wireless local exchanges and fiber optic transmission—the technological mirror image of the copper-and-microwave combination that precipitated the Bell breakup.<sup>369</sup>

A mere decade after the D.C. Circuit upheld the AT&T/McCaw consent decree, no one today regards that merger as anything but a minor footnote in the recent and rapidly evolving history of telecommunications. Though that merger signaled the rise of wireless telephony as a significant competitive factor, the designers of the 1996 Act took pains to minimize the role and the contribution of wireless technologies to local competition. AT&T's later forays into cable would not only reshape that company, but also prove even more significant for the state of competition in the industry. The once fearful combination of AT&T's interexchange kingdom with McCaw's wireless network had virtually no impact on SBC's acquisition of AT&T. Rather than responding to these developments, the path of legal reform in telecommunications since 1996 has focused on other issues, such as unbundled access to the local exchange and section 271 petitions permitting the provision of interexchange carriage to BOC customers. Meanwhile, a technological transformation arguably more significant than the development of microwave transmission or cellular telephony went largely unaddressed.

The AT&T/McCaw merger did manage to reverse the baseline by which the law approaches telecommunications mergers. Line-of-

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366. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 143-44 (codified in scattered sections of 47 U.S.C.).

367. See, e.g., WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 16 (1994) (describing the AT&T/McCaw merger and its effect on certain telecommunications markets); J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1224 (1993) (explaining how the merger created "a more technologically advanced version of the former Bell System").

368. *SBC Commc'ns, Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995) (quoting Brief for the Appellants in Case No. 94-1639 at 3, *SBC Commc'ns, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (Nos. 94-1637, 94-1639)).

369. See *United States v. W. Elec. Co.*, 46 F.3d 1198, 1201-02 (D.C. Cir. 1995) (tracing the legal history of the AT&T/McCaw merger); *In re McCaw & AT&T Co.*, 10 F.C.C.R. 11,786, 11,800-03 (1995) (modifying the McCaw decree before its termination by the 1996 Act).

business firewalls separating local wireline carriage, interexchange carriage, wireless carriage, and equipment manufacturing once characterized the MFJ.<sup>370</sup> The Bell breakup decree *a fortiori* scrutinized any proposed merger that would blur these presumptive operational boundaries. Yet the AT&T/McCaw merger proceeded almost without regard to the MFJ. Though the FCC did consider the MFJ as a “special circumstance” affecting the merger’s legality, the Bell breakup decree was all but irrelevant.<sup>371</sup> Ever since that merger, federal authorities, at both the FCC and the Department of Justice, have been content to extract regulatory concessions from the parties in proposed telecommunications mergers. But neither the FCC nor Justice has barred a major telecommunications merger outright in the tradition of William Baxter and the MFJ. In a legal realm whose “regulatory measures” emphatically “are temporary expedients, not eternal verities,”<sup>372</sup> meaningful barriers to telecommunications mergers have yielded in favor of presumptive regulatory comfort with convergence, consolidation, and concentration.<sup>373</sup>

To be fair, “[e]conomic analysis and market predictions” are nowhere near “an exact science,”<sup>374</sup> least of all of in an industry whose “unusually dynamic character” has notoriously confounded legal efforts to keep pace with technological change.<sup>375</sup> The FCC has had to fashion a merger policy from almost no legislative raw material and under conditions of rapid technological change and predictive uncertainty. Throughout the merger mania of the late 1990s, the FCC “could not read the depth of [its own] thought[s], but stared down into it as into a deep well where a little light glimmers on the dark water.”<sup>376</sup> It may be just as well that the FCC has developed its merger policy over a period of years, without conscious forethought, and in response to rather than in anticipation of market events.

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370. See generally Kearney, *supra* note 6, at 1419–32 (outlining the various interexchange restrictions found in the Modification of Final Judgment in the Department of Justice’s monumental antitrust case against AT&T).

371. *SBC Commc’ns*, 56 F.3d at 1489–90.

372. *FPC v. E. Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting).

373. See generally THOMAS F. BALDWIN ET AL., *CONVERGENCE: INTEGRATING MEDIA, INFORMATION, AND COMMUNICATIONS* (1996) (describing the convergence in broadband communications that is facilitated by federal policy).

374. *United States v. W. Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

375. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 235 (1994) (Stevens, J., dissenting); see also *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (stressing the “rapidly fluctuating” and “dynamic aspects of radio transmission” as a justification for an expansive interpretation of the FCC’s jurisdiction).

376. ROBERT PENN WARREN, *WILDERNESS: A TALE OF THE CIVIL WAR* 302 (1961).

The FCC's experience since 1996 finds an instructive parallel from the Commission's earliest days. In response to Congress's first request for an investigation of the telephone industry,<sup>377</sup> the FCC concluded that the "fundamental problem" of regulating interstate telephony "consist[ed] largely of developing ways and means . . . for continuous acquisition of basic factual data" on the industry.<sup>378</sup> The Commission thus developed and pursued a policy of "constant or continuing surveillance" of long-distance rates through "informal negotiation."<sup>379</sup> Constant surveillance allowed the FCC to patrol long-distance rates without interminable hearings or the antagonistic atmosphere of command-and-control regulation, all the while gathering more knowledge of telephony's underlying market structure.<sup>380</sup> The Commission not only stumbled onto the aptly named regulatory strategy of "muddling through"<sup>381</sup> but also anticipated the "modern" technique of negotiated rulemaking by a half century.<sup>382</sup>

Merger policy, at most an afterthought in the 1996 Act, has become a major part of telecommunications reform. The market has moved unpredictably, and the FCC has been fortunate enough to respond in a reasonably flexible way.<sup>383</sup> Ad hoc responses to numerous unanticipated legal and economic twists since 1996 have

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377. See S.J. Res. 46, 74th Cong., 49 Stat. 43, 45 (1935) (appropriating \$750,000 for an investigation of the telephone industry).

378. FED. COMM'NS COMM'N, INVESTIGATION OF THE TELEPHONE INDUSTRY 596 (1939).

379. FED. COMM'NS COMM'N, FINAL REPORT OF THE TELEPHONE RATE AND RESEARCH DEPARTMENT 69 (1938).

380. See Francis X. Welch, *Constant Surveillance: A Modern Regulatory Tool*, 8 VILL. L. REV. 340, 352-59 (1963) (describing the dynamics of constant surveillance and its effect on the rate regulating process).

381. See Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 86 (1959) (explaining that policymaking is a "very rough process" of "successive approximation[s]" by policymakers who do not "know enough about the social world to avoid repeated error in predicting the consequences of policy moves" and seeking an end which "continues to change under reconsideration"); cf. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 733 (1969) (suggesting agencies accumulate information over time about the industries they regulate and follow a "common law" body of rules or precedents in formulating policy). See generally Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 847-48 (1997) (noting that the Commission's early success came from "the absence of a coherent agenda" and stating that the Commission's later policy became one of "muddling through").

382. See Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969, 4970 (codified at 5 U.S.C. §§ 561-570 (2000)) (establishing a "framework for . . . negotiated rulemaking" while "limit[ing] innovation and experimentation with the negotiated rulemaking process"). See generally Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 27-113 (1982) (describing regulatory negotiation, or "reg neg," and proposing a process for its use by administrative agencies).

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

made merger policy an important component of its implementation of the Telecommunications Act. Although that policy has never stopped a proposed merger falling within the Act's comprehensive scope, the FCC's record of adaptation and response refutes suggestions that the Commission since 1996 has behaved like "a lazy no-good [sheriff], prone to take [its] ease with a bottle of liquor, and let trouble-makers and thieves, even the most dangerous type of cutthroats, run free and wild."<sup>384</sup> That record, however, is only as valuable as its most recent manifestation. VoIP, once fully deployed and embraced "by a substantial majority of residential customers,"<sup>385</sup> will pose an unforgiving test of the ability of the existing framework governing telecommunications mergers to respond to unanticipated anticompetitive threats. "History may be servitude, / History may be freedom."<sup>386</sup> Whether telecommunications law liberates or encumbers this market depends on regulators' ability to manage what may be the most significant technological development in communications since the invention of the telephone.

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384. TRUMAN CAPOTE, *OTHER VOICES, OTHER ROOMS* 17 (1948).

385. 47 U.S.C. § 254(c)(1)(B) (2000).

386. T.S. ELIOT, *Little Gidding*, in *FOUR QUARTETS*, *supra* note \*, at 49, 55 ll. 162-63.