THE TELECOMMUNICATIONS ACT OF 1996: THE CHALLENGE OF COMPETITION

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The most significant overhaul of our nation's telecommunications laws since 1934 was signed into law by President Bill Clinton on February 8, 1996.1 Passed by a bipartisan Congress, the Telecommunications Act of 1996 (hereinafter the "Act") opened virtually every sector of the telecommunications industry, including local and long distance telephone services, cable television, and equipment manufacturing to competition.2 The Act also made changes affecting the regulation of both radio and television, modified spectrum allocation, and created the Communications Decency Act.3

President Clinton said during the signing of the Act, "[t]oday, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light."4 Indeed, less than an hour after President Clinton signed the bill, the largest local telephone company in the United States, GTE Corp. announced it was partnering with WorldCom, the fourth-largest long distance company, to resell long distance under the GTE name.5 A few minutes later, AT&T Corp.

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2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to codified in various sections of 47 U.S.C.). The Act passed the House of Representatives 414-16 and the Senate 91-5. The Act is divided as follows: Title I-Telecommunications; Title II-Broadcast Services; Title III-Cable Services; Title IV-Regulatory Reform; and Title V-Obscenity and Violence.
3. Id. The Communications Decency Act of 1996 was ruled unconstitutional by the United States Supreme Court on June 26, 1997.
4. President William J. Clinton, Remarks by the President at the Signing Ceremony for the Telecommunications Act, available at <http://www.whitehouse.gov/WH/eop/op/telecom/release.html>. The Act was signed into law at the Library of Congress. It is thought to be the first time legislation was signed at the Library of Congress and the first time in three decades that legislation was signed on Capitol Hill.
5. Phone Wars Begin with Penn State: Clinton Signs Sweeping Telecom Act that Opens Long-Distance Market, Mil. J. Sentinel, Feb. 9, 1996, at 1.
Chairman Robert Allen stood before reporters in Washington and said that the largest long-distance company in the world would offer local phone service by late summer.\(^6\)

Described by one author as a "legislative trifecta," the principles of the Act are simple.\(^7\) They are: (1) to promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunication consumers, (2) to encourage the rapid deployment of new telecommunications technologies, and (3) to implement policies that will prevent harm to consumers from the implementation of competition.\(^8\) The Act touches every aspect of telecommunications, making a comprehensive summary of each of the Act's provisions difficult. This Article will provide a brief history on the Act's passage and will focus on the sections of the Act pertaining to telephony, particularly Sections 251 through 254 and Section 271 of Title I. For organizational purposes, each section will be discussed independently. Finally, this Article will discuss the successes and failures of the Act after its first full year.

**THE EVOLUTION OF TELECOMMUNICATION REGULATION: 1934 TO 1996**

Prior to the signing of the Act, the United States operated with an outdated set of telecommunication policies. When the 1934 Act was implemented, there were no personal computers and only one phone company. It was not until the 103rd Congress in 1993 that significant local telecommunications reform was finally introduced.\(^9\) The prior inability or unwillingness to pass legislation should not, however, be interpreted as a signal of inaction on the part of our nation's lawmakers. U.S. Representative John Dingell of Michigan, former Chairman of the Commerce Committee, addressed the subject when he said "[c]ontrary to the apparent belief of the Republican freshman class, the world did not begin in November of 1994. When the President signed the Telecommunications Act of 1996 into law on February 8, it was the culmination of nearly two decades of work."\(^10\)

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6. Id.
In 1994, the House passed H.R. 3626 to reform telecommunications at all levels.\textsuperscript{11} Although disputed by House Republicans, Representative Dingell stated in 1996 that H.R. 3626 “was almost identical in language, in intent, and in substance” to the Act.\textsuperscript{12} The Senate Commerce Committee also advanced telecommunications legislation, S. 1822, from Committee in 1994.\textsuperscript{13} A floor vote was never taken on S. 1822 because it was dropped by Senator Ernest Hollings (D-SC), then Chair of the Senate Commerce Committee, in response to Minority Leader Bob Dole’s (R-KS) threats to filibuster the measure.\textsuperscript{14}

Congress was not alone in its belief that the telecommunications industry was dynamic and ready for deregulation. In 1983, industry giant AT&T was broken up due to antitrust concerns.\textsuperscript{15} In the ensuing consent decree, the court required AT&T to divest the local telephone companies it owned (the unitary Bell system) and created seven independent holding companies, known as Regional Bell Operating Companies (RBOCs), the “Bells.”\textsuperscript{16} Although stringent business restrictions were placed on AT&T and the RBOCs after the divestiture, the court acknowledged the companies would eventually lose their ability to control markets once competition materialized.\textsuperscript{17} Accord-

\textsuperscript{11} See supra note 9 and accompanying text. On June 28, 1994, H.R. 3626 passed 423 - 5.
\textsuperscript{12} See supra note 9 and accompanying text. While Representative Dingell described the 1994 bill as similar to the 1996 Act, H.R. 3626 did not lift price controls on cable television and did not permit radio broadcasters to own an unlimited number of stations across the country, provisions that were included in the Act.
\textsuperscript{13} See supra note 9 and accompanying text. S. 1822 was introduced in February 1994 by Senators Hollings and Danforth. The Senate Commerce Committee heard testimony from 86 witnesses during 11 days of hearings. On Aug. 11, 1994, the bill advanced from Committee by a vote of 18-2.
\textsuperscript{15} See generally United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff’d sub nom. Maryland v. United States, 460 U.S. 1001 (1983). “In 1974, the Department of Justice filed an antitrust suit against AT&T. After seven years of pretrial proceedings, the case was tried in district court for eleven months but did not culminate in a verdict. Instead, the parties submitted a proposed consent decree to the court for review according to the ‘public interest’ standard prescribed in 15 U.S.C. 16(b)-(h).” United States v. Western Elec. Co., 900 F.2d 283, 289 (D.C. Cir. 1990). Modifications were made by the district court, prior to its approval. Western Elec. Co., 900 F.2d at 289.
\textsuperscript{16} United States v. Western Elec. Co., 569 F. Supp. 1057, 1062 (D.D.C. 1983), aff’d sub nom. California v. United States, 464 U.S. 1013 (1983). Seven Regional Bell Operating Companies (RBOCs) were created in the divestiture of AT&T: Bell Atlantic, Bell South, SBC Communications (formerly known as Southwestern Bell), Pacific Telesis Group (known as PacTel), NYNEX, Ameritech and U.S. West (formerly known as Northwestern Bell).
\textsuperscript{17} Western Elec. Co., 900 F.2d at 291. The RBOCs were prohibited from (1) providing long distance services, (2) manufacturing telecommunications and customer premises equipment, (3) providing information services and, (4) providing non-telecom-
ingly, the court provided that the consent decree's restrictions could be lifted upon an RBOC showing that there was no substantial possibility that it could "use its monopoly power to impede competition in the relevant market."18

States legislatures, public service commissions and courts also acted to eliminate competitive barriers without Congressional direction. Two years before the Act was signed, thirteen states permitted telephone competition at the local level and twelve states were considering allowing local competition.19 In 1995, new local entrants such as AT&T, TCG and MFS began preparations or actual competition with traditional local companies such as GTE and the Bell companies in many states. Similarly, courts removed restrictions prohibiting telephone companies from simultaneously offering cable service.20

The facts show deregulation of the telecommunications industry was not an idea that first arose in the 104th Congress. Many states had already commenced their own efforts to deregulate the telecommunications industry.21 Despite nationwide changes prior to 1996, the significance of the Act itself should not be minimized. The Act enabled local competition to exist nationwide and erected an especially strong framework for local competition by establishing baseline rules for every company that wanted to provide telecommunications service.

SECTION 251: SETTING THE GROUND RULES

The reality of local telephone competition hinges on the success of Section 251 of the Act. In this section, Congress attempted to facili-
tate local competition by delineating specific duties for all local companies that operated prior to the Act.\textsuperscript{22} These companies, such as GTE and the seven RBOCs, are known as incumbent local exchange carriers ("ILECs"). Section 251 requires ILECs to allow competitors to interconnect with their system so that all customers, even those served by a competitor, can seamlessly and transparently make and receive calls.\textsuperscript{23} Section 251(a) gives specific duties to all telephone companies, Section 251(b) describes duties of local companies, and Section 251(c) outlines the duties of ILECs.\textsuperscript{24} When competition ultimately will be available to consumers depends on how quickly the ILECs follow the duties prescribed in this section and how quickly companies are able to negotiate interconnection agreements.

ILECs are the most important piece of the puzzle, since they own the current network. While ILECs must comply with the requirements set forth for local companies and all telecommunications companies in Section 251(a) and (b), the six obligations under Section 251(c) are the most critical to the success of the Act.\textsuperscript{25} The six obligations are: (1) the ILEC must negotiate with competitors the terms of Section 251 in good faith;\textsuperscript{26} (2) the ILEC must provide, at just and reasonable rates, interconnection with competitors so that calls may be transmitted and routed between their networks;\textsuperscript{27} (3) the ILEC must provide access to network elements on an unbundled basis so that competitors are allowed to combine such elements to provide complete telecommunications services;\textsuperscript{28} (4) the ILEC must offer services it provides at retail to competitors at wholesale prices so that the competitors may offer such services for resale;\textsuperscript{29} (5) the ILEC must give reasonable notice of any changes made in its networks or facilities that would affect interoperability with competitors;\textsuperscript{30} and (6) the ILEC must allow competitors to physically locate on their premises, unless physical location is not practical due to technical limitations or be-

\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 61-63. The Act defines telecommunications as the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form of content of the information sent and received. \textit{Id.} at 60. The specific duties of local companies and telecommunications companies are discussed in notes 29 to 35.
\textsuperscript{26} \textit{Id.} at 62 (to be codified at 47 U.S.C. § 251(c)(1)).
\textsuperscript{27} \textit{Id.} (to be codified at 47 U.S.C. § 251(c)(2)).
\textsuperscript{28} \textit{Id.} at 62-63 (to be codified at 47 U.S.C. § 251(c)(3)).
\textsuperscript{29} \textit{Id.} at 63 (to be codified at 47 U.S.C. § 251(c)(4)).
\textsuperscript{30} \textit{Id.} (to be codified at 47 U.S.C. § 251(c)(5)).
cause of space limitations. While this section may seem complex, it essentially means that every ILEC must open their facilities to competitors who wish to offer competing services. The fourth point illustrates well the cooperation that is expected under Section 251. The provision requires an ILEC, such as U.S. West, to allow a competitor, such as AT&T, to "resell" any of the services U.S. West currently offers its customers. For example, if U.S. West offers basic residential service at $16.85 per month, the wholesale price may be $13.50 per month after U.S. West subtracts avoidable costs such as advertising and billing. AT&T can then purchase basic residential service from U.S. West at the wholesale rate, $13.50 per line, and sell it to its own customers at competitive prices. Resale arrangements such as this facilitate rapid entry into local markets because competitors need not supply their own facilities or equipment to compete.

The ability to resell services using another company's network was the key to developing long distance competition. When MCI was permitted to operate as a long distance company over ten years ago, it owned facilities in only a small number of cities. In order for MCI to enroll customers to MCI services nationwide, AT&T was forced to lease its network to allow MCI calls to be routed across the nation. Today, hundreds of companies have followed MCI's lead and offer long distance services in the United States on a resale basis.

Nearly half a century of being the monopoly provider of telephone service still has its privileges. As of this writing, AT&T controls approximately 53% of the long-distance market. Similarly, even though competition exists in the long distance market, most long distance companies still do not own their own facilities. Hundreds of companies, known as "resellers," buy long distance services from and utilize the networks of AT&T, Sprint and MCI and resell those services across leased networks to their own customers. The resellers are

31. Id. (to be codified at 47 U.S.C. § 251(c)(6)).
32. Telecommunications Act of 1996, § 252(d)(3), Pub. L. No. 104-104, 110 Stat. at 68 (to be codified at 47 U.S.C. 252(d)(3)) defines wholesale rates as the retail rate charged to subscribers, less any costs of marketing, billing, collection and other services that will be avoided by the ILEC if they were to sell the service to a competitor. AT&T, for example, would have its own marketing and sales people, not to mention its own billing and collection department.
33. Nebraska has forty-one incumbent local telephone companies. Until the Nebraska Public Service Commission lifts the rural exemption held by the vast majority of those companies, they need not share their facilities. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 69 (to be codified at 47 U.S.C §§ 251(f)(1)-(2).
34. Carolyn Hirschman, Telecom Act Fails to Live up to First-Year Expectations, TELEPHONY, Feb. 10, 1997, at 14. Most consumers subscribe to AT&T for their long distance service, with MCI and Sprint having the second and third largest customers. Less than 1% of the nation utilizes the long distance companies known as "resellers".
now boldly entering local markets nationwide offering consumers resale ILEC services.

ILECs aren’t the only companies who must offer their services for resale. Every local telephone company, including competitive companies, must play by the same rules. Once competitive carriers begin to build their own networks, they too must resell their services if ILECs are inclined to purchase those services. Along the way, all companies have to comply with several rules to make sure consumers have a seamless experience with their telephone service. Specifically, all companies must provide number portability so that customers can keep their local telephone number if they choose to switch companies and provide dialing parity so that additional numbers are not required to complete calls. Furthermore, every local company must provide nondiscriminatory access to poles, conduits and rights-of-way. Finally, all companies must interconnect with other telecommunications carriers and must comply with the Act’s network standards.

The Act required the Federal Communications Commission (FCC) to promulgate rules and regulations to implement Section 251 by August 8, 1996. Given that FCC rulemaking proceedings normally take one to three years to complete, the Act has greatly increased activity in the agency. The agency released its Notice of Proposed Rulemaking (NPRM) on Section 251 just two months after the Act’s passage and sought comments from interested parties on various issues such as wholesale rates, network elements, and terms of interconnection and collocation.

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36. Id. (to be codified at 47 U.S.C. §§ 251(b)(2) & (b)(3)).
37. Id. (to be codified at 47 U.S.C. § 251(b)(4)).
38. Id. at 61-62 (to be codified at 47 U.S.C. §§ 251(a)(1) and (a)(2)). No telecommunications company shall install network features or functions that do not comply with the standards set forth in section 255 and 256 of the Act. Id. at 62 (to be codified at 47 U.S.C. § 251(a)(2)). Section 255 requires that services be accessible for persons with disabilities, as defined by the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A)). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 75 (to be codified at 47 U.S.C. § 255). Section 256 requires coordinated network planning and design so that customers may seamlessly and transparently transmit and receive information between telecommunications networks. Id. at 76 (to be codified at 47 U.S.C. § 256).
40. APPLIED INFORMATION MANAGEMENT INSTITUTE, supra note 39, at 2.5.
41. FCC Notice of Proposed Rulemaking, 61 Fed. Reg. 18,311, 18,311-312 (1996). Initial comments were due to the FCC on May 16, 1996 and reply comments were due
Public comments regarding the NPRM have been numerous. Prior to the release of the NPRM, FCC Chairman Reed Hundt said in a speech to the National Association of Regulatory Utility Commissioners (NARUC) that “the states are laboratories for democracy, and for communications deregulation. States have generated valuable economic models and critical economic data. You (state commissioners) know as much about local exchange issues as anyone — a lot more than many of us at the FCC.” Interestingly enough, during the same speech, Hundt addressed the issue of eliminating federal and state jurisdictional boundaries. “Let’s agree to focus not on jurisdictional debates, but on building a car and getting it going down the road to competition. Congress has told us there is only one road and one direction to drive in, and that is toward competition.” Hundt’s comments left more than a few observers confused.

The question, then, is whether the states or Federal Government should lead the way to competition. While Hundt may have acknowledged the states’ ability to lead the way, his comments, along with the language contained in the NPRM, indicated the FCC believed broad federal guidance was appropriate and indeed necessary to implement the Act. The FCC’s NPRM opined that national rules were needed to “minimize variations among states in implementing Congress’s national telecommunications policy” and to “guide states that have not yet adopted the competitive paradigm of the 1996 Act.” These statements indicate states should not establish unique rules appropriate for their own telecommunications markets, not to mention provide a not-so-subtle hint as to where the FCC was heading before the rules were even written.

The U.S. Department of Commerce offered input to this discussion in May 1996 when it recommended the FCC establish a “dynamic national policy framework” involving federal and state regulatory commissioners. The Department, through the National Telecommunications and Information Administration (NTIA), urged the FCC to enlist the states’ assistance in implementing the Act’s provisions.

42. FCC Chairman Reed Hundt, Address at the National Association of Regulatory Utility Commissioners (Feb. 27, 1996). Chairman Hundt has resigned from his position, but will serve as the FCC Chairman until his replacement is named by the President.
43. Id.
44. Id.
Similarly, just two weeks later, the National Governors' Association (NGA) urged the FCC to not ignore the states' role in implementing local competition and expressed concerns that the FCC rulemaking not downplay the provisions of 47 U.S.C. Section 152(b). In the letter, Governors Jim Guy Tucker of Arkansas and Stephen Merrill of New Hampshire wrote "(t)he Act clearly envisions a joint effort between the states and the FCC in implementing telecommunications reform." Taking into consideration these and comments of other interested parties, the FCC beat its statutory deadline and adopted rules to implement Section 251 on August 1, 1996. In its news release, the FCC stated that the rules rely heavily on the states to develop specific rates and procedures and that the FCC decision reflects the experiences of "states that have already endeavored to promote local competition." According to the FCC, "(t)he experience(s) of these states helped the Commission determine that a flexible policy framework was the best approach, leaving up to individual states the application of our national rules, with appropriate discretion to accommodate the special characteristics of their regions and needs of their local markets." Disagreements with the validity of that statement was widespread and immediate.

The response from several states, telephone companies and Congressional members showed significant opposition to the approach taken in the FCC order. NARUC President Cheryl Parrino said "States share the FCC's commitment to local telephone competition, and are moving ahead to carry out the pro-competitive goals of the 1996 Act. Indeed, we agree with many of the policy judgements reflected in the FCC's order. However, that order has wide-ranging jurisdictional impacts that we simply cannot ignore." Several public

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47. Letter from National Governors Association to FCC Chairman Reed Hundt (June 14, 1996) (on file with the author). Title 47 U.S.C. § 152(b) (1994) provides that intrastate telecommunications services are excluded from the FCC's jurisdiction. See also Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 359 (1986), in which the Supreme Court ruled the 1934 Communications Act prohibited federal incursion into intrastate matters unless unambiguous language existed granting the FCC such authority.

48. Letter from National Governors Association to FCC Chairman Reed Hundt (June 14, 1996) (on file with the author).

49. Hundreds of comments were submitted to the FCC in response to the NPRM from telecommunications companies, state commissions, trade associations and consumer organizations.


51. Id.

52. NARUC-Appeals FCC Interconnection Rulemaking 1-2 (August 26, 1996) (on file with Creighton Law Review). President Parrino said while a coordinated federal-
service commissions and RBOCs, as well as the NARUC and GTE, filed appeals of the FCC order. In *Iowa Utilities Board et. al. v. FCC*, parties claimed the FCC order was arbitrary and capricious, beyond the FCC's jurisdiction, and not in accordance with the law. The FCC said its rules establish national regulations that will enable the states to implement the Act quickly. Although the question as to whether or not the FCC exceeded its jurisdictional authority will ultimately be determined by the court, others have not restrained from offering their opinions.

Former U.S. Representative Jack Fields (R-TX), Chairman of the House Telecommunications Subcommittee in 1996, played a pivotal role in the Act's passage. Fields objected to the FCC's order from the inception stating "it was never the intent of Congress to bypass the states and federalize the process or get the Federal Government into the issue of pricing." Fields increased his criticism of the FCC Chairman by stating:

"[I]f the interconnection order is not a simple and honest mistake and Chairman Hundt was willful, and intentionally disregarded the specific language of the Act and the intent of Congress, then he should step aside—he should resign or the President should appoint someone else who can read and understands that his role as a Chairman, is as an implementer of a law passed by Congress and signed with great fanfare by President Clinton."

As the parties awaited the results of the appeals and interventions regarding the FCC's order, state commissions began to implement local competition. In fact, four of the nine state plaintiffs in *Iowa...
Utilities Board have been lauded for "seizing the initiative" by dismantling barriers to local competition. Today, forty-six state commissions have approved the entry of competitive companies into the local market and numerous states already have companies offering competitive local services. State commissions have also moved quickly to arbitrate and mediate issues as required under Section 252, the subject of the next section of this Article. As of last November, 278 arbitration proceedings were pending under Section 252, including at least one in every state. The facts seem to indicate allegations that state commissions have appealed the FCC rules simply to delay competition are unfounded.

SECTION 252: WHEN COMPANIES CANNOT AGREE

The issues surrounding the implementation of Section 251 rules have been extremely contentious, to say the least. As expected, the ability of telecommunications companies to voluntarily reach satisfactory agreements on the terms set forth in Section 251 has been tenuous at best. Congress recognized this dilemma and established Section 252 as a way to provide assistance to telecommunications companies unable to voluntarily negotiate interconnection agreements. Section 252 provides that state commissions shall mediate or arbitrate open issues if petitioned by a party. While some companies have been successful at voluntarily negotiating interconnection agree-

58. STATE TELEPHONE REGULATION REPORT (Sept. 7, 1995). (Iowa, California, New York and Florida were given high marks for their pro-competitive policies).
60. Telecommunications Act of 1996, Pub. L. No. 104-104 110 Stat. at 66 (to be codified at 47 U.S.C. 252). This section, discussed infra, allows companies not able to voluntarily negotiate interconnection agreements to ask for mediation and/or arbitration from state commissions. State commissions must resolve such disputes within nine months from the date companies request to negotiate.
62. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 66-67 (to be codified at 47 U.S.C. § 252(a)(2), (b). Section 252(a)(2) provides any party may ask a state commission to participate in the negotiation and to mediate any differences arising in the course of negotiation. Telecommunications Act of 1996, 110 Stat. 66 (to be codified as 47 U.S.C. 252(a)(2)). Section 252(b) provides during the 135th and 160th day after the date which an ILEC receives a request for negotiation, any party may petition the state commission to arbitrate any open issues. Telecommunications Act of 1996, 110 Stat. at 66-67 (to be codified as 47 U.S.C. § 252(b)). The state commission shall resolve each issue no later than nine months after the date which the ILEC received the request to negotiate. Id. at 67.
ments, all fifty states have received requests from telecommunications companies for mediation and/or arbitration assistance.63

State commissions have developed various procedures to carry out arbitration and mediation responsibilities. In Nebraska, the Public Service Commission has implemented a policy establishing that independent, third party arbitrators will be used to make recommendations to the commission.64 Nebraska policies make the Public Service Commissioners ultimately responsible for approving or denying the arbitrator's recommended interconnection agreement pursuant to federal law.65 Iowa, on the other hand, has promulgated rules establishing that the Commissioners themselves would arbitrate the dispute, as well as rule on whether to approve or deny the agreement.66 Still other states have utilized state commission staff, including administrative law judges, to arbitrate unresolved issues.67

It is understandable that the losing parties in most arbitrated agreements are not completely happy with the result. Section 252(e) provides that any party aggrieved by a state commission's decision may bring action in federal court.68 Accordingly, numerous telecommunications companies, primarily ILECs, have filed suits contesting the state commissions' interconnection agreement decisions.69 In an appeal against the Nebraska Public Service Commission, GTE alleges that the arbitrator's decision as to nearly every issue was (1) arbitrary

63. See supra note 61.
65. Id. See also Telecommunications Act of 1996, Pub. L. No. 104-104 110 Stat. 68-69 (to be codified at 47 U.S.C. 252(e)). The Act requires all interconnection agreements adopted by voluntary negotiation, mediation or arbitration to be submitted to the state commission for approval. Id. at 68. The state commission must approve or deny the agreement within 90 days if the agreement is adopted by negotiation or mediation or within 30 days if the agreement is adopted by arbitration. Id. at 69.
69. The filing of suits in Federal district court has raised Eleventh Amendment claims from various state commissions. The Supreme Court has stated that Congress may not abrogate a state's Eleventh Amendment immunity from suit in the Federal courts except through its exercise of powers under the Fourteenth Amendment. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1123-26, 1133 (1996). Numerous state commissions have responded in their Federal district court briefs that the Act is not an exercise of Congress's Fourteenth Amendment powers and that accordingly, relief from the Federal court is not available absent a state's consent.
and capricious; (2) not the product of reasoned decision making; (3) not based on the record; and (4) would result in an unconstitutional taking without just compensation.\textsuperscript{70}

Ironically, many of the same telecommunications companies are also appealing the FCC's order regarding Section 251 stating that jurisdiction over intrastate telecommunications matters, and specifically over establishing intrastate rates, are duties of the states. On one hand, ILEC sentiment can be summarized by the testimony of William Barr, General Counsel for GTE Corp., during oral argument before the United States Court of Appeals for the Eighth Circuit. Mr. Barr stated that the Act provides that state commissions "shall establish any rates as required for interconnection and unbundled network elements."\textsuperscript{71} On the other hand, despite Mr. Barr's acknowledgment of the states' abilities, Section 252 appeals have been filed by GTE against numerous state commissions.\textsuperscript{72} At this time, additional appeals are being filed nationwide.

\textbf{SECTION 253: LET EVERYONE IN}

While Section 251 has broad regulatory provisions, Section 253 is succinct and simply states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services."\textsuperscript{73} This section enables entities such as electric utility companies, natural gas providers, cable television companies and even municipalities to become telecommunications carriers. Companies who plan to take advantage of Section 253 include American Electric Power Co., of Columbus, Ohio, which soon will offer telephone services over the wires it currently uses to control its power lines and the Nebraska Public Power District, an electric provider, which is already providing telecommunications services to community college classrooms.\textsuperscript{74} Similarly, KN Energy, Inc., of Lakewood, Colorado, has entered the telecommunications sec-

\textsuperscript{71} FCC's Pricing Rules Face Less Criticism from Eighth Circuit, Vol. 6, No. 2 TELCO COMPETITION REPORT, Jan. 30, 1997, at 3.
\textsuperscript{72} Id. at 4. GTE has filed appeals against the public utility commissions of Pennsylvania, Virginia, Washington, Nebraska, Oregon, Michigan, California and Oklahoma. At the time GTE filed its appeals against the Nebraska and Washington commissions, final orders had not been entered by the commissioners approving or denying the interconnection agreements as required pursuant to section 252(e). GTE based its appeals on preliminary reports filed by the arbitrators in both cases.
\textsuperscript{73} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 70 (to be codified at 47 U.S.C. § 253(a)).
\textsuperscript{74} Ross Kerber, Utilities Reach Out to Add Phone, Cable Service, WALL ST. J., Jan. 27, 1997, at B1. Some power companies have unused capacity in their network, known
tor by selling satellite dishes and Internet services to customers who before only relied on it for natural gas.\textsuperscript{76}

While it may appear unusual for these companies to enter the telecommunications market, they possess natural advantages. Electric and gas companies own approximately 600,000 miles of high-capacity, fiber-optic cable.\textsuperscript{76} Cable companies own 1,202,854 miles of cable.\textsuperscript{77} Converting those lines to offer telephone services is both feasible and practicable, as it provides additional uses for excess line capacity. Utility companies also generally hold easements over rights-of-way, which simplifies the deployment of cable and wire. These companies already have access to poles, alleyways and underground utility systems, which eliminates the need to conduct extensive negotiations to access these critical points. Additionally, these companies have established customer service and billing departments that can assist in the transition to the competitive telecommunications market.

While the Act clearly states there shall be no barriers to entry, there is an expansive exception in Section 253 which provides "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."\textsuperscript{77} Under this provision, state commissions may continue to regulate telecommunications in the public interest, provided that such regulations are competitively-neutral. Despite the fact that Section 253 does not allow barriers to entry, it should not be interpreted as a hindrance to legitimate state efforts to safeguard consumers.\textsuperscript{79}

One of the major concerns of state regulators is how to allow publicly-owned utility companies or municipalities to enter the market and compete against private sector companies without bias for either side. Nebraska, of course, is in the unique situation of receiving nearly all of its electric utility services from public power districts. Districts are completely supported by ratepayers and receive a myriad of benefits not afforded to private entities, including unique tax

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} NATIONAL CABLE TELEVISION ASSOC., CABLE TELEVISION DEVELOPMENTS, at 13 (Fall 1996).
\textsuperscript{78} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 70 (to be codified at 47 U.S.C. § 253(b)).
While these advantages have been successful at keeping electric rates low for subscribers, the same benefits may create an unfair advantage for public power districts that choose to enter the telecommunications market. It is the province of Nebraska's Legislature and Public Service Commission to ensure fair competition. Creating "competitively-neutral" regulations that do not prevent public power districts from entering the market while simultaneously ensuring the districts enter the market with fairness will not be an easy task.

For all companies, including public power districts, regulations regarding entry into the market based on technical, financial and managerial qualifications can be applied in a competitively-neutral manner to assess a carrier's fitness and ability to operate in the public's interest. Unfortunately, even an examination of basic qualifications such as these can result in the prohibition of some entities from entering the market, contrary to the provisions set forth in Section 253(a). Virtually any type of consumer protection, quality of service regulation or operating requirement creates the possibility of barring entities from entering the market. Since this conundrum is not clarified in the Act's legislative history, the patent ambiguity of Section 253 is likely to be settled on a case-by-case basis.

SECTION 254: Universal Service

The purposes of the Act are to bring lower rates, better quality and enhanced services to all residents of the United States, regardless of where they reside. Achieving these goals for low income consumers and consumers located in rural, insular and other high cost areas has been historically difficult. As a result, Congress incorporated Section 254 into the Act to assist consumers who might not otherwise have affordable telephone service. The concept of "universal service" focuses on this assistance and means, in short, that telephone service should be available to every American at an affordable rate. Universal service has been achieved to a large extent, as 93.9% of American households have telephone service. However, telephone subscriber-
ship for low income residents, as well as for African-Americans and Hispanics, is much lower.\(^8\)

Universal service has been a goal of telephone regulation since the 1960s. However, it was not enacted as a social policy by Congress until the passage of the Act.\(^5\) Prior to 1996, local companies kept basic service affordable by internally subsidizing residential telephone service. This subsidy typically meant business customers paid higher rates than residential customers for basic service. By shifting revenue internally, ILECs were able to keep prices for residential customers low. The price differential was justified since most business customers derived substantial economic benefits from their telephone, and in turn placed a greater value on telephone service.\(^6\)

In a monopoly environment, ILECs were able to require certain customers to pay prices that exceeded the actual cost of the service in order to subsidize other customers. In a competitive environment, customers paying prices above the cost of service will be targeted by competitors. Therefore, as they transition from a monopoly to a competitor, ILECs have been rebalancing rates, or decreasing business rates while increasing residential rates.\(^7\) While residential customers have benefitted from internal subsidies, they may begin to suffer as rate rebalancing occurs. State commissions should closely scrutinize whether an ILEC has priced residential service below cost before approving any residential rate increase. At least one state commission recently determined since the Act's passage that the residential rate charged by one ILEC, U.S. West, was in fact not below cost, and accordingly refused to increase the residential rate.\(^8\) The company

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\(^8\) Id. For example, 75.9% of households earning less than $5,000 annually have phone service, while African-American households are at 87.1% and Hispanics, 86.5%. Id. In comparison, 95% of Caucasian households have telephone service and 99.2% of households earning more than $75,000 annually have telephone service. Id.


\(^6\) CHARLES H. KENNEDY, AN INTRODUCTION TO U.S. TELECOMMUNICATIONS LAW 13 (1994). Optional residential features, such as touch-tone, call forwarding, and caller I.D. are also priced above cost and subsidize basic residential rates.

\(^7\) Approximately 90% of the residential subscribers in Nebraska have experienced rate increases since the passage of the Act. This compares to roughly 6% of the state’s business subscribers during the same period. Note, LB660, passed by the 1997 Nebraska Legislature on May 28, 1997, permits small local companies (those that serve less than 5% of Nebraska’s total access lines) to increase rates up to 30% a year and large companies (more than 5% of the state’s access lines) to increase rates up to 10% a year. The Commission may only review such increases if a sufficient number of protests are filed with the Commission objecting to the rate increase. See NEB. REV. STAT. §§ 86-803, 75-609.01 (Cum Supp. 1997).

\(^8\) Colorado Public Service Commission, Decision No. C97-88 (Jan. 27, 1997). Citing a failure to demonstrate residential rates were set below cost, the Colorado Commission denied U.S. West’s request to increase residential rates. Id. at 56.
was permitted, however, to decrease its business rate and level of access charges as requested.\textsuperscript{89}

ILECs have also internally subsidized residential rates by a mechanism called “access charges.” Access charges are paid by all long distance companies to all local companies or “LECs” so that LECs can recover the costs they incur to build and maintain their networks used to place and receive long distance calls.\textsuperscript{90} Ultimately, long distance companies include the access charges they pay to the LECs as part of the long distance rates consumers pay. Access charges have traditionally been priced above the actual cost of maintaining the LEC network so that residential rates can remain artificially low. This internal shift has assisted low income consumers because typically most low income consumers make fewer long distance calls than high income customers.\textsuperscript{91} While the structure of access charges has furthered universal service, it contradicts Section 254(b)(5) of the Act which provides that all subsidies be specific, predictable and sufficient.\textsuperscript{92} Accordingly, on May 7, 1997, the FCC released its order to reform interstate access charges to address the present internal revenue shift used by most companies.\textsuperscript{93}

Besides internal revenue shifts, some ILECs have also maintained universal service by drawing revenue from the federal Universal Service Fund (USF).\textsuperscript{94} The USF is currently financed by large long distance companies based upon the number of access lines they serve.\textsuperscript{95} AT&T, with the largest market share in the long distance industry, is the biggest contributor to the USF. Local telephone companies that serve high cost areas, such as rural or insular regions, receive support from the USF so that customers residing in these areas are able to receive telephone service at rates that do not greatly exceed the nationwide average.\textsuperscript{96} If states do not believe that adequate support will be offered from the federal USF to provide afforda-

\begin{itemize}
\item \textsuperscript{89} Colorado Public Service Commission, Decision No. C97-88 (Jan. 27, 1997).
\item \textsuperscript{90} Judith A. Endejan, The View From the Local Exchange Carrier, 14 COMM. LAW 23 (Summer 1996).
\item \textsuperscript{91} Krattenmaker, 49 Fed. Com. L.J. at 21.
\item \textsuperscript{92} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 72 (to be codified at 47 U.S.C. § 254(b)(5)).
\item \textsuperscript{94} See In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, 96 F.C.C.2d 781, 795-96 (Feb. 15, 1984).
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Krattenmaker, 49 Fed. Com. L.J. at 22-23.
\end{itemize}
ble service, the Act permits states to establish their own funds, provided they do not burden the federal fund.97

While rate rebalancing and access charge reform will obviously benefit business customers and long distance users, they both may adversely affect the affordability of residential telephone service in the United States. Accordingly, Congress required a Federal-State Joint Board to convene to thoroughly review the existing system of federal universal service support and to provide recommendations to the FCC on what changes, if any, should be made.98 Pursuant to Section 254(a)(1), the Joint Board recommendations regarding universal service were due on November 8, 1996.99 In addition to providing recommendations regarding universal service for residential customers, the Joint Board was to make recommendations regarding schools, libraries and health care providers.100 Section 254 provides that elementary and secondary schools, libraries and health care providers shall receive access to advanced telecommunications services.101 Further, all schools and libraries are to receive telecommunications services at discounted rates and rural health care providers are to receive telecommunications services at urban rates.102

The Board’s recommendations, released November 7, 1996, were over 500 pages long and encompassed several subjects.103 The recommendations included “replacing or modifying existing support mechanisms that are inconsistent with the pro-competitive, deregulatory


98. Id. at 71 (to be codified at 47 U.S.C. § 254(a)(1)). The members of the Joint Board shall be the same as that required under section 410(c); that is three FCC Commissioners and four state commissioners. In addition, the Act provided that a state-appointed utility consumer advocate serve on the Board. FCC Commissioners Reed Hundt and Susan Ness, along with state commissioners Ken McClure (MO), Julia Johnson (FL), Sharon Nelson (WA) and Laska Schoenfelder (SD) and State Consumer Advocate Martha Hogerty (MO) served as Joint Board members. Initially, FCC Commissioner Andrew Barrett was appointed to the Board. After his resignation from the FCC, Commissioner Rachelle Chong assumed his position on the Board.


100. Id. at 72 (to be codified at 47 U.S.C. § 254(b)(6)).

101. Id.

102. Id. at 73-74 (to be codified at 47 U.S.C. § 254(h)).

103. In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision (Nov. 7, 1996), available at 1996 WL 656113 (F.C.C.). The Board made numerous recommendations regarding Universal Service principles, funding and administration and addressed the support necessary for rural, insular and high cost areas, low income consumers, as well as schools, libraries and health care providers. Id.
spirit of the 1996 Act." According to the Board, its decision "ensure[s] that the goals of affordable service[s] and access to advanced services are met by means that enhance, rather than distort, competition." Six significant recommendations were forwarded by the Board to ensure consumers in all regions of the nation receive quality services.

First, the Joint Board recommended that all telecommunications carriers that meet the criteria in Section 214 of the Act be eligible to receive support from the USF fund. Section 214(e) provides that state commissions shall designate "eligible telecommunications carriers" or ETCs to receive support from the USF. These carriers must offer a defined level of services throughout their service territory using their own facilities or a combination of their own facilities and resale of another carrier's services. To be eligible, the carrier must also advertise the availability of such services. One exception to this recommendation is that all entities, not just ETCs, are eligible to draw support from the USF if they provide discounted services to schools and libraries.

As a second recommendation, the Joint Board defined the level of telecommunications services that an ETC must provide. Services that must be offered are voice-grade access to the network, touch-tone or dual tone multi-frequency signaling, single-party service, and access to emergency services, operator services, interexchange services and directory assistance. These services were chosen as they were subscribed to by a majority of residential customers. In addition, these services were essential to education, public health and safety and were offered by most carriers. According to the Board, full support for these services should be provided to the first residential line, so that all households may have access to telephone services, including emergency services. The Joint Board declined to support other res-

104. Id. at 4.
105. Id. (citations omitted).
106. Id. at 85.
108. Id.
110. Id. at 26-29, 36.
111. Id. at 26-29. These standards were set forth in the Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 72 (to be codified at 47 U.S.C. 254(c)(1)(A-D)).
112. In the Matter of Federal-State Joint Board on Universal Service, supra note 103, at 46-47. This Article refers to a telephone "line." To be competitively neutral, a principal adopted by the Joint Board, the term "connections" should be used so as to encompass all telecommunications carriers, including wireless companies.
idential lines saying they were not necessary for access to telephone service and because it was questionable whether the use of second lines was consistent with the goals of universal service.\textsuperscript{113}

Third, the Joint Board urged that funding for the USF be provided by all interstate telecommunications companies, not just long distance companies.\textsuperscript{114} The Board also recommended that contributions be based on a carrier's gross intrastate and interstate telecommunications revenues, in order to support the discounts for schools, libraries and health care providers.\textsuperscript{115} The Board did not make a recommendation on whether both intrastate and interstate revenues were needed to assist low income consumers and high cost companies.\textsuperscript{116} Instead, the Joint Board requested further information be submitted from parties on whether intrastate and interstate revenues were necessary to support these other programs.\textsuperscript{117}

Fourth, the Board recommended schools and libraries receive discounts between 20 and 90 percent on all telecommunications services, Internet access and internal connections, subject to a $2.25 billion annual cap.\textsuperscript{118} Schools and libraries that are the most economically disadvantaged, as well those located in high cost areas, are to receive the highest discount.\textsuperscript{119} The Board recommended that any funds not disbursed in a given year be carried forward and disbursed in subsequent years without regard to the cap.\textsuperscript{120} While Section 254 requires that health care providers receive reduced rates, the Commissioners unanimously determined it lacked sufficient information to establish services that were necessary for health care providers.\textsuperscript{121} Therefore, like revenue assessment, the Board sought additional input.\textsuperscript{122}

The Board also urged that low-income consumers nationwide, including insular areas,\textsuperscript{123} be able to participate in the Lifeline and

\begin{footnotes}
\item[113] Id. at 47.
\item[114] Id. at 396.
\item[115] Id. at 409, 414.
\item[116] Id.
\item[117] Id. at 416. The FCC released a public notice asking interested parties to provide input on all unresolved issues, as well as to comment on the Board's recommendations in general. See FCC Public Notice, CC Docket 96-45, 11 FCC Rcd. 16,374, 16,374-76 (1996).
\item[118] In the Matter of Federal-State Joint Board on Universal Service, supra note 103, at 235, 237, 244 and 285.
\item[119] Id. at 285.
\item[120] Id.
\item[121] Id. at 335.
\item[122] Id.
\item[123] Joint Explanatory Statement, S. Conf. Rep. No. 104-230, at 17 (1996). The 1996 Act does not define "insular areas," but Congress stated that insular areas would include areas such as the Pacific Island territories.
\end{footnotes}
Link Up programs. Currently forty-one states, the District of Columbia and the U.S. Virgin Islands participate in Lifeline, a program that assists low-income residents by paying part of their monthly bill. Every state participates in the Link-Up program to help low-income residents pay installation charges. Link-Up, unlike Lifeline, does not require state matching funds. Additional recommendations on behalf of low-income consumers included prohibiting companies from disconnecting local service for the non-payment of long distance calls and prohibitions against requiring service deposits from low-income customers who elect to be restricted from making long distance calls.

Finally, the Board recommended changes be made on how to determine whether or not a company serves high costs areas, or areas with costs that exceed the nationwide average. Companies that currently serve high cost areas receive support from the USF based on their reported costs. The Joint Board recommended instead the use of a proxy model to objectively determine the costs telephone companies experience. The Joint Board recommended a bifurcated system to implement the proxy cost model, meaning immediate implementation for certain companies and a six year transition for others. Rural companies, as defined by the Act, may continue to

124. In the Matter of the Federal-State Joint Board on Universal Service, supra note 103, at 214. The FCC established the Link Up and Lifeline programs in 1985 pursuant to its authority under Titles I and II of the 1934 Act, as amended. The Link Up program provides federal support to reduce up to one half of the installation charges assessed to low income consumers. Lifeline provides recurring financial assistance for low income customers to pay all or part the federal subscriber line charge (SLC).

125. In the Matter of the Federal-State Joint Board on Universal Service, supra note 103, at 214 n.1393. Areas without Lifeline programs are Indiana, Delaware, Kansas, Iowa, Kentucky, Nebraska, Louisiana, New Hampshire, Puerto Rico and New Jersey.


128. Id. With long distance blocking (toll blocking), a subscriber voluntarily surrenders his or her ability to place long distance calls. With long distance control (toll control), a subscriber's long distance usage is capped at a certain dollar or minute-of-use amount per month. Both mechanisms are designed to enable subscribers to control their long distance service bills.


130. In the Matter of the Federal-State Joint Board on Universal Service, supra note 103 at 144.

131. Id. at 7, 144-45. Rural companies with limited revenue streams rely to a great extent on the USF and would be significantly affected if the model does not accurately reflect their costs. Accordingly, the Board recommended a delay in the proxy model implementation for rural companies until the proxy model has improved.
rely on their reported costs for three years, but must then transition over three years to a proxy cost model.133 Non-rural companies will receive support from the USF based on a proxy model starting January, 1998.134 Proxy models were submitted by various companies, but by agreement of all Joint Board members, no model was fully functional.135 Therefore, the Board requested additional information be submitted regarding proxy models.136 A subsequent FCC public notice called for industry participants to conduct proxy model workshops with the FCC and state joint board staffs so that a proper proxy model could be developed.137

While the Joint Board reached a collective decision, separate statements were issued by all members which covered their individual opinions. FCC Chairman Hundt proudly declared, "[t]oday America takes a major step forward in our quest to bring the benefits of the Information Age to every person in the country."138 FCC Commissioner Susan Ness was equally proud when she said, "[t]oday's decision is another milestone in the implementation of the Telecommunications Act of 1996."139 Similarly, State Commissioners

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132. The Act defines rural telephone company as a local exchange carrier that (a) provides service to any local exchange study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, based on the most recent statistics of the Census Bureau; or (ii) any incorporated or unincorporated territory included in an urbanized area, as defined by the Census Bureau; (b) provides service to fewer than 50,000 access lines; (c) provides service to any local exchange study area with fewer than 100,000 access lines or (d) has less than 15 percent of its access lines in communities of more than 50,000 as of February 8, 1996. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 60 (to be codified at 47 U.S.C. 153).

133. In the Matter of the Federal-State Joint Board on Universal Service, supra note 103, at 145. Currently, support is given to companies that serve high cost areas based on costs reported by the company. Alternatively, proxy models project companies' estimated costs of providing service assuming efficient wireline engineering and design, using efficient technology. The level of support a company receives for its high cost areas will now be based on the proxy model results, rather than reported costs.


135. Id. at 143. While the Joint Board thought the proxy models continued to evolve and improve, none of the models were sufficiently developed to make a recommendation. The Board received the following proxy models: Benchmark Cost Model (BCM) from MCI, NYNEX, Sprint and U.S. West; BCM2 from Sprint and U.S. West; the Hatfield Model from MCI and AT&T and the Cost Proxy Model from Pacific Telesis (PacTel). Id.


Sharon Nelson and Julia Johnson supported the recommended decision and urged federal and state policy makers to be aware of what they called our "common interest," the American consumer.\textsuperscript{140}

Even the Administration felt compelled to comment on the Joint Board's decision. Vice President Al Gore said the Board's recommendations represented a "bold move toward eradicating this gap" between those schools that have access to technology and those that do not.\textsuperscript{141} While not directly referencing the Act or the Joint Board's recommendations, President Clinton in his State of the Union Address on February 4, 1997, said "[w]e must bring the power of the Information Age into all our schools. Last year, I challenged America to connect every classroom and library to the Internet by the year 2000, so that, for the first time in our history, children in the most isolated rural towns, the most comfortable suburbs, the poorest inner city schools, will have the same access to the same universe of knowledge."\textsuperscript{142} By allocating $2.25 billion annually to schools' and libraries' telecommunications needs, the Joint Board's recommendations make the President's challenge much more possible.

Not everyone offered completely glowing reviews of the Joint Board's work. FCC Commissioner Rachelle Chong called Section 254 "laudable" in promoting telephone service for all Americans, but expressed reservations regarding the Joint Board's recommendation to support funding for internal connections (traditionally referred to as "inside wire") for schools and libraries.\textsuperscript{143} While noting that supporting internal connections was a worthy goal, Commissioner Chong said the billion dollar cost of this unmandated portion of the program would have impacts on all telecommunications users' bills.\textsuperscript{144} Further, Commissioner Chong argued that there is a difference between the telecommunications services that are repeatedly required to be discounted in the Act and telecommunications facilities, such as internal connections (wiring), computers and modems.\textsuperscript{145}

State Commissioners Kenneth McClure and Laska Schoenfelder also dissented in part from the Joint Board's recommendation. Both


\textsuperscript{141} Press Release of Vice President Al Gore, Office of the Vice President (Nov. 7, 1996) (on file with the Creighton Law Review).

\textsuperscript{142} President William J. Clinton, State of the Union Address (Feb. 4, 1997) (on file with the Creighton Law Review).


\textsuperscript{144} Id.

\textsuperscript{145} Id. (emphasis added).
commissioners objected to the recommendation to assess intrastate revenues of interstate telecommunications carriers, saying the FCC only has jurisdiction to assess interstate revenues.146 Commissioner McClure said that “[I]n my opinion, Congress has made it clear that there is a distinction between the federal and state universal service programs and thus the same distinction should follow related to the contributions for those programs.”147 Congressman Jack Fields criticized the Board and said “the Telecommunications Act of 1996 sets universal service as a national goal, not a federally-mandated entitlement.”148 Calling the size of the fund “breathtaking,” he said internal connections should not be supported from the fund.149

Pursuant to the Act, the FCC promulgated new rules regarding Universal Service and access charge reform on May 7, 1997. The FCC rules substantially mirror the recommendations proposed by the Joint Board. At the time of this writing, the Joint Board continues to review proxy models that will be used in allocating Universal Service support.

SECTION 271: REMOVING THE BELL COMPANY RESTRICTIONS

The terms of the 1983 AT&T consent decree set rigid restrictions on the services that the BOCs could and could not offer.150 Section 271 abandons the consent decree and permits the BOCs to offer long distance telephone service.151 Under 271, BOCs may offer interLATA long distance services outside their region and incidental interLATA


149. Id.

150. The seven RBOCs are composed of 20 Bell Operating Companies (BOCs). These include Ameritech - Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell and Wisconsin Telephone; Bell Atlantic (BA) - BA Pennsylvania, BA District of Columbia, BA Maryland, BA Virginia, BA West Virginia, BA Delaware and BA New Jersey; Bell South - South Central Bell and Southern Bell; NYNEX - New England Telephone and New York Telephone; Pacific Telesis - Pacific Bell and Nevada Bell; Southwestern Bell - Southwestern Bell and U.S. West -U.S. West Communications.

services in every state effective immediately.152 BOCs may offer interLATA long distance services within their region and may also manufacture telecommunications equipment after they have been certified by the FCC.153

Local Access and Transport Areas, or LATAs, are service areas defined in the consent decree.154 The decree created 163 LATAs, some as large as states and some as small as areas with 10,000 subscribers.155 Pursuant to the terms of the decree, BOCs were restricted from carrying telecommunications services between LATAs, but could carry long-distance services within a LATA.156 Section 271 reverses this restriction and permits BOCs to fully enter the long distance market.

BOCs may enter the interLATA long distance market in their region once they satisfy a 14-point checklist.157 The checklist is reviewed by the FCC to ensure that the BOCs cannot use their controlling power in the local exchange market to hinder other entities from entering the market.158 Referred to as an “in-region” test in the Joint Explanatory Statement of Congress, the checklist comes virtually verbatim from the House of Representatives.159 The checklist examines whether or not the BOC has opened its network to competitors, as required by Section 251. To meet the checklist, a competitor must be offering local services in the BOC’s service territory predominantly over their own facilities.160

152. Id. at 86 (to be codified at 47 U.S.C. § 271(b)). Examples of incidental interLATA services include audio and video programming; interactive video services and commercial mobile radio services.

153. Id. at 95 (to be codified at 47 U.S.C. § 273(a)).

154. See supra note 85 at 55. The consent decree defines a LATA as one or more contiguous local exchange areas serving common social, economic, and other purposes, even when such configuration transcends municipal or other local governmental boundaries.

155. Id. The size of LATAs are based on an estimate of the minimum area necessary to make it economical for competing long distance companies to make the investment necessary to provide service. Many LATAs are equivalent to territories of area codes.

156. Id.


158. Id. at 89-90 (to be codified at 47 U.S.C. § 271(d)).


160. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 88-89 (to be codified at 47 U.S.C. § 271(c)(2)(B)). The BOC must fulfill fourteen separate provisions. They are to provide interconnection (in accordance with Section 251), white page directory listings, and nondiscriminatory access to network elements, rights-of-way, 911 services, directory assistance, operator services, telephone numbers and data bases necessary for call routing. Id. The BOC must also provide local loop transmission, local transport, local switching, interim number portability, reciprocal compensation, services for resale and local dialing parity. Id.
The FCC is responsible for reviewing the checklist, but explicit consultative roles are delineated for the state commissions and the Department of Justice (DOJ).\footnote{161} State commissions must verify the BOC's compliance with the checklist and the DOJ must evaluate the application to consider any concerns it deems appropriate, such as antitrust violations. While the roles are specific, the Act does not give preclusive effect to the recommendations.\footnote{162} Thus, the Act permits the FCC to approve an application, even if the DOJ and states recommend otherwise.\footnote{163}

The time frame Congress allocated for the FCC to review Section 271 applications is extremely swift. The Act requires the FCC to issue written determinations approving or denying applications within 90 days from the date of filing.\footnote{164} Accordingly, the FCC issued a Public Notice on December 8, 1996, specifying the procedures it intended to use to process Section 271 applications.\footnote{165} The Notice provided that states must file written comments no later than 20 days after publication in the Federal Register of the application’s receipt.\footnote{166} Since states want to participate in the FCC proceedings, many have concerns that scheduling and providing notice for a hearing, reviewing evidence and issuing an order relative to each point on the checklist could take more than 20 days.\footnote{167} The FCC has not altered its position as of this writing regarding the 20 day response time.

Successful fulfillment of the responsibilities under Section 271(d)(2)(B) has forced state commissions to “redefine their primary role from that of regulators of monopoly service providers to that of enforcers of antitrust and consumer protection regulation.”\footnote{168} Several states have begun to make that transition by opening investigatory dockets and promulgating procedures to rapidly review the 14-point checklist.\footnote{169} By making preparations in advance, state commissions

\begin{footnotes}
\footnote{162. Id.}
\footnote{163. Id.}
\footnote{164. Id. (to be codified at 47 U.S.C. § 271(d)(3)).}
\footnote{165. FCC Public Notice, CC Docket 96-469 (Dec. 6, 1996) (on file with the Creighton Law Review).}
\footnote{166. Letter from the Florida Public Service Commissioners to FCC Chairman Reed Hundt (Dec. 12, 1996) (on file with the Creighton Law Review).}
\footnote{167. Id.}
\footnote{168. Rosario & Kohler, 29 CONN. L. REV. at 331.}
\footnote{169. Illinois Commerce Commission, Notice of Inquiry concerning Illinois Bell Telephone Company’s Compliance with Section 271(c) of the Telecommunications Act of 1996, 96-NOI-1 (July 17, 1996); Ohio Public Utilities Commission, In the Matter of Investigation Into Ameritech Ohio’s Entry Into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996, Case No. 96-702-TP-COI (July 18, 1996).}
\end{footnotes}
are hopeful that a full and complete record can be provided to the FCC once a BOC files its petition.

The first application for relief under Section 271 was filed with the FCC by Ameritech on January 2, 1997.\footnote{170. Leslie Cauley, \textit{Ameritech Files a Long-Distance Plan}, \textit{WALL ST. J.} Jan. 3, 1997, at A3.} In its more than 4,000 page application, Ameritech argued it met the 14-point checklist for the state of Michigan.\footnote{171. \textit{Id}.} On January 17, 1997, Ameritech supplemented its filing and the FCC restarted the 90 day approval period. Pursuant to Section 271(d), the Michigan Public Service Commission ("PSC") on February 5, 1997, ruled that Ameritech had seemingly met the 14-point checklist.\footnote{172. \textit{Id}.} On February 18, 1997, Ameritech withdrew its application in response to the FCC striking Ameritech's interconnection agreement with AT&T from the record.\footnote{173. Ameritech's application relied heavily on the AT&T agreement to demonstrate compliance with the checklist. \textit{Ameritech's InterLATA Bid Doomed as FCC Strikes AT&T Agreement}, \textit{Vol. 6, No. 3 TELCO COMPETITION REPORT}, Feb. 13, 1997, at 1.} The FCC action was based upon the Michigan PSC's comments which stated that five versions of an AT&T agreement had been filed thus far and that in fact, the PSC had not yet given final approval to the AT&T interconnection agreement submitted by Ameritech in its amended filing.\footnote{174. \textit{Id}.} Therefore, while considered to be a significant business opportunity for the BOCs, at the time of this writing, few BOCs had formally pursued relief under Section 271.\footnote{175. \textit{Id}. at 11.}

**Has the Act delivered?**

Many predicted the Act would result in an explosion of competition in the local telephone market, creating not only new opportunities, but increasing the variety of services offered.\footnote{176. \textit{Id}. at 11.} Former Senator Larry Pressler (R-SD), sponsor of the Act, vowed upon its enactment that it "will lower prices on local telephone calls through competition.

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It will lower prices on long distance calls through competition. It will lower cable TV rates through competition. This is the biggest jobs bill ever to pass this Congress." The reality has not been as profound.

Immediately after the Act’s passage, AT&T Chairman Robert Allen said AT&T would enter local markets in all 50 states as early as the following summer. One year later, AT&T offers residential local service on a resale basis in one city, Sacramento, California. AT&T presently offers local phone service to businesses in 35 states and hopes to expand its service to 45 states by February 1997. The service, while a step towards competition, is unfortunately available only to medium and large corporate customers. Further, the service, called Digital Link, is available only to businesses that have dedicated lines to AT&T’s long distance network.

As 1997 quickly passes, one has to ask “Where’s the competition?” Has the Act delivered on its “simple” principles? FCC Commissioner Susan Ness acknowledged, “(l)ong distance rates are up. Cable rates are up even more. Local telephone rates are not down, and few of us have the ability to choose our local telephone carrier, or video provider.” Commissioner Ness, while not ready to call the Act a failure, acknowledged it just may be too soon to tell.

Most observers have been reluctant to criticize the Act so soon after the end of its first year. Jeffrey Kagan, President of Kagan Telecom Associations, agrees: “(I)t took years before competitive long distance service was available to everybody. This is just one step on a long journey.” Similarly, AT&T Chairman Robert Allen said “it is too soon to criticize the law for failing to deliver major savings to consumers. The only unreasonable expectation was that this would hap-

177. Mike Mills & Paul Farhi, This is a Free Market? The Telecommunications Act So Far: Higher Prices, Fewer Benefits, WASH. POST, Jan. 19, 1997, at H01.
179. Id.
180. Dave Mayfield, AT&T Edges Back Into Local Phone Market with Service for Business the Company Plans to Offer Local Service to Residential Customers As Well, VIRGINIA-PILOT, Jan. 29, 1997, at D1.
184. Id.
Indeed, although local competition has not occurred as rapidly as hoped, several issues have become clear over the past year. Creating interconnection agreements that are satisfactory to competing telecommunications companies is, if not impossible, extremely difficult. The rules promulgated by the FCC to implement the Act not only are controversial, but legally questionable. The USF will not be meager, as recommendations have been made to allocate $2.25 billion to fund discounts solely for schools and libraries.187

Last year also brought additional consolidations and mergers of telecommunications companies, leading to the creation of mega-carriers that have vast financial resources, improved viability and the ability to be "one-stop" shop providers.188 Prior to the Act's passage, AT&T was already positioning itself to offer wireless services by acquiring McCaw Cellular at a cost of approximately $12.6 billion in 1994.189 Two of the seven RBOCs, SBC Communications (formerly Southwestern Bell) and Pacific Telesis Group (PacTel) announced intentions to merge their operations in 1996. The FCC has already approved the merger, a stock swap valued at nearly $17 billion.190 The newly created company expects to generate revenues of more than $21 billion and employ more than 100,000 workers.191 Also in 1996, Bell Atlantic announced intentions to merge with NYNEX, a more than $23 billion transaction.192 The merger was approved by the DOJ on April 24, 1997, and the FCC on August 14, 1997. Prior to the FCC's approval, Frank Thompson, Director of External Affairs for Bell Atlantic, opined the Bell Atlantic/NYNEX merger might be subject to more intense review than the SBC/PacTel merger in that hundreds of miles separated SBC and PacTel, while Bell Atlantic and NYNEX had adjacent territories.193

186. Timothy J. Mollaney, AT&T Chief Defends Telephone Reform Law; 'It was an act of Congress, not an act of God,' BALT. SUN, Feb. 5, 1997, at 1C.
187. See supra notes 118-20 and accompanying text.
189. Ron Choura and Robin Ancona, Report to the National Association of Regulatory Utility Commissioners Communications Subcommittee (Feb. 9, 1996).
191. Id.
192. Id.
193. Telephone Interview of Frank E. Thompson, Director of External Affairs for Bell Atlantic (Feb. 20, 1997).
On an international scale, MCI and British Telecom are merging operations at costs exceeding $20 billion. While these transactions significantly improve the position of these companies to compete in a competitive marketplace; the consolidation could adversely affect competition by making it more difficult for smaller companies to compete. The FCC approved the MCI/BT merger on August 21, 1997, subject to conditions that expect to enhance competition in the United States.

It is also clear the Act did not intend to rob state commissions of their authority to guide the development of telecommunications infrastructure and services or their ability to protect consumers. Arbitrations are being conducted in every state under swift time periods. State commissions are certificating competitive carriers to offer local service and a few states, Michigan and Oklahoma, have already provided an important consultative role to the FCC regarding Section 271.

In theory, the competition unleashed by the Act should create market share shifts among players, lower prices and increase demand. While the Act is a deregulatory piece of legislation, it does not mandate lower prices or increased competition. Instead, it merely removes the legal barriers to competition in the belief that market forces will lead to increased consumer choice and lower prices. Those forces take time, and the "clock doesn't start ticking until the new regulations are in place."

In retrospect, it seems that consumers were promised too much after the Act's passage. Despite the fact that implementing local competition will take longer than people expected, consumers should remain confident. More than 680 interconnection agreements have been reached through either voluntary negotiations or arbitrations. Local competition is indeed spreading to urban areas across the United States, albeit primarily to business customers.

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195. RURAL TELEPHONE COALITION, STATE COMMISSIONS RETAIN THE RESPONSIBILITY AND POWER TO ENSURE DEVELOPMENT OF THE INFRASTRUCTURE IN RURAL AMERICA (available at the Creighton Law Review).
199. Id.
200. Id.
With the passage of time, local competition should become available to consumers in every part of the country. Whether and when all this happens depends in large part on the activities of the FCC, the state commissions and the courts as they interpret and implement the Act. Recently, efforts have been extended by the FCC to form an advisory committee of local and state government officials to help in implementing the Act. The 15-member committee is scheduled to meet at least three times annually to advise the FCC on issues such as mutual policy concerns and rights-of-way.

The FCC's extension of this olive branch to state and local governments is a step in the right direction. Eventually, competition will benefit consumers by bringing lower prices, innovative technology and improved services, but it will take joint regulatory efforts. The Act has created an "arranged marriage" between the FCC and the state commissions. They must interact in a collaborative manner to make the promises of the Act a reality for consumers. Chairman Hundt has said the FCC and states must reconcile their competing views instead of resorting to the court for reconciliation. Although his statement is right on target, until the words are put into action, implementing local competition rapidly will continue to be difficult.

Commissioner Ness said, "(c)ompetition isn't like carrots or tomatoes. To prepare the soil, plant the seeds, let them sprout, grow and flower takes years, not weeks . . . Telephone competition hasn't flowered yet, but the soil has been carefully prepared, the seeds have been planted, and the first sprouts are appearing. If we continue to cultivate the right environment, the harvest will be bountiful." While the perfect environment is unlikely, consumers have every right to expect competition and the benefits competition will bring. Whether those benefits to consumers will arrive years or weeks from now is a question only time will tell.

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202. FCC Chairman Reed Hundt, Speech to the National Association of Regulatory Utility Commissioners (NARUC) (Nov. 20, 1996). Chairman Hundt cited the "arranged marriage" as an analogy used by NARUC President Cheryl Parrino in her address to the Great Lakes and Mid Atlantic Conference of Regulatory Utility Commissioners.

203. Id.
