Current Telecommunications Legal Issues

Litigation v. Legislation: Is the 1996 Act a Beginning or an End?

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Abstract

This paper presents an overview of the current litigation and legislation that is driving the telecommunications market. There has been a hypothesis that the collapse of the stock market was driven by the telecommunications collapse, a $2 trillion loss of market cap to the industry. It has been further speculated that this loss was driven by poor legislation, poor administration, and excessive litigation. This paper examines these issues in light of the current litigation across the spectrum of the telecommunications issues. The conclusions draw and in contrast to the accepted party line. The author contends that the litigation may have just begun, and that via successful approaches via antitrust litigation by individuals, the industry may see the greatest change. Specifically the author contends that litigation brings about good legislation from bad.

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1. INTRODUCTION

The telecommunications industry is wrapped in a complex fabric of legislation and litigation. It is a combination of administrative, tort, constitutional, and criminal law. It is woven from the fabric of 19th century monopoly thought and 21st century technology. This paper address the key issues from a legal perspective as regards to the evolution of the technology and legal implications as well as drivers. Unlike any other industry, telecommunications is a legal industry. As had been said about Bill McGowan, when he was at MCI, the predecessor of Worldcom, MCI was a law firm which ran a telephone network. In fact today the industry is a law firm running a telephone industry, but one trying to get into the 21st century.

We begin this paper with a brief overview of the 1996 Telecom Act. Then we commence to address the recent legislation and litigation which currently flows within this business. The Telecom Act of 1996 is just one of many stepping off points for the telecom industry. The MFJ of 1982 was even more so. The Telecom Act did not change the industry, it introduced more law, more complexity, and more litigation. It was in one sense liberalizing and in another constraining. We attempt in this paper to outline all of these elements.

This paper starts with the 1996 Telecommunications Act. It then discusses several of the Acts issues in some detail. Then it frames the antitrust issues relating to the Act. The Act expressly removes antitrust protection from the monopoly telephone carriers, the RBOCs or ILECs, whichever term is used. Then we discuss the issues relating to recent litigation on the issue of privacy. This issue is critical since it represents an clear and present threat to individual privacy and shows the true nature of the RBOCs in terms of their relationship to their customers. Then we discuss recent litigation regarding municipalities and proposed changes by the RBOCs to prevent municipalities from exercising their constitutional rights.

The picture which emerges from this analysis is that for the consumer litigation rather and legislation may be the only option. As has been discussed elsewhere by the author[2], the RBOC themselves have severe internal problems and their approach is to attack everyone, even the consumer, to achieve a hegemony for control. The recommendation is that the only option being litigation, it must be exercised fully.

2. THE 1996 ACT

The Telecommunications Act of 1996 has provided for the open competition in the Local Exchange Carrier markets. There are several factors that make this new competitive environment dramatically different from that of the Inter Exchange Carrier markets in which AT&T and MCI and others found themselves in 1984. Specifically, there is a technological change wherein the issue of economic scale has been eliminated, namely there are de minimis entry barriers from an economic perspective. The barrier to entry is the issue of Interconnection, which simply stated is the need to connect from one new LEC entrant to the existing monopoly LEC player, specifically the RBOC. Thus there exist many new and significant legal issues relating to the implementation of such fair and equitable interconnection. The FCC in its role as Administrative Agency has taken steps effective August 8, 1996 to promulgate rules of behavior.[3] The alternatives available if such rule fail to provide for a competitive framework are the antitrust laws. This new area for antitrust law is one that rejoins many of the issues that were thought to be left behind at the time of the AT&T divestiture.

The Act as amended in 1996 has removed antitrust protection from the telecommunications industry.[4] In light of that fact, it is necessary to reexa mine the implications of the many arrangements that have been

[2] See McGarty, The Imminent Collapse of the Telecommunications Industry, August, 202.

[3] See FCC First Report and Order on the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. These relate expressly to Sections 251 and 252 of the Act.

[4] See Section 601 of the Act.

customary practice, and view those arrangements in the light that all other similar arrangements can be viewed in all other industries. From an historical perspective, the Antitrust laws have been used to manage the gross misconduct of larger entities in existing competitive markets. In the case of local exchange telecommunications, however, there is a sharp distinction. Namely, the existing entities are the only player in the market and thus have essentially full monopoly control. The 1996 Act in Sections 251 and Sections 252 provide a vehicle that allows new entrants into the market so that a competitive environment may evolve. The issues however focus around the approaches taken in the new Act and how they may be interpreted.

Reed Hundt, the Chairman of the FCC and former practicing antitrust attorney, recently remarked about the relationship between interconnection and antitrust law:[5]

"When cases like Standard Oil and Alcoa were decided, our economy ran on oil and metal. Our economy now runs on impulses of digital bits transmitted via fiber, wire or the ether. It is high time that the communications industry (so vital to our country) operate under the same pro- competitive policy as every other industry in the U.S. And -- despite the intricacies of our legal culture, which has at least given an interesting and rewarding life to the lawyers in this room – I am confident that this will happen and happen quickly."

It is clear that with the 8th Circuit Court intervening on the behalf of the monopolists and the Supreme Court has recently upheld this. Hundt's point is very significant in that the Courts have addressed monopolies I oil and transportation when they were the key elements of our society, whereas the Courts are seeming to take a strong pro-monopoly position when telecommunications is at the center of our growing economy.[6]

There seems to be no question but that Congress had the intent to create competition in the Local Exchange markets. The wording of the Act and its reflection in the Commission's attempt to clarify certain issues leads directly to that belief. However, it has been seen that the Incumbent LECs, namely the RBOCs, have a strong and vested interest in delaying or prolonging that effort. The track record of companies such as NYNEX are clear in their continued attempts to delay the entry of companies such as MFS and Teleport ,especially through the process of state regulatory delay. The Commission has the set of certain authorities in the new Act to facilitate this process and create a more competitive environment but the States retain certain controls and interests.

Furthermore, telecommunications has, as a result of the Act, become potentially a more competitive environment. Despite the intention to allow competition, the industry also has certain existing structures and interlocking relationships that permit the incumbents to retain significant share by blocking the entrance of new players. This paper focuses on the local exchange market in which the local exchange carrier, "LEC", is the principal player. Twelve years ago the interexchange market was opened up to full competition. The result is an network that allows for strong competition with even stronger competitors. The local exchange market is closed. This paper provides an overview framework for this market, the technological change agents that make it dramatically different from other markets, and the re-application of antitrust law from the perspective of maximizing the public welfare, independent of the individual competitors.

There are several significant changes that are also occurring in the delivery of these types of products that will allow for the dramatic entry of new competitors. These will also be explored. Specifically, technology allows for disaggregation of functions in the delivery of the product. Technology also allows these

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[5]See Hundt, October, 1996.

[6]Posner, see Posner references, has developed a significant theory of justice based upon the economic structure of utility and justice. I believe that one can take a Posnerian position that states that the monopoly should be totally abandoned and that there are clear economic structures in place that can handles these changes. The Courts on the other hand seem to be taking a mid-nineteenth century position which reflects pr-Sherman doctrines.

functions or product elements to be delivered at marginal prices since the inherent scale in the industry is disappearing. Namely the scale economies of copper wire and large switches is now being replaced by the scale-less technology of wireless and ATM or frame relay switching.

The main objectives of this paper are to discuss the following issues:

i. *What is the competitive environment that a new local exchange carrier faces in the market with the structures imposed by the modifications to the Act.*

ii. *How can the Incumbent Local Exchange Carriers ("I-LEC"), namely the RBOCs, exercise their current monopolistic control to delimit new entrants and how can the new Local Exchange Carriers compete. Specifically, is there a viable competitive dynamic in this market under the new law.*

iii. *What is the role of the Commercial Mobile Radio Service ("CMRS") and Competitive Local Exchange Carriers ("C-LECs"), and how are they integrated into the telecommunications environment.*

iv. *What are the unbundled elements that the I-LEC and the CMRS can provided to a the C-LEC in this competitive market.*

v. *What is the current Administrative and Federal law as regards this competitive environment and what is the impact on antitrust law as applied to this area.*

vi. *How are the un-bundled elements and interconnection and access currently provided and is the means and methods of the current provision a "tying arrangement" created by the incumbents as a means to eliminate any competition and is such action an antitrust violation?*

vii. *How should these unbundled elements and interconnection be priced and what is the relative pricing of these elements within the I-LEC and to the C-LEC. Namely, is predatory pricing an issue of concern hereby the I-LEC against the C-LEC and the CMRS.*

viii. *Where is the point of regulatory control and where is the point of antitrust control in this market? Namely, does the Department of Justice Antitrust Division have any role to play or should this be disputed as civil proceeding amongst and between the competing parties. More specifically, is there an over-riding Federal concern*[7].

3. REGULATORY FRAMEWORK

The regulatory framework has changed dramatically with the passing of the 1996 Act. The Act recognizes that the I-LECs, the incumbent LEC, namely the RBOCs, have had monopoly control, and that for competition to exist, the I-LECs must unbundle, interconnect, co-locate and provide other similar services. Failure to provide such services would result in the FCC refusing to allow the I-LECs to enter certain markets, such as long distance services and manufacturing.

The 1934 Act codified a monopoly around the AT&T structure. The first major crack occurred in the Modified Final Judgment and the separation of Interexchange Services. This allowed new entrants into the IEC business and thus permitted the rapid growth of Sprint, MCI, LDDS (now WorldCom), and others. In 1996 the IEC business is approaching a competitive market with prices generally reflecting commodity pricing with the market share distribution being that of a competitive market.[8]

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[7]The concern is that this is almost a trillion dollar industry representing over 20% of the GDP and the DoJ has spent a great deal of focus on the Microsoft antitrust issues despite the fact that there is a clear and present danger that the incumbent carriers, namely the RBOCs, have maintained a monopoly hold on this dominant part of our economy. The DoJ under the current administration has almost a totally laissez fair approach to regulating this industry and in fact in even enforcing the law.

[8]Economists will still argue whether the IEC business is competitive or a cartel. The measure of cartel like behavior is generally driven by the distribution of market share. Porter has shown that in a purely competitive commodity market the markets shares are 40%, 30%, 20%, and 10% going to all others. This case at hand is one wherein the AT&T share is about 60%, MCI at 20% and all others at 20%. Thus the argument may not be complete for full competition but is has gone a far distance in ten years.

The view also taken by Congress and the Commission is that there are two elements that are drivers for the rapid introduction for competition; technological innovation and price reduction. The Congress in the new Act has stated in many places that there is a need for technological innovation and that this can best be achieved via a competitive environment. The case of long distance has been a clear case where this has been proven to be the case.

There were previous arguments support monopoly in the case of a telecommunications environment, especially from Alfred Kahn who noted[9]

"We have already alluded to the technological explosion in communications after World War II,...The case for a national telecommunications network monopoly has the following aspects ... Aggregate investment costs can be minimized.. if the planning for the installation and expansion is done with an eye for the total system....Since any one of the 5 million billion possible connections that the system must stand ready to make at any point in time may be performed over a variety of routes....justifies the interconnection...completely dependent on its own resources alone."[10]

This argument for interconnection, combined with transport and control (namely horizontal integration) was valid in 1970. It however is not valid today. They are separable functions and scale economies are in the hands of the CPE manufacturers not the network providers. In effect, there exists no monopoly in interconnect as a result of these technology changes. This is a dramatic change from 1971 and Kahn's analysis.

Historically, a more chilling argument trying to eliminate competition on the local loop was given by an AT&T executive. Consider what was written by a Bell System polemicist in 1977 at the 100th anniversary of the Bell System at MIT. The author was John R. Pierce, Executive Director at Bell Labs, who stated:

" Why shouldn't anyone connect any old thing to the telephone network? Careless interconnection can have several bothersome consequences. Accidental connection of electric power to telephone lines can certainly startle and might conceivable injure and kill telephone maintenance men and can wreak havoc with telephone equipment. Milder problems include electrically imbalanced telephone lines and dialing wrong and false numbers, which ties up telephone equipment. An acute Soviet observer remarked: "In the United States, man is exploited by man. With us it is just the other way around." Exploitation is a universal feature of society, but universals have their particulars. The exploitation of the telephone service and companies is little different from the exploitation of the mineral resources, gullible investors, or slaves.[11]

The readers should note that this was written nine years after the Carterfone decision and five years before the announced divestiture. Pierce had a world view of an unsegmentable telephone network. This paper has the view of a highly segmentable communications system. The world view of the architecture has taken us from "slavery" of Pierce to the freedom of the distributed computer networks of today. Kuhn has described technologists as Pierce as the "Old Guard", defenders of the status quo. They defend the old paradigms and are generally in controlling positions for long periods of time.

3.1 Legal Framework

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[9]See Kahn, (II, p 127).

[10] It should be noted that Kahn was the father of airline deregulation, less than a smashing success. He has recently taken the pro-monopoly position that there should be highly delimited interconnection to the incumbents, thus allowing them continuing monopoly control. Kahn has little understanding of the technological changes and thus his view is that of a 19th century monopoly regulator rather than that of 21st century market liberator. See A. Kahn, Telecom Deregulation: The Abominable TELRIC-BS, see www.connective.com/events/manhattaninstitute/.

[11]See .de Sola Pool Ed, Pierce, Social Impact of the Telephone, 1977, pp 192-194.

The 1996 Act introduced the first glint of competition in the local exchange market. The Act thus amended the 1934 Act and took steps to eliminate the MFJ. The new Act allowed for entrants into the strongly monopolistic local exchange market. It must be noted that the LEC business is dramatically more complex than the IEC or long distance business. Long distance requires transport, simple switching and interconnection to a local carrier. All IECs pay the same rate to the I-LECs and thus they all have the "water" raised the same amount so that there is no inherent competitive advantage. However this is not the case in LEC competition. The new LEC must build out a plant and interconnect. It is this action of interconnection or accessing the incumbent LEC that is the issue for any antitrust concern. This is the point at which the existing monopolist can create a barrier to entry to any competitor. The new law mandates competition but the Administrative interpretation of that law can be weak and delayed. Both weakness and delay can eliminate any competitor no matter how well the words of the law are phrased.

Regulatory delay has been the strong card of any I-LEC in dealing with new entrants. The new entrant is much less capitalized than the RBOC and thus by dealing with the regulatory bodies the new entrant is weakened, has its financial resources reduced and ultimately is placed in a strongly disadvantageous position. We argue in this paper that the vehicle for effective competition in this new market is via the antitrust laws and not only by the Administrative process.

The legal framework that we shall pose are legal requirements posed in Sherman, Clayton and the FTC Act. These laws are at the heart of the Federal jurisdiction in controlling competition and ensuring that monopoly players would not have dominant control. Unlike the breakup of long distance telephony, the LEC market is a significantly greater monopoly. This monopoly is controlled by the RBOCs predominantly and thus they have dramatic power to control the rate of introduction of new LEC competitors, called the C-LECs. Evidence over the past fifteen years has shown that the RBOCs have taken all steps possible to delay, deter, and in any other way avoid the introduction of new competitors.

Thus the analysis of this paper is only that will be confined to a reading of the law and its interpretation to such factors as predatory pricing, tying arrangements, barriers to entry, and other specific actions that an I-LEC may take to ensure its survival.

3.2 The Opportunity and the Paradigm Change

The opportunity is that of new and significant competition in the local exchange market. The paradigm shift is one from a product which has significant scale in production to one that has de minimis scale. The author has shown elsewhere that the average capital per subscriber and the marginal capital per subscriber are equal at low percent penetrations of any market. In addition, due to the scalability of the technology, the plant can be arbitrarily expanded at capital per subscriber can be kept and the minimal scale level.[12] In addition, the author has shown, that the scale in operations costs can also be attained by outsourcing. The direct implication is that any new entrant can see costs at full scale in a short period of time. Thus if there were a fully open market, new competitors can compete as efficiently as the existing large companies, and in fact may be much more competitive in a shorter period of time.

There are two major trends in the process of allowing and enhancing disaggregation of networks. They are the development of a distributed processing environment and the loss of scale in infrastructure. We shall discuss each of these in some detail since they will be at the heart of our understanding of the new disaggregated networks.

3.3 The Act

The 1996 Telecommunications Act, the Act, became law on February 8, 1996. The law mandated that the FCC in its role as Administrative agency establish the appropriate renderings of the law into administrative procedures in the Code of Federal Regulations, and thus amending the current CFR. The FCC took this mandate and on August 8, 1996, six months after the law was effective, issued a set of administrative

[12] See the papers by the author as referenced.

rulings regarding the implementation of several key elements of the law. Specifically the FCC ruled on the issues of interconnection and unbundling of the plant. The issues still before the FCC are access and universal service.

The following is a list of the key portions of the 1996 Act. Each is a Section and each will be reviewed and rendered into administrative code by the FCC. The total number of sections are significant and they cover telephony, satellites, cable and broadcast. We shall not deal with satellites, cable and broadcast in this paper.

Section	***Topic***	***Issue***
SEC 251	***INTERCONNECTION***	This section deals with interconnection and unbundling of the local exchange carrier. It proposes that such a set of procedures be established and that such procedures reflect a maximally competitive environment for the local exchange business.
SEC 252	***PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS***	This section details processes, procedures and remedies for the failure to effectively provide for the provisions under 251.
SEC 253	***REMOVAL OF BARRIERS TO ENTRY***	This section broadly requires the removal of any and all barriers to entry in the market. This section is a classic antitrust statement of competition in the local market.
SEC 254	***UNIVERSAL SERVICE***	This section details the universal services provision.
SEC 601	***APPLICABILITY OF CONSENT DECREES AND OTHER LAW***	Eliminates Clayton exemption from Antitrust laws for all of the RBOCs.

3.4 The FCC First Report and Order

On August 8, 1996 the FCC issued a report and Order, the First, on 251 and 252. They detailed in almost 800 pages the interpretation of the law as a result of the Notice of Public Rulemaking process. There were approximately a dozen law suits filed, mostly by the RBOCs objecting to this R&O. The RBOCs clearly feared local competition of any form and their filings attacked the FCC and the suits are filed in every District Court available.

3.5 Interconnect

Section 251 is the key section in establishing competitive local exchange access. The key elements of Section 251 state the following:

"(a) ***GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS****- Each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards.....*

(b) ***OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS****- Each local exchange carrier has the following duties: (1) RESALE- The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services. (2) NUMBER PORTABILITY- The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission. (3) DIALING PARITY- The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such*

providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays. (4) ACCESS TO RIGHTS-OF-WAY- The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224. (5) RECIPROCAL COMPENSATION- The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) ***ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS****- In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties: (1) DUTY TO NEGOTIATE- The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements. (2) INTERCONNECTION- The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network....... (3) UNBUNDLED ACCESS- The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point....... (4) RESALE- The duty-- (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions .... (6) COLLOCATION- The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, ...*

(d) ***IMPLEMENTATION****-....... (3) PRESERVATION OF STATE ACCESS REGULATIONS- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that-- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."*

3.6 Universal Service

Universal service has been in effect de facto since the Kingsbury decision of 1913.[13]This implicitly allowed AT&T to retain its monopoly subject to the agreement to provide, ultimately, universal service. The universal service would mean that there would be access to all people to telephone services and that for poor people that service would be subsidized. The state PUCs then followed up on this and embodied this in state regulatory requirements. In effect, AT&T and the BOCs were transferring wealth fro the "rich" to those who could not pay for such services, either because of their income or because the costs to provide services to that individual would be prohibitive. This was then an enforced payment, established and managed by the BOCs, for the purpose of collecting moneys from the haves for redistribution by the BOCs to what was perceived as the have nots. Needless to say this is per se taxation. From a Constitutional perspective such rights inure solely to the states and the Federal governments and under the Commerce Clause it is highly problematic that any independent third party has any right to tax especially as regards to interstate commerce. Needless to say there has never been a challenge here.

The Universal services fund was and still is a taxation by the BOCs to redistribute income.[14] It also is a pool of funds to be used by them as a vehicle to bar competition. The universal services issue however goes to the heart of the interconnection issue. The RBOCs have used this ruse as a means to control competition in two ways. First, in interexchange access they have charged an access fee disproportionately higher than costs since it was then used as a basis for universal services. This was the taxation issue. Second, they have

[13]See Weinhaus, p. 9.

[14]This is a Rawlsian approach to justice, ensuring that the least amongst us in the society has equal benefit to society asses. Baumol has taken this principle and applied it to monopolies supplanting the individual with the monopolist. The Baumol-Willing theorem takes the utilitarian approach and uses it as a basis for demanding the continuation of access. What Baumol does it create a Rawlsian universal service for the monopolist.

used a unilateral fee for any other interconnect player. Thus cellular companies, arguable providing local services, pay for initiating ad terminating calls. This has been changed by the new Act.

The Act has mandated a separate Universal Services fund to be managed by the Government, and thus the Governments powers to tax are valid and this is a legal act in contrast to the arguably illegal actions of the RBOCs in the pursuit of taxation. Second, the Act mandates balanced interconnection.

To better understand where the legal applications will be addressed we first present an overview of the major theories behind the applications of the antitrust laws. This will be important since these theoretical basis are not only applied to antitrust law but also to the enactment of the administrative regulations in the application of the Telecommunications Act. The litigation of any case in this area will require an understanding of the philosophical framework underlying its application.

Universal Services is the mandate to provide services by any carrier to any person not individually financially able to obtain the service in the area in which the inhabit.[15] Namely the low income and rural customers. The universal services provisions are as follows:

" (b) UNIVERSAL SERVICE PRINCIPLES- The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles: (1) ***QUALITY AND RATES.....*** *-(2)* ***ACCESS TO ADVANCED SERVICES*** *- ..... (3)* ***ACCESS IN RURAL AND HIGH COST AREAS*** *- ...... (4)* ***EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS*** *......*

(c) DEFINITION (1) IN GENERAL- Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services..... such telecommunications services; (A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity........"

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[15]See McGarty, October, 1996.

[16]See Weinhaus, p. 9.

The Act has mandated a separate Universal Services fund to be managed by the Government, and thus the Governments powers to tax are valid and this is a legal act in contrast to the arguably illegal actions of the RBOCs in the pursuit of taxation. Second, the Act mandates balanced interconnection.

3.7 Code Changes of the First R&O

The First Report and Order ("R&O") by the FCC mandated certain changes to interconnection. These changes are as follows:[17]

"§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: (1) for the transmission and routing of telephone exchange traffic, exchange access traffic, or both; (2) at any technically feasible point within the incumbent LEC's network.......; and (5) on terms and conditions that are just, reasonable, and nondiscriminatory........

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection......

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically ....

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence........

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request. "

The above mandates that the I-LEC interconnect itself to any purveyor of services that may become a competitor. This is the first time that the FCC has mandated such a requirement.

The following are the rules for interconnection pricing. There are several factors that are key. First is the reciprocal nature of the rules, second the method and means at which the prices for interconnect are to be determined, and third the bill and keep, or zero access fee, option.

"§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) <u>Local</u> <u>telecommunications</u> <u>traffic</u>. For purposes of this subpart, local telecommunications traffic means: (1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or (2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area.....

[17]The following are U.S.C. 47.

(c) <u>Transport</u>. For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic .... from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) <u>Termination</u>. For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) <u>Reciprocal</u> <u>compensation</u>. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

§ 51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

§ 51.705 Incumbent LECs' rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of: (1) the forward-looking economic costs of such offerings........; (2) default proxy.........; or (3) a bill-and-keep arrangements......

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs.........

§ 51.707 Default proxies for incumbent LECs' transport and termination rates.

(a) A state commission may determine that the cost information available to it with respect to transport and termination of local telecommunications traffic does not support the adoption of a rate or rates for an incumbent LEC that are consistent with the requirements........

(b) If a state commission establishes rates for transport and termination of local telecommunications traffic on the basis of default proxies, such rates must meet the following requirements.........

§ 51.709 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner that carriers incur those costs.......

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

§ 51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be …….

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study……

(c) Pending further proceedings before the Commission, a state commission shall establish the rates that licensees in the Paging and Radiotelephone Service ……..

§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

(a) For purposes of this subpart, bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network.

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so…….

(c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption."

The bill and keep approach is the approach that is the most economically efficient approach, is allowed by the law, and allows fore the ,most effective means to establish competition in the market. In the remainder of this paper we shall focus on this issue.

4. ILEC LITIGATION TO STALL

4.1 Litigation Excess

The ILECs/RBOCs have been litigating in excess to prevent the CLECs and the DSL companies from becoming real competitors. Some of the initial cases are:

1. AT&T CORPORATION, *et al* ., PETITIONERS *v* . IOWA UTILITIES BOARD *et al* .;
2. AT&T CORPORATION, *et al* ., PETITIONERS *v* . CALIFORNIA *et al* .
3. MCI TELECOMMUNICATIONS CORPORATION, PETITIONER *v* . IOWA UTILITIES BOARD *et al.;*
4. MCI TELECOMMUNICATIONS CORPORATION, PETITIONER *v* . CALIFORNIA *et al* .
5. ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.* , PETITIONERS *v* . IOWA UTILITIES BOARD *et al.*
6. FEDERAL COMMUNICATIONS COMMISSION *and* UNITED STATES, PETITIONERS *v* . IOWA UTILITIES BOARD *et al.;*
7. FEDERAL COMMUNICATIONS COMMISSION *and* UNITED STATES, PETITIONERS *v* . CAIFORNIA *et al* .
8. AMERITECH CORPORATION, *et al* ., PETITIONERS *v* . FEDERAL COMMUNICATIONS COMMISSION *et al* .
9. GTE MIDWEST, INCORPORATED, PETITIONER *v* . FEDERAL COMMUNICATIONS COMMISSION *et al* .
10. U S WEST, INC., PETITIONER *v* . FEDERAL COMMUNICATIONS COMMISSION *et al* .
11. SOUTHERN NEW ENGLAND TELEPHONE COMPANY, *et al.* , PETITIONERS *v* .FEDERAL COMMUNICATIONS COMMISSION *et al* .

Recently, in June 2002, in the case of Trinko v Bell Atlantic, United States Court of Appeals For the Second Circuit, however, what we see is the first of several examples of how customers, not companies, are fighting back with the RBOCs using antitrust laws.

The following analysis considers several of the more recent cases wherein the RBOCs have used litigation to delay the deployment of services, broadband and more standard services. One should remember that the Act was passed in February 1996 and the FCC completed the rule making in September 1996. Thus by January 1997, the RBOCs had aggressively moved to have PUCs take pro RBOC positions. The first was Iowa as shown below. These five cases start to set the ground work for what the potential legal environment will hold.

4.1.1 Iowa Utilities Board v FCC et al, US 8th Circuit Court, July 17, 1997

This was one of the first major rulings. The 8th circuit was asked to vacate the entire FCC First Report and Order, which in essence established the details of the procedures to be followed in the implementation of Sections 251 and 252 of the 1996 Act. It was not that the FCC did a bad job, it was that the RBOCs wanted to generate confusion and delay.

In the ruling the 8th Circuit partially kept and partially rejected the issue of what authority the FCC has over states, generally ruling in the favor of the states. The Court stated that the States and not the FCC have the prime role of rate setting. In fact they severely restricted the FCC's ability.

There was the "pick and choose" rule, whereby the FCC stated that CLECs could pick and choose elements of interconnection agreements previously agreed to by other carriers to implement their own interconnection agreement. This would give CLECs an advantage. The 8th Circuit denied this.

However, it then addressed the issues regarding unbundling. This is the UNE issue. The UNE issue as we have stated was at the heart of broadband. It was the reason broadband failed. As to unbundling the 8th Circuit stated:

1. Unbundling of Operations Support Systems software and databases is approved. This allows for a seamless integration.

2. The FCC determination of allowing interconnection to the ILEC at any "technically feasible" point is acceptable.

3. Denied the FCC's interpretation that any element that must be unbundled and which is needed must be unbundled.

4. Upheld the FCCs interpretation of the "necessary" and "impairment" interpretations. "Necessary" means that it was necessary for the CLEC and impair meant that it would impair the CLECs service.

5. Denied the rule requiring unbundling and affiliated combining. The Court decided that the ILEC did not have to do the combining, that the CLEC would be both able and required to combine UNEs. This meant that the CLEC had to reassemble parts that were under the control of the ILEC. This lead to impossible situations.

6. Upheld the provision of allowing CLECs to purchased finished services. Generally this was and is not a competitive issue.

7. Upheld the unbundling rules in general. The RBOCs tried to stop this via referral to intellectual property rights and Constitutional Takings clauses in the Fifth amendment. The Court did not agree with these positions.

4.1.2 AT&T et al v Iowa Utilities Board, US Supreme Court, January 1999

The Supreme Court, Justice Scalia delivering, in addressing the above case for the 8th Circuit, found as follows:

1. Reversed the 8th Circuit in stating that Federal Law permits the FCC to have jurisdiction over the Act and its implementation.[18]

2. Reversed the 8th Circuits denial of "pick and choose" because it was clearly stated in the law. This is interesting since the 8th Circuit tried in many ways to remove this FCC interpretation.

3. Approved all unbundled access rules except Rule 319 (also 47 USC 51.319, FCC 96-325, First Report and Order), which is the necessary and impair clause. From the First R&O we find the FCC stating:

"275. The Department of Justice and Comptel reject the BOCs' argument that the general obligation imposed by section 251(c)(3) is limited by consideration of whether the failure to provide access to an element would impair a carrier's ability to offer a service. They argue that the term "impair" does not mean "prevent," and that we should interpret this standard to mean that a carrier's ability to provide a service is impaired if obtaining an element from a third party is more costly than obtaining that same element from the incumbent. They also dispute the incumbent LECs' argument that the "impair" language in this standard means that new entrants cannot exclusively use unbundled elements to provide the same or similar retail services that an incumbent offers. They argue that, if similarity is enough to prevent the use of unbundled elements, then section 251(c)(3) would be nullified. They further contend that, under the BOCs' theory, incumbents could prevent new entry through the use of unbundled elements by offering unbundled loops, switching, and other elements as retail services."

The Court vacated the rule 319, which had necessary and impair. The Courts reasoning was simply that necessary and impair were in eye of the beholder, and in this case the beholder was the CLEC not the FCC. It remanded the rule back to the FCC.

4.1.3 Verizon et al v FCC, US Supreme Court May 13, 2002

In this case, the Court ruled as follows

1. Affirmed that the FCC can set rates on a forward-looking basis. They also rejected the need for factoring in historical costs.[19]

2. Affirmed the TELRIC forward- looking cost basis for setting the rates.[20] [21]

3. Reversed 8th Circuit in requiring that ILECs combine UNEs into a single UNE at request of CLEC since ILECs have capability and control process, whereas the CLECs are helpless in the effort and may be hindered by the ILEC.

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[18] See Chevron v NRDC, 467 US 837. The case involved EPA regulations. The Court ruled that the EPA, and Federal Agencies in general, have great latitude in interpreting the law and in fact may have the right to change their interpretation.

[19] See Smyth v Ames, 169 US 466. The case involves railroads and rate setting across state lines. The Court ruled that it was reasonable for Nebraska to set railroad rates and that a state had that authority.

[20] TELRIC, is Total Element Long Range Incremental Costs. It is a method to determine costs that are: (i) forward looking, (ii) least cost, (iii) long run, (iv) incremental, and (v) include a return on invested capital. However, like all models the input determines the output. Thus, albeit a methodology, it is not based irrefutably and consistently based on facts. It is not reproducible.

[21] See Duquesne v Barasch, 488 US 299. In this case the Court ruled that a state could set rates and in so doing did not violate the takings clause of the Constitution.

4. Takings argument was rejected.

This was in many ways a reversal for the RBOCs.

4.1.4 US Telecom Association (USTA) v FCC, Bell Atlantic as Intervenor, US Court Appeals, District of Columbia, May 24, 2002

This extremely poor and seemingly prejudiced opinion rejects the FCC re-do of the necessary and impair issues in 319 as described above. The DC Court totally rejected the FCC's efforts. It set unbundling back severely.

The DC Circuit Court focused on DSL services. The DSL companies, all bankrupt by the time of the ruling due to ILEC anticompetitive actions, has continued to block this effort. The DC Court, totally oblivious to this fact, actually states:

"The Line Sharing Order Petitioners primarily attack the Line Sharing Order on the ground that the Commission, in ordering unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite). ***We agree."***

There is no competition. In fact the ILECs or RBOCs have slowly rolled out limited DSL knowing that in the long run they want separate monopolized fiber exempt from any Act provisions. This accomplished, with the help of the DC Court and their ilk, one can foresee slow broadband at extortionary rates. The DC Court goes on to say:

"In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition. The Commission's naked disregard of the competitive context risks exactly that result. Accordingly, the Line Sharing Order must be vacated and remanded. Obviously any order unbundling the high frequency portion of the loop should also not be tainted by the sort of error identified in our discussion of the Local Competition Order and identified by petitioners here as well."

In fact the FCC did regard the competition, the Court has not look at the stock market and see the impact.

4.2 The RBOC Strategies to Broadband

Verizon has aggressively staked out its position vis-à-vis broadband with a paper written by John Thorne, Senior Vice President and Deputy General Counsel, Verizon.[22] The paper outlines what the RBOC, namely Verizon, intends to do to delay broadband until it is in its sole best interest.

Mr. Thorne begins the paper with:

"Computers make us rich. Computer networks make us richer. Very fast computer networks will make us richer still, if and when they finally get built – which will happen when the federal government steps aside and unleashes competition in the industry that now has the technology in hand to build them"

We can readily deconstruct this rather compelling statement from a corporate officer, a lawyer, and a representative of the Verizon position. Clearly, Verizon believes that having anyone else in the market is anti-competitive. The need is to take any and all restrictions and regulation off of them and then they will, single handedly, resolve the problem. As a result, they will get very, very rich. In turn, their sole intent is "to make us richer still".

[22] See :

http://newscenter.verizon.com/policy/broadband/primer_c.pdf?PROACTIVE_ID=cecfc9cbc9cdcdcec9c5cecfcfcfc5cecfc7cdc8c7c7cacfcec5cf

He goes on to state:

"Unfettered competition delivers the most when markets are young, and when technology is evolving quickly. This is evidently true in broadband markets today. Most of the market is completely up for grabs, because 90-plus percent of the technology that will ultimately be used hasn't yet been built, 90-plus percent of the capital hasn't yet been committed, and 90-plus percent of the customers aren't yet being served. And because broadband digital services will ultimately absorb and displace the old, analog voice and video, it is equally true that no player in the market today has any assurance of winning any given share of the digital market ahead. Everything is up for grabs, because an extraordinary transformation in technology has overtaken all the old certainties.

In circumstances like these, regulators should have the wisdom and the courage to stand by and do nothing. For the most part, they have chosen to do just the opposite. Telecom regulation today reaches further, and more intrusively, than ever before. And the effects are now being felt across the economic landscape. The third wave of the IT boom – the broadband wave – has not materialized…"

This is a veiled threat. Verizon is clearly saying that they are not building broadband despite DSL efforts. DSL is the poor man's broadband. Verizon will not build broadband until it has been deregulated. Then and only then will it create more wealth for itself at the cost to the consumer.

The UNE issue is clearly an element of their strategy to delay and divert. As Thorne states:

"Rather than make unbundling the direct stepping stone to deregulation, as Congress intended, the FCC has instead transformed it into a mountain of new regulation. The Commission has invented far too many "unbundled network elements," and it has contrived to price them much too cheaply. It has done this ostensibly for the benefit of small competitors that lack both the resources and the technical expertise to build their own networks. But the upshot has been a tangle of regulation that has simultaneously discouraged new investment by both incumbent carriers and by competitors that have the finances and technical ability to build out new broadband networks and develop facilities-based competition. This is not simply the conclusion of chronically over-regulated incumbents. A unanimous U.S. Supreme Court reached that conclusion in a major January 1999 ruling. As did a unanimous Eighth Circuit Court of Appeals, in a key, follow-up decision in July 2000. That latter ruling is itself now headed back to the Supreme Court for further review."

As shown above, the Supreme Court has overthrown this issue. However the DC Appeals Court has brought it back into the fray.

"Collocation rules allow competitors to squat on the incumbent LECs' real estate, for the ostensible purpose of interconnecting their equipment with unbundled network elements in the incumbents' central office. The competitors supply network equipment, but are not required to have an office of their own. The "UNE Platform" rules push things a step beyond that – competitors do not have to supply any network equipment, either."

The answer to Thorne's concern is simply to create neutral meet points where Verizon and any competitor for any service can meet. Thus, the "squat" is not necessary. The meet point we propose is that of the head end of the municipal networks.

"The Commission has even managed to endorse a scheme under which incumbent carriers end up paying others – and paying them billions of dollars – to interconnect with and use the incumbents' own networks. This scheme travels under the innocuous alias of "reciprocal compensation." The 1996 Act required carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The original idea was simple: local carrier A would have to pay local carrier B to "terminate" traffic originating on A's network and terminating on B's."

This is the access and interconnection issue. Having a "bill and keep" approach would eliminate mutual compensation and the significant transactions costs related thereto. Only when Verizon saw that to be the case did it start to move in that direction. He further states:

"For ordinary voice traffic, this would mostly be a wash. But for tens of millions of dial-up Internet users, the call always originates on their home phone line; the Internet itself never originates calls or phones you back. Moreover, Internet users often stay on line for hours at a time – much longer than typical voice callers."

Thus again we see a tendency to not do broadband.

Thorne then goes on to attack the cable companies. This is really a feint attack, since in reality he and Verizon ultimately want total deregulation.

"There is, as a result, sharply different regulation of high-speed data services provided over phone lines and over coaxial cable. Telephone companies have to unbundle the portion of the spectrum used for broadband and do so at below-cost pricing. Cable companies do not. Telephone companies have to permit their competitors to collocate equipment to make it easier to use the unbundled spectrum. Cable companies do not. Telephone companies have to offer for resale their retail broadband transmission services at a federally mandated wholesale discount. Cable companies do not. Telephone companies have been forced to provide their broadband services through separate affiliates as a condition to gaining regulatory approval of recent mergers. Cable companies have not. Telephone companies have to pay in to the universal service regime when they provide broadband access. Cable companies do not. And telephone companies are almost completely locked-out of the multi-billion dollar (and rapidly expanding) Internet backbone market. Cable companies are not."

This is a gross misstatement of facts. Towns or local cable boards regulate Cable companies. They do not have a monopoly. At any time, the franchise can be removed. Cable is a franchise business and towns get franchis e fees. They provide universal services to towns, the franchising authority.

He then goes on to discuss the Internet:

"The Internet backbone is currently the least competitive part of the broadband market, owned and controlled by a few companies. The Bell Companies have sufficient incentive and capital to play an important role in developing the next generation Internet backbone, but have been kept out of the game. The economies of backbone networks depend on picking up and dropping off traffic at all major nodes nationwide – missing even one creates a serious competitive disadvantage. Section 271 approval, however, occurs on a state-by-state basis. A Bell Company, therefore, cannot become a meaningful competitor in the backbone market until it obtains its last approval to provide long-distance voice and data services in the last state where it serves as the incumbent local phone company."

The fact is that the Internet backbone is ruthlessly competitive. The biggest players are UUNet, Genuity, Sprint, AT&T, Cable and Wireless, and many more.[23]

His final statement is another sophistry of the highest form:

"Yet, if prior monopoly status were sufficient, unbundling and TELRIC regulation would equally apply to cable companies, which are, in fact, current monopolists in the market for multi-channel video. The incumbent phone companies, however, have no "prior monopoly" in the broadband market – there is no "prior" market here at all; the market is brand new. The disparate regulatory regimes

[23] See McGarty, Transit, January 2002 for details.

the Commission has adopted will shape the development of that market, by inefficiently shifting investment in new products and services from the heavily regulated technologies to the unregulated technologies. By picking winners and losers in this nascent market, the Commission ultimately harms consumers.

Thus, the Commission has again placed competitors ahead of competition. By extending to broadband services the entire panoply of unbundling regulation, along with the attendant regulation of price, collocation, operations support systems, and competition in Internet backbone markets, the Commission has labored to boost a host of small firms that do little more than resell the facilities of phone companies. But resale adds little in the way of new value, and the unbundling rules themselves directly inhibit the provision of functional service. It takes a lot of delicate adjustment to overlay a torrent of data on top of a trickle of voice on a mile-long strand of copper. The high-tech business of pulling together high-speed networks has been taken over completely by fractious regulators."

This remark falsely states that cable is a monopoly whereas it is a franchise. It can be replaced or overbuilt at any time. His goal is to get Verizon's loop free from the FCC; then Verizon would unbundle any and all UNEs that any other competitor wants. If Verizon is allowed to do that, it will mean the end of any competition, any alternatives to access, and the beginning of the control of the network as it was before 1982 and the breakup of AT&T.

5. ANTITRUST LITIGATION

It has been argued that effective competition in the local exchange market can only be achieved by the timely unbundling of the ILEC as well as the existing CMRS, the cellular carriers, as well as of the new CMRS.[24] In addition the unbundling should be done at fair and equitable prices. Furthermore we have argued that zero cost access was also an essential element in this overall process. We have developed these arguments based upon three elements; fundamental changes in the technological and operational environment, the application of the Telecommunications Act, and the direct application of the existing antitrust laws.

In many ways this is no longer an FCC or State PUC issue but has been raised to the civil and possibly criminal level of Clayton and Sherman respectively. The latter issue is one of blatant sustained anti-competitive behavior in the local exchange market. Recent evidence brought before the FCC and the State Commissions clearly indicate that there is more than just grounds for investigation.

This paper argues further, that the regulatory and administrative law process is rant with delays and inefficiencies. Further, we argue that although the antitrust laws are vehicles for appropriate remedies we should not expect the Federal Government to act on these issues. Thus, it is argued that the civil application of these laws may be the most used and most efficient vehicle for the true development of a truly competitive local, exchange market. Many authors have argued against the antitrust laws but these arguments have been based on much less market power and control that is evident in this case.[25]

The essence of antitrust law is to promote competition and not competitors. To do so in telecommunications one must recognize several significant principles. First is the loss of scale. As we have argued, technology is driving scale out of telecommunications. All costs are marginal costs and all average costs approach margin in a precipitous fashion. Second, disaggregation allow for marginal pricing in all elements of the business. Capital plant has been marginalized as a result of technology and operations costs are marginalized as a result of the restructuring of industry. Third, commoditization is the driving factor in telecommunications. A connection is just a connection and differentiation is driven to the periphery of the network. Fourth, prices is cost based, and this means that such artifacts of Rawlsian economics as the

[24] See McGarty TPRC papers.

[25] See the works by Bork and Posner. We generally agree with Posner that economic analysis is the key to determining how to best apply the law in these cases. In fact, we argue that the Posner approach is most likely to be the basis for many of the briefs developed in subsequent litigation.

Baumol-Willig theorem have no place in a competitive environment, and the only maximization allowed is consumer welfare.

These four conclusions drive our analysis along antitrust grounds.

1. Telecommunications, especially at the local exchange level, has and still is a monopoly.

2. The 1996 Act took away any last vestige of antitrust protection from the ILECs, namely the RBOCs.

3. The main issue is interconnection and the secondary issue is unbundling.

4. Interconnection is dominated by tying arrangements which are directed at the elimination or thwarting of any competition as well as the competitors.

Thus, the conclusion is quite clear. Implementation of the 1996 Act will require aggressive prosecution of the antitrust laws. This prosecution will most likely be done by the new incumbents and not by the Government since such acts on the Governments side have become a conflict between all three branches of the Government.

The following Table presents a summary of the antitrust cases and their application to the telecommunications market.

Case	***Cite***	***Decision***	***Relationship***
United States v. Loew's, Inc.	466 U.S. at 13-14 citing 371 U.S. 38 (1962)	Court held that Loew's violated § 1 Sherman because of block booking despite having only 8% or market share but Court ruled that "requisite economic power is presumed when tying product is patented or copyrighted".	Any patent protection by the RBOC is putatively proof. The extension to this is the RBOCs ability via the standards setting body or even via the regulatory bodies to establish de factor "patent" rights by their presences in the market as the participant controlling the definition of interfaces.
United States v. Jerrold Electronics Corp.	466 U.S. at 23, aff'd per curiam, 365 U.S. 567 (1961)	Issue of two separate products. Court focused on three elements: 1. Firms other than Jerrold sold the products separately. 2. Jerrold priced the product separately. 3. Jerrold's packages were customized suggesting separate products.	The issue is the separability of such products as ILEC interconnection and airtime. Also airtime as merely the provision of connections and not bundled with other separable products.
United States v. Fortner Enterprises (Fortner I)	394 U.S. 495 (1969)	Reiterated Northern Pacific. Namely; ...a total monopoly is not essential, rather the key is whether some buyers can be forced to "accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product"	This is the case with ILEC and the airtime issue. The tying applies to the bundled CMRS opportunity as well as the bundling into the pricing algorithms used by the PUCs. The clear way to eliminate this ruling is to go to Bill and Keep.
United States Steel Corp. v. Fortner Enterprises (Fortner II)	429 U.S. 610 (1977)	US Steel credit company had insufficient market power. The Court concluded that a tying arrangement existence is insufficient unless the entire deal makes consumer worse off than they would be in a competitive market.	The issue is the consumer welfare and this is driven by clearing the market with the most efficient use of capital by the most efficient producer of the overall product. Clearly, in the case of interconnection, be it for local service or interconnect, the consumer is better off with a lower price, which has been shown via the IEC competition to be a direct result of competition.

Case	Cite	Decision	Relationship
United States Shoe Corp. v. United States	258 U.S. 451 (1922)	The Court ruled that "while the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor the practical effect of these drastic provisions is to prevent such use."	Clearly the specific enjoining of usage is not required only the effect thereto. The application herein relates to the specific use of tandem offices that may be a back door into increasing access fees.
Unger v. Dunkin' Donuts of America, Inc.	531 F.2d 211) 3d Cir. 1971)	Court held that the seller's power could be inferred from: 1. coercion. 2. resolute enforcement of a policy to "influence" buyers to take both products. 3. widespread purchase of both products by buyers.	Clearly there is a form of coercion as argued supra and there is significant influence. There is no widespread purchase of both other than is the small segment of competitors. We have demonstrated these elements in this paper.
Times Picayune Publishing Co. v. United States	345 U.S. 594 (1953)	Clayton was only to commodities. Government evoked § 1 of Sherman. However although in § 3 of Clayton either "monopolistic position" or restraint of significant volume of trade was required, in Sherman both were required.	The issue is whether the products are products or services. If ruled services still have protection but a sharper issue to prove. Clearly the issue here is services.
Siegal v. Chicken Delight, Inc.	448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972)	Court found against Chicken by stating that if it had been secret recipe than it would have been acceptable but that defendant could have provided specifications for materials and the Plaintiff could have achieved the same results. Court ruled that three elements must be shown: 1. the scheme in question has two distinct items and provides that one may not be obtained without the other. 2. the tying product posses sufficient economic power to appreciably restrain competition in the tied product area. 3. a "not insubstantial" amount of commerce is affected.	Two distinct have been proven supra, economic power id evident via the monopoly control, and commerce is telecommunications which is per se "not insubstantial".
Northern Pacific Railway Co. v. United States	356 U.S. 1 (1958)	Court condemned the freedom of choice for consumers. Court held could show monopolistic control by simply showing "sufficient economic power to impose an appreciable restraint on free competition of the tied product". Court held the per se rule by stating: "tying arrangements serve hardly any purpose beyond the suppression of competition..."	Argue that "per se" rule can be applied directly. This is applicable to all elements of these arguments.
Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.	549 F.2d 368 (5th Cir. 1977)	Court upheld Kentucky because there was no real coercion. Kentucky had approved other suppliers.	Not allowed to choose other suppliers thus a violation and Kentucky does not apply. This also applies since the monopolist controls the market.

Case	Cite	Decision	Relationship
Jefferson Parish Hospital District No. 2 v. Hyde	466 U.S. 2 (1984)	Set out five elements for successful tying: 1. must effect more than de minimis amount of interstate traffic. 2. tie is not express and coercion to buy the tyed product is evident. 3. two products must be separate. 4. defendant must have economic power. 5. no valid business reason for tying. Court in Jefferson ruled that Jefferson had only 30% of market power and thus did not force "customer" to buy product. Court stated, dicta, that: "to force a purchaser to do something that he would not do in a competitive market" was condemned.	Have proved all elements supra. Also this extends the per se rule to this violation. This case has been discussed extensively in the body of the paper.
International Sale Co. v. United States	332 U.S. 392 (1947)	Defendant may insist upon a tied sale when the quality of the tied product affects the operation of the tying product. Tying arrangement is not justified when the defendant can set quality standards for the tied product.	No issue of quality changes can be made in the issue of interconnection. Specifically, with the establishment of standards there is now a set of open and definable interfaces and performances and certifications that these interfaces must comply with. Thus any grounds from this case do not apply.
International Business Machines v. United States	298 U.S. 131 (1936)	When the tied sale is not accompanied by escape clause for the buyer who finds a better price then the tying arrangement can be used to price discriminate.	No escape clause allowed is one option to consider an antitrust case. We extend this to cover the inability to interconnect as a per se barrier to entry since it automatically precludes any competitor to enter the market in any efficient manner.
Henry v. A.B. Dick	224 U.S. 1 (1912)	Allowed defendant to force users of patented duplicating to use its paper.	This cases may have some benefit t o the ILEC but we believe that it is irrelevant since the defendant in this case had no monopoly position and it could be shown that there was some justification for the tying. Again, in the interconnection world there is a clear precedent for separation and the elimination of the tying arrangement.
Eastman Kodak Co. v. Image Technical Services, Inc.	112 S.Ct. 2072 (1992)	Court reaffirmed the view that products are separate when there is sufficient consumer demand to justify firms providing one without the other.	This extends the per se rule and reads onto the cases presented in this paper Moreover, the issue of bundling is at the heart of the current debate regarding interconnection. The ILEC is forcing companies to interconnect at the access tandem levels and will not allow them to select their own interconnect. They are bundling transport and switching and pricing it a factor of ten to twenty times their Long Run Average Costs. .

5.1 Tying Arrangements

The ability to offer a local exchange service in a competitive manner depends upon any new entrant being able to collect together five elements; user connection, switch interconnection, billing, customer care, and sales. How these are obtained are dependent upon each user. The user connection may be obtained via the unbundled connection capability purchase from the I-LEC, from the deployment of the purveyor's own fiber network, from air time purchased from a third party, or from a wide variety of means. Namely, as we have already argued, there is a multiplicity of means available for the purveyor and these means may be

owned and constructed by the purveyor or they may be provided as products from some other third party. The switch interconnection is the ability to have access to any and all other purveyors to assure universal interconnectivity. We shall focus on this latter element, interconnection, in a later section. In this section we focus on the unbundling of the elements, specifically airtime. This analysis applies to the unbundling of any of the elements as specified in Section 251.

We can now proceed with a detailed analysis of the product offered and how they may be purchased from other players, especially dominant market player, or the monopoly player in the market. At the hear of this analysis is the argument that there are clear and evident tying arrangement present. As we have argued, the following facts are self evident:

i. *Local Exchange services is the product being provide to the customer.*

ii. *Local Exchange Service can be provided by the agglomeration of such "operational components" or "products" as air time, I-LEC/CMRS interconnection (namely the interconnection between the CMRS switch and the I-LEC switch), I-LEC interconnection which is the direct interconnection to the I-LEC switch no matter what the source of the interconnection, billing, customer service, network management, sales, switching, local interconnection, and other elements as may be required.*

iii. *The competing player in this market may provide the product by delivering several of the "operational components" directly themselves and by obtaining some of the missing operational components from the monopoly Incumbent LEC.*

iv. *The 1996 Act mandates that the I-LEC unbundle amongst other requirements.*

v. *The 1996 Act removes the Antitrust protection from the I-LEC.*

vi. *The Incumbent LECs have monopoly control of the Local Exchange market.*

vii. *The Incumbent LEC has, through its holding company, directly or through interlocking agreements, overt control over the CMRS which is related to it.*

5.1.1 Tying Arrangements Defined

To quote from the Court in *Kodak*:[26]

"A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5-6 (1958). Such an arrangement violates 1 of the Sherman Act if the seller has "appreciable economic power"' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969)."

A tying arrangement exists only when a producer of a desired product sells it only t those who also buy a second product from it.[27] Consider the arrangement made by the CMRS. If a local exchange carrier who is not the I-LEC desires to enter the local exchange market by purchasing air time from the CMRS, then the CMRS may tie with the air time such services as network management, customer service, engineering services and other such services. In addition the CMRS generally ties together the interconnection between the switch of the CMRS and the switch of the I-LEC. The latter is a separable set of product offerings and the forced tying arrangement we argue is a per se violation. The Court has ruled in *Jefferson Parish Hospital v. Hyde* that when "forcing" occurs with a company that has "market power" that such is unlawful.

[26]See *Eastman Kodak Company v. Image Technical Services, Inc. et al.* (June 8, 1992).

[27]Areeda & Kaplow, p. 704.

The elements of an illegal tying arrangement have been articulated by the Court in *Jefferson Parish Hospital v. Hyde*. Specifically the elements for a successful claim are:[28]

i. the tie must affect more than a de minimis amount of interstate traffic;

ii. where the tying arrangement is not express, buyers must in fact have been coerced into buying the tied product as a condition of buying the tying product;

iii. the two products must be separate;

iv. the defendant must have economic power in the tying market;

v. there must not be any valid business justification for the tied sale.

We shall now go through each of these elements in turn for the case of the I-LEC and CMRS relationship.

5.1.2 Interstate Traffic

The issue of interstate traffic is a forgone conclusion in the case of telecommunications. The overall product that is to be sold is local exchange service combined with inter-exchange carrier service. Since the I-LEC is by definition a monopoly player in all markets in which it acts it has the market power and in view of the CMRS it is a duopoly player in an interstate market. The specificity of the interstate issue has been joined and resolved by the Congress and is stated in U.S.C. 47 Section 332.

5.1.3 Coercion

The contracts with the CMRS explicitly require the purchase of the tied elements. Namely, if one were to go to any existing CMRS provider the service offered is that of the air time plus the I-LEC interconnection. As we shall argue, these are clearly two separate products and in fact there should be no reason that the CMRS should in any way refuse to connect to the competitive the C-LEC. The refusal is a barrier to entry to the C-LEC. It is argued that that refusal is a *per se* violation.

5.1.4 Separate Products

In *Kodak* the Court ruled that products or services are separate when there is sufficient consumer demand to justify firms providing one item without the other.[29] Let us consider the products being offered. For the CMRS they are:

Air Time: This is the provision of access to the cell transport facility allocated on a block of trunk voice channels which can be readily allocatable by the switch software. This allocations is common practice in all MTSO or MSC trunk routing software. The air time is the provision of end to end trunk circuits.

Field Service: These are the costs allocated to the servicing of cells and the switch of the I-CMRS provider.

Network Management: This is the management associated with the provision of the CMRS services.

The CMRS will bundle the interconnection, as follows into this product.

I-LEC Interconnection: This is the connection from the CMRS switch trunk side to the I-LEC line side. There is no functional reason why this cannot be terminated on the C-LEC switch. The reason provided by the I-LEC is that it would allow for IEC access to the C-LEC and thus avoid the payment of access fees.

[28]Ross, p. 285.

[29]Ross, p. 289.

We bundle these three elements into an airtime fee for service. In addition to these the CMRS provides the following products. It should be noted that the CMRS also provides line item costing and pricing for these demonstrating that they exist and are separable.

Billing: This is the full bill service from tape collection at the switch, issuance of the bill, provisioning of the switch, and collections process.

Customer Service: This is the provision of all incoming customer service calls.

Sales: This is the sales, set, provisioning, collections and other functions.

Administration: This is the overhead management of the system in addition to the normal operations of the business. It may not generally have any relation to the delivery of any products provided.

Planning, R&D, Overhead: These are general overheads related to the service that may be related to new services and products that the CMRS may offer but would have no relation to general air time.

5.1.5 Economic Power of Incumbent

It is beyond a doubt that the incumbent has economic power. As a duopoly player aligned with the monopolist player this is without a doubt. The cartel formed by the A and B band cellular providers who are for the most part the I-LEC affiliates or agents is prima facie proof of this power.

5.1.6 Business Justifications

There are no viable business justifications for the bundling of such services. It can be argued that the 1996 Act recognized that unbundling and other similar requirements are a necessary step for the I-LECs to be allowed entry to the IEC market.

5.2 Pricing Arrangements

Prices charged can be used as a barrier to entry and a per se violation of the antitrust laws. The issue of separate products and the prices applied thereto is key to the understanding of the pricing mechanism in the antitrust sense.

5.2.1 The Products and The Prices

We have introduced the following set of distinct products that can be provided; Wireless Connection, I-LEC Interconnection, Billing, Customer Service, Sales, and Overhead. The costs are generally presented as fixed costs plus variable costs. We have shown elsewhere that the Wireless Connection, the I-LEC connection, billing, customer service and sales can all be obtained on a marginal basis and that there are thus de minimis fixed costs and thus de minimis scale. Therefore, we have in the case of the CMRS business an Average Total Cost equal to the Average Variable Cost, which is approximately equal to the Marginal Cost.[30]

Specifically, in the referenced papers by the author, values of these costs have been presented. In addition, the author has demonstrated, herein and elsewhere, that the AVC for the Wireless Connection, which we shall call air time although it includes some other variable costs, is less than 20% of the sum of all AVC elements. Sales is over 20% of the sum of all AVC, billing and customer service is about 20% and the remaining costs are overhead and access fees for interconnection.

The questions that we ask are two:

[30]McGarty, 1993-1994 papers on access. The author derives the detailed costing model for all of these elements.

i. Does the CMRS sell itself air time at a price that is below the AVC?

ii. Does the CMRS sell airtime at a price that is dramatically above AVC?

The counter to these questions are also asked concerning the cost of interconnection to the I-LEC regarding access fees. Specifically:

i. Does the I-LEC sell itself interconnection at a price that is below the AVC?

ii. Does the I-LEC sell interconnect at a price that is dramatically above AVC?

5.2.2 Price Discrimination

Price discrimination exists when a seller provides its product to two buyers in such a fashion that one sale has a different rate of return than the other. Namely, one buyer is discriminated against by being forced to sustain a higher rate of return to the seller than another. As has frequently been noted, in a purely competitive business wherein the good being market is a commodity there should be no price discrimination. Let us consider the issue of air time.

In the ideal world after the PCS licenses, there will be two 800 MHz cellular carriers, six PCS carriers, namely three at 30 MHz bandwidth and three at 10 MHz bandwidth, and an SMR carrier. This is a collection of at least nine providers of air time. We have also argued that air time is a separable product, that it is in essence a commodity, namely there is generally no discernible difference in the market other than price, and thus one would anticipate the evolving of a commodity market that is competitive for airtime.[31]

Let us consider a simple market case. Let us assume that there are two sellers of local exchange service and let us further assume that the service is composed of agglomerating the products of: airtime, interconnect, billing, customer service, and sales. This is a simple case of five products being blended together to deliver the overall product to the customer.

Let us further assume that there are costs related to these products for each provider. Namely:

- A_k = *Airtime for supplier k.*
- I_k = *interconnect for supplier k.*
- B_k = *billing for supplier k.*
- C_k = *customer care for supplier k.*
- S_k = *sales for supplier k.*

Then the supplier have an assumed rate of return of R_k. The price to the consumer, P_k is given by:

$$P_k = (A_k + I_k + B_k + C_k + S_k)(1 + R_k)$$

Thus is Supplier 2 is the most efficient supplier and is airtime is priced at commodity rates, then all things being equal the price of Supplier 2 should be lower than the price of supplier 1.

If however, Supplier 1 controls the airtime, and if Supplier one sells itself airtime at a rate that is equal to or above the AVC, but sells Supplier 2 airtime at a rate that is dramatically higher than it sells it to itself, then, although there is no per se violation, there is price discrimination. Namely, the Supplier 1, who perforce of market power due to its duopoly presence, is allowed for the interim to sell airtime at disproportionately higher rates, does so with the intent of controlling the market.

[31] It should be noted that NextWave, the dominant winner in the C Band PCS auctions proposes to be solely a purveyor of airtime on a wholesale basis.

It should also be made clear that Supplier 1 may, if it so chooses, to be a purveyor of air time only and thus reap adequate returns on its investment. It, however, wants to reap larger returns by selling the consumer the bundled product at higher prices even though a competitor Supplier 2 could deliver lower costs on all other elements, except airtime, since Supplier 2 does not have an FCC license.

We can define the situation better as follows. If P is the price, we define E as the excess costs. Then:

$$P_k = (A_k + E_k)(1 + R_k)$$

If Supplier 2 is much more efficient than Supplier 1 in providing all but the air time element, then:

$$E_2 << E_1$$

But the Supplier 1 charges airtime to itself at a dramatically lower rate than it charges Supplier 2. Specifically:

$$A_1 << A_2$$

Then clearly the consumer will be forced to pay the excess charge for airtime, which would accrue to Supplier 1 as excess oligopoly rents.

Recall that Section 2 of *Clayton*, namely the *Robinson Patman Act*, states:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them..."

Recall also that this regulates consistency of prices and not consumer welfare. In this above example, however, consistency of prices, through the aggregation effect, also maximizes consumer welfare. In fact it does not material disadvantage the supplier of airtime who may still reap an adequate return on their air time investment. It does, however, drive from the market the producers of "excess" product elements that can more efficiently be provided by alternative suppliers. It allows for the ultimate commoditization of airtime. We shall return to this later.

5.2.3 Predatory Pricing

Predatory pricing generally means that the competitor sells its product at artificially low prices. Generally it is illegal for a firm to sell below cost where the intent its to drive competitors out of the market or to ensure that competitors do not enter the market. Competition should drive prices to the margin and this is what one would expect in a market wherein true competition exists. In the local exchange market we are starting with a monopoly situation and we are seeking to allow new entrants.

We shall focus on two elements in this business from two competitor. The two competitors are the I-LEC and the CMRS. In all markets the CMRS is affiliated with the I-LEC and that affiliation has been allowed to be more closely affirmed under Section 601 of the 1996 Act. In effect, the author has argued elsewhere that the relationship can be viewed within the context of the law of Agency and it can be seen that the Incumbent's CMRS is acting as one and the same with the I-LEC. Thus they are indistinguishable in the market and have pari passu equal power.

From the I-LEC the product that we will concern ourselves with is the switch interconnection product. For the CMRS perspective, the product is airtime.

Predatory pricing has been analyzed by the use of the Areeda-Turner test. Specifically the test states:

i. *If the Price offered by the competitor to the market is greater than the Average Total Cost then there is no issue of predatory pricing.*

ii. *If the Price offered by the competitor to the market is greater than the Average Variable Costs then there is no predation.*

iii. *If the Price offered by the competitor to the market is less than the AVC then the price is predatory and it is unlawful.*

We now want to consider the two cases. However we must remember that the price of the bundled product, namely LEC service, is the sum of the prices of the separate products that are combined to offer that end product.

5.2.4 I-LEC and Access

As we shall demonstrate latter in this paper, the I-LEC sells itself interconnection. It also sells interconnection to other parties. First it sells interconnection to the inter-exchange carriers, "IEC"s. They pay a significantly higher price than all other entities.

Let us assume that the price that the I-LEC charges the customer is the sum of the price for the interconnection plus all other prices. Namely, the price to the customer is the sum of the two product prices:

$$P_C = P_I + P_O$$

where P_I is interconnection price and P_O is all other prices. Let us assume that C_I is the cost of interconnection and C_O is the cost of all other elements. We shall assume that these costs are the AVC costs. The question is, can the I-LEC charge the customer for the LEC service a price that reflects a predatory rate, whereby we define a predatory rate as one where:

$$P_I << C_I$$

How can this be achieved. Quite simply. If the I-LEC charges the IEC a Price for Interconnect as follows:

$$P_{I,IEC} >> C_I$$

Thus the I-LEC makes up for losses in the local exchange area to ensure a sustainable monopoly position, by charging much higher interconnection prices in the interexchange area. This is a cross-subsidy scheme that ensures that the interexchange market subsidizes the monopoly position of the local exchange market. We have argued elsewhere that the I-LEC charges should reflect the totality of the I-LEC and should not select subsidies, costs from other competitors or any other market pricing distortion. We shall return to this latter.[32] We argue, however, that interconnection is predatory and falls in the collection of Class 3 Areeda-Turner violations.

[32]See McGarty, "Access...", 1994. That paper demonstrates the LEC's access AVC and shows that there is Areeda-Turner problems.

5.2.5 CMRS and Airtime

The argument on predatory pricing for an I-LEC does not apply to the CMRS. We cannot argue that the bundled offering is priced at below costs. Unlike the I-LEC case where there is a "back-door" subsidy to allow below AVC and allegedly Marginal costs pricing, there is no similar argument here for the CMRS. Notwithstanding that observation, we do argue that the tying arrangements are themselves per se violations.

5.3 Corporate Against the ILEC

There are a plethora of antitrust complaint now lodged against the RBOCs. The following is a list

ACTIVE ANTITRUST COMPLAINTS

1. Covad vs. Verizon
2. Covad vs. BellSouth
3. Ntegrity vs. Verizon
4. Cavalier Telephone vs. Verizon
5. ATX (formerly, CoreComm) Counter Claim vs. SBC
6. Law Offices Curtis Trinko vs. Verizon (Class Action)
7. ATX (formerly, CoreComm) Counter Claim vs. Verizon

SETTLED COMPLAINTS

1. CalTech International vs. PacBell - Jury Trial finds for CalTech
2. Covad vs. SBC - Arbitration finds for Covad - Terms of $300 million in various financing
3. Intermedia vs. BellSouth - Undisclosed settlement
4. GlobalNaps vs. Verizon - Undisclosed settlement
5. Goldwasser vs. Ameritech - Consumer standing affirmed on appeal. Pleading deemed insufficient.
6. NOWCommunications vs. BellSouth - Undisclosed settlement

5.4 Trinko v Bell Atlantic, US Court of Appeals, 2nd Circuit, June 2002

Trinko is a law firm in New York. It tried to get some telecommunications service from a CLEC, in this case AT&T. The CLEC failed to deliver based upon Verizon's refusal to deal. The result was that the law firm sued Verizon on two grounds; violation of the 1996 Act and antitrust violations. The 2nd Circuit dismissed the 1996 Act action based on not having standing. It agreed to the antitrust action.

The 2nd Court starts its discussion on the antitrust claim as follows:

"Generally, a plaintiff can establish that a defendant violates section 2 of the Sherman Act by proving two elements "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Volvo N. Am. Corp., 857 F.2d at 73 (citations omitted); accord Top Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (2d Cir. 1998)."

The 2nd Court structures the claim as follows:

"Similarly, as a result of the alleged monopoly scheme, the plaintiff in this case had a similar set of choices: (1) stay with AT&T and receive inferior local service; or (2) switch to Bell Atlantic. While the second choice would hurt AT&T as a competitor, the first choice directly injures the plaintiff as a consumer. In this case, the plaintiff made the first choice and suffered the requisite antitrust injury."

The 2nd Court then stated:

"It is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act. In discussing the impact such suits would have on the

regulatory process, it is useful to discuss separately suits seeking damages and suits for injunctive relief. Awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act. In contrast, injunctive relief in this area may have ramifications that require particular judicial restraint."

However the 2nd Court ruled that the suit and claim survived based on antitrust grounds. This will open up a whole new avenue for litigation against the unbundling rules. It will also further delay broadband.

The litigation by the RBOCs against the FCC and all competitors is akin to slaveholders suing the Federal Government in 1866 for passage of the 13th Amendment eliminating slavery, under the "takings" clause of the Constitution. The RBOCs were and to a great degree are still the monopolists in all markets. They set prices, control who gets what segments, lobby the government to their advantage, and use the courts to protect their monopoly position. All of this is done in spite of the 1996 Act and the antitrust laws.

6. PRIVACY LITIGATION

6.1 The 1996 Act and Privacy

The 1996 Act had a clause, Section 222, which established a customer privacy initiative which the FCC was to implement. The Act specifically stated:

"SEC. 222. PRIVACY OF CUSTOMER INFORMATION.

***(a)** IN GENERAL- Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier...*

(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION-

(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS- Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of

(A) the telecommunications service from which such information is derived, or
(B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) DISCLOSURE ON REQUEST BY CUSTOMERS- A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(3) AGGREGATE CUSTOMER INFORMATION- A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefore.

(d) EXCEPTIONS- Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents:

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service."

The wording of the law is quite clear.

6.2 US West v FCC

The FCC in its wisdom prepared a Notice of Public Rulemaking that considered Section 222 of the above 1996 Act and prepared the Administrative Code which is part of 47 USC 222. In 1999 US West sued the FCC because the FCC interpreted the law literally. The basis of the suit was simply that US West claimed that the FCC breached US West's First and Fifth Amendment rights, free speech and takings. The basis of the US West claim was that US West collected telephone numbers and data on everyone's call. US West wanted to sell this to anyone as a revenue generator. Thus they wanted to sell anyone's calling record to anyone who paid. The issue of whose property it really was had never been raised. All litigants seem to believe ab initio that the calling numbers were US West property.

The Court stated that the FCC was wrong, that Congress was wrong, and that US West had the right to sell to anyone any information regarding any telephone call made by anyone, privacy notwithstanding.

The 10th Circuit vacated the FCC Privacy order. Their basis was to first amendment violation. The 10th Circuit first states that the CPNI, customer phone number information, regulations restrict speech. They first address restricted speech. Specifically they state:

*"Do the CPNI regulations restrict speech? As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech. The government argues that the FCC's CPNI regulations do not violate or even infringe upon petitioner's First Amendment rights because they only prohibit it from using CPNI to target customers and do not prevent petitioner from communicating with its customers or limit anything that it might say to them. This view is fundamentally flawed. Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech. Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (noting that the First Amendment protects the communication, whether the speech restriction applies to its source or impinges upon the audience's reciprocal right to receive the communication); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (noting the First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it"). In other words, a restriction on speech tailored to a particular audience, "targeted speech," cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, "broadcast speech." Perhaps the Supreme Court case of Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), best illustrates this. ...**Therefore, the existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech**."*

Then the 10th Circuit states:

"Privacy considerations of some sort clearly drove the enactment of § 222...The concept of privacy, though, is multi-faceted. Indeed, one can apply the moniker of a privacy interest to several understandings of privacy, such as the right to have sufficient moral freedom to exercise full individual autonomy, the right of an individual to define who he or she is by controlling access to information about him or herself, and the right of an individual to solitude, secrecy, and anonymity... The breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest....When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest. "[T]he Central Hudson standard does

not permit us to supplant the precise interests put forward by the State with other suppositions." Edenfield v. Fane, 507 U.S. 761, 768 (1993)."

The 10th Circuit then goes on to describe boundaries on privacy:

"The government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI. In Edenfield, the Supreme Court struck down a Florida ban on CPA in-person solicitation because the state had presented no evidence anecdotal or empirical that such solicitation created the dangers of "fraud, overreaching, or compromised independence" that the state sought to combat. See 507 U.S. at 771; cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 626-27 (1995)... The FCC faces the same problem here. While protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. Indeed, we do not even have indication that the disclosure might actually occur. The government presents no evidence regarding how and to whom carriers would disclose CPNI."

They 10th Circuit states that they have no idea as to the fact that disclosure may occur. De facto, release of such CPNI information is disclosure per se! Using the rules laid down in Central Hudson, 447 U.S. at 564-65, the 10th Circuit asks:

a. Does the government have a substantial state interest in regulating speech involving CPNI?
b. Does the Regulation Directly and Materially Advance the State's Interests?
c. Are the CPNI regulations narrowly tailored?

Without addressing the 10th Circuits answers, one must look first at Hudson. Hudson relates to a Gas and Electric company trying to advertise to promote usage during the 1970s energy shortage. The Public Service Commission, PSC, attempted to stop them and the Court ruled they had the right of free speech. There are substantial difference here.

First: There is a property interest in the CPNI. At no point does anyone truly argue who owns these sets of information. It can be argued that the CPNI are not the property of US West but of the customer. There is a wealth of copyright law on this subject. When did title transfer and under what agreement did this become effected. As we show latter, in a Posnerian analysis, see Richard Posner latter, there is a property or economic right. The right is that of the creator, namely the customer. The 1996 Act reaffirms that right, the FCC presented Administrative law requiring release of that right by affirmation by the consumer, and the 10th Circuit rejects it.

Second: Arguendo, if it is speech, whose speech is it? It clearly was an utterance, albeit electronic, of the consumer. The consumer has an expectation of privacy. The Court has in multiple decisions articulate the concept of expectation of privacy. We summarize these cases herein. Given that established expectation, that alone is basis for protection established by the 1996 Act.

Thus the 10th Circuit establishes a precedent of RBOC generated elimination of privacy and property rights that have been developed over the past 100 years. This is an ominous precedent if it is let to stand.

6.3 Wiretapping and Privacy Decisions in a Telecommunications World

The following is a summary of some of the key Court decisions on privacy in a telecommunications world. What is clear is that they demonstrate that there is a clear expectation of privacy in many situations. Thus the 10th Circuits decision is of concern.

Olmstead v U.S., 277 U.S. 438, 1928: Justice Taft delivered the decision. Olmstead was a leading conspirator in a bootlegging ring. He moved liquor from Canada to the US. The police put taps on the telephone lines of all the conspirators. The taps were placed outside of the homes and were done without warrants. The information gathered from the taps were used to convict. The Court stated: "The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice

Bradley said [277 U.S. 459] *"Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated. But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and, to this extent, the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.""* Olmstead v. United States, 32 one of the two premises underlying the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises; where there had been an invasion, a technical trespass, electronic surveillance was deemed subject to Fourth Amendment restrictions.

Berger v New York 388 U.S. 41, 1967: Justice Clark delivered the Opinion. Berger was convicted in bribery of a government official. A bar owner had complained that officials from NY State Liquor Board had entered his bar and without cause seized his books. The bar owner said it was in reprisal for failing to pay bribe. On this basis an wire tap was authorized by NY court for 60 days on the office of official. Based on wiretap evidence the warrant was extended. Evidence was obtained on two other bars being shaken down. Defendant stated that this information was not legally obtained since the warrant was for evidence on the first case. Court ruled that this was un-constitutional. The warrant was too broad in scope.

Katz v U.S., 389 U.S. 347, 1967: Justice Stewart delivered the Opinion. The defendant was convicted for a violation of the wagering acts. The FBI recorded his calls without a warrant by attaching a recording device on the outside of a telephone booth. The defendant tried to pose the following two questions: *"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth. [389 U.S. 350] B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."* The Court rejected this posing. The Court stated: *"The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.... To read the Constitution more narrowly is to ignore the vital role that* the *public telephone has come to play in private communication."* Further; *"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected*." Finally the Court states: "*Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment,"{ 24} a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case*.." The Fourth Amendment protects people, not places.

6.4 Privacy Legal Theory

Privacy legal theory is quite complex.[33] We discuss two extreme cases here and then address the issue in some detail regarding the telephony world. The first is that of Brandeis and relates to the "right to be let alone". We have argued elsewhere that this becomes a right to anonymity, a right to be unknown. The problem is that post 9-11 this right has been obscured by the demands to ferret out foreign nationals and subversives. One must be careful to balance these with Constitutional rights.

The second is the brief description of Richard Posner, a Federal Appeals Judge and Professor at University of Chicago. His view is that all the world is some form of economic transaction, property and transactions. Each transaction has value and all law is balancing of these transactions.

6.4.1 Brandeis

Louis Brandeis was to become one of the most important and influential Supreme Court justices. He was a Harvard Law School Graduate, he practiced law in Boston, and was one of the most insightful crafters of Supreme Court Decisions. He wrote a seminal paper on privacy in response to the Boston press' invasion of the privacy of a daughters wedding.

In his paper, with Warren his law partner, he begins by saying:[34]

"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. *Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life--the right to be let alone, the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession-- intangible, as well as tangible."*

Brandeis then goes on to describe the specific "privacy" rights and the sources of those rights:

"In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. ... The right is lost only when the author himself communicates his production to the public--in other words, publishes it. It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.... The statutory right is of no value, unless *there is a publication; the common-law right is lost* as soon as *there is a publication... What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; ...A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the*

[33] See McGarty, Privacy in the Internet Environment, MIT Working Paper, December 2002.

[34] See Zimmerman, Diane, Requiem for a Heavyweight, A Farewell to Warren and Brandeis's Privacy Tort, p. 295, of Garvey and Schauer, The First Amendment, A Reader, West Publishing, St Paul, 1992. Ms. Zimmerman attempts to refute the claims for Brandeis's theories which had survived for so long. In addition, as is well known, Roe v. Wade is based significantly upon the privacy considerations in the Constitution as is Griswold and many others. Recent Department of Justice actions are a direct threat to such an open Brandeisian "right of privacy" theory.

restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. …The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them. Yet in the famous case of Prince Albert v. Strange *the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "'the publishing … though not by copy or resemblance, …".*

Brandeis then goes on to describe the following precedents:

" Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825), where the plaintiff…sought to restrain the publication in the* Lancet *of unpublished lectures which he had delivered … Lord Eldon doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence…*

… Prince Albert v. Strange*, 1 McN. & G. 25 (1849), Lord Cottenham…recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.*

… Tuck v. Priester*, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale … the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.*

… Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence… Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libelous or otherwise illegal, there is no restriction on the photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property, in order to bring it within the line of those cases which were relied upon as precedents."*

Brandeis concludes with the following:

"First. The right to privacy does not prohibit any publication of matter which is of public or general interest.…

Second. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.…

Third. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.…

Fourth. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

Fifth. The truth of the matter published does not afford a defense.…

Sixth. The absence of "malice" in the publisher does not afford a defense….

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely:

An action of tort for damages in all cases. Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

An injunction, in perhaps a very limited class of cases."

Brandeis thus initially established the tort type protection that has been discussed herein. Specifically, the discussion by Prosser and the Restatement of Torts discussed by Prosser may be for shadowed by the recommendation by Brandeis.

However, Brandeis deflects inwardly, on the individual and a right to be let alone. It is the reclusive version of privacy. However, it is a version which has developed a body of law over the past one hundred plus years. It is the basis of the torts that allows one to be let alone.

6.4.2 Posner

In contrast to Brandeis is the view of Richard Posner. Richard Posner, a prolific Federal Court Judge and faculty member at the University of Chicago, approaches privacy in a purely economic fashion. As he states:

"… the interest I am calling "the face we present to the world". Economics, with a bit of simple game theory… and some help from philosophy, can help us thread this maze, uncover the laws unity, think concretely, about problems often obscured by the "sonorous" talk of "privacy", and incidentally provide a bridge…"[35]

Posner is clearly a jurist who views almost all legal issues in an economic context. All interactions or actions are transactions, the decision to make and compete an action based on some economic measure or value. For example, I decide to rob a bank because in my mind I make money from doing so and the weighted probability of getting caught and the cost to me of doing so is significantly less than what I will get robbing the bank. It is not clear that all thieves think in terms of von Neuman game theorists, in fact I can think of very few people who can or even less who do.

To Posner, there is first and almost only and economic rule a play, a rule in many ways dependent on privacy as a property and with an economic or transactional value applied.

To better understand property and privacy one must consider why Richard Pipes, of Harvard, in his treatise on Property, makes the following statement regarding privacy:

"The whole concept of privacy derives from the knowledge that we can withdraw, partly or wholly, into our own space; the ability to isolate oneself is an important aspect of property rights. Where property does not exist, privacy is not respected…which helps explain why the Russian language-the language of a people who through most of their history have no private property in the means of production-has no word for privacy…"

Pipes is a Soviet and Russian scholar, a Pole, who had escaped the Soviet domination of Poland and Central Europe. He clearly understands the issues of privacy as derivative from but as superior to property. Pipes is one who has seen the flow of German Nazi troops and the counter flow of Russian Soviet forces back and forth across Poland. He understands the essential belief in the sanctity of the individual and in his work clearly and unambiguously states this.

[35] Posner, Overcoming Law, p. 531.

Posner considers privacy as an element of an economic exchange. Part of that assumption is that privacy has value comparable to property. Pipes takes that even further and states a duality between property and privacy, in fact Pipes can be said to state that privacy is the natural extension to property.

Posner starts his discussion on Privacy in his book, *The Economics of Justice* ("EOJ"), as follows;

"Provisionally, privacy means the withholding or concealment of information, particularly personal information..."

Posner then states:

"It is no answer that people have the "right to be let alone" for few people want to be let alone"

Clearly that statement is at best self serving, since aloneness is not necessarily the same in all cases. I may want as a social animal to interact with people but at the same time I may want to retain the privacy or secrecy of my hobbies or collections.

Posner states regarding privacy as concealment. He argues that people frequently go around selling themselves but conceal items that may not allow them to be presented in the best light. Posner then goes on to say that in buying things, we should have the right to know anything material to the sale about the person selling the product. Thus for example, one may assume Posner demands that the seller of a Pizza if he has AIDS should reveal that to all buyers, or at least the buyer should have the right to ask and the seller the duty to respond truthfully. This is generally not the case.

He talks generally about the concepts of privacy as; (i) secrecy, (ii) seclusion, and (iii) autonomy. Specifically these are defined as:

Secrecy: Secrecy is a form of concealment. Posner states that he feels that what people do today is seek to keep personal information secret for personal gain.[36] In a sense the desire for secrecy is to control others perceptions of one's self.[37] This means to create an alternative persona. This concept of privacy in the Posnerian world is one we shall see again in the Internet world. The ability to create a persona, to mold by withholding and to mold by mis-stating, a new and unique personality. The Internet personas are based on controlling information, but positively and negatively.

Seclusion: In a sense this is a withdrawal from the cares of public life. Posner refers to gregarious seclusion, specifically when someone wants to be let alone to do something of more import, not a desire to separate themselves from society.[38]

Autonomy: Posner defines this as the "being allowed to do what one wants without interference". He further states that it is inappropriate to define privacy as the same thing.

The three types or characterizations of privacy from Posner seem very compelling. As he states in EOJ, the interpretation of Brandeis and the subsequent attempts by the Supreme Court to establish a right of privacy where none exists is to limit privacy to secrecy and seclusion and it should be expanded to be free from governmental interference.[39] This expansive interpretation would seem to be within the Brandeis format but Brandeis in writing his paper was responding to an invasive attack by the press, not government. Would

[36] Posner, EOJ, p. 271.

[37] Posner, EOJ, p. 233.

[38] See Posner, EOJ, p 269. He has extensive discussion on these concepts.

[39] Posner, EOJ, p. 315.

Brandeis have responded in a similar fashion in today's world. Thus, in a Posnerian world, the autonomy construct is the broadest and most far reaching.

7. MUNICIPALITIES AND THE ILECS

The next area of legal warfare will most likely be that of municipal networks. It has been shown elsewhere that the RBOCs are in sever financial shape and thus will not be able to provide financing for local broadband. Their approach is delay and elimination of competitors to ensure that if and when they are ready there will be only one player, and that player is them.

USTA, the US Telephone association is an association of the monopoly telephone companies and their surrogates. They had attempted in the 107th Congress to pass the "***The Government Entity Owned Telecommunications Reform Act of 2001***". The USTA Bill requires:

USTA is supporting federal legislation with the following components:

1. Where private industry provides or has a willingness to provide telecommunications service at a reasonable price, government ownership and operations should be prohibited.

2. Government controlled telecommunications operations should not have access to any subsidies, in the form of tax exemptions (including income, property, gross receipts and exc ise taxes), tax exempt bond financing, or other subsidies, that are not available to privately owned enterprises. In other words, an evening of the playing field should occur.

3. Government controlled competitive telecommunications operations should be subject to the same regulation as privately owned firms engaged in providing the same service(s).

4. Government shall impute to its cost of providing service the cost of taxes and fees consistent with the obligations of private (e.g. non-government) telecommunications carriers.

5. Government shall not use its sovereign powers, such as control of rights of ways or powers of condemnation, to provide an advantage to government controlled competitive telecommunications operations over privately owned concerns. Nor should it delegate its sovereign powers to a competitive privately owned telecom services provider.

6. Government controlled competitive telecommunications operations should not be regulated by the same governmental entity as they are controlled.

7. State statutes that prohibit government controlled competitive telecommunications operations should be upheld.

8. Government inefficiencies should not be masked by taxpayer subsidies.

This is a blatant attempt by the monopolists to prevent municipalities from entering the role of providing broadband services to their communities. Broadband, it has been argued, is a natural public utility which should be open to all service providers and open to all end users. The only natural way to implement this is either a separation of the local plant from the incumbents or the establishment of non-corporate owned plant like a local road. The local roads are naturally municipal investments.

8. CONCLUSIONS

This paper has argued that effective competition in the local exchange market can only be achieved by the timely unbundling of the I-LEC as well as the existing CMRS as well as of the new CMRS. In addition the unbundling should be done at fair and equitable prices. Furthermore we have argued that zero cost access was also an essential element in this overall process. We have developed these arguments based upon three

elements; fundamental changes in the technological and operational environment, the application of the new Telecommunications Act, and the direct application of the existing antitrust laws.

In many ways this is no longer an FCC or State PSC issue but has been risen to the civil and possibly criminal level of Clayton and Sherman respectively. The latter issue is one of blatant sustained anti-competitive behavior in the local exchange market. Recent evidence brought before the FCC and the State Commissions clearly indicate that there is more than just grounds for investigation.

This paper argues further, that the regulatory and administrative law process is rant with delays and inefficiencies. Further, we argue that although the antitrust laws are vehicles for appropriate remedies we should not expect the Federal Government to act on these issues. Thus, it is argued that the civil application of these laws may be the most used and most efficient vehicle for the true development of a truly competitive local, exchange market. Many authors have argued against the antitrust laws but these arguments have been based on much less market power and control that is evident in this case.[40]

The essence of antitrust law is promote competition and not competitors. To do so in telecommunications one must recognize several significant principles. First, the loss of scale. Namely as we have argued, technology is driving scale out of telecommunications. All costs are marginal costs and all average costs approach margin in a precipitous fashion. Second, disaggregation allow for marginal pricing in all elements of the business. Capital plant has been marginalized as a result of technology and operations costs are marginalized as a result of the restructuring of industry. Third, commoditization is the driving factor in telecommunications. A connection is just a connection and differentiation is driven to the periphery of the network. Fourth, prices is cost based, and this means that such artifacts of Rawlsian economics as the Baumol-Willig theorem have no place in a competitive environment, and the only maximization allowed is consumer welfare.

These conclusions drive our analysis along antitrust grounds. Telecommunications, especially at the local exchange level has and still is a monopoly. The 1996 Act took away any last vestige of antitrust protection from the I-LECs, namely the RBOCs. The main issue is interconnection and the secondary issue is unbundling. Interconnection is dominated by tying arrangements which are directed at the elimination or thwarting of any competition as well as the competitors. Thus, the conclusion is quite clear. Implementation of the 1996 Act will require aggressive prosecution of the antitrust laws. This prosecution will most likely be done by the consumers, not the new incumbents and not by the Government since such acts on the Governments side have become a conflict between all three branches of the Government.

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[40] See the works by Bork and Posner. We generally agree with Posner that economic analysis is the key to determining how to best apply the law in these cases. In fact, we argue that the Posner approach is most likely to be the basis for many of the briefs developed in subsequent litigation.

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