The Unfinished Business of Breaking Up "Ma Bell:" Implementing Local Telephone Competition in the Twenty-first Century

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The Unfinished Business of Breaking up "Ma Bell:" Implementing Local Telephone Competition in the Twenty-First Century

by Michael T. Osborne[*]


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I. INTRODUCTION

{1} Responding to the statutory deadline in the Telecommunications Act of 1996, the Federal Communications Commission (FCC) released its first Local Competition Order (LCO), In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (FCC 96-325), on August 8, 1996. (1) Designed to implement local competition nationwide, this Order in nearly 1500 pages promulgated detailed provisions regarding the relationship between the Regional Bell Operating Companies ("RBOCs") (traditional monopoly providers of local telephone service) and new entrants in local telecommunications.

{2} This article focuses on several key provisions in the first LCO implementing §§ 251, 252, 271, and 272 of the Telecommunications Act and how these provisions affect local telecommunications competition as the twenty-first century begins. First, this article examines each of these critical statutory provisions in detail and how the FCC implemented them in the first LCO. Then this article looks at the legal challenges made to these regulations by both RBOCs and new entrants and the FCC's response in its revised LCO.

II. BACKGROUND

{3} Congress passed the Telecommunications Act of 1996 ("the Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), to promote competition for local telecommunications services and deregulate the provision of local telecommunications services nationwide. (2) The Act eliminated the monopoly position in local telephone service held by all seven RBOCs since the breakup of "Ma Bell" in 1984. (3) In the Act, Congress required that the FCC adopt all regulations necessary to implement local telecommunications competition nationwide within six months of enactment. (4) The first LCO, (5) adopted by the FCC in August 1996, created significant controversy over the regulatory standards applicable to interconnection and unbundled network elements (UNEs). (6) This controversy led to the filing of several lawsuits challenging first, the FCC's authority to issue the first LCO, and second, the FCC's authority to compel unbundling of specific RBOC network elements in that Order. The United States Court of Appeals for the Eighth Circuit consolidated these cases on appeal and vacated the challenged FCC rules. (7) Responding to the Eighth Circuit's ruling that the FCC lacked jurisdiction to issue the first LCO, the Supreme Court reversed its ruling in part and upheld the FCC's administrative jurisdiction. (8) However, the Supreme Court agreed with the Eighth Circuit that the FCC had failed to support its definition of UNEs with adequate regulatory justification in the first LCO. (9) The Supreme Court remanded the first LCO back to the FCC for reconsideration of the regulatory standards applicable to UNEs. With the adoption of the revised LCO on September 15, 1999, the FCC both responded to the Supreme Court's "UNE Remand" in Iowa Utilities and, more importantly, gave further impetus to achieving meaningful local telecommunications competition. (10)

III. WRITING THE NEW TELECOMMUNICATIONS BIBLE: THE TELECOMMUNICATIONS ACT OF 1996

{4} Congress intended that regulatory implementation of the Act achieve the full benefits of meaningful local telecommunications competition within a very short period by "get[ting] everybody into everybody else's business." (11) Under the Act, RBOCs first enter local telecommunications markets outside their former
monopoly region and, later, enter the national long distance market. Existing long distance providers can enter local telephone service markets as well. In the final Senate debate on the Act, Senator Harkin argued that "[t]he essential purpose of this measure is to foster competition by removing barriers between distinct telecommunications industries and allow[ing] everyone to compete." (12) Senator Dole believed that, by allowing new entrants into local telecommunications markets, the Act would complete the unfinished business of telecommunications deregulation begun in 1984 with the breakup of AT&T. (13) Supporters of the Act emphasized the "level playing field [created by the Act] where every player will be able to compete on the basis of price, quality, and service, rather than on the basis of monopoly control of the market." (14) The Senate clearly intended that the FCC would decide quickly what were the "rules of the road" in local telecommunications competition. (15) The House Report on the Act contained findings necessary to justify nationwide local telecommunications competition, including the reasonable conclusion that the RBOCs' monopoly position in local telephone service was a "bottleneck" posing significant harm to consumers. (16) To the Telecommunications Act's supporters, the FCC's most important role after enactment was in facilitating a swift transition from the "bad old days" of monopoly provision of local telephone service to a new era of fully competitive and deregulated local telecommunications markets.

The interest invoked most frequently in congressional debates on the Telecommunications Act was, quite correctly, the public interest in obtaining better telecommunications services at lower cost. (17) In signing the Act, President Clinton also focused on the importance of protecting the public interest in receiving competitive local telephone service. (18) Several senators expressed concern that the Act promoted the private interests of telecommunications companies at the expense of the public interest. (19) The emphasis on swift delivery of competition and deregulation created legitimate concerns about accountability expressed by the Act's congressional opponents.

The short time-frame provided in the [Act] … could provide the incumbent Bell company with the ability to use its stranglehold monopoly on local service to leverage its new long-distance service to the detriment of consumers. Regulators will have to be vigilant to this potential consequence. (20)

One of the greatest concerns expressed by the Act's opponents was its compulsory regulatory timetable for implementing local telecommunications competition. For example, Section 251(d)(1) of the Act required that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1) (1996).] [Under section 271, the FCC is only given ninety days to decide whether an RBOC could participate in local and long distance markets based on a further regulatory determination that the RBOC faced meaningful local telecommunications competition. 47 U.S.C. § 271(D)(3) (1996). The Act's congressional opponents feared that the continuing trend of corporate combinations in telecommunications, along with the regulatory protections repealed by the Act, might ultimately hurt consumers. (21)

IV. THE FCC'S FIRST LOCAL COMPETITION ORDER ("LCO"): THE ROAD TO DAMASCUS?

A. Section 251

Section 251 of the Act, 47 U.S.C. § 251(a)(1) (1996), imposes a general duty on all telecommunications carriers "to interconnect directly … with the facilities and equipment of other telecommunications carriers." Section 251(a), 47 U.S.C. § 251(a) (1996), requires compliance with the Act by local exchange carriers ("LECs"), incumbent local exchange carriers ("ILECs"), and RBOCs. Congress ordered the FCC to establish cost standards for those unbundled network elements (UNEs) that it later ordered the RBOCs to provide new entrants in telecommunications. (22) As defined by the Act in § 251, interconnection requires that the RBOCs provide access to any requesting carrier at any technically feasible point in the RBOC's network. Found in 47
U.S.C. § 251(c)(2) (1996), this interconnection requirement applies to RBOCs and ILECs but not to LECs because of LECs perceived weaker market influence than that held by RBOCs and ILECs. Section 251 also requires that RBOCs offer unbundled access to their network elements at any technically feasible point where any new entrant requests access. (23) To prevent RBOCs from discriminating in favor of themselves or an affiliated telecommunications company, the conference report on the Act clarified the definition of technically feasible. The report stated that "[a]t a minimum, [Congress] intends that any technically feasible point would be any point at which the [RBOC] provides access to any other party, including itself or any affiliated entry." (24) Section 251 also mandates that unbundled access to RBOC network elements occurs in a way "that allows requesting carriers [or new entrants in telecommunications] to combine such [unbundled network] elements in order to provide telecommunications service." (25)

Congress also listed in § 251 the FCC's duties in achieving meaningful local telecommunications competition. Section 251(d) provided the FCC with a standard for defining those UNEs that must be made available by the RBOCs to new entrants in local telecommunications. Congress required that the FCC consider, at a minimum, whether competitive access to a network element was "necessary" or whether denying competitive access to a network element would "impair" meaningful local telecommunications competition. The "necessary" standard applies to proprietary elements of RBOC networks, while the "impair" standard applies to both proprietary and non-proprietary network elements. (26) Under this standard, if the FCC decides that access to RBOC UNEs is necessary, the agency can order an RBOC to provide access to any new entrant. (27) Further, if the FCC decides that an RBOC denial of access impairs meaningful local telecommunications competition, it can overrule the denial and order an RBOC to provide any new entrant access to UNE's. (28) Section 251(d) quickly became known as the "necessary and impair" standard in the Act.

B. Section 252

Section 252 details the process by which new entrants in telecommunications request interconnection to RBOC networks in order to offer competitive local telephone service. Typically, a new entrant for local telephone service gains access to RBOC UNEs under a comprehensive contract or interconnection agreement where, for a fee, the RBOC allows the new entrant access to its network at technically feasible points of access. The two companies negotiate both pricing and terms of access in their interconnection agreement. Without access to RBOC UNEs via an interconnection agreement, new entrants in local telecommunications face the formidable task of either duplicating the RBOC's existing network (at a prohibitively expensive cost) or seeking other, more costly ways to offer competitive local telephone service.

Congress placed the initial burden for negotiating interconnection agreements on the private parties, reminding both RBOCs and new entrants in local telecommunications that all interconnection agreements must comply with the Act's pro-competitive vision. (29) If the private parties are unable to reach an interconnection agreement, either may petition the appropriate state public utility commission to settle the dispute by arbitration since these state agencies are charged with regulating telecommunications carriers. (30) Unlike § 251, which vests sole regulatory authority in the FCC, § 252 allows state public utility commissions to control the rates that RBOCs charge new entrants in local telecommunications for UNE access. Finally, § 252 requires state public utility commission approval for "[a]ny interconnection agreement adopted by negotiation or arbitration." (31) The process outlined in § 252 makes interconnection agreements a fundamental building block in achieving meaningful local telecommunications competition. Section 252 preserves a role for state public utility commissions in regulating telecommunications while at the same time reflecting the new federal regulatory push for meaningful local telecommunications competition.

C. Section 271
In its conference report on the Act, Congress linked the duty to negotiate and implement interconnection agreements addressed in §§ 251 and 252 with the application process that allows RBOCs to enter new telecommunications markets in § 271. (32) Section 271 details how RBOCs enter markets outside their former monopoly region to offer local telephone service and how to offer long distance service within their former monopoly region. (33) Before an RBOC offers either new service under § 271, the FCC must certify that the RBOC faces meaningful local telecommunications competition in its former monopoly region. (34) Congress specifically required that the FCC complete this § 271 certification within ninety days of receiving an RBOC's § 271 application to offer new services. (35) Once it receives FCC certification under § 271, an RBOC may compete for local and long distance service nationwide. Congress commented extensively on the pro-competitive goals of § 271 in its conference report on the Act.

New section 271(c) sets out the requirements for an [RBOC] provision of interLATA services originating in an in-region State … In addition to complying with the specific interconnection requirements under new section 271(c)(2), an [RBOC] must satisfy the in-region test by virtue of the presence of a facilities-based competitor or competitors under new section 271(c)(1)(A). (36)

The Act offered two paths for RBOC entry into long distance (or interLATA) service in § 271(c)(1). (37) Section 271(c)(1)(A) allows RBOC entry into long distance service once a facilities-based competitor for local telephone service exists in the RBOC's own region. The Act also mandates that the facilities-based competitor sign a binding interconnection agreement with the RBOC to provide competing local telephone service in the RBOC's own region. (38) Known as the "pick and choose" rule, § 271(c)(1)(A) allows competitors to choose whether they will offer competing local telephone service exclusively over their own networks or via UNE access provided by the RBOC. (39) An RBOC needs FCC certification under § 271 that meaningful local telecommunications competition exists in its own region before an RBOC can participate in newly competitive local or long distance telephone markets. In order to certify that meaningful local competition exists in a given RBOC region, the FCC applies a twelve-step "competitive checklist" found in § 271(2)(B) to each RBOC § 271 application. The FCC grants regulatory permission to compete if an RBOC's § 271 application satisfies the competitive checklist in that section of the Act.

While the most important path to competition is found in § 271(c)(1)(A), the Act allowed a second path for RBOC entry into newly competitive long distance telephone service through § 271(c)(1)(B). Section 271(c)(1)(B) provided that, if no competitor enters an RBOC's region in order to provide competitive local telephone service within ninety days of enactment, the RBOC may offer long distance telephone service without filing a detailed § 271 application with the FCC. Because of the pace of competition, this sub-section has not been used by an RBOC to offer long distance telephone service.

D. Section 272

Congress aimed at protecting new entrants in local telecommunications from the harm that it perceived in allowing RBOCs to use their existing monopoly power as leverage in newly competitive telecommunications markets when it passed § 272. Congress required in § 272(a)(1), 47 U.S.C. § 272(a)(1) (1996), that the RBOCs establish a separate affiliate to provide competitive local or long distance service once the RBOCs received FCC permission to compete under § 271. For example, if Verizon (formerly Bell Atlantic) wants to offer long distance service in Virginia (an in-region state), Verizon is required by § 272 to set up a separate company in order to offer this service. However, if Verizon wants to provide long distance service in Wisconsin (an out-of-region state), it does not need to establish a separate company in order to offer this service (assuming that Verizon had received FCC authorization under § 271). Although at odds with congressional rhetoric about breaking down barriers in the Act, § 272 in fact enables new entrants in local telecommunications to compete on a level playing field with RBOCs. Section 272 effectively prevents RBOCs from attempting to short-circuit meaningful local telecommunications competition by using their
existing monopoly power as leverage against new entrants in local telecommunications.

V. BUILDING THE NEW JERUSALEM IN TELECOMMUNICATIONS: THE FIRST LCO & THE TELECOMMUNICATIONS ACT

{15}Faced with four new pillars of local telecommunications competition in §§ 251, 252, 271, and 272 of the Act, the FCC promulgated its first Local Competition Order ("LCO") in August 1996 to support these pillars with sufficient regulatory firmament so that they would stand the test of time in telecommunications law. The first LCO labeled § 251 the most important part of a pro-competitive trilogy that the Act directed the FCC to implement. (40) The FCC acknowledged the direct link between §§ 251 and 271 in its executive summary of the first LCO:

> Competition in local exchange and exchange access markets is desirable … because competition eventually will eliminate the ability of an [RBOC] to use its control of bottleneck local facilities to impede free market competition. Under section 251, [RBOCs] are mandated to take several steps to open their networks to competition … Under section 271, once the [RBOCs] have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service … (41)

This language is virtually identical to that found in the Act. (42) Like Congress, the FCC also recognized the importance of protecting the public interest in achieving meaningful local telecommunications competition. The clearest way to promote this kind of competition, according to the FCC, was by adopting flexible regulations that allow multiple means of entry into local telecommunications markets via § 251. (43) Consistent with congressional intent in the Act, the FCC stated that the rules governing interconnection and UNE access in § 251 were "minimum requirements upon which the states may build." (44)

{16}In the first LCO, the FCC outlined a minimum set of five technically feasible points of network access at which an RBOC must provide interconnection to any requesting carrier under § 251. (45) A point of interconnection is the point in an RBOC's network at which a new entrant in local telecommunications connects its own network. (46) The FCC also stated that each point of access to a UNE was also a technically feasible point of interconnection. (47) Consistent with this interpretation, the FCC concluded that "we should identify a minimum list of technically feasible points of interconnection that are critical to facilitating entry by competing local service providers." (48) In linking each point of UNE access to the definition of technically feasible points of interconnection, (49) the FCC boosted arguments made by new entrants in local telecommunications that RBOCs had to provide them UNE access whenever and wherever it proved technically feasible to access the RBOC's network. The FCC identified seven UNEs that must be provided by all RBOCs to any new entrant that requested interconnection. (50) Under the broad interpretations given interconnection and UNEs by the FCC in the first LCO, a new entrant could insist that interconnection was technically feasible at any point in the RBOC's network so long as that point was one of the UNEs listed in the first LCO. The FCC also concluded that it had authority under § 252 to set national pricing rules for interconnection and access to UNEs. (51) The FCC decided that uniform national rules on interconnection and UNEs would facilitate the work of the state public utility commissions by minimizing the potential for duplicate state litigation and by ensuring quality standards in local telecommunications. (52) Without giving the standard that it used in defining interconnection and UNE access, the FCC concluded that successful interconnection was prima facie evidence that a UNE must be provided by the RBOC to any new entrant at any point of successful interconnection. (53) From the RBOC's perspective, the saving grace in this expansive world of competitive interconnection is that new entrants in local telecommunications must pay for this virtually unlimited UNE access.

{17}The first LCO did not offer a detailed regulatory analysis of the FCC's duties under either § 271 or § 272. This is perhaps because the FCC interpreted §§ 251 and 252 as a more important means of promoting
local telecommunications competition and viewed §§ 271 and 272 as less important in achieving the Act's pro-competitive vision. Because it was unlikely that an RBOC would not face competition for local service in its own region, the FCC did not flesh out its regulatory duties under § 272 in the first LCO. Recall that § 272 covers only the situation where an RBOC faces no competition for local telephone service within ninety days after the Act's passage.

The sub-section of § 271 most applicable to the FCC's regulatory authority is § 271(d). This sub-section provides, first, that an RBOC must apply to the FCC for permission to provide long distance (or interLATA) service "originating in any in-region [s]tate." Since the Act's passage, the "271 process" has been a crucial part of the FCC's regulatory work. FCC staff compares each § 271 application with the twelve-point competitive checklist in § 271 to measure an RBOC's compliance with each checklist provision. FCC staff then provides analysis of relevant parts of the checklist, and the level of RBOC compliance with the checklist, to the FCC commissioners for each § 271 application. Recall that § 271 requires RBOC compliance with the competitive checklist before the FCC grants an RBOC regulatory permission to compete for local or long distance service. The § 271 application process is consistent with congressional intent that the FCC should protect the public interest in advancing meaningful local telecommunications competition via §§ 251, 252, 271 and 272 of the Act.

A. A Bump in the Road to Damascus: The Iowa Utilities Case

Surrounded by controversy, the issues of telecommunications reform and the FCC's proper role in achieving meaningful local telecommunications competition ended up at the Supreme Court in AT&T v. Iowa Util. Bd., 525 U.S. 366 (1999). In this case, the FCC faced a fundamental jurisdictional attack from several state public utility commissions who asserted that the federal agency's proper role in deregulating local telecommunications was to retire from the field of telecommunications regulation. The FCC also faced a specific challenge from several leading telecommunications companies to regulations in the first LCO that implemented uniform national rules on interconnection and UNE's. These telecommunications companies also challenged the regulatory definitions that the FCC had adopted in the first LCO. The Eighth Circuit held earlier in Iowa Util. Bd. v. FCC, 120 F.3d 753 (1997), that the FCC properly defined key terms in the debate over how to secure meaningful local telecommunications competition. The Eighth Circuit, however, had rejected the FCC's regulatory authority over local telecommunications carriers and services.

Reversing the Eighth Circuit's earlier decision in part, the Supreme Court held that the FCC had jurisdiction "to carry out the provisions of this Act [the Communications Act of 1934] which include §§ 251 and 252 added by the Telecommunications Act of 1996." The Court agreed with the Eighth Circuit that the FCC's definition of UNEs was "eminently reasonable." However, the Court vacated the FCC's interpretation of the necessary and impair standard found in § 251 of the Act. The FCC had implied under the necessary and impair standard that it had discretionary authority to consider either the necessary standard or the impairment standard in determining whether to order unbundling of RBOC network elements. In the first LCO, the FCC concluded that the Act imposed on it the regulatory duty to identify a national list of UNEs that must be provided by RBOCs to all telecommunications carriers requesting interconnection under §§ 251 and 252. The FCC reserved to itself authority to revise this national list of UNEs as technological changes occurred. The Court held in Iowa Utilities that the FCC had misread the plain language of § 251 when it discussed the necessary and impair standard in the first LCO. The FCC's interpretation ignored the direct language of § 251(d)(2). The Court found in Iowa Utilities that the FCC incorrectly gave "blanket access" to UNEs via a clearly erroneous interpretation of the necessary and impair standard.

In criticizing the FCC's definition of the necessary and impair standard, the Court held that "blanket access" to RBOC network elements was not what Congress had intended in the Act.
incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said … that whatever requested element can be provided must be provided … [I]t appears that this is precisely what the Commission thought Congress had said. (68)

{22} Relying on this conclusion and the Eighth Circuit's earlier analysis of the necessary and impair standard, the Court stated that the FCC's primary mistake in the first LCO had been in asking which network elements must be unbundled instead of asking where unbundled access must occur. (69) The Court concluded that the Act authorized the FCC to order the points at which unbundled access must occur but not which specific RBOC network elements must be unbundled in order to achieve meaningful local telecommunications competition via access to UNEs. The Court also held that, in addition to improperly mandating blanket access to UNE's, the FCC violated the Act by combining both cost and quality measurements of network elements under the necessary and impair standard. (70) The Court found that quality and cost are two separate measurements for gauging how much access to RBOC UNEs that a new entrant needs in order to offer competitive local telecommunications services. The FCC had imposed an "all or nothing" cost measurement in justifying its view of what was necessary or what might impair the development of local telecommunications competition under §§ 251 and 252. "We believe, generally, that an entrant's ability to offer a telecommunications service is [impaired] … if the quality of the service … absent access to the requested element, declines and/or the cost of providing the service rises." (71) The Court held that this cost measurement was too low a regulatory threshold to withstand judicial review. Specifically, the Court held that the FCC had failed to consider cost and quality factors of facilities and equipment available outside the RBOC's network when it implemented uniform national rules on UNE access in the first LCO. (72)

{23} The Court also disagreed with the general tone of "regulatory grace" that permeated the first LCO. (73) The Court sharply criticized the FCC for reserving to itself the authority to achieve meaningful local telecommunications competition via administrative agency fiat. The Court then provided a more appropriate rational basis standard for evaluating the FCC's uniform national rules on interconnection and UNEs.

[Section 251] requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the necessary and impair requirements. The latter is not achieved by disregarding entirely the availability of elements outside the [RBOCs] network, and by regarding any increased cost or decreased service quality as establishing a necessity and an impairment of the ability to provide services. (74)

With the Court's authoritative interpretation of appropriate telecommunications regulation in Iowa Utilities, the FCC accepted the challenge of revising its first LCO when the Court remanded back to the agency the vacated rules in early 1999.

B. Rebuilding the New Jerusalem in Telecommunications: The FCC's Revised LCO (75)

{24} The FCC responded to the Supreme Court's remand of its rules relating to interconnection and UNE's (known as the "UNE Remand") by issuing a revised LCO on September 15, 1999. (76) As ordered by the Supreme Court, the FCC devised a rational basis test for evaluating the necessary and impair standard in its rules on interconnection and UNEs. The FCC "reaffirmed that [RBOCs] must provide unbundled access to six of the original seven network elements that it required to be unbundled in the original order." (77) The FCC concluded that unbundled access to these six network elements was necessary to promote meaningful local telecommunications competition. This conclusion generally reaffirmed the terms of local telecommunications competition in effect since the FCC issued the first LCO in August 1996. Consequently, the revised LCO should not create significant legal or practical controversy in how RBOCs currently provide UNE access to new entrants in local telecommunications.
This does not mean, however, that the revised LCO is without controversy. Since the Supreme Court was unsatisfied with the FCC's initial determination of the necessary and impair standard, it is unclear how the FCC could reaffirm six of its seven original UNEs without undertaking a thorough reexamination of the regulatory justification that it offered for each UNE. The same tone of "regulatory grace" that the Supreme Court rejected in the first LCO also permeated the revised LCO, constituting a implied rebuff to the judicial criticism that the FCC needed to reexamine the overall tone of its local telecommunications regulations. In the revised LCO, the FCC still reserves to itself significant regulatory authority in local telecommunications competition. State public utility commissions have a role in local telecommunications competition only when and where the FCC considers it appropriate to include its state-level counterparts. For example, the FCC--and not the relevant state public utility commissions--imposed significant conditions when it approved the SBC/Ameritech merger. (78) Although this merger created the nation's second largest local telephone company, the conditions imposed on the post-merger company put the FCC firmly in charge of local telecommunications issues and relegated the state public utility commissions to a limited role via regulatory grace. (79) The SBC/Ameritech merger offered little guidance on what role the FCC sees for state public utility commissions under the revised LCO. Whatever role eventually develops, it is not likely to come from the Act's mandates but instead may originate in the same regulatory grace that the Supreme Court criticized in Iowa Utilities.

Subsequent to the Iowa Utilities decision, but before the FCC issued the revised LCO, several federal courts commented on the appropriate standard for evaluating whether meaningful local telecommunications competition exists. (80) In AT&T Comm. of the S. States, Inc., v. BellSouth Telecomm., Inc., 7 F. Supp.2d 661, 667 (E.D. N.C.1998) (hereinafter BellSouth), the court held that a new entrant in local telecommunications cannot request access to RBOC UNEs in ways that put the RBOC at a competitive disadvantage. Additionally, the new entrant cannot force the cost of its decision under the pick and choose rule (whether or not to offer competitive local telephone service over RBOC UNEs or over its own network) onto the RBOC. (81)

In BellSouth, the court followed a standard of review for state public utility commission involvement in policing interconnection agreements first announced in U.S. West Comm., Inc. v. Hix. (82) Although it reached its decision before the Supreme Court decided Iowa Utilities, the Hix court held that there is a two-part test useful in evaluating state public utility commission review of interconnection agreements and, more specifically, UNE access provisions contained in those agreements. First, the Hix court held that state public utility commission decisions are examined under a de novo standard to see if they comply procedurally and substantively with federal law and regulations. (83) Second, the Hix court held that all other issues involved in state public utility commission review and policing of valid interconnection agreements were subject to judicial review under an arbitrary and capricious standard. (84) The Hix court noted that, although judicial application of an arbitrary and capricious standard to issues other than compliance with federal law and regulations is normally highly deferential, state public utility commissions should not expect automatic deference to their decisions regarding interconnection agreements and UNE access. (85) Here, the Hix decision conflicts with the Supreme Court's subsequent Iowa Utilities decision upholding the deference that the FCC accorded to itself in the first LCO. (86)

The Supreme Court did not address what deference that courts owed to state public utility commission decisions in Iowa Utilities. However, other language in that opinion suggests that it is unlikely that the Hix court's non-deferential view controls when federal courts examine a state public utility commission's interpretation of, for example, the necessary and impair standard.

None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority. While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements … these assignments … do not logically preclude the Commission's issuance of rules to guide the state-commission judgments. (87)
The revised LCO reaffirmed the basic outlines of the necessary and impair standard even as it expanded the regulatory protection afforded new entrants in local telecommunications under both parts of this regulatory standard. Important to a new definition of impairment is a reexamination of what constitutes a proprietary network element under § 251 of the Act. If an RBOC successfully claims to the FCC or the relevant state public utility commission that a network element is proprietary, then the RBOC escapes the Act's unbundling requirements as to that element. Since there are no direct FCC Orders providing an exact definition of what constitutes a proprietary network element, the FCC drew an analogy in the revised LCO to proprietary as it is defined in FCC Orders covering customer proprietary network information ("CPNI"). In promulgating a new definition of impairment under the Act, the FCC should be accorded considerable deference for whatever specific definition it adopts - so long as the FCC grounds its definition of impairment in a rational basis review of the Act. While the limited nature of the Supreme Court's decision in Iowa Utilities made it unnecessary for the FCC to reinvent the wheel in its revised LCO, the agency is on notice to pay closer attention to the deregulatory emphasis of the Act.

VI. CONCLUSION

The revised LCO issued by the FCC on September 15, 1999, was the result of a tumultuous period of reform, deregulation, and promises of further competition in local telecommunications markets. This new period began with the enactment of the Telecommunications Act of 1996. An historic piece of legislation, the Act cleared away the regulatory underbrush beneath the Communications Act of 1934 and a strict wall of separation between local and long distance telephone service created in the aftermath of AT&T's breakup in 1984. When "the walls came a-tumblin down" (so to speak) in local and long distance telecommunications, the FCC had in place a lengthy first LCO whose speed of promulgation just six months after the Act became law was matched only by its sheer complexity. Not surprisingly, this complex Order ended up at the Supreme Court. The Court rendered a careful, detached consideration of the intricate legal, regulatory, and technical issues surrounding telecommunications reform in AT&T v. Iowa Util. Bd., 525 U.S. 366 (1999). Having been assured of its regulatory primacy in the new age of telecommunications by most of the Court's decision in Iowa Utilities, on remand the FCC reconsidered its regulatory scheme for determining what network elements needed unbundling in order to achieve meaningful local telecommunications competition. With the revised LCO issued in September 1999, the FCC likely ensured that, in Churchill's memorable phrase, "[t]his is not the beginning of the end. It is merely the end of the beginning.

ENDNOTES

The Act will provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. 142 CONG. REC. S686 (daily ed. Feb. 1, 1996) (statement of Sen. Dole).

The Act refers to the RBOCs in several ways: as local exchange carriers (LECs), incumbent local exchange carrier (ILECs), and as Bell Operating Companies (BOCs). For clarity, this article will substitute the terms "RBOC" or "RBOCs" when either the Act or the FCCs Orders refer to traditional monopoly providers of local telephone service (often called the "Baby Bells").


The First LCO, supra, note 1.

A network element is defined as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including . . . information . . . used in the transmission, routing, or other provision of a telecommunications service." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).


Id. at 387-93.


The debate over this measure has never been about the need for reform--everyone agrees that it's time. The real debate has been over how we reform our telecommunications law. The 1934 Communications Act serves our country as the cornerstone of communications law . . . The current regulatory structure set up by the 1934 Act is based . . . [on] assumptions . . . which . . . are fast becoming obsolete." 142 CONG. REC. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Harkin).

"The essential purpose of this measure is to foster competition by removing barriers between distinct telecommunications industries and allowing everyone to compete in each other's business. But how do we increase competition while simultaneously ensuring that everyone is playing on a level playing field?" 142 CONG. REC. S710 (daily ed. Feb. 1, 1996) (statement of Sen. Kerry).

The legislation contemplates that the FCC should act favorably and expeditiously on Bell company petitions to compete in the long distance business . . . as soon as competing communications service providers reach an interconnection agreement . . . Congress fully expects the FCC to recognize and further its intent to open all communications markets to competition at the earliest possible date. The debate over


[21] "This integration at the top corporate level and the market position of many of these [telecommunications] companies demands [sic] that consumers be given a voice--a trusted voice--to speak for them in the coming years … I believe that this legislation will lead to too much concentration of power in a very, very important and decisive area of public life in the United States." 142 CONG. REC. S701 (daily ed. Feb. 1, 1996) (statement of Sen. Wellstone); see also 142 CONG. REC. S695 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy).


[26] Id. at § 251(d)(2).

[27] Id.

[28] Id.


[30] Id. at § 252(b).

[31] Id. at § 252(e).

[32] "The competitive checklist is not intended to be a limitation on the interconnection requirements
contained in section 251, but rather, at a minimum, [sic] be provided by an [RBOC] in any interconnection
agreement approved under section 251 to which that company is a party . . . before the Commission may
authorize the [RBOC] to provide in region interLATA services." H.R. CONF. REP. NO. 104-458, at 144 (1996)

[33]. Section 271 distinguishes between an "in-region" state and an "out-of-region" state. These terms refer to
the seven RBOC regions created in the aftermath of AT&T's breakup in 1984. An "in-region" state is one in
the region where an RBOC held the local telephone service monopoly after 1984. An "out-of-region" state is


[35]. Id.


[37]. The Act defines interLATA service as "telecommunications between a point located in a local access
and transport area and a point located outside such area." 47 U.S.C. § 153(21) (1996). The Act then defines a
local access and transport area as a "contiguous geographic area . . . established before [or after] the date of
enactment of the Telecommunications Act of 1996 by an [RBOC] . . . [Each LATA] includes [only] points


[39]. Id.

[40]. The other parts of the trilogy were universal service reform and access charge reform. The First LCO,
supra note 1, at 15507.

[41]. Id.


[43]. "Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy.
Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to
indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our
obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may
be explored. As to success or failure, we look to the market, not regulation, for the answer." The First LCO,
supra note 1, at 15509.

[44]. Id, at 15513.

[45]. These five points of technically feasible access are "(1) the line side of a local switch . . . (2) the trunk
side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-
connect points; and (5) out-of-band signaling facilities . . . necessary to exchange traffic and access call-
related databases." The First LCO, supra note 1, at 15505.

[46]. Id. "The Commission concludes that the term 'interconnection' under section 251(c)(2) refers only to the
physical linking of two networks for the mutual exchange of traffic." Id.

[47]. Id.
The seven unbundled network elements (UNE's) are: local loops, local and tandem switches, interoffice transmission facilities, network interface devices, signaling and call-related databases, operations support systems functions, and operator and directory assistance facilities. *Id.* at & 27.

We believe that national pricing rules are a critical component of the interconnection regime set out in sections 251 and 252. . . . We believe that national rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings . . . A national regime should also help to ensure consistent federal court decisions on review of specific state orders under sections 251 and 252." *Id.* at 15557-61.

In particular, the author wants to commend the staff in the Common Carrier Bureau's Policy & Program Planning Division with whom he worked and from whom he began to understand the array of regulatory choices in telecommunications.

"The Commission may only grant an [§ 271] application, or any part of an application, if the Commission finds that the petitioning [RBOC] has fully implemented the competitive checklist . . . [T]he Senate intends that the determination of whether the checklist has been fully implemented should be a straightforward analysis based on ascertainable facts." H.R. CONF. REP. NO. 104-458, at 145 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 157.

"[T]he Commission's determination of whether the provision of the requested interLATA services is consistent with the public interest . . . must be based on substantial evidence on the record as a whole." *Id.*


*Id.*

"National requirements for [UNEs] will allow new entrants . . . seeking to enter local markets . . . to take advantage of economies of scale in network design. If fifty states were to establish different unbundling requirements, new entrants . . . could be denied the benefits of scale economies in obtaining access to [UNE's]." The First LCO, supra note 1, at 15624, 15626.

525 U.S. at 387-91.


525 U.S. at 387.

Id. at 388-91 (joining Justice Scalia's opinion at this point were Chief Justice Rehnquist and Justices Breyer, Ginsburg, Kennedy, Stevens, and Thomas.

Id. at 390.

Id.

The First LCO, supra note 1, at 15643.

525 U.S. at 387-91.

"The Commission began with the premise that an [RBOC] was obliged to turn over as much of its network as was 'technically feasible,' and viewed § 251(d)(2) as merely permitting it to soften that obligation by regulatory grace . . . The Commission's premise was wrong. Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying [RBOC] duty to make all network elements available." Id.

Id. (internal quotations omitted) (emphasis added).

The Revised LCO, supra note 10.

"Today's [revised LCO] responds to a U.S. Supreme Court decision which generally affirmed the FCC's implementation of the pro-competition goals of the Telecommunications Act, but which required the Commission to reevaluate the standard it uses to determine which network elements the [RBOCs] must unbundle [sic]." News Release, Federal Communications Commission, FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements (Sept. 15, 1999) (http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrcc9066.html).

The six UNE's in the revised LCO are loops, network interface devices, local circuit switching, dedicated and shared transport, signaling and call-related databases, and operations support systems. Id.


The conditions included requirements of quarterly filings with the FCC and not the state commissions where the post-merger company provides local telephone service. To ensure compliance with the conditions imposed on the post-merger company, the FCC's Chief of the Common Carrier Bureau appoints an independent auditor who answers to the FCC alone. There is no role for the state commissions in the independent auditor condition. Id.

See AT&T Comm. of the S. States, Inc., v. BellSouth Telecomm., Inc., 7 F. Supp.2d 661 (E.D. N.C.


[83]. Id at 19.

[84]. Id.

[85]. Id.


[87]. Id. at 733.

[88]. In the interest of full disclosure, the author wishes to inform his readers that he participated in the reexamination of how the FCC defined proprietary network elements under the Telecommunications Act.

[89]. Without getting into too much detail, CPNI is the personal information--name, address, phone number--that local telephone companies receive when customers sign up for local telephone service. See generally, News Release, Federal Communications Commission, Common Carrier Action; FCC Clarifies Rules for Use of Customer Proprietary Network Information (Aug. 16, 1999) (1999 FCC LEXIS 3927) (defining CPNI and discussing how customers can bar their local telephone companies from sharing that information with other affiliated companies).

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