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M&A IMPLICATIONS OF
TELECOMMUNICATIONS ACT OF 1996 *

Jay L. Birnbaum **

INTRODUCTION

One of the primary goals of the Telecommunications Act of 1996¹ – otherwise known as the communications lawyers employment program – is to increase competition in current monopoly or undercompetitive services such as local telephony and cable television.² It also provides for consolidation in areas previously subject to arbitrary aggregation limits, namely broadcast radio and TV.³

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¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151-614 (1996)); see also Francesca O. Schroeder et al., *Telecommunications Act of 1996 Signed*, METROPOLITAN CORP. COUNS., Apr., 1996, at 13. Congress passed the Act and President Clinton signed the bill in February, 1996. The most substantial revision of U.S. communications laws in 62 years, the Act "deregulates the local and long-distance telephone and the cable and broadcast television industries, loosens or removes limits on the number of broadcast television or radio stations any one company may own, and nullifies much of the 1982 consent decree that broke up the old AT&T." *Id.*

² Schroeder et al., *supra* note 1. According to this article, "[s]upporters claim the Act will encourage competition and generate mergers, partnerships, and new ventures." *Id.* But see Senator Byron Dorgan, *Dorgan Says Concentration of Ownership in Television and Radio Stations is Unhealthy*, CONG. PRESS RELEASE, Mar. 18, 1996. Senator Dorgan asserts that he does not "think it is healthy to see increased concentration in the broadcasting industry." *Id.* He concludes that the Act "will result in fewer locally owned television and radio stations, and it will mean less competition and a decrease in localism in broadcasting standards." *Id.*

³ 47 U.S.C. § 202 (1996) (setting a 35% national television audience limit); see also Schroeder et al., *supra* note 1. The authors state that while:

[p]rior law limits the reach of any one television station owner to 25% of U. S. television households. . . . [t]he Act removes limits on the number of AM or FM radio stations any one company may own nationwide, but maintains certain limits on the number of stations that a single company may own, control, or operate within a specific area.

Id.; see also *FCC to Lift Market Limits on Radio, TV Ownership*, DAILY VARIETY, Mar. 11, 1996, at 10 (stating that prior law permitted a company to own up to 20 AM and 20 FM stations nationwide).

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The statute, although laying the groundwork for significant M&A activity in the telecoms sector, I do not believe will cause a sudden rash of mega mergers.⁴ Rather, the convergence will more likely be in the form of large and small strategic combinations, with companies focusing on how to provide video programming services along with local, long distance, and wireless telephony. I will briefly discuss these likely occurrences, and how they are ignited by the statute, for the broadcast, telephony and cable or multi-channel video programming sectors.

I BROADCAST

In the broadcast sector, the 1996 Act substantially relaxes the Federal Communications Commission's ("FCC") multiple ownership restrictions.⁵ As you may know, the FCC has long imposed restrictions on the number of radio and television stations that a single entity can own nationwide.⁶ Under the 1996 Act, these ceilings are eliminated.⁷ The 20-station limit each for AM and FM radio and 12-station limit for TV are gone.⁸ Certain restrictions -- primarily local -- however, are retained.⁹

⁴ Schroeder et al., *supra* note 1. According to this article, "[s]upporters claim the Act will encourage competition and generate mergers, partnerships, and new ventures." *Id.*

⁵ 47 U.S.C. § 202 (1996) (instructing the FCC to revise section 73.3555 of its regulations (47 C.F.R. 73.3555) to relax radio diversity requirements and television ownership limitations); *see also* Schroeder et al., *supra* note 1.

⁶ Schroeder et al., *supra* note 1 (recognizing that the 1996 Act, deregulating local and long-distance telephone and cable and broadcast industries and relaxing restrictions on the number of TV or radio stations any one company may own, is the most substantial revision of U.S. communications laws in 62 years).

⁷ 47 U.S.C. § 202 (1996).

⁸ *Id.* § 202 (1996). The statute states:

BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED. --

The Commission [FCC] shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY. --

(1) APPLICABLE CAPS--The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that--

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

A. Radio

For example, there are still restrictions on the number of commercial radio stations that a single entity can own in a single market: up to 5 to 8 radio stations, depending on the size of the market.¹⁰ Anywhere from 3 to 5 of these can be in a single service – AM or FM – again depending on the market size.¹¹ In larger markets such as L.A. or New York, where there are 45 or more commercial radio stations, a single entity can own up to 8 stations with up to 5 being in a single service, either AM or FM.¹² In the smallest markets, with 14 or fewer commercial stations, a single entity can own up to only 5 stations, with no more than 3 being in a single service.¹³

Thus, large group owners – such as Infinity, Chancellor, and Evergreen Media¹⁴ – will probably

- (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
 - (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
 - (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.
- (2) EXCEPTION—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.
- (c) TELEVISION OWNERSHIP LIMITATIONS. --
- (1) NATIONAL OWNERSHIP LIMITATIONS. --The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—
- (A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and
 - (B) by increasing the national audience reach limitation for television stations to 35 percent.

Id.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Donna Petrozzello, *Top 10 Shuffle*. *BIA Publications Radio Group Ratings*, BROADCASTING & CABLE, Mar. 25, 1996, at 56 (indicating that the top four radio groups remained CBS Radio Station Group, Infinity Broadcasting, Evergreen Media, and Disney/Cap Cities/ABC even after BIA revised its rankings of the top ten radio groups pursuant to the recent flurry of mega-mergers).

acquire additional stations in major markets where they already have a presence. Indeed, Infinity Broadcasting recently announced an agreement to purchase 12 stations in major cities where it already had a presence.¹⁵ Station owners will also seek to expand into new markets. In fact, a new service on the horizon is satellite-delivered digital audio radio,¹⁶ which could be available as early as 1997 or 1998,¹⁷ will also create an incentive for large radio group owners to increase their nationwide "foot-print" by acquiring stations in other markets.

B. Television

For television, there will also be consolidation, but the level of activity will likely be less. Under FCC rules an entity can still own only one television station per market, although the FCC is instructed to review whether this television "duopoly" prohibition should be retained, modified, or eliminated. Also with respect to television, consolidation will be restricted somewhat by the retention of a 35% cap on national audience reach.¹⁸ Thus, although there is no numerical limit on the number of stations in which a single

¹⁵ *The Media Business; Infinity to Buy 12 Radio Stations for \$410 Million*, N.Y. TIMES, Mar. 5, 1996, at D6 (indicating that Infinity Broadcasting Corp. now has 46 radio stations nationwide including a dozen it bought for \$410 million a couple of weeks ago); see also Donna Petrozzello & Elizabeth Rathbun, *Radio's Mega Week: In the Largest Radio Deal Ever, Infinity Buys 12 Stations \$410 Million, Raising Its Total to 46*, BROADCASTING & CABLE, Mar. 11, 1996, at 5 (noting other radio mega-deals inspired by the Act include Jacor's \$774 million acquisition of Citicasters Inc. on Feb. 12 and its Feb. 5 purchase of Noble Broadcast Group Inc.).

¹⁶ Jonathan Marshall, *Telecom Act Has Some Pitfalls*, S.F. CHRON., Apr. 1, 1996, at B1 (explaining that this service could broadcast CD quality music to any car or home in America).

¹⁷ "Don't Stumble Around"; *FCC's Stewart Sets Out Priorities for Mass Media Bureau*, COMM. DAILY, Mar. 5, 1996, at 3 (indicating that FCC chief Stewart is concerned about the effect that unfinalized digital audio radio rules will have on local broadcasters); see also Marshall, *supra* note 16 (stating that new technologies such as this are being held up at the FCC because of existing competitors who oppose their requests for spectrum).

¹⁸ 47 U.S.C. § 202 (1996) (instructing the FCC to modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide and by increasing the national audience reach limitation for television stations to 35 percent).

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entity can obtain an ownership interest, the aggregate national audience reach of all such stations is limited to 35%.¹⁹

For example, CBS (following temporary waivers it received in connection with the Westinghouse merger) has approximately a 32% audience reach²⁰ and thus could acquire only 2-3 more stations in small or mid-sized markets. NBC, in contrast, has approximately a 22% audience reach and could acquire a relatively large station group.²¹ In such cases, the most likely targets would be station groups with no individual market overlap with the network's owned-and-operated stations. Moreover, because UHF stations are attributed only one-half of the audience reach allocated to the market in which they are located,²² UHF stations also are likely acquisition targets. This is particularly true since cable systems' "must-carry" obligations afford the UHF stations the ability to obtain larger actual audience shares than they historically could. Some likely targets include LIN Broadcasting and New World Communications, although companies like these could also decide to expand rather than sell out.

¹⁹ *Id.* § 202 (1996).

²⁰ *FCC to Lift Market Limits on Radio, TV Ownership*, *supra* note 3 (stating that the FCC gave Westinghouse permission to temporarily exceed the national ownership limits after its acquisition of CBS caused CBS' coverage to reach 32% of all TV homes nationally); *see also* Greg Spring, *NATPE '96; CBS, Maxam Consolidate Distribution*, *ELECTRONIC MEDIA*, Jan. 29, 1996, at 4.

²¹ *FCC to Lift Market Limits on Radio, TV Ownership*, *supra* note 3 (stating that ABC reaches 24 percent of all television homes nationally with ten stations and CBS reaches 32 percent with 16 stations).

²² *House Commerce Telecommunications and Finance Telecommunications Revisions, 1995: Hearings Before the Subcomm. on Telecommunication and Finance of the House Comm. on Commerce, 104th Cong., 1st Sess. (1995)* (statement of Michael Eigner, Executive Vice President and General Manager WPIX-TV). Mr. Eigner stated:

[a]s a class, UHF stations suffer from considerable signal and technical handicaps. Signal reach for a UHF station is considerably smaller than its VHF counterpart. ... In addition, technical interference problems are more acute in the UHF band. As a result, these stations generally garner smaller audiences and operate at much higher costs - a fact the FCC expressly recognizes when computing the reach of a UHF station under its national ownership rules.

Id.

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Further, mergers between or among the four existing networks – ABC, NBC, CBS, and FOX²³ – or between one of these networks and either of the fledgling networks – Warner Bros. (WB) and Paramount (UPN)²⁴ – are prohibited.²⁵ Warner Bros. and UPN, however, could merge.²⁶

In addition, the 1996 Act eliminates the statutory ban on owning both a cable television system and an over the air TV station whose service areas overlap.²⁷ It also deletes the FCC's cable/network cross-ownership restriction. Therefore, an NBC or CBS may now purchase a cable system. It gets a little confusing, however, because despite the statutory change, the FCC's own rule restricting cable system and TV station cross-ownership in the same market is still in effect. Therefore, an NBC, CBS or other network could purchase a cable system, but only where it did not already own a TV station, unless it were to obtain an FCC waiver.²⁸ These TV ownership rules pertain only to owned and operated stations, not the hundreds of stations that are merely affiliated with – or carry the programming distributed by – the networks.

²³ Mike Mills, *House Approves Phone, Cable Bill; Act Would Open Market for Local Calls, End TV System Rate Curbs*, WASH. POST, Aug. 5, 1995, at A1 (indicating that the four major networks are CBS, ABC, NBC and Fox).

²⁴ Bill Carter, *Outlook '96: Technology and Media; Network's Gains Mask Some Basic Weakness*, N.Y. TIMES, Jan. 2, 1996, at C14 (stating that there are two new companies, Paramount, owned by Viacom, and Warner Brothers, a unit of Time Warner, which began to establish themselves as networks in 1995); *see also* Diane Holloway, *Mini-Networks not up to Warp Speed; Despite Some Growth, Baby "Weblets" WB and UPN Garner Dismal Ratings*, AUSTIN AMERICAN-STATESMAN, Feb. 15, 1996, at E1 (indicating that these year-old networks which broadcast two nights per week for two hours each night lost about \$70 million in their first year of operation, a figure which has been acknowledged by WB, but not publicly disclosed by UPN).

²⁵ Dorgan, *supra* note 2. Since under the new law, "no one [television] owner can own stations that exceed coverage of more than 35 percent of the country," this effectively prohibits any of the major networks from acquiring each other or either of the two new networks because this would cause the acquiring network to exceed the 35% limit).

²⁶ *Id.*

²⁷ 47 U.S.C. § 202 (1996). Broadcast Ownership, § 202, states in relevant part:

(f) CABLE CROSS OWNERSHIP. –

(1) ELIMINATION OF RESTRICTIONS. – The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION. – The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

Id.

²⁸ 47 C.F.R. 76.501 (1996).

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The legislation, combined with the recent demise of the FCC's financial interest and syndication rules (FINSYN)²⁹ and the prime time access rule (PTAR),³⁰ should result in continued consolidation and vertical integration within the broadcast industry. These rules restricted network involvement in program production, syndication, and prime time broadcasting of entertainment programs. Thus, we can expect to see more mergers – such as the Disney-Cap Cities and Westinghouse-CBS deals.³¹ The major television networks and large station group owners will likely embark on a flurry of acquisitions to increase their total number of owned-and-operated stations and will expand program production capabilities to service their respective syndicates of stations.

II TELEPHONY

A. Regional Bell Operating Companies

With respect to local telephony, the 1996 Act eliminates the AT&T Divestiture Consent Decree (the "MFJ") and its attendant restrictions imposed on the seven Regional Bell Operating Companies ("BOCs")³² – most notably the restriction on providing "interexchange" or long distance service.³³ As a pre-condition to providing "in-region" long distance service (i.e., services originating in a state where the

²⁹ 60 Fed. Reg. 48,907 (1995). The statute states:

The Commission repealed significant portions of its financial interest and syndication rules, scheduled the remaining rules for expiration.... The fin/syn [financial interest and syndication] rules, which were adopted in 1970 to limit network control over television programming and thereby foster diversity of programming through the development of diverse and antagonistic programming sources, restricted the ability of the three established networks (ABC, CBS, and NBC) to own and syndicate television programming.

Id.

³⁰ *Id.*, at 48,909-10.

³¹ Mills, *supra* note 23 (indicating the announcements of Walt Disney Company to buyout of Capital Cities/ABC and Westinghouse to buy CBS Inc.).

³² United States v. AT&T Co., 552 F.Supp. 131 (D.D.C. 1982).

³³ Edmund L. Andrews, *Baby Bell' is Looking to Old Field*, N.Y. TIMES, Apr. 2, 1995, at 30 (indicating that the Baby Bells have been barred from the long-distance market since their creation).

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BOC provides wireline exchange service), a BOC generally must demonstrate to the FCC that a facilities-based landline competitor exists and that the BOC is providing access and interconnection consistent with what the statute calls the “competitive checklist.”³⁴ Accordingly, BOCs will have to wait 12 -15 months before they could be authorized to provide in-region long distance services.

There are certain long distance services, however, that BOCs were permitted to provide immediately upon the 1996 Act’s enactment, without prior FCC authorization. These include “out-of-region” long distance – long distance services originating in a state in which the particular BOC provides no local landline telephone service and for which the originating party chooses the long distance carrier – and certain “incidental” services, such as audio, video, and other programming services, wireless telephone services, and data storage and retrieval.

BOCs will also be permitted to engage in the manufacture and sale of telecommunications network equipment as well as the manufacture of customer premises equipment – both previously restricted by the MFJ – once the FCC authorizes such BOC to provide in-region long distance services.

B. Long Distance Companies, CAPs,³⁵ and Registered Utility Companies

The statute also provides line-of-business relief for the BOCs’ would-be competitors: namely long distance companies, competitive access providers, registered utility companies, and cable television operators.³⁶ Specifically, the 1996 Act preempts all state laws that have the effect of restricting entry into the provision of local, intrastate telecommunications services.³⁷ This means that AT&T, MCI, and Sprint

³⁴ 47 U.S.C. § 271 (1996) (listing access or interconnection that must be provided by a Bell operating company to other telecommunication carriers).

³⁵ *Independent Market Research Firm Praises New SmarTalk Product*, BUSINESS WIRE, June 25, 1996 (defining CAP as Competitive Access Provider).

³⁶ 47 U.S.C. § 253 (1996) (providing for the removal of barriers to enter the interstate or intrastate telecommunications service market).

³⁷ *Id.*

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and CAPs such as MFS and Teleport can negotiate with incumbent local telephone providers to provide local telephone service. The incumbent telephone company in turn must negotiate in good faith³⁸ with any such new entrant, and also provide the new entrant interconnection to its existing network.³⁹ Incumbents not only include the BOCs and GTE, but also smaller entities such as AllTel, Cincinnati Bell and United Telephone. Similarly, cable operators cannot be blocked from entering the local telephone market.

Finally, the statute specifically creates a procedure for utilities regulated under the Public Utilities Companies Holding Act to obtain FCC authorization to provide telecommunications services through separate subsidiaries.⁴⁰ Utilities may actually have greater leverage in at least one respect than cable operators since they already have wires into most homes, whereas cable extends only to about two-thirds of all homes in the U.S. The drawback for these registered utility companies, however, is that, unlike cable providers and certain other non-registered utility companies, they have no telecommunications experience and their networks would require major retrofitting to accommodate two-way voice, data, or video services.

³⁸ 47 U.S.C. § 251 (1996) (indicating the duties and obligations of telecommunications carriers and all local exchange carriers).

³⁹ 47 C.F.R. 20.11(a) (providing that a local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after request, unless it is not technically or economically feasible).

⁴⁰ 47 U.S.C. § 103 (1996); Public Utility Holding Company Act of 1935 (15 U.S.C. 79 and following) is amended by inserting a new section 34, Exempt Telecommunications Companies.

C. Potential M&A Activity

All of these changes pave the way for significant convergence in the telecommunications industry. Entities will seek to provide one-stop shopping for local, long distance, and wireless telephony as well as multi-channel video programming services. Each BOC, with the ability to provide originating long distance immediately throughout most of the U.S., may find that the fastest way to enter that business is by acquiring or joint venturing with one or more of the several hundred long distance resellers, such as Excel, already in the U.S. Many of these resellers are regional in nature and therefore could be a convenient fit for a BOC.

Additionally, BOCs could merge or venture with a "carrier's carrier," such as LDDS/WorldCom. These carriers' networks could easily be converted into providing service directly, or indirectly through resale arrangements, to end users. Mergers or ventures with any such facilities-based operators, however, which also could include more well known entities like LCI International, would be subject to the spin-off of any "in-region" facilities -- at least until the BOC receives in-region long distance authority. Such transactions, of course, will also be subject to Justice Department review under the antitrust laws. BOCs also will probably seek mergers or joint ventures with Internet providers and on-line companies, which their new-found long distance freedoms will permit. This could be fueled by such things as AT&T's recent announcement that it will provide Internet access to its long distance customers.⁴¹

BOCs may also seek to acquire cable systems outside their telephone operating regions, although only U.S. West -- with its Time Warner and the recently announced Continental Cablevision deal -- seems very interested in cable.⁴² U.S. West, however, is the smallest BOC with the largest region and smallest

⁴¹ Leonard Wiener, *Guess Who's Coming to Cybertown?*, U.S. NEWS & WORLD REP., Mar. 11, 1996, at 71 (discussing AT&T's announcement that it will begin offering nationwide access to the Internet and the World Wide Web).

⁴² Eben Shapiro, *For Time Warner, Continental Deal Complicates its Stormy U.S. West Ties*, WALL ST. J., Feb. 28, 1996, at B3 (explaining how US West's surprise decision to buy Continental Cablevision may complicate US

population centers.⁴³ Thus, it probably sees a greater need to strengthen its holdings at the local network level. Indeed, given that local telephone operators are on the verge of seeing their local market shares decrease significantly, the BOCs most assuredly will focus their initial efforts on digging into the increasing long distance carrier market shares. Thus, mergers between BOCs and large cable operators or between BOCs and other BOCs are less likely. In fact, even the long-rumored Bell Atlantic-Nynex merger reportedly has cooled significantly.⁴⁴

On the other hand, long distance companies may look to merge or joint venture with cable operators, CAPs, wireless companies, or utilities, all of whom could facilitate the long distance operator's entry into the local telephone service by reducing the need for an entire overbuild of the local telephone network.⁴⁵ Alternatively, given the cost inherent in over-building such networks, joint venture arrangements like that reportedly being discussed by AT&T and MCI's Metro subsidiary make a great deal

West's already turbulent partnership with Time Warner. US West and Time Warner are engaged in an ugly lawsuit in which US West asserts that Time Warner's proposed acquisition of Turner Broadcasting System, Inc. violates the terms of US West's 25% interest in Time Warner Entertainment which controls Warner Bros. Studio, Home Box Office and most of Time Warner's cable operations); *see also*, *US West Buying In, Knight-Ridder Bowing out as the Cable TV Business Turns*, NEWSINC, Mar. 18, 1996. This article indicates that the US West acquisition of Continental Cablevision "fits in with US West Media's vision of operating cable holdings with an eye toward packaging cable, telephone and Internet access services outside its home territory . . . Continental, meanwhile, nails down the capital it needs to remain a force in the next round of the cable wars." *Id.*

⁴³ Gautam Naik, *Mergers Ring In a Daunting New Era For the Three Independent Baby Bells*, WALL ST. J., Apr. 22, 1996, at B1. US West has "the largest geographic region - but smallest opportunity for cashing in on long-distance traffic inside it..." *Id.*

⁴⁴ Leslie Cauley, *Bell Atlantic and NYNEX Discuss Merger to Form Second-Biggest Phone Firm: Talks Are Spurred by Moves to Let Baby Bells Enter Long-Distance Business*, WALL ST. J., Dec. 18, 1995, at A3 (discussing the possible merger of Bell Atlantic Corporation and Nynex Corporation, spurred by the then pending federal legislation, and stating that it's considered a done deal); *but see* Leslie Cauley et al., *Bell Atlantic and NYNEX Make it Official, the \$24 Billion Merger Faces Regulatory, Other Hurdles*, WALL ST. J., Apr. 23, 1996, at A4 (announcing that the merger has become a reality).

⁴⁵ William C. Taylor, *Books in Review*, HARV. BUS. REV., Nov.-Dec., 1994, at 64 (reviewing Kevin Kelly, *CONTROL IN AN AGE OF CHAOS; OUT OF CONTROL: THE RISE OF NEO-BIOLOGICAL CIVILIZATION* (1994)); *but see* Alan Murray, *Competition is at Risk in Telecommunications*, WALL ST. J., July 17, 1995, at A1 (explaining how local telephone companies, accustomed to a monopoly market, may avoid competition by purchasing large ownership stakes in cable companies which would be their biggest potential competitors in their local market).

of sense.⁴⁶ The big question there, of course, is whether two life-long adversaries put aside their hostilities and varying business approaches to make a go of the competitive local network concept.

Other participants, such as CAPs and cable operators may also join in. This makes particular sense since, as in the long distance industry where there is only a handful of facilities-based nationwide networks, there will probably be little need or economic justification to have more than 2 or 3 over-built networks in most markets, save the likes of New York, Los Angeles, Chicago, etc. Although some BOCs may seek to engage in such overbuilds in major cities outside their existing regions, as I just mentioned, they will probably focus on entering markets previously not open to them and in which they will have greater name recognition, namely long distance.

Finally, despite the inevitable lifting of the manufacturing restriction on the BOCs, it is not expected that they will rush into acquiring foot-holds in the telecoms manufacturing sector. Traditionally, except for AT&T, equipment vendors have not made good service providers and vice versa. Indeed, even AT&T has decided to spin off its manufacturing business to concentrate on the various telecom service markets now open to it. Hence, although there may be significant M&A activity in the equipment sector in light of the increasing demand for wireless and landline telecom equipment and video and Internet distribution networks, such activity is more likely to be among the current sector participants and not the BOCs or other telecoms service providers.

⁴⁶ John J. Keller, *AT&T and MCI Explore Local Alliances: Long-Distance Foes Discuss Joint Cost-Saving Effort to Attack Bells, Others*, WALL ST. J., Feb. 12, 1996, at A3 (discussing talks between longtime foes, AT&T and MCI, aimed at joining forces to build or swap local phone networks in major U.S. markets); *see also*, John J. Keller, *MCI Proposes A \$20 Billion Capital Project: Investors, Partners Sought To Upgrade Networks, Battle the Baby Bells*, WALL ST. J., Jan. 5, 1994, at A3 (explaining how MCI's plan to upgrade its networks and break up the Baby Bell's monopoly over local telephone service was expected to cost \$20 billion, roughly twice the amount MCI had previously expected to spend).

III CABLE REFORM

A. Competition in Multichannel Video Services

In an effort to ensure that actual competition does emerge in both the telephony and multichannel video services markets, the 1996 Act prohibits buy-outs between cable operators and in-region local exchange carriers, whether the latter are BOCs or independents. Generally speaking, local exchange carriers and cable operators with overlapping service areas are prohibited from acquiring more than a 10% financial interest or any management interest in one another.⁴⁷ Certain exceptions to this buy-out prohibition are available for certain systems serving rural and non-urban areas. In addition, the FCC may grant waivers if enforcement of the buy-out prohibition would result in economic hardship.⁴⁸ Again, however, where there are no overlaps, or where overlapping networks are divested or not contributed to a joint venture, the statute does permit consolidation.⁴⁹

Nonetheless, because the playing field has been leveled to facilitate entry by telcos providing video services, it appears likely that competition will come to the cable industry sooner rather than later. In particular, BOCs can acquire or venture with wireless cable operators and DBS⁵⁰ operators as their means of entering the video delivery marketplace.

⁴⁷ 47 U.S.C. § 572 (1996) (discussing prohibition on buy-outs).

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Bill Abrams, *Capital Cities Will Seek FCC Waiver on Owning Philadelphia TV Station*, WALL ST. J., May 14, 1985, at 12.

⁵⁰ Prepared Statement of Theodore Steinke, Chairman of the Board and CEO of National Instructional Television Fixed Service Association (ITFS): Before the Subcomm. on Commerce and Admin. Law, 104th Cong., 1996 (defining DBS as Direct Broadcast Service).

V FOREIGN INVESTMENT

Finally, a brief word on foreign investment. The 1996 Act eliminates the statutory restrictions on foreign citizens serving as officers and directors of corporate licensees and their parents.⁵¹ This applies to both broadcast and common carrier wireless licensees (such as cellular, paging, and PCS).⁵² In addition, the FCC itself had recently taken steps to relax its restrictions on foreign ownership in the parent companies of such common carrier radio licensees. In short, the FCC has announced that it will exercise its discretion to permit foreign ownership in such licensees above the statutory 25% threshold to the extent such foreign investors are from countries where reciprocal opportunities are available to U.S. entities, and provided that certain regulatory safeguards are also present in the applicable foreign countries.⁵³

The combined effect of these changes will make it easier for U.S. licensees to attract foreign capital and could also increase the value of wireless common carrier licensees by making them potential targets for foreign entities seeking to enter the U.S. telecommunications marketplace.⁵⁴ Of course, several foreign

⁵¹ 47 U.S.C. § 310 (1996).

⁵² *Id.*; see also Lauren Young, *Wireless Future Will Be Coming at a High Price: Talk Isn't Cheap, as Firms Search for Financing of Unproven Systems*, WALL ST. J., Nov. 25, 1994. According to the article, "PCS is billed as an 'anywhere, anytime' wireless technology that could replace conventional methods of communicating. . . . [I]t will integrate voice, video and data with digital technology in seamless networks . . ." *Id.*; see also, *FCC Warns it Will Enforce its Auction Default Rules*, WALL ST. J., Apr. 9, 1996, at C17 (explaining how auction prices for PCS spectrum have reached nearly \$10 billion and that the FCC issued a public notice that bidders who fail to make a required 10% downpayment promptly after bidding at auctions of wireless telephone licenses will have their license applications dismissed).

⁵³ 47 U.S.C. § 310 (1996); see also Richard L. Hudson and Mary Lu Carnevale, *British Telecom Won't Fight U.K. Plan of AT&T Provided It Gets U.S. Access*, WALL ST. J., Apr. 16, 1993, at B4 (indicating AT&T's desire to block British Telecom's application to the FCC to provide international services claiming that U.S. carriers are denied equal treatment with U.K. carriers in Britain).

⁵⁴ *FCC Today Begins Auctioning Licenses for Cellular Services*, WALL ST. J., Dec. 5, 1994, at B4.

According to the article:

[C]able-TV companies and long-distance carriers plan to use the radio spectrum to compete with local phone companies. The new licenses could accelerate the trend among communications companies to become full-service enterprises, providing customers with interactive TV programs, data services, paging and ordinary phone service

Id.

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telecom operators have already begun to invest significantly in U.S. companies, with the FCC most recently approving the \$4.2 billion investment of France Telecom and Deutsche Telekom in Sprint.

CONCLUSION

We have already begun to see M&A activity in the cable/telephony and broadcast areas. In addition, Internet-related companies continue to announce new ventures almost weekly. In short, these activities will continue -- perhaps with a few large transactions but certainly with smaller and medium-sized ones -- until the major players draw their respective lines in the sand to compete across the local telephony, long distance, and multi-channel video delivery marketplaces.

