Panel III: Implications of the New Telecommunications Legislation

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Panel III: Implications of the New Telecommunications Legislation

Moderator: Dr. John M. Phelan

Panelists: David E. Bronston, Esq.
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          J. Richard Devlin, Esq.
          Theodore C. Hirt, Esq.
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DANIELLE RUBANO: The third panel for today’s symposium is “Implications of the New Telecommunications Legislation.” It is my pleasure to introduce Dr. John Phelan, who will be moderating this panel. Dr. Phelan is the director of the McGannon Communications Research Center here at Fordham University. We are honored to have Dr. John Phelan with us today.

DR. PHELAN: Let me just say a brief word about the McGannon Center to give you some idea of why I was asked to come here today. The McGannon Center was founded ten years ago by a seed grant from Westinghouse Electric Corp., and has

a. Director of the McGannon Communications Research Center and Professor of Communications, Fordham University; Fordham University, A.B. 1952, M.A. 1956; Woodstock, S.T.L. 1962; New York University, Ph.D., communications 1968.
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f. General Counsel for Technology & Intellectual Property, Citicorp/Citibank, New York, NY; Georgetown University, A.B. 1975; Catholic University of America, J.D. 1978.
subsequently received modest grants from American Telephone & Telegraph ("AT&T") and other major players to pursue projects connected with communications and the public interest. The McGannon Center has run a number of policy conversations at New York City's Lincoln Center with similar panels to this, including people from government, industry, and the public interest sector. So, the McGannon Center has had a long interest in this area and has published a number of studies concerning questions.¹

Let me provide a macroscopic perspective on the two ways of looking at the communications picture before our very knowledgeable panel so expertly dissects the details. It seems that we have had two ways of looking at the communications picture. One model may be termed the "Ritual Model" which considers communications as something that people do. Indeed, communications is something into which people immerse themselves, but one has to specify the context to give this definition meaning. For example, it could be an opportunity for people to discuss important issues and come to decisions, like a New England town meeting. Larry Grossman, former president of Public Broadcasting Service ("PBS") and of National Broadcasting Corporation ("NBC"), recently came out with a book called, The Electronic Republic,² highlighting this aspect of new technologies which extend this old-fashioned way of communicating with one another.

Getting information today is so much more facilitated. One of the things that strikes me as an old guy with a Ph.D. is that when I got a Ph.D., it was really hard getting a Ph.D., because we did not have hard disks. Research, international bodies of knowledge, databases, and I am sure lawyering with the electronic databases now available to lawyers, are immensely facilitated. However, as I point out to my undergraduate students and graduate students, caution must be exercised, because the usual database is not like a library. Unlike a library, a database does not contain its own meth-

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¹. See, e.g., Public Group Leadership Survey: Fiber Optics to the Home, Donald McGannon Communication Research Center of Fordham University (June 1989).
ods of evaluation, so you must establish some other way of evaluating that information.

Communications is also a vehicle for pornography, and religion, and to really discover who we are and what we mean. That is the Ritual Model.

The second model is the "Transportation Model," which sees communications as a set of devices and connections much like a railroad for distributing goods. The goods in this case, simply put, are messages. These messages are value-added, and the government is particularly interested in regulating their distribution, as the government did during the early era of railroads. This once again raises the issues of going through different jurisdictions, through space, with a certain amount of messages, a certain period of time and freight goods for sale. What is the fair way to regulate this traffic? This seems to be a very central notion in the new legislation that we will analyze today, as the transportation model seems to be one that is most germane and most to the front, with the exception of the pornography and V-chip issue.

Now we begin our panel this afternoon with Antoinette ("Toni") Cook Bush, a partner at Skadden, Arps, Slate, Meagher & Flom in Washington, D.C. Toni Bush's comments today are particularly pertinent given her experience with the Senate Committee on Commerce, Science and Transportation when the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act") was debated and pushed forward. She has a lot of inside information and insights into the political process of what some have called the great struggle over the recent telecommunications between the rich and the wealthy.

MS. BUSH: Well the first thing that everybody keeps asking is who are the winners and the losers. I am not sure if it was The New York Times or The Washington Post that concluded that the big winners were the Washington lawyers, but I happen to agree

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4. Cindy Skrzycki, New Deregulation Game Leaves the FCC With Tough Calls,
with that.

The Telecommunications Act of 1996 (the "1996 Act" or the "Act") is also referred to as the lawyers' full employment act. What will become clear as we talk today is that the 1996 Act represents a tremendous leap forward for the telecommunications industry, and it is the biggest change in the Communications Act (the "1934 Act") in decades. However, there is still a lot of work to be done by the Federal Communications Commission ("FCC"), and state and city regulators; that will continue to cause uncertainty for some time.

I have been asked to focus on the broadcast and Internet-related provisions in the 1996 Act. The impetus behind the Act is very simple. As competition increases, the need for regulatory oversight decreases. Thus, in theory, the Act attempts to tear down, or at least lessen, the barriers to providing service in each segment of the telecommunications industry. You will see, as I proceed with my presentation, that this goal will eventually be accomplished. However, there are some instances in which there will be more, not less, regulation, at least in the near future.

In the broadcast sector, one of the areas where some of the changes will take effect immediately, the 1996 Act substantially relaxes the multiple ownership restrictions of the FCC. In particu-
lar, the Act eliminates the restrictions on the number of radio and television stations that a single entity can nationally own.\textsuperscript{9} Certain restrictions, primarily local in nature, however, have been re-tained.\textsuperscript{10} The retention of these restrictions is largely a concession to the Clinton administration, which on several occasions voiced concern that the complete elimination of the ownership restrictions would result in undue media concentration and thus impede competition and reduce diversity and localism in broadcasting. For example, there will still be restrictions on the number of radio stations that a single entity could own in a given market. The extent of this limit, however, depends on the size of the market.\textsuperscript{11}

For television, the "duopoly rule,"\textsuperscript{12} which prohibits an entity from owning more than one television station in a market,\textsuperscript{13} remains in effect.\textsuperscript{14} The 1996 Act, however, specifically instructs the FCC to conduct a proceeding to determine whether the television duopoly prohibition should be retained, modified, or eliminated.\textsuperscript{15} If the FCC ultimately relaxes the prohibition, the Act limits the circumstances in which a single entity could own two VHF stations in the same market.\textsuperscript{16} Under the Act, television local management agreements continue to be permissible, at least until the FCC determines otherwise.\textsuperscript{17} But, as part of the biennial review required beginning in 1998, the FCC will have the opportunity to review all of the ownership rules and those could be changed.\textsuperscript{18} Local management agreements in effect as of February 8, 1996, however, are specifically grandfathered.

\begin{itemize}
\item \textsuperscript{9} \textit{id.} \S 202(a), (c), 110 Stat. at 110-11.
\item \textsuperscript{10} \textit{id.} \S 202(c)(2), 110 Stat. at 111.
\item \textsuperscript{11} \textit{id.} \S 202(b)(1), 110 Stat. at 110 (The Act’s restrictions create applicable caps on local radio markets containing, respectively: 45 or more commercial radio stations; between 30 and 44 (inclusive); between 15 and 29 (inclusive) and 14 or fewer.).
\item \textsuperscript{12} \textit{id.} \S 202(c), 110 Stat. at 111.
\item \textsuperscript{13} \textit{id.}
\item \textsuperscript{14} \textit{id.}
\item \textsuperscript{15} \textit{id.} \S 202(c)(2), 110 Stat. at 111.
\item \textsuperscript{16} \textit{id.} \S 202(e), 110 Stat. at 111.
\item \textsuperscript{17} \textit{See generally} Michael E. Lewyn, \textit{When is Time Brokerage a Transfer of Control? The FCC’s Regulation of Local Marketing Agreements and the Need for Rulemaking}, 6 \textit{FORDHAM INT’L. PROP., MEDIA & ENT. L. J.} 1 (1995).
\item \textsuperscript{18} 1996 Act \S 202(h), 110 Stat. at 111-12.
\end{itemize}
The ownership revisions contained in the conference report do not go nearly as far as the version passed by the U.S. House of Representatives. For example, under the 1996 Act, a single entity may not own a broadcast television station, national network, newspaper, multiple radio stations and a cable system all in the same market. But, in a major market like Los Angeles, a single entity could own a national television network, a television station, and operate another television station pursuant to a local management agreement. The Act also instructs the FCC to liberally grant a one-to-a-market waiver in the top 50 markets, which allows the same entity to own up to eight radio stations, not to exceed five radio stations in the same service (AM or FM). The same entity, however, could not own a cable system serving Los Angeles. Although the statutory provision prohibiting ownership of a cable system and a television system in the same market was eliminated by the Act, there still remains an FCC rule that prohibits such common ownership.

Finally, mergers between or among the existing networks [American Broadcasting Corporation (“ABC”), National Broadcasting Corporation (“NBC”), Columbia Broadcasting System (“CBS”) and Fox Broadcasting (“Fox”)] or between one of these existing four networks and one of the new networks [Warner Brothers or United Paramount Network (“UPN”)] would also be prohibited. Thus, although the Act does not effect sweeping ownership deregulation as initially proposed by some of its sponsors, it nevertheless is an historic relaxation of regulation. Moreover, as I pointed out earlier, this is only the beginning, because the Act instructs the FCC to review these rules every two years and thus provides the

19. Id. § 202, 110 Stat. at 110.
22. Id. § 202(d), 110 Stat. at 111.
23. Id. § 202(b)(1)(A), 110 Stat. at 110.
24. Id. § 202(f)(1), 110 Stat. at 110.
27. Id. § 202, 110 Stat. at 110.
opportunity for further deregulation.  

Having outlined the extent of ownership reform, the next step is to assess the likely ramifications on the broadcast industry. The 1996 Act, combined with the recent demise of the financial interest and syndication rules (FINSYN), and the prime time access rules (PTAR), will most likely result in continued consolidation and vertical integration in the broadcast industry. We can expect to see more mergers, such as the Disney-Capital Cities/ABC and Westinghouse-CBS deals. The major broadcast television networks and large station group owners (both radio and television) 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 syndicated stations. Consequently, the market prices for broadcast properties will probably increase substantially, and the number of independent program producers may perhaps decrease.

With respect to television, the extent of vertical integration will be tempered by the retention of the national audience cap. For example, CBS, following the Westinghouse merger, has approximately a 32 percent audience penetration, and thus can only acquire two to three more stations in mid-size markets. NBC, in contrast, has approximately a 22 percent audience share and therefore may

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29. 47 C.F.R. § 73.662 (lessening regulation on interest ownership in single television markets).
30. Id.
33. See Stockholders of CBS, Inc., Memorandum Opinion and Order, 1995 FCC LEXIS 7533 (FCC decision approving merger); see also Paul Farhi, FCC To Approve Takeover of CBS; Agency Resolves Fight Over Children’s Shows, WASH. POST, Nov. 22, 1995 at E1.
34. 1996 Act § 202(c), 110 Stat. at 111 (the national audience cap restricts any of the networks to a limit of 35 percent of the national audience).
acquire a larger station group.\textsuperscript{35}

Stations having no market overlap with the network-owned-and-operated stations would be the most likely targets. Generally speaking, however, the new 35 percent cap\textsuperscript{36} does not permit sufficient aggregation to automatically guarantee programming or syndication success for vertically integrated companies.

With respect to radio, large group owners will probably acquire additional stations and markets where they already have a presence, such as Los Angeles and Chicago.

The most controversial aspects of the 1996 Act are the provisions concerning the so-called advance television spectrum ("ATV"),\textsuperscript{37} which could dramatically affect the future of over-the-air television as we know it. At the root of the controversy is the additional channel which each broadcaster would need in the transition to digital broadcasting so as to avoid immediately rendering every analog television set obsolete. Senator Dole dubbed this transitional use of the six megahertz channel a form of corporate welfare.\textsuperscript{38}

Specifically, the Act provides that the initial eligibility for ATV licenses should be limited to existing television licensees.\textsuperscript{39} Broadcasters thus would not be forced to bid for this transitional channel at auction.\textsuperscript{40} The temporary use of this six megahertz of spectrum, however, would be conditioned on the recovery of either the existing license or the new ATV license following conversion to digital technology.\textsuperscript{41} The FCC would then be free to auction the recovered channel. Consequently, broadcasters, in effect, would have two channels for a short period, but not indefinitely.

Contrary to Senator Dole's opinion, broadcasters would not get a free ride under the 1996 Act for three reasons. First, broadcast-

\textsuperscript{35} Id. § 202(e), 110 Stat. at 111; see also 47 C.F.R. § 73.3555(e)(3) (explaining how national audience penetration is calculated).
\textsuperscript{36} 1996 Act § 202(e), 110 Stat. at 111.
\textsuperscript{37} Id. § 201, 110 Stat. at 106 (to be codified at 47 U.S.C. § 336).
\textsuperscript{38} Mike Mills, A "Camelot Moment" on Communications, \textit{WASH. POST}, Feb. 4, 1996, at H1.
\textsuperscript{39} 1996 Act § 201, 110 Stat. at 107-08 (to be codified at 47 U.S.C. § 336(a)(1)).
\textsuperscript{40} Id.
\textsuperscript{41} Id. § 201, 110 Stat. at 108 (to be codified at 47 U.S.C. § 336(c)).
ers are not being given a windfall of additional spectrum with which to do as they please. At most, the six megahertz transition channel should be viewed as a loan, because, due to technical constraints, the broadcasters cannot use their existing six megahertz channel to broadcast both analog and digital signals.

Second, although digital technology would enable broadcasters to provide ancillary services, such as paging and multiple streams of programming, to the extent broadcasters provide services in exchange for some fee or payment other than advertising revenue, the broadcasters would be required under the Act to pay an annual fee cumulatively equal to the amount the government would have recovered had the spectrum been auctioned. In other words, the only services for which broadcasters would not have to pay would be free over-the-air television which they currently provide by analog technology.

Finally, broadcasters' use of this transition does not preclude the auctioning of the spectrum. At most it simply delays it, because the FCC would be free to auction recovered channels.

Another provision of the 1996 Act which has generated stiff opposition from the broadcast industry is that the FCC must enact regulations requiring television sets to contain the so-called V-chip, which is short for violence chip, or circuitry that would enable viewers to block such programs. In order for the V-chip to work, programs would have to be coded, which would require a rating system. Thus, the Act requires the FCC to establish guidelines for rating violent and indecent programming if the industry has not voluntarily adopted such ratings within one year of enactment.

The broadcasters' opposition to the V-chip and the attendant rating systems stems from their fear of lost advertising revenues.

42. Id.
43. Id.
44. Id. § 551(c), 110 Stat. at 141 (to be codified at 47 U.S.C. § 303); see also Craig Turner, No Victory For V-Chips In Canada; Nonviolent-TV Experiment Draws Tepid Reactions, WASH. POST, Sept. 4, 1995, at F15.
46. Id. § 551(e)(1), 110 Stat. at 142.
and the administrative nightmare of having to keep up with last minute program changes.\footnote{47}

President Clinton and other Democratic lawmakers have jumped on the television violence bandwagon and are urging the television industry to stop resisting and to commence work voluntarily on a rating system.\footnote{48} The emergence of a broadcast television rating system appears to be a certainty under Act.\footnote{49}

What remains to be seen, however, is whether broadcasters will go along peacefully, which I doubt, or go kicking and screaming. Some broadcasters have already vowed that they are going to fight these provisions in the courts. Nevertheless, it would appear to be in the industry’s best interest to adopt a rating system voluntarily where they would have more control over defining the system and how it works, rather than having guidelines imposed on them by the FCC.\footnote{50}

The last topic that I am going to talk about is the highly controversial provisions of the 1996 Act pertaining to obscenity and indecency on the Internet.\footnote{51} The provision imposes criminal liability on those persons who knowingly create and initiate transmission of obscene or indecent material knowing that the recipient is under 18 years of age, or who knowingly use an interactive computer service to send or post any indecent communication to a specific person under 18 years of age.\footnote{52}

The Act not only imposes liability on content providers,\footnote{53} but also imposes liability on online service providers that knowingly permit telecommunications facilities under their control to be used for such activities, and intend that their facilities be used for such purposes.\footnote{54}

\footnote{47. Turner, supra note 44.}
\footnote{48. Id.}
\footnote{49. Jonathan Yardley, TV’s Rating System: Give It An ‘F’, WASH. POST, Mar. 4, 1996, at D2 (broadcast industry voluntarily adopting a rating system).}
\footnote{50. 1996 Act § 551(b)(2), 110 Stat. at 140-41.}
\footnote{51. Id. § 502, 110 Stat. at 133-36 (to be codified as amending 47 U.S.C. § 223).}
\footnote{52. Id. § 502(2), 110 Stat. at 133-34 (to be codified at 47 U.S.C. § 223(d)).}
\footnote{53. Id. § 502(1), 110 Stat. at 133 (to be codified as amending 47 U.S.C. § 223(a)).}
\footnote{54. Id. § 502(2), 110 Stat. at 134 (to be codified at 47 U.S.C. § 223(e)(3)).}
The Act, however, exempts from criminal liability on-line service providers that solely provide access to the Internet. In addition, an employer would not be liable for actions taken by an employee unless the employer has knowledge of and authorizes or recklessly disregards the employee's conduct. Another defense to liability exists for all who take reasonable, effective, and appropriate actions in good faith to restrict or prevent access by minors. These defenses are intended to assure that the focus is on bad actors—not on those who lack knowledge of a violation.

Through the so-called "Good Samaritan" protections from liability, the Act overrules prior court decisions which treated online service providers as publishers or speakers simply because they have restricted access to objectional material. No provider or user of interactive computer services will be liable in civil actions for voluntarily restricting access to material considered obscene, indecent, excessively violent or otherwise objectionable.

Given the controversial nature of the provisions regarding Internet indecency and television violence, constitutional challenges will likely ensue. Accordingly, the 1996 Act provides for the expedited review of any civil action challenging such provisions. The Act borrows from the "must-carry" provisions of the 1992 Act in order to establish a framework in which a decision by a

55. Id. § 502(2), 110 Stat. at 134 (to be codified at 47 U.S.C. § 223(e)(1)).
56. Id. § 502(2), 110 Stat. at 134 (to be codified at 47 U.S.C. § 223(e)(4)).
57. Id. § 502(2), 110 Stat. at 134 (to be codified as amending 47 U.S.C. § 223(e)(5)).
59. 1996 Act § 509, 110 Stat. at 138 (to be codified at 47 U.S.C. § 230(c)).
60. Id. § 509, 110 Stat. at 138 (to be codified at 47 U.S.C. § 230(c)(2)(A)).
three-judge district court holding one of these provisions unconstitutional will be directly appealable to the U.S. Supreme Court.\textsuperscript{64}

In conclusion, the 1996 Act is a remarkable piece of legislation that takes unprecedented steps towards ending, with some exceptions, the regulatory burdens faced by all sectors of the telecommunications industry. There does not appear to be a big industry winner and corresponding loser under the legislation, except for the lawyers. This legislation was supported by most sectors of the communications industry.\textsuperscript{65} It has been speculated that the only loser possibly will be some of the smaller interexchange carriers. Even with the cloud caused by the pendency of the ATV spectrum auctions, I expect the value of television and radio stations will increase as those industries further consolidate.

I think that the 1996 Act is a unique piece of legislation in that it had so much industry support,\textsuperscript{66} and very little direct consumer interest. While there were consumer groups that participated, and certainly state and local government entities, it was very different from the cable legislation in that members of Congress did not have thousands of consumers writing letters telling them what position to take on this legislation. I think that is one of the major reasons why such expeditious action was taken on the legislation and the debate was somewhat more limited.

A lot of people were saying that they still thought this legislation would not be enacted until March, 1996. I tended to disagree with them, because I felt that it was amazing that the legislation had advanced through the various committees so quickly. That was in large part due, again, to the widespread industry support and the willingness of members of Congress to work on this Act from a bipartisan perspective. So, it did not surprise me that they were able to pull it together at the last minute and get it worked out.

\textsuperscript{64} 1996 Act § 561(b), 110 Stat. at 143.


I think the one political dynamic that will continue in the future will be the interplay between Congress and the FCC as the FCC implements this legislation. Having a Republican Congress and a Democratically-controlled FCC could lead to continued tensions going forward. In fact, the first issue on the agenda of both the House of Representatives and the Senate Commerce Committee is to examine reform of the FCC, an item about which many industry players are very nervous. On one hand, the industry will have the opportunity to register every one of its complaints about FCC processes and thus attempt to have Congress effect fairly significant changes at the FCC. On the other hand, the industry participants will not want to alienate the FCC, because there will be many pending rulemaking proceedings to implement the Act. So it is going to create an interesting dynamic over the next year. Thank you.

DR. PHELAN: Our next speaker is J. Richard Devlin, Executive Vice President, General Counsel and External Affairs of Sprint Corporation. Mr. Devlin was formerly with AT&T and has a lot of first-hand experience, not only with these new technologies, but particularly with the regulatory aspects of these new technologies. So, I am sure he has a lot of insights into the future as well as the past of these developments.

MR. DEVLIN: Well thank you very much. To have an intelligent discussion on the impact of the 1996 Act, we really need to come to grips with two issues: (1) What does the 1996 Act state?; and (2) How does it differ from current rules? My job in this introductory piece is to provide this kind of information for the new legislation as it pertains to local and long-distance telephone competition.

As a result of my 20 years experience in the industry, after graduating from Fordham University School of Law, I have some very strong ideas and views about the impact of this legislation. While I think it is an important step, I have serious doubts that the promised reduction in cost to consumers and the increase in com-

petitive alternatives will materialize in the short term.

Like Toni Bush, I believe the principal beneficiary of the legislation is the legal fraternity generally, and not limited to Washington lawyers. I think this particular piece of legislation will breathe new life into the antitrust bar, both from plaintiff and defense perspective.

There really is no way to address this subject without touching on history. I think the admonition of the philosopher Santayana is very instructive here as well. He said those that do not know history are condemned to repeat it. The telecommunications industry has a wonderfully rich and vibrant history, including much litigation and regulatory turmoil.

The Department of Justice ("DOJ"), in three major efforts this century, has taken action against the former integrated Bell System, which included AT&T, Western Electric, and the Bell Telephone Operating Companies ("BOCs") (collectively, the "Bell System"). The first was settled in 1913 with the commitment that AT&T and the Bell System would stop buying up independent telephone companies. The second was filed in 1949 and settled in 1956 with a consent decree dealing with patents and keeping AT&T out of certain competitive businesses. The focus of these two suits and the third one to follow was anticompetitive abuses of the local telephone bottleneck which impaired other markets such as manufacturing and long-distance.

The third suit, which was the AT&T litigation, was filed in the

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68. GEORGE SANTAYANA, THE LIFE OF REASON [1905-1906], VOL. I, REASON IN COMMON SENSE.
70. United States v. Western Elec. Co., Civil A. No. 17-49 (D.N.J. 1956). Final judgment, entered Jan. 24, 1956, required the Bell System companies to license patents at reasonable royalties and essentially required Bell companies to confine their activities to regulated telecommunication services. Id.
71. "Bottleneck" refers to the Essential Facilities Doctrine in antitrust law.
mid-1970s and settled by consent decree in 1982. The case actually went to trial, and the DOJ put on a very extensive case. In ruling upon a motion for summary judgment filed by AT&T, Judge Greene, who was administering the case, and to this day has jurisdiction over the matter, found that the DOJ had introduced very substantial and compelling evidence that AT&T and the Bell System used its local telephone bottleneck to impair competition in long-distance service and manufacturing.

Shortly after the judge’s decision, AT&T and the DOJ entered into a consent decree that broke up the Bell System. First, AT&T agreed to divest its BOCs. Second, it was agreed that the BOCs would provide equal access, meaning a consumer had the ability to reach its long-distance company of choice without dialing extra digits. Third, the consent decree barred the divested BOCs from entering the long-distance business (among others) until it could be shown that there was no substantial possibility that they could use their monopoly power to impede long-distance competition.

The consent decree became effective on January 1, 1984, and has been an enormous success. Competition has flourished, and consumers now have numerous choices in long-distance service. One example of this increased competition is Sprint. Sprint was the first, and probably still the only, long-distance company to have a nationwide fiber optic digital network. Sprint entered the market and became successful with “pin drop” quality sound. The long-distance marketplace grew from a few competitors to now close to 500. AT&T’s market share dropped from the mid-80 percent mark range to the mid-to-high 50 percent mark range. Antitrust suits

74. The decree was styled as a modification of the 1956 Final Judgment and thus is known in business and legal communities as the Modification of Final Judgment (“MFJ”). See Western Elec., 552 F. Supp. at 225.
75. Id. at 226 (MFJ § I). The term “Bell Operating Company” [hereinafter “BOC”] is defined in the 1996 Act § 3(a)(2), 110 Stat. at 58 (to be codified at 47 U.S.C. § 153).
76. Western Elec., 552 F. Supp. at 227 (MFJ § II and Appendix B).
77. The line of business restrictions are in § II.D of the MFJ. Id. The standard for relief from line of business restrictions is in § VIII.C of the MFJ. Id. at 227-28.
came to a total halt because none of the players in the long-distance business have a bottleneck that they can leverage to impair competition.

The divested BOCs were not very happy with the line of business restrictions that were imposed upon them by the Modification of Final Judgment ("MFJ"). Judge Greene pointed out that before the ink was dry on the decree, the BOCs challenged and tried to get rid of the restrictions, by launching frontal and collateral attacks on the decree, and filing waiver requests and various other documents with the DOJ.

The BOCs have also used their considerable political influence in an attempt to get legislative relief from the decree. In 1986, for example, Senate Majority Leader Robert Dole (R. Kan.) introduced legislation to remove the decree from the DOJ and the federal court, and move it to the FCC. Virtually every year since then, legislation to override the decree has been introduced in either the House of Representatives or the Senate.

A lot of what is seen in the 1996 Act is a direct result of the BOCs’ attempts to get relief from the consent decree. Since there is no Bell spokesperson here today it is incumbent on me to present both sides of the story. I would say that the long-distance industry considers Judge Greene a sound antitrust anchor and an enlightened administrator of a very complex decree. In fact, Bill McGowan, the founder of MCI Communications Corporation ("MCI"), once said that when he went to bed every night, he prayed for the health of Judge Greene. The BOCs, on the other hand, would say Judge Greene is a federal judge run amok and that

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78. Judge Greene ruled that the BOCs must seek DOJ authorization before acquiring conditional interests in companies engaged in lines of business foreclosed to them by the decree. United States v. Western Elec. Co., 894 F.2d 430, 432 (D.C. Cir. 1989).
80. BOCs are required to obtain DOJ review before filing with the District Court.
the decree basically instilled in one federal judge the telecommunications policy for this country.

Most commentators agree, and the DOJ testified this summer, that virtually 99 percent of all long-distance calls originate or terminate over the facilities of the local telephone company. In other words, the local telephone company has a virtual monopoly in their franchised area.

The system that has been in place for a long time is to subsidize local residential service for social policy purposes. The government interest here is to have universal service—to have affordable local service. Historically, this goal has been achieved by overpricing long-distance service to subsidize local service. In fact, this is still practiced today through the mechanism known as access charges. Access charges are what a long-distance company pays a local telephone company to obtain access to customers in order to originate and terminate calls. The 1996 Act keeps the notion of these public policy subsidies alive. In fact, it actually extends the subsidies, although it is not clear how this can occur in a competitive environment.

The 1996 Act is extraordinary in that it requires incumbent local telephone companies to open up their networks for resale, thereby making them more friendly to competitive providers, so
that Sprint, MCI, and AT&T can essentially buy the local telephone service from NYNEX\(^9\) and resell it to the customer.\(^9\) Furthermore, the Bell company or the local company must make it available at a wholesale rate, which is defined as a retail rate less the avoided cost of marketing, billing, collection and any other cost.\(^9\)

As a practical matter, there will be an appearance of competition very quickly. For example, Sprint can go in and resell NYNEX service. Thus, you can get your local and long-distance service from Sprint; however, this will not result in any different service. All Sprint is doing is repackaging what NYNEX offers. There will not be intensive price competition, because we are buying from NYNEX and having to resell. So, although resale is an important development, it is the appearance of competition, as opposed to real consumer choice.

Section 252 of the 1996 Act discusses how the resale will occur.\(^9\) I do not mean to be disrespectful to members of Congress who tried very hard here, but the notion of how these interconnection agreements are to be reached is one of negotiation between the carrier seeking to enter the market and the entrenched monopolist. I would compare it to going to the Department of Motor Vehicles and trying to negotiate more favorable terms there. It is very hard to negotiate with somebody who has 100 percent of the market, and has a very strong desire to keep that situation in place. Although mediation and arbitration services are provided by each State,\(^9\) this really is going to be tough sledding.

The 1996 Act does do something that I think is very helpful. It preempts all state laws that purport to limit the ability of carriers to provide long-distance, interstate or intrastate service,\(^9\) and I think that is important. The Act also has a provision on universal service\(^9\) (i.e., the aforementioned social subsidies), and describes

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91. NYNEX is the acronym for New York New England Exchange.
92. 1996 Act § 101(a), 110 Stat. at 63 (to be codified at 47 U.S.C. § 251(c)(4)(A)).
93. Id. § 101(a), 110 Stat. at 68 (to be codified at 47 U.S.C. § 252 (d)(3)).
94. Id. § 101(a), 110 Stat. at 66 (to be codified at 47 U.S.C. § 252).
95. Id. (to be codified at 47 U.S.C. §§ 252(a)(2) and (b)(1)).
96. Id. § 101(a), 110 Stat. at 70-71 (to be codified at 47 U.S.C. § 253(d)).
97. Id. § 101(a), 110 Stat. at 71-75 (to be codified at 47 U.S.C. § 254).
how the joint board\textsuperscript{98} (a combination of the federal and state regulators) will get together and agree on principles\textsuperscript{99} in very short order. In addition to other things, it requires the joint Board to consider: that quality services have to be offered at affordable rates;\textsuperscript{100} that all segments and regions of the United States have to have access to advanced services;\textsuperscript{101} that customers in rural areas should get the same types of services and the same price services as available in urban areas;\textsuperscript{102} and that discounted rates should be available for schools and libraries for advanced services.\textsuperscript{103}

The problem here of course is that there really is no way to achieve these social goals in a competitive environment without distorting the competitive process. Even if you could attain these goals in a competitively neutral manner, all you are essentially doing is imposing a tax on users, forcing some users of telecommunication to pay for others.

The last point that I would like to discuss is the Bell System’s entry into the long-distance market.\textsuperscript{104} As I mentioned, this legislation basically abrogates the AT&T consent decree. The legislation allows the Bell companies to get into some long-distance businesses; there are also incidental services they can do right away.\textsuperscript{105} Given the history of problems with the local bottleneck, the legislation properly sets a high standard before the BOCs can get into the long-distance business on an in-region basis: (1) they must have an actual facilities-based competitor;\textsuperscript{106} (2) they must have implemented a competitive checklist that allows competition;\textsuperscript{107} (3) they have to file with the FCC for a public interest determination;\textsuperscript{108} and (4) the FCC has to refer to the Attorney General who can use any antitrust standard he or she wants, and that decision must be ac-

\textsuperscript{98} Id. § 101(a), 110 Stat. at 71 (to be codified at 47 U.S.C. § 254(a)(1)).
\textsuperscript{99} Id.
\textsuperscript{100} Id. (to be codified at 47 U.S.C. § 254(b)(1)).
\textsuperscript{101} Id. § 101(a), 110 Stat. at 72 (to be codified at 47 U.S.C. § 254(b)(2)).
\textsuperscript{102} Id. (to be codified at 47 U.S.C. § 254(b)(3)).
\textsuperscript{103} Id. (to be codified at 47 U.S.C. § 254(b)(6)).
\textsuperscript{104} Id. § 151(a), 110 Stat. at 86-92 (to be codified at 47 U.S.C. § 271(b)(3)).
\textsuperscript{105} Id. § 151(a), 110 Stat. at 86 (to be codified at 47 U.S.C. § 271(b)(3)).
\textsuperscript{106} Id. § 151(a), 110 Stat. at 87 (to be codified at 47 U.S.C. § 271(c)(1)(A)).
\textsuperscript{107} Id. § 151(a), 110 Stat. at 88 (to be codified at 47 U.S.C. § 271(c)(2)(B)).
\textsuperscript{108} Id. § 151(a), 110 Stat. at 89 (to be codified at 47 U.S.C. § 271(d)(3)(C)).
corded substantial deference.109

There are some quirks here. One provision says that if AT&T, Sprint, or MCI enter the market through reselling BOC facilities, they cannot jointly market those resold facilities with their long-distance service.110 This provision is hard to explain. It is also hard to explain why Congress preempted the states from further implementing competition in short-haul long-distance.

You may be curious as to why I have a negative attitude towards this legislation at the outset. There are probably three reasons. First, for this bill to make any sense at all, there is just an extraordinary amount of State PSC and FCC work that needs to be done. The legislation directed very short time frames for these proceedings, and it is not feasible to assume that it can be done.

Second, the long-distance experience suggests strongly that when you have organizations managed by people who grew up in a monopoly environment, they will work extremely hard to fight any loss of market share once you change to a competitive environment. So, it is safe to assume that we are going to start seeing anticompetitive acts and lawsuits.

Finally, for this whole thing to work, the universal service problem needs to be addressed. Thank you very much.

DR. PHELAN: Our next speaker is David Bronston, who is the general counsel of the New York City Department of Information Technology and Telecommunications. The Information Technology and Telecommunications Department is an agency of about 300 people. David Bronston has a lot of responsibilities that will be directly affected by this new legislation and he will tell us about it right now.

MR. BRONSTON: Thank you. Let me state at the outset as an advertisement for New York City to all these telecommunications companies, New York City is about competition. The governing principle is open competition for all players in all markets. For example, even before this legislation, we in New York City

109. Id. § 151(a), 110 Stat. at 89 (to be codified at 47 U.S.C. § 271(d)(2)(A)).
110. Id. § 151(a), 110 Stat. at 90 (to be codified at 47 U.S.C. § 271(e)(1)).
had six franchises for telecommunications services\textsuperscript{111} with no regulations on the pricing or services. Lately we have been working towards making other facilities available, such as street light poles for mobile telecommunications.\textsuperscript{112} In fact, one of the Personal Communications Services ("PCS") licensees for New York City, a Sprint co-licensee, has been testing microcell radio technology\textsuperscript{113} as has the cellular licensee and one of our local utilities.\textsuperscript{114}

In addition, for better or worse, pay telephones are now open to competition.\textsuperscript{115} With the impetus of the new bill, we hope to bring real, viable competition to cable television as well.

But even these segmentations of mobile, cable, and basic telecommunications are problematic as the technologies converge. Cable companies want to offer telephone and data services. Telephone companies wish to offer multi-channel video programming. Computers and the Internet offer full communications of voice, video, and data. PCS and new generations of wireless services also seek to be a fully competitive end-to-end network.

So we are in a transition period, moving from the old era of scarcity, mass audiences, and monopoly providers to a new period of abundance, personalization, and competition. As the former president of the National Association of Telecommunications Officers and Administrators stated, "[r]egulatory frameworks crafted for historically segmented and monopolistic industries are outmoded for a competitive environment with multiple providers offering multiple services."\textsuperscript{116}

\begin{footnotesize}
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\item[111.] See infra note 245.
\item[112.] Wireless: Metricom Signs Agreement to Deploy Ricochet as a Wireless Data & Internet Solution in the Eleven-City Marin County Area: Metricom has now received approval to cover 80 percent of the extended Bay Area, EDGE, 1996 WL 8071221 (Jan. 22, 1996).
\item[114.] Cox Enterprises was cited for its development of technology, specifically for using cable TV plants to connect PCS microcells, as well as Omnipoint Communications for its 2-GHz equipment that will facilitate the development and implementation of PCS services and technologies. See \textit{COMMUNICATIONS DAILY}, Dec. 15, 1994, at 8.
\item[115.] 1996 Act § 151(a), 110 Stat. at 106-07 (to be codified at 47 U.S.C. 276).
\item[116.] \textit{Telecommunications Issues at a Crossroads: Foresight and Vision Needed}; Text
\end{itemize}
\end{footnotesize}
Each level of government needs to define its legitimate role and properly allocate its regulatory functions in this brave new world under the 1996 Act. Unfortunately, the 1996 Act did not completely address these issues. In order for the new legislation to function properly we need a clear division of regulatory functions without any redundancies. Accordingly, the three levels of government should each receive clearly assigned duties. If not, the result would be preemptive laws, which the 1996 Act contains in many instances, leading to higher costs to companies who pass on higher rates to consumers.

It is important to discuss specific areas of the bill which address the new regulatory paradigm, paying particular attention to cable competition. Despite the inroads over the past few years of some alternative cable systems such as DBS and wireless, the most recent FCC report on cable competition found that, with a 91 percent market hold, traditional cable subscribership continues to dwarf the combined subscribership of all multi-channel video programming and distributors. This exemplifies that there is a long way to go in competition for cable.

One aspect of the 1996 Act, the Barton Stupak Amendment, was particularly important to local governments. This proposal

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of Speech by National Association of Telecommunications Officers and Advisors President William F. Squandron; Transcript, NATION'S CITIES WKLY., Jan. 3, 1994, at 5.


118. Wireless cable systems reach otherwise unattainable homes through the use of microwaves which beam television programming. Anne Michaud, Analysts Say Wireless Cable Has Become Ripe for Fraud, L.A. TIMES (Orange County Ed.), Apr. 13, 1994. The advantages of this system include lower costs because of no wires, maintenance of equipment and the ability to reach remote and sparse areas. Id.


120. 141 CONG. REC. H8460-01 (1995).
concerned local control of rights-of-way.\textsuperscript{121} The provision allowed municipalities to manage and receive compensation for the use of the public rights-of-way, such as our city streets which are owned and maintained at the expense of local taxpayers.\textsuperscript{122} While Senators Hutchinson, Kempthorn and Feinstein championed the proposal in the Senate, local governments made their case at every opportunity in the House, which voted 338 to 86 in support of the Barton Stupak Amendment.\textsuperscript{123} So in a real "Perils of Pauline" situation that didn't make it into the media, really one of the last hurdles for this bill that could have squashed it was a last second compromise in the conference committee that preserved our rights. The local governments had to raise a parliamentary point of order, go to the Congressional Budget Office and say that this would lead to unfunded mandates and it was a real last minute issue.

Another important aspect of the 1996 Act involves telephone company entry into the cable business.\textsuperscript{124} Section 302 lifts the ban on telephone companies' entry into the cable industry.\textsuperscript{125} Telephone companies which provide video services will be regulated according to the delivery system they use: wireless, traditional cable, common carrier or what is called open video system ("OVS").\textsuperscript{126} Telephone companies would fall under the new OVS.\textsuperscript{127} If a telephone company offers two-thirds of its capacity to unaffiliated programmers while complying with certain other conditions, they could offer video programming as an open video system.\textsuperscript{128} Under this program the telephone companies would incur some traditional cable obligations, but they may not be required to obtain a local franchise.\textsuperscript{129} The concept of OVS is a refinement of the video dial tone systems, which did not seem to

\begin{footnotes}
\item[121] \textit{Id.} at H8460.
\item[122] \textit{Id.}
\item[123] \textit{Id.}
\item[125] \textit{Id.}
\item[126] \textit{Id.} § 302(a), 110 Stat. at 118-19 (to be codified at 47 U.S.C. § 651(a)).
\item[127] \textit{Id.} § 302(a), 110 Stat. at 119 (to be codified at 47 U.S.C. § 651(a)(3)(A)); see also \textit{id.} § 302(a), 110 Stat. at 121-24 (to be codified at 47 U.S.C. § 653) ("Establishment of Open Video Systems").
\item[128] \textit{Id.} § 302(a), 110 Stat. at 119 (to be codified at 47 U.S.C. § 651(a)(4)).
\item[129] \textit{Id.} (to be codified at 47 U.S.C. § 651(c)).
\end{footnotes}
attract much interest from the telephone companies. They seem to be either pursuing—I think Ameritech in its regions have been interested in trying to be a traditional cable franchisee or wireless provider; NYNEX has bought into some wireless companies.

As always, the theme throughout is going to be in the details. Not only does the legislation leave so much to the rule makings, but the FCC is going to have to draft regulations on this in a very tight time frame, a six month period.

Other provisions of the 1996 Act grant the FCC exclusive authority to regulate direct home satellite service while prohibiting local governments from taxing the service. Local governments may, however, tax both equipment sales (as a sales tax) and improvements to real property.

Another important change in the 1996 Act involves situations where, under the 1992 Act, cable operators in large cities were required to get franchised. For example, if you hooked up buildings without crossing the rights-of-way, you would have been required to get franchised. Now, if you went from 200 West 79th Street to 220 West 79th Street in New York City without going across, but you ran a wire from your antenna on 200, you served 200 and then you ran a wire to 220. As long as an operator does not cross the rights-of-way, a franchise is no longer required. This change may lead to a lot of competition in New York City, and other large cities, where it is cost effective to hook up these apartment buildings.

On the other hand, the franchise cable operator competing with those types of systems is now able to offer bulk rates to these buildings. The operator may offer a bulk rate to the building at 220 West 79th Street; however, it must not engage in predatory pricing to undercut the competitor in that building.

One final, more parochial point. The 1996 Act affirms that local governments have the authority to determine, in a reasonable

130. Id. § 602(a), 110 Stat. at 144.
132. 1996 Act § 301(a)(2), 110 Stat. at 114 (to be codified as amending § 522(7)).
133. Id. § 301(b)(2), 110 Stat. at 115 (to be codified as amending 47 U.S.C. § 543(d)).
non-discriminatory manner, the placement of mobile services and wireless common carrier sites.\textsuperscript{134} This brings up a zoning issue. Except in limited circumstances, the provision prevents FCC preemption of these local government decisions over zoning. Local governments, however, may not regulate the placement of facilities on the basis of environmental effects of radio frequency emissions if the facilities comply with the FCC’s regulation on such emissions.\textsuperscript{135}

The allocation of authority discussed above takes a lot of the headache away. Of course, this does not deal with cable competition, but in terms of what Rich Devlin was discussing with respect to the BOCs getting into long-distance, it provided the real driving force that gave the BOCs the impetus, the benefit, the carrot that they needed to support the 1996 Act. NYNEX is probably going to be among the first companies to get into this business since the New York market has been more open to facilities-based competition than some of the other local markets of the RBOCs, or “Baby Bells.”

In terms of regulation at the state and federal level, which, as Rich Devlin stated, is really where the action is going to be, the FCC and states will have to ensure a number of things, including interconnectivity, interoperative ability, elimination of market entry barriers, rate of return regulations, and fair infrastructure sharing. It is going to be a messy situation while it gets sorted out.

Returning to the overall implications of the 1996 Act, though everyone wanted certainty, for the moment we are trading one period of uncertainty for a new one. As government will have to let the new experiments and ventures take hold and arbitrate fairly between the competitors and the technologies, the irony of deregulation and competition is that we are moving from being a regulator of a monopoly to a referee of competitors at the federal, state and local level.

That is what our position in Manhattan has been, for example,

\textsuperscript{134} Id. § 704(a), 110 Stat. at 151-52 (to be codified at 47 U.S.C. § 332(c)(7)).
\textsuperscript{135} Id. § 704(a), 110 Stat. at 152 (to be codified at 47 U.S.C. § 332(c)(7)(B)(iv)).
between Time Warner Cable and Liberty.\textsuperscript{136} It is also happening at state public service commissions as well. Take, for example, Ohio and Illinois, where Ameritech and Time Warner are battling.\textsuperscript{137}

While it is very exciting, it is going to take a while to work this out. I was just beginning to understand Toni Bush's work on the 1992 Act and we are still awaiting key decisions on that law. So let us keep one eye on the prize and another on the hype. If the deregulatory aspects of the bill lead to a 70 percent decrease in rates by the year 2005, as I have heard predicted, then that is great. But if it simply replaces current monopolies with new monopolies, then I am not so sure of the benefits. Thank you.

DR. PHELAN: Thank you very much.

Our next speaker is Theodore Hirt, who is with the DOJ, as the Associate Assistant Director of the Civil Division, Federal Programs Branch. He has also written extensively on constitutional issues, particularly the First Amendment.\textsuperscript{138}

MR. HIRT: I want to extend my thanks to the Fordham Intellectual Property, Media & Entertainment Law Journal and to all of you for attending. I hope we can shed some light on the 1996 Act, as opposed to more darkness or shadow, because some of these provisions are probably not crystal clear.

My first caveat, which you heard from Mr. Tyler this morning and which I need to reiterate, is that I am not speaking as an official spokesperson for the DOJ or the Clinton administration. The views today are my own, and they may not necessarily coincide with what someone from either group has said.

When I spoke at this symposium two years ago,\textsuperscript{139} I tried to set

\begin{footnotesize}
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\item[136.] Liberty Cable Co. v. City of New York, 60 F.3d 961 (2d Cir. 1995).
\item[139.] Symposium, First Amendment and the Media: Current Issues in Telecommu-
up, as an analytical framework for evaluating telecommunications reform, the principles that were set forth in Vice President Gore's various speeches on telecommunications policy in December 1993 and January 1994. I am not going to try to analyze the 200 plus pages of the 1996 Act, but I want to focus on a few high points.

First, let me set forth the principles which I will discuss. The Clinton administration was strongly committed to five items: first, encouraging private investment in the National Information Infrastructure, or Information Superhighway; second, promoting and protecting competition; third, open access to that highway by both consumers and service providers; fourth, preserving and enhancing the concept of universal service that Mr. Devlin has talked about; and last, but not necessarily least, providing flexibility to regulators given rapid changes in the marketplace and technology.

The Clinton administration, like everyone else, had been predicting there would eventually be one information marketplace and a lot of players, but there were structural barriers set up by virtue of the 1934 Act. The Clinton administration was and is still looking for open competition in the marketplace, but has expressed much concern over potential obstructions (cross subsidies and antidiscrimination) through information bottlenecks. To reiterate what John Tyler said about the *Turner* litigation, in which we are representing the government and the FCC, the "must-carry" rules are certainly pro-active in terms of First Amendment interest, despite what Mr. Joffe and his colleagues from Time Warner said this morning.
Regardless of where we go in the year 2000 or 2005, information bottlenecks and other types of gatekeeper roles exist for the major players in the telecommunications field, for both the local exchange carrier and the monopoly cable operator in your local jurisdiction. That was the reality under the 1992 Act and it certainly remains the situation as of 1996. The President’s signing the 1996 Act will not change immediately any of that environment. The question remains as to what environment do we shift to. That comes back to the point of flexibility and what has been called a regulatory framework rather than a rigid statutory bar such as the so-called cross-ownership rule of 533(b), which is being repealed by this legislation. This cross-ownership rule has precluded the telephone companies from becoming cable operators.

I would like to make a few comments about trends, perhaps the short-term trends, and then return to the five principles. As the previous commentators have already noted, one of the big, unanswered questions is whether litigation will be the hallmark of these changes or if these problems can be worked out within an administrative framework.

My bailiwick is district court litigation. Unless a statute comparable to the “must-carry” statute is implicated, I rarely get involved with appellate court litigation, such as petitions to review FCC decisions. I am certain, however, that I can speak on behalf of my colleagues at the FCC, who may or may not be looking forward to resolving all these issues, that they definitely will not be looking forward to a regulatory landscape that is just a repetition of all the litigation both they and we have seen. I suppose we would like to see an amicable solution among the competing industries and players, but I am not going to hold my breath.

One part of the 1996 Act which Rich Devlin has talked about and which I found very intriguing is section 252, in which Con-
gress says that the local telephone carriers and a requesting telecommunication carrier should come to a voluntary agreement regarding the carriage on nondiscriminatory terms. If that does not work out, the case will go before both the public utility or service commission, and the FCC, with the possibility of a private right of action for violations. Therefore, one can see that the potential for litigation exists if voluntary and regulatory measures fail. Similarly, section 274 allows the BOCs into electronic publishing, subject to some fairly tight restrictions. How effective this is going to be in terms of a competitive marketplace remains to be seen.

Focusing on the FCC, it is being put in the role of a referee in terms of the BOCs coming into the cable marketplace. A lot of the litigation that we were involved in, in terms of defending the so-called cross ownership rule of section 533(b), went to the touchstone issue of the telephone companies criticizing the 1996 Act as archaic, draconian, and chilling First Amendment speech. We are substituting the clarity of the statutory prohibition with uncertainty concerning the extent to which the BOCs and the other telephone companies can become cable operators through these various systems, including OVS's. Only time will tell what sort of safeguards are going to be put in place to assure against cross subsidies and anti-discriminatory conduct by the telephone companies.

There is also the issue of separate affiliates, or operations. Section 272 says the BOCs have to maintain structural and functional independence. This encourages subsidiary questions, including how and whether the FCC has the resources to monitor this requirement.

151. 1996 Act § 151, 110 Stat. at 92-95 (to be codified at 47 U.S.C. § 272(a)).
153. 1996 Act § 151, 110 Stat. at 100-01 (to be codified at 47 U.S.C. § 274(a)-(d)).
The final question, which goes back to a lot of the themes of the earlier panels, is from the perspective of the consumer's bottom line: How much diversity of choice and viewpoints is this going to lead to? I will not pretend or try to give you an answer, because it is such a long-range issue. I suppose the expectation is that if you have competitive providers of programming and these barriers fall, or at least the level playing field barriers, which was the grievance of the proponents of the legislation, including the telephone companies who want to get into the cable business, or if you have a level playing field, you will have the beneficial side effect of more consumer choice in terms of programming, and thereby the First Amendment will be advanced and not impeded by the new regulatory framework.

Regarding the Clinton administration's goals, I would like to highlight just a few sections for you. There are provisions that would, at least on their face, encourage private investment. For example, section 257\textsuperscript{158} directs the FCC to look at market entry barriers and to determine how they may be reduced.\textsuperscript{159} Additionally, section 706\textsuperscript{160} talks about advanced telecommunications incentives, such as wiring school systems for the Information Superhighway.\textsuperscript{161} Section 707\textsuperscript{162} has a telecommunications development fund which helps access capital for small businesses.\textsuperscript{163} We have already talked about the structure as trying to open up access and, as Rich Devlin said, we will have to see how well that works in the real world.

Universal telephone service is another issue which will be subject to study by the joint Board.\textsuperscript{164} There is a greater directive in section 255\textsuperscript{165} for services to those who have disabilities.

Finally, on the flexibility side, and this will be a very interest-
The Wall Street Journal said something to the effect that the FCC will have to come up with 80 rules under this legislation.\footnote{169} Although I have not talked to anyone at the FCC regarding the accuracy of that tally, I am sure it is going to be quite a burden on them. If simultaneously they’re going to have to be looking at sections \footnote{170} and \footnote{171} on how to treat regulatory forbearances and streamline their regulations, I think they have an interesting dilemma on their hands.

Looking at this chronologically, and more from a litigation side, my final point is one I picked up from David Bronston. It took me a long time to figure out the litigation and how the Cable Communications Policy Act of 1984 ("1984 Act")\footnote{172} worked. We have outstanding issues with respect to the 1992 Act, including among other things “must-carry” and “non-must-carry,” and now we will have the 1996 Act with its attendant litigation.

We are heading for a period of great uncertainty and we will have to look very carefully for the benefits. The public interest will have to be watched out for very carefully at all levels of government, to make sure that all the promises of this legislation come to fruition. Thank you.

DR. PHELAN: Our next speaker, Michael Nugent, is the Gen-

\footnote{166. Id. § 401, 110 Stat. at 128-29 (to be codified at 47 U.S.C. § 160).
167. Id. § 402(b)(1), (3), 110 Stat. at 129 (to be codified as amending 47 U.S.C. §§ 204(a), 208(b)).
168. Id.
171. Id. § 402(b)(1), (3), 110 Stat. at 129 (to be codified as amending 47 U.S.C. § 204(a), § 208(b)).
eral Counsel for Technology and Intellectual Property at Citicorp/Citibank NA ("Citicorp"). Among the many responsibilities that Mr. Nugent has are global ones that involve the use of telecommunications for the many customers that Citicorp has.

MR. NUGENT: Thank you and good afternoon. I guess we have to ask ourselves, what is this all about? What are we talking about here? We have heard about telephone companies, government, and regulators, and yet this bill is supposed to be for us, residential subscribers, traditional users, folks who want to put Internet pages up, businesses. So I am going to take that point of view.

Let me tell you a little bit why Citicorp is interested. Citicorp is a big user of telecommunications. It spends close to $1 billion a year on telecommunications, and a lot of that goes to carriers, that is including local telephone companies, those that compete with telephone companies, long-distance companies, and international companies. It is a big percentage of Citicorp's expense base, and it is growing, not collapsing. It is not because communications is getting cheaper, it is because Citicorp is using it in just about everything. Citicorp is nothing but a bank, but it is really a software company and a telephone company masquerading as a bank.

Additionally, Citicorp is a big provider of network-based services. Automated Teller Machine ("ATM") networks have some of the most sophisticated networking, particularly for redundancy and similar factors. Funds transfer and home banking is also growing in leaps and bounds. All of these require telecommunications interconnections. Citicorp just signed off today on mortgage pages that are going up on the Internet. Citicorp is looking at the Internet as a major vehicle for communications customers. In general, telecommunications is the hub of Citibank; it is a big user, a big provider, and also a potential competitor of telephone companies.

When AT&T offered its credit card,\textsuperscript{173} Citicorp was very worried about AT&T's abuse of a database that it received, Citicorp

believes, from regulated and rate pair funded subsidies. Citicorp was concerned that AT&T would use the database to find out who were good customers to market credit card information.\textsuperscript{174} Citicorp complained, but the FCC rejected the argument.\textsuperscript{175} The issue was resolved, but it shows that telephone companies have a lot of resources at their beck-and-call to enter into competing marketplaces.

Another possibility is credit card authorization at a local switch. There is a competitive advantage if a little telephone company can do credit card authorization and get a penny a transaction every time a credit card is approved, whereas Citicorp has to put it way out in South Dakota, where it presently is, which makes it more expensive. It then becomes more of a competitive issue.

As I said, Citicorp is a competitor, a provider, and a user. The 1996 Act is really good for big users. I cannot really talk about small users or residential subscribers, but the 1996 Act will allow Citicorp to pressure the telephone and cable companies to give good rates and services. This is what Citicorp wants, but we will see how that shakes out.

In many ways the 1996 Act allows the rest of the country to catch up with New York, Chicago, and California. I know that is a little chauvinistic, but many of the state public utility commissions have let a lot of this stuff happen already on an intrastate basis, and now the FCC has made sure that this happens for interstate services and in other areas. In that sense, the 1996 Act will be good for Citicorp because its network is going to become more harmonized, a little bit more sophisticated, and it is going to have some fun with the local telephone companies and carriers.

I am going to discuss six topics. First, the promotion of the competitive alternatives. Think of a network as having four interconnected locations. You have the user location or the premises, the central office where the initial switches are located, another central office which will take you to yet other central offices in a local area, and then the point of presence of the long-distance carri-


\textsuperscript{175} Bank America, 8 F.C.C.R. at 8782.
er.

That is where all this competition is going to start happening. We have seen it point-of-presence to point-of-presence with the long-distance competition.\textsuperscript{176} Now you are going to see all these little links from the user premises to the point-of-presence where you get interconnected to the long-distance market. We are going to see a lot of competition developing because of the 1996 Act. We have seen it to date in New York City already.\textsuperscript{177} Both MFS Communications Co., Inc. ("MFS")\textsuperscript{178} and Teleport Communications Group, Inc. ("Teleport")\textsuperscript{179} are big providers who you will see all over the country introducing competition.\textsuperscript{180} It will be interesting to see how long-distance carriers move into this arena. I can see them starting to buy MFS and Teleport.

With the promotion of competitive alternatives in general, you are going to see more negotiation or arbitration of connection of local exchange carriers and allowing competing carriers to interconnect those various links to the central offices, this becoming the golden switches of the telephone company. You are also going to see more states backing off arbitrary regulation that may be seen as preventing others from coming in to provide services that com-

\begin{itemize}
  \item \textsuperscript{176} Points of presence ("POPs") are the locations where the telecommunications networks of local telephone companies and numerous interexchange carriers interconnect. United States v. Western Elec. Co., 969 F.2d 1231, 1233 (D.C. Cir. 1992).
  \item \textsuperscript{177} Liberty Cable Co. v. City of New York, 60 F.3d 961 (2d Cir. 1995); see also note 136 and accompanying text.
  \item \textsuperscript{178} See John S. McCright, \textit{Telecom Industry Wired for Free-for-All Ahead}, \textit{BOSTON BUS. J.}, Dec. 30, 1994, sec. 1, at 4 ("Joseph Baylock, analyst with Stamford, Conn.-based Gartner Group, sees Teleport and MFS/McCourt as the biggest winners of 1995.").
  \item \textsuperscript{179} Teleport began providing competitive access services for New York City businesses in 1983 to compete with New York Telephone in the provision of corporate telephone service in New York City. Alan Breznick, \textit{Third Fiber-optics Network Takes on N.Y. Tel. Teleport}, CRAN"S N.Y. BUS., Mar. 26, 1990, at 6 (discussing the entry of Metropolitan Fiber Systems Inc. into the same market and comparing the franchising terms established for Teleport and Metropolitan).
  \item \textsuperscript{180} Teleport and MFS are both competitive access providers ("CAPs") which provide direct competition to earlier access carriers by offering "local transport" services. Such services offer an alternative connection between local telephone companies and points of presence. See Joseph A. Post, \textit{Universal Service and the Information Superhighway: Perspectives from the Telecommunications Experience}, 64 FORDHAM L. REV. 782, 788 (Dec 1995).
\end{itemize}
pete with the telephone companies. More users like Citicorp will likely put their equipment on central office and on telephone company premises so that it can interconnect to that equipment on the telephone companies' central offices. There are many reasons to do that, primarily involving flexibility, ease of communication, and quickness of communication.

Citicorp is very anxious to see the BOCs emerging into long-distance. This is going to be fun for all customers. It is going to take some time, but NYNEX is going to start marketing right alongside AT&T and Sprint for long-distance service. The 1996 Act will put Citicorp in a good position, because it can now say "look what we are getting from this carrier, look what we are getting from that carrier." It is going to be good for competition and franchise by decreasing rates and improving terms, conditions, and flexibility.

In the short term, we will begin seeing carriers and others getting into the mode of being a competitive alternative, but will be primarily in very dense locations, for example, where you have multiple buildings on a campus or within a close geographic area. For example, Citibank has a number of buildings that are within eight or ten blocks of each other. The cable companies may well be a real resource for cabling or video and related services.

That is the promotion-of-competitive-alternatives discussion. Citicorp thinks there is going to be more competition. It is going to be good for all of us and Citicorp is just going to have more fun with the telephone companies.

Topic two is deregulation. More deregulation is going to come out of this, primarily in the area of streamlining of tariffs. Right now if we negotiate a good deal, or if we want a service, depending on what that service is, it takes a period of time before the tariff is approved. If the net effect of a local telephone company tariff filing is to reduce a rate, under the 1996 Act, it will be approved in seven days. That is a good thing. If it increases the rate, it will be approved within 15 days. That is also a good thing. Again, it is a benefit incentive for harmonizing tariff regulation across the country and for streamlining it.
The third topic is obscenity or indecency. Citibank is worried because it has a lot of people on the Internet. Citibank is encouraging Internet use for employees. It is an active policy to get onto the Internet to explore, to use it, and to experiment with it. But with this comes employees who download obscenity. It is a problem because human beings are human beings. Any company will have problems with employees abusing the Internet. The law, from the standpoint of a big business user, says that if you’ve got the right procedures or defense mechanisms in place, if you limit access with credit cards or Personal Identification Numbers (“PINs”), you are not going to be held liable for this. That was a very important step for business users.

Topic four is consumer protection. I like to consider this really another aspect of competition. I will use the AT&T database that I mentioned before as an example. There is a thing called customer proprietary network information. It is information such as who you are, where you live, how many telephones you have, what your numbers are, what kind of features you have, what kind of bill payments you have, whether you subscribe to the Internet or whether you are taking certain services off the Internet.

Citicorp is worried about the customer, worried about the telephone companies using that information, particularly when the rate payer has subsidized the creation of that data. It is a gold mine of data which may indicate whether you are willing to subscribe to home banking, or whether you have a telephone in your upstairs that can be dedicated to home banking for example.

The carriers are going to have to protect the confidentiality of this information. Carriers can use or disclose aggregate customer information for non-service related purposes and non-phone service purposes, but the information must also be available to other entities on a non-discriminatory basis. That is very important. In other words, if the telephone company uses it, we must be allowed to have access to it on the same basis.

Topic five is competitive safeguards. If the telephone companies are going to provide long-distance telecommunications services within the franchised area, as was mentioned before, and if they are going to engage in manufacturing, they have to do so through a
separate affiliate for three years.\textsuperscript{181} In other words, there must be an arm's length vehicle for the marketing and the development and the provision of that service. This argument induces more competition, even among the various parts of the telephone company as they are trying to get business.

The separate subsidiary obligation also will apply to the use of customer proprietary network information. A telephone company cannot pass the information to its competitive subsidiary without it being disclosed to others. This is something we have been fighting for a long time.

The last point is wireless communication, which Citicorp considers very important. Much of its future is wireless communication of ATM data. It wants people to be able to bank at their personal display, or their personal assistance, and it wants them to be able to communicate from the telephone. Citicorp wants them to use Citiphone banking anywhere, even on their cellular telephones. It is putting a lot of money into encryption and security for that. So Citicorp is very interested in wireless telecommunications.

As Dave Bronston was saying, the local zoning authority is going to be preserved, which is good, because that is where you really need to deal with these issues of where do you put the antenna, where do you put the broadcasting facilities.

There is some limitation placed on the state's authority to preclude the use of facilities for new services. There cannot be discrimination, so it will be interesting to see how the state and local authorities avoid favoring one method of wireless communication over another, particularly when many corporations like Citicorp are pushing for as much wireless as possible.

There are also some provisions for making rights-of-way available.\textsuperscript{182} You can just see telephone companies that have very valuable rights-of-way having to make them available to competitors. That will have to apply to rights-of-way when it comes to wireless,

\textsuperscript{181} 1996 Act § 151(a), 110 Stat. at 94 (to be codified at 47 U.S.C. § 272(f)(1)).
\textsuperscript{182} See, e.g., 1996 Act § 101(a), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(b)(4)) (local exchange carriers' duty to afford rights-of-way access to competing providers).
and to government's rights-of-way with respect to putting up antennae, and so on.

I guess you could say, all in all, Citicorp likes the 1996 Act. There will be a lot of work involved in making these things real, to make them happen, but the 1996 Act is already putting pressure on the telephone companies.

Citicorp is already asking the long-distance carriers and NYNEX to come in and explain how they intend to respond to the 1996 Act. Citicorp has a number of deals which it really had to gerrymander legally in order to get around the various restrictions in the modified final judgment, and the consent decree. Citicorp is now asking the carriers to come discuss what we do with these awkward service deals now that we are free.

So Citicorp is already putting pressure on the telephone companies, the carriers, and the utility companies to start thinking creatively now that they have competitive opportunities. Thank you.

DR. PHELAN: I want to thank Mike Nugent for ending on a note of incredible energy as well as clarity and giving us a whole new meaning to the phrase "money talks." We are now going to start off with a brief two minutes or so of reactions from each of the panelists to what their colleagues had to say and then we'll have questions from the floor. So, Toni Bush, we will begin with you.

MS. BUSH: For the most part I agree with most of what my fellow panelists have said, particularly Michael Nugent. I think he is right that the real winners are the big customers in the big cities, where the competition is going to arrive first. The business customers are going to have the most choices and options. Unfortunately, the corresponding side is that the largest potential losers are residential customers due to, if nothing else, the confusion that is likely to result over interpretation of the 1996 Act. Residential customers are not going to be the market segment most sought after once competition is introduced. Only through the efforts of the FCC and the state regulators are their concerns likely to be

addressed.

I do think that it is just a matter of time before competition comes. We are embarking on an important new era. With all the technological developments, we will undoubtedly have to revisit many of these issues. The 1996 Act provides a good start, but the FCC has a tremendous task ahead of it in implementing the 1996 Act.

MR. DEVLIN: Well, one thing I heard, and Michael Nugent really drove it home is a basic distrust of the power of the local telephone company—and the advantage of being the entrenched monopolist, with the information available at your fingertips and so forth—but it does remind me of a personal experience I had on this legislation.

Because it was very clear that the BOCs were so effective in lobbying this bill before Congress, the long-distance companies decided to get together and lobby. So we formed a coalition, and to say the meetings were awkward is a little bit of an understatement. There was enormous mistrust during the meetings, and,

184. Among the lobbyists enlisted by the BOCs were President Clinton’s former Deputy Chief of Staff Roy Neel, former Labor Secretary Lynn Martin, Carter administration Attorney General Griffin Bell, and former Chief Counsel of the Senate Commerce Committee Ralph B. Everett. See Jube Shiver Jr., Reform Bill Prompts a Frenzy of Lobbying, L.A. TIMES, Dec. 14, 1995, at D2; (“for months, political observers said, the Baby Bells outclassed the long-distance industry” in lobbying); Marcia Stepanek, For Lobbying, Telecom Bill Is Manna from Heaven, DENVER POST, Aug. 20, 1995, at H-01.

185. The Competitive Long Distance Coalition represented 500 long-distance companies, including AT&T, MCI Telecommunications Corp. and Sprint Corp. Frederick H. Lowe, Long-Distance Industry Lobbies Against Overhaul, CHI. SUN-TIMES, July 20, 1995, at 51. Among the lobbyists enlisted by the long-distance coalition were former Senate Majority Leader Howard Baker of Tennessee, President Bush’s White House Press Secretary Martin Fitzwater, and former Senator Paul Lexalt of Nevada. See Shiver, supra note 184; Stepanek, supra note 184.

For discussion of the lobbying efforts of the BOCs and the coalition, see Shiver, supra note 184 (“[F]ew lobbying campaigns have been as massive and relentless as the one over the bid to reform the nation’s 61-year-old communications laws . . . [F]rom the beginning of the year, lobbyists for the coalition and the Baby Bells have ranked as the most aggressive influence peddlers on Capitol Hill.”); Stepanek, supra note 184 (“‘Everybody in this town who has a pulse has been hired by either the long-distance coalition or the Bell operating companies,’ says Rep. Michael Oxley, an Ohio Republican on the House Commerce Committee. ‘It’s just amazing.’”).
I will tell you honestly, this happened. Former Senator Howard Baker,\(^{186}\) now in private practice in Washington,\(^{187}\) was the head of the coalition. He called an emergency meeting, which I attended. There was an MCI person to my right, and an AT&T person to my left, and all I know is, when I got up to leave that meeting, my fountain pen was gone. True story.

MR. BRONSTON: A few reactions. Consumers weren’t at the table in the negotiations and I think that was deliberate by the new majority. I think the consumer groups may have had their best chance with the Clinton administration, but I think the Clinton administration had other issues they wanted to raise.

I did not mention cable rate aspects of the 1996 Act in my talk. Cable rate regulation of the Cable Program Service Tier will die an ignominious death on March 31, 1999.\(^{188}\) What that is going to mean to subscribers is probably not good in the short term. The basic service tiers will continue to be regulated by the local franchising authorities,\(^{189}\) which is not exactly a blessing.

In my earlier remarks, I also did not talk about cable entry into the telecommunications market. City franchising authorities cannot prohibit cable companies from entering into telecommunications services in their cable franchises. In fact, Time Warner and Cablevision\(^ {190}\) are talking about getting into that business.\(^ {191}\)

\(^{186}\) Former Senator Howard H. Baker, Jr. (R. Tenn.). Senator Baker was a member of the United States Senate from 1967-1985, served as Senate Majority Leader from 1981-1985, and was the Chief of Staff for President Bush.

\(^{187}\) Mr. Baker is now a Senior Partner at Baker, Donelson, Bearman & Caldwell in Washington, D.C.

\(^{188}\) 1996 Act § 301(b)(C), 110 Stat. at 115 (to be codified at 47 U.S.C. 543(c)(4)).

\(^{189}\) 47 U.S.C. § 543 (Regulation of Rates), § 544 (Regulation of Services, Facilities, and Equipment).

\(^{190}\) See Elizabeth Corcoran, Time Warner to Buy Cablevision Industries: Deal Positions Firm for Phone Competition, WASH. POST, Feb. 8, 1995; Skip Wollenberg, Time Warner Buys Cablevision for $2.6 Billion, PORTLAND OREGONIAN, Feb. 8, 1995 (“The Cablevision Industries’ deal...push[es] Time Warner’s subscriber total to about 11.5 million, up by about 4 million from a year ago. That will put Time Warner, the nation’s second-biggest cable TV provider, into a near-dead heat with industry leader Tele-Communications Inc., which claims 11.7 million subscribers.”); Bob Niedt, Time Warner Aligns with Cablevision, SYRACUSE HERALD-J., Feb. 7, 1995 (“Cablevision Industries, a Long Island-based cable system operator with 1.3 million subscribers, has agreed to merge with Time Warner...‘Cablevision Industries, like many cable operators, has been
is fine. I think cable service providers in general have to get over the customer-service perception of cable companies—and I think they have gotten better at customer service—before they will succeed in this business and be recognized as a viable alternative telephone company.

Regarding the confusion issue: I do not understand long-distance telephone offerings, and I am in the business. I think with competition, people's eyes are going to cross, so I think that is going to be a problem for consumers as well, going forward.

Local franchising authorities have been painted as a barrier to entry. I do not think that has been the case. I think franchising provides valuable services to the community: it prevents discrimination, brings in-kind services to government and local groups, imposes customer service standards, and ensures public, educational, and governmental channels. Franchising has not prevented companies like MFS or Teleport from growing in revenues from looking for partners, alliances with either a telephone company or large cable company to enter the next level of telecommunications...."

191. See Corcoran, supra note 190 ("As cable companies upgrade their networks, they hope to be able to offer voice and data services to customers much as they now offer television, and so compete with traditional telephone companies."); Wollenberg, supra note 190 (The deal "completes Time Warner's cable expansion plans and frees the company to focus on introducing telephone service...."); Cable Takes on Baby Bells: Firms Seek Slice of Phone Market, RICHMOND TIMES-DISPATCH, Aug. 10, 1994 ("The nation's largest cable television companies plan to spend more than $2 billion this fall on equipment for providing one-stop telecommunications services to homes. Seven companies are expected to do the spending."); Jim DiLorenzo, Rochester Tel Plan Passes Key Hurdle, TELEPHONY, May 23, 1994 ("If the Rochester plan is approved, Time Warner, which operates Greater Rochester Cablevision, intends to offer switched business and residential telephone and telecommunications services."); Michael Farrell, Cable TV Provider Sets a $15M Rebuild, COPYRIGHT CAP. DISTRICT BUS. REV., Feb. 21, 1994 ("Capital Cablevision Systems Inc., a cable television provider based in Albany, NY..., announced a subsidiary of its parent company, Time-Warner Inc. of New York City, would offer local telephone service....")

192. These local franchising requirements are authorized by 47 U.S.C. § 532 (Cable Channels for Commercial Use) and § 535 (Carriage of Noncommercial Educational Television).


194. These local franchising requirements are authorized by 47 U.S.C. § 531 (Cable Channels for Public, Educational, or Governmental Use).
essentially zero to 30 or 60 million dollars in the space of four years.\textsuperscript{195} Santayana was right: I picture a photograph I have seen of New York City in the late 19th century, with wires and wires and wires criss-crossing the sky; as we get more competitors, you’re not going to want to look under the ground to see the spaghetti that is going to be there. But that is something we have to deal with. Where it is going to affect the subscriber most is where the rubber meets the road—the home-wiring issues. How many wires can we put in an apartment-building molding and who will own and control that? It is going to be a very, very big consumer issue going forward. Thank you.

MR. HIRT: I have three comments. First, I do not want to be on record as understating the potential benefits of the legislation, either short-term or long-term. I do not want my prior remarks construed as pessimism and dismay over short-term benefits. I think that Mike Nugent’s comments, in particular, as an incumbent user with some presumed ability to negotiate with the retailer or wholesaler of the services, whichever it may be, show that the existence of the legislation alone may well have impact even before you get to the messy regulatory stage of implementing it on a long-term or structural or broad-based basis.

My second reaction concerns the role of consumers. In the morning panels, you heard about consumer interest; I think it is fairly easy to articulate the consumer interest in assuring over-the-air broadcast programming choices, which is the issue in “must-carry.” In the panel on indecency,\textsuperscript{197} the colloquy between Stuart Gold and the other panelists shows that there can be a diverse audience for cable, with diverse views about what should be shown on cable in terms of the content.\textsuperscript{198} As Mr. Gold said, consumers

\textsuperscript{195} Records on file with the New York City Department of Information Technology and Telecommunications.

\textsuperscript{196} See supra note 69 and accompanying text.


\textsuperscript{198} \textit{Id.}
register their views in that forum.\textsuperscript{199} The irony in the "macro" stage is, how do consumers fit into a big bill like this, which is to a large extent about competing industries? It may be counter-intuitive to expect consumers to rise up and comment when the issue is not cable rates, which they see on a monthly basis if they subscribe to cable. If there are competing advertisements saying "we are just trying to have a level playing field" or "everybody should enter everybody else's markets on an equitable basis"—who can be against that in the abstract? How are you going to get people to comment in a situation like that?

There is another issue, which is not a legal one, which has had consumers voice their views in the context of national economic legislation. If Mike Nugent will forgive the analogy, one of the other unresolved issues in the Congress, is, how do you deal with the regulation of financial institutions? What are the respective roles of banks, insurance companies, the securities industry and related interests, and the various statutes that regulate them? For example, the Glass-Steagall Act sets out statutory prohibitions such as what banks can do \textit{vis-à-vis} the securities industry.\textsuperscript{200} Once again the same issue arises—where does the consumer fit in?

A final point is that—without implying that there is any divergence between the Clinton administration and the 1996 Act—section 257,\textsuperscript{201} the market entry barriers provision, has a statement of national policy in it which struck me as significant. The provision states that, in implementing the market entry barriers provision, "the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity."\textsuperscript{202} So you have Congress saying that the FCC should try to accomplish all of these

\begin{flushright}
199. \textit{Id.}

200. 12 U.S.C. § 377 (prohibiting banks from involvement with the securities industry), § 378 (prohibiting the securities industry from engaging in banking); \textit{see, e.g.}, Investment Co. Institute v. FDIC, 815 F.2d 1540, 1542 (D.C. Cir.), \textit{cert. denied}, 484 U.S. 847 (1987).


202. 1996 Act § 101(a), 110 Stat. at 77 (to be codified at 47 U.S.C. § 257(b)).
\end{flushright}
objectives.

MR. NUGENT: One of the concerns I had when listening, especially to Rich Devlin and Toni Bush, about the impact of subsequent proceedings on the 1996 Act, was how long it might take for some of this to happen. I had not really appreciated how long it might take. I wonder if they have any idea whether—and this is a tough question—it is going to be one year or a couple of years before we see implementation of key parts of the 1996 Act?

MS. BUSH: Well I will take a crack at it and then Rich Devlin can give his view. The FCC is looking at this issue, and it is hoping to initiate rulemaking proceedings as soon as possible. The FCC is also in the process of evaluating which provisions of the 1996 Act require implementing regulations and which provisions are self-effectuating. As I pointed out earlier, many provisions, like the broadcast multiple ownership restrictions, change automatically without the need for FCC action. But in other areas the FCC is statutorily required to promulgate implementing regulations within a prescribed time period. For example, the FCC must promulgate, within six months, regulations implementing the interconnection obligations imposed on local exchange carriers. The universal service regulations must be adopted within 15 months. Even given those timetables, the question will be whether the regulations go into effect if there are pending appeals, petitions for reconsideration, or court challenges. I estimate that it will be a couple of years before implementation is anywhere near completion.

We saw this delay of implementation of FCC regulations pending the resolution of court challenges on a mini-scale in the area of personal communications service ("PCS"), where the FCC was very quick in adopting rules. Although some appeals are still pending in the courts and some issues are left unresolved, the FCC did move very quickly and had the bulk done within a year.

Obviously the 1996 Act involves FCC implementation on a much larger scale. The bulk of the responsibility will fall on the Common Carrier Bureau and the Wireless Bureau of the FCC.

203. See supra pp. 536-42 (comments of David Bronston).
204. The Common Carrier Bureau regulates interstate wireline "common carrier"
Two or three years will likely pass before all the dust is settled, but there will be things that can happen in the interim. The incidental services provisions are pretty much self-executing, so the BOCs will be able to provide incidental interexchange services such as long-distance, mobile long-distance, video, and data retrieval immediately.

MR. DEVLIN: I agree with everything Ms. Bush said, but I want to point out that, in a lot of respects, the speed with which local competition will occur is in the hands of the local telephone companies. The BOCs have an incentive to act quickly because local competition is a prerequisite for them to get into long-distance business. Whether, in fact, they view it in their business interest to move quickly to give up their monopoly in order to get into a business where there are already 500 competitors, I cannot answer.

DR. PHELAN: Now we'll open it up to the floor for questions.

AUDIENCE MEMBER: Ms. Bush, regarding the provisions concerning the Internet and, specifically, the obscenity and indecency provisions, was any thought given in the legislature to the fact that the World Wide Web, in particular, is, by definition, a worldwide system and that a lot of the sites and providers are not actually located in the United States? How, if at all, does the 1996
Act deal with the possibility of indecent or obscene materials being transmitted into the United States from outside the United States?

MS. BUSH: Well, certainly the issue was raised. Whether Congress adequately considered it or not is a question I cannot answer, but it was raised. I think the issue will simply boil down to an international law and jurisdictional issue.

Certainly, the U.S. government cannot prevent people from sending obscene or indecent material into the United States over the Internet. The question is, once such material is imported into the United States, is there some way to go after those people in a foreign country? I think the answer is probably no, or only under limited circumstances. Clearly the international aspect was considered, but I think the conclusion was, even if the U.S. government cannot control obscene or indecent information coming from abroad, the government can at least have an impact on information that originates in the United States and is distributed to and from points within the United States.

AUDIENCE MEMBER: You said the bill overrules Stratton Oakmont;208 could you explain that a little further?

MS. BUSH: In that case, the issue was the liability of a service provider, Prodigy, where it affirmatively tried to control the content of the materials it distributed online. Because of its exercise of editorial control, Prodigy was found liable as a publisher.209 With the Good Samaritan law,210 Congress is saying that, if a company, like Citibank, for example, voluntarily takes steps to keep people from distributing obscene, indecent, or otherwise objectionable material over the Internet or through the company's system, the company cannot then be held liable for any information that is distributed.211 In other words, the idea is to encourage companies to put in place mechanisms to prevent people from distributing

211. 1996 Act § 509, 110 Stat. at 138 (to be codified at 47 U.S.C. § 230(c)).
obscene or indecent material without imposing liability on the companies. This bill effectively reverses the *Stratton Oakmont* decision.\textsuperscript{212}

**AUDIENCE MEMBER:** Referring to the Title V obscenity and violence section again,\textsuperscript{213} I was wondering if anyone on the panel can clarify whether it is limited to just the Internet or does it apply to all telecommunication devices, such as laptop computers and wireless telephones? Would it then require some sort of "indecency chip" installed in each device?

**MR. HIRT:** As a general matter, I have to decline to answer questions about the Internet "indecency" issue since the "press clips" that I have read suggest that suits will be filed challenging the provision. It would not be consistent with my role in the DOJ to answer questions on the subject any earlier than I might have to if I am involved in such future litigation.

**MS. BUSH:** I am not absolutely sure of whether you were asking about V-chips or about the Internet obscenity provision? Section 223\textsuperscript{214} regulates the telephone industry, not the broadcast industry, so I guess from that perspective, it could be read as having a broader implication.

There has always been a prohibition on the distribution of obscene material, either over television or telephone systems.\textsuperscript{215} The issue has been that the telephone companies, as common carriers, are prohibited from regulating the content or having any impact on the content of information transmitted over their systems, which has led to some fairly creative ways of trying to regulate the distribution of obscene or indecent materials by telephone.\textsuperscript{216} For exam-

\textsuperscript{212} Id.
\textsuperscript{213} See supra note 207 and accompanying text.
\textsuperscript{215} See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (finding constitutional a statutory ban on interstate transmission of obscene commercial telephone messages, but finding the ban unconstitutional as applied to indecent commercial telephone messages).
\textsuperscript{216} See *id.* at 119-23 (summarizing the FCC's responses to the mandate in the Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, §
ple, Congress, in the late 1980s or early 1990s, dealt with the "900" number issue. It required the telephone companies to try to take steps to encourage all the "900" telephone sex services to require their customers to use a credit card, or to have some kind of pre-subscription arrangement. There has always been a prohibition in the obscenity area and efforts to deal with it through telecommunications regulation, but I have not studied it in depth.

AUDIENCE MEMBER: I work for Teleport Communications Group, which has been mentioned here by members of the panel. I'd like to address the perception of local-exchange competition in New York raised by both David Bronston and Michael Nugent. I work for Teleport in the regulatory and External Affairs Department, and part of my job is to go out and get our Certificate of Service authorities which we have done in New York. Although New York is considered a pro-competitive state and its commission

8(b), 97 Stat. 1470, that the FCC promulgate regulations specifying how dial-a-porn sponsors could screen out underage callers).


218. Under the mandate of the Federal Communications Commission Authorization Act of 1983, the FCC attempted to promulgate regulations restricting minors' access to obscene and indecent commercial telephone communications (dial-a-porn). Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8, 97 Stat. 1467, 1469. The FCC first established as defenses time channeling and credit-card screening, but the time channeling provision was set aside as both underinclusive and overinclusive. See Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) ("Carlin I"). The FCC next provided for defenses of credit card screening and access codes, but rejected a proposal for customer premises blocking; due to the FCC's failure to consider the blocking proposal adequately. See Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) ("Carlin II"). Finally, the FCC proposed defenses for credit card screening, access codes, and message scrambling, again rejecting the blocking proposal; the court accepted these proposals but declared the statute unconstitutional as applied to indecent speech. See Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.), cert. denied, 488 U.S. 924 (1988). Congress almost immediately amended 47 U.S.C. § 223(b) to prohibit all indecent and obscene commercial telephone communications to all people, regardless of age or willingness, however, it is this version of the Communications Act of 1934 that the Supreme Court found constitutional for obscene, but unconstitutional for indecent, commercial telephone communications, in Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

is pro-competitive, what we find in reality is that after we receive
our certificate, when we try to go out and negotiate interconnection
agreements and compensation issues, we find the negotiations get
dragged out and in many cases the deals are not economic for us.
Meanwhile, the incumbent local-exchange company is often going
out and negotiating very favorable long-term agreements with some
of the best businesses to tie them up for years to come. So when
we get through all the steps necessary to become a local-exchange
company, we find that it is tough for us actually to do business.
The 1996 Act does not seem to have a lot of teeth in terms of what
is going to be required in terms of these interconnection arrange-
ments.

MR. BRONSTON: We are going to see the state PSCs drafting
these interconnection requirements and that is going to be part of
your cudgel, but again, the main benefit is that the RBOCs will not
be permitted to get into the promised land of long-distance until
there is viable local competition available to Teleport or MFS, and
Time Warner becomes a fully-integrated provider.

MR. NUGENT: Just to echo your point, I think it took too
long for New York Telephone to negotiate interconnection arrange-
ments that resulted in real benefits for users. I always wondered
why there was not more focus on that. The PSCs are going to
have to be really vigilant and the deals are going to have to be
very transparent. The contracts are going to have to be filed with

220. Interconnection agreements are:
agreements between alternative-access companies and Bell operating companies
on collocation. The agreements let the alternative-access companies put their
equipment in or near the operating companies’ central offices. In effect, that
means the alternative-access companies can provide the same access to local
exchanges as the local operating companies. Such access . . . could signal the
beginning of the end for the Bell companies’ monopoly on local exchange
service.

Margie Semilof, Opening Up Local Access, COMM. WK., Mar. 4, 1991, at 26 (“So far,
one regional Bell holding company has struck a collocation agreement—NYNEX Corp.,
New York, which includes . . . New York Telephone Co.”); Anita Taff, NYNEX Agrees
to Collocate Alternative Carriers’ Gear, NETWORK WORLD, Dec. 10, 1990, at 2
(“NYNEX has been negotiating with Teleport for more than four years . . . on agreements
in New York alone. In May 1989, the New York Public Service Commission stepped in
and ordered NYNEX to work out interconnection agreements.”).
the FCC, as they are now, in a way that it can actually identify what sweetheart deals have been cut. Users just have to negotiate shorter deals. We have had a lot of pressure put on us to do long deals, but those decade-long deals or seven-year deals just do not make any sense in this day and age. I think the PSC is going to have to be really vigilant.

MS. BUSH: I want to reemphasize what David Bronston said: the legislation does give the BOCs incentive to encourage competition in their local market. Creation of such incentive was, I think, a very smart move on the part of Congress, because despite what Rich Devlin says, the BOCs really do want to get into the long-distance business, even though he says they’re not going to make any money. Long-distance is a high priority for the BOCs, as it should be. The BOCs, like the long-distance companies, know how to provide telecommunications services. It certainly makes more sense for the BOCs to extend their business in the direction of long-distance telephone service rather than branching out into cable or some other new areas, as some telephone companies have tried to do recently.

There is another place where Teleport and others will have an opportunity to have an impact on what the 1996 Act means. The FCC must conduct rulemaking proceedings to have to implement the competitive checklist. Because some issues in the competitive checklist will require further clarification by the FCC, there will be an opportunity for Teleport and others to lobby the FCC on these issues. The FCC will move on such issues fairly quickly since the BOCs, for one, have incentive to see these issues resolved in a timely fashion.

MR. NUGENT: I think we will see more interconnection between premises and the POPs without having to interconnect to the central offices. As I read the 1996 Act, it would be very difficult for the PSCs to limit such interconnection, even for termina-

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221. 1996 Act § 101(a), 110 Stat. at 63 (to be codified at 47 U.S.C. § 251(d)(1)) (requiring the FCC to complete all acts necessary to establish regulations implementing the interconnection section).

222. See supra notes 176-80 and accompanying text.
tion of public switched services. If AT&T were to buy MFS for provision of local-exchange service and termination or origination of long-distance service, I do not see a PSC being able to hobble or discourage that without paying some kind of penalty.

AUDIENCE MEMBER: Mr. Hirt, now that the divisions between cable and telephone and wireless are coming down through horizontal and vertical mergers, how will the DOJ define markets? Will the DOJ now have a different formula for determining the "relevant market" and "market power" factors?

MR. HIRT: As John Tyler said this morning, I am a Civil Division attorney, and I do not know how our Antitrust Division will look at market issues. That is as much as I can say.

AUDIENCE MEMBER: I am interested in the implications for average everyday Americans like myself. I was reading an article in The New York Times on Friday that mentioned that, although long-distance rates are expected to decrease, local rates will increase. Is that true, and why? I do not understand why local rates would actually increase instead of decrease.

MR. DEVLIN: I did not read the article, so I can't comment definitively on that. But this is the phenomenon that I talked about before—that is, residential rates are priced below cost for public policy purposes. Since the 1934 Act was passed, there has been a system of subsidies from long-distance to local service. Local business users actually subsidize local residential service as well. The public policy being advanced by the system of subsidies is to keep rates low enough to attract as many residential customers to the telephone system as possible.

When we change to a competitive environment, we introduce competition into areas that are providing the local-service subsidy. A great example is long-distance access charges. Long-distance

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223. 1996 Act § 101(a), 110 Stat. at 68 (to be codified at 47 U.S.C. § 252(e)(2)) (specifying limited grounds for rejection by the state commission).
224. See generally Edmund L. Andrews, Clinton Set to Sign Bill That Is Expected to Spur Competition, N.Y. TIMES, Feb. 2, 1996 ("consumer groups complained that the measure would lead to higher prices for telephone and cable customers").
carriers like Sprint pay a lot of that subsidy. If we can buy from somebody else, such as Teleport, that doesn’t have to pay that subsidy, then New York Telephone Company, from whom we would otherwise buy, will have to lower its access rates to stay competitive with companies like Teleport. It drives down the subsidy and ultimately forces local rates up. In the long term, the introduction of competition will cause prices to go down, but in the short term, some prices will go up.

MR. BRONSTON: I agree with what Rich Devlin says: maybe it is supposed to be a short-term anomaly. Any threat to universal service is a very serious threat that could divide us into information haves and have-nots, so I would like to see some protection for universal service. Maybe it can’t be in the form of a subsidy—we’ll see about this universal service fund with the joint federal/state board—but there has to be some protection for universal service.

MS. BUSH: I am more optimistic that the FCC will preserve universal service provisions. While I agree there is the possibility of confusion initially, as we saw when we first experienced competition in the long-distance arena, I think it will settle out fairly quickly. Much is dependent on what happens with universal service. If universal service is revamped to include very expensive services that are not widely used, then there will not be any choice but to increase telephone rates. If full two-way video wires are required into every home, it will cost money, and ultimately consumers will have to pay for it.

In implementing universal service, the FCC and the joint board have the opportunity to address this issue. Therefore, I am not completely pessimistic that this will have the long-term negative effects claimed by some. But I do think there will be some initial confusion in the marketplace.

MR. NUGENT: Does anyone see local measured rates coming in? In other words, instead of paying for local residential service on a monthly flat fee, that we start paying per minute of use? Does anyone see that as an alternative?

MS. BUSH: I do not know.
AUDIENCE MEMBER: My question is to Mr. Hirt. You had mentioned, in response to Mr. Joffe's argument regarding gatekeepers and bottlenecking,\textsuperscript{226} that these roles will be maintained but will change from a statutory framework to a regulatory framework.\textsuperscript{227} Considering that this is a change to a more private framework, I'd like to know what you feel will be the First Amendment implications for the ordinary citizen.

MR. HIRT: If we go back to John Tyler's analogy,\textsuperscript{228} the problem of the telephone companies becoming cable operators in their own regions under this statute is the same issue that has been raised in the "must-carry" context.\textsuperscript{229} The government's position in defense of "must-carry" was that, if, by virtue of structure or regulation or whatever past events, there was basically one choice for entertainment, news, or other service,\textsuperscript{230} that provider in a sense had been the cable operator, and was required to carry certain offerings by competitors. Now the telephone companies are going to say, we want to enter this field, and everybody will have the choice of "two wires." I think one of the long-term debates is, will residential customers pick one wire for all of their services?

The government's position, reflecting the past statutes, has been that where you have the carrier also providing the content, in which it has an ownership interest and an operational interest, the carrier is going to identify with that programming. Just as Time Warner has an ownership interest in programmers, we understand, from the litigation on the former cross-ownership rule, that the Bell Companies want to be programmers, too. They said, we do not simply want to make money carrying other people's programs, we want to produce our own programs. In the media there have been various reports about the Bell Companies going to Hollywood and

\textsuperscript{226} See Panel I, supra note 146 (remarks of Robert Joffe).
\textsuperscript{227} See supra remarks of Theodore Hirt.
\textsuperscript{228} See Panel I, supra note 146 (remarks of John Tyler).
\textsuperscript{230} 47 U.S.C. § 534 (Carriage of Local Commercial Television Signals), § 535 (Carriage of Noncommercial Educational Television).
talking about independent creation of entertainment.

I am not saying there should not be entertainment brought to you by the Bell Companies. That’s not the point. The point is, just as in the cable context, if the economics are going to be one wire to the home, and you have the Bell Telephone Hour, you may not only have the Bell Telephone Hour but you will also have the Bell Telephone News Program, the Bell Telephone Movie Channel . . . you can see where I’m going with that.

The bottom-line issue is still unsettled—will the First Amendment be advanced or not advanced by this type of competitive structure? Clearly, Congress felt that a competitive marketplace was paramount, and yet, as I read to you from section 257,231 Congress clearly wants to preserve or enhance the number of media voices. The problem is, will any of these new competitive structures get us there?

To give you another example, when the FCC has to deal on an administrative level with a programmer complaining that the NYNEX cable system will not carry programmer’s material, if I understand the legislation right, the FCC will have to inquire whether NYNEX was making a business decision not to carry this programmer, or did NYNEX want to favor some programming that it created “in-house” or through a subsidiary?

So the FCC will be the “gatekeeper” on a case-by-case basis for these instances of alleged discrimination. I am not trying to be the “prophet of doom and gloom”—maybe everything will work out fine, and NYNEX will come in and compete with Time Warner, and they’ll all give everybody diverse programming choices, and we, the consumers, the cable subscribers, will be in great shape.

But, we argued in the C & P232 case, these were the concerns that motivated Congress to keep the cross-ownership rule in effect. Now Congress has decided to let this other mechanism work, so we will have to see if it will work or not.

MS. BUSH: I think many would agree that if we could start all over again with cable, cable would be a common carrier service. Congress would have separated the ownership of the programming from that of the wire. There would then be no debate on whether you should have two wires into the home or one, because it would not matter. Somebody would provide the wire and then lease capacity, as the telephone companies now do with some success. The debate of vertical integration would be moot.

But Congress didn't do that. Those of us that thought that cable should have been regulated as a common carrier service were not around to suggest it at the time. If Congress knew then what we know now, Congress could have addressed it that way. The vertical integration and the access to programming provisions in the 1992 Act were basically an effort to remedy the problem associated with common control over both the programming and the distribution wire. These provisions have now been extended to vertically-integrated telephone companies that want to provide both programming and the wire into the home.

When we were working on the 1992 Act, the programming-access provisions were the most controversial and were what prevented a cable bill in 1990 or 1991. We were on the Senate floor ready to introduce a bill, and Senator Wirth stood up and said, "Up these program access provisions," and it brought the whole bill down.

Since enactment and FCC implementation of these provisions, there has hardly been a complaint or objection from anybody. They seem to be working, and they are no longer very controversial. I assume that the same thing will happen when they are implemented in the telephone arena.

AUDIENCE MEMBER: I am with Read & Laniado in Albany and I have a partial answer to Mr. Nugent's question. NYNEX, at

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least upstate, is packaging new local service deals, if you want to call it that, where the customer has a choice between all-inclusive local charges or per-minute charges. Whether you will see that in the New York metro area, I do not know. Mr. Bronston could probably explain some of the local concerns here that have basically restricted your local calling area to New York. But at least upstate, the sort of world you want to see is coming.

In answer to the student's question about how much her bill may change, I believe the current subsidy of the New York local telephone bill is in the neighborhood of $12 a month. Whether that is what your bill will change, no one knows, but for the state-wide average, that is the subsidy.

AUDIENCE MEMBER: I work at Teleport. My question is directed to Mr. Devlin. Would you say the requirements to be imposed on the RBOCs before they come into the long-distance market are strong enough to create meaningful competition in the market?

MR. DEVLIN: I do not think we know. It sure is a lot better than the House Bill that passed this summer.237 The House Bill only had a few competitive requirements. There was a requirement that there be one competitor someplace in the state on a facilities basis,238 and it could have been a niche competitor. There was also a competitive checklist.239 But there was no DOJ review,240 nor an FCC public interest review.241 So I think we are just going to see how it plays out. On the face of it, Sprint is pleased. We think that this piece of the legislation is fair.

238. Id. § 245(a)(2)(A). The requirement of a facilities-based competitor is included in the 1996 Act. 1996 Act § 151(a), 110 Stat. at 87 (to be codified at 47 U.S.C. § 271(c)(1)(A)).
241. The requirement of an FCC public interest review is included in the 1996 Act. Id. at § 151, 110 Stat. at 89 (to be codified at 47 U.S.C. § 271(d)(3)(C)).
AUDIENCE MEMBER: Going back to what Mr. Hirt mentioned concerning the C & P case—which is right now pending before the Supreme Court—is that ruling, if it comes out, going to be moot due to the new legislation? My second question is this: as you know, both Bell Atlantic and NYNEX bought CAI Wireless; how much of CAI Wireless will have to reach the markets before Bell Atlantic and NYNEX will be considered to have penetrated the cable marketplace for video programming?

MR. BRONSTON: I think the answer to the last part is 15 percent within a franchise area. New York City has essentially ten franchise areas. This is a question I am currently looking into. I think the only real effect, though, is that it ends rate regulation for that area.

MR. HIRT: On the first point, which is whether telephone company challenges to the cross-ownership statute, such as the C & P case, are moot: that is a decision the Solicitor General’s office is making or maybe has made. Certainly there could be a good argument made that there is not much point in litigating a statute that, as of tomorrow, is “off the books” and replaced by a whole new scheme. Therefore, I am sure we will find out the answer to that fairly soon.

AUDIENCE MEMBER: I do not fully understand what the role of the DOJ will be when a BOC claims to have fulfilled the requirements of the 1996 Act and goes to the FCC, and the FCC

242. See supra text accompanying note 232.

243. Subsequent to this symposium, on Feb. 27, 1996, the Supreme Court vacated the judgment and remanded to the United States Court of Appeals for the Fourth Circuit for consideration of the question of mootness. Chesapeake & Potomac Tel. Co. of Va. v. United States, 64 U.S.L.W. 4115 (1996).


245. The franchise areas are Northern Manhattan, Southern Manhattan, the Bronx, Western Brooklyn, Eastern Brooklyn, Southeast Queens, Western Queens, Northeast Queens, Northern Staten Island, and Southern Staten Island.

defers to the DOJ. What type of parameters or standards is the DOJ going to use? How will the DOJ respond to that type of request by the FCC?

MR. HIRT: Again, I am not from the Antitrust Division. All I can say is to second what Rich Devlin said about the terms of the 1996 Act. The statute, if I read it correctly in the Conference Report, says the FCC shall give substantial weight to the Attorney General's view and that the Attorney General has flexibility in whatever standards are to be applied to this situation. But I cannot tell you how our Antitrust Division will look at it. As Rich Devlin has pointed out, there is certainly a role for the Attorney General in looking at what the FCC proposes.

MR. DEVLIN: If I may provide a little historical perspective for that particular phrase in the legislation. In prior iterations of this bill, starting in 1992, the legislation purported to describe a standard that the DOJ would have to impose. For example, one standard was "no substantial possibility that the Bell Operating Company could impede competition in the market it seeks to enter." Through the legislative process, different formulations were proposed, some which made absolutely no sense at all from an antitrust standpoint. So Anne Bingaman and President Clinton and Vice-President Gore argued strongly that the DOJ review must be independent and Congress should not prescribe specifically how it should be done.

DR. PHELAN: If there are no other questions on this point, let me just throw something out to the panel that is a little more general. What concerns me when I see this new law is, what is the presupposition or the unstated assumption behind the formulation and direction of the law? Whatever litigation may occur in the future, what are the unstated assumptions about the public? Is the public conceived of as a group of individual consumers who are

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248. Id.
basically passive people, who are going to just negotiate a price for an already-determined product, that itself will be determined by market research of some kind? Is this bill divorced completely from notions that have been enshrined in earlier law with regard to public interest and diversity, for instance?

I raise this question because the Market Model seems to be so congenial to the Transportation Model I referred to when we began. The Market Model is concerned with rates, sales, and things of that type. The diversity referred to here is the diversity of source. In other words, if I say exactly what Mike Nugent says, but I am a different guy from Mike Nugent, then according to this way of looking at things, that is "diverse"—even though we may be saying the same thing.

Look at what happened in the development of broadcasting, for instance. In the news business, there are competitors. There are very strong competitors. But it does not create the diversity that we normally would think of in terms of the marketplace of ideas. What happens is you have a convergence of the same kinds of news, so you have the perennial Time/Newsweek covers that reflect one another. You have the three networks going after the same type of audience. The only diversity you have is in the so-called "niche" market.

There is a recently-published book by a professor named Lance Bennett, called The Governing Crisis. He says in this book that the tremendous use of marketing methods in elections has fragmented the electorate. Whereas before, for good or for ill, candidates would try to present some sort of unifying vision to gather together a following and thus be elected, now, with the new marketing methods, there is an attempt deliberately to divide the electorate and to accentuate the differences that already exist, in

251. Id. at 16-19, 32-33 (arguing that changes in campaign financing systems, systemic marketing of campaign dates, and perfection of techniques for controlling the news media have contributed to a decline in governing standards).
252. Id.
order to gain a crucial marketing niche for a winning vote.\textsuperscript{253}

He does a very impressive and convincing analysis, which indicates that something like three percent of the people eligible to vote are very crucial in the determination of a national election.\textsuperscript{254} The people who do market research know who those three percent are and spend a lot of time trying to get that three percent.

The reason I mention it is, it would seem that the notion of competition, the notion of a lot more players, in terms of the transportation model, makes sense. But if you also look at communications as a vehicle for democratic discourse, I do not think it makes sense, just as I do not think marketing makes sense in health care. So I tend to see the diversity question in the marketing model in the same way you would look upon managed competition and HMOs. I think it has had a bad effect on medicine, and I think the same methods will have a bad effect on public debate as carried on in our channels of communication. I realize there are a lot of little spurts and hooks on what I just said. David Bronston, do you have a reaction?

MR. BRONSTON: I think there is a threat to diversity in consolidation. An example that is often brought up is when the long-distance coalition wanted to run ads on CNN against this legislation, and the powers that be at CNN and Time Warner, which has a controlling stake in CNN and Turner Broadcasting, decided, “No, we want this legislation and therefore we are not going to run these ads.” So I think we have to be very vigilant about the threats to diversity posed by the potential consolidations and vertical integrations.

DR. PHELAN: Ms. Bush, you said earlier, if I remember correctly, that one of the reasons this legislation went through a little faster than some people thought it would, was that there was not a tremendous amount of consumer interest compared to the interest shown about some other pieces of legislation. I wonder if there is some kind of connection between the so-called lack of consumer

\textsuperscript{253} Id.
\textsuperscript{254} Id.
interest and the lack of major-media coverage of the details of the bill. It really was not covered, just as campaign finance reform is certainly not covered that much in the media, because it seems to be against the interest of the people who are supposed to report on it. Do you have any comment on that?

MS. BUSH: I do not think it is that simple. People would like to say the media didn't really cover the 1996 Act, or didn't cover it in enough detail or present it in a way that people were likely to understand. Based on my experience, there was more media coverage of the 1992 Act, although the coverage came toward the end of the legislative process. There was an intense media blitz by the broadcasters supporting the 1996 Act and the cable industry opposing the Act. It was interesting, because obviously both groups controlled access to people's homes.

I was working for Senator Hollings\textsuperscript{255} when the 1992 Act was in its infancy, and what got the 1992 Act moving—because there really was not an interest on the part of many elected officials to do a new cable bill since they had just completed the 1984 Act, and the bill that became the 1992 Act started in 1987 or 1988—was that he did a 46 county tour of South Carolina. In one year he visited every county in his state. He was prepared to talk about issues such as the budget and foreign affairs, but every place he went, people wanted to talk about cable. The city officials, the county officials, and constituents were concerned about their cable rates. That grass-roots concern is what got the cable legislation moving. The 1996 Act did not present that same dynamic. People are fairly happy with their telephone service. You do not hear local officials saying that their constituents are calling with complaints about their telephone bills. So, while there may have been an absence of media coverage, in part the lack of consumer interest in the 1996 Act was because people are not really concerned about the telephone industry: they think their telephone service is fine. The emergence of competition into the local telephone marketplace

\textsuperscript{255} Senator Ernest F. "Fritz" Hollings (D. S.C.), then-Chairman of the Senate Commerce, Science and Transportation Committee and now the Ranking Minority Member on that committee.
is an abstract concept. In contrast, when the 1992 Act was pending, many consumers had just experienced significant cable rate increases. Some consumers saw their cable bills double from one week to the next, and so consumers had a really strong feeling about the cable industry.

The cable industry, unfortunately, is still subject to those strong feelings. Most people do not have many positive things to say about their cable operator, but that is not the case with the telephone industry. Indeed, I do believe that the public opinion about the cable industry is why significant changes in the cable provisions were not part of the 1996 Act. Cable rate regulation does end in three years. Originally Congress had proposed elimination of rate regulation sooner, but I think the Congress got nervous. Members were concerned that, if they did phase out rate regulation, and rates went up again, constituents would express their anger through their vote.

DR. PHELAN: I think we are going to let Toni Bush have the last word on this. I want to thank the panel. I really learned a lot from this afternoon and the questions were extremely provocative. Thank you for joining us today.