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Missed Connections: One Failed Attempt to Ease Restrictions on Bell Operating Companies

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Missed Connections: One Failed Attempt to Ease Restrictions on Bell Operating Companies

Jeffrey Walker*

INTRODUCTION	440
I. REGULATION OF LOCAL TELEPHONE COMPANIES SINCE DIVESTITURE OF AT&T	441
A. <i>Effect of the Modification of Final Judgment</i>	442
B. <i>Attempts to Lift Restrictions on BOCs</i>	443
II. BENEFITS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY	444
A. <i>Market Share</i>	445
B. <i>Infrastructure Development</i>	445
C. <i>Keeping Costs Low</i>	446
D. <i>Furthering Public Policy</i>	446
III. H.R. 3626: A PROPOSAL TO LIFT MFJ RESTRICTIONS	447
A. <i>Time Frame for Review</i>	448
B. <i>Standards for Review</i>	448
C. <i>Reaction to the Bill</i>	449
IV. BENEFITS OF EASING INTEREXCHANGE RESTRICTIONS ON LOCAL EXCHANGE COMPANIES	450
A. <i>Local Exchange Is Becoming More Competitive</i>	451
B. <i>BOCs Should Protect Their Financial Position</i>	452
C. <i>Eased Restrictions Would Facilitate Agency Review</i>	453
D. <i>Reform Would Allow BOCs to Contribute to Infrastructure Development</i>	453
E. <i>Competitive Concerns Are Protected</i>	454
CONCLUSION	454

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INTRODUCTION

The American public is being tantalized by the promise of being able to use the television to call up movies and other forms of entertainment on demand in the near future. Through the television, the consumer will also be able to access a spectrum of on-line information or benefit from consumer services, all without ever leaving home.¹ Government officials have heralded communications advances as an opportunity to foster economic development, create jobs, improve health care, advance educational goals, and enhance quality of life.² Businesses are scrambling to diversify and merge with communications entities to secure a share in the developing multimedia market.³

Everyone seems to want a piece of the evolving information superhighway, but many observers wonder what part competition will play in the new communications structure. Many critics already disagree on what role government should play in promoting and regulating competition among developing and expanding telecommunications industries.⁴ President Bill Clinton's administration has pushed for legislation to ease regulations which currently restrict telecommunications-service providers, allowing them to participate in further development of an information superhighway.⁵

Technological advances and changes in the marketplace, coupled with an outdated regulatory scheme based on restrictions laid down with the divestiture of AT&T, are hindering local telephone companies' opportuni-

1. See generally Joshua Quittner, *Online to a Revolution*, NEWSDAY, July 18, 1993, at 4; Jolie Solomon, *Big Brother's Holding Company*, NEWSWEEK, Oct. 25, 1993, at 38; *The New Communications Era*, S.F. CHRON., Oct. 14, 1993, at B1; Mortimer B. Zuckerman, *Welcome to Communicopia*, U.S. NEWS & WORLD REP., Nov. 1, 1993, at 116.

2. See NATIONAL TELECOMM. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, THE NTIA INFRASTRUCTURE REPORT: TELECOMMUNICATIONS IN THE AGE OF INFORMATION 34 (1991) [hereinafter INFRASTRUCTURE REPORT].

3. Kent Gibbons, *A War on Hold: Newspapers, Phone Companies Edge Closer to Info-Truce*, WASH. TIMES, June 6, 1993, at A12; William Glaberson, *The Baby Bells Are Finding an Unlikely Ally in the Information-Services War: Newspapers*, N.Y. TIMES, July 5, 1993, § 1, at 41. For a detailed discussion of recent mergers and alliances, see Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39 (1993).

4. See Ronald E. Yates, *Regulation Clogs Information Superhighway*, CHI. TRIB., Jan. 3, 1994, § 4, at 1.

5. National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49,025 (1993) [hereinafter Agenda for Action]. Agenda for Action describes the administration's intended role for government in promoting and developing a telecommunications and information infrastructure. See also Debra Gersh Hernandez, *Telecommunications and the Clinton Administration*, EDITOR & PUBLISHER, Jan. 15, 1994, at 11.

ties to participate in the telecommunications revolution and compete with other communication-service providers. Lifting regulations will help ensure that local telephone-service providers can competitively participate in advances and remain market players. One piece of legislation overwhelmingly passed by the House of Representatives in the 103d Congress, House Bill 3626, would have eased such restrictions on local telephone companies.⁶

Part I of this Note will review how local telephone companies have been regulated since the AT&T divestiture and subsequent judicial actions. Part II will discuss the advantages of a competitive communications marketplace. Part III will examine House Bill 3626 (the Antitrust Reform Act of 1993), which would gradually lift regulations that currently prevent local telephone-service providers from competing in many communications markets. Part IV will look at the benefits of allowing local telephone companies to compete free of current restrictions. This Note concludes that enactment of House Bill 3626 or a significantly similar measure in the next Congress would further the development of the national telecommunications infrastructure, benefit consumers, and allow Bell Operating Companies to protect their business interests by expanding into developing markets.

I. REGULATION OF LOCAL TELEPHONE COMPANIES SINCE DIVESTITURE OF AT&T

Many analysts mark the AT&T divestiture as the beginning of the current telecommunications revolution. According to telecommunications analyst Blake Bath, "The divestiture has to get a lot of credit for creating the pre-eminent telecommunications market in the world."⁷ The Supreme Court has recognized the "revolution in telecommunications occasioned by the federal policy of increasing competition in the industry."⁸ Therefore, any examination of current local and long-distance telephone service regulation must start with at least a surface understanding of the divestiture of AT&T.⁹

6. H.R. 3626, 103d Cong., 1st Ses. (1993); see William J. Eaton & Leslie Helm, *House Rewrites Phone, Cable Rules*, L.A. TIMES, June 29, 1994, at A1; Carolyn Lochhead, *Historic Reform of Telephone, Cable OK'd; House Votes by Landslide to Boost Telecommunications Competition*, S.F. CHRON., June 29, 1994, at A1; *Vote Shows Wide Support*, COMM. DAILY, June 29, 1994, at 1.

7. Paul Carranza & Colleen M. McElroy, *A Decade of Revolution in Telecommunications; Breakup of AT&T Brought Lower Prices, New Services, Vast Potential*, BUFF. NEWS, Jan. 1, 1994, at A13.

8. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 358 (1986).

9. For more detailed sources concerning the history of the divestiture action, see generally STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986);

A. *Effect of the Modification of Final Judgment*

In *United States v. AT&T*, the United States District Court for the District of Columbia (decree court) ended an antitrust action suit brought by the Department of Justice against AT&T, Western Electric, and Bell Telephone Laboratories by approving a consent decree reached by the parties.¹⁰ The consent decree mandated the divestiture of AT&T and the reorganization of local telephone service into Regional Bell Operating Companies (BOCs or Baby Bells) which oversee local operating companies.¹¹ This decision and subsequent actions have become commonly known as the Modification of Final Judgment (MFJ).¹² Before the breakup, AT&T, which had built a nationwide telecommunications network as a regulated monopoly, was restricted to offering common carrier telephone services.¹³ In *AT&T*, the court found that divestiture was necessary because AT&T had used its monopoly control over local markets to preclude competition in those markets.¹⁴

The MFJ granted a monopoly over local service areas to the newly-formed operating companies, provided they gave equal access to all telephone service carriers, especially AT&T's competitors.¹⁵ Other terms of the MFJ imposed line-of-business restrictions, which limited the range of services the Baby Bells could provide, specifically prohibiting the operating companies from engaging in "(1) the provision of interexchange [or *interLATA*] services;¹⁶ (2) the provision of information services; (3) the manufacture of telecommunications products and customer premises equipment; (4) the marketing of such equipment and (5) directory advertising."¹⁷ The court justified the restrictions as necessary to prevent

PETER TEMIN, *THE FALL OF THE BELL SYSTEM* (1987).

10. *AT&T*, 552 F. Supp. 131, 178-79 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

11. *Id.* at 141. Seven BOCs manage the individual local telephone systems. The regional companies and their geographical areas include: NYNEX Corp. (New York and New England), Bell Atlantic Corp. (Mid-Atlantic), BellSouth Corp. (South), Ameritech (Midwest), Southwestern Bell Corp. (Southwest), and PacTel (California and Nevada).

12. Richard A. Hindman, *The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies*, 38 CATH. U. L. REV. 471, 472 n.3 (1989).

13. *Id.* at 497. A common carrier "means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. §153(h) (1988).

14. *AT&T*, 552 F. Supp. at 161-62.

15. *Id.* at 142-43, 227.

16. To avoid confusion, the court adopted the term LATA, or "local access transport area," in place of "exchange" when referring to the MFJ.

17. *AT&T*, 552 F. Supp. at 186 (footnote added).

the newly formed operating companies from subsidizing prices in competitive markets with profits earned in monopoly markets and from hindering competitors by restricting access.¹⁸

The judgment included a provision for removing restrictions on the BOCs “upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter,”¹⁹ putting a substantial burden of proof on the BOC. The decision also included a provision for judicial review of the MFJ by the decree court every three years to consider lifting restrictions on BOCs.²⁰

The AT&T reorganization plan divided the country into 164 exchange areas, or LATAs.²¹ Each local operating company includes several LATAs, but is only allowed to provide transmissions within a single LATA, providing what is commonly known as local telephone service.²² Local telephone companies derive their revenue by providing *intra*LATA services.²³ When a call is placed from one LATA to another, even if it is within the same BOC region, the call must be transmitted to an inter-exchange carrier, such as AT&T or one of its long-distance competitors, and be transmitted across LATA boundaries and picked up by the BOC serving that LATA.²⁴ Thus, the MFJ prevents Baby Bells from offering any interexchange transmissions across LATA boundaries—whether it is a telephone conversation or a stream of information—even within their own region.

B. Attempts to Lift Restrictions on BOCs

In 1987, as part of the first three-year review of the MFJ, the Department of Justice recommended that the court modify the *inter*LATA services restriction and remove other line-of-business restrictions. “[S]ubsequent technological, economic and regulatory changes have sufficiently reduced the competitive danger of BOC entry into any of these fields,” said one report at the time.²⁵ The court maintained manufacturing

18. *Id.* at 187.

19. *Id.* at 231.

20. *Id.* at 195.

21. Christy Cornell Kunin, *Unilateral Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907, 917 (1993).

22. *United States v. Western Elec. Co.*, 569 F. Supp. 990, 994-95 (D.D.C. 1983).

23. Kunin, *supra* note 21, at 917.

24. *Id.*

25. *See* Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment at 6-7, *United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987)

and *interLATA* restrictions, but lifted the catch-all restriction and modified the information-services ban.²⁶ The court of appeals reversed the decision to remove the information-services restriction, and maintained that the decree court should have analyzed the recommendation under a "public interest" standard implicit in Section VII of the decree,²⁷ rather than under the monopoly power test detailed in Section VIII(C).²⁸ In July 1991, the decree court issued an order staying the information-services ban, pending appeal.²⁹ The court of appeals affirmed the modification lifting the ban, explaining that the public interest standard included "probable effects of competition within the relevant market."³⁰

The *AT&T* case and subsequent reviews, appeals, and modifications have created a mishmash of opinions, regulations, and standards for review. A search of the appellate history of the original case outlining the MFJ restrictions yields more than 100 subsequent actions. Trying to make any sense of current telecommunications and telephone service policy from these scattered sources is burdensome, if not impossible.

At present, BOCs are free to offer information services, but it is unclear whether they can transport those services across LATA lines. The bans on manufacturing and offering long-distance services still stand, with little clarity on which standards should be used to decide whether to lift these restrictions. For now, BOCs want a modification allowing them to seek entry into a new market. But they must wait for the next triennial review and then make their case for lifting a restriction.

II. BENEFITS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

There seems to be agreement that, for most industries, competition in some form is good for consumers and for furthering public policy.³¹ The telecommunications industry is no different. Analysis of the effects of the *AT&T* divestiture shows that allowing BOCs to compete in telecommunications markets will help prevent any one entity from controlling too much

(No. 81-0192), *aff'd in part and rev'd and remanded in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied sub nom.*, *MCI Comm. Corp. v. United States*, 498 U.S. 911 (1990).

26. *Id.* at 540-562.

27. *United States v. AT&T*, 552 F. Supp. 131, 186 (D.D.C. 1982) (describing the "public interest" standard applied by the court), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

28. *See id.* at 231.

29. *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991).

30. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1579 (D.C. Cir. 1993).

31. *See TEMIN*, *supra* note 9, at 344.

of the market share, keep costs for communications services low, spur technological innovations, and further public policy.

A. Market Share

Competition helps prevent any one service from holding too much power over the telecommunications market. Immediately after divestiture in 1985, AT&T enjoyed 80 percent of the market share for long-distance services.³² Eight years later, AT&T's share had dropped to 60 percent due to competition by some 400 competing interexchange carriers.³³ The number of carriers serving more than forty-five states has grown from only two to nine.³⁴

As Baby Bells enter other markets, they bring additional competition to existing industries as the national information network is constructed. "[P]romoting competition . . . will prevent the kind of single-behemoth providers that the regulators are concerned about," says Suzanne Tichenor, a vice president of the Washington-based Council on Competitiveness.³⁵

B. Infrastructure Development

Whatever the effects of the AT&T divestiture, the long-distance service market has grown under a competitive scheme, in both financial and technical terms. The total long-distance market has grown from \$38.8 billion in 1984 to \$59.4 billion in 1993.³⁶ Increased competition and rapid technological advances have forced AT&T to become more responsive to consumer demands.³⁷ Before the break-up, AT&T had little incentive to introduce products invented by its research division.³⁸ In 1985, for example, AT&T decided not to build a nationwide fiber-optic system. A competitor, Sprint, soon started running advertisements highlighting the clarity of Sprint's fiber-optic lines. Within a month, AT&T reevaluated its decision and, today, its fiber-optic network has grown from several hundred

32. *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 184 (1994) [hereinafter Hundt testimony] (testimony of Reed Hundt, Chairman, FCC).

33. *Id.* Other major long-distance service providers include MCI, with a 20% share of the market, and Sprint, which holds a 10% share. *See also Carranza & McElroy, supra* note 7, at A13.

34. Hundt testimony, *supra* note 32, at 184.

35. Yates, *supra* note 4, § 4, at 1.

36. Hundt testimony, *supra* note 32, at 193.

37. Carranza & McElroy, *supra* note 7, at A13.

38. Aaron Zitner, *10 Years Later, Bell's Breakup Impact Grows*, BOSTON GLOBE, Dec. 27, 1993, at 38.

miles to more than 35,000 miles.³⁹ The variety of equipment and services available to customers has dramatically expanded since deregulation.⁴⁰ Many analysts cite the divestiture's effect on AT&T as an indication that more competition among all telecommunications providers will eventually lead to even better service and more innovations for consumers.⁴¹

C. *Keeping Costs Low*

The common wisdom is that extensive regulation keeps telephone rates low.⁴² Yet, long-distance telephone rates have decreased by approximately 50 percent in real dollars since divestiture.⁴³ Before divestiture, the price of a ten-minute daytime call from Chicago to Atlanta, in 1993 dollars, was \$6.28; after increased competition, the same call costs only \$2.30.⁴⁴ These decreased costs to consumers occurred while the total long-distance market grew from \$38.8 billion in 1984 to \$59.4 billion in 1992 and while total traffic volume grew from 167 billion minutes to 212 billion minutes.⁴⁵ Increased competition in other telecommunications markets can be expected to achieve the same positive results as long-distance competition for all parties.⁴⁶ BOC-backed studies say competition in the long-distance market could save consumers \$30 billion in phone rates over a decade.⁴⁷

D. *Furthering Public Policy*

The Clinton administration has made the development of the National Information Infrastructure (NII) to provide widespread telecommunications services a top priority.⁴⁸ The administration has proposed administrative and legislative reform of telecommunications policy based on the following

39. *Id.*

40. *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 145 (1994) [hereinafter Irving testimony] (testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Dep't of Commerce).

41. Guy Halverson, *Callers Win From Leaps in Telephone Technology*, CHRISTIAN SCI. MONITOR, Jan. 7, 1994, at 9.

42. *Id.*

43. *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong. 2d Sess. 135 (1994) [hereinafter Bingaman testimony] (testimony of Anne K. Bingaman, Assis't Attorney General, Antitrust Div., U.S. Dep't of Commerce).

44. Hundt testimony, *supra* note 32, at 193-94.

45. *Id.* at 194.

46. *Id.*

47. Eaton & Helm, *supra* note 6, at A16.

48. Laurent Belsie, *Gore Supports Move to End Information Monopolies*, CHRISTIAN SCI. MONITOR, Dec. 23, 1993, at 9.

principles: (1) encouraging investment in the NII; (2) promoting and protecting competition; 3) providing open access to the NII by consumers and service providers; (4) ensuring universal service; and (5) ensuring a regulatory framework flexible enough to handle rapid market and technological changes within the telecommunications industry.⁴⁹

The administration has acknowledged that current regulations may harm consumers by impeding competition and discouraging investment in the NII. To promote growth of the NII, the administration has supported legislation that would eliminate burdensome regulations and increase competition both by companies already in the telecommunications market and those seeking entry.⁵⁰

III. H.R. 3626: A PROPOSAL TO LIFT MFJ RESTRICTIONS

On November 22, 1993, Rep. Jack Brooks (D-Tex.) and Rep. John Dingell (D-Mich.) introduced H.R. 3626 (Brooks-Dingell bill or Antitrust Reform Act) in the House of Representatives, a move to supersede the Modification of Final Judgment in *AT&T*.⁵¹ In introducing the bill, Rep. Dingell said enactment would allow Congress to "reclaim its rightful role in formulating telecommunications policy."⁵² The bill sets forth a series of incremental dates after which BOCs may petition the Attorney General and the FCC for permission to provide services restricted by MFJ provisions.⁵³

The Brooks-Dingell bill was not the only telecommunications legislation passed by the House of Representatives during the first session of 1993. House Telecommunication Subcommittee Chairman Ed Markey (D-Mass.) and Rep. Jack Fields (R-Tex.) sponsored House Bill 3636, which would have required that local phone companies allow competitors, such

49. Administration White Paper on Communications Act Reforms 1 (Jan. 27, 1994).

50. *Id.*

51. H.R. 3626, 103d Cong., 1st Sess. (1993). The bill has two titles. Title I, the Antitrust Reform Act of 1993, concerns the supersession of MFJ restrictions and is the subject of this Note. Title II, the Communications Reform Act of 1993, concerns the regulation of manufacturing, alarm services, and electronic publishing by BOCs.

52. 139 CONG. REC. H10,911 (daily ed. Nov. 23, 1993) (statement of Rep. Dingell).

53. H.R. 3626, 103d Cong., 1st Sess. (1993). Rep. Dingell was involved in earlier congressional efforts to lift MFJ restrictions. *See Dingell Joins Bipartisan Group in Endorsing Free-RHC Effort*, COMM. DAILY, July 15, 1988, at 4. One resolution suggested removing the line-of-business restrictions to promote development of a public transportation network and further public policy by improving the capacity of the United States to better compete in the global information and high technology marketplace. H.R. Con. Res. 339, 100th Cong., 2d Sess., 134 CONG. REC. E2412-13 (1988).

as cable companies, to have access to their telephone lines.⁵⁴ The Brooks-Dingell bill, by contrast, was focused on issues presented by MFJ restrictions.⁵⁵

A. Time Frame for Review

The Brooks-Dingell bill allows BOCs to request authorization to provide services in noncompetitive markets, offer interexchange telecommunications services incidental to another BOC service, and provide interstate, interexchange telecommunications services that originate and terminate within the BOC's service area immediately upon enactment.⁵⁶ The BOCs may request authorization to provide interexchange services by acquiring and reselling those services eighteen months after enactment.⁵⁷ Sixty months after enactment, the BOCs could ask permission to provide any interstate telecommunications services.⁵⁸

B. Standards for Review

Before a BOC could offer expanded services, the Attorney General and the FCC would publish an application for authorization in the *Federal Register* within ten days of receipt. Interested parties could then comment within forty-five days.⁵⁹ The bill requires the Attorney General and the FCC to consult with each other before issuing separate written determinations, based on clear and convincing evidence of their decision to grant, or not grant, interstate service.⁶⁰ The Attorney General is to approve applications only upon finding "that there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market such company seeks to enter."⁶¹ This is the standard currently used, at least in part, by the decree court.⁶²

The bill allows the FCC to approve the BOC's proposals to the extent that granting permission to enter new communications markets would be

54. H.R. 3636, 103d Cong., 1st Sess. (1993); see also Eaton & Helm, *supra* note 6, at A16.

55. *Brooks and Dingell Introduce MFJ Bill*, COMM. DAILY, Nov. 24, 1993, at 1.

56. H.R. 3626. The Department of Justice and the Federal Communications Commission (FCC or Commission) must establish criteria for evaluation within 180 days of enactment of the bill.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

consistent with public interest, convenience, and necessity.⁶³ In making such a determination, the FCC would consider whether approval would: (1) reduce rates in the market the BOC seeks to enter; (2) increase rates for exchange service; (3) further delivery of new products and services to consumers; (4) permit collusion between BOCs; (5) result in concentration among service providers to the detriment of consumers; and (6) whether regulations will preclude the applicant from engaging in coercive practices in the market that the applicant seeks to enter.⁶⁴ Authorization would be granted to the extent that the FCC and the Attorney General both approve.⁶⁵ The bill requires that final opinions must be published in the *Federal Register*, which would remain final unless vacated or reversed by judicial review.⁶⁶

Within forty-five days of a determination on the authorization request, the BOC or "any person who might be injured in its business or its property as a result of the determination" could institute a civil action in the Court of Appeals for the D.C. Circuit against the FCC or the Department of Justice for review of the determination.⁶⁷ The bill also includes a provision precluding a BOC with a monopoly in any exchange-service market from bundling services to lessen competition in any market.⁶⁸

C. *Reaction to the Bill*

The Clinton administration announced its support for the bill,⁶⁹ and urged Congress to enact it quickly and with few changes.⁷⁰ FCC Chairman Reed Hundt also endorsed the measure, saying, "[C]ompetition in this market can be expected to produce the same positive results for consumers that we have seen in other markets for telecommunications services that have undergone the transformation from monopoly to competition: technological and service innovation, lower prices, and responsiveness to consumer tastes."⁷¹

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* Bundling of services means to tie (directly or indirectly), in any relevant market, the sale of any product or service to the provision of any telecommunications service.

69. Joanne Kelley, *Clinton Endorses Choice for Phone, Cable Services*, CHI. SUN-TIMES, Jan. 27, 1994, at 46.

70. *White House Officials Urge Lawmakers to Make Few Changes to Competition Bills*, Daily Rep. for Executives (BNA), at A-18 (Jan. 28, 1994).

71. Hundt testimony, *supra* note 32, at 202.

Long-distance carriers lobbied against the effort and placed advertisements with the slogan "Tell the Bells to mind their own business" in newspapers and magazines.⁷² Several consumer groups also voiced concerns about whether the measure would adequately protect consumers from anticompetitive practices by BOCs.⁷³

The House of Representatives passed House Bill 3626 on June 28, 1994, by a lopsided vote of 423-5.⁷⁴ Assistant Secretary of Commerce Larry Irving said support for the bill "crossed every possible ideological and party line, indicating that it's pretty good legislation."⁷⁵

Telecommunications reform did not fare as well in the Senate. The Senate Commerce, Science, and Transportation Committee less enthusiastically approved a telecommunications reform bill (Senate Bill 1822), sponsored by Sen. Ernest Hollings (D-S.C.) on August 11, 1994.⁷⁶ The BOCs were displeased that the Senate bill set a higher standard for their entry into the long-distance market by requiring that they face substantial competition in their local telephone market before they can offer long-distance services.⁷⁷ Sen. Hollings pronounced the measure dead on September 24, saying opposition by the BOCs and other factors would have made it impossible to pass the bill before Congress adjourned.⁷⁸

IV. BENEFITS OF EASING INTEREXCHANGE RESTRICTIONS ON LOCAL EXCHANGE COMPANIES

Local telephone service has been described as a "natural monopoly" or an industry where "it is less costly for a single firm to serve the market than it is for two or more firms [to compete]."⁷⁹ Some observers have concluded that local telephone service is not a natural monopoly but a regulated one, and that government should remove the artificial legal barriers that perpetuate it.⁸⁰ In addition, technological changes now make

72. *Mind Your Own Business*, COMMUNICATIONSWEEK, Jan. 3, 1994, at 109, 109.

73. *Key Consumer Groups Opposing House Telco Measures*, NATIONAL JOURNAL'S CONGRESSDAILY, Dec. 7, 1993.

74. Lochhead, *supra* note 6, at A1.

75. *Id.*

76. S. 1822, 103d Cong., 2d Sess. (1994).

77. Aaron Zitner, *House Votes to End Cable, Phone Curbs*, BOSTON GLOBE, June 29, 1994, at 24.

78. Edmund L. Andrews, *Bill to Revamp Communications Dies in Congress*, N.Y. TIMES, Sept. 24, 1994, § 1, at 1.

79. INFRASTRUCTURE REPORT, *supra* note 2, at 268-69.

80. See JOHN T. WENDERS, THE ECONOMICS OF TELECOMMUNICATIONS 173 (1987); see also PETER W. HUBER, U.S. DEP'T OF JUSTICE, ANTITRUST DIV., THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY 2.23 (1987).

it desirable for local telephone companies to provide interexchange services not contemplated when the MFJ restrictions were put into place.

A. Local Exchange Is Becoming More Competitive

While BOCs currently hold virtually the entire market share for local-exchange services,⁸¹ technological advances are introducing formidable competition into these services. Capital costs to enter the local telephone service business would drop as telecommunications providers expand their operating bases after the bill is passed.⁸²

Most cable television companies are already installing fiber-optic transmission networks to enable their systems to carry new services, including high-definition television and computer linkages.⁸³ Such fiber-optic networks—which are capable of carrying voice transmissions—give cable companies an opportunity to offer *interLATA* competition, either by leasing facilities or by providing direct services.⁸⁴ Major cable companies, including TCI and Time Warner, have jointly invested in Teleport Communications Group, a communications provider that will let cable operators use their combined eighty million coaxial cables to offer local telephone service.⁸⁵ Other alternative local service providers have introduced fiber-optic systems in highly populated areas to create metropolitan area networks (MANs) intended to bypass Baby Bell local access systems.⁸⁶

Improving digital technology is enabling cellular phone systems to greatly expand their capacity, which will eventually allow them to offer local telephone services on a much larger scale.⁸⁷ Cellular telephone systems already have approximately fourteen million customers,⁸⁸ and industry estimates predict that number could grow to sixty million by the year 2000.⁸⁹ Development of a radio-based personal communications system (PCS), for which the federal government will auction two licenses,

81. Nancy Hass, *Betting on MCI? Don't Bury the Bells Just Yet*, NEWSWEEK, Jan. 17, 1994, at 38, 38.

82. SCOTT C. CLELAND, COMMVERGENCE V. REGULATION: COMMUNICATIONS SECTOR STRATEGIC AND POLITICAL FIVE-YEAR FORECAST 22 (1993).

83. See COMM. DAILY, Mar. 28, 1991, at 5.

84. INFRASTRUCTURE REPORT, *supra* note 2, at 264-65.

85. Leslie Helm, *Talk Is Cheap, and Now Bells' Future Is Rich*, L.A. TIMES, Dec. 25, 1993, at A1.

86. See Gail Garfield Schwartz & Jeffrey H. Hoagg, *Virtual Divestiture: Structural Reform of an RHC*, 44 FED. COMM. L.J. 285, 290 (1992).

87. *Id.* at 294.

88. Carranza & McElroy, *supra* note 7, at A13.

89. Peter Haynes, *The End of the Line*, ECONOMIST, Oct. 23, 1993, at 5.

will enlarge local telephone service competition even further.⁹⁰ Even current long-distance-service providers are investigating ways to move into the *interLATA* market. In January 1994, MCI announced plans to spend \$20 billion over a six-year period to develop an electronic information network that will include local exchange service.⁹¹ AT&T is the only long-distance provider prohibited by the MFJ from entering the local service market,⁹² leaving open the opportunity for entry in local telephone service by any other long-distance provider.

While local exchange service may not yet be completely competitive, it appears that technological advances will continue to draw business away from the Baby Bells' monopoly. BOCs have already lost up to half the revenues they once received from *intraLATA* service now carried by competitors.⁹³ House Bill 3626 contemplates the time when technological advances cause local service companies to lose their predominant share of the local exchange market and provides a mechanism for lifting regulations when that happens.

B. BOCs Should Protect Their Financial Position

Increased competition from alternative local service providers and regulated rate cuts have reduced the Baby Bells' average annual revenue growth to 2.6 percent in the last 4 years, compared with 6.5 percent from 1984 through 1988.⁹⁴ To finance expansion efforts, some local operating companies have cut payrolls.⁹⁵ Stephen Gutkowski of Moody's Investors Service says, "there is a concern that the Baby Bells' financial position could be impacted by the need to finance . . . [expansion] with debt capital."⁹⁶

90. INFRASTRUCTURE REPORT, *supra* note 2, at 264; CLELAND, *supra* note 82, at 27.

91. Martin Dickson, *Uncle Sam's Super-Highway: In a Rapidly Changing Market, the US Is Dismantling Telecommunications Regulations*, FIN. TIMES, Jan. 13, 1994, at 23; Hass, *supra* note 81, at 38. With a \$2 billion investment, MCI could effectively bypass local telephone systems in 20 of the country's largest markets and avoid access fees charged by local providers. See William J. Cook et al., *Fast Lane to the Future*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 56, 56.

92. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

93. *Phone-Cable Convergence Will Test Regulators' Political Courage*, State Telephone Reg. Rep. (BNA) No. 24, Dec. 2, 1993, available in LEXIS, Nexis Library, BNA File.

94. Cook et al., *supra* note 91, at 56.

95. From 1990 through 1992, Baby Bells eliminated 44,848 jobs. *Id.* One Baby Bell, NYNEX, plans to cut another 16,800 positions by the end of 1996. David Robinson, *Suddenly, 'Utility' No Longer Means 'Monopoly'*, BUFF. NEWS, Jan. 30, 1994, at D10.

96. Cook et al., *supra* note 91, at 57.

Lifting MFJ restrictions would allow BOCs to seek entry into potentially profitable markets as telecommunications technology develops. By doing so, they can realize a fair profit, which enables them to reinvest in research and development without paring employees or borrowing capital.

C. Eased Restrictions Would Facilitate Agency Review

Since the divestiture of AT&T, national telephone system policy has been under the exclusive control of the decree court, with Judge Harold H. Greene guiding decisions about how to interpret the MFJ. Congress never intended the decree court to usurp power over determining communications policy.⁹⁷ The Clinton administration wants "to create a stable regulatory environment" for telecommunications, not one subject to change by a new court ruling every three years.⁹⁸

The companies affected by the MFJ restrictions apparently would welcome freedom from court jurisdiction.⁹⁹ The reform called for in House Bill 3626 would, in the words of Assistant Attorney General Anne K. Bingaman, "move telecommunications policy out of the courtroom and into the hands of the two expert agencies charged with protecting the public interest in telecommunications [the FCC] and competition [the Department of Justice]."¹⁰⁰ The bill would also allow a more consolidated and timely approach for handling rapidly changing market conditions. The review process set forth in House Bill 3626 ensures that regulations would preclude local exchange companies from improperly entering restricted markets. Because BOCs will not have to wait out a judicial review process, they will not be excluded from evolving telecommunications opportunities any longer than is beneficial or necessary.

D. Reform Would Allow BOCs to Contribute to Infrastructure Development

The Administration maintains that the NII should be developed by the private sector and driven by increased competition following eased government regulations. The BOCs are uniquely suited to contribute to this development. The local telephone companies have already built an infrastructure that reaches into nearly every home in the United States. By

97. See CLELAND, *supra* note 82, at 18.

98. See Dennis Wharton, *FCC to Extend Freeze on Rate Increases*, VARIETY, Nov. 22, 1993, at 27.

99. Robert D. Hershey, Jr., *2 in House Want to Free Baby Bells*, N.Y. TIMES, Nov. 24, 1993, at D1.

100. Bingaman testimony, *supra* note 43, at 142.

gaining the ability to compete in other markets, Baby Bells could eventually reduce the total costs of constructing the NII by building on the existing infrastructure.¹⁰¹ Preventing telephone companies from cooperating or competing with other NII participants could slow the process of building a system.

E. Competitive Concerns Are Protected

In upholding the lower court ruling allowing BOCs to own information services, the Court of Appeals for the D.C. Circuit noted the types of companies against which Baby Bells would compete. "They include GE, AT&T, . . . IBM, and Sears with their Prodigy service, Merrill-Lynch, ITT, Mead Corporation, American Express, Citicorp, Chase Manhattan Bank, and a variety of foreign and independent telephone companies. . . . These firms are not pushovers."¹⁰² When entering any new telecommunications market, Baby Bells are going to have to compete with large, well-financed corporations. The likelihood that a BOC could drive such a competitor out of the market is slim.

In addition, the Brooks-Dingell bill would have adequately protected competitive concerns by setting forth standards for review. The Attorney General is charged with approving only those applications where there is "no substantial possibility 'the BOC' could use monopoly power to impede competition."¹⁰³ Any party who, as a result of the ruling, suffers an injury to its business or property, has an opportunity for judicial review.¹⁰⁴ By including such safeguards, the Brooks-Dingell bill ensures that BOCs cannot enter markets where they would have an opportunity to use their local telephone monopoly to a detrimental, anticompetitive effect.

CONCLUSION

Provisions in House Bill 3626 to lift MFJ restrictions on BOCs would have allowed local telephone companies to effectively compete in the growing telecommunications industry without compromising concerns about protecting American consumers from anticompetitive behavior. Enactment of a similar measure in the next Congress would further the development of the NII and increase competition for communications services, resulting in lower prices and better service for consumers.

101. Daniel Brenner, *Telephone Company Entry Into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 98 (1991).

102. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993).

103. H.R. 3626, 103d Cong., 1st Sess. (1993).

104. *Id.*

House Bill 3626 would have given the FCC and the Attorney General the power to review any authorizations for antitrust and public policy concerns, fully empowering them to deny authorization to requests that do not satisfy these standards. Further, the bill would have taken control of telecommunications policy away from the decree court's triennial review and appeal process, and replaced it with a more efficient and immediate review by agencies qualified to consider antitrust and communications policy issues. Congress should use House Bill 3626 as a model when proposing telecommunications reform legislation in the next session.

