ESSAY

Antitrust and Communications: Changes After the Telecommunications Act of 1996

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Introduction

Congress' enactment of the Telecommunications Act of 1996[(2)] (`96 Act) was the culmination of twenty-five years of debate over the regulation of communications common carriers and the replacement of much of that regulation with competition. The replacement of regulation with competition actually began in 1968 with the Federal Communications Commission's decision in the *Carterfone* case.[(3)] Prior to *Carterfone*, regulated monopoly was the umbrella under which telephone common carriers operated.

I.The History of Competition in Telecommunications

The Telecommunications Act of 1996 marks a return to the type of competition that prevailed among telephone companies in the early part of the twentieth century. Local exchange telephone companies competed vigorously, with numerous companies offering service in a single city, without regulation of interconnection. In fact, there was little interconnection.[(4)] Telephony came to be viewed as an essential service so that by 1913, states began to regulate the telephone common carriers through the public utility commissions.[(5)] The state commissions were given authority to grant monopoly status to telephone common carriers and eliminate competition. They also had the power to order the telephone carriers to interconnect and to regulate their prices. Competition in telephony disappeared while state commissions controlled entry.

In 1934, Congress adopted the Communications Act (`34 Act)[(6)] which created the Federal Communications Commission (FCC or Commission) and commenced regulation of interstate telecommunications activities and companies. The `34 Act gave the FCC power to control entry, regulate prices, and take whatever action was in the public interest including approving mergers and acquisitions. The FCC cooperated with the state commissions in following a jurisdictional separations policy between intrastate and interstate service and interconnection. A part of this [(7)]

policy was designed to keep local rates low by assigning greater expenses to interstate service. The result was interstate subsidization of local exchange.

The FCC began to alter its monopoly policy in 1968 with its *Carterfone* decision.[(8)] That decision invalidated tariff provisions, which prohibited attachment of customers and provided equipment to the telephone company's network. The following year, the FCC granted MCI authority to construct a microwave system competing with the Bell System between Chicago and St. Louis.[(9)] It expanded the MCI decision to permit entry of specialized common carriers in 1971.[(10)] While competition was being permitted in intercity service and terminal equipment, there was no competition permitted by the states in local exchange service. That noncompetition in local exchange continued until the enactment of the `96 Act.

The Senate Subcommittee on Antitrust and Monopoly, chaired by Senator Philip Hart, held a series of hearings in 1973 and 1974 on the question of competition in telecommunications.[(11)] The hearings, while directed at AT&T, reflected on the entire telecommunications industry. Subsequent to those hearings, the Department of Justice filed an antitrust suit, against AT&T and the Bell System companies that resulted in the breakup of the Bell System.[(12)] MCI had earlier filed an antitrust suit against AT&T and the Bell System.[(13)] While the Senate hearings did not result in legislation, they did spur the introduction of further competition. Thereafter, AT&T and the telephone industry launched a lobbying effort to get Congress to adopt legislation that would preserve the telephone companies' monopolies. However, it proved unsuccessful.

Further, in 1981 the FCC moved to increase competition in telecommunications when it adopted the structure and procedure for cellular mobile radio service (CMRS).[(14)] This cellular order provided for the licensing of two carriers in each market. It also prohibited limitations on resale and required that service to resellers be on a non-discriminatory basis. Thus, the order not only opened competition with a duopoly of licensees in each local market, it also spawned many other competitors as resellers.

Congress has placed its imprimatur on this move to competition with the `96 Act. The enactment of the `96 Act will change significantly the application of the antitrust laws to communications activities. The FCC stated that in enacting the `96 Act, "Congress sought to establish `a procompetitive, de-regulatory national policy framework' for the United States telecommunications industry."[(15)] Prior to the enactment of the `96 Act, telecommunications companies were somewhat immunized from full application of the antitrust laws, regarding mergers and acquisitions, because of regulation by the FCC and the state public utility commissions. Section 601(b)[(16)] of the `96 act provides:

(b) ANTITRUST LAWS.

(1) SAVINGS CLAUSE. - Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL. - Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) CLAYTON ACT. - Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking "Federal Communications Commission,".

This language may have a significant effect on future mergers and acquisitions of telecommunications companies as well as their activities. No longer will FCC approval of merger or acquisition insulate the carrier from action under the Clayton Act.

II.The Clayton Act Exemption and Repeal of

Section 221(a)

Under the old section 221(a) of the `34 Act,[(17)] the FCC was vested with authority to review and approve or disapprove mergers and acquisitions of telephone companies. It is only in more recent years that the FCC considered the issue of antitrust implications of a merger or an acquisition.[(18)] Earlier, the Commission simply viewed the issue in light of the overall public interest standard.[(19)] Section 7 of the Clayton Act[(20)] exempted similar transactions of the FCC. Exemptions in each act are now repealed. The result is that such transactions are now subject to the full scope of the Clayton Act, as well as the Hart-Scott-Rodino Act.[(21)] The FCC, however, retains its jurisdiction over the issuance and transfer of licenses and, the public interest standard gives it wide latitude in considering licensing. The repeal of section 221(a) does not affect other provisions in the `34 Act. However, with the language in section 601(b)(1) of the `96 Act, dual enforcement of the antitrust laws will exist with both the Department of Justice and the FCC. The result is greater avenues for the Department of Justice and private parties to challenge mergers and acquisitions.

Parties, seeking to merge or acquire a telecommunications company, could find themselves in three separate venues with three separate standards. Under section 7 of the Clayton Act,[(22)] either a private party or the Department of Justice could go into court, to seek an injunction preventing the transaction, on the grounds that it substantially lessens competition. Likewise, under the Hart-Scott-Rodino Act, the parties may be required to file for approval, with the Department of Justice, because of the size of the transaction.[(23)] If the transaction involves the transfer of licenses by the FCC, the public interest standard must be met.[(24)] Private parties could challenge at the FCC with petitions to deny. The House Senate Conference Report for the 1996 Act states:

In addition, if immunity were conferred under section 221(a), it would allow mergers between telecommunications giants to go forward without any antitrust or securities review. In the old world, the statute was usually used to confer immunity on mergers between non-competing Bell operating subsidiaries or mergers between Bells and small independents within their territories. Neither of these situations involved competitive considerations.

However, in the future, the conferees anticipate that cable companies will be providing local telephone service and the BOCs will be providing cable service. Mergers between these kinds of companies should not be allowed to go through without a thorough antitrust review under the normal Hart-Scott-Rodino process. The new language contains a conforming change to clarify that these mergers will now be subject to Hart-Scott-Rodino review. By returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill--to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws. The repeal would not affect the Commission's ability to conduct any review of a merger for Communications Act purposes, e.g. transfer of licenses. Rather, it would simply end the Commission's ability to confer antitrust immunity.

Clearly, Congress intended future review of mergers and acquisition to be subject to all three acts. This will impose a greater burden on the parties seeking to merge or engage in sizable acquisitions. What is not addressed is the doctrine of primary jurisdiction. If a party files in the courts to prevent a merger/acquisition under the Clayton Act, does the federal court defer to the FCC for initial determination and is that FCC determination binding on the Court?[(25)] If a party files a petition to deny transfer of the license, and in the courts, the FCC may defer consideration of anticompetitive effects until the appropriate federal court has rendered a judgment on such issues.[(26)] The argument that, because of pervasive regulation by the FCC, telecommunications carriers are immune from the antitrust law has met with little success. The courts have generally denied immunity from the antitrust laws.[(27)]

III.FCC Application of Antitrust Laws

Although the `34 Act does not explicitly require the FCC to adjudicate allegations of anticompetitive behavior of communications licensees, pursuant to its mandate, the FCC does consider anticompetitive behavior to reach decisions which are consistent with the public interest. Section 314 of the `34 Act states that no person, engaged in the transmission of radio communications, may act in a way which substantially lessens competition or restrains commerce.[(28)] In addition, pursuant to section 309 of the `34 Act, the Commission's authority to grant applications is conditioned upon a finding that "the public interest, convenience, and necessity will be served by the granting of such

[(29)] [(30)]

application." The `34 Act also prohibits price discrimination. This is similar to a prohibition in the Robinson-Patman Act.[(31)] Lastly, the Commission is mandated by statute to make available an efficient communications service at a reasonable cost, consistent with the public interest, convenience, and necessity.[(32)]

In *AT&T* (*Designation Order*), the Commission found that its public interest determination should include consideration of the effects of proposed actions on competition.[(33)] Harkening back to the fundamental principle established in its *Specialized Common Carrier Services Order*,[(34)] the Commission expressed what remains the guiding principle in its public interest determination: the "promo[tion] and mainten[ance] [of] an environment within which existing and any new carriers shall have an *opportunity to compete fairly and fully*"[(35)] Specifically, the FCC would not provide "any `protective umbrella' for new entrants *or any artificial bolstering of operations that cannot succeed on their own merits.*"[(36)] The FCC's policy envisioned and encouraged an environment comprised of entities thriving on competition and providing high quality service to customers at reasonable prices.

Under the framework of the FCC's "full and fair competition" standard,[(37)] antitrust concerns, such as an applicant's market power and the proposal's effect on competition, constitute only one component[(38)] of the public interest determination undertaken; this evidence is then weighed against other evidence[(39)] to determine whether the benefits resulting from the proposal outweigh the costs of diminished competition. In addition to the more rapid introduction of advanced technology, other public interest benefits which the FCC will weigh include reductions in barriers to new customers and the resulting spread of fixed costs over a larger population of users, economies of scale, efficient use of the spectrum, and the improvement in service resulting from the carrier's own choice, as to the most efficient distribution system.[(40)] The FCC's cost-benefit analysis reflects consideration of the "special considerations that have influenced Congress to make specific provision for the particular industry."[(41)]

In the *McCaw/AT&T* case the FCC approved the merger, finding that it would have procompetitive effects. The FCC noted that the merger would "lead to a broadened range of consumer choices, more price competition, an increased responsiveness to consumer needs and desires on the part of competing carriers and potential entrants, as well as incentives for continued technical and service innovations in the cellular service business."[(42)] The FCC went on to hold that likely procompetitive results outweighed any potential anticompetitive effects.[(43)] The weighing of benefits and harms under the public interest standard gives the FCC far more leeway than the courts have under the Clayton Act standard of "lessening competition."

The FCC has consistently held that its public interest standard and the antitrust laws exist to protect the *public's* interests, *not* the economic interests of competitors.[(44)] The FCC is mandated by statute to review the actions of common carriers to prevent discrimination against subscribers.[(45)] That Congress intended for the FCC's focus to be on customers and not on competitors[(46)] is evident from the `34 Act which includes remedies only for injured customers, not competitors.[(47)] Nonetheless, the FCC analysis is similar to the Supreme Court's in *Brown Shoe*[(48)], which stated that market share and concentration are critical in a Clayton Act analysis.

The concentration argument, however, was not accepted by the Court in *Cincinnati Bell*,[(49)] where the Court remanded the FCC rulemaking regarding how cross-ownership affects eligibility for PCS auctions. The Court rejected the FCC argument that a minority interest in a PCS license by a cellular licensee in the same market was predictive of an incentive not to compete. The Court, however, did not address the questions of potential violations of section 1 of the Sherman Act[(50)] (price fixing) and section 8 of the Clayton Act.[(51)]

In its reconsideration order and in responding to the courts, the FCC adopted traditional antitrust standards regarding minority ownership in competing companies.[(52)] By adopting the new rules on attribution, the Commission rejected a "control-based" attribution test. The Commission stated:

We reject a control-based attribution test because significant, but non-controlling, investments have sufficient potential to affect the level of competition in the CMRS market. The CMRS spectrum cap ownership attribution rule, just as all other ownership attribution rules and similar statutory provisions, must take such interests into account. Economic theory predicts that where a CMRS licensee owns a substantial portion of one of its competitors, neither company has as strong an incentive to compete vigorously against its partner as it does with respect to an unrelated competitor. That is the case for several reasons. A company that is entitled to a substantial percentage of the profit generated by its competitor will be reluctant to undercut the competitor's price -- doing so would amount to taking money out of its own pocket. Rather than compete on price, both companies have an incentive to maintain a high price level by coordinated interaction. In any event, the minority shareholder would have an incentive to stifle vigorous price competition. It would also have the capability of doing so because a minority owner may exert influence over the company by challenging various business decisions, by conducting (or even just threatening) litigation, by refusing to provide additional capital, by insisting upon business audits, or by using other mechanisms by which minority owners protect their investments in closely held firms.

Under 47 C.F.R. 20.6(e)(4)(i), a party holding a controlling interest in both a cellular licensee and a PCS licensee in the same market, must divest one of the two within 90 days.[(53)] These factors, however, may not receive the same weight from the FCC. The public interest standard gives the FCC wide latitude, but it may need to make specific economic findings in light of the *Cincinnati Bell* case.

IV.Separate Subsidiaries

In section 272 of the `96 Act, Congress has adopted separate subsidiary requirements, for the former Bell operating companies, that are intended to impose a wall between local exchange and manufacturing or interlata service. This adopts a structure initially adopted by the FCC in the *GTE/Telenet* case.[(54)] The FCC, in that case, expressed concern over possible cross-subsidization of competitive services with monopoly services. This cross-subsidization concern has been of paramount importance to regulators, as competition increased.

In the *McCaw/AT&T* case, the FCC took a contrary approach and declined to require structural separation. The Commission held that other requirements, imposed on the merger, cured concerns over possible cross-subsidization or misallocation of costs between regulated and unregulated business.[(55)] This case marks a significant departure from the antitrust theory that anticompetitive conduct necessarily flows from structure. The *McCaw* case stands for the antitrust theory that structure, plus conduct, is necessary for structural separation. Structure, without the conduct, is benign. It is a long held economic misconception that, by breaking-up or preventing vertically or horizontally integrated structures, anticompetitive conduct is prevented. Such a view may prevent business from taking advantage of economies of scale and cost efficiency that provide a lower cost product for the consumer.[(56)] It is noteworthy that the court in *Cincinnati Bell*,[(57)] in its remand, cast doubts on the structural separation imposed on BOC's, between their cellular and wireline companies,[(58)] which was effectively repealed by section 601(d) of the `96 Act.

Even though section 272 of the `96 Act imposes the separate subsidiary requirement only on former Bell System companies, other non-Bell local exchange carriers must, however, proceed with caution in acting as a unitary enterprise. Cross-subsidization of competitive services, by monopoly services, also runs afoul of the Clayton Act. Leveraging monopoly power in one market, to gain an advantage in another market, would violate the Clayton Act and be construed as anticompetitive by the FCC.[(59)]

In the *NYNEX Order*, regarding out-of-region BOC interstate interexchange services, the FCC held that such services must be offered through a separate subsidiary. That separate subsidiary must maintain separate books. It is not permitted to jointly own transmission or switching equipment with the LEC nor to take tariffed services from the LEC's general tariff.[(60)]

In approving a merger or acquisition, the FCC has wide discretion in imposing conditions, affecting structure and operation, that may not be imposed by the courts or the Department of Justice.

V.Competition In Local Exchange

Among the significant changes, brought about by the `96 Act, is the introduction of competition into local exchange service. Section 251 imposes interconnection duties on local exchange carriers to provide connection to competing carriers. Likewise, section 253 of the `96 Act precludes a state commission from denying a competing local exchange carrier the right to enter the market. In addition, section 251 provides for entry by resellers of local exchange service. In many ways, the clock has been turned back 100 years. What is different is the regulatory compulsion of interconnection.

The `96 Act does not mention section 152(b) of the `34 Act which reserved to the states, jurisdiction over intrastate carriers.[(61)] Section 152(b) bumps up against section 253(a) of the `96 Act that limits the state PUC action if it restricts entry. When Congress adopted the 1993 amendments regarding CMRS, it specifically excluded application of section 152(b).[(62)] The `96 Act makes no such exclusion. The result is an inconsistency within section 253 of the `96 Act. Subsection (a) restricts the states, subsections (b) and (c) recognize a form of state jurisdiction, and subsection (d) gives the FCC the power to preempt the states. If that is confusing, throw in section 152(b) and it looks chaotic. The FCC adopted regulations for the implementation of the `96 Act's requirements of competition in local exchange on August 8, 1996 in its *Second Report and Order*.[(63)] The Commission stated "potential competitors in the local and long distance markets face numerous operational barriers to entry not withstanding their legal right to enter such markets. The dialing parity, nondiscriminatory access, and network disclosure requirements should remove those barriers to entry."[(64)] This *Second Report and Order* places the FCC in the role of directly regulating local exchange service. Whether that is beyond the power of Congress and the FCC is a question of profound importance. The U.S. Court of Appeals for the Eighth Circuit has stayed the implementation of the regulations pending review.[(65)]

In its *First Report and Order on Local Exchange*, the Commission concluded that the dual regulation by the federal and state agencies was significantly altered by the `96 Act.[(66)] The Commission went on to conclude that section 251 of the `96 Act is binding on the states, "even with respect to intrastate issues." There are dramatic changes that limit the regulatory role of the state commissions, over telecommunications, except to promote competition as defined by the FCC.

VI.Congress's Power To Regulate Local Exchange

It is likely that Congress, acting under the Commerce Clause of the Constitution, has power to regulate telecommunications that are connected to the switched nationwide network.[(67)] But it must make findings to support such a legislative concept. The Conference Report makes little mention of the language, except to say that state laws to protect the "captive utility ratepayer from the potential harms caused by such activities are not preempted." Congress does not clarify what that means.

The Commerce Clause expressly gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States."[(68)] "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[(69)] In short, the clause was intended to create a common market with uniform regulations governing national concerns.[(70)]

Congress's grant of authority is practically limitless, reaching well beyond commerce to include most economic relationships.[(71)] Indeed, the Commerce Clause limits state power even where Congress has not acted.[(72)] This self-executing aspect of the provision is known as the "dormant" or "negative" Commerce Clause.[(73)] The Commerce Clause "by its own force created an area of trade free from interference by the States."[(74)] The significance of this judicial construction of the provision's scope is this: a state law can be challenged if it impermissibly burdens interstate commerce, even where Congress has chosen not to exercise the full scope of its authority in preempting a particular field of activity.

In telecommunications, Congress surprisingly avoided giving the FCC power to regulate the intrastate aspect. Until adoption of the Omnibus Budget Reconciliation Act (OBR) in 1994, and section 332 of the `34 Act,[(75)] Congress's adoption of section 151 stood as a bulwark against FCC intervention into the intrastate realm of local exchange.

Section 253 of the `96 Act changes that. Congress has made an enormous leap, with section 253, to give the FCC the power to invalidate what may be intrastate activity. The principal issue, however, is whether there were sufficient findings to support this quantum leap by Congress. In the OBR, Congress preempted state regulation of CMRS rates and entry by CMRS carriers. The Second Circuit has upheld that preemption.[(76)] The authority of the Commerce Clause, however, must be viewed against the restrictions in the Tenth Amendment.

Tenth Amendment[(77)] issues would normally be trumped by Commerce Clause findings, but the Supreme Court's decision in *United States v. Lopez*[(78)] gives states' rights new meaning. The Tenth Amendment is not mentioned in *Lopez*. The case instead turns on limitations of the Commerce Clause. The Commerce Clause, however, cannot be viewed in a vacuum. Even though ignored, the Tenth Amendment hovers over the decision.

The Constitutional source of the states' "historic police powers" is the Tenth Amendment.[(79)] The courts "use the Tenth Amendment to encompass any implied constitutional limitation on Congress's authority to regulate state activities, whether grounded in the Tenth Amendment itself, or in principles of federalism, derived generally from the Constitution."[(80)] The nature and extent of this limitation on federal power was rejected in *Garcia v. San Antonio Metro. Transit Auth.*[(81)] As the Court later explained in *South Carolina v. Baker*:

The Tenth Amendment limits on Congress's authority to regulate state activities are set out in *Garcia* [ ]. *Garcia* holds that the limits are structural, not substantive--i.e., that states must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.[(82)]

Thus, it is the legislative process which protects the fundamental interests of the states, and not the courts.[(83)] If Congress has the power to act, then a state's local interests cannot limit that power.[(84)] Moreover, *no* "residuum of power" resides in the states to make laws that limit federal power.[(85)]

More practically, *National League of Cities* had attempted to create a framework for identifying "traditional governmental functions," which the Court said were immune from federal regulation under the Tenth Amendment. In doing so, the Court provided an elaborate explanation of protected and unprotected state functions.[(86)] These functions generally consisted of health and safety measures undertaken by local governments.[(87)]

Garcia, nevertheless, undermined the legitimacy of any attempt to identify "traditional governmental functions," calling the *National League of Cities* Court's methodologies "unworkable," "arbitrary," "unmanageable," and ultimately unconstitutional. Accordingly, "historic police powers" should be narrowly construed. *Garcia*, however, must be contrasted with *Lopez*. In *Lopez*, the Court pointed out that the legislative history contained no express findings, regarding the effect on interstate commerce. Prior legislation by Congress reflects a recognition of the intrastate nature of local exchange service. *Lopez* brings into question the constitutional validity of section 253 of the `96 Act and the FCC's implementing regulations. While it would appear that all of telecommunications, even at the local exchange level, affects interstate commerce it must be viewed against thirty-six years of legislative precedent calling part of it intrastate. This long hands-off attitude of Congress must be used to argue a Congressional recognition of its being solely within the states ambit.

Conclusion

The `96 Act injects competition into telecommunications with a burst. But with competition also comes the antitrust law to provide the rules of conduct. The antitrust focus will now achieve a new status for telecommunications.

Likewise, the `96 Act intrudes into areas long thought to be intrastate, and the sole province of state regulatory commissions. Congress has dramatically changed the rules. The question is whether, in changing those rules so as to federalize all aspects of telecommunications, it has violated the Constitution.

1. The author practices communications law in Washington, D.C.

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).

3. *In re* Use of the Carterfone Device in Message Toll Tel. Serv., *Decision*, 13 F.C.C. 2d 420, 13 Rad. Reg. (P & F) 597 [hereinafter *Carterfone Decision*], *aff'd and clarified by Memorandum Opinion and Order*, 14 F.C.C.2d 571, 14 Rad. Reg. (P & F) 185 (1968).

4. John Brooks, Telephone 109 (1975).

5. *See, e.g.*, Shively-Spencer Act of 1913, Ind.Code 8-1-2-88. (1995).

6. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

7. *In re* AT&T and the Assoc. Bell System Cos. for Interstate and Foreign Comm. Serv., *Interim Decision and Order*, 9 F.C.C.2d 30 (1967).

8. *Carterfone Decision*, 13 F.C.C.2d 420, 13 Rad. Reg. 2d (P & F) 597.

9. In Re Applications of Microwave Comm., Inc. For Construction Permits to Establish New Facil. in the Domestic Public Point-to-Point Microwave Radio Serv. at Chicago, Ill., St. Louis, Mo., and Intermediate Points, *Decision*, 18 F.C.C.2d 953 (1969); *aff'd and clarified by Memorandum Opinion and Order*, 21 F.C.C.2d 190, 18 Rad.Reg. 226 (P & F) (1970).

10. *In re* Establishment of Policies and Procedures For Consideration of App'n to Provide Specialized Common Carrier Serv. in the Domestic Public Point-to-Point Microwave Radio Serv. and Proposed Amend. to Parts 21, 43, and 61 of the Comm'n Rules, *First Report and Order*, 29 F.C.C.2d 870, 22 Rad. Reg. 2d (P & F) 1501, [hereinafter *Specialized Common Carrier Services Order*], *reconsideration denied in Memorandum Opinion and Order*, 31 F.C.C.2d 1106, 23 Rad. Reg. 2d (P & F) 1501 (1971), *affirmed sub nom.* Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975).

11. *Competition in Telecommunications, 1973-74: Hearings on S.1167 Before the Senate Comm. on the Judiciary*, 103rd Cong. (1974).

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

13. MCI v. AT&T, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891. Competition also received a boost when MCI obtained approval of switched services. MCI v. AT&T, 496 F.2d 214 (3rd Cir. 1974).

14. *In re* Use of the Bands 825-845 MHz and 870-970 MHz for Cellular Comm. Systems, *Report and Order*, 86 F.C.C.2d 469, 49 Rad. Reg 2d (P & F) 809 (1981) (proceeding terminated). *See also In re* Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd. 1411, 74 Rad. Reg. 2d (P & F) 835 (1994).

15. *In re* NYNEX Long Distance Co. App'n for Authority Pursuant to Section 214 of the Comm. Act of 1934, as amended, to provide Int'l Serv. from Certain Parts of the U.S. to Int'l Points through Resale of Int'l Switched Serv., *Order, Authorization and Certificate*, 11 FCC Rcd. 8685, para. 6, 3 Comm. Reg. (P & F) 1295 (1996) (D.A. Acting Chief, Int'l Bureau) (quoting S. Conf. Rep. No. 104-230, at 1 (1996)) [hereinafter *NYNEX Order*].

16. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(b), 110 Stat. 56, 143.

17. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. 221(a)) (1994).

18. *See In re* S. Cent. Bell Phone Co. and S. Bell Tel. and Tel. Co., *Memorandum Opinion and Order*, 6 FCC Rcd. 7136 (1991); *In re* The Mountain States Tel and Tel. Co., Northwestern Bell Tel. Co., and Pacific Northwest Bell Tel. Co., *Memorandum Opinion and Order*, 5 FCC Rcd. 1982 (1990).

19. *In re* App'n. of Southwestern Bell Tel. Co. For A Certificate Under Section 221(a) of the Comm. Act of 1934, as Amended, to Acquire the Tel. Plant and Properties of the DeSoto Mut. Tel. Co., Located in and Around the Community of DeSoto, Kansas, *Initial Decision of Hearing Examiner David I. Kraushaar*, 1 F.C.C.2d 1420 (1965), *aff'd. in Decision*, 1 F.C.C.2d 1411.

20. Clayton Act 7, 15 U.S.C. 18 (1994).

21. Hart-Scott-Rodino Act, 15 U.S.C. 18(a).

22. Clayton Act, 7, 15 U.S.C. 18.

23. Hart-Scott-Rodino Act, 15 U.S.C. 18(a).

24. 47 U.S.C. 309. *See also* 47 U.S.C. 313, 314 (none of these sections were changed by the `96 Act).

25. Litton Systems, Inc. v. AT&T, 700 F.2d 785 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

26. Mobilfone of Northeastern Pa., Inc. v. FCC, 682 F.2d 269 (D.C. Cir. 1982).

27. *See* Phonetele v. AT&T, 664 F.2d 716 (9th Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983); Southern Pacific v. AT&T, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); Mid-Texas v. AT&T, 615 F.2d 1372, *cert. denied*, 499 U.S. 412 (1980); Otter Tail Power v. U.S., 410 U.S. 366 (1973); United States v. RCA, 358 U.S. 334 (1959).

28. 47 U.S.C. 314.

29. 47 U.S.C. 309(a).

30. 47 U.S.C. 202.

31. Robinson-Patman Act, 15 U.S.C. 13(a).

32. 47 U.S.C. 205.

33. *In re* the App'n of AT&T For Auth. Under Section 214(a) of the Comm. Act of 1934, as Amended, To Supplement Existing Facilities Between Boston, Mass., *Memorandum Opinion and Order*, 50 F.C.C.2d 501, para. 25 (1974).

34. *Specialized Common Carrier Services Order*, 29 F.C.C.2d 870, 22 Rad. Reg. 2d (P & F) 1501, *recon. denied in Memorandum Opinion and Order*, 31 F.C.C.2d 1106, 23 Rad. Reg. 2d (P & F) 1501 (1971), *affirmed sub nom.* Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975).

35. *In re* App'n of AT&T For Auth. Under Section 214(a) of the Comm. Act of 1934, as Amended, To Supplement Existing Facilities Between Boston, Mass., *Memorandum Opinion and Order*, 50 F.C.C.2d 501, para. 17 (citing *Specialized Common Carrier Services Order*, 29 F.C.C.2d 870, para. 90, 22 Rad. Reg. 2d (P & F) 1501) (emphasis added).

36. *Id*. (citing *Specialized Common Carrier Services Order*, 29 F.C.C.2d 870, para. 90, 22 Rad. Reg. 2d (P & F) 1501) (emphasis added).

37. Although the Commission has interpreted and applied the antitrust laws in a fashion uniquely tailored to the communications industry, the FCC may look to well-established principles of antitrust law, where they are relevant, for guidance. *See In re* AT&T Investigation into the lawfulness of Tariff FCC No. 267, offering a Dataphone Digital Serv. Between Five Cities, *Final Decision and Order*, 62 F.C.C.2d 774 (1977).

38. United States v. FCC, 652 F.2d 72, 82, 85 (1980).

39. *Id.* at 82.

40. *In re* Bundling of Cellular Customer Premises Equip. and Cellular Serv., *Report and Order*, 7 FCC Rcd. 4028, paras. 19-21, 70 Rad. Reg. 2d (P & F) 1288 (1992).

41. United States v. FCC, 652 F.2d 72, 86 (citing FCC v. RCA Comm., Inc., 346 U.S. 86, 98 (1953)) (citations omitted); *See generally NYNEX Order*, 11 FCC Rcd. 8685, 3 Comm. Reg. 1295 (P & F) (1996).

42. *In re* Craig O. McCaw and AT&T For Consent to the Transfer of Control of McCaw Cellular Comm., Inc. and its Subsidiaries, *Memorandum Opinion and Order*, 9 FCC Rcd. 5836, para. 57, 75 Rad. Reg. 2d (P & F) 1345 (1994) [hereinafter *McCaw/AT&T*]. "The pro-competitive effects of a merger can be as important to our competitive analysis as the anticompetitive effects." *Id.*

43. *Id*. para. 61.

44. United States v. FCC, 652 F.2d 72, 102 (citing Brown Shoe Co v. United States, 370 U.S. 294, 320 (1961)).

45. *See* MCI Comm. Corp. v. AT&T, 462 F. Supp. 1072, 1087 (N.D. Ill. 1978), *aff'd in part*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

46. *See, e.g., id*.; In Re Channel 41, Inc. (WUHQ-TV), Battle Creek, Mich. For Modification of Constr. Permit, *Memorandum Opinion and Order*, 27 F.C.C.2d 595, para. 5, 21 Rad. Reg. 2d (P & F) 73, *recon. denied in Memorandum Opinion and Order*, 30 F.C.C.2d 6, 22 Rad. Reg.2d (P & F) 147 (1971).

47. MCI v. AT&T, 462 F.Supp. 1072, 1088 (N.D. Ill. 1978).

48. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

49. Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995). The Sixth Circuit decision may be an anomaly and of doubtful precedential value. It seems to hold opposite Congress' specific language in 47 U.S.C. 309(j)(3)(B) (1994).

50. Sherman Act, 15 U.S.C. 1; *see also* United States v. United States Gypsum, 438 U.S. 422 (1978); United States v. Container Corp., 393 U.S. 333 (1969).

51. Clayton Act, ch. 323, 1, 38 Stat. 730 (1914) (codified at 15 U.S.C. 19 (1994)); *see also* Square D Company v. Schneider S.A., 760 F. Supp. 362 (S.D.N.Y. 1991).

52. *In re* Amendment of Parts 20 and 24 of the Comm'ns. Rules--Broadband PCS Competitive Bidding and the Commercial Mobile Radio Serv. Spectrum Cap, *Report and Order*, 11 FCC Rcd. 7824, para. 121 (1996).

53. 47 C.F.R. 20.6(e)(4)(i) (1995).

54. *In re* App'n of General Telephone & Electronics Corporation to Acquire Control of Telenet Corporation, *Memorandum Opinion and Order*, 72 F.C.C.2d 91, 107, n.34, 45 Rad. Reg.2d (P & F) 1189, 1201, n.34 (1979) [hereinafter *GTE/Telenet*]. *See also* California v. FCC, 39 F.3d 919 (9th Cir. 1994).

55. *McCaw/AT&T*, 9 FCC Rcd. 5836, 75 Rad. Reg. 2d (P & F) 1345 (1994).

56. *Id.* at 5905 n.284, 75 Rad. Reg. 2d (P & F) at 1374, n.284.

57. Cincinnati Bell Tel. Co. v. FCC, 69 F. 3d 752, 768 (6th Cir. 1995).

58. *See also In re* An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Comm. Systems, *Report and Order*, 86 F.C.C.2d 469, paras. 48-52, 49 Rad.Reg. 2d (P & F) 809 (1981) (proceeding terminated), *as modified in Memorandum Opinion and Order on Reconsideration*, 89 F.C.C.2d 58 (1982) (proceeding terminated); *In re* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular

Comm. Serv. by the Bell Operating Cos., *Report and Order*, 95 F.C.C.2d 1117, paras. 48-52 (1983) (as codified 47 C.F.R. 22.903 (1994)). Section 601(d) of the `96 Act permits wireline carriers to jointly market cellular and other local exchange services.

59. United States v. Griffith, 334 U.S. 100 (1948); Berkey Photo v. Eastman Kodak, 603 F.2d 263 (2nd Cir. 1979).

60. *NYNEX Order*, 11 F.C.C. Rcd. 8685, para. 7, 3 Comm. Reg. (P & F) 1295 (1996) (D.A. Acting Chief, International Bureau).

61. 47 U.S.C. 151(b) (1994).

62. 47 U.S.C. 332(c)(3). Under the `96 Act CMRS is excluded from access charge requirements under section 705, Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 705, 332(c)(8), 110 Stat. 56, 152, and joint marketing restrictions, *id.* sec. 601(d), 110 Stat. at 144.

63. *In re* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Second Report and Order and Memorandum Opinion and Order*, CC Dkt. No. 96-98, FCC 96-333, para. 2 (Aug. 8, 1996).

64. *Id*. para. 3.

65. Iowa Utilities Bd. v. FCC, Nos. 96-3321, 96-3406, 96-3436, 96-3414, 96-3416, 96-3410, 96-3430, 96-3418, 96-3424, 1996 WL 589204 (8th Cir. 1996). A motion to vacate the stay was denied on Nov. 12, 1996, 117 S.Ct. 419.

66. *In re* Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Dkt. No. 96-96, FCC 96-325 (Aug. 8, 1996).

67. North Carolina Utilities Comm. v. FCC, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976).

68. U.S. Const. art. I, 8, cl. 3.

69. National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).

70. *See* Cooley v. Bd. of Wardens, 12 How. 299, 317 (1851).

71. *See* Wickard v. Filburn, 317 U.S. 839 (1937); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

72. *See* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 114 S.Ct. 2268, 2276 (1994); Redwood Theatres, Inc. v. Festival Enterprises, Inc., 908 F.2d 477, 481 (9th Cir. 1990).

73. *Barclays*, 114 S.Ct. at 2276 n.9.

74. American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 280 (1987).

75. Omnibus Budget Reconciliation Act of 1994, 47 U.S.C. 332 (1994).

76. Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d 842 (2nd Cir. 1996).

77. U.S. Const. amend. X.

78. United States v. Lopez, 115 S. Ct. 1624 (1995).

79. U.S. Const. amend. X.

80. South Carolina v. Baker, 485 U.S. 505, 511 n.5 (1988).

81. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

82. *Baker*, 485 U.S. at 512 (citations omitted).

83. Nevada v. Skinner, 884 F.2d 445, 452 (9th Cir. 1989) (rejecting state's argument that Tenth Amendment "carves out a sphere of state influence upon which even the Commerce power may not intrude").

84. *See* Columbia River Gorge United v. Yeutter, 960 F.2d 110, 114 (9th Cir. 1992).

85. *See* Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1944); *see also*, Western Union Tel. Co. v. Boegli, 251 U.S. 315, 316 (1920) (stating "the purpose of Congress to subject such companies to a uniform national rule [left] no room thereafter for the exercise by the several states of power to regulate.").

86. *See Nat'l League of Cities*, 426 U.S. at 851, 854 n.18; *see also Garcia*, 469 U.S. at 538-39.

87. *See* Ridings v. Lane County, 862 F.2d 231 (9th Cir. 1988) (construing *Nat'l League of Cities*) (operation of a police force is a traditional governmental function); *see also* Bonnette v. Cal. Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) ("declaring the chore worker" program not a traditional government function because federal government established and funded program); *Skinner*, 884 F.2d at 452 (control of roads and highways not subject to plenary state control); Air Transport Ass'n v. Pub. Util. Comm'n, 833 F.2d 200 (9th Cir. 1987) (stating the antidiscrimination provision of Communications Act did not preempt state law which protected privacy interests).

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