

Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act

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I. Introduction

On February 8, 1996, the tortoise of federal law finally caught up with the hare of communications technology. After more than a half-century of broadcast regulation under the Communications Act of 1934,⁽²⁾ a dozen years of tinkering with cable television,⁽³⁾ and more than a decade of telephone supervision by Judge Greene,⁽⁴⁾ Congress passed, and President Clinton signed, the Telecommunications Act of 1996.⁽⁵⁾

This law represents a vision of a telecommunications marketplace where the flexibility and innovation of competition replaces the heavy hand of regulation. It is based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers and programmers being made available to the American consumer.

Ironically, it is the convergence of technology that is to lead to a diverse telecommunications marketplace.⁽⁶⁾ If the same physical plant can offer local and long-distance telephone service, provide cable television programming, and carry voice, data, and video signals, then competing systems offering the whole package, as well as selected sub-parts, can replace localized monopolies.

There is no guarantee, however, that true competition will flourish, and it is certainly possible that unregulated fiefdoms will soon dot the electronic landscape. The 1996 Act is an experiment, as, one would have to admit, all telecommunications regulation is an experiment.⁽⁷⁾

Whether or not the devil is in the details, the future of telecommunications regulation can only be appreciated with, at least, a preliminary understanding of the specific details of the Act.⁽⁸⁾ This Article represents an effort to provide a guided tour through the major provisions of the 1996 Act.

Section II describes the new regime for telecommunications in general, and telephone in particular. Section III describes the newest cable regulation, while Section IV details the changes in broadcast regulation. Section V describes the major attempt to regulate content, rather than conduit, in the 1996 Act.

II. From Telephone to Telecommunications

The goal of Congress was to create a legislative change as dramatic as the evolution of the old-fashioned telephone, carrying voices over distant wires, into telecommunications, the transmission of "information," including data and video, as well as aural communications.⁽⁹⁾ Accordingly, Congress decided that the monopolistic local telephone company must be forced to share its market, while at the same time, be permitted into both the free wheeling competitive world of long-distance service and the potentially competitive video market as well. In the words of the FCC: "In the old regulatory regime, government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress."⁽¹⁰⁾

The most difficult piece in the deregulatory puzzle is how to create competition for local telephone service. Telephone (in fact all telecommunications) service is generally divided between local and long-distance service. Current technology has created a peculiar reality where it is far easier to carry information thousands of miles across the

country than the last mile into a recipient's business or home. It is the market for that last mile, so to speak, which must be competitive for the 1996 Act to achieve its far-reaching goals.

The geographical dividing line for a local telephone region is termed a "Local Access and Transport Area," or "LATA".⁽¹¹⁾ A company that offers long distance service is said to be offering "InterLATA Service," meaning the communication is between points not within the same local area.⁽¹²⁾

Following the break-up of AT&T in 1982, long-distance, or interLATA, telephone service became a highly competitive market, with both large and small players.⁽¹³⁾ The local telephone market was initially divided among seven Bell Operating Companies (BOCs),⁽¹⁴⁾ known colloquially as "Baby Bells." But these "babies" were not only large, they continued to enjoy virtually monopoly control over their area's local telephone service. There were numerous much smaller local telephone companies, that had monopolies over rural or much smaller geographic areas.

The expense of duplicating the local phone company's infrastructure, and the necessity of interconnecting with its plant, also made it obvious that competition for the local market would be impossible without the active assistance of the very companies with whom competition was sought. The question for lawmakers was how local telephone service, long considered a "natural monopoly,"⁽¹⁵⁾ could be opened for competition.

New Part II of Communications Act, entitled "Development of Competitive Markets," creates the blueprint for what Congress hoped would become the future of telecommunications.⁽¹⁶⁾ Section 251 details the substantive framework necessary for achieving competition in telecommunications and section 252 describes the procedural mechanism for implementing that framework.⁽¹⁷⁾

A. The Duties of Competitors

Congress divided telecommunication carriers into four classifications and varied the degree of regulation with each category. The broadest group is the general telecommunications carrier, then comes the subgroup called Local Exchange Carriers (LECs), which is further subdivided into "incumbent" Local Exchange Carriers, and finally, the most detailed regulatory provisions are for the BOCs.⁽¹⁸⁾

A "telecommunications carrier" is defined as any entity offering, for a fee to the public, to transmit information without changing the content of that which is transmitted.⁽¹⁹⁾ The primary duty imposed on all telecommunications carriers is interconnection. In other words, all telecommunication carriers must connect directly or indirectly with other carriers.⁽²⁰⁾ Additionally, carriers are prohibited from designing their networks so as to thwart the ability of other carriers from interconnecting with them.⁽²¹⁾

Far more detailed requirements are imposed on the LECs--those who provide either telephone exchange service or service access.⁽²²⁾ Genuine competition in local phone service was recognized as being very difficult to achieve, yet was regarded as essential if there were to be true telecommunications competition. Despite the initial situation of general monopoly LEC status, the 1996 Act described five obligations to be shouldered by all future LECs, both dominant and challenger.

The first of these obligations involves resale.⁽²³⁾ LECs are barred from either prohibiting or imposing discriminatory or unreasonable conditions on the resale of telecommunications services.

Next, all LECs must provide "number portability."⁽²⁴⁾ This will permit users to switch from one telecommunications carrier to another without having to change their existing telecommunications numbers.⁽²⁵⁾ The Act recognizes the potential difficulty in implementing this mandate, so it provides that number portability will be required only "to the extent technically feasible," and in accordance with FCC requirements.⁽²⁶⁾ Additionally, the Act states that the FCC must ensure that the costs of establishing number portability are "borne by all telecommunications carriers on a competitively neutral basis."⁽²⁷⁾

The third requirement for all LECs is that they provide dialing parity.⁽²⁸⁾ The term "dialing parity" is defined to mean that customers would dial the same number of digits to use any available telecommunications provider.⁽²⁹⁾

Next, all LECs must provide their competitors with access to their poles, conduits, and other rights-of-way.⁽³⁰⁾ Congress first protected the rights of cable operators to use telephone poles in the Pole Attachment Act of 1978.⁽³¹⁾ Under the 1996 Act, access to poles will be even easier. In addition to requiring LECs to share their poles, the Act requires utilities,⁽³²⁾ such as gas and electric companies, to provide access on a nondiscriminatory basis to cable operators and other telecommunications carriers.⁽³³⁾

The final obligation imposed on all LECs is that they establish "reciprocal compensation arrangements."⁽³⁴⁾ Such arrangements provide that a network in which a call originates compensates the network in which that call terminates. For simplicity and efficiency, the Act permits arrangements such as the so-called "bill-and-keep" arrangement, whereby two networks agree to waive their rights to recover from one another under this section.⁽³⁵⁾

Congress was well aware that existing LECs would have an enormous potential advantage over potential competitors in the local market. Accordingly, several additional restrictions were placed on "incumbent" LECs, those either providing telephone exchange service on the enactment date of the Act (February 8, 1996) or those newcomers determined by the FCC to have obtained a market position comparable to that of an incumbent.⁽³⁶⁾

In addition to the requirements imposed on all LECs, incumbent LECs must provide interconnection for other telecommunication carriers at "any technically feasible point" in the incumbent's network.⁽³⁷⁾ This means that interconnection must be provided for all competitors who wish to provide local telephone exchange service and exchange access. There is no similar requirement that an incumbent LEC permit interconnection by a cable television operator or other sort of information service, except to the extent that they are providers of telecommunications service. All interconnection under this provision must be, at least, of the same quality as that available for either the incumbent LEC itself or its affiliates, and must be made available at reasonable and nondiscriminatory rates and terms.

Incumbent LECs are also required to make available to competing telecommunications carriers "unbundled access" to "network elements."⁽³⁸⁾ A "network element" is defined to include not only the physical equipment used to provide telecommunications service, but also significant functions, systems, and information that are made available by, or are used in the transmission of, telecommunications service.⁽³⁹⁾ These would include local loops and sub-loops, switching, and signaling functions. "Unbundled access" means the availability of access to distinct parts of the incumbent's network, at an appropriately lower cost than access to all of the elements of the network. Thus, a competitor can purchase only those network components and functions that it needs to offer service. That competitor is then free to combine these unbundled elements in the manner its deems best for providing service.

In order to make interconnection and unbundled access economically feasible, incumbent LECs are required to permit physical collocation of their competitors' equipment.⁽⁴⁰⁾ In other words, incumbent LECs must allow other telecommunication carriers to place their equipment at the site of the incumbent's own switching center. Again, rates charged for using these premises must be reasonable and nondiscriminatory.

A different type of competition is made possible by the requirement that the incumbent LEC sell to other carriers, at wholesale rates, the same telecommunication service it provides to retail customers.⁽⁴¹⁾ The availability of wholesale pricing will enable the other carriers to offer for sale the same service to the incumbent's customers.⁽⁴²⁾

The most contentious part of this issue is the determination of wholesale rates. If the wholesale rates are too close to retail rates, it will discourage competition in the local market.⁽⁴³⁾ On the other hand, if wholesale rates are too low, it may discourage the construction of facilities-based competition.⁽⁴⁴⁾

The 1996 Act states that "wholesale" rates are to be calculated by subtracting from retail subscriber rates any "costs

that will be avoided by the local exchange carrier."⁽⁴⁵⁾ Arithmetically, wholesale rates equal retail rates minus costs avoided. Even though the 1996 Act says that each "State commission" should determine the wholesale rates,⁽⁴⁶⁾ the FCC has adopted a "minimum set of criteria for [the] avoided cost studies" that will be conducted by the states.⁽⁴⁷⁾

Most notably, the FCC ruled that the "avoided costs" are not to be limited to only the costs that an incumbent LEC will *actually* avoid by selling wholesale rather than directly to subscribers.⁽⁴⁸⁾ If that were the case, the incumbent would have an incentive to keep its expenditures high, so that its competitors would pay a higher resale price. The FCC, instead, ruled that "avoided costs" means all of the costs "that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers,"⁽⁴⁹⁾ whether these savings were actually realized or not.

The FCC also decreed a default wholesale rate, one that is to be used by State commissions who either have not yet conducted an "avoided retail cost study" or choose not to undertake such a study.⁽⁵⁰⁾ In either case, the FCC decreed that interim wholesale rates must be set at between 17 percent and 25 percent below the incumbent LECs retail rates.⁽⁵¹⁾

B. The Special Case of BOCs

The strongest monopolists in the telecommunications universe are the Bell Operating Companies, the BOCs, who spun off from AT&T and carved up the local telephone market. If a competitive telecommunications system is to evolve, the BOCs must face direct competition for local service. The BOCs, meanwhile, have long been champing at the bit to enter the long distance market.

In a sense the most important piece of legislative strategy in the 1996 Act was the provision that the BOCs are to be given permission to offer long distance service to their local customers only upon fulfilling a "competitive checklist" that ensures or permits competition for local service. Because of the lack of a similar danger of unfair competition, BOCs are free to offer long-distance service to those not within their local service areas immediately.⁽⁵²⁾ For a BOC to be given FCC permission to offer long-distance service to its own local clientele, though, there must be either: 1) an agreement with an existing competitor for that BOCs local service or, 2) if no competitor has come forward, a statement indicating that the BOC is ready to provide access and interconnection for potential competitors. Before the FCC will consider a BOCs request to provide long distance service to its local customers, the state commission with jurisdiction over that locality must give its approval to the agreement of statement.

1. The Competitive Checklist

The "competitive checklist" for BOCs wanting to offer long distance service includes many of the provisions required under the provisions governing general incumbent Local Exchange Companies.⁽⁵³⁾ The Act, however, adds several requirements that are specific to telephone service. To gain permission to enter the long distance market, a BOC must offer "access and interconnection" to others who wish to compete for the local market. "Access and interconnection" is defined to include all of the following:

From the incumbent LEC checklist

1. Interconnection for other carriers offering intraLATA service at "any technically feasible point" in the BOC's network
2. Unbundled access to network elements

From the general LEC checklist

3. Access to BOC poles, conduits, and other rights-of-way.
4. Number portability

5. Dialing parity
6. Reciprocal compensation arrangements
7. Availability for resale

Specific for BOCs Checklist

8. Local loop transmission (from the central office to customer's premises)
9. Local transport
10. Local switching
11. Nondiscriminatory access to emergency (911 and E911), directory assistance, and operator call-completion services
12. White page directory listing for competitors' customers
13. Nondiscriminatory access to telephone numbers
14. Nondiscriminatory access to data bases and signalling necessary for call routing and completion.

2. Facilities-based Competitors for the Local Market

The above checklist encompasses the minimum requirements to be contained in agreements with competitors for the local telephone market. In order to ensure that a powerful, independent competitor exists for local service prior to a BOC's entry into the long distance market, the Act requires that any competitor be "facilities-based." ⁽⁵⁴⁾ The term "facilities-based" means that the competitor is providing local service either exclusively or predominantly over its own facilities. It excludes a competitor who is merely reselling the BOC's telephone exchange service. ⁽⁵⁵⁾ The prime example given by Congress of an effective "two-wire" policy is the provision of competitive local telephone service through the facilities of a local cable television system. ⁽⁵⁶⁾

Moreover, to ensure that local competition is in place, the competitor must be operational, not merely in the planning stage. ⁽⁵⁷⁾ This will also make it easier to ensure that the full checklist is in place.

3. The Absence of Local Competitors

It is, of course, possible that no one will want to take on a particular BOC on its home court. The drafters of the 1996 Act did not want to deny a BOC under those circumstances all opportunity to offer long-distance service to its local customers. Accordingly, the Act provides that a BOC who has not received a request for interconnection may still apply for permission to provide such long-distance service. Instead of an agreement, the BOC must file a statement of the terms and conditions under which it is ready and willing to offer the components of the competitive checklist.

It was also foreseeable that, if a signed agreement was a necessary prerequisite for BOC entry into the long-distance market, some player in that market might try to delay BOC entry by engaging in bad faith negotiation or otherwise acting improperly. To prevent such subterfuge, the statement described above will also suffice if the only providers to request access have failed to negotiate in good faith. ⁽⁵⁸⁾

4. Separate Affiliates

Even with the competitive checklist in place, Congress feared that a BOC could use its local power to leverage an unfair advantage over competitive markets. As an additional safeguard, the 1996 Act requires that a BOC create a separate affiliate if it wanted to offer certain services.

First, a BOC must use a separate affiliate to offer its local customers long-distance service.⁽⁵⁹⁾ These services include all long-distance telephone, telecommunications, or information services, other than "incidental" services,⁽⁶⁰⁾ and services that had been authorized prior to the 1996 Act.⁽⁶¹⁾

Second, a separate affiliate is needed for BOCs engaged in manufacturing activities.⁽⁶²⁾ The term "manufacturing" includes all the activities previously covered by that term in the AT&T Consent Decree.⁽⁶³⁾ A BOC cannot discriminate in favor of its own affiliate in the procurement of manufacturing equipment.⁽⁶⁴⁾

The separate affiliate must operate independently from its BOC parent.⁽⁶⁵⁾ It must keep separate books and records and must have separate officers, directors and employees. Further, all transactions with the BOC must be "on an arm's length basis."⁽⁶⁶⁾

With the hope that true competition against BOC's will flourish quickly, the 1996 Act provides for a sunset of the separate affiliate requirements. Three years after a BOC is authorized to offer long-distance services, it will no longer need to either offer long-distance telecommunications services or conduct manufacturing activities through a separate affiliate.⁽⁶⁷⁾ Using a different starting point, the Act similarly states that four years after the date of the 1996 Act (February 8, 2000), a separate affiliate will not be needed for the provision of long-distance information services.⁽⁶⁸⁾ The timing of either of the sunset provisions can be extended by the FCC if the risk of anticompetitive abuse remains.⁽⁶⁹⁾

C. Obtaining an Interconnection Agreement

Most of the issues surrounding interconnection will be resolved, to a large extent, on a case-by-case basis. The final rates, terms, and conditions governing a particular interconnection must reflect the legitimate needs of all parties. Thus, competitors must reach agreement on a host of sensitive issues. There are obvious problems involved in reaching a mutually beneficial agreement between business adversaries, especially where one party, in effect, holds all the cards.⁽⁷⁰⁾ The 1996 Act creates a multi-layered scheme, whereby interconnecting agreements are reached either through negotiation or binding arbitration, and then subject to review by the local state commission.

It will be most cost-efficient if parties resolve their differences through voluntary negotiations.⁽⁷¹⁾ Both sides have the duty to negotiate "in good faith."⁽⁷²⁾ This provision requires more cooperation than the analogous requirement under federal labor law. While unions and management are required to "confer in good faith," that duty is specifically restricted so as not to "compel either party to agree to a proposal or require the making of a concession."⁽⁷³⁾ There is no similar restriction in the 1996 Act. Although the Act is not more specific, the very purpose of the Act, to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies . . . by opening all telecommunications markets to competition . . ."⁽⁷⁴⁾ implies a more cooperative mindset. While reaching an agreement is not required, it would violate the 1996 Act if a party "negotiates without serious intent to contract."⁽⁷⁵⁾

If voluntary agreement is not reached, either side can petition the state commission to conduct binding arbitration.⁽⁷⁶⁾ In setting rates for interconnection or access to unbundled network elements, the state commission is not to use the traditional rate-of-return formula. Instead, the rates are to be based on actual cost, including a reasonable profit, and must be nondiscriminatory.⁽⁷⁷⁾ Similarly, rates charged for reciprocal compensation (for transport and termination of calls originating on a competitor's network) must either reflect the actual costs associated with the transport and termination of calls, or be supplanted by a "bill-and-keep" arrangement.⁽⁷⁸⁾

The 1996 Act requires that all interconnect agreements, whether obtained through voluntary negotiations or binding arbitration, must be submitted to the state commission for approval.⁽⁷⁹⁾ It is not entirely clear why an agreement that was created through arbitration by a state commission should need to be submitted to the same commission for approval, but so be it.⁽⁸⁰⁾ Negotiated agreements must be approved unless the agreement is found to either discriminate

against a carrier not party to the agreement or be otherwise against the public interest.⁽⁸¹⁾ Arbitrated agreements are to be approved unless they conflict with the provisions of sections 251 or 252.⁽⁸²⁾

There are only two permissible ways to attack the decision, action, or inaction of a state commission in this area. First, an aggrieved party can petition the FCC to preempt the state commission and take over the proceedings.⁽⁸³⁾ Second, a complaint can be filed in federal court to determine whether an agreement complies with the Act.⁽⁸⁴⁾ State courts are denied jurisdiction in this matter.

States are further limited by section 253, which preempts any local law or regulation which creates a barrier to entry into the telecommunications market.⁽⁸⁵⁾ The local government is not entirely out of the regulatory picture though. The drafters of the 1996 Act intended that state and local governments would retain their ability to "manage the public rights-of-way" in a non-discriminatory, competitively-neutral way, and charge "fair and reasonable" fees for use of those rights-of-way.⁽⁸⁶⁾

This savings clause is likely to be the source of much litigation. Not only is the Act silent as to what makes a fee "reasonable," there is also the question as to whether cable operators, who already pay a franchise fee,⁽⁸⁷⁾ can be required to pay a second time for the same wire, just because it is carrying telecommunications information as well as video programming. Moreover, local regulators contend that the power to "manage" rights-of-way encompasses the power to condition use by telecommunications carriers on a variety of regulatory obligations, while those carriers argue that management of rights-of-way is limited to safety-type concerns and does not include the manner in which the carrier provides service.

While neither the 1996 Act nor the Conference Report define manage, the restricted interpretation is probably more consistent with the intent of Congress. First, the section is entitled, "Removal of Barriers to Entry."⁽⁸⁸⁾ Additionally, the Act specifically permits local governments to protect other important interests, such as the rights of consumers and the promotion of universal service.⁽⁸⁹⁾ Such specific permission would not have been needed had the authority to manage rights-of-way been all-inclusive. The FCC is charged with preempting any local government which oversteps its management powers and creates an impermissible barrier to telecommunication service.⁽⁹⁰⁾

D. Universal Service

The concept of universal service is one of the most important links between the old regulatory scheme and the 1996 Act. From the very beginnings of the FCC, universal service has been at the center of telecommunications policy.⁽⁹¹⁾ The 1934 Communications Act, for example, mandated that the FCC regulate electronic communications "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"⁽⁹²⁾

The 1996 Act represents an attempt to fulfill the commitment to universal service while adapting to ongoing changes in both technology and the marketplace.⁽⁹³⁾ The 1996 Act includes within its list of universal service principles: that rates be "just, reasonable and affordable"; that access to "advanced telecommunications and information services" be provided to consumers living in rural, low-income, or high-cost areas; and that all providers of telecommunications services make an "equitable and nondiscriminatory contribution" to universal service.⁽⁹⁴⁾

There are, of course, two preliminary questions for any universal service policy: what "services" must be provided, and how "universal" must their provision be? Most importantly, the 1996 Act recognizes that the services, which as a matter of national policy, should be available to all Americans, can no longer be a static concept. Thus, the Act decrees that universal service "is an evolving level of telecommunications services"⁽⁹⁵⁾ The FCC's definition of universal service is to be established "periodically" based on which services have become: essential to education, health or safety; deployed and subscribed to by a "substantial majority" of residential customers; and otherwise consistent with the public interest.⁽⁹⁶⁾

The actual mechanism for ensuring universal service is to be decided by the FCC. All telecommunications carriers that provide interstate service must contribute to this mechanism, on an equitable and nondiscriminatory basis.⁽⁹⁷⁾ These contributions will then go to an "eligible telecommunications carriers"⁽⁹⁸⁾--those carriers that offer and advertise the components of universal service throughout a designated service area.⁽⁹⁹⁾ Both the scope of the designated area and a carrier's status as eligible are determined by each state's commission.⁽¹⁰⁰⁾ In nonrural areas, the state commissions must designate more than one carrier as eligible if multiple carriers request the designation and meet the statutory requirements.⁽¹⁰¹⁾

In addition to receiving monetary contributions, an eligible carrier also has the right to demand that incumbent LEC's share their infrastructure in order to receive the benefits of the incumbent's economies of scale and scope.⁽¹⁰²⁾ The incumbent must make infrastructure, technology, information and facilities or functions available on "just and reasonable terms" for the purpose of providing universal service.⁽¹⁰³⁾

Eligible carriers may only use universal service support for the provision, maintenance, and upgrading of facilities and services related to the provision of universal service.⁽¹⁰⁴⁾ This is consistent with the general requirement that carriers cannot use noncompetitive services to subsidize services subject to competition.⁽¹⁰⁵⁾ For interstate services, the FCC must establish whatever cost allocation rules and accounting safeguards are necessary to ensure that universal services bear no more than a reasonable share of the costs of the facilities providing all services.⁽¹⁰⁶⁾ The states have the same responsibility for intrastate services.⁽¹⁰⁷⁾

III.Cable Television and Video Programming

Like the BOCs, cable operators enjoyed a virtual monopoly in their service areas prior to the 1996 Act. True, there was the legal right under the 1992 Cable Television Act for competitors to obtain franchises to lay a second cable in an area.⁽¹⁰⁸⁾ Also, competition of a limited kind was being offered by the newer video distribution systems, such as Direct Broadcast Satellites (DBS) and Multi-channel Multipoint Distribution Services (MMDS). Nonetheless, cable television still had many of the earmarks, and much of the power, of a traditional monopoly.⁽¹⁰⁹⁾

Cable television faced a dizzying array of changing regulatory environments in the twelve years prior to the 1996 Act. In 1984, cable operators received a large amount of freedom, for the first time, from rate and other forms of regulation.⁽¹¹⁰⁾ With consumers angry about skyrocketing rates and broadcasters anxious to ensure that their programming would be carried on cable systems, Congress overrode a Presidential veto and tightened the regulatory reins in 1992.⁽¹¹¹⁾

The 1996 Act represents a different balancing act. Cable television is to be partly deregulated so it can compete in the broader telecommunications market. Full deregulation, however, is avoided, because of the likelihood of continuing (at least for the immediate future) market dominance in the local video arena. Meanwhile, provisions are made to lift, once and for all, the legal barriers both to telephone company provision of cable and other video programming, and cable entry into the local telephone market.

A. Effective Competition

The provisions involving the definition of "effective competition" are important for many reasons. "Effective competition" is a label desired by cable operators seeking rate deregulation as well as the ultimate goal of the drafters of the 1996 Act.

Under the 1992 Cable Act, the term "effective competition" was limited and rarely found. These standards continue after the 1996 Act, but an additional means to determine "effective competition" was added.

Under the 1992 Cable Act, cable systems with very low penetration rates, under 30 percent of franchise-area
⁽¹¹²⁾

households subscribing, are deemed to face effective competition. The vast majority of cable operators, those with higher penetration, need to prove that they face direct head-to-head competition from a multichannel programmer (such as another cable operator, MMDS system, or DBS operator).⁽¹¹³⁾ To qualify though, that competitor needs to offer service to at least half of the cable operator's franchise area and provide service to at least 15 percent of the area's households.⁽¹¹⁴⁾ The last way the 1992 Cable Act provided for a declaration of "effective competition" was if the local government itself offered a comparable service to at least half of the franchise area's households.⁽¹¹⁵⁾

The 1996 Act adds a fourth way for a cable operator to claim "effective competition," and thus obtain rate deregulation. If a telephone company (a "local exchange carrier" in the Act's parlance), offers comparable video programming, either directly or through an affiliate, the cable operator will be deemed to face effective competition.⁽¹¹⁶⁾ Included in this definition are telephone companies who offer video service through any means, including MMDS as well as a wire, other than direct-to-home satellite, in an unaffiliated cable operator's service area. Unlike the 1992 Cable Act's provisions regarding other private multi-channel competitors, the telephone company need not serve any particular number of video subscribers. Instead, the telephone company must simply "offer" service: that is be physically able to provide video programming service with only a minimal additional investment.⁽¹¹⁷⁾

B. Rate Deregulation

The battle over the extent to which cable rates should be regulated has always been the emotional highlight of debates over cable regulation in general.⁽¹¹⁸⁾ The 1996 Act provides greater deregulation immediately, with the promise of far greater pricing freedom for cable operators in the years to come.

The 1996 Act continues the distinction, created in the 1992 Cable Act, between "basic" service and "cable programming service."⁽¹¹⁹⁾ The "basic" tier of cable programming contains broadcast channels and channels offering Public, Educational, and Government (PEG) Access programming. "Cable programming service" includes all other tiers of cable programming excepting programming offered on a per-channel or per-programming (such as pay-per-view) basis.

The basic tier is subject to local regulation, but that local regulation must follow strict FCC guidelines.⁽¹²⁰⁾ The FCC's guidelines are extraordinarily complicated, even for the telecommunications field, with the Commission's implementation order totaling more than 500 pages.⁽¹²¹⁾ Ironically, all the legal and mathematical factors represent nothing more than an attempt to define which basic rates are "reasonable."⁽¹²²⁾

Cable operators facing effective competition are not subject to regulation of the basic tier. Additionally, small cable operators who only offered basic service as of the end of 1994 are similarly free of basic service rate regulation.⁽¹²³⁾

For cable operators, the most important change brought by the 1996 Act is that the other tiers of cable programming, those providing "cable programming service," will be free from rate regulation after March 31, 1999.⁽¹²⁴⁾ On the belief that there will be true competition for delivering "cable-type" programming to consumers after April 1, 1999, governmental rate regulation of cable programming service will be no more. Such rate regulation is, of course, already ended for those operators facing "effective competition," but this deregulation will cover the entire cable industry.

Until March 31, 1999, for cable operators not facing effective competition, rates for these tiers, as with the basic tier, are required to be "reasonable." The primary difference is that the setting of these rates is done by the FCC, not the local franchising authorities.⁽¹²⁵⁾

While the rate relief reflects a belief in the impending arrival of competition, the 1996 Act did not relieve cable operators of many other rules that were designed to protect the video marketplace. For example, the 1992 Cable Act contained strong program access requirements.⁽¹²⁶⁾ Programmers who are vertically integrated with cable operators must sell their programs to competing distribution services at reasonable and nondiscriminatory prices.⁽¹²⁷⁾ The requirement was not lessened by the 1996 Act.⁽¹²⁸⁾ Similarly, the must-carry rules, which require cable operators to

carry local broadcast channels, remain substantially unchanged by the 1996 Act.⁽¹²⁹⁾

C. Ownership of Cable Systems and Other Video Providers

Other than rates, the other area where the 1996 Act promises to create major changes in the cable industry involves the loosening of the rules involving cable ownership. Cable television operators are free to enter into the larger telecommunications market, but may face stiff competition on their home turf from local telephone companies.

1. Telco Provision of Video Programming

Ending a lengthy legal battle, the 1996 Act eliminated the ban on cable-telephone cross-ownership. Previously, cable television operators and local telephone companies were barred from entering the other's field in the same location.⁽¹³⁰⁾ A string of lower federal courts had struck down the cross-ownership ban as violative of the First Amendment, and the Supreme Court had agreed to hear the issue.⁽¹³¹⁾ Before the Court could rule however, the 1996 Act's removal of the ban was enacted,⁽¹³²⁾ and the Court dismissed the challenge as moot.⁽¹³³⁾

Under the 1996 Act, there are four ways a local phone company can offer video programming in its local area. A telephone company can provide video either as a pure common carrier or a traditional cable operator.⁽¹³⁴⁾ As a video common carrier, the telephone company is treated as a classic common carrier, subject to the common carrier provisions of Title II of the Communications Act of 1934. As a traditional cable operator, the telephone company would be subject to all of the requirements of the 1984 and 1992 Cable Acts.

A third possibility for video distribution is through radio-based communication.⁽¹³⁵⁾ If a telephone company provides a wireless, radio-based multichannel video programming distribution service, it will not meet Cable Act restrictions.

The most innovative part of the 1996 Act in this area was the creation of a fourth way for telephone company delivery of video programming: the "open video system."⁽¹³⁶⁾ An open video system is a hybrid, of sorts. It permits some programming control for the telephone company, but reserves other channels for use by nonaffiliated programmers. The drafters of the 1996 Act hoped that the open video system would become the predominant model for telephone entry into the video marketplace.⁽¹³⁷⁾

Specifically, the local telephone company can only select the programming for one-third of the open video system's channel capacity, if demand for channels exceeds the system's supply. The other two-thirds of the system must be made available to nonaffiliated program providers. The 1996 Act, however, places no upper limit on the *number* of channels a telephone company or its affiliate can program. This provides an incentive for the creation of open video systems with large channel capacity.

As with so much of the 1996 Act, regulation of open video systems contain significant antidiscrimination provisions. Most broadly, the operators of an open video system may not discriminate in regards to carriage of programming, and rates and other conditions of carriage must be just, reasonable, and nondiscriminatory.⁽¹³⁸⁾ Moreover, operators of an open video system may not discriminate in favor of their own programming or that of their affiliates with regard to information presented to subscribers.⁽¹³⁹⁾ Thus, in its advertising or its provision of technical means of program selection, the open video systems operator cannot favor its own programming over that offered by nonaffiliated entities.

In keeping with its hybrid nature, an open video system is not to be treated, aside from the above requirements, as a common carrier,⁽¹⁴⁰⁾ and faces only a limited amount of cable-type regulation. There is no need for a cable franchise, and neither rate regulation, leased access, cable equipment, nor consumer service rules apply.⁽¹⁴¹⁾ Other Cable Act provisions designed to increase the variety of programming choices, such as PEG access, must-carry, and program access rules, remain applicable to open video systems.⁽¹⁴²⁾

2. Cable Provision of Telephone Service

The 1996 Act clears away much of the regulatory underbrush which kept cable operators from providing local telephone service. Most basically, the Act preempts much of the state and local regulations which governed the provision of noncable service by cable operators.

First, franchising authorities are barred from imposing any limit on the provision of telephone or telecommunications service by a cable operator.⁽¹⁴³⁾ Second, franchising authorities are barred from requiring that cable operators obtain a franchise prior to offering telephone or telecommunications service.⁽¹⁴⁴⁾ Finally, the franchising authority may not use revenue from a cable operator's telephone or telecommunications service to calculate the franchise fee owed by the operator.⁽¹⁴⁵⁾

3. Mergers between Cable Operators and Local Telephone Companies

The major restriction on the competitive free-for-all for video programming is the continued restriction on mergers and buy-outs between cable companies and local telephone companies within their respective service areas. This is in keeping with the "two-wire" dream of direct head-to-head competition between cable and local telephone companies.⁽¹⁴⁶⁾

The 1996 Act contains parallel prohibitions: a local telephone company cannot acquire more than a 10 percent financial interest in a cable operator providing service in the telephone company's service area; and a cable operator cannot acquire more than a 10 percent financial interest in a local telephone company providing service in the cable operator's franchise area.⁽¹⁴⁷⁾ Not only are direct mergers prohibited, but joint ventures between cable operators and telephone companies in the same market are also proscribed by the 1996 Act.⁽¹⁴⁸⁾

The joint venture ban is limited, though, to the provision of video programming and telecommunications services. A joint venture for other purposes, such as constructing the physical facilities for providing the programming and services, would be permitted.⁽¹⁴⁹⁾ Similarly, a local telephone operator can use a cable system's subscriber drops, the last link between the cable operator's network and the individual subscriber.⁽¹⁵⁰⁾ This use requires the approval both of the cable operator, as to rates and conditions, and of the FCC, to ensure that this sharing is of limited scope and duration.⁽¹⁵¹⁾

The FCC was also given authority to issue waivers, permitting cable/telco combinations.⁽¹⁵²⁾ Prior to issuing such a waiver, the FCC must determine either that the cable or telephone company faces economic distress; the cable system or telephone facilities would not be economically viable; or the public interest clearly outweighs the anticompetitive effects of the combination.⁽¹⁵³⁾ Additionally, the local franchising authority must approve such waiver before it becomes effective.⁽¹⁵⁴⁾

4. Other Cable Ownership Issues

While the drafters of the 1996 Act maintained numerous provisions to limit co-ownership of cable and telco systems, a deregulatory mindset pervaded other cable ownership issue. In an effort to strengthen cable as a player in the new competitive marketplace, many previous restrictions on cable sale and ownership were lifted.

Under the former Cable Act provisions, "trafficking" in cable systems was limited. Cable operators were barred from selling a cable system for three years after acquisition or initial construction.⁽¹⁵⁵⁾ That three-year holding period has now been eliminated.⁽¹⁵⁶⁾ As under the old law, franchising authorities are given 120 days to decide whether to approve a request for approval of a transfer of system ownership, with the transfer treated as granted if no decision is rendered within that time.⁽¹⁵⁷⁾

Similarly, restrictions on cable operator co-ownership of other forms of electronic communication were also eased. First, the FCC was instructed to eliminate its restriction on cable operator ownership of a broadcast network.⁽¹⁵⁸⁾ To prevent anticompetitive abuse by such co-ownership, the FCC was also instructed to ensure carriage, channel

positioning and nondiscriminatory treatment of nonaffiliated broadcasters by the cable/network combination.⁽¹⁵⁹⁾

The 1996 Act is not quite so bold with the issue of cable cross-ownership of broadcast stations in the same market. While the 1996 Act removes the statutory ban on such combinations,⁽¹⁶⁰⁾ the FCC is left to determine the ultimate question as to their permissibility. In fact, the drafters of the 1996 Act specified that they did not intend, by their statutory repeal, to indicate one way or the other whether the FCC should change its existing cross-ownership ban.⁽¹⁶¹⁾

Finally, the ban on cable ownership of either colocated SMATV systems or colocated MMDS systems is eased. Cable ownership of either of these two video delivery systems will now be permitted in any area where a cable operator is subject to effective competition.⁽¹⁶²⁾

IV. Broadcasters in the New Telecommunications Marketplace

The lowest-tech players in the telecommunications revolution, the broadcasters, received significant regulatory relief from the 1996 Act. In addition to the changes in the rules governing cable ownership of stations and networks,⁽¹⁶³⁾ broadcasters also benefited from the deregulatory tradewinds. Ironically, though, most of the changes affecting broadcasters actually serve to limit intramedia competition.

For example, in deciding whether to renew a broadcast license, the FCC is now barred from considering the proposal of any alternate potential broadcaster.⁽¹⁶⁴⁾ Instead, the FCC must only consider whether the broadcaster has committed "serious" violations of FCC rules and has served the public interest.⁽¹⁶⁵⁾

Not only is renewal easier,⁽¹⁶⁶⁾ the terms of the license have been increased. Instead of a five-year license for television and seven-year for radio, all broadcasters will now enjoy an eight-year license period.⁽¹⁶⁷⁾

Many of the limits on multiple ownership of broadcast licenses have been eased or eliminated. On a national level, the limit on the number of AM or FM radio stations which can be controlled by one entity was eliminated.⁽¹⁶⁸⁾ The national limit on the number of television stations was also removed,⁽¹⁶⁹⁾ and now the only remaining national ceiling is that one entity cannot own television stations which, together, reach more than 35 percent of the nation's television households.⁽¹⁷⁰⁾

The rules governing multiple-ownership within a particular local market have been relaxed, though not eliminated. For radio, a complicated matrix was created, with the number of permissible co-owned stations dependant both on the number of available commercial radio stations and whether the stations are concentrated in the same "service," either the AM or FM band:⁽¹⁷¹⁾

Number of Commercial Stations in a Market	Maximum Number of All Stations in That Market	Maximum Number of Same-Service Stations
45 or more	8	5
30 - 44	7	4
15 - 29	6	4
14 or fewer	5	3

Congress was not willing to make a final decision as to local ownership limits for television stations. Instead, the 1996 Act directs the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify or eliminate" the current ban on owning more than one station in a market (the so-called "duopoly rule").⁽¹⁷²⁾ While not expressing any position on this issue directly, Congress did state in the Conference Report that if the duopoly rules were revised, VHF-VHF combinations should only be allowed in "compelling circumstances."⁽¹⁷³⁾

Congress also liberalized the rules as to television/radio co-ownership. Prior to the Act, the FCC permitted common ownership of a radio and a television station in the same market only if thirty broadcast owners were operating in that market, and the market was in any of the top twenty-five largest.⁽¹⁷⁴⁾ The 1996 Act extends that policy to include any of the top fifty markets.⁽¹⁷⁵⁾

The 1996 Act also provides a little more flexibility than in the past for broadcast television networks to combine. Previously, all television networks were barred from common-ownership.⁽¹⁷⁶⁾ The "Big-4" networks (ABC, CBS, NBC, and Fox) are still barred from merging either with each other or the fledgling WB and UPN networks. Mergers are permitted, though, between either the WB and UPN networks, or between any existing network and some new network formed after the Act.⁽¹⁷⁷⁾

Perhaps the strangest part of the 1996 Act, involves "Advanced Television Services" (ATV), the allocation of the spectrum which will be used for digital, high definition television.⁽¹⁷⁸⁾ Whomever gets awarded this portion of the spectrum stands to enjoy an enormous windfall, in large measure due to the variety of services that will be able to be transmitted simultaneously by the license holder.

The early winners in this legislative slugfest were the existing broadcasters. The 1996 Act states that if ATV licenses are issued, they are to be awarded to only those who are already licensed broadcasters.⁽¹⁷⁹⁾

But even that requirement in the Act did not end the dispute. Shortly before Congress completed its work on the Act, political opposition to this "governmental give-away" began to build. In order to prevent the issue from scuttling the rest of the Act, and to avoid a painful rewriting process, Congressional leaders secured a promise from the FCC that the Commission would not issue ATV licenses until Congress held further hearings and had the opportunity to revise the plan laid out in the 1996 Act.⁽¹⁸⁰⁾ Thus, the actual control over ATV is still not determined, and it has yet to be seen whether the broadcasters of the twentieth century are permitted to become the high-tech HDTV station owners of the future.

V. Direct Regulation of Content of Telecommunications

There is an almost Holmesian feel to much of the 1996 Act, an underlying conviction that the creation of multiple carriers of information will benefit society by multiplying the number of voices in the marketplace of ideas.⁽¹⁸¹⁾ Or, as Judge Learned Hand saw it, "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."⁽¹⁸²⁾ The 1996 Act, accordingly, focuses largely on creating competition between carriers of information, and trusts to the market to determine the content which is carried.

All freedoms, though, are capable of abuse.⁽¹⁸³⁾ In particular, not only was the marketplace for violent and sexually oriented programming getting larger, but Congress feared that too many children were wandering through its stalls. Accordingly, in contradistinction to the content-neutrality of the rest of the 1996 Act, several provisions dealing directly with such programming were included, under the appellation "Communications Decency Act of 1996."⁽¹⁸⁴⁾

A. Broadcast Violence and Indecency

For broadcast television, Congress's primary interest was to create a technological barrier to objectionable programming, but leave control over that barrier in the hands of individual parents. The easier part of that task was the mandating of the technological barrier. First, all video programming that has been rated must be transmitted with its rating.⁽¹⁸⁵⁾ Second, all television sets sold in the United States will contain a so-called "V-Chip" that will block out all programming which has been rated unsuitable for children due to its sexual or violent content.⁽¹⁸⁶⁾ The FCC is charged with choosing the starting date for this requirement, as long as that date is after February 8, 1998, two years after enactment of the 1996 Act.⁽¹⁸⁷⁾

The tricky part of the plan, however, is to design a rating system that does not violate the First Amendment. Any system in which the Government is choosing what programs to bar is, of course, fraught with constitutional peril.⁽¹⁸⁸⁾ The 1996 Act contains the threat that the FCC will create its own ratings guidelines.⁽¹⁸⁹⁾ The only way to avoid a governmentally created rating system is if the broadcasters, along with cable television operators, follow the model of the film industry,⁽¹⁹⁰⁾ and do the rating themselves.⁽¹⁹¹⁾

There are several possible side-effects from the V-Chip proposal that may prevent it from achieving its goal. First, since the 1996 Act requires that the ratings identify "programming that contains sexual, violent, or other indecent material about which parents should be *informed*,"⁽¹⁹²⁾ it is possible that much prime time television programming will be "identified." If that happens, parents will be forced to choose between having almost all broadcasting blocked in the evenings, or letting all of the material, appropriate and inappropriate, into their homes. Secondly, the FCC's current ban on indecent broadcasting was upheld by the Court because "broadcasting is uniquely accessible to children," since offensive broadcasts could not "be withheld from the young without restricting the expression at its source."⁽¹⁹³⁾ Once the V-Chip is in place, though, such selective withholding of offensive material will be possible, and the prime rationale for distinguishing broadcast indecency from bookstores and movie theaters will be gone. The unintended result of the V-Chip proposal, then, would be that broadcasters would show far *more* sexually explicit, indecent, and violent programming, contending that children were now to be protected by technology.⁽¹⁹⁴⁾

B. Cable Indecency

Cable television, in a sense, may present a picture of what the future of broadcasting looks like. Lock-boxes and similar devices to block out particular, unwanted programming, have not only been available, but, since 1984, cable operators have been required to offer them to subscribers.⁽¹⁹⁵⁾ Accordingly, courts have uniformly found bans on cable indecency to be unconstitutional.⁽¹⁹⁶⁾

Nonetheless (or perhaps, predictably), complaints over the explicitness of cable programming have continued. Both the 1992 Cable Act and the 1996 Telecommunications Act contain numerous provisions attempting to deal with the issue, but much of the legislative plan became entangled in constitutional challenges.

The 1996 Act, for example, required the scrambling of any "sexually explicit adult programming," or indecent programming on a channel "primarily dedicated to sexually-oriented programming."⁽¹⁹⁷⁾ Prior to scrambling the signal, the program could not be shown during any time of day, "when a significant number of children are likely to view it."⁽¹⁹⁸⁾ Almost immediately upon enactment, this provision was found to be constitutionally suspect. Again, it was held that lock boxes were less-restrictive alternatives, which would adequately protect parents.⁽¹⁹⁹⁾

A more modest, content-neutral scrambling requirement imposed by the 1996 Act has not been challenged. This section requires the scrambling, at no cost, of any channel at the request of a cable subscriber.⁽²⁰⁰⁾ An earlier Senate version of this provision had included the additional standard that the programming to be scrambled be, in the judgement of the subscriber, "unsuitable for children," but this was dropped from the final bill.⁽²⁰¹⁾

Another area of interest to legislators has been programming offered on leased and public access channels. These channels are programmed by those not affiliated with the cable operator, and traditionally have been carried free from operator censorship.⁽²⁰²⁾ Both the 1992 Cable Act and the 1996 Telecommunications Act contain provisions

permitting cable operators to refuse to carry offensive programming on these channels.⁽²⁰³⁾ In a split decision, of sorts, the Supreme Court ruled that the 1992 provisions on leased access were constitutional, but that the public access provision violated the First Amendment.⁽²⁰⁴⁾ The primary differences between the two provisions, according to a plurality of the Court, was that public access was imposed and regulated by franchising authorities, and not the Federal Government, and that there was no record of a nationwide problem with "patently offensive" public access programming.⁽²⁰⁵⁾ Granting cable operators the power to bar public access programming would "greatly increase the risk that certain categories of programming (say borderline offensive programs) will not appear."⁽²⁰⁶⁾

Although the 1996 Act's provisions were not at issue in this case, it seems likely that only the leased access provisions will be enforceable. One court has suggested that the 1996 Act provision permitting operators to bar "obscene" public access programming would be constitutional, since such programming is unprotected by the First Amendment.⁽²⁰⁷⁾ The same reasons that led to the 1992 public access provisions being held unconstitutional--the role of local franchising authorities, the lack of a record of national problems with public access, and the risk that "borderline" public access programming will be barred--apply with equal force to the 1996 public access provisions.

One area of potential difficulty arises because the 1992 Act imposed liability on cable operators for carrying obscene public and leased access programming.⁽²⁰⁸⁾ It is, however, unconstitutional to impose liability for programming that one is mandated to carry.⁽²⁰⁹⁾ Unless the cable operator is relieved of all liability for public access programming, control of such programming, with the attendant risk that certain programming "will not appear," will need to be returned to the operator.

C. Internet Indecency

The 1996 Act does not deal in great detail with the Internet.⁽²¹⁰⁾ Generally, the philosophy seems to be that the highly populated world of networks, web pages and on-line services was sufficiently competitive without federal intervention. The major area where Congress did attempt to regulate computer services involved the presentation of indecent material which could be accessed by minors.

In addition to several noncontroversial provisions,⁽²¹¹⁾ the 1996 Act criminalized the use of interactive computer services to display "patently offensive" sexually explicit material so that it was "available" to minors.⁽²¹²⁾ This provision was held unconstitutional by two different three-judge courts.⁽²¹³⁾ Each court found that there was no practical way, under current technology, for most providers of on-line information, to control who receives their communication. As Judge Sloviter wrote: "[I]t is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the [Act] without seriously impeding their posting of online material which adults have a constitutional right to access."⁽²¹⁴⁾

A perhaps more successful approach will be the encouragement of nongovernmental players to police the Internet. The 1996 Act protects what it terms "good samaritan" blocking of certain programming.⁽²¹⁵⁾ This section states that those who run interactive computer services may not "be held liable" if they voluntarily restrict access to material they consider, in good faith, to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."⁽²¹⁶⁾

The stated purpose of this provision is "to overrule"⁽²¹⁷⁾ the decision of the New York trial court in *Stratton-Oakmont v. Prodigy*.⁽²¹⁸⁾ The issue in that case was whether, Prodigy, an on-line computer service which operated numerous "forums" for subscriber's to use to share information, should be viewed as a "publisher" responsible for defamatory comments on its forums, or a "conduit" with minimal liability. Because Prodigy had declared itself to be "family oriented" and used both software and personnel to police the forums for inappropriate language and topics, the court held that Prodigy would bear legal responsibility, just like a traditional newspaper publisher.⁽²¹⁹⁾ This theory would force on-line service providers into choosing between foregoing all control of their service or engaging in the task of reviewing, and censoring, thousands of postings daily.⁽²²⁰⁾

The 1996 Act attempts to give service providers a middle ground. They will not be held responsible for content they do not produce simply, "because they have restricted access to objectionable material."⁽²²¹⁾ Thus, a service provider need not adopt a totally hands-off policy to escape liability for bulletin board comments.⁽²²²⁾

While this should give some comfort to service providers who want to offer a "family" service, the protection given by the 1996 Act is not complete. If a service provider bars a message for a reason other than those listed in the Act, it presumably would be treated as a publisher of *all* the messages it posts.

A Prodigy spokesperson had stated, "What we do with our bulletin boards is identical to the policy taken by most newspapers on letters to the editor. No obscenity, no slander, no libel, no commercialism."⁽²²³⁾ It is not at all clear that this policy is covered by the good samaritan provision. Under the doctrine of *ejusdem generis*, the phrase "otherwise objectionable," probably will not be interpreted so broadly as to cover anything to which a service provider like Prodigy might object.⁽²²⁴⁾ Ironically, then, an on-line service provider who removes some defamatory material, may well end up responsible for any defamatory material that remains, while a similar provider who permits all the material to be posted would escape liability.

VI. Conclusion

The 1996 Telecommunications Act has forever transformed the regulatory landscape.⁽²²⁵⁾ The Act itself is complex; simultaneously detailed and incomplete. The thousands of pages of FCC rulemaking only increase the difficulty of comprehending the enormous changes brought about by the Act.

Nonetheless, there are basic themes that permeate the Act. The Act contemplates the creation of competition across the full telecommunications field, even in areas such as local telephone service and cable television service that had previously been monopoly controlled.⁽²²⁶⁾ The main combatants in this new marketplace will tend to be even larger companies than those currently dominating the scene. One can well "envision a future of titanic telecommunications and titanic telecommunicators, a competitive field dominated by highly capitalized, deep-pocket giants."⁽²²⁷⁾

The hope is that this new marketplace will create not only the advantages of competition but the unforeseeable benefits which result from a new synergetic relationship between previously separated businesses and technologies: "The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers."⁽²²⁸⁾

There are numerous dangers, however, that will have to be averted in order for the Act to be successful. The first is that existing monopolies, such as the BOCs or cable operators, will leverage their current power either to gain an unfair advantage in a competitive market, or to retain their advantage in the local arena.⁽²²⁹⁾

The second danger is that the cure to the first is worse than the disease. The primary strategy for creating new competition is that the Act permits, indeed encourages, smaller players, "to combine, collude, and combat" the entrenched monopolies.⁽²³⁰⁾ Accordingly, there is a lessening of *intramedia* competition (such as the ability for one entity to control more broadcast stations), in the hope of creating *intermedia* competition. Additionally, certain cross-media combinations (such as between cable operators and broadcast networks, or between long-distance and local telephone providers) are permitted in the hope of improving the chances of "intermodal" competition.⁽²³¹⁾

If these new combinations do not compete with one another, then the Act may have only permitted the creation of large, deregulated monopolists (or oligopolists). The FCC, local regulators, and Congress must watch carefully the unfolding of the new telecommunications field so that we may see these large entities truly battling each other for the hearts and wallets of consumers.⁽²³²⁾

Even if there is such competition, the FCC will have one more critical task: the need to ensure that there is a place for the smaller player. Be it in reselling of local phone service, or a programmer seeking one channel on a cable or Open

Video System, there must always be some way for new entry into the telecommunications field.

Finally, amidst all the wiring and rewiring, merging and affiliating, one thought should be kept in mind. At the end of the day, what will be most important for the American citizen is not the quantity of fiber optics, coaxial cable or microwave antennae that line our streets, but the quality of the information that enters our businesses and homes.

1. Professor of Law, University of Baltimore School of Law. B.A., Hampshire College, 1976; J.D., University of Pennsylvania, 1979. Support for this Article was provided by the University of Baltimore Summer Research Stipend. Thanks go to Emily Greenberg, Will Tress, and the rest of the University of Baltimore Law School Library staff for their creative and energetic assistance.
 2. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).
 3. *See, e.g.*, Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. 521-559); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (some sections codified throughout 47 U.S.C.; other sections uncodified). In this Article, I will refer to "the Cable Act" to refer to cable law at the time the 1996 Telecommunications was passed. I will refer to the "1984 Cable Act" or the "1992 Cable Act" to reference particular sections from those laws.
 4. Judge Harold Greene oversaw the break-up of the AT&T, beginning with approval of an antitrust settlement in *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) and numerous decisions that followed.
 5. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified at scattered sections of 47 U.S.C.). Unfortunately for lawyers and judges trying to discuss this Act, there is no uniform way to refer to all the sections. Some are codified, some are not. For ease of reference, the following convention will be used: When a provision is codified, it will be referred to by both its section number within the Act itself as well as by its U.S.C. section; uncodified sections will be referred to by their particular section number within the Act itself.
- The most important legislative history for the 1996 Act is the report that was issued by the House-Senate Conference which reported the final version of the bill, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458 (1996).
6. One definition of convergence is "the combination of both new and existing media--e.g., broadcasting, cable, fiber optics, satellites--into one integrated system for delivery of video, voice, and data." Michael H. Botein, *Antitrust Issues in the Telecommunications and Software Industries*, 25 Sw. U.L. Rev. 569, 569 (1996).
 7. *Cf.* *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (describing the theory of free speech by stating, "It is an experiment, as all life is an experiment.").
 8. Those struggling to attain this understanding, may well feel new sympathy for the sentiments of Henry David Thoreau: "Our life is frittered away by detail. . . . Simplify, simplify." Henry David Thoreau, *Walden*.
 9. *See* Telecommunications Act, sec. 3, 153(48), 110 Stat. at 60 (to be codified at 47 U.S.C. 153(48)).
 10. *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Part II, *Order*, 61 Fed. Reg. 45,476, 45,479 (1996) [hereinafter *Implementation Order, Part II*].
 11. Telecommunications Act, sec. 3, 153(43), 110 Stat. at 59 (to be codified at 47 U.S.C. 153(43)). A LATA is a contiguous region, encompassing no more than one metropolitan statistical area. The area can be greater if permitted under the AT&T Consent Decree or by the FCC. *Id.*
 12. *Id.*, sec. 3, 153(42), 110 Stat at 59 (to be codified at 47 U.S.C. 153(42)).
 13. The three largest companies, AT&T, Sprint, MCI, are joined by hundreds of smaller long-distance companies. *See*

generally Debra Kay Thomas Graves, *The Consumer Protection Myth in Long-Distance Telephone Regulation: Remedies for the "Caveat Dialer" Attitude*, 27 Tex. Tech. L. Rev. 383, 391 (1996).

14. Telecommunications Act, sec. 3, 153(35), 110 Stat. at 58 (to be codified at 47 U.S.C. 153(35)).

15. "The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly." *Implementation Order, Part II* 61 Fed. Reg. at 45,481. *See generally* Lawrence Sullivan, *Elusive Goals Under the Telecommunications Act*, 25 Sw. U.L. Rev. 487, 494-507 (1996).

16. Telecommunications Act, sec. 101, 110 Stat. at 61.

17. *Id.* sec. 101, 251-252, 110 Stat. at 61-70 (to be codified at 47 U.S.C. 251-252).

18. *Id.* secs. 101, 251, sec. 151, 271, 110 Stat. at 61-62, 86-92 (to be codified at 47 U.S.C. 251-271).

19. *Id.* sec. 3, 153(49)-(51), 110 Stat. at 60 (to be codified at 47 U.S.C. 153(49)-(51)).

20. *Id.* sec. 101, 251(a)(1), 110 Stat. at 61 (to be codified at 47 U.S.C. 251(a)(1)).

21. *Id.* sec. 101, 251(a)(2), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(a)(2)).

22. *Id.* sec. 3, 153(44), 110 Stat. at 59 (to be codified at 47 U.S.C. 153(44)).

23. *Id.* sec. 101, 251(b)(1), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(b)(1)).

24. *Id.* sec. 3, 251(b)(2), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(b)(2)).

25. *Id.* sec. 3, 153(46), 110 Stat. at 60 (to be codified at 47 U.S.C. 153(46)).

26. *Id.* sec. 101, 251(b)(2), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(b)(2)). For the FCC's regulations, see 47 C.F.R. 52.21-.31.

27. *Id.* sec. 101, 251(e)(2), 110 Stat. at 64 (to be codified at 47 U.S.C. 251(e)(2)).

28. *Id.* sec. 101, 251(3), 110 Stat. at 59 (to be codified at 47 U.S.C. 251(3)).

29. *Id.* sec. 3, 153(39), 110 Stat. at 59 (to be codified at 47 U.S.C. 153(39)). *See generally* 47 C.F.R. 51.205-.215.

30. *Id.* sec. 101, 251(b)(4), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(b)(4)).

31. Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33, 35-36.

32. Telecommunications Act, sec. 703, 110 Stat. at 149-50 (to be codified at 47 U.S.C. 224(a)(1)).

33. *Id.* sec. 703, 110 Stat. at 150. Such access may be denied if there is insufficient pole capacity or problems with safety or reliability. *Id.* sec. 703, 110 Stat. at 150. By 1998, the FCC must devise a means for resolving disputes over the rates charged for this pole attachment, to be phased in over a five-year period. *Id.* sec. 703, 110 Stat. at 150. For now, cable operators using the poles of others, can continue to rely on the rate formula used prior to the 1996 Act. *Id.* sec. 703, 110 Stat. at 150. The new FCC regulations, when they do become effective, will apply to all telecommunications carriers, except for cable television systems providing only cable service. *Id.*

34. *Id.* sec. 101, 251(b)(5), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(b)(5)).

35. *Id.* sec. 101, 252(d)(2)(B)(i), 110 Stat. at 68 (to be codified as 47 U.S.C. 252(d)(2)(B)(i)).

36. *Id.* sec. 101, 251(h), 110 Stat. at 65 (to be codified as 47 U.S.C. 251(h)). As the FCC stated, "The rules we adopt . . .

. will benefit consumers by making some of the strongest aspects of local exchange carrier incumbency--the local dialing, telephone numbers, operator services, directory assistance, and directory listing--available to all competitors on an equal basis." *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Part III, *Second Report and Order*, 61 Fed. Reg. 47,284, 47,287 (1996).

37. Telecommunications Act, sec. 101, 251(c)(2), 110 Stat. at 62 (to be codified as 47 U.S.C. 251(c)(2)). According to the FCC, the term "interconnection" in this section "refers only to the physical linking of two networks for the mutual exchange of traffic." *Implementation Order, Part II*, 61 Fed. Reg. 45,476, 45,500. See 47 C.F.R. 51.305 for the FCC's regulations on interconnection.

38. *Id.* sec. 101, 251(c)(3), 110 Stat. at 62-63 (to be codified as 47 U.S.C. 251(c)(3)). See 47 C.F.R. 51.307-.321 for the relevant FCC regulations.

39. *Id.* sec. 3, 153(45), 110 Stat. at 59-60 (to be codified as 47 U.S.C. 153(45)).

40. *Id.* sec. 101, 251(c)(6), 110 Stat. at 63 (to be codified as 47 U.S.C. 251(c)(6)). If physical collocation is either technically impractical or impossible due to space limitations, the Act permits a state regulatory commission to authorize "virtual collocation" instead. *Id.* See generally 47 C.F.R. 51.323 (1996).

41. Telecommunications Act, sec. 101, 251(c)(4)(A), 110 Stat. at 63 (to be codified at 47 U.S.C. 251(c)(4)(A)).

42. In keeping with this particular provision's goal of creating direct competition, only one limitation is placed on the resale of telecommunications service: where a service has not been made universally available by the incumbent, but has only been available to a particular category of subscribers, a State commission can prohibit the resale of that service to a different category of subscribers. *Id.* sec. 101, 251(c)(4)(B), 110 Stat. at 63 (to be codified as 47 U.S.C. 251(c)(4)(B)).

43. See generally *Implementation Order, Part II, supra* note 9, 61 Fed. Reg. 45,475, 45,563-67. The FCC stated that resale is an "important entry strategy for many new entrants, especially in the short term when they are building their own facilities," and also for "small businesses that may lack capital to compete in the local exchange market . . . by building their own networks." *Id.* at 45,564.

44. *Id.* at 45,565.

45. Telecommunications Act, sec. 101, 252(d)(3), 110 Stat. at 68 (to be codified as 47 U.S.C. 252(d)(3)).

46. *Id.*

47. *Implementation Order, Part II*, 61 Fed. Reg. at 45,565.

48. *Id.*

49. *Id.* See 47 C.F.R. 51.609 (1996). This avoided cost includes both the direct costs of providing retail service and a pro rata share of indirect costs, meaning costs like general corporate operating expenses that are shared between retail and wholesale operations. 47 C.F.R. 51.609(c) (1996).

50. *Implementation Order, Part II*, 61 Fed. Reg. at 45,565.

51. 47 C.F.R. 51.611(b) (1996).

52. Telecommunications Act, sec. 151, 271(b)(2), 110 Stat. at 86. Some services, such as "800" services which terminate inside a BOC's local area and permit subscribers to choose their long distance carriers, are considered in-region services subject to the competitive checklist requirement. *Id.* sec. 151, 271(j), 110 Stat. at 92 (to be codified at 47 U.S.C. 271(j)).

53. See *supra* Part II.A.

54. Telecommunications Act, sec. 151, 271(c)(1)(A), 110 Stat. at 87 (to be codified at 47 U.S.C. 271(c)(1)(A)). According to the Conference Report, this requirement is to ensure, "that an unaffiliated competing provider is in the market." H.R. Conf. Rep. No. 104-458, at 148.
55. H.R. Conf. Rep. No. 104-458, at 148.
56. *Id.*
57. *Id.*
58. Telecommunications Act, sec. 151, 271(c)(1)(B), 110 Stat. at 87 (to be codified at 47 U.S.C. 271(c)(1)(B)). The statement will also suffice if the only providers to request access have failed to comply, in a timely fashion, with the implementation schedule of an interconnection agreement. *Id.*
59. *Id.* sec. 151, 272(a)(2)(B), 110 Stat. at 92 (to be codified at 47 U.S.C. 272(a)(2)(B)).
60. *Id.* sec. 151, 272(a)(2)(B)(i), 110 Stat. at 92 (to be codified at 47 U.S.C. 272(a)(2)(B)(i)). "Incidental services" are defined to include such services as: alarm monitoring services, audio and video programming and the capability of interaction for subscriber selection of such programming, commercial mobile services, and signaling information used in connection with telephone exchange services. *Id.* sec. 151, 271(g), 110 Stat. at 91 (to be codified at 47 U.S.C. 271(g)).
61. *Id.* sec. 151, 272(a)(2)(B)(iii), 110 Stat. at 92 (to be codified at 47 U.S.C. 272(a)(2)(B)(iii)).
62. *Id.* sec. 151, 272(a)(2)(A), 110 Stat. at 92 (to be codified at 47 U.S.C. 272(a)(2)(A)).
63. *Id.* sec. 151, 273(h), 110 Stat. at 100 (to be codified at 47 U.S.C. 273(h)). This section states that the definition of "manufacturing" is to be the same as in the AT&T Consent Decree.
64. *Id.* sec. 151, 273(e)(1), 110 Stat. at 99 (to be codified at 47 U.S.C. 273(e)(1)).
65. *Id.* sec. 151, 272(b)(1), 110 Stat. at 92 (to be codified at 47 U.S.C. 272(b)(1)).
66. *Id.* sec. 151, 272(b)(5), 110 Stat. at 93 (to be codified at 47 U.S.C. 272(b)(5)).
67. *Id.* sec. 151, 272(f)(1), 110 Stat. at 94 (to be codified at 47 U.S.C. 272(f)(1)).
68. *Id.* sec. 151, 272(f)(2), 110 Stat. at 94 (to be codified at 47 U.S.C. 272(f)(2)).
69. *Id.* sec. 151, 272(f)(1)-(2), 110 Stat. at 94 (to be codified at 47 U.S.C. 272(f)(1)-(2)).
70. "As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants." *Implementation Order, Part II*, 61 Fed. Reg. 45,475, 45,481. As one commentator noted, "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 a very strong desire to keep that situation in place." See Panel III: *Implications of the New Telecommunications Legislation*, 6 Fordham Intell. Prop., Media & Ent. L.J. 517, 534 (1996) (statement of J.Richard Devlin, Executive Vice President, Sprint Corporation).
71. Telecommunications Act, sec. 101, 252(a)(1), 110 Stat. at 66 (to be codified at 47 U.S.C. 252(a)(1)).
72. *Id.* sec. 101, 251(c)(1), 110 Stat. at 62 (to be codified at 47 U.S.C. 251(c)(1)). Although this requirement is contained in the subsection entitled "Additional Obligations of Incumbent Local Exchange Carriers," the section explicitly places the duty to negotiate in good faith on both the incumbent and "[t]he requesting telecommunications carrier." *Id.* See also 47 C.F.R. 51.301(a)-(b) (1996) (Duty to Negotiate).

73. 29 U.S.C. 158(d) (1971).

74. H.R. Conf. Rep. No. 104-458, at 113.

75. Robert Summers, *'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 221 (1968). *See generally* E. Allan Farnsworth, *Contracts* 187-190 (1982).

76. Telecommunications Act, sec. 101, 252(b)(1), 110 Stat. at 66 (to be codified at 47 U.S.C. 252(b)(1)). The demand for arbitration must be filed within a relatively short window: between the 135th and 160th day (inclusive) after the incumbent has received a request for negotiation. *Id.* The state commission must reach its arbitration decision within nine months from the date of that request for negotiation. *Id.* sec. 101, 252(b)(4)(c), 110 Stat. at 67 (to be codified at 47 U.S.C. 252(b)(4)(c)).

77. *Id.* sec. 101, 252(d)(1), 110 Stat. at 67 (to be codified at 47 U.S.C. 252(d)(1)).

78. *Id.* sec. 101, 252(d)(2), 110 Stat. at 68 (to be codified at 47 U.S.C. 252(d)(2)). The bill-and-keep arrangement provides that each network will waive its recovery rights in exchange for the other network's agreement to do the same. *See supra* text accompanying note 34.

79. *Id.* sec. 101, 252(e)(4), 110 Stat. at 69 (to be codified at 47 U.S.C. 252(e)). If the state commission does not act within 90 days of submission of a negotiated agreement, or 30 days of an arbitrated agreement, the agreement will be deemed approved.

80. While the arbitration procedure, designed to reach a mediated agreement, serves a different purpose from the approval procedure, which is designed to ensure that the substance of the agreement squares with the procompetitive sections of the Act, it would have no doubt been simpler to require the state commission, as arbitrator, to ensure that the final agreement be consistent with the Act.

81. Telecommunications Act, sec. 101, 252(e)(2)(A), 110 Stat. at 68 (to be codified at 47 U.S.C. 252(e)(2)(A)).

82. *Id.* sec. 101, 252(e)(2)(B), 110 Stat. at 68 (to be codified at 47 U.S.C. 252(e)(2)(B)).

83. *Id.* sec. 101, 252(e)(5), 110 Stat. at 69 (to be codified at 47 U.S.C. 252(e)(5)).

84. *Id.* sec. 101, 252(e)(6), 110 Stat. at 69 (to be codified at 47 U.S.C. 252(e)(6)).

85. *Id.* sec. 101, 253(a), 110 Stat. at 70 (to be codified at 47 U.S.C. 253(a)). State and local governments are also prohibited from regulating Direct Broadcast Satellite (DBS) service, *id.* sec. 205, 303(v), 110 Stat. at 114 (to be codified at 47 U.S.C. 303(v)), and the FCC must regulate to prevent local zoning or other regulation that impairs a viewer's ability to receive DBS or MMDS service. *Id.* sec. 207, 110 Stat. at 114. The new federal regulations bar restrictions not only by zoning and building laws, but by private covenants and homeowner's associations, unless narrowly tailored to protect interests in safety or historic preservation. 47 C.F.R. 1.4000 (1996).

86. *Id.* sec. 101, 253(c) (to be codified at 47 U.S.C. 253(c)). *See also* H.R. Conf. Rep. No. 104-485, at 180 (stating that even though franchising authorities cannot regulate cable television operators in their provision of telecommunications services, local governments retain their authority over rights-of-way and can charge reasonable fees for their use).

87. *See* 47 U.S.C. 542(b) (1994).

88. Telecommunications Act, sec. 101, 253, 110 Stat. at 70-71 (to be codified at 47 U.S.C. 253).

89. *Id.* sec. 101, 253(b), 110 Stat. at 70 (to be codified at 47 U.S.C. 253(b)).

90. *Id.* sec. 101, 253(d), 110 Stat. at 70-71 (to be codified at 47 U.S.C. 253(d)).

91. Though as the FCC correctly points out, the costs of universal service are sometimes hidden from view: "The current universal service system is a patchwork quilt of implicit and explicit subsidies." *Implementation Order, Part II*, 61 Fed Reg. 45,480.
92. 47 U.S.C. 151 (1934) (current version at 47 U.S.C. 151 (1994)).
93. *See generally* H.R. Conf. Rep. No. 104-458, at 130-34 (1996).
94. *Id.* sec. 101, 254(b), 110 Stat. at 71-72 (to be codified at 47 U.S.C. 254(b)).
95. *Id.* sec. 101, 254(c), 110 Stat. at 72 (to be codified at 47 U.S.C. 254(c)).
96. *Id.* sec. 101, 254(a)-(d), 110 Stat. at 71-73 (to be codified at 47 U.S.C. 254(c)(1)(A)-(D)). The FCC's action is preceded by the recommendation of a Federal-State Joint Board. *Id.* sec. 101, 254(a)(1), 110 Stat. at 71 (to be codified at 47 U.S.C. 254(a)(1)).
97. *Id.* sec. 101, 254(d), 110 Stat. at 73 (to be codified at 47 U.S.C. 254(d)).
98. *Id.* sec. 101, 254(e), 110 Stat. at 73 (to be codified at 47 U.S.C. 254(e)).
99. *Id.* sec. 102, 214(e)(1), 110 Stat. at 80 (to be codified at 47 U.S.C. 214(e)(1)).
100. *Id.* sec. 102, 214(e)(2),(5), 110 Stat. 80 (to be codified at 47 U.S.C. 214(e)(2), (5)).
101. *Id.* sec. 102, 214(e)(2), 110 Stat. 80 (to be codified at 47 U.S.C. 214(e)(2)). For rural areas, the decision whether to designate more than one carrier as eligible is left to the discretion of the state commission. *Id.*
102. *Id.* sec. 101, 259(a),(b)(4), 110 Stat. at 77-78 (to be codified at 47 U.S.C. 259(a),(b)(4)). If an eligible carrier enjoys its own economies of scale and scope, there is no right under this provision to share infrastructure. *Id.* sec. 101, 259(d), 110 Stat. at 78 (to be codified at 47 U.S.C. 259(d)).
103. *Id.* sec. 101, 259(b)(4), 110 Stat. at 78 (to be codified at 47 U.S.C. 259(b)(4)).
104. *Id.* sec. 101, 254(e), 110 Stat. at 73 (to be codified at 47 U.S.C. 254(e)).
105. *Id.* sec. 101, 254(k), 110 Stat. at 75 (to be codified at 47 U.S.C. 254(k)).
106. *Id.*
107. *Id.*
108. 47 U.S.C. 541(a) (1994). *See also* Preferred Comm., Inc. v. City of L.A., 754 F.2d 1396 (9th Cir. 1985) (holding exclusive cable franchises unconstitutional), *aff'd on other grounds*, 476 U.S. 488 (1986).
109. "Limited non-cable competition exists today from several non-cable technologies, such as DBS, MMDS, and SMATV. Since the total penetration of such alternative providers today accounts for less than 10 percent of the country's multichannel video offerings however, the competition is a long way from being effective in most areas of the country." Botein, *supra* note 5, at 596-97.
110. *See* 1984 Cable Act. This was not, by any means, a law which deregulated cable. *See generally* Michael I. Meyerson, *The 1984 Cable Communications Policy Act: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543 (1985).
111. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

112. 47 U.S.C. 543(l)(1)(A) (1994).

113. 47 U.S.C. 543(l)(1)(C) (1994).

114. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 301, 110 Stat. 56, 115 (to be codified at 47 U.S.C. 543(l)(1)(B)). *See also* Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151 (D.C. Cir. 1995).

115. Telecommunications Act, sec. 301, 110 Stat. at 115 (to be codified at 47 U.S.C. 543(l)(1)(C)).

116. *Id.* sec. 301, 110 Stat. at 115 (to be codified at 47 U.S.C. 543(l)(1)(D)). "Comparable" programming means at least 12 channels of programming, at least some of which are television broadcast channels. H.R. Conf. Rep. No. 104-458, at 170 (1996).

117. 47 C.F.R. 76.905(e). Additionally, potential subscribers must be reasonably aware that the telephone company's service is available. *Id.*

118. The 1992 Cable Act, in fact, begins with the finding that cable rates were rising three times faster than the rate of inflation since the 1984 Act. *See* 1992 Cable Act, Pub. L. No. 102-385, 2(a)(1), 106 Stat. 1460, 1460.

119. *See* Telecommunications Act, sec. 301, 110 Stat. at 115 (to be codified at 47 U.S.C. 543(b)(7)(A), (l)(2)).

120. *Id.* sec. 301, 110 Stat. 56, 116 (to be codified at 47 U.S.C. 543).

121. Rate Regulation, *Report and Order*, 8 F.C.C. Rcd. 5631, 72 Rad. Reg. 2d (P & F) 733 (1993).

122. Telecommunications Act, sec. 301, 110 Stat. at 116 (to be codified at 47 U.S.C. 543(b)(1)).

123. *Id.* sec. 301, 110 Stat. at 116 (to be codified at 47 U.S.C. 543(m)(2)). A "small" cable operator means one who is not affiliated with either any company serving more than 1 percent of the nation's subscribers or any business with gross annual revenue greater than 250 million dollars. *See id.*

124. *Id.* sec. 301, 110 Stat. at 115 (to be codified at 47 U.S.C. 543(c)(4)).

125. *Id.* sec. 301, 110 Stat. at 116 (to be codified at 47 U.S.C. 543(c)). It will be harder to file a complaint concerning rate increases under the 1996 Act. In a change from the 1992 Cable Act, only complaints from franchising authorities, rather than by individual subscribers, will trigger FCC investigation. *Id.*

126. *Id.* sec. 301, 110 Stat. at 117 (to be codified at 47 U.S.C. 548). The constitutionality of this requirement was upheld in *Daniels Cablevision, Inc. v. United States*, 835 F.Supp. 1 (D.C. Cir. 1993).

127. Telecommunications Act, sec. 301, 110 Stat. at 117 (to be codified at 47 U.S.C. 548(c)).

128. In fact, the provision was extended to telephone companies providing video programming. *Id.* sec. 302, 110 Stat. at 121 (to be codified at 47 U.S.C. 653(b)(1)(a)). *See* note 137 and accompanying text, *infra*.

129. Telecommunications Act, sec. 301(d)(1)(B), 110 Stat. at 116 (to be codified at 47 U.S.C. 534-535). The only changes made to the must-carry rules were minor: The FCC was permitted to use a variety of measures to determine the market for broadcasters, section 534(h)(1)(C), and the FCC was forced to rule on petitions to modify a television market within 120 days of a request. *See id.*

130. 47 U.S.C. 533(b), now repealed. There were a few small exceptions, such as for cross-ownership in rural areas. *See* 47 C.F.R. 63.56(a), now repealed.

131. *See, e.g.,* Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated*, 116 S.Ct. 1036 (1996); U.S. West, Inc. v. United States, 855 F.Supp. 1184 (Wash. 1994), *aff'd*, 48 F.3d 1092, (9th Cir. 1994), *vacated*, 116 S.Ct. 1037 (1996); Pacific Telesis Group v. United States, 48 F.3d

1106 (9th Cir. 1994), *vacated sub nom.* U.S. West, Inc. v. United States, 116 S.Ct. 1037 (1996).

132. Telecommunications Act, sec. 302(b)(1), 110 Stat. at 122 (to be codified at 47 U.S.C. 521).

133. *See, e.g.*, Chesapeake & Potomac Tel. Co. v. United States, 116 S.Ct. 1036 (1996), *vacating* 42 F.3d 181 (4th Cir. 1994); U.S. West, Inc. v. United States, 116 S.Ct. 1037 (1996), *vacating* 48 F.3d 1092 (9th Cir. 1994); Pacific Telesis Group v. United States, 48 F.3d 1106 (9th Cir. 1994).

134. Telecommunications Act, sec. 302(b)(1), 651, 110 Stat. 56, 118-19 (to be codified at 47 U.S.C. 651(a)(2),(3)).

135. *Id.* sec. 302, 651, 110 Stat. at 118 (to be codified at 47 U.S.C. 651(a)(1)).

136. *Id.* sec. 302, 653(b)(3), 110 Stat. at 124 (to be codified at 47 U.S.C. 653(b)(3)). The FCC's regulations implementing this provision are found at 47 C.F.R. 76.5100 et. seq. The "open video system" concept replaces the former FCC attempt to create a telco-cable hybrid, the video dialtone regulations. *See id.*

137. H.R. Conf. Rep. No. 104-458, at 187 ("[T]he conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets.").

138. Telecommunications Act, sec. 302, 653, 110 Stat. at 121 (to be codified at 47 U.S.C. 653(b)(1)(a)).

139. *Id.* sec. 302, 653(b)(1)(e)(i), 110 Stat. at 122-23 (to be codified at 47 U.S.C. 653(b)(1)(e)(i)).

140. *Id.* sec. 302, 653(c)(3), 110 Stat. at 124 (to be codified at 47 U.S.C. 653(c)(3)).

141. *Id.* sec. 302, 653(c)(1)(C), 110 Stat. at 123 (to be codified at 47 U.S.C. 653(c)(1)(C)).

142. *Id.* sec. 302, 653(c)(1)(B)-(C), 110 Stat. at 122 (to be codified at 47 U.S.C. 653(c)(1)(B)-(C) (stating, *inter alia*, that Cable Act sections 611 [47 U.S.C. 531], 614 [47 U.S.C. 534], and 628 [47 U.S.C. 548], will apply to open video systems).

143. *Id.* sec. 303, 110 Stat. at 125 (to be codified at 47 U.S.C. 541(b)(3)(B)). *See also* 47 U.S.C. 253(a) (preempting state and local regulation having the effect of prohibiting any entity from providing telecommunications service), discussed in text at note 84, *supra*. Local governments are also prohibited from *requiring* that cable operators offer telecommunications services, except for PEG and leased access channels and institutional networks. *See id.*

144. Telecommunications Act, sec. 303, 110 Stat. at 124 (to be codified at 47 U.S.C. 541(b)(3)(A)(i)).

145. *Id.*, sec. 303, 622(b), 110 Stat. at 125 (to be codified at 47 U.S.C. 542(b)). Under the Cable Act, franchise fees are capped at 5 percent of a cable operator's gross revenue. *Id.*

146. There is much uncertainty as to how soon it will be economically practicable for either the cable or telephone company to use one wire to carry both cable service and telephone service: "[I]t is physically impossible to send a telephone conversation over a contemporary unswitched cable system, or to push a full-motion video signal through a switched but low-capacity telco." Botein, *supra* note 5, at 594. As Professor Botein has noted, although both cable systems and LECs send electronic signals through wires, "the resemblance between the two technologies just about ends there; for the foreseeable future, the two distribution systems are about as similar as an electric utility and a gas pipeline." *Id.* at 569.

147. Telecommunications Act, sec. 302, 652(a)-(b), 110 Stat. at 125 (to be codified at 47 U.S.C. 652(a)-(b)).

148. *Id.* sec. 302, 652(c), 110 Stat. at 119-20 (to be codified at 47 U.S.C. 652(c)).

149. H.R. Conf. Rep. No. 104-458, at 174.

150. *Id.*

151. There were some narrow exceptions made to the ban on cable/telco merger. Telephone companies can combine with co-located cable operators in rural areas. Telecommunications Act, sec. 302, 652(d)(1), 110 Stat. at 119 (to be codified at 47 U.S.C. 652(d)(1)). Under this provision, the combined-entity must serve a location with fewer than 35,000 inhabitants outside an urbanized area, and must serve no more than 10 percent of the households in the telephone company's service area.

There were also some provisions that were written to apply to only a tiny number of situations. For example, under one exception, merger is permitted if the cable system either: 1) is not owned by one of the 50 largest cable operators, is outside the top 100 television markets, and serves no more than 17,000 subscribers, with at least 8000 urban and 6000 non-urban; or 2) serves fewer than 20,000 subscribers, of whom at most 12,000 live in urban areas, and is combining with a small telephone company, one with less than \$100 million in annual revenue. *Id.* sec. 302, 652(d)(4)-(5), 110 Stat. at 121 (to be codified at 47 U.S.C. 652(d)(4)-(5)).

A special exception was also carved out for some of the extremely few areas where a competitive cable market existed prior to the 1996 Act. Under this provision, in all but the top 25 largest television markets, a telephone company will be able to merge with a local cable operator, as long as: 1) It is not the largest cable operator in the area; 2) The acquired cable system is not owned by one of the 50 largest MSOs; 3) The area's larger cable system is owned by one of 10 largest MSOs; and 4) The acquired cable system must have obtained a franchise covering the same area as the largest system as of May 1, 1995. *Id.* sec. 302, 652(d)(3), 110 Stat. at 121 (to be codified at 47 U.S.C. 652(d)(3)).

152. *Id.* sec. 302, 652(d)(6), 110 Stat. at 120 (to be codified at 47 U.S.C. 652(d)(6)).

153. *Id.* sec. 302, 652(d)(6)(A), 110 Stat. at 121 (to be codified at 47 U.S.C. 652(d)(6)(A)).

154. *Id.*

155. 47 U.S.C. 542(b) (1994) (repealed 1996).

156. Telecommunications Act, sec. 301(i), 110 Stat. at 117 (to be codified at 47 U.S.C. 537)).

157. *Id.* sec. 301, 110 Stat. at 117 (to be codified at 47 U.S.C. 537).

158. *Id.* sec. 202(f)(1), 110 Stat. at 111 (revising 47 C.F.R. 76.501).

159. *Id.* sec. 202(f)(2), 110 Stat. at 111.

160. *Id.* sec. 202(i), 110 Stat. at 112 (eliminating 47 U.S.C. 533(a)(1)).

161. H.R. Conf. Rep. No. 104-458, at 164 (discussing FCC review of 47 C.F.R. 76.501).

162. Telecommunications Act, sec. 202(i)(6), 110 Stat. at 112 (adding 47 U.S.C. 533(a)(3)). For a discussion of "effective competition," see text accompanying notes 111-16, *supra*.

163. *See* text accompanying *supra* notes 154-61.

164. Telecommunications Act, sec. 204, 309(k), 110 Stat. at 115 (to be codified at 47 U.S.C. 309(k)(4)). In fact, this subsection is entitled, "Competitor Consideration Prohibited." *Id.*

165. *Id.* sec. 204, 309(k)(1), 110 Stat. at 112 (to be codified at 47 U.S.C. 309(k)(1)).

166. In practice, though, broadcast renewal has always been a virtual sure-thing. *See, e.g.,* *Monroe Comm. Corp. v. FCC*, 900 F.2d 351, 359 (D.C. Cir. 1990) (Silberman, J., concurring) ("Quite obviously the FCC shrinks from the prospect of taking the license away from the incumbent, but . . . it is hard to see how the FCC can justify the weight it places on incumbency in [the renewal] case.").

167. Telecommunications Act, sec. 203, 307(c), 110 Stat. at 112 (to be codified at 47 U.S.C. 307(c)(1)).
168. *Id.* sec. 202(a), 110 Stat. at 110 (to be codified at 47 C.F.R. 73.3555).
169. *Id.* sec. 202(c)(1)(A), 110 Stat. at (to be codified at 47 C.F.R. 73.3555).
170. *Id.* sec. 202(c)(1)(B), 110 Stat. at (to be codified at 47 C.F.R. 73.35555). This is an increase from the previous national cap of 25 percent. *See* 47 C.F.R. 73.3555 (1995) (now revised).
171. Telecommunications Act, sec. 202(b), 110 Stat. at 110 (to be codified at 47 C.F.R. 73.3555).
172. *Id.* sec. 202(c)(2), 110 Stat. at 111 (referring to current duopoly rule at 47 C.F.R. 73.3555).
173. H.R. Conf. Rep. No. 104-458, at 163.
174. 47 C.F.R. 73.3555 (1995) (now revised).
175. Telecommunications Act, sec. 202(d), 110 Stat. at 111.
176. 47 C.F.R. 73.658(g) (now revised).
177. Telecommunications Act, sec 202(c), 110 Stat. at 111. *See* 47 C.F.R. 73.658(g) (as revised).
178. Telecommunications Act, sec 201, 336(g), 110 Stat. at 110 (to be codified at 47 U.S.C. 335(g)).
179. *Id.* sec. 201, 336(a)(1), 110 Stat. at 107 (to be codified at 47 U.S.C. 335(a)(1)).
180. *See, e.g.*, Jonathan D. Blake & Ellen P. Goodman, *Second Byte: Congressional Excursion into Digital TV*, 14 *Comm. Law.* at 3-5 (1996).
181. *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").
182. *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1944).
183. "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (196) (quoting James Madison *in* 4 Elliot's *Debates on the Federal Constitution* 571 (1876)).
184. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 501, 110 Stat. 56, 133.
185. *Id.* sec. 551(b), 303(w)(2), 110 Stat. at 140 (to be codified at 47 U.S.C. 303(w)(2)).
186. *Id.* sec. 551(c), 303(x), 110 Stat. at 141 (to be codified at 47 U.S.C. 303 (x)). Actually, this only applies to television sets with a diagonal screen of 13 inches or greater. *Id.*
187. *Id.* sec. 551(e)(2), 110 Stat. at 142.
188. *See, e.g.*, *Freedman v. Md.*, 380 U.S. 51 (1965); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968).
189. Telecommunications Act, sec. 551(b), 303(w)(1), 110 Stat. at 140 (to be codified at 47 U.S.C. 303(w)(1)); *id.* sec. 551(e)(2), 110 Stat. at 142. These guidelines, which are to be promulgated after an advisory board issues recommendations, are not intended to be formal "requirements," that broadcasters must use. H.R. Conf. Rep. No. 104-458, at 195. However, if any rating system is used, the rating must be transmitted with the programming. *Id.* sec. 551(b), 303(w)(2), 110 Stat. at 140 (to be codified at 47 U.S.C. 303(w)(2)).

190. See generally Douglas Ayer et al., *Self-Censorship in the Movie Industry: An Historical Perspective of Law and Social Change*, 1970 *Wisc. L. Rev.* 791 (1970).
191. Telecommunications Act, sec. 551(e)(1), 110 Stat. at 142. The broadcast industry, in part due to their desire to please the same congressional powers that would be distributing the lucrative spectrum for Advanced Television, see text accompanying *supra* notes 177-79, announced their willingness to establish "voluntary" rules for rating programming.
192. *Id.* sec. 551(e)(1), 110 Stat. at 142 (emphasis added).
193. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).
194. This is what occurred in the dial-a-porn case, where a ban on telephone indecency was struck down due to the availability of "less restrictive means" for protecting children. *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).
195. 47 U.S.C. 544(d)(2) (1994).
196. See, e.g., *Cruz v. Ferre*, 755 F.2d 1415, 1420-21 (11th Cir. 1985); *Community Television, Inc. v. Wilkinson*, 611 F.Supp. 1099 (D. Utah 1985), *aff'd sub nom. Wilkinson v. Jones*, 800 F.2d 989 (10th Cir. 1986), *aff'd without opinion*, 480 U.S. 926 (1987). Obscenity, which is not constitutionally protected, can be banned from cable television, and the 1996 Act raised the penalty for transmitting obscene cable programming from \$10,000 to \$100,000. Telecommunications Act, sec. 503, 110 Stat. at 136 (amending 47 U.S.C. 559).
197. Telecommunications Act, sec. 505, 641(a), 110 Stat. at 136 (to be codified at 47 U.S.C. 641(a)). "Scramble" is defined to mean rearranging the content of the signal sent into the home so that the programming cannot be seen or heard in an understandable manner. *Id.* sec. 505, 641(c), 110 Stat. at 136 (to be codified at 47 U.S.C. 641(c)).
198. *Id.* sec. 505, 641(b), 110 Stat. at 136 (to be codified at 47 U.S.C. 641(b)). The FCC ruled that unscrambled adult programming could only be shown between the hours of 10 p.m. and 6 a.m.
199. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813 (D. Del. 1996).
200. Telecommunications Act, sec. 504, 640(a), 110 Stat. at 136 (to be codified at 47 U.S.C. 640(a)).
201. H.R. Conf. Rep. No. 104-458, at 192.
202. 47 U.S.C. 531, 532 (1994).
203. The 1992 Cable Act permitted operators to refuse to carry access programming that depicted "sexual or excretory activities or organs in a patently offensive manner," Section 10(a) and 10(c). The 1996 Telecommunications Act permitted operators to refuse to carry access programming, "which contains obscenity, indecency or nudity." Telecommunications Act, sec. 506, 110 Stat. at 136-37 (to be codified at 47 U.S.C. 531(e), 532(c)(2)).
204. *Denver Area Educational Tele-Comm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996). The Court also struck down a 1992 provision requiring cable operators to segregate "patently offensive" leased access programming on a single channel and only permit subscriber access upon written request. 1992 Cable Act, Section 10(b).
205. *Denver Educational*, 116 S.Ct. 2374, 2394-97. This part of Justice Breyer's opinion was joined by only Justices Stevens and Souter.
206. *Id.* at 2397.
207. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 981 n.7 (D.C. Cir. 1996).
208. 47 U.S.C. 558 (1994). This provision was upheld in *Time Warner*, 93 F.3d 957.

209. *See Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

210. For a general description of the Internet, see *Shea v. Reno*, 930 F. Supp. 916, 925 (S.D.N.Y. 1996) (describing the Internet as, "a collection of more than 50,000 networks linking some nine million host computers in ninety countries . . .").

211. For example, the 1996 Act makes it a crime to use telecommunication devices to induce a minor to engage in any illegal sexual act, Telecommunications Act, sec. 508, 110 Stat. at 137 (to be codified at 18 U.S.C. 2422(b)), or to annoy or harass another person either with obscene and indecent communication or by repeated telephone calls. *Id.* sec. 502, 223(a)(1)(B), (D)-(E), 110 Stat. at 133 (to be codified at 47 U.S.C. 223(a)(1)(B), (D)-(E)). The Act also clarifies that it is a felony to use a computer to transmit obscene material. *Id.* 110 Stat. at 137 (to be codified at 18 U.S.C. 1462). This last amendment probably does not change pre-existing obscenity law, which was generally interpreted to reach that result. *See United States v. Thomas*, 74 F.3d 701, 704-05 (6th Cir. 1995) (affirming obscenity convictions for the operation of a computer bulletin board).

212. Telecommunications Act, sec. 502, 223(d), 110 Stat. at 133 (to be codified at 47 U.S.C. 223(d)).

213. *Shea*, 930 F. Supp. 916; *ACLU v Reno*, 929 F. Supp. 824 (E.D. Pa. 1996). The Supreme Court has agreed to review the ruling in *ACLU v. Reno*, 65 U.S.L.W. 3411 (1996).

214. *ACLU v Reno*, 929 F. Supp. at 853.

215. Telecommunications Act, sec. 509, 230(c), 110 Stat. at 138 (to be codified at 47 U.S.C. 230 (c)).

216. *Id.* sec. 509, 230(c)(2), 110 Stat. at 138 (to be codified at 47 U.S.C. 230(c)(2)). The 1996 Act also protects those who provide connections to the Internet or networks they do not control, are not responsible for on-line content. *Id.* sec. 502, 223(e), 110 Stat. at 134 (to be codified at 47 U.S.C. 223(e)). This protection is reserved for "entities that simply offer general access to the Internet and other online content." H.R. Conf. Rep. No. 104-458, at 190.

217. H.R. Conf. Rep. No. 104-458, at 194

218. 1995 N.Y. Misc. LEXIS 229 (N.Y.S.Ct. 1995).

219. *Id.*

220. *See generally* Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the 'Speaker' Within the New Media*, 71 Notre Dame L. Rev. 79, 116-124 (1995).

221. H.R. Conf. Rep. No. 104-458, at 194.

222. *Cf. Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding that CompuServe was not responsible because it had "little or no editorial control" over the content of the postings.).

223. Felicity Barringer, *Electronic Bulletin Boards Need Editing. No They Don't*, N.Y. Times, Mar. 11, 1990 at Section 4, p.4 quoting Brian Ek, spokesperson for Prodigy.

224. This doctrine states that "where general words follow an enumeration . . . by words of a particular and specific meaning, such general words are not to be construed to their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary 517 (6th ed. 1990).

225. "From this point forward, telecommunications law starts with the Telecommunications Act of 1996." Jim Chen, *Antitrust Issues in the Telecommunications and Software Industries: Titanic Telecommunications*, 25 Sw. U.L. Rev. 535, 537 (1996).

226. See text accompanying *supra* notes 8-16.

227. Chen, *supra* note 224, at 545. See also *id.* at 551 (stating that in the local telephone market, "we should expect only one type of entrant: big.>").

228. *Implementation Order, Part II*, 61 Fed. Reg. 45,475, 45,480 (1996).

229. See, e.g., *Sullivan*, *supra* note 14, at 522 (stating "There is no question that the risk of cross-subsidy is highest when the regulated monopolies enter an adjacent market with high joint costs."). But see Chen, *supra* note 224, at 552 (stating local telephone service is "a contestable, albeit imperfectly competitive market . . .").

230. Chen, *supra* note 224, at 558.

231. *Id.* at 551.

232. See, e.g., *Botein*, *supra* note 5, at 597 (stating that "both the telco and cable industries may end up with three or four dominant players - which in turn may merge or form strategic alliances with each other"); Chen, *supra* note 224, at 557 (referring to "the possibility of procompetitive combinations").

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