CHRISTOPHER J. WRIGHT*

The central goal of the market-opening provisions of the 1996 Act[1] was to provide mass-market consumers with a choice of multiple wireline telephone companies providing local as well as long-distance service. In particular, Sections 251[2] and 252[3] of the Act established rules permitting long-distance companies such as AT&T and MCI to use "unbundled network elements" to enter local markets. Once that happened, Section 271 [4] established rules under which the seven regional Bell Operating Companies ("BOCs") would be permitted to provide long-distance service. This central goal of the Act was not achieved, largely on account of litigation by the BOCs. The BOCs speak of the litigation following the enactment of the 1996 Act as a sweeping victory for them, but in fact they won a war of attrition. They mostly absorbed losses while winning just enough to hold off competitive entry.

As the Commission was drafting the Local Competition Order that implemented the market-opening provisions of the 1996 Act, my colleagues and I in the Office of General Counsel ("OGC") were identifying important legal issues and attempting to ensure that the Commission's implementation of the Act would be upheld in court. One important issue was whether the FCC or the state regulatory commissions had primary authority to adopt rules implementing the Act. This was critical in part because, as Justice Scalia famously stated in his 1999 decision for the Supreme Court in *AT&T v. Iowa Utilities Board*, [5] the Act was "a model of ambiguity, even self-contradiction."[6] (Congressman Billy Tauzin famously said in response that, "If you had a law that everybody understood completely, nobody would like it.") Accordingly, there was a lot of room for disagreement about how to implement the Act, and therefore (a) who had rulemaking authority mattered a lot, and (b) implementation under different rules in every state would, as a practical matter, favor incumbents rather than new entrants. It was no surprise to anyone that this jurisdictional issue would be the focus of litigation concerning the FCC's implementation of the Act.

In addition, there were three important issues relating to "network elements" that were sure to be litigated. One concerned the pricing rules for network elements, which were required by the statute to be "cost-based" to

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* Christopher J. Wright was the FCC's Deputy General Counsel from 1994 to 1997 and General Counsel from 1997 to 2001. Since then, he has been the head of the Appellate Group at Harris, Wiltshire & Grannis LLP.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
2. 47 U.S.C. § 251 (2012).
3. 47 U.S.C. § 252 (2012).
4. 47 U.S.C. § 271 (2012).
5. AT & T Corp. v. Iowa Utilis. Bd., 525 U.S. 366 (1999).
6. *See id*. at 397.

encourage competitive entry.[7] The second issue was whether competitors ought to be required to provide at least some network element themselves or could lease the "UNE platform" of transport, switching, and the loops. The third issue was how to implement the statutory provision requiring competitors to show that they would be *impaired* without access to a network element in order to be entitled to lease the element.[8]

An issue that OGC did not spot that turned out to be important was whether Section 271 of the Act was a bill of attainder. Bills of attainder are unconstitutional laws that single out persons for punishment,[9] and historically the only laws struck down as bills of attainder have been those punishing confederate supporters after the Civil War and communists during the height of the Cold War. I will not fault us for failing to foresee an argument that Section 271—which *benefitted* the BOCs by authorizing them to enter long-distance markets closed to them on account of their ability to extend their local monopolies into those markets—in fact unconstitutionally *punished* them within the meaning of the bill of attainder clause.

After the Commission released the Local Competition Order in August of 1996, the state commissions, the BOCs, and GTE (the eighth large incumbent local telephone company, which merged with Bell Atlantic to form Verizon) quickly challenged the Order in court. Petitions for review were filed in numerous circuits and the Eighth Circuit won the lottery to hear the case. Judges Bowman, Wollman, and Hansen would hold five separate oral arguments over the next few years as the case bounced back and forth between the Eighth Circuit and the Supreme Court.

The Eighth Circuit's first and most consequential decision was to issue a stay in October 1996 on the ground that the FCC lacked jurisdiction to issue rules concerning most of the provisions of the Act.[10] That decision was reversed by the Supreme Court in *Iowa Utilities Board*.[11] The government advanced two different jurisdictional arguments. One focused on the various provisions of the 1996 Act itself, which pointed in different directions concerning who had rulemaking authority. The other focused on Section 201(b),[12] the provision of the Communications Act adopted in 1934 that gives general rulemaking authority to the FCC. The Eighth Circuit focused on the contradictory provisions in the 1996 Act, but the Supreme Court emphasized Section 201(b) in holding that the Commission had rulemaking authority with respect to every provision in the Communications Act of 1934, as amended, including provisions added by the 1996 Act. Nevertheless, the stay, while overturned, significantly delayed implementation of Commission's rules.

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7. *See* 47 U.S.C. § 252(d).
8. *See* 47 U.S.C. § 251(d)(2).
9. U.S. CONST. art. I, § 10, cl. 3.
10. Iowa Utilis. Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996).
11. *See Iowa Utilis. Bd.*, 525 U.S. at 397 (1999).
12. 47 U.S.C. § 201 (2012).

Another consequential decision was a decision by District Court Judge Joe Kendall of the Northern District of Texas on New Years' Eve 1997 striking down Section 271 as an unconstitutional bill of attainder.[13] It was as irrational as it sounds to strike down a law that benefitted the BOCs as a bill of attainder. But three different court of appeals decisions followed before the issue was dead and buried.[14] Because the BOCs would have been able to enter long-distance markets without satisfying the requirements of Section 271 if their bill of attainder argument had somehow prevailed, they had less motivation to attempt to do so until the argument was finally rejected by the courts.

Regarding the pricing rules for network elements, on remand from the Supreme Court's *Iowa Utilities Board* decision the Eighth Circuit struck down those rules on the merits.[15] But the Supreme Court reversed in its 2002 *Verizon*[16] decision and upheld the Commission's decision to apply a total element long run incremental cost ("TELRIC") model to determine the prices for leasing network elements. But six years elapsed between adoption of the rules and the Supreme Court's decision upholding them.

With respect to the other network elements rules, the Eighth Circuit upheld both (a) what the Supreme Court called the "all elements" rule permitting competitors to lease the "UNE platform" and (b) the FCC's "impairment" rule that essentially presumed that competitors were necessarily impaired without access to any network element they wanted to lease because they would choose to buy rather than lease if they could. In *Iowa Utilities Board*, the Supreme Court upheld the all elements rule. But the Court reversed the Eighth Circuit's decision upholding the FCC's interpretation of the impairment requirement. The Supreme Court did not suggest that the statutory impairment requirement set a high hurdle, but rather faulted the FCC for not requiring *any* showing of need.

When new unbundling rules were issued in 1999, review occurred in the District of Columbia Circuit. In 2002, Judge Williams sent the revised standard back to the Commission in the first *United States Telecommunications Association v. FCC*[17] decision. Chairman Michael Powell then issued another set of unbundling rules, which Judge Williams vacated in 2004.[18] The court's key decision was to overturn the Powell Commission's conclusion that competitors would be impaired without access to unbundled switching on the ground that an extremely granular and time-consuming analysis was required to justify unbundling.

There had been relatively little competitive entry into mass market telephone markets in the eight years since the Act was passed. The entry that

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13. SBC Comm'ns, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997).

14. *See, e.g.*, BellSouth Corp. v. FCC, 162 F.3d 678, 683 (D.C. Cir.1998); BellSouth Corp. v. FCC, 144 F.3d 58, 62 (D.C. Cir.1998); SBC Comm'ns, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998).

15. Iowa Utilis. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000).

16. Verizon Comm'ns, Inc. v. FCC, 535 U.S. 467 (2002).

17. U.S. Telecomms. Assn. v. FCC, 295 F.3d 1326 (D.C. Cir. 2002).

18. U.S. Telecomms. Assn. v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

had occurred was primarily by cable operators, who were low-hanging fruit because they already had broadband connections to consumers' homes. Entry by other would-be competitors depended on access to unbundled network elements, and there was no realistic prospect of competitive entry into the mass market without access to switching. MCI and AT&T, whose stock values had collapsed, gave up and sought to be acquired after the D.C. Circuit's 2004 decision. Verizon bought MCI and SBC bought AT&T (and adopted its name).

The BOCs had ground out a victory by outlasting and then acquiring their two main potential competitors. To recap, in the Eighth Circuit, the BOCs won a jurisdictional victory and overturned the TELRIC rules, but ultimately lost in the Supreme Court on both issues. Similarly, they initially prevailed on the bill of attainder argument that would have let them provide long-distance service without even attempting to open their local markets, but ultimately lost on that issue as well. The BOCs lost the all elements rule in the court of appeals and the Supreme Court. They won the impairment issue in the Supreme Court after losing in the Eighth Circuit, but that should not have been a victory that prevented competitive entry. As the FCC concluded, the statute requires unbundling of network elements when competitors would be impaired without them and nothing in the Supreme Court's decision is to the contrary. The fact that no mass-market competition developed after the D.C. Circuit struck down the Powell Commission's unbundling rules shows that competitors were in fact impaired without access to unbundled switching.

Could it have been different? Under considerable congressional pressure, the Commission granted the BOCs authority to enter the long-distance markets before there had been any substantial competitive entry into local mass markets. Here the Commission relied on determinations that local competition was possible rather than that it had been actual competitive entry on a significant scale. With 20-20 hindsight, that was a mistake. In my view, an ounce of empirical evidence is worth a pound of theory. Moreover, in hindsight it was a mistake to rely on competition that depended on the availability of unbundled network elements when the litigation concerning the availability of unbundled switching had not concluded.

But if any one change might have led to mass-market competition by multiple competitors, it would have been to require the BOCs to actually enter other local markets themselves to a significant extent in order to obtain authorization to provide long distance. Thus, for example, Bell Atlantic might have been required to compete with Nynex in the New York metropolitan area rather than acquire it. In order to successfully compete in another BOC's region, the BOCs would have been forced to support rules that would have permitted competitive entry using network elements, including unbundled switching. Of course, Congress did not require competitive entry by the BOCs, so the FCC could not have imposed such a requirement. The FCC nevertheless attempted to force a BOC to compete in other local markets by conditioning SBC's acquisition of Ameritech on

SBC's promise to enter multiple local markets outside its territory, but SBC chose to pay the fines imposed by the FCC rather than compete.

A common view of the rise and fall of the market-opening provisions of the 1996 Act is that it is good as a policy matter that the Act failed to achieve its central goal. That is because there was and is a pressing need for deployment of broadband loops and, it is argued, such deployment was unlikely to occur if unbundling were required. As an initial matter, it should be noted that this argument is an attack on the statute, which provides that competitors are entitled to lease network elements if they would be impaired without them. In any event, if the BOCs had been required to compete with each other, it seems likely that they would have devised rules that supported broadband deployment while permitting competitive entry—otherwise, they would not have been able to compete with the cable operators. And a healthy MCI and AT&T might have spurred rather than deterred deployment.