Telecommunication Breakdown: Promoting Competition Through Reform of the Telecommunications Act Of 1996

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I. INTRODUCTION

The 1996 Telecommunications Act's stated goal was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[1]

The success of the 1996 Telecommunications Act is that as of 2021, 97% of Americans own a cell phone capable of communicating long distance to other users, compared to only 36% of households owning a cell phone in 1998, a short two years after the Act was passed.[2] The average monthly cell phone bill is $144, an expensive price that consumers are still willing to pay for the essential role that cell phones play in American life.[3]

However, the Act has partially failed in that competition in the telecommunications industry has massively consolidated. With the successful merger of T-Mobile and Sprint in 2020, the telecommunications industry became dominated by only three major firms: AT&T, Verizon, and the new-look T-Mobile.[4] These three firms account for about 98% of the United States' mobile service revenues.[5] In 1996, there were seven competitive long-distance carrier providers.[6] The investment-heavy nature of the telecommunications industry poses a major barrier to entry for potential new competitors.[7] Due to this barrier to entry, the future of flourishing competition in the telecommunications industry beyond the three giant firms feels like a long shot.

A question that remains alludes to the purpose of the Act's final goal: what will the future of telecommunication competition look like with the development of technology? The landscape of how humans use

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

2. *Compare Mobile Fact Sheet*, PEW RSCH. CTR. (Jan. 31, 2024), https://www.pewresearch.org/internet/fact-sheet/mobile/ [https://perma.cc/8Q7V-X8HE], *with Cellphone Ownership Soared Since 1998*, WALL ST. J. (Nov. 27, 2009), https://www.wsj.com/articles/BL-REB-8073 [https://perma.cc/BW9E-GNA5].

3. *See What is the Average Cell Phone Bill per Month?*, ASTOUND BROADBAND (Apr. 28, 2023), https://www.astound.com/learn/mobile/average-cell-phone-.bill/ [https://perma.cc/6URU-3TR9].

4. Edmund Lee, *T-Mobile and Sprint are Cleared to Merge as the Big Get Bigger*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/business/media/t-mobile-sprint-merger.html [https://perma.cc/92DJ-KL9Z].

5. *See* 20 FCC WIRELESS COMPETITION ANN. REP. 8 (2017), https://docs.fcc.gov/public/attachments/FCC-17-126A1.pdf [https://perma.cc/9DC8-YTH6] (reporting the market share strength of the three major firms compared to all other service providers).

6. *See* Jason Whalley & Peter Curwen, *Whatever Happened to the Baby Bells? Internationalization and De-internationalization in the Telecommunications Industry*, 8 MINN. J.L. SCI. & TECH. 149, 155 (2007) (outlining the immense long-distance presence that Baby Bells have in the telecommunications market).

7. *See* Pamela Mondliwa, *Policy Brief: Barriers to Entry in Telecoms*, U. JOHANNESBURG (2016), https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/578275e7bebafbf781923a46/1468167662832/Telecommunications+100716.pdf [perma.cc/J3MQ-6WMK].

telecommunications as we know it today will surely evolve with the emergence of novel technologies like AI and machine learning, nanotechnology, advanced sensory digitalization, cloud solutions, and edge computing. These sophisticated technologies require immense amounts of capital, infrastructure, and time to progress into practical tools. They are being developed further every day and could transform the status quo of telecommunications industry as we now know it.

This Note asserts that the Telecommunications Act of 1996, particularly Section 251, has failed to fulfill its intended purpose to empower competition because it benefits incumbent interests and does not give new market entrants the opportunities to succeed nor the incentives to invest in competitive infrastructure. Instead, the Act's approach to promoting competition through deregulation and enabling incumbent telecommunication firms to venture into new industries has produced the opposite effect: industry consolidation.[8] This approach encourages firms to consolidate with competitors who offer similar services to increase their market share.[9] The approach also incentivizes firms to merge with competitors that maintain robust presence in industries the firm seeks to enter but does not want to build out from scratch.[10]

To address this shortcoming, this Note argues that the Telecommunications Act of 1996 needs to be amended to ensure that competition in emerging technologies can flourish alongside currently prevalent technologies in the telecommunications industry. Lawmakers must learn from the 1996 Act's mistakes, using historical context to guide how they should amend the Act to account for the present and future. Emerging technologies create an opportunity for industry newcomers to rise to the challenge against the big three. An amended Telecommunications Act of 1996 must encourage this challenge and do so thoughtfully to prevent a recurrence of the backfire that the original Act experienced. Specifically, Section 251 of the Act needs to be amended to redesign how newcomers to the telecommunications industry can meaningfully capitalize on interconnection requirements.[11] Through amendments to Section 251, newcomers will be able to use incumbent carriers' infrastructure to eventually become independent owners of crucial infrastructure themselves to persist in the industry as legitimate industry competitors.

Section II of this Note discusses the history leading up to the passage of the Telecommunications Act of 1996 and describes its unintended consequences after being made into law Section III analyzes the shortcomings of the Act using examples of how it promoted consolidating effects that run counter to its intended purpose. Finally, Section IV will propose amendments to the Act, aiming to ensure newcomers to the telecommunications industry

8. *See* Gene Kimmelman et al., *The Failure of Competition Under the 1996 Telecommunications Act*, 58 FED. COMM. L.J. 511, 513 (2006).

9. *See id.*

10. *See* Whalley & Curwen, *supra* note 6, at 158 (showing the rationale behind the modified final judgment's decision to restrict the newly created baby bells from entering the long-distance service market).

11. *See* 47 U.S.C. § 251.

may emerge as independent operators of telecommunications infrastructure and loosen their reliance on preexisting infrastructure currently dominated by major industry incumbents.

II. BACKGROUND

The first domino leading to the creation of the Telecommunication Act of 1996 fell in 1982 when AT&T's telecommunications monopoly was divested into seven regional Bell Operating Companies (hereinafter "BOCs"), or the "Baby Bells," who subsequently dominated their respective regions.[12] Congress passed the Telecommunications Act of 1996 with the goal to "let anyone enter any communications business – to let any communications business compete in any market against any other[,]" implying Congress' attempt to counterbalance the BOCs' dominance through the introduction of new competition into telecommunication.[13] The 1996 Act attempts to accomplish this goal through the removal of stringent regulations that had previously restricted businesses from expanding into a diverse range of markets.[14] The passage of the 1996 Act instead produced an opposite consolidating effect, and the BOCs subsequently merged with one another to capitalize on each other's presence in complementary markets.[15] Today, the telecommunications industry is dominated by three major firms after the 2020 merger of T-Mobile and Sprint: AT&T, Verizon, and T-Mobile.[16] Boost Mobile, a previous subsidiary of Sprint, was organized by the Department of Justice (DOJ) and Federal Communications Commission (FCC) to be purchased by Dish Network in hopes of them emerging as a fourth competitor in the telecommunications industry.[17] However, Dish has been unable to pose a legitimate threat to the big three firms due to their major losses in subscribers regardless of their steadfast support from the DOJ and FCC.[18] It appears that no firm will be able to threaten the triopoly of AT&T, Verizon,

12. *See* Michael Meyerson, *Ideas of a Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 254 (1997) (detailing the root cause of the local rate increase that was diluting the benefits of the competitive long-distance market).

13. *Telecommunication Act of 1996*, FCC, https://www.fcc.gov/general/telecommunications-act-1996 [https://perma.cc/5A5X-39P7].

14. *See* Whalley & Curwen, *supra* note 6, at 153, 156.

15. *See id.* at 158.

16. *See* David Lumb, *T-Mobile's Merger with Sprint: Everything That's Changed 3 Years Later*, CNET (Apr. 22, 2023, 11:27 AM), https://www.cnet.com/tech/mobile/t-mobiles-merger-with-sprint-everything-thats-changed-3-years-later/ [perma.cc/XH5A-6VQ9].

17. *See* Press Release, U.S. Dep't of Just., Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to DISH (July 26, 2019) (on file with Dep't of Justice), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package [perma.cc/8L6F-6Q8T] (detailing the agreed upon settlement between the DOJ, FCC, T-Mobile, and Sprint).

18. *See* Linda Hardesty, *Dish Loses 225,000 Wireless Subs in Q3 2023*, FIERCE NETWORK (Nov. 6, 2023, 6:30 PM), https://www.fiercewireless.com/wireless/dish-loses-225000-wireless-subs-q3-2023 [perma.cc/QUS6-4NM4] (outlining Dish's competitiveness compared in the 5G industry).

and T-Mobile unless significant changes are made to the governing doctrines of the telecommunications industry.

A. Pre-Telecommunications Act of 1996

1. The 1982 AT&T Divestiture

In 1974, the DOJ filed a lawsuit against AT&T.[19] This lawsuit was based on antitrust grounds under Section 2 of the Sherman Act alleging that AT&T had used its dominant position in the telecommunications market to further progress its already existing monopoly position in the market.[20] The two sides reached a settlement in 1982, when a consent decree was agreed to divest AT&T from the BOCs, often referred to as the "Baby Bells," which were smaller companies spread out on a regional basis that provided strictly local telecommunications services to the region in which they were located.[21] The BOCs no longer exist as a result of their mergers with one another that occurred shortly after the passage of the Telecommunications Act of 1996.[22]

The United States District Court for the District of Columbia described the main ways that AT&T had used its monopoly in local telephone services to harm competitors through its control of the BOCs.[23] First, the court noted that AT&T had prevented or severely delayed competing long-distance carriers to access their local networks, which is essential to compete in the long-distance market.[24] Second, the court found that AT&T had used profits obtained through these monopolistic local practices to fund its long-distance enterprise, thus maintaining an unfair advantage against its competitors.[25] According to the court, divestiture was necessary because of AT&T's "substantial domination of the telecommunications industry in general."[26]

Further, the court assumed that the BOCs would want to expand their business into wider markets to grow, including the lucrative long-distance market.[27] The modified final judgment ("MFJ") predicted this and prohibited

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19. *See* Ben M. Enis & E. Thomas Sullivan, *The AT&T Settlement: Legal Summary, Economic Analysis, and Marketing Implications*, 49 J. MKTG. 127 (1985) (describing the timeline of the Department of Justice's action against AT&T).

20. *See* John Pinheiro, *AT&T Divestiture & the Telecommunications Market*, 2 HIGH TECH. L.J. 303, 303 (1988) ("It charged that AT&T had used its dominant position in the telecommunications market to suppress competition and enhance its monopoly power."); *see also* 15 U.S.C. § 2.

21. *See id.* (detailing the effects of the agreed-upon settlement between the DOJ and AT&T in 1982).

22. *See* Whalley & Curwen, *supra* note 6, at 155 (outlining the effects of the consolidation of the Baby Bells shortly after the passage of the Telecommunications Act of 1996).

23. *See* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 223 (D.D.C. 1982) (indicating the practices of AT&T that led to the court's decision for its divestiture).

24. *See id.*

25. *See id.*

26. *Id.* at 163 (showing the court's agreement as to the scale of AT&T's control of the telecommunications industry before the 1984 divestiture).

27. *See* Whalley & Curwen, *supra* note 6, at 151 (outlining the broader business goals of the Baby Bells).

them from providing long-distance services and manufacturing products or customer premises equipment.[28]

2. The Aftermath of the 1982 AT&T Divestiture

While the AT&T divestment resulted in seven different BOCs, each were massive enterprises on their own. The BOCs—Ameritech, Bell Atlantic, BellSouth, Nynex, Pacific Telesis, Southwestern Bell, and US West—had average assets of $15.8 billion (equivalent to $47 billion today), and an average of 84,000 employees each.[29] Instead of having monopoly control over the local market on a nationwide basis, the large BOCs instead now controlled a virtual monopoly over their specifically delegated service area.[30]

The competition for the local telephone market thus faced the same problem the D.C. Circuit Court faced regarding AT&T: the expense of creating a local infrastructure as robust as the BOCs was massive, and a new local entity being introduced would require access to a BOC's own network and services to challenge it.[31] In this way, the BOCs had a government-sponsored natural monopoly on the local telephone market. Therefore, a new firm attempting to compete for the local market requires collaboration and help from the same entity which that new firm seeks to compete with.[32] This relationship parallels the reliance that Dish's telecommunications brand Boost Mobile has on its former owner T-Mobile's infrastructure, which will be discussed thoroughly later in this Note.[33]

Though the BOCs were restricted by the D.C. Circuit Court's MFJ from expanding into the long-distance market, they could operate in new lines of business through a waiver process if they successfully showed that they would not abuse their monopoly powers.[34] The BOCs were able to enter new realms of business beyond their local specialty through this waiver process.[35]

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28. *Id.* at 152 (showing the rationale behind the modified final judgment's decision to restrict the newly created Baby Bells from entering the long-distance service market).

29. *See id.* (showing that though the Baby Bells were spawned from a shared entity their scale remained massive).

30. *See* Meyerson, *supra* note 12, at 254 (detailing the root cause of the local rate increase that was diluting the benefits of the competitive long-distance market).

31. *See id.* (showing the central issue of the 1984 divestiture and a parallel concern that this Note seeks to remedy).

32. *See id.* (displaying the paradoxical nature of the Baby Bell monopoly problem).

33. *See* Jacob Kastrenakes, *Dish Now Owns Boost Mobile, Following Sale from T-Mobile*, VERGE (July 1, 2020, 11:46 AM), https://www.theverge.com/2020/7/1/21309968/dish-boost-sprint-tmobile-acquisition-spinoff-closes-prepaid [https://perma.cc/F6EV-QUHZ].

34. *See* Meyerson, *supra* note 12, at 259-63 (detailing the ability, though limited, for Baby Bells to enter other lines of business with a proper showing they would not abuse their monopoly power).

35. *See id.* (outlining a diverse set of business the Baby Bells entered).

B. The Telecommunications Act of 1996: Scope and Application

As noted earlier, the stated purpose of the Telecommunications Act of 1996 is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[36] This Act eliminated the AT&T consent decree and the restrictions that it imposed on the BOCs and replaced them with new duties and regulations.[37]

The Act defines "telecommunications carriers" as "any provider of telecommunications services offering telecommunications for a fee directly to the public to be effectively available directly to the public."[38] One of the duties of telecommunications carriers imposed by the Act centers around interconnection, which is found in Section 251 of the Act.[39] This means that all carriers must allow any other carrier to interconnect with their network fairly and equally.[40] Section 201(a) of the Act broadly affirms this duty, and states that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and . . . to establish through routes . . . to establish and provide facilities and regulations for operating such through routes."[41]

Preexisting telecommunications carriers are one of such entities that has a duty to interconnect their infrastructure with other carriers.[42] The Act defines "Incumbent Local Exchange Carriers," or "ILECs," to be those carriers that already offer telephone services on the date the Act was passed, or firms who are later found to maintain operations similar to an incumbent carrier.[43] Congress imposed additional duties on preexisting ILECs because of their significant advantage over potential market newcomers.[44] As noted, one of the most crucial duties imposed upon ILECs is the duty to provide "for

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36. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 251-271) (noting the original stated purpose for the Act).

37. *See* Jay L. Birnbaum, *M&A Implications of Telecommunications Act of 1996*, 1 FORDHAM J. CORP. & FIN. L. 59, 63 (1996) (explaining the Act's effect on the Baby Bells, which is a central provision of the Act).

38. Telecommunications Act of 1996, 47 U.S.C. § 153(51)-(53) (stating the statutory definition of "telecommunications carriers").

39. See 47 U.S.C. § 251 (detailing a specific provision of the Act that imposes a duty upon incumbent carriers).

40. *See id*. at (a)(1)-(2) (stating what above-defined "telecommunications carriers" are obligated to do under the Act).

41. 47 U.S.C. § 201(a) (detailing the broad duty of common telecommunications carriers to establish physical connection of their communications infrastructure to others).

42. *See* 47 U.S.C. § 251(c)(2) (showing incumbent telecommunications carriers' obligation to interconnect with competing telecommunications carriers).

43. *Id.* at (h)(1)-(2); *see also* Meyerson, *supra* note 12, at 257 (stating the Act's definition of "incumbent local exchange carriers").

44. *See id.* (detailing the reasoning why the Act imposes are additional duties on incumbent LECs).

the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network."[45]

The Act further contains a section titled "Bell Operating Company entry into interLATA services," which outlines what a BOC may do to enter the long-distance telecommunications market.[46] Following the divestiture of AT&T in 1982, there was a expansion in the amount of service providers that operated in the long-distance service space.[47] Before this Act, the BOCs were severely restricted from entering the long-distance markets even though their assets were well suited to do so.[48] A BOC was allowed to expand their operations into the long-distance market for telecommunications after they adhered to the Act's "competitive checklist," which lawmakers expected would uphold the potential for competition in the local service market.[49] The foremost requirement in the BOC competitive checklist is interconnection with other telecommunications carriers, thus mirroring the interconnection requirements found in Section 251 of the Act.[50]

C. Post-Telecommunications Act of 1996 Act Effects on Competition in the Telecommunications Industry

Sections 201(a) and 251 of the 1996 Telecommunications Act marked the beginning of BOCs having a clearer path to being able to enter the long-distance and equipment manufacturing markets.[51]

The BOCs had begun to consolidate themselves in 1995 through complex corporate arrangements.[52] However, the 1996 Act's enactment opened the door for a rapid flood of mergers largely due to provisions allowing for expansion into a diverse range of markets.[53] For example, the BOCs were immediately permitted to provide "out-of-region" long distance

45. Telecommunications Act of 1996, 47 U.S.C. § 251(c)(2) (stating what the above-defined incumbent local exchange carriers are obligation to do under the Act).

46. 47 U.S.C. § 271(a) (detailing specific requirements BOCs must satisfy to enter the long-distance market).

47. *See* Eli M. Noam, *Assessing the Impacts of Divestiture and Deregulation in Telecommunications*, 59 S. ECON. J. 438, 443 (1993) (detailing AT&T's reduction in market share in inter-LATA long-distance service from 84.2% in 1984 to 62.9% in 1990).

48. *See* Stuart N. Brotman, *Was the 1996 Telecommunications Act Successful in Promoting Competition?*, BROOKINGS (Feb. 8, 2016), https://www.brookings.edu/articles/was-the-1996-telecommunications-act-successful-in-promoting-competition/ [perma.cc/Z7HT-ZW67] (showing a specific change that the passage of the 1996 Act caused).

49. *See* Meyerson, *supra* note 12, at 260.

50. *See* Telecommunications Act of 1996, 47 U.S.C. §§ 251(c)(2), 271(c)(2)(B) (drawing parallel duties between BOCs and ILECs to enter into the long-distance telecommunications market).

51. Meyerson, *supra* note 12, at 254-55 (showing that adherence to the competitive checklist allowed for Baby Bells to enter the long-distance telephone service industry).

52. *See* Whalley & Curwen, *supra* note 6, at 156 (noting that consolidation within the telecommunications industry began slowly before the 1996 Act).

53. *See id.*

service and to manufacture and sell telecommunications network equipment once they received FCC permission to offer in-region long distance service.[54]

The BOCs rapidly restructured themselves through mergers beginning in 1996 following the enactment of the 1996 Act.[55] By 2006, the BOCs had merged with one another, starting from seven entities into three prominent telecommunications companies: Verizon, AT&T, and Qwest.[56] Qwest now operates under the CenturyLink brand and is owned by Lumen Technologies.[57]

D. The Present Day

According to the FCC's latest Mobile Wireless Competition Report released in 2022, AT&T, Verizon Wireless, and T-Mobile accounted for 98.9% of the market share for providers with publicly-traded facilities by the end of 2021.[58] UScellular retains the remaining 1.1%.[59] However, only AT&T, Verizon Wireless, and T-Mobile are facilities-based service providers referred to as "nationwide service providers" because they cover a substantial majority of the country.[60] UScellular is best characterized as a multi-regional service provider because it deploys wireless network operations in portions of 21 states.[61]

Mobile Virtual Network Operators ("MVNOs") are wireless service providers that do not own any network facilities but instead purchase wireless services wholesale from facilities-based providers and resell those services to consumers.[62] Examples of MVNOs include Mint Mobile, Google's Google Fi, and Boost Mobile, which is owned by Dish.[63] However, Dish is a unique hybrid-type MVNO in that it uses T-Mobile's wireless network to provide service to its customers, provides wholesale services to its customers through AT&T's network, and is committed to building its own 5G network infrastructure alongside its usage of another company's infrastructure.[64] This arrangement and Boost Mobile's existence altogether can be attributed to its

54. *See id.* (detailing another key provision that led to BOCs being interested and able to merge with other entities).

55. *See id.* at 155.

56. *See id.* at 155, 158 (showing the massive consolidation effect that the passage of the 1996 Act had on the telecommunications industry).

57. *See* Aldo Svaldi, *CenturyLink Rebrands Itself as Lumen Technologies*, DENVER POST (Sept. 14, 2020), https://www.denverpost.com/2020/09/14/centurylink-rebrands-itself-as-lumen-technologies/ [perma.cc/8VGX-8VPZ] (detailing the transaction that transformed Qwest's business branding).

58. *See* 2022 Communication Marketplace Report, *Report*, 37 FCC Rcd 15514, 58 (2022) [hereinafter FCC 2022 Communications Marketplace Report].

59. *See id.*

60. *Id.* at 51.

61. *See id.*

62. *See id.* at 52.

63. *See id.* at 52-53.

64. *See* FCC 2022 Communications Marketplace Report, *supra* note 58, at 62.

divestiture from Sprint, which was a result of the pledge agreement approving the massive merger between T-Mobile and Sprint.[65]

1. The T-Mobile/Sprint Merger

Note that according to the 2023 Merger Guidelines released by the FTC and DOJ, a market is presumed to be highly concentrated and subject to stricter antitrust scrutiny when the calculated Herfindahl-Hirschman Index ("HHI") exceeds 1,800.[66] According to the FCC's Mobile Wireless Competition Report in 2022, the weighted average HHI for mobile wireless services was 3,596.[67]

The most contemporary example of consolidation within the telecommunications industry is the merger between industry giants T-Mobile and Sprint under the T-Mobile branding, which was finalized in April 2020.[68] This merger transformed the telecommunications industry from four major carriers to three, with any other meaningful competition largely coming from only Verizon and AT&T.[69] In seeking the completion of this deal, T-Mobile and Sprint needed to appease the competition concerns of one of the antitrust enforcement agencies, the DOJ, and the agency with regulatory authority over common carriers, the FCC.[70]

The DOJ and FCC proposed that Sprint hand over its prepaid mobile business Boost and the entirety of its 800MHz spectrum ownership to Dish, a satellite TV company.[71] They further required strict wholesale interconnection agreements between T-Mobile and Dish.[72] T-Mobile and Sprint were also required to make at least 20,000 cell sites and hundreds of retail locations available to Dish.[73]

Though the FCC and DOJ's competition concerns were held at bay as a result of their negotiations, a group of states and the District of Columbia sued to block the merger in federal court in the Southern District of New York.[74] The plaintiffs claimed that "the effect of the merger would substantially lessen competition in the market for retail mobile wireless telecommunication services (the 'RMWTS Market') in violation of Section 7 of the Clayton Act."[75]

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65. *See* Lumb, *supra* note 16.

66. *See* U.S. DEP'T OF JUST., FED. TRADE COMM'N, MERGER GUIDELINES 5-6 (2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/C43T-WNCV].

67. *See* FCC 2022 Communications Marketplace Report, *supra* note 58, at 60-61.

68. *See* Lumb, *supra* note 16.

69. *See id.* (detailing further consolidation within the telecommunications industry).

70. U.S. Dep't of Justice, *supra* note 17.

71. *See id.* (outlining further demands made by the DOJ to approve the T-Mobile merger).

72. *See id.*

73. *See id.*

74. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 187-88 (S.D.N.Y. 2020) (describing the plaintiffs in the T-Mobile/Sprint merger lawsuit).

75. *Id.* at 186; *see also* 15 U.S.C. § 18 (outlining the central claim made by the plaintiff states).

The court approved the merger between T-Mobile and Sprint.[76] One of the court's foremost reasons for approving the merger was because they found that the FCC and DOJ's agreements with Sprint and Verizon were satisfactory to set up Dish as a fourth competitor in the industry through their spectrum holdings and the Boost brand.[77] The court did not reference the Telecommunications Act of 1996 anywhere in their opinion.[78]

2. Dish's Failure Following the T-Mobile/Sprint Merger

Dish opened its 5G offerings in August of 2022, along with its newly acquired prepaid service, Boost, following the T-Mobile/Sprint merger.[79] However Dish's new acquisition and 5G rollout has failed to present a legitimate challenge to the incumbent market giants.[80]

Dish's attempt at competing with the likes of Verizon, AT&T, and T-Mobile in the 5G space is not going as the FCC and DOJ had hoped.[81] In Quarter Three ("Q3") of 2023 alone, Dish lost 225,000 retail wireless subscribers, adding to the 188,000 subscribers lost in Quarter Two ("Q2") of 2023.[82] Dish closed Quarter Four ("Q4") with a total of 7.5 million retail wireless subscribers.[83] In their Q3 report, they achieved revenue of $3.70 billion, a significant decrease compared to their 2022 Q3 revenue of $4.10 billion.[84] In comparison, for Q4 of 2023, T-Mobile reported 119 million wireless subscribers,[85] Verizon reported 144 million,[86] and AT&T reported 241.5 million.[87]

After the T-Mobile/Sprint merger was affirmed, there were three dominant players in the telecommunications industry, with little resistance from Dish.[88] There appeared to be negligible hope that any new competition would emerge. However, Mint Mobile presented itself as a strong newcomer

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76. *See Deutsche Telekom AG*, 439 F. Supp. 3d at 248.

77. *See id.*

78. *See id.* at 179-249.

79. *See* Lumb, *supra* note 16 (indicating a result of the concessions made during the T-Mobile/Sprint negotiations).

80. *See id.*

81. *See* Hardesty, *supra* note 18 (outlining Dish's competitiveness compared to other players in the 5G industry).

82. *See id.* (outlining specific metrics suggesting Dish's lack of accomplishment).

83. *See id.* (showing Dish's macro losses of revenue).

84. *See id.*

85. *See* T-MOBILE, T-MOBILE DELIVERS INDUSTRY-LEADING GROWTH IN CUSTOMERS, SERVICE REVENUES, PROFITABILITY AND CASH FLOW IN 2023, SETTING UP STRONG 2024 OUTLOOK (2023), 2, https://s29.q4cdn.com/310188824/files/doc_financials/2023/q4/Q4-2023-TMUS-Earnings-Release.pdf [perma.cc/F8NR-Z4QY] (showing T-Mobile's success in comparison to Dish).

86. *See* VERIZON, FINANCIAL AND OPERATING INFORMATION, 11 (Dec. 31, 2024), https://web.archive.org/web/20250124153521/https://www.verizon.com/about/file/74377/download?token=aFR5AvZZ [https://perma.cc/9HDT-E47H].

87. *See* AT&T Inc., Current Report (Form 8-K), 6, (Jan. 24, 2024), https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?FilingId=17201271&Cik=0000732717&Type=PDF&hasPdf=1 [https://perma.cc/268H-5D4Z] (showing AT&T's success in comparison to Dish).

88. *See* Hardesty, *supra* note 18, at 6.

to the industry.[89] In fact, Mint Mobile was the fastest growing mobile service provider in the United States in 2022, and by a large margin.[90] Mint Mobile had a 45% year over year ("YoY") growth rate in 2022, compared to T-Mobile's 12%, AT&T's 5%, and Verizon's -5% YoY rates.[91] Mint Mobile held only a small piece of the market share pie with their 3.4% share in 2022, compared to Verizon's 24%, T-Mobile's 31%, and AT&T's 41%.[92]

However, T-Mobile announced in March of 2023 that they acquired Mint Mobile.[93] Mint Mobile specialized in affordable wireless access, which T-Mobile cited as being a key reason for its desire to acquire the brand and expand their position with cost-conscious consumers.[94] Outside of this buyout, Mint Mobile was merely an MVNO that does not own its own facilities.[95]

E. Technologies Pre-Telecommunications Act of 1996 vs. Today And Beyond

1. The 1996 Act's Anachronistic Language

There are a total of eleven references to the Internet in the Telecommunications Act of 1996, but these references occur in only two sections of the Act.[96] First, the Act defines "interactive video services or Internet services over facilities to or for elementary and secondary schools . . ." under the definition of interLATA services during its discussion of the interLATA provision by a BOC.[97] The remaining twenty references come from the famous Section 230, which outlines protection for private blocking and screening of offensive material on the Internet.[98] The definition of "Internet" under this section is "the international computer network of both Federal and non-Federal interoperable packet switched data networks."[99] Though Section 230 repeatedly references the rapid development of the Internet, it does not reference any specific details regarding how development of the Internet could look.[100]

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89. *See* Sneha Pandey, *T-Mobile Acquires Mint Mobile – 2022's Fastest-Growing US Mobile Service Provider*, SIMILARWEB BLOG (Sept. 6, 2023), https://www.similarweb.com/blog/insights/software-tech-news/t-mobile-aquires-mint-mobile/ [perma.cc/B4GX-KJE8].

90. *See id.*

91. *See id.* (detailing a central reason behind Mint Mobile's presence in the industry).

92. *See id.* (placing Mint Mobile's location in the industry in the context of market power).

93. *See id.*

94. *See id.* (describing Mint Mobile's general consumer base and target).

95. *See* FCC 2022 Communications Marketplace Report, *supra* note 58, at 65.

96. *See* Telecommunications Act of 1996, 47 U.S.C. §§ 230, 271(g)(2).

97. *Id.* § 271(g)(2) (showing the first location of reference to the Internet in the 1996 Act).

98. *See id.* § 230 (detailing the second and more prominent location of references to the 1996 Act).

99. *Id.* § 230(f)(1) (noting the specific definition of "Internet" as defined by the Act).

100. *Id.* (showing how the Act defines the Internet's rapid development).

Importantly, the 1996 Act makes no reference to the current global wireless standard: 5G broadband.[101] In telecommunications, broadband refers to a wide bandwidth that is capable of transporting multiple signals over a wide range of frequencies that supports numerous Internet traffic types, thus allowing multiple data streams to be sent at once.[102] Put simply, mobile broadband technology allows today's phones to connect to the Internet.[103] 5G, or the fifth generation mobile network, is the most prevalent vehicle for broadband support in the telecommunications industry today.[104] 5G allows telecommunications users to leverage the Internet with the highest speed capabilities to date as compared to 4G and 3G, and was specifically designed to flexibly support future telecommunications services that are currently unknown.[105]

2. Telecommunications' Technological Future

As mentioned, there are numerous technologies widely used today and predicted to be the major keystones for future technologies that are not addressed by the 1996 Telecommunications Act. Examples include 3G, which allowed for video calling and Internet access on mobile devices, 4G, that opened the doors to even higher quality video calls and streaming, and the newest development, 5G, which allows for advancements like self-driving vehicles, 4K mobile streaming, and enhanced security.[106] North America alone experienced 22 million new 5G connections in Q3 2024, which adds to a total of 264 million 5G connections in the region.[107] North America leads all continents in 5G adoption.[108]

In addition, new cutting-edge technologies are emerging rapidly that seek to impact the way telecommunications are used. Examples include artificial intelligence, cloud computing, virtual reality, Internet of Things

101. *See Everything You Need to Know about 5G*, QUALCOMM, https://www.qualcomm.com/5g/what-is-5g#:~:text=5G%20will%20bring%20wider%20bandwidths,Gbps%20throughput%2C%20and%20low%20latency [https://perma.cc/QRQ5-Z3K4]; *see also* 47 U.S.C. § 251.

102. *See* NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T COM., INTRODUCTION TO BROADBAND AND HIGH SPEED INTERNET 4 (2022), https://broadbandusa.ntia.doc.gov/sites/default/files/2022-12/Introduction_to_Broadband_and_High_Speed_Internet_FINAL_0.pdf [perma.cc/WV5N-UZT8].

103. *See id.*

104. *See* QUALCOMM, *supra* note 101.

105. *See* NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T COM., *supra* note 102.

106. *See 3G vs. 4G vs. 5G: What's the Difference?*, ACKERMAN SEC., https://www.ackermansecurity.com/blog/home-security-tips/3g-4g-5g (last visited Apr. 14, 2025) [perma.cc/S8RZ-DGZT] (detailing examples of how telecommunications technology has changed since the passage of the Act in 1996).

107. *See Global Connections Pass 2BN*, CSI (Dec. 19, 2024), https://www.csimagazine.com/csi/Global-5G-connections-pass-2BN.php [https://perma.cc/X46X-U9SD].

108. *See id.*

("IoT"), edge computing, and advanced cybersecurity.[109] 5G is the central facilitator to most of these emerging technologies, including IoT and virtual reality.[110] 5G is considered to be the critical enabler to facilitation for a cohesive and operational relationship between broadband-based technology, and was specifically designed to stand the test of time to continue being useful as future innovation surfaces.[111]

III. ANALYSIS

A. The Telecommunications Act of 1996's Failure to Promote Competition

The Telecommunications Act of 1996, particularly Section 251, has failed to fulfill its intended purpose to empower competition because it benefits incumbent interests and does not give new market entrants the opportunities to succeed nor the incentives to invest in competitive infrastructure. The primary goal of the Telecommunications Act of 1996 was to promote competition in the telecommunications industry.[112] Yet almost immediately after the Act's passage the opposite effect began to occur, and the true implications of the Act emerged: consolidation.[113] The Act permitted the BOCs to access a diverse range of markets that were previously restricted to them, including "out-of-region" long distance service and manufacturing and sales of telecommunications network equipment.[114] Vast opportunity for diversification and investment in new business and industry presented itself. Investment in new areas of business is expensive and requires significant capital to become a practical business solution. This need for investment incentivized companies that had presence in unique realms of business from one another to combine forces through merger, creating an even larger market force with its hands in a wider range of industry.[115]

In the present day of the telecommunications industry, the infrastructure and facilities necessary to deliver quality mobile communications solutions that consumers expect are stacked in the hands of Verizon, T-Mobile, and AT&T.[116] The reason for this is found in history. The 1984 divestiture of AT&T resulted in seven BOCs who maintained a government granted monopoly in their respective telephone region.[117] These

109. *See* Susi Wallner, *Discover the Top 10 Telecom Industry Trends in 2024*, STARTUS INSIGHTS (Feb. 21, 2021), https://www.startus-insights.com/innovators-guide/top-10-telecom-industry-trends-innovations-in-2021/#trend-six [perma.cc/S8RZ-DGZT] (showing examples of new technology being released and developed).

110. *See id.*

111. *See* James Dean, *How 5G Technologies Can be Implemented More Efficiently*, TECH RADAR (Dec. 5, 2018), https://www.techradar.com/news/how-5g-technologies-can-be-implemented-more-efficiently [perma.cc/93EV-M7JL].

112. *See* 47 U.S.C. §§ 251-271.

113. *See* Whalley & Curwen, *supra* note 6, at 155.

114. *Id*. at 156.

115. *Id*. at 155, 158.

116. FCC 2022 Communications Marketplace Report, *supra* note 58, at 58.

117. *See* Pinheiro, *supra* note 20, at 303.

seven BOCs held complete domination over their respective regions because of their well-established infrastructure and financial resources stemming from their previous regional monopolies.[118] New competitors struggled to enter the market because of the massive head start that the BOCs had from being mandated as the sole telecommunications presence in a region.[119] When the 1996 Telecommunications Act was passed the merger spree between the seven BOCs began.[120] In 2020, the T-Mobile and Sprint merger created the power triangle that we know today between AT&T, Verizon, and T-Mobile.[121]

This Note finds that the failure of the 1996 Act is largely due to the existing interconnection provisions outlined in Section 201 and Section 251 being ill-suited for the task of promoting competition. This is true for three main reasons. First, the provisions are focused on outdated telecommunications technologies that are not relevant to today's telecommunications landscape. Second, imposing a duty to provide interconnection is alone not sufficient to guaranteeing competition because the massive benefits of incumbency severely outweigh the significant startup cost and barrier to entry in the telecommunications industry. Third, the current interconnection system leads to a strange economic situation where "new entrants" are not legitimate competition at all, but rather weak state-subsidized wholesale customers of the incumbents themselves. As a result, the interconnection provisions of the 1996 Act should be rewritten around a new notion of modern infrastructure sharing that would more effectively drive new competition in the future.

1. Outdated Language in Sections 201 and 251

First, Sections 201 and 251 of the 1996 Act are focused on outdated technologies that are not relevant to today's telecommunications landscape.[122] Specifically, Section 251 is not equipped to address the current or emerging telecommunications industry because it exclusively encompasses telecommunications network realities of the 1980s and 1990s.[123] High-speed mobile broadband networks ubiquitous today were not available at the time of the 1996 Act.[124] Cellular networks have used different standards for data transmission via broadband since 1996, including 3G, 4G LTE, and the incumbent 5G most prevalent today.[125] Today's networks carry traffic of varying types, including video, data, and voice. 2G existed at the time of the

118. *See* Meyerson, *supra* note 12, at 254.
119. *See id*.
120. *See* Whalley & Curwen, *supra* note 6, at 155.
121. *See* FCC 2022 Communications Marketplace Report, *supra* note 58, at 58.
122. *See* 47 U.S.C. §§ 201, 251.
123. *See id*. § 251.
124. *See The History of Cellular Network and Broadband*, CUSTOM TRUCK ONE SOURCE (May 24, 2021), https://www.customtruck.com/blog/the-history-of-cellular-networks-and-broadband/ [https://perma.cc/M8X8-JVWU].
125. *See id.*

1996 Act's passage, which primarily focused on voice calls and text messaging.[126]

Section 251(2) of the Act's language is thus ill equipped to promote meaningful interconnection because it fails to acknowledge the existence of broadband networks altogether.[127] Rather, Section 251(2)'s language strictly uses the words "network," "telephone exchange services," and "exchange access" when discussing what is covered under an incumbent's duty to provide interconnection to.[128] There is no reference to broadband in any definition located in Section 153 of the Act, nor is there any open-ended language in the definitions that accounts for evolution in the industry to impliedly cover future innovations like 5G broadband capabilities.[129] There is a complete lack of reference to the most prevalent means of telecommunications: broadband. This, combined with its lack of open-ended language, opens the door for incumbent telecommunications carriers to argue that they do not need to provide broadband interconnection, which newcomers need to legitimately compete. Instead, incumbents may claim that they need only to provide interconnection to services of the most archaic type: simple telephone communication capabilities that existed during the 1996 Act's passage. For this reason, the Act's language in Section 251(2) needs to be updated to account for these technological realities, or at the very least add open-ended language that implies coverage of such broadband technologies.

2. Weak Interconnection Accessibility and Infrastructure Investment

Second, imposing a duty to provide interconnection alone is not sufficient to guarantee competition because the massive benefits to incumbency severely outweigh the significant startup cost and barrier to entry in the telecommunications industry. While Section 251 on its face seems satisfactory in ensuring that new competitors are able to access crucial facilities and equipment necessary to enter the telecommunications industry, it currently lacks enough direct support for industry newcomers to be able to become legitimate competition. Specifically, Section 251's interconnection provision does not afford industry newcomers the ability to build their own telecommunications infrastructure and become independent from the incumbent firms. Instead, its scope is limited to ensuring access to an incumbent's infrastructure at a reasonable cost.[130] This benefit is inadequate to properly subsidizing newcomers to develop their own infrastructure and reach independence.

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126. *See id.*; *see also What is Second-Generation (2G)*, LENOVO, https://www.lenovo.com/us/en/glossary/what-is-2g/ (last accessed Apr. 14, 2025) [https://perma.cc/EQK2-RLMV].

127. *See* 47 U.S.C. § 251(2).

128. *Id.*

129. *Id.* § 153.

130. *See* 47 U.S.C. § 251.

Consider the aforementioned 5G broadband technologies. 5G is currently the preeminent mobile network technology deployed by mobile carriers.[131] The dominance of Verizon, T-Mobile, and AT&T in 5G is so massive that the barrier of entry seems to be insurmountable. For an outside firm to attempt to enter the 5G industry, they must invest into a wide variety of infrastructure to even have the capability to producing 5G, nevertheless being able to bring forth satisfactory pricing, service coverage, and speeds to convince consumers to switch to their services.[132] Such infrastructure includes base stations, antennas, sensors, and onboard radios for devices.[133] Further, usage of this type of infrastructure requires a massive real estate portfolio to be able to house crucial infrastructure necessary to maintain 5G around the entire country. Since Verizon, T-Mobile, and AT&T are so far ahead in both infrastructure and real estate, potential competitors need to rely on the big three's preexisting infrastructure and technology to compete with them.

Dish's attempt to enter the telecommunications industry illustrates this point. Dish was championed by the FCC and DOJ during the T-Mobile and Sprint merger negotiations as a new competitor to the big three, and ensuring Dish's ability to compete was a prerequisite for the agencies to approve of T-Mobile and Sprint's merger.[134] T-Mobile made promises that were monitored and requested by these agencies to subsidize Dish into the role as fourth competitor.[135] Even with the conscious backing of two federal agencies, concessions and aid from two of the largest competitors in the industry, and key wireless spectrum assets to create its own 5G network offered to Dish at significant discount, Dish has still failed to pose a legitimate competitive threat to Verizon, AT&T, and the new-look T-Mobile as of mid-2024.[136] This is because they have been unable to establish their own 5G infrastructure to break away from reliance on T-Mobile's infrastructure.[137]

Dish is a multi-billion-dollar company backed by two federal agencies who provided them cheap access to necessary infrastructure to implement 5G. Even so, Dish could not compete with the big three. This suggests that if Dish cannot compete in the 5G industry given these facts, seemingly nobody can as the 1996 Act currently stands. Therefore, the 1996 Act needs to be amended to account for the massive barrier of entry to the telecommunications industry.

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131. *See* QUALCOMM, *supra* note 101.

132. *See* Lisa Schwartz, *Top 24 Challenges Facing the Telecom Industry Today*, ORACLE NETSUITE (June 11, 2024), https://www.netsuite.com/portal/resource/articles/erp/telecom-industry-challenges.shtml [https://perma.cc/S3FX-4T9R].

133. *See* Chuck Moozakis, *Enterprise 5G: Guide to Planning, Architecture, and Benefits*, TECHTARGET (Dec. 8, 2023), https://www.techtarget.com/searchnetworking/Enterprise-5G-Guide-to-planning-architecture-and-benefits [https://perma.cc/RE44-ZQUX] (detailing necessary infrastructure needed to properly establish 5G).

134. *See* U.S. Dep't of Just., *supra* note 17.

135. *See id*.

136. *See* Hardesty, *supra* note 18.

137. *See* Lumb, *supra* note 16 (describing the shortcomings of the negotiations during the T-Mobile/Sprint merger).

3. The Paradox of Interconnection with Incumbents

Third, amendments to the 1996 Act need to solve the strange economic situation brought by the current interconnection system where "new entrants" are not legitimate competition due to their reliance on incumbent infrastructure. This problem must be solved by balancing the interests of newcomers and incumbents as equally as possible. This situation is best illustrated by Dish's current reliance on T-Mobile's telecommunications infrastructure as a "hybrid" MVNO.[138] This situation also existed with Mint Mobile before it was bought by T-Mobile.[139] While Mint Mobile appeared to be its own independent and fast-growing company, it was essentially T-Mobile in disguise due to Mint Mobile operating entirely on T-Mobile's nationwide infrastructure.[140]

However, it is important to note that Mint Mobile, unlike Dish, is categorized as a "pure MVNO" in that they merely purchase wholesale wireless service, and do not build or maintain their own network infrastructure.[141] This Note's proposed changes to the 1996 Act are not targeted at pure MVNO firms, as these entities may decide their preferred method of business. Instead, this Note proposes reforms to the 1996 Act that specifically impact hybrid MVNOs, like Dish, who are relying on Section 251's interconnection provisions while actively intending to build their own infrastructure.

Current interconnection rates considered fair and reasonable are likely not low enough for industry newcomers to also undertake significant investment to build telecommunications infrastructure alongside their business operations and emerge as legitimate long-lasting competitors.[142] However, an attempt to change the pricing regime in favor of newcomers presents a concerning situation where the Act would essentially be forcing incumbents to subsidize their own potential competitors with absolutely no benefit to themselves, which is analogous to a government taking without fair compensation. This situation presents a unique paradox where seemingly the only means of a newcomer gaining traction in the industry is through the very support of firms they compete directly against.

To solve this paradox, an additional provision must be added to the Act that strikes a balance between ensuring that potential industry newcomers are able to emerge as legitimate competition while offering some level of incentive and benefit to incumbents for funding a newcomer's ability to do so. To attempt to solve this issue is incredibly complex, but clearly requires substantial change from the current 1996 Act's status quo.

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138. *See* FCC 2022 Communications Marketplace Report, *supra* note 58, at 52-53.
139. *See id.*
140. *See id.*
141. *See id.* at 52.
142. *See* Mondliwa, *supra* note 7.

4. The 1996 Act's Present Shortcomings

The Telecommunications Act of 1996 is clearly outdated and unequipped to address the competition in the current state of the telecommunications industry. Consider again the T-Mobile/Sprint decision.[143] The Act, whose stated purpose was literally to promote competition in the telecommunications industry, *was not mentioned a single time in the entire opinion by the U.S. District Court for the District of Columbia's opinion*.[144] Rather, the court relied entirely on antitrust law guided by Section 7 of the Clayton Act in making their decision.[145] If this complete lack of consideration of the 1996 Act in the most pressing telecommunications competition case of the century does not prove that the Act needs updating to achieve its goal, nothing will.

B. Pro-Competitive Reforms to the 1996 Act

The Telecommunications Act of 1996 failed in promoting competition for telecommunications services as we know it today. Thus, lawmakers must shift their attention to amending the Act to ensure vigorous competition and opportunity for new market entrants while accounting for the massive barriers of entry into the telecommunications industry.

To do this, this Note argues that Section 251's language needs to be amended with specific language that reflects the ubiquitous 5G broadband capabilities currently dominating the telecommunications industry, alongside open-ended flexible language that ensures that the Act is equipped to cover future telecommunications technology that is not yet operational in the market. Further, this Note argues for further provisions to be added that allows for newcomers to use incumbent facilities at a steeply discounted cost for a ten-year period, with the caveat that newcomers must invest in their own infrastructure and pay incumbents back generously in following years. These amendments are to ensure that potential new competitors can enter the industry for feasible investment prices and to restrict even further consolidation and control of the industry into the hands of Verizon, AT&T, and T-Mobile.

This newcomer-favorable provision should be balanced with a provision that offers incentive for incumbents to subsidize their potential future competition, namely by requiring that the newcomers pay the incumbent organization annually for fifteen years after the newcomer operates on their own infrastructure at a steep interest rate, with the incumbent's cost of allowing the newcomer to use their facilities acting as the basis for the accruing interest.

Through these reforms, newcomers will be able to invest their profits during the ten-year period into rapid infrastructure development and emerge

143. *See generally Deutsche Telekom AG*, 439 F. Supp. 3d 179.

144. *See generally* 47 U.S.C. §§ 251-271); *see generally Deutsche Telekom AG*, 439 F. Supp. 3d 179.

145. *See Deutsche Telekom AG*, 439 F. Supp. 3d at 249.

as legitimate long-lasting competitors, all while being required to handsomely reimburse the incumbents for their interconnection services that were provided during the newcomers' building period.

1. Updating Language to Address the Technological Present and Future

Section 251(a) of the Act describes that telecommunications carriers have a general duty to interconnect with the facilities and equipment of other telecommunications carriers.[146] Sections 251(c)(2)(C)-(D) further describe that ILECs have a duty to provide facilities and equipment for any requesting telecommunications carrier equal to the quality provided to the local exchange carrier itself, and on rates, terms, and conditions that are reasonable and nondiscriminatory subject to arbitration by a neutral State commission.[147]

First, I argue that Section 251(c)(2)'s language pertaining to interconnection needs to be changed to require any organization who has "access to infrastructure, networks, facilities, or other equipment necessary for the delivery of broadband capabilities and telecommunications to customers" to provide access to those commodities by "any requesting telecommunications carrier." Other language regarding quality of service and reasonability of pricing of access to these facilities contained in subsections (C) and (D) would be maintained.[148] The goal of this updated language is to encompass present 5G broadband technology that is ubiquitous in the modern telecommunications industry and continues to grow in relevance since its inception in 2019. Further, 5G broadband is considered a flexible technology that is specifically designed to be able to maintain its relevance and usefulness through innovation. Therefore, it is crucial that interconnection for 5G-based infrastructure is ensured to maintain potential for competition in future telecommunications technologies that are not yet in operation.

I would also change the outdated language of Section 251(h) that defines "incumbent local exchange carrier."[149] This "incumbent local exchange carriers" definitional language should be changed to "organizations offering telecommunications and/or broadband services to consumers." This broader term will serve to ensure that the 1996 Act holds jurisdiction over all organizations that provide telecommunications services rather than relying on the anachronistic language of "local exchange carriers" that modern day telecommunications companies could subvert due to the Act's limited language and almost thirty-year-old legislative history.

The 1996 Act should also update its definitions of "telephone exchange services" and "exchange access" located in Section 153 of the Act.[150] Both these terms are found in Section 251(c)(2)'s interconnection requirement, but

146. *See* 47 U.S.C. § 251(2).

147. *See* 47 U.S.C. §§ 251(c)(2)(C)-(D), 252(b)(1) (outlining specific duties telecommunications companies must abide by through the 1996 Act).

148. *See* 47 U.S.C. § 251(c)(2)(C)-(D).

149. *Id.* § 251(h).

150. *Id.* § 153.

none mention the existence of broadband technology, nor do they contain flexible language capable of ensuring that the 1996's Act's jurisdiction is retained over future technologies.[151]

Further, the 1996 Act should be amended to add the term "network" to its definitions located in Section 153 of the Act. There is currently no definition of "network" contained in Section 153, even though Section 251(c)(2) imposes a duty on incumbents to provide "interconnection with the local exchange carrier's *network*."[152] The 1996 Act should amend the language of each of these definitions to cover "infrastructure necessary for high-standard broadband performance, and other infrastructure necessary for contemporary telecommunications usage."

2. Increasing Deterrence through Fines, Transparency, And Consent Decrees

Second, this Note argues that additional provisions and amendments be added to Section 251(g) and Section 251(c)(2) of the Act to ensure incumbents comply with their interconnection duties. To do this, Section 251(g) should be amended to replace the preexisting language to make such restrictions and obligations set forth by Section 251 enforceable by a fine "amounting to five percent of a corporation's revenues for the fiscal year in which the violation occurred." While this penalty could amount to hundreds of millions of dollars and be considered harsh by some, it is simply to ensure that the preexisting provisions of the 1996 Act are followed.

Further, transparency of the prices is crucial to ensure fair dealing and nondiscriminatory rates that Section 251(c)(2)(D) calls for.[153] Therefore, I would add an additional provision to this section codified as Section 251(c)(2)(E), which would require that pricing arrangements between incumbent telecommunications organizations and hopeful competitors are reported to the FCC, who then make the pricing arrangement publicly accessible. This provision hopes to restrict incumbent telecommunications organizations from offering better prices for preferred customers.

Next, I urge Congress to add an additional subsection provision to Section 251(g): Section 251(g)(1). This subsection should specify that if a company violates Section 251(c)(2)'s requirement for interconnection, in addition to the five percent fine of that company's revenues for the fiscal year, the violating entity will be required to negotiate a consent decree with the FCC. This consent decree is required to expire no later than ten years from its established date, requires bi-annual reporting to the FCC regarding facility usage, and establish a heightened fine of ten percent of that company's yearly

151. *See id.* § 251(c)(2).

152. *Id.* §§ 153, 251(c)(2).

153. *See* INFODEV, TELECOMMUNICATIONS REGULATION HANDBOOK MODULE 3: INTERCONNECTION 3-7 (Hank Intven & McCarthy Tétrault, 2000), https://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/3_Interconnection.pdf [https://perma.cc/V3B3-VNHP] (supporting the need for transparency of prices to ensure fair dealing between incumbents and new market entrants); *see also* 47 U.S.C. § 251(c)(2)(D).

revenue if a second violation is found during the consent decree's controlling period. If additional provisions beyond the minimum described cannot be agreed upon by the FCC and the violating party through voluntary negotiations outlined in Section 252(a)(1) of the 1996 Act, deliberations regarding additional terms of the consent decree should be completed through arbitration as described by Section 252(b)(1) of the Act.[154]

The inspiration behind implementation of a consent decree after a violation of the interconnection standard's new terms comes from FTC and FCC enforcement actions. Consider the FTC's past privacy enforcement actions. The FTC enforces Section 5 of the FTC Act, which grants the FTC the authority to regulate "unfair or deceptive" acts or trade practices.[155] Consent decrees operate similarly to settlements, acting as an agreement between the agency and the party at fault to outline consequences and rules for their required behavior moving forward after their first violation.[156] Consent decrees can add major monetary penalties for a second violation, acting as an impactful deterrence strategy. For example, in 2019 Facebook made a record-breaking settlement with the FTC by agreeing to pay $5 billion for violating the FTC's 2012 order against them after their first privacy violation charge.[157]

FTC consent decrees can also impose monitoring, compliance, and program requirements upon the violating organizations. For example, in 2022 the FTC alleged that Twitter violated its 2011 consent decree with the FTC.[158] Twitter agreed to pay the FTC $150 million and agreed to an updated consent decree that was to last for an added twenty years.[159] The consent decree also requires that Twitter create a "comprehensive privacy and security program," and report to the FTC within thirty days of any occurrence of an incident that was agreed upon in their negotiations.[160]

The purpose of imposing a consent decree requirement unto telecommunication companies if they fail to comply with interconnection mandates is to produce additional non-monetary costs if that company is a repeat offender. While the five percent yearly revenue payment is already costly, increasing the cost of a second offense through even more payment,

154. *See* 47 U.S.C. § 252(a)(1), (b)(1).

155. *FTC Consent Decrees are Best Guide to Cybersecurity Policies*, BOIES SCHILLER FLEXNER (Sept. 22, 2015), https://www.bsfllp.com/news-events/ftc-consent-decrees-are-best-guide-to-cybersecurity-policies.html. [https://perma.cc/5URZ-8GAJ] (showing a method the FTC uses to enforce a specific power it holds).

156. *See id.* (analogizing consent decrees with an example).

157. *See* Lesley Fair, *FTC's $5 Billion Facebook Settlement: Record-Breaking and History-Making*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/business-guidance/blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-and-history-making. [https://perma.cc/6V4Z-3KCX] (detailing a specific result of a consent decree).

158. *See* Letter from Cheyenne Hunt, Big Tech Accountability Advocate, Pub. Citizen, to Lina Khan, Fed. Trade Comm'n Chair, and Merrick Garland, Attorney Gen. (Mar. 13, 2023) (on file with the website of Public Citizen) (detailing further example of a consent decree in action).

159. *See id.* (showing an example of a time period used for a consent decree).

160. *Id.* (noting forced creation of programs to satisfy compliance).

along with time-consuming compliance measures, hopes to add another layer of incentive and deterrence to comply with Section 251.

3. Imposing Significantly Discounted Interconnection Access

Further, I argue that the FCC needs to enforce *significantly* discounted access to incumbent organizations' infrastructure for the first ten years, with the accompanying requirement that the newcomer be off the incumbent's infrastructure completely after those ten years. This provision would be added on to Section 251's preexisting interconnection requirement. As exemplified by Dish's attempt to enter the telecommunications industry, it is extremely difficult to gain a foothold in the industry even with fair and reasonable prices negotiated by the FCC and DOJ.[161] Therefore, I believe the FCC should lower the threshold for what price meets its rates, terms, and conditions for access to incumbent facilities.

However, this benefit to newcomers comes at a caveat: they need to operate on their own infrastructure after ten years of discounted usage of the incumbent facilities. Meaning, while they operate on a cheap basis for ten years through the incumbent's infrastructure, the newcomer market entrant needs to offset that cost by investing heavily in their own infrastructure to become *actual* competition after the ten-year period rather than posing as the big three in disguise, like Mint Mobile.[162]

However, the requirement that the new firm be off the incumbent's infrastructure after ten years would apply strictly to hybrid MVNO's, like Dish, whose business plan is to build their own network.[163] This provision is not intended to apply to pure MVNOs, like pre-buyout Mint Mobile, whose goal was to purchase wireless services wholesale from facilities-based provider T-Mobile and resell those services to consumers, without any intention to build their own physical infrastructure.[164] Rather, these reforms are designed to maintain the ability for companies to pursue the pure MVNO business model while providing rules beneficial to those attempting to become independent infrastructure operators. Therefore, these reforms would not change pure MVNOs' interconnection rates that are the current norm, nor would the reforms have a requirement to halt their usage of incumbent infrastructure after ten years.

4. Solving the Paradox of Interconnection With Incumbents

Further, I argue that there needs to be an award to the incumbent for essentially subsidizing an emerging competitor to their telecommunications

161. *See* Hardesty, *supra* note 18; *see also* Schwartz, *supra* note 132.
162. *See* FCC 2022 Communications Marketplace Report, *supra* note 58, at 52-53.
163. *See id.*
164. *See id.*

market through the severely steep discounted interconnection price afforded to newcomers. To address this, this Note proposes that another provision be added alongside the discounted access for the ten-year period in Section 251. This added provision would require the newcomer to *pay back* the incumbent for what it had cost them to support the newcomer's usage of their facilities.

This price cannot simply be paying the incumbent back equally to what it cost them (inflation included) or following interest rate standards set by the Federal Reserve. Rather, the money owed must be calculated at a steep interest rate to account for the fact that because of their support, though legislatively required, a new competitor may emerge. Further, this payment period would last for fifteen years, which is five years longer than the newcomer is able to use their facilities. For the final five years, the industry newcomer would be required to pay the incumbent a certain percentage of their yearly revenue to be determined by the FCC. The goal of these provisions is to add a layer of benefit to the incumbent carriers to make up for the cost incurred from hosting a newcomer on their facilities and having a competitor in the industry afterward.

5. Preventing Reconsolidation

Lastly, there needs to be a preventive measure to ensure that telecommunications newcomers do not simply merge with current incumbents during any point of this new process, as the BOCs did shortly after the passage of the 1996 Act.[165] To prevent reconsolidation, a final provision would be added that restricts telecommunications organizations who utilized the newly implemented Section 251 discount from merging with any other telecommunications organizations who maintain a certain level of infrastructure or facilities. This provision will hopefully result in the addition of more competitors into the telecommunications landscape balanced with the inability to revert to the consolidated industry that these new provisions were created to address.

C. The Purpose of Reform

The central goal of modernizing the language of Section 251, increasing the penalties for incumbent telecommunication carriers that violate it, offering discounted access to the incumbent organizations with the requirement to create their own infrastructure, and restricting mergers involving industry newcomers is to even the playing field for fresh competition in the industry. For competition to thrive, or even exist, in the telecommunication industry, there needs to be an actual potential for new competition in the first place.

AT&T, Verizon, and T-Mobile had a decade-spanning head start to build telecommunications facilities, which originated from the 1984 divestiture of AT&T. The only feasible way that competitors can attempt to enter the modern-day telecommunications industry is through using these big

165. *See* Whalley & Curwen, *supra* note 6, at 158.

three's infrastructure in hopes of eventually amassing enough capital to build and maintain their own crucial infrastructure. Even with government assistance in helping achieve this aim, it's a daunting task. As exemplified by cable giant Dish's miserable progress in attempting to enter the industry through the Boost Mobile brand and discounted access to the big three's 5G capabilities, entering the market is difficult, even with the right tools. Through these proposed amendments to the Telecommunications Act of 1996, some semblance of an opportunity to enter the concentrated telecommunications market will be available for those daring to try.

IV. CONCLUSION

The telecommunications industry is highly complex due to its unique requirement for comprehensive infrastructure and need for massive investment to acquire such infrastructure. Today, that infrastructure and resulting market share is almost exclusively held by three major players: AT&T, Verizon, and T-Mobile. The reason for this can be traced to history. The 1984 divestiture led to government sponsored quasi-monopolies defined by different regions. The 1996 Telecommunications Act then attempted to fix this monopolized industry by lifting regulation to open the door for competition. This legislation backfired.

Changes must be made to the 1996 Telecommunications Act to achieve a competitive telecommunications industry that the 1996 Act had hoped to achieve. The Act's language must be updated to reflect the realities of the current state of telecommunications technology, and the approach to achieving increased competition in the industry must be changed through promoting the ability for newcomers to enter the industry balanced with incentive for incumbent organizations to support them. Through these changes, vast amounts of competitors in the telecommunications industry may be able to emerge and persist, resulting in an even deeper drive for industry players to innovate cutting-edge telecommunications offerings for the benefit of consumers everywhere.