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COMPETITION IN THE LOCAL TELECOMMUNICATIONS MARKET: LEGISLATE OR LITIGATE?

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I. INTRODUCTION

Members of the House-Senate Conference Committee spent valuable time debating which adjective ("viable," "meaningful," "fungible")[1] to use in defining competition in the Telecommunications Competition and Deregulation Act of 1996 (the "Act").[2] However, this adjective choice is the least of their worries in pursuing the goal of introducing competition into the previously regulated telecommunications market.

Section 101 of the Act, as presented to the Conference Committee, specifically requires interconnection[3] by the local exchange carriers[4] for any potential market entrant so requesting. Local exchange carriers, who have market power in providing telephone exchange service or access service, must: (1) negotiate in good faith with any telecommunications carrier who requests interconnection between the facilities and equipment of the requesting telecommunications carrier and said incumbent local carrier; and (2) provide interconnection at reasonable and nondiscriminatory rates.

Congress would have been wiser to subject local exchange carriers to antitrust laws, rather than the Act. Threatened or actual enforcement

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1. Edmund L. Andrews, *What's in a Word? Only the Future of Communications*, N.Y. TIMES, Dec. 15, 1995, at D1.

2. The Telecommunications Competition and Deregulation Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. This Note was written prior to enactment and is based on S. 652, 104th Cong., 2d Sess. (1995). All cites are to the current law as enacted unless otherwise noted.

3. Interconnection is a "link between two telephone systems [that] allow[s] each system's customers to talk to [the] subscribers of the other system." Roger G. Noll & Bruce M. Owen, *The Anticompetitive Uses of Regulation:* United States v. AT&T, *reprinted in* THE ANTITRUST REVOLUTION 291-94 (John E. Kwoda & Lawrence J. White eds., 1989).

4. The Act, in § 3(a)(2)(44) defines "local exchange carrier" as a provider of telephone exchange service or exchange access service. Pub. L. No. 104-104, § 3(a)(2)(44), 110 Stat. 56 (1996). The local exchange telephone service has been defined as "the ordinary service provided in nearly all homes and businesses." MCI Communications v. AT&T, 708 F.2d 1081, 1093 n.8 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

of the antitrust laws would foster negotiation between local exchange carriers who truly dominate the market and entering carriers who desire interconnection to the local exchange. The antitrust laws would not automatically mandate interconnection; rather, the laws would only apply to carriers actually dominating the essential facilities of the local exchange market and creating a monopoly for themselves. Hence, the antitrust laws would allow the free market to operate, unrestrained, in pursuit of competition.

In contrast, the local exchange requirements of the Act will hinder the transition to true competition far more than they will foster this transition. By requiring local exchange powers to negotiate in good faith with those desiring interconnection, Congress is guaranteeing that the faster and cheaper route for potential local carriers is to free ride on the investment of established players. This situation, in turn, makes unnecessary any innovation or research which might lead to cheaper, more efficient local exchange service.

Part II of this Note discusses the previous state of the local exchange market, and Part III addresses the current market in light of technological advancements. Part IV describes the Telecommunications Competition and Deregulation Act of 1996, particularly focusing on its purpose. The purpose of the Act is then compared to the purpose of the antitrust laws in Part V, and the antitrust laws pertaining to the deregulated telecommunications market are analyzed in Parts V and VII. In Part VI, the antitrust laws are applied to a hypothetical situation arising in the deregulated telecommunications market, with Part VIII assessing the ramifications of such an application. Finally, Part IX discusses and reviews additional concerns surrounding the Congressional mandating of interconnections in the context of the antitrust laws.

II. THE PREVIOUS STATE OF THE LOCAL EXCHANGE MARKET

The local access market[5] (or the "local exchange" market) was treated for years as a natural monopoly, rather than a forced or "malicious" monopoly. A "natural monopoly" exists if a single firm can supply the market at a lower cost than can multiple firms.[6] The local exchange market was traditionally characterized as a natural monopoly, for significant fixed costs,[7] deemed impractical to duplicate, created technological barriers to entry.[8] These fixed costs included items such as networks, switching centers, poles and lines, transmission facilities, and related technical support facilities. While necessary as start-up investments, these costs were not justifiable for facilities that were entirely redundant.[9] It was generally viewed as wholly impractical to run multiple sets of telephone lines to a residence to allow multiple local carriers to vie for the residential business at that location.

With the passage of time, the barriers to entry argument mainly shifted to one of "sunk costs," which loosely referred to the significant start-up investments that incumbents in the local exchange market had already priced to recover, but that a new market entrant would have to recover through higher short term prices. These higher prices would effectively price the new entrant out of possible competition with the

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5. Judge Greene used the terminology "exchange telecommunications" to refer to local telephone service. United States v. AT&T, 552 F. Supp. 131, 141 (D.D.C. 1982) (Modification of Final Judgement) *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (mem.). Judge Greene also referred to such service as "intraexchange service," service within new units called "exchange areas." Exchange areas are merely geographic regions delineated to bring some modicum of practicality to the divestiture of the Bell Operating Companies into twenty-two separate operating companies. Judge Greene defined the service by which long distance carriers would connect to local services between exchange carriers as "exchange access". Thus, Judge Greene distinguished between the exchange market and the interexchange service market. *Id.*

The Act confuses the two markets in the generic definition of "local exchange carrier" in § 3(a)(2)(44), which defines such a carrier as "any person that is engaged in the provision of telephone exchange service or exchange access." Pub. L. No. 104-104, § 3(a)(2)(44), 110 Stat. 56 (1996).

For purposes of this Note, the phrases "local exchange carrier" and "local carrier" are used interchangeably, in accordance with the Act's definitions.

6. *See* Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 31 (1995) (citing 1 JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY 132-54 (W.J. Ashley ed., 1961) (1848)).

7. *See id.* at 120-21; *see generally* WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 120-21 (1994).

8. "A barrier to entry is any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering." PHILLIP E. AREEDA ET AL., ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 55 (1995).

9. *See* Spulber, *supra* note 6, at 38-39.

existing local service provider, thereby discouraging a new market entrant from ever emerging.

District Judge Harold Greene addressed these considerations about the local access market in 1982 when he developed the Modification of Final Judgment ("MFJ") between AT&T and the United States Department of Justice.[10] The MFJ arose from a consent decree between AT&T and the Department of Justice, in which AT&T was to divest itself of the Bell Operating Companies.[11] The consent decree and the MFJ were born of the belief that AT&T dominated the telecommunications market and, more specifically, was abusing or was susceptible to future abuse of its local exchange market power.[12] Judge Greene indicated in his MFJ opinion that though he viewed AT&T as a threat to competition throughout the telecommunications market, he determined that the local telecommunications market specifically was susceptible to anticompetitive actions by AT&T as the present local market dominator.[13] For that reason, he devised the MFJ to prevent even the future possibility of AT&T engaging in anticompetitive behavior in both the local market and in other relevant markets by leveraging its monopoly power off the local market.[14]

The local telecommunications market traditionally has been restrained by the regulations of state Public Service Commissions.[15] The Commissions reviewed rates, service offerings, tariff filings, and profit margins, among other operational indicators, fostering a fairly uninviting environment for potential market entrants. In addition, many Commissions based public telecommunications service provider rates on profit margins, meaning that, regardless of the costs, service providers could only charge prices that earned them a certain profit percentage. Therefore, there were no incentives for new, innovative, progressive market entrants. In recent years, however, Commissions (particularly in

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10. United States v. AT&T, 552 F. Supp. 131, 141 (D.D.C. 1982) (Modification of Final Judgement) *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (mem.).

11. *See id.* at 135-46. AT&T had corporate divisions that dominated both the local exchange market and the interexchange (long distance) market. The Department of Justice viewed this broad domination of the market as dangerously anticompetitive, and the Department of Justice wanted AT&T to dilute its power by divesting itself. By divesting itself, AT&T would break up along service lines, meaning that the long distance providers would become their own corporations and the local exchange/local service providers would divide themselves into separate Bell Operating Companies.

12. *See id.*

13. *See id.* at 161-66.

14. *See id.*

15. For reasons not discussed in this Note, regulated industries such as telecommunications are not generally within the scope of the antitrust laws to the extent that their activities are regulated at the state or federal level.

Illinois, Florida, and New York)[16] have tried to decrease the rigidity of their regulations, mindful that Congress ultimately is trying to deregulate the industry. For example, New York's Public Service Commission is striving to achieve a regulating style that mimics true competition in a deregulated market.[17]

III. THE CURRENT STATE OF THE LOCAL EXCHANGE MARKET

Some telecommunications scholars currently argue that the nature of the telecommunications field has changed with the advancement of technology, such that the local telecommunications market is no longer (or is on its way to no longer being) a natural monopoly.[18] Reasons commonly cited for these views are the increasing alternatives to the traditional local access exchange (e.g., cellular communication), the increasing appeal to small competitive access providers of "bypassing"[19] the local exchange carrier to get to the large commercial customers, the potential competitive strength of cable providers who can diversify into telecommunications,[20] and the possibilities of cheaper technological

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16. *See* Henry D. Levine, *Defining Local Exchange Service: For Whom May Only Bell Toll?, reprinted in* TELECOMMUNICATIONS AND THE LAW 276 (Walter Sapronov ed., 1988).

17. In light of some states' partiality to pro-competitive deregulatory measures, it is the author's belief that even though the Act does not specifically state that it pre-empts any and all state regulation, state Public Service Commissions will voluntarily allow the Act to operate unimpeded by state regulatory interference.

18. *See* Spulber, *supra* note 6, at 34-44. Some scholars ponder "which arenas of local telephone service, if any, are natural monopolies." BAUMOL & SIDAK, *supra* note 7, at 121. Other wonder whether telecommunications ever was a natural monopoly. *See* Roger G. Noll, *The Future of Telecommunications Regulation, in* TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 45 (Eli M. Noam ed., 1983).

19. A connection between a customer and a local carrier is a "bypass" when it avoids either services (i.e., switching services) or facilities generally furnished by the dominant local carrier. *See* MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW 851 (1992).

Competitive Access Providers ("CAPs") are telecommunications carriers (usually fiber-based carriers) who are able to "bypass" the services/facilities of the dominant local carrier. The CAPs bypass the local exchange carrier by directly connecting their clients (the telecommunications end-users) to either an interexchange carrier (for long distance service) or a smaller local exchange carrier without utilizing the dominant local carrier. CAPs generally target commercial clients with large telecommunications service needs. In these circumstances, the CAP's investment in support facilities to service the commercial client without connection to the dominant local carrier is well returned through the volume of the commercial client's telecommunication use. *See* Samuel F. Cullari, Comment, *Divestiture II: Is the Local Loop Ripe For Competition?*, 3 COMMLAW CONSPECTUS 175, 176-78 (1995).

20. For an aggressive prediction of what can soon be done in communications, see KELLOGG ET AL., *supra* note 19, at 57.

innovations.[21] More specifically, satellites, cellular service, land microwave networks, and expanded fiber optics have been viewed as technologies capable of allowing direct competition in transmission of local calls.[22] New developments in switching facilities also make possible alternative local communications and possibly integrations with cable television.[23] Also, coaxial cables, which are used for cable television, are a potential source of competition against current local telecommunication systems because these cables have the frequency capacity to carry other communications.[24] It has been suggested that Western Union's underground cable could carry local calls, although the cable is of a lower capacity than today's cables.[25] These sources of direct competition within the local access market destroy the natural monopoly argument, by definition.[26]

The above-mentioned factors indicating a degradation of the natural monopoly characterization notwithstanding, it is useful to note the premonitions of telecommunications scholars and economists from prior decades.[27] For example, an economist formerly with the United States Department of Justice, Antitrust Division, opined in 1986 that "technological changes may erode the local exchange monopoly."[28] He further proposed that other telecommunications carriers bypassing the local carriers for large users would be an initial aspect in the development of competing technologies.[29] Indicating that competition might be forthcoming, Judge Greene, in 1982, acknowledged that "although the cost of entering the telecommunications business is still substantial, the size of the required capital investment is not as great as it once was."[30] Judge Greene continued, in a footnote, that the reduction in size of the investments was due in part to the new technologies in telecommunica-

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21. *See* Cullari, *supra* note 19, at 178-79; Spulber, *supra* note 6, at 33-39.

22. *See* JOHN R. MEYER ET AL., THE ECONOMICS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 185-92 (1980).

23. *See id.* at 189.

24. *See id.*

25. *See id.* at 192.

26. *See* Spulber, *supra* note 6, at 31. In a situation exhibiting direct competition, clearly a single firm is not supplying the market at a lower cost than multiple firms. The mere existence of competing firms refutes the natural monopoly argument.

27. *See* AMERICAN ENTERPRISE INSTITUTE LEGISLATIVE ANALYSES, TELECOMMUNICATIONS LAW REFORM, 96th Congress, 2d Sess. 9-10 (1980); KELLOGG ET AL., *supra* note 19, at 57 ("One way or another, it seems certain that new network capabilities will be developed to accommodate the new demand.").

28. Timothy J. Brennan, *Regulated Firms in Unregulated Markets: Understanding the Divestiture in* U.S. v. AT&T, 32 ANTITRUST BULL. 741, 787 (1987).

29. *See id.*

30. United States v. AT&T, 552 F. Supp. 131, 172 (D.D.C. 1982) (Modification of Final Judgement) *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (mem.).

tions.[31] Bolstering academics' current arguments that the aforementioned factors indicate that local telecommunications is no longer a monopoly are the unsolicited opinions from years ago that the local telecommunications market would progress in such a manner, for the same reasons cited by current scholars.

IV. THE TELECOMMUNICATIONS COMPETITION AND DEREGULATION ACT OF 1996

A. The Act and Its Purpose

The Act[32] was introduced to the Senate on March 30, 1995, by Senator Larry Pressler (R-SD).[33] The purpose of the Act was stated in § 3:

> It is the purpose of this Act to increase competition in all telecommunications markets and provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets consistent with the public interest, convenience, and necessity.[34]

31. *Id.* at 172 n.173.

32. In early December, 1995, the House-Senate Conference Committee was still revising the bill. Senator Larry Pressler of the Communications Committee, the bill's original sponsor, indicated in a telephone interview that the local interconnections section of the bill, as it currently existed in the House-Senate Conference Committee, would not be likened to the section of the bill that the House or the Senate proposed. However, Senator Pressler refused to comment on how the interconnections section of the proposed Act was developing. Telephone interview with Larry Pressler, U.S. Senator (Jan. 3, 1996). Therefore, for purposes of this Note, the Senate's third version of the bill dated June 23, 1995, as quoted *infra* note 38, and the local interconnections requirement contained therein are analyzed.

33. S. 652, 104th Cong., 2d Sess. (1995).

34. S. 652, 104th Cong., 2d Sess. § 3 (1995). The purpose stated in the enacted version is "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." Pub. L. No. 104-104, 110 Stat. 56 (1996).

The overall goal of the Act, as stated in Section 4[35] is to achieve competition in the telecommunications market, which will promote advanced telecommunications, improve international competitiveness, spur economic growth, and increase the quality of life.[36] Section 5 outlines the Congressional findings supporting the goal. Among the pertinent findings in § 5 are:

> (4) [W]here possible, transition rules should create investment incentives through increased competition. Regulatory safeguards should be adopted only where competitive conditions would not prevent anticompetitive behavior.
> (5) More competitive American telecommunications markets will promote United States technological advances, domestic job and investment opportunities. . . . .
> (9) Achieving full and fair competition requires strict parity of marketplace opportunities and responsibilities on the part of incumbent telecommunications service providers as well as new entrants into the telecommunications marketplace. . . .[37]

Findings 4 and 5 stress that investment and technological progress are important byproducts of the competition sought through the Act. Finding 9 indicates that a level playing field for both incumbents and new market entrants is a requisite for true competition, as envisioned by the Senate. These three findings are important for comparison with the

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35. Section 4 states:

> This Act is intended to establish a national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and to meet the following goals:
> (1) To promote and encourage advanced telecommunications networks, capable of enabling users to originate and receive affordable, high-quality voice, data, image, graphic, and video telecommunications services.
> (2) To improve international competitiveness markedly.
> (3) To spur economic growth, create jobs, and increase productivity.
> (4) To deliver a better quality of life through the preservation and advancement of universal service to allow the more efficient delivery of educational, health care, and other social services.

S. 652, 104th Cong., 2d Sess. § 4 (1995). No similar statement appears in the enacted version.

36. S. 652, 104th Cong., 2d Sess. § 5 (1995). See *supra* note 34 for the stated purpose of the current version of the Act.

37. *Id.*

goals of antitrust law, since the findings are very similar to the objectives of antitrust law.

B. Section 101[38]

Section 101(a) of the proposed Act, entitled "REQUIRED INTERCONNECTION," is the focus of analysis.[39] This section mandates that a local exchange carrier, having market power in telephone exchange

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38. S. 652, 104th Cong., 2d Sess. § 101 (1995).

39. The Act states:

> a) DUTY TO PROVIDE INTERCONNECTION
>
> (1) IN GENERAL. — A local exchange carrier, or class of local exchange carriers, determined by the Commission to have market power has a duty under this Act, upon request —
>
> (A) to enter into good faith negotiations with any telecommunications carrier requesting interconnection between the facilities and equipment of the requesting telecommunications carrier and the carrier, or class of carriers, of which the request was made for the purpose of permitting the telecommunications carrier to provide telephone exchange or exchange access service; and
>
> (B) to provide such interconnection, at rates that are reasonable and nondiscriminatory, according to the terms of the agreement and in accordance with the requirements of this section.

S. 652, 104th Cong., 2d Sess. § 101(a) (1995).

For comparison, the relevant portion of the House's bill requires a local exchange carrier to provide interconnection. The wording of this bill does not contain the Senate's "good faith negotiations" terminology, rather it absolutely requires interconnection at a technically feasible and economically reasonable point.

The current version of the Act contains similar provisions:

> c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. — In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> (1) DUTY TO NEGOTIATE. — The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described
>
> . . . .
>
> (2) INTERCONNECTION. — The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local carrier's exchange network —
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. . . .

Pub. L. No. 104-104, § 251(c)(1, 2).

service or exchange access service, negotiate in good faith with any telecommunications carrier who requests interconnection between the facilities and equipment of the requesting telecommunications carrier and the carrier to whom the request was made. Further, the local exchange carrier to whom the request was made must provide such interconnection at reasonable and nondiscriminatory rates.

Is § 101 of the proposed Act a means to the goal of competition, keeping in mind the aforementioned Congressional findings?

V. ANTITRUST LAWS WITHIN THE DEREGULATED TELECOMMUNICATIONS MARKET

A. The Purpose of the Antitrust Laws Versus the Purpose of the Interconnection Requirements

Theoretically, governmental regulation and antitrust laws may be viewed as flip sides of the same coin; "regulation is an alternative to antitrust" laws, as both focus on a competitive goal.[40] As discussed in Part IV, the goal of the regulatory interconnections mandate of the Act is to foster competition in the telecommunications market. The antitrust laws are recognized by scholars and the judiciary as a vehicle for achieving competition in markets.[41] Regarding telecommunications and antitrust laws, Judge Harold Greene, citing the Supreme Court in *Northern Pacific Railway*, acknowledged that the Supreme Court has interpreted the Sherman Act as intended to "preserv[e] free and unfettered competition as the rule of trade."[42] Essentially this is the same purpose that underlies the current interconnection requirements in local telecommunications.

As an alternative to the interconnections requirements, the antitrust principles developed under the Sherman Act (specifically the "essential facilities doctrine" within the general "refusal to deal" principles) will ensure that, whenever appropriate in pursuit of competition, the local exchange carriers will have a legal obligation to negotiate in good faith with competitors desiring access. Congress could simply deregulate without mandating interconnections and rely on the application of the

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40. STEPHEN G. BREYER, REGULATION AND ITS REFORM 156-61 (1982).

41. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 51-66 (1978) (referring to the legislative history of the Sherman Act, which explicitly mentions competition benefitting consumer welfare as the ultimate goal); *see also* BREYER, *supra* note 40, at 157.

42. United States v. AT&T, 552 F. Supp. 131, 149 (D.D.C. 1982) (Modification of Final Judgement) *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (mem.).(citing Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958)).

relevant antitrust laws to keep local exchange carriers operating in a competitive manner.

B. A Hypothetical Situation in a Deregulated Telecommunications Market

In a deregulated[43] telecommunications market, absent a local interconnections requirement such as § 101, the local service carrier/local exchange dominator could refuse[44] to allow a competitor to connect ("interconnect") to the local exchange owner's facilities. This refusal effectively prevents the potential competitor from competing with the local exchange dominator because the potential competitor could not offer its customers the opportunity to call persons served by the local incumbent's facilities. Considering that the dominant market carrier controls access to the majority of customers, if the potential local carrier's customers cannot access the local customers of the dominant local carrier, the potential local carrier will have no customers because no one would choose service from a local exchange carrier unable to place a majority of the local calls due to lack of interconnections. Therefore, the local incumbent would have nearly all the customers and could potentially create or sustain a monopoly. However, the antitrust applications embodied in the general "refusal to deal" doctrine, explained below, would be triggered at this point and would, when necessary and appropriate, truncate such an anticompetitive refusal.

C. "Refusal to Deal"

The principles underlying the "refusal to deal" doctrine are based on the Sherman Antitrust Act.[45] The statute provides, in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . .[46]

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43. Throughout this Note the term "deregulated" denotes that there is no state or federal regulation, no applicable restraints under the Act, and no form of governmental intervention other than the workings of the relevant antitrust laws.

44. For refusal to deal purposes, the category of actionable refusals does not encompass justifiable refusals.

45. 15 U.S.C. § 2 (1995). *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

46. 15 U.S.C. § 2.

Courts have applied the statute in refusal to deal situations in a consistent manner on several occasions.[47] Application of this statute begins with the premise that in the absence of a purpose to create or maintain a monopoly, a firm has no duty to do business with other firms.[48] However, the right to refuse to deal with other firms is not absolute.[49] If the refusal is an "[attempt] to exclude rivals on some basis other than efficiency," the conduct can be deemed anticompetitive in violation of relevant antitrust laws.[50] In such circumstances, the refusal to deal is an attempt to create or maintain a monopoly, and it falls within the scope of § 2 of the Sherman Act.[51]

Both intent to monopolize and the power to monopolize are crucial components in proving an attempt to monopolize through a refusal to deal in violation of § 2 of the Sherman Act.[52] In and of itself, a refusal to deal has been held to indicate intent because "[i]mproper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."[53] Power to monopolize is often self-evident because those accused of attempting to monopolize generally have market shares that clearly demonstrate their ability to dominate the market. Therefore, courts have held a monopolist's unilateral refusal to deal with its competitors to constitute prima facie evidence of exclusionary conduct as the basis for a § 2 claim since both intent and power to monopolize are inherent.[54]

D. The "Essential Facilities Doctrine" Defined

In the local telecommunications market after deregulation (as set out in Part V(B)), it is more appropriate to apply the "essential facilities doctrine," a specific doctrine within the boundaries of refusals to deal.[55] The essential facilities doctrine applies when a monopolist controls a

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47. *See Aspen Skiing*, 472 U.S. at 602; Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994).

48. *Aspen Skiing*, 472 U.S. at 602.

49. *Id.* at 601.

50. *Id.* at 605.

51. *Id.*

52. 15 U.S.C. § 2; *see Aspen Skiing*, 472 U.S. at 603 (noting the two requirements of an attempt to monopolize, in violation of § 2, as specified in United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945)).

In Swift & Co. v. United States, 196 U.S. 375, 396 (1905), the Court indicated that intent, the nature of the conduct, and the dangerous probability that a monopoly will be achieved are to be examined in a § 2 claim under the Sherman Act.

53. BORK, *supra* note 41, at 160.

54. Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994).

55. *See id.* at 1184.

"bottleneck," where the only access to a potentially open market is through a facility or service that the monopolist (in the "access" market) controls.[56] The bottlenecking situation, which usually arises in technical and capital-intensive industries such as telecommunications or electricity transmission, allows the monopolist in one market to create a monopoly in another market by refusing a competitor access to that second market.[57] Theoretically, in the local telecommunications market, the exchange dominator would use its power in the exchange market to leverage its monopoly power in the local market into monopoly power in the interexchange (long distance) market, while maintaining the dominant position in the local market. As an illustration, if company *X* dominates market #1 which produces widgets, a necessary input in the production of goods in market #2, company *X* can effectively dominate market #2 by its control of the widget market. The monopoly control of the sale of widgets in market #1 creates the bottleneck to market #2.

The essential facilities doctrine attaches antitrust liability to a firm refusing to deal with another when the following are established: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.[58]

Inability to duplicate the essential facility has been broadly construed to apply if it is not economically feasible or practical to duplicate

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56. A "bottleneck" exists when a monopolist in a given market controls the access of competitors to inputs from the given market needed by the competitors to compete in a second market. The effect of a bottleneck is to allow a monopolist in one market to create for itself a monopoly in a second market by denying competitors the inputs from the first market that they need to produce and compete in the second market. For local exchange purposes, a bottleneck exists in the access service market which supplies the connection between incoming telecommunications from outside areas and the local loop receivers. The local exchange carriers control the local loop and the access market. They therefore have a bottleneck to the outside markets — they can use their monopoly power over the access market to take their monopoly power within the local loop and create a monopoly in the outside areas.

It is generally recognized that the Supreme Court decisions usually cited as underlying the bottleneck doctrine do not offer much support specifically for the doctrine. *See* Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 398 (1986). However, academics and courts other than the Supreme Court continue to cite these same cases.

57. *See* MCI Communications v. AT&T, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

58. *See id.* at 1132-33.

the facility.[59] However, mere inconvenience or some economic loss does not suffice.[60]

The denial of the use of the facility to a competitor need not be an outright denial.[61] It is enough that the terms of the offer are unreasonable in price, profit margin, time obligation, or other substantive criteria.[62] In assessing the motivation underlying the denial, self-interest alone is not a valid business reason and will not shield against antitrust liability.[63] The Sherman Act assumes that a company will preserve its financial well-being through innovation, cost control, and increased efficiency.[64] Refusing to deal to protect profits is unacceptable.[65]

A claim of infeasibility in providing the facility may be supported by valid business reasons for the monopolist's refusal to deal.[66] "In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare."[67] The court will allow the refusal to stand due to infeasibility if the capacity to provide the service (i.e., interconnection) is lacking, if the service provided to the end consumer would suffer as a result, if the refusal benefits the consumer, or if there is a valid technical justification.[68]

VI. THE ESSENTIAL FACILITIES DOCTRINE AS APPLIED IN THE HYPOTHETICAL DEREGULATED TELECOMMUNICATIONS SITUATION

Of the four above-mentioned requirements in a successful essential facilities lawsuit, the second (a competitor's inability practically or reasonably to duplicate the essential facility) is crucial to the doctrine's application to the telecommunications situation. Returning to the hypothetical, set out in Part V(B), arising in the deregulated local telecommunications market absent the mandatory interconnections requirement, if a potential local competitor brings an antitrust suit against

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59. *See id.*; Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991).

60. Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

61. *See Delaware & Hudson Ry.*, 902 F.2d at 179-80.

62. *See id.* at 180.

63. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

64. *See id.* at 380.

65. *See id.*

66. *See* MCI Communications v. AT&T, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

67. Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994).

68. *See Aspen Skiing*, 472 U.S. at 608-11.

the local telecommunications monopolist on the grounds of denial of access to an essential facility, the local monopolist most likely will argue the second requirement in defense. The monopolist will assert that the potential competitor is able practically or reasonably to duplicate the essential facility.[69] The local monopolist certainly will not argue the first requirement (control of the essential facility by a monopolist), as it is most likely self-evident. The monopolist probably will not argue the third point (the denial of the use of the facility to a competitor) since it is probably undisputed.[70] The monopolist possibly could argue the fourth point (the feasibility of providing the facility), but, due to the technical capacities of local exchange facilities as demonstrated through years of mandated interconnection by state regulators, an argument of infeasibility is likely to prove unsuccessful.

Therefore, an essential facilities case in the local telecommunications market will usually focus upon whether or not the competitor can duplicate the essential facility. In the local exchange market, the switching facility and wiring are the "essential facilities" in question. In both cases, new technology has evolved since local telecommunications were last litigated and legislated, and this will be a point of contention in the hypothetical case. For example, New York, a leader in telecommunications, uses digital "switching",[71] which is the newer, more efficient technology in the local access market. For wiring, fiber-optics is emerging where it previously had not been used. Both of these advances could potentially cast doubt on the argument that it is not economically or practically reasonable for a competitor to duplicate the local access dominator's facility. It is entirely possible that a courtroom battle involving the essential facilities doctrine in the local exchange market will hinge on a contested battle between telecommunications technology experts.

VII. A FINAL ANTITRUST THOUGHT FROM THE SUPREME COURT

Even absent a clear essential facilities situation, definite injury to competition seemingly has been used to sustain a successful § 2 claim

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69. Technically, the plaintiff has the burden of proving the infeasibility of practically or reasonably duplicating the essential facility. However, the defendant can show the opposite in defense. *See infra* note 79.

70. Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 180 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991).

71. For these purposes, switching refers to the technical process of connecting calls from one server's lines to another's.

when accompanied by a unilateral refusal to deal.[72] In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[73] the Supreme Court affirmed a violation of § 2 of the Sherman Act in such a situation. In *Aspen Skiing*, the lower court treated the defendant's refusal to deal in a manner consistent with the essential facilities doctrine, but the Supreme Court refused to even consider that argument.[74] Instead, the Court determined that the questionable refusal to deal was anticompetitive, in furtherance of an attempt to monopolize.[75] Since the Supreme Court used this broader reasoning, rather than the specific essential facilities doctrine, courts have held that *Aspen Skiing* invites "the application of more general principles of antitrust analysis to unilateral refusals to deal" when there is injury to competition, even absent an essential facilities situation.[76]

Academics view the Supreme Court's refusal in *Aspen Skiing* to acknowledge the essential facilities doctrine as a harbinger.[77] While the lower federal courts have had no hesitancy invoking the essential facilities doctrine,[78] the Supreme Court's specific refusal to do so in *Aspen Skiing*, seems to indicate some disfavor for the doctrine.

Therefore, perhaps the plaintiff in the hypothetical deregulated local telecommunications market should not claim the denial of an essential facility, but rather a pure attempt to monopolize in violation of § 2 of the Sherman Act. Arguably, this will not make the plaintiff's case easier, per se, but it will be more in keeping with the Supreme Court's intent.

VIII. THE RAMIFICATIONS OF ALLOWING AN ESSENTIAL FACILITIES CLAIM TO ARISE IN THE DEREGULATED TELECOMMUNICATIONS MARKET

Would forcing a potential market entrant and the incumbent access market dominator to litigate the potential market entrant's request for

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72. *See Aspen Skiing*, 472 U.S. at 589-603; *see generally* Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973).

73. 472 U.S. 585 (1985).

74. *Aspen Skiing*, 472 U.S. at 611 n.44 ("[W]e find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine.").

75. *Id.* at 610-11.

76. Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1184 (1st Cir. 1994).

77. *See* Boudin, *supra* note 56, at 397-401.

78. *See generally* MCI Communications v. AT&T, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Data General*, 36 F.3d at 1183; Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 189 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

interconnections be beneficial? Do we want to litigate a scenario which has (at least for the last decade) been under a strong regulatory governmental thumb? Unequivocally, the answer is yes.

A. *Assessing the Technology of Telecommunications*

Litigation would bring the technological discussion to the forefront. Potential competitors would be forced[79] to answer the question: "Technologically, why can't you do by yourself that which the incumbent is doing?"

Mandating[80] interconnection by local incumbents would avoid this question because the interconnection must simply be requested by a potential market entrant, not justified.[81] Because the Act specifically requires that the incumbent interconnect those market entrants who so desire, the potential market entrants could avoid ever having to explain why they cannot, with today's technology, economically create the same facilities that the local incumbents created years previously.[82]

Therefore, under the Act, as opposed to litigation under the antitrust laws, interconnections that are not truly essential may be performed.

B. *Encouraging Innovation and Increased Efficiency*

If the potential market entrant (the plaintiff in the hypothetical antitrust case) fails to offer proof that it is infeasible to recreate the telecommunications facilities of the market incumbent, and therefore the

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79. "The plaintiff must demonstrate the infeasibility of duplicating the facilities in question. . . ." KELLOGG ET AL., *supra* note 19, at 140.

80. Prior to enactment, it was unclear whether incumbents would have to negotiate in good faith, as the Senate hoped to require, or almost absolutely interconnect, as the House had proposed. While neither option is desirable, the House proposal is particularly frightening because it is apparently unequivocal. The enacted version requires good faith negotiation to obtain interconnection. Pub. L. No. 104-104, § 251(c)(1, 2), 110 Stat. 56 (1996).

81. *See* S. 652, 104th Cong., 2d Sess. (1995).

82. To address the economic aspect of the feasibility issue, it is worth noting that the New York State Public Service Commission mandates that for many cost assessing purposes, the local exchange incumbent (NYTel) must utilize forward-looking costs, as opposed to historical costs. This indicates that the New York Public Service Commission recognizes that the start-up costs of years ago were very disproportionate to the costs of today due to the advances in technology. The New York State Public Service Commission is conceding, therefore, that the costs of the technology needed in telecommunications today are much less than the costs of the technology in local telecommunications of years ago. Aside from having implications on the economic feasibility issue, that a regulator is conceding that the technological costs in the telecommunications market are much lower than previously believed lends further support to the theory that the natural monopoly no longer exists.

market incumbent (the defendant in the hypothetical antitrust case) does not have to offer interconnection to the essential telecommunications facilities, the public stands to gain a great deal. The prospective market entrant is not going to forgo the expanding telecommunications market. Rather, the entrant will seek a better, cheaper, more efficient way to do what the local telecommunications incumbent is doing. Either the potential market entrant will find a niche in which to specialize (e.g., large commercial clients or cellular services), find a way to do more efficiently that which the incumbent is doing, or join forces with a company needing to produce similar technology (e.g., a cable television provider erecting wires for use with a telecommunications carrier). Observers have envisioned this last option, and it is materializing in other aspects of the communications market.[83]

C. *Limiting the "Taking" to Purely Anticompetitive Situations*

A refusal to deal is not an antitrust violation absent injury to competition.[84] Although a refusal to deal may harm an individual competitor, the refusing firm is not subject to antitrust prosecution absent harm to the competitive process.[85] Therefore, application of the essential facilities doctrine will ensure that interconnection is mandated only when *competition* faces injury. This is a limitation on mandating interconnection that should come as a relief to those viewing the requirement of interconnections as an unconstitutional "taking."[86] Also, this limitation most succinctly meets the aforementioned goal of the Act — competition — without needlessly mandating competition-neutral interconnections.

IX. ADDITIONAL CONCERNS THAT ARE ADDRESSED THROUGH LITIGATING AS OPPOSED TO MANDATING

Aside from the previously mentioned benefits from allowing the antitrust laws to operate in the deregulated local telecommunications market rather than mandating interconnections, there are other concerns regarding Congress' determination to maintain a regulatory influence within the "deregulated" local market that indicate mandating interconnections is not the best option.

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83. *See AT&T Gets Turner Deal*, ALBANY TIMES UNION, Nov. 8, 1995, at C8.

84. *See* Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990).

85. *See id.*

86. *See* KELLOGG ET AL., *supra* note 19, at 157 (citing Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co., 45 F.2d 995 (8th Cir. 1930) in which the Eighth Circuit held that a state law requiring interconnection constituted a "taking").

Legal scholars are in almost absolute agreement that the law of monopolization "does not condemn the existence of a monopoly acquired by lawful means, nor should it condemn a firm's creation of, or control over, an 'essential' facility acquired by lawful means."[87] Further, investment and innovation are encouraged in the United States. Therefore, a legislative mandate that one must "share" innovations when this innovation has led to a position of market domination seems contrary to policy. One academic, while discussing the Supreme Court's refusal to assess the essential facilities doctrine in *Aspen Skiing*, questioned whether the Court's refusal to endorse the doctrine, when squarely presented with it, was based on a manifestation of doubts about "the implications of a general obligation for a monopolist to 'share' its essential facility with its competitors."[88] The judiciary in *United States v. Aluminum Co. of America*, expressed the same concern stating that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[89] Even the spokesman for the Department of Justice, Antitrust Division, conceded that valid protest can exist when a facility's owner is denied a "legitimate return on his investment."[90] The argument against mandating interconnections is best summarized by the simple observation that this is a policy consideration; "[r]equired sharing discourages building facilities. . . even though they benefit the consumer."[91] A legislative mandate of interconnection would fuel these concerns, while a restraint only through the antitrust laws would not.

Another concern with the Congressional mandate arises from the theory that "market forces are preferable to governmental intervention."[92] Such certainty that the local exchange is incapable of attaining competition without a strong legislative imposition seems to mock the Adam Smith's "invisible hand."[93]

The rigidity that § 101 imposes is unnerving. The Congressional mandate on interconnections in § 101 of the Act makes the denial of access virtually unlawful per se for local exchange carriers. The obligation of interconnection seems directly opposed to the theory that

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87. Scott D. Makar, *The Essential Facility Doctrine and the Health Care Industry*, 21 FLA. ST. U. L. REV. 913, 919 (1994).

88. Boudin, *supra* note 56, at 401.

89. United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).

90. Statement of Charles F. Rule before the Senate Committee on the Judiciary concerning S. 447, Apr. 23, 1985, at 6 (cited in Boudin, *supra* note 56, at 402 n.52).

91. Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 851 (1990).

92. BAUMOL & SIDAK, *supra* note 7, at 4.

93. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776). The "invisible hand" theory proposes that the market forces of supply and demand, acting as an invisible hand, will guide the market and prices to some level of stability, efficiency, and competition.

"denial of access is never per se unlawful."[94] One could argue that there is some injustice in applying the absolute rule that there is no "unqualified duty to cooperate" to everyone, even a monopolist,[95] except local exchange carriers. Although scholars postulate that it would be amazing if the collection of concerns and variables surrounding a situation where a monopolist controls a main facility "could all be reduced to order by a one-sentence doctrine asserting that a monopolist controlling an essential facility has a duty to deal with competitors,"[96] Congress is trying to do just that. While Sherman Act § 2 claims allow flexibility,[97] mandated interconnection allows none.

Even at the most basic level, in achieving the goal of competition, mandating interconnections is wrong. Regulating by mandating interconnections "replicates the results of competition."[98] The antitrust laws, however, "seek to create or maintain the conditions of a competitive marketplace."[99] The findings of the Act refer to a competitive marketplace, not a marketplace that replicates competition.[100]

X. CONCLUSION

Congress is at a crossroads. They can either continue regulating within the context of a "Deregulation" Act or they can allow the antitrust laws to serve the function scholars argue they were supposed to serve. Considering that the Congressional goal underlying the Act is competition, mandated interconnections actually would stimulate a skewed competitive result because *any* service provider requesting interconnections would probably receive them. Also, mandated interconnections would discourage innovations: market entrants would have no need to innovate because interconnections are readily available, and market incumbents would have no incentive to innovate because they would be forced to share anything they produced. Mandated interconnections would also stiffle the true competitive functioning of the market. There is no indication in the legislative history of the Act that the Senate even considered what the market's invisible hand could achieve on its own.

Deregulating the telecommunications market would be the best thing for Congress to do, allowing the antitrust laws to operate to stimulate a competitive marketplace. Unnecessary interconnections would not be

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94. Areeda, *supra* note 91, at 852.
95. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985).
96. Boudin, *supra* note 56, at 401.
97. *See id.* at 402.
98. BREYER, *supra* note 40, at 157.
99. *Id.* at 156-57.
100. *See* S. 652, 104th Cong., 2d Sess. (1995).

forced, and potential market entrants would be prodded to consider innovations to propel themselves into the local market. At the same time, market incumbents would innovate because they would not be compelled to share their innovations with competitors.

Overall, considering the pros of allowing the telecommunications market to be solely subject to antitrust laws and the cons to be had from a Congressional mandate of interconnections, it becomes clear that the best route is to litigate, not legislate.