Harvard Journal of Law & Technology
Volume 11, Number 3 Summer 1998

THE FCC AND THE TELECOM ACT OF 1996: NECESSARY STEPS TO ACHIEVE SUBSTANTIAL DEREGULATION

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I. INTRODUCTION

A general principle underlying the Telecommunications Act of 1996 ("Telecom Act" or "Act") is that making telecommunications markets competitive will "bring new packages of services, lower prices and increased innovation" to consumers.[1] However, tearing down the regulatory framework of the Communications Act of 1934 that created the local exchange monopolies will not instantly transform the telecommunications arena into a competitive marketplace. Congress realized that regulatory intervention would be necessary in the short-term to minimize the barriers to market entry and to offset the competitive advantages built up by incumbent carriers. Accordingly, the Telecom Act sets out two courses of action to achieve reform: (1) it directly removes many of the regulatory barriers that formerly restricted which lines of business competitors could enter and (2) it imposes statutory "obligations"[2] and empowers the Federal Communications Commission ("FCC") to implement these provisions to facilitate near-term competition.

This paper focuses on the common carrier provisions of the Act and is based on the premise that local exchange markets will not reach a desirable state of competition until these markets are substantially

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1. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at 4–5 (Aug. 8, 1996) [hereinafter First Report & Order], *available at* <www.fcc.gov/ccb/local_competition/fcc96325.html>.

2. Former FCC Chairman Reed Hundt classified the provisions of the Act into "obligations" and "incentives." *Testimony on the 1996 Telecommunications Act: An Anti-trust Perspective Before the Subcommittee on Antitrust, Business Rights and Competition of the Senate Committee on the Judiciary*, 105th Cong., *available in* 1997 WL 590625 (1997) [hereinafter *1996 Telecommunications Act Hearings*] (testimony of Reed E. Hundt, Chairman, FCC). This paper notes that "obligations" on carriers correspondingly become "rights" of the benefitted parties.

deregulated.[3] Substantial deregulation is clearly the Act's long term goal; the Act's primary shortcoming is its failure to delineate a clear shift from a status quo of regulation to a default condition of deregulation with pockets of regulatory intervention only when necessary. Even current and former FCC Commissioners agree that, in a telecommunications industry that is producing new competitors and technologies at breakneck speed, statutory and FCC intervention is the wrong answer to maintaining market competition in the long run.[4]

Since the Act's passage, critics have decried the Act's shortcomings and have suggested alternative measures. Some seek to define a more significant role for antitrust law.[5] Others, in spite of the Act's empowerment of the FCC, call for the abolition of this agency.[6] This paper instead suggests that the Act provides a workable path for the FCC to help guide the telecommunications industry towards substantial deregulation. This paper provides a means to help the FCC achieve the necessary shift in mindset to phase out both *legislative* regulation and its own *administrative* control over telecommunications.

Part II of this paper provides a high-level summary of the Act in terms of the statutory obligations imposed on carriers and the roles for the FCC in the telecommunications arena. One of the FCC's most

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3. This paper's "substantial deregulation" standard leaves room for future statutory and regulatory intervention over limited aspects of wireline telecommunications, including interconnection, universal service and information exchange.

4. Although incumbent FCC Commissioner Susan Ness proclaims that "the need for the FCC is greater now than ever," she further states that "if we do our job well, and competition takes root in market sectors that are not currently competitive, the FCC of the future will be even more streamlined . . . [c]ompetition cannot replace monopoly overnight, but as it does the Commission can and should be downsized accordingly." Susan Ness, *This is my response to a letter I received over the Internet from a student at Texas A&M University* (visited Nov. 15, 1997) <http://www.fcc.gov/nessjour.html>. *See also 1996 Telecommunications Act Hearings*, *supra* note 2, at D 961; Dennis R. Patrick, *The Telecommunications Act of 1996: Intent, Impact and Implications* (May 14, 1996) <http://www.pff.org/ pff/cad/patr051496.html>.

5. *See generally* George J. Alexander, *Antitrust and the Telephone Industry After the Telecommunications Act of 1996*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 227 (1996) (analyzing antitrust law roles and immunities under the Act); Douglas B. Mcfadden, *Antitrust and Communications: Changes After the Telecommunications Act of 1996*, 49 FED. COMM. L.J. 457 (1997) (outlining the antitrust implications of the Act); Daniel F. Spulber, *Deregulating Communications*, 12 YALE J. ON REG. 25 (1995) (analyzing the telecommunications industry from an antitrust perspective).

6. *See, e.g.*, The Progress and Freedom Foundation, *Plan to Abolish FCC Unveiled* (visited May 3, 1998) <http://www.pff.org/pff/abolish_fcc.html>; PETER W. HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 4 (1997).

important roles is to implement the Act's local competition provisions. This paper focuses on these primary provisions in order to highlight Congress' goal of achieving substantial deregulation. However, this paper also calls for immediate repeal of lesser regulations, such as reporting requirements and procedural rules.[7] As markets approach desired states of competition, this paper provides a mechanism for phasing out the Act's primary statutory provisions.[8]

Part III examines the extent to which the Act defines the transition from managed competition[9] to substantial deregulation. This part first examines general policy reasons for deregulation and concludes that the FCC must eventually phase out its involvement and allow the market to run its own course. This part also briefly examines the Act's legislative history to demonstrate Congress' intent of long-term substantial deregulation. Second, this part highlights sections of the Act that explicitly authorize statutory and regulatory repeal. This paper argues that these provisions rely too much on voluntary FCC forbearance and are not sufficient means in themselves for achieving substantial deregulation.

In Part IV, this paper outlines a two-pronged approach for achieving a clear transition to substantial deregulation: (1) affirmative FCC action under § 10 without waiting for carrier petitions; and (2) mandatory FCC forbearance with sunset regulations.[10] First, this part refutes the more common interpretation of § 10, concluding that the Act authorizes the FCC to act proactively despite § 10(c). Second, this part examines issues in adopting sunset regulations, including: (a) Congress' prior consideration of sunset provisions as a means to achieving deregulation; (b) whether the Act authorizes the FCC to promulgate sunsets, or

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7. *See, e.g.*, David W. Zesiger, Independent Telephone & Telecommunications Alliance, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance 11, 27 (Feb. 17, 1998).

8. For one critic's list of FCC roles that should be eliminated, see HUBER, *supra* note 6, at 6. Part II.B of this paper provides a high-level overview of some of the FCC's other roles pertaining to common carriers. Again, this paper's proposals relate primarily to the FCC's role in promoting competition in wireline telecommunications; the need for the FCC in other areas remains a separate issue.

9. Jeffrey A. Eisenach, *Time to Walk the Walk on Telecom Policy* (July 2, 1997) <http://www.pff.org/pff/ telecom.html>.

10. "Sunset" laws were a reform idea under which a government agency would be phased out of existence after a fixed period of time unless legislature renewed the agency's charter. Congress has since applied sunsets on statutes to phase out laws over a fixed number of years. The goal behind sunsets is to compel Congress to reassess its delegations of authority periodically. *See* ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 42–43 (4th ed. 1997).

whether Congress must amend the Act; (c) substantive issues in promulgating sunset provisions, especially which type of sunset will create the most optimal set of incentives; (d) which approaches might be susceptible to collateral legal attack; and (e) general administrative and procedural approaches in implementing this proposal.

Finally, using the Title II local competition provisions as a case study, Part V applies the ideas in Part IV to a specific proposal for sunsets on the Act's resale and unbundling provisions. Again, the general proposal outlined in Part IV has more immediate application to lesser FCC regulations and Act provisions. Moreover, sunsets should be part of any new regulation promulgated by the FCC.

One issue this paper will not address is the jurisdiction of state regulators once sunsets are triggered and federal regulation is phased out. A detailed discussion of this issue is beyond the scope of this paper. However, some guidance on this issue can be gleaned from § 10(e) of the Act, which prevents state commissions from enforcing provisions of the Act that the FCC forbears from applying under § 10(a).

II. "OBLIGATIONS" AND THE FCC'S ROLE UNDER THE TELECOM ACT

A. Promoting Competition

The primary goal of the Telecom Act is to "promote competition and reduce regulation . . . to secure lower prices and higher quality services . . . and encourage the rapid development of new telecommunications technologies" by this country's telecommunications industry.[11] The common carrier provisions of the Act seek to achieve this in three ways: (1) opening local exchange and exchange access markets to competition; (2) promoting increased competition in the long distance markets; and (3) reforming universal service in light of opening the local exchange markets.[12] The FCC's immediate role under the Act is to implement rules to achieve these goals.[13]

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11. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 18 & 47 U.S.C.A. (West Supp. 1997)), Purpose Statement.

12. *See* First Report and Order, *supra* note 1, at 2. The Act also seeks to manage competition by restricting the ability of incumbent carriers to leverage their existing networks into unfair competitive advantages in the equipment manufacturing and electronic publishing arenas.

13. Specifically, the Act granted the FCC jurisdiction to promulgate regulations implementing 47 U.S.C. §§ 251(b)(2) (number portability), 251(c)(4)(B) (prevention of discriminatory resale), 251(d)(2) (unbundled network elements), 251(e) (numbering

The Act employs two courses of action in opening up the local exchange markets. First, the Act removes many of the regulatory barriers to entry for new market entrants.[14] Second, the Act attempts to counteract market barriers to entry created by the competitive advantages of incumbent carriers ("ILECs") by imposing statutory obligations on ILECs and granting the FCC the power to implement these provisions.[15] It is this affirmative intervention that must be phased out over time to achieve true market competition.

By imposing obligations upon the ILECs, § 251 provides competitive local exchange carriers ("CLECs") with three paths of entry into local exchange markets: (1) facilities-based competition through construction of new networks; (2) purchasing unbundled network elements from ILECs; and (3) reselling the ILECs' retail services. For those CLECs that construct their own networks, interconnection with existing networks is necessary to enable the CLECs' subscribers to communicate with the ILECs' subscribers. The Act takes the position that ILECs have strong disincentives against negotiating fairly with new entrants and possess superior bargaining power that allows ILECs to refuse such negotiations. Therefore, § 251(c)(2) requires ILECs to interconnect with the facilities of other carriers. If voluntary negotiations fail, the Act establishes a system for compulsory arbitration — this system empowers states to determine a "just and reasonable rate" for interconnection.[16]

Many entrants will choose not to build their own networks or will rely on a combination of their own facilities, unbundling, and resale. Section 251(c)(3) requires ILECs to provide requesting carriers access to *unbundled* network elements at "any technically feasible point" on

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administration), 251(g) (enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). Iowa Utilities Board v. FCC, 120 F.3d 753, 794 (8th Cir. 1997). Moreover, the Act also granted the FCC the authority to forbear from applying any of the Act's provisions to individual carriers, services or markets. *See infra* Part III.B.1.

14. 47 U.S.C.A. § 253(a) (explicitly preempting state and local governments from prohibiting any entity from providing any interstate or intrastate telecommunications service).

15. Section 251 outlines a three-layer set of obligations. The first layer imposes a general duty for every telecommunications carrier to interconnect with others. The second layer imposes duties on all local exchange carriers in the following areas: resale; number portability; dialing parity; access to rights-of-way; and reciprocal compensation. The third layer imposes additional requirements on ILECs.

16. The Eighth Circuit recently struck down FCC rules that attempted to dictate the standards that states must follow in determining prices for interconnection, unbundled elements and resale. *See* Iowa Utilities Board, 120 F.3d at 793–800.

terms that are "just, reasonable, and nondiscriminatory."[17] Section 251(c)(4) requires ILECs to make all of its subscriber retail services available for resale. The unbundling rule allows market entrants to obtain "finished services" at a lower, cost-based rate than the retail rate available via the resale provisions, but requires market entrants to assume greater risk by making a larger up-front investment.[18]

Finally, the Act's promotion of competition in the *long distance* markets is interwoven with its attempts to open the *local exchange* markets. As a carrot to induce the Bell Operating Companies ("BOCs") to open up their local exchange markets, § 271(b)(1) lifts the restriction on BOCs from offering interLATA[19] services that originate in their own regions once they open up their local exchange markets in accordance with a fourteen-point "competitive checklist."[20] This incentive-based

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17. The FCC has identified the following minimum list of unbundled network elements that ILECs must provide to satisfy this section: (1) network interface devices, (2) local loops, (3) local and tandem switches, (4) interoffice transmission facilities, (5) signaling and call-related database facilities, (6) operations support systems and information, and (7) operator and directory assistance facilities. *See* First Report and Order, *supra* note 1, at 25. Moreover, to assist carriers seeking either interconnection or access to unbundled network elements, § 251(c)(6) requires ILECs to provide either physical or virtual collocation.

18. *See* Iowa Utilities Board, 120 F.3d at 815.

19. The 1984 Modified Final Judgment ("MFJ") divided the continental United States into several Local Access Transport Areas ("LATAs"). The MFJ awarded local carriers franchises to carry "intraLATA" traffic; only long distance carriers could transport tarffic between LATAs.

20. A BOC may provide interLATA services that originate outside its in-region States immediately. 47 U.S.C.A. § 271(b)(2). However, the in-region interLATA market is more appealing to BOCs since BOCs can leverage upon their existing local exchange client base and provide bundled end-to-end services. Before the FCC will authorize a BOC to provide in-region interLATA services, the BOC must enter into an interconnection agreement with a facilities-based competitor in the region (or prove to the FCC that it can provide future competitors an agreement) that satisfies the following checklist:

(1) Interconnection;
(2) Access to network elements;
(3) Access to rights-of-way;
(4) Unbundled local loop transmission from the central office to the customer's premises;
(5) Unbundled local transport from the trunk side of a wireline local exchange carrier switch;
(6) Local switching unbundled from transport, local loop transmission, or other services;
(7) Nondiscriminatory access to —
  (a) 911 and E911 services;
  (b) directory assistance services to allow the other carrier's

structure operates on the assumption that each BOC wants to enter the lucrative interexchange market.

B. Other FCC Roles

Besides promoting competition, FCC oversight of common carriers involves at least three additional responsibilities under the Act: (1) ensuring equal access to telecommunications services and administering entitlements; (2) protecting consumers; and (3) facilitating information exchange. Additionally, the FCC maintains roles in regulating wireless, mass media and broadcast, cable services, and international issues.

Most of the FCC's role in ensuring equal access and administering entitlements focuses on universal service.[21] Making communications markets competitive necessarily requires reforming the universal service system to find new providers and new sources of revenue to assume burdens formerly held by the ILEC monopoly-holders. The FCC will continue to balance the benefits of the network effect with regards to new digital services against the cost of making access to such services universal. Moreover, an additional element of the FCC's universal service policy involves ensuring equal access to advanced telecommunications services for schools, libraries and health care providers.[22] Finally, under the dictate of § 255, the FCC has promulgated rules supporting equal access to telecommunications services for persons with disabilities.

Regarding consumer protection, § 258 empowers the FCC to police against "slamming" by carriers.[23] Even more important is the FCC's role with the V-chip pursuant to § 551(b)–(c) of the Act. The FCC is

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customers to obtain telephone numbers; and
(c) operator call completion services;
(8) White pages directory listings for customers of the other carrier's telephone exchange service;
(9) Access to telephone numbers for assignment to the other carrier's telephone exchange service customers;
(10) Call routing and completion;
(11) Number portability;
(12) Local dialing parity;
(13) Reciprocal compensation arrangements;
(14) Resale of telecommunications services.

47 U.S.C.A. § 271(c)(2)(B) (West Supp. 1997).

21. *See* 47 U.S.C.A. § 254 (West Supp. 1997).

22. *See* FCC, *Welcome to LearnNet* (visited Mar. 9, 1998) <http://www.fcc.gov/learnnet>.

23. Slamming refers to switching a customer's long distance provider without the customer's advance consent.

currently participating in both the development of technical standards for the V-chip and in creating an acceptable industry ratings system.[24]

Third, the Act looks to the FCC to facilitate the exchange of information between market participants. Section 256 authorizes the FCC to oversee coordinated network planning by telecommunications carriers. Also, this section authorizes the FCC to work with industry standards-setting entities in the development of public telecommunications network interconnectivity standards.[25] Additionally, § 251(e) authorizes the FCC to create an entity responsible for administering telecommunications numbering. The FCC's role in information exchange must not be understated; as carriers enter each other's markets the need for coordination could grow in importance.[26]

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24. William E. Kennard, *Press Statement of Chairman William E. Kennard on the Second Anniversary of the Telecom Act of 1996* (May 3, 1998) <http://www.fcc.gov/Speeches/Kennard/Statements/stwek804.html>; *see also FCC V-Chip Homepage* (visited May 3, 1998) <http://www.fcc.gov/vchip>.

25. This section does not expand or limit the FCC's authority as it existed prior to the Act's passage, but merely makes explicit that the FCC retains this power under the Act. *See* 47 U.S.C.A. § 256(c) (West Supp. 1997).

26. Many people predict that deregulation will lead to industry consolidation, while fragmentation appears to be the "contrarian" view. *See* Patrick, *supra* note 4, at "Implications for the Industry." However, consolidation through mergers is not a forgone conclusion in this industry; telecommunications mergers in particular face challenging culture hurdles. *See* John Salak, *Morning-After Management*, TELE.COM (Oct. 1997), *available at* <http://www.teledotcom.com/1097/features/tdc1097culture.html>.

Regardless, the FCC's role in information exchange stands to grow in importance even if industry consolidation occurs for the simple reason that multiple carriers with overlaying networks will be competing against each other in each market. As new products and services are developed, coordination will become paramount for consumers who subscribe to services from multiple carriers simultaneously.

For a contrasting view, see HUBER, *supra* note 6, at 9. In spite of the "public good" argument in favor of the government assuming an information exchange and coordination role, Huber points out that the computer industry developed interconnection rules and open systems without the advent of a Federal Computer Commission.

III. THE TELECOM ACT'S GOAL OF SUBSTANTIAL DEREGULATION

A. Why is Substantial Deregulation Generally Necessary?

1. Policy Discussion

This paper's purpose is not to repeat the numerous substantive arguments in favor of substantial deregulation, but instead to focus on how to achieve this within the framework of the Act. However, understanding these substantive arguments is a necessary prerequisite to proposing reform, so this part briefly summarizes the strongest arguments for substantially deregulating the telecommunications industry.

First, while one common market failure is a lack of consumer information, in the telecommunications industry the markets are certain to have more information than regulators. Former FCC chairman Dennis Patrick states this best, conceding that "it is impossible for any Federal agency to have access to the hundreds of millions of pieces of information relevant to technology, consumer demand and cost benefit trade-offs necessary to make efficient resource allocation decisions."[27] For example, recently retired FCC chairman Reed Hundt admitted that FCC regulations which allow competitors to buy new telco services at deep discounts are chilling the telcos from deploying new services.[28]

A related argument is that the telecommunications industry is evolving and will continue to evolve so rapidly that neither interventionist laws nor any regulatory body can keep pace. Law must not lead the market, but instead react to it.[29] However, in this deregulatory era technology and business are changing so quickly that by the time the law reacts, the law is outdated. For instance, much of the FCC's regulatory structure is based on an artificial distinction between voice, video and data that technological advances have since rendered obsolete.[30] Thus, in the short-term FCC and regulatory intervention must be limited to the more focused task of kick-starting new market entrants.

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27. Patrick, *supra* note 4, at "Implications for FCC/Government Regulation."

28. *See* Gail Lawyer, *FCC: More Carrot, Less Stick*, TELE.COM (Nov. 1997) <www.teledotcom.com/1197/ headend/tdc1197headend_innovate.html>.

29. *See* HUBER, *supra* note 6, at 8.

30. *See* Patrick, *supra* note 4, at "Implications for FCC/Government Regulation."

In the long run, the need for this intervention disappears. Even if telecommunications carriers consolidate,[31] at least a future market with five to ten vertically integrated "super-carriers" will compete against each other in many markets, unlike today where several carriers exist but do not compete due to geographic boundaries.[32] Also, while the interLATA market is generally acknowledged as the more lucrative market, competition should also continue to increase in the local exchange markets as consumer demand for bundling local services with interLATA services offsets the relative disincentive to enter the local exchange markets.[33] Even if local exchange competition ends up being limited to business customers,[34] the physical presence of CLECs to nearby residential markets creates a more direct threat of market entry to unchallenged carriers.[35] Last, whether they are enforced by the FCC or the Justice Department, the antitrust laws provide a more static framework that can withstand rapid industry change while ensuring that competition persists and that consolidation does not reverse the actions of the Modified Final Judgment.[36]

Recently released statistics suggest that the "long run" is not so far away. In 1997 alone, CLECs tripled their customer lines to about 1.5 million at the end of the year and now account for about 2.6% of all

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31. *See supra* note 26.

32. *See* Joseph Braue, *A Sense of Huber*, TELE.COM (Sept. 1996) (interview with Peter Huber), *available at* <http://www.teledotcom.com/0996/features/tdc0996huber.html>.

33. *Cf.* Peter W. Huber, *Local Exchange Competition Under The 1996 Telecom Act: Red-Lining The Local Residential Customer* (Nov. 4, 1997), at iv–v <www.cais.com/huber/redline/report.pdf> (statistics and observations since the passage of the Act). *See generally* Alexander C. Larson, *Reforming Telecommunications Policy in Response to Entry into Local Exchange Markets*, 18 HASTINGS COMM. & ENT. L.J. 1 (1995) (arguing that market entry by competitive access providers already shows that local exchanges are not natural monopolies).

34. According to WorldCom CEO Bernard Ebbers, "[n]ot AT&T, not MFS or anyone else, is going to build local telephone facilities to residential customers. Nobody ever will, in my opinion." Huber, *supra* note 33, at iii.

35. *See generally* Mark S. Fowler et al., *"Back to the Future": A Model for Telecommunications*, 38 FED. COMM. L.J. 145 (1986) (arguing that local exchange markets would become competitive due to the potential entry of cable television companies, cellular radio providers and interexchange carriers).

36. *See Hearings on Reform of the Federal Communications Commission Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong. 106 (1996) [hereinafter *FCC Hearings*] (testimony of Peter K. Pitsch) (stating that regulation of mergers should be done through antitrust enforcement); *see generally* Alexander, *supra* note 5; Elizabeth A. Nowicki, *Competition in the Local Telecommunications Market: Legislate or Litigate?*, 9 HARV. J. L. & TECH. 353 (1996).

local telephone revenues.[37] This growth promises to continue, as more than 2,400 interconnection agreements have been signed by USTA local telephone companies and the Bells and GTE are processing more than 8,000 competitive orders daily.[38] Even more importantly, statistics over the past two years indicate that significant progress is being made towards facilities-based competition. The Bell Companies and GTE have sold over 140,000 loops to competitors, while the Bell Companies alone have sold more than 480,000 interconnection trunks to competitors.[39] Successful efforts by CLECs at raising capital support projections of continued growth in infrastructure development and increased facilities-based competition in the future.[40]

Finally, the FCC regulatory process creates opportunities for manipulation by ILECs who seek to delay competition.[41] Former FCC Chairman Dennis Patrick conceded that ILECs have nothing to lose by disputing competitive offerings by other carriers that are about to enter their markets and noted that the FCC commits "thousands of man hours a year" to reviewing these challenges.[42]

A premise of the information age is that growth in information technology will provide more information and greater choice to American consumers. Consistent with this notion, free markets, not government regulation, will best serve the interests of consumers in lowering prices, directing resource allocation and developing technology in the telecommunications industry.[43] Long-term market regulation threatens to promote new market entrants that are otherwise inefficient while slowing down existing carriers who may have the best chance at achieving technological and market progress.

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37. *See* Federal Communications Commission, *Two Years After the Act (Fact Sheet)* (Jan. 1998) <http://www.fcc.gov/Bureaus/Miscellaneous/Factsheets/afteract.html>. Some industry participants question the magnitude of this growth. *See, e.g., En Banc on State of Local Competition* (Jan. 29, 1998) <http://www.fcc.gov/enbanc/012998/tr012998.txt> (statement of Heather B. Gold, President of Association for Local Telecommunications Services, noting that ILECs are forecast to gain seven million lines in 1998).

38. *See* United States Telephone Association, *Local Telephone Markets Are Open To Competition (Fact Sheet)* (visited May 1, 1998) <www.fcc.gov/enbanc/012998/ustafact.pdf>.

39. *See Id.* Additionally, the USTA's members have established more than 1,600 collocation points with competitors.

40. *See Two Years After The Act*, *supra* note 37; *see also* Susan Ness, Why Investment Matters, Remarks Before the Economic Strategy Conference, Washington, D.C. (Mar. 3, 1998), *available at* <http://www.fcc.gov/Speeches/Ness/spsn804.html>.

41. *FCC Hearings*, *supra* note 36, at D 936 (testimony of Peter K. Pitsch).

42. *See* Patrick, *supra* note 4, at "Implications for FCC/Government Regulation."

43. *See id.*

2. Congress' Legislative Intent Was Substantial Deregulation

Congress strongly endorsed the above arguments when it passed the Telecom Act. The Act's language clearly states Congress' focus, setting out dual goals to "promote competition and *reduce* regulation."[44] While Congress clearly looks to the FCC to guide the telecommunications industry through a transition stage, this language makes it clear that Congress did not wish to promote competition by *adding* regulation.

A brief glimpse at the Act's legislative history reinforces this deregulatory intent. Senator Hollings declared that "[t]he basic thrust of the bill is clear: competition is the best regulator of the marketplace."[45] Additionally, Rep. Tom Bliley, Chair of the Commerce Committee responsible for the Act, testified that the Act would "create the transition to a more competitive marketplace" by preserving "existing 'rules of the road' while market forces are permitted to develop, but which cease to have effect when those forces have developed to the point that they are sufficient to protect consumers."[46]

Dennis Patrick also proclaims the Act's goal to be substantial deregulation, stating that "[t]he intention of the Congress . . . seems quite obvious: to move as quickly as possible toward an open, competitive and largely unregulated communications marketplace."[47] Patrick notes that there is "an important transitional role for the FCC to play."[48] However, concluding that this role is too big, Patrick calls for the FCC to voluntarily re-invent itself into a smaller, less influential body by utilizing the phase-out provisions in Title I of the Act.[49]

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44. Telecommunications Act of 1996, *supra* note 11, Purpose Statement (emphasis added).

45. 142 CONG. REC. S688 (daily ed. Feb. 1, 1996).

46. H.R. REP. NO. 204(I), 104th Cong., 1st Sess. 495 (July 24, 1995).

Additionally, Congressman John Linder testified that "this bill will be remembered as the most deregulatory telecommunications legislation in history." H.R. CONF. REP. on S. 652, Telecommunications Act of 1996, 104th Cong., 2d Sess., 142 CONG. REC. H1145, 1146 (Feb. 1, 1996). Moreover, commenting on the proposed Communications Act of 1995, Rep. Bill Paxon stated that "[i]n areas where regulations are necessary, such as the transition rules while opening the local phone loop, regulations must be fair, reasonable, flexible, and sunset as quickly as possible. 141 CONG. REC. H8269 (Aug. 2, 1995).

47. Patrick, *supra* note 4.

48. *Id* at "Public Utility Regulation."

49. *Id* at "How Do We Get There From Here?" For a description and analysis of the Title I phase-out provisions, see *infra* Part III.B.1.

B. Mandates for Substantial Deregulation Within the Telecom Act

1. Title I "Phase-out" Provisions

Title I of the Act provides two engines for phasing out regulatory control over telecommunications markets: (1) discretionary forbearance; and (2) mandatory FCC regulatory review. Section 10 defines the means for discretionary forbearance, mandating that the FCC *shall* forbear from applying one of the Act's statutory provisions or an FCC regulation promulgated under the Act to some or all of a carrier's services in one or more of its geographic markets if the FCC determines, according to a three-part test based on a "public interest" standard, that the regulation is no longer needed.[50]

The second provision, § 11, requires the FCC to perform a biennial review of each FCC regulation issued under the Act. This section dictates that the FCC shall review *all* regulations and must repeal or modify any regulation that the FCC determines is no longer in the "public interest."[51] While § 10 covers both the Act's statutory provisions and FCC regulations, § 11 does not apply to the statutory provisions of the Act. Although § 11 authorizes repeal while § 10 only authorizes forbearance, it is unclear which section's "public interest" test is easier to satisfy, if they are different at all.

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50. Section 10(a) of the Telecom Act states in relevant part:

> "the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest."

Telecommunications Act of 1996, *supra* note 11, at § 401.

Under the third prong, the FCC's determination of "public interest" must consider "whether forbearance from enforcing the provision or regulation will promote *competitive market conditions*." *Id.* § 10(b) (emphasis added).

51. 47 U.S.C.A. § 11(a)(2) (West Supp. 1997). Critics of the FCC claim that the first biennial review process has been conducted inconsistently with the mandate that all regulations be reviewed. *See infra* Part III.B.3.

2. Title II Sunsets and Equivalent Provisions

Although sunsets on major statutory provisions were included throughout earlier drafts of the Act,[52] the final version of the Act contains only a few sunsets on common carrier provisions. The most important is the four year sunset on the restriction preventing BOCs from participating in electronic publishing.[53] Two other sunsets on minor restrictions on common carriers include: (1) a three year sunset on the provision restricting major carriers from jointly marketing local and interLATA services;[54] and (2) a sunset that terminates obligations on standard-setting organizations that also manufacture telecommunications equipment once the FCC determines that alternative sources of industry-wide standards have developed.[55]

Conversely, the Act utilizes an incentive-based[56] approach to phase out the restrictions barring certain BOCs from providing in-region interLATA services and from manufacturing telecommunications equipment. Under §§ 271(d) and 273(a), BOCs can free themselves of these restrictions by opening up their local exchange networks in compliance with the fourteen-point competitive checklist.[57] However, while using a "carrot and stick" approach with BOCs can facilitate competition,[58] §§ 271(d) and 273(a) present at least two shortcomings.

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52. *See infra* Part IV.B.1.

53. *See* 47 U.S.C.A. § 274(g) (West Supp. 1997).

54. *See* 47 U.S.C.A. § 271(e)(1) (West Supp. 1997). Additionally, § 272(f)(1) phases out the requirement that a BOC must offer certain services, including manufacturing and interLATA, through a separate affiliate. This section imposes a "default sunset" on this requirement of three years from the date that the FCC authorizes a BOC to provide interLATA services under § 271(d). However, the FCC can elect to extend this three-year period.

55. *See* 47 U.S.C.A. § 273(d)(6) (West Supp. 1997).

56. *See 1996 Telecommunications Act Hearings, supra* note 2.

57. If a BOC honors a request by a facilities-based competitor to interconnect in accordance with the checklist, it may provide in-region interLATA services. *See* 47 U.S.C.A. § 271(c)(1)(A).

Moreover, this section is flexible enough to account for the possibility that some markets will only support one facilities-based competitor. Thus, if a BOC does not receive an interconnection request from a facilities-based competitor within three months, it may satisfy this section by demonstrating to the FCC that it has taken the steps necessary to offer terms that comply with this checklist to any future competitor that requests interconnection. 47 U.S.C.A. § 271(c)(1)(B).

58. While applying regulatory incentives in the long-term may appear contradictory to the theme of this paper, incentives may be employed selectively to cure market imperfections. For example, free market theory is based on the assumption of the "rational actor." Even if an ILEC has more to gain from entering the interLATA market than it has to lose by cooperating with § 251, the monopolistic environment that

First, even if a carrier complies with the checklist, both sections leave the FCC with absolute discretion to accept or deny carrier petitions according to the ambiguous "public interest" standard in § 271(d)(3)(B).[59] Second, a pro-competitive incentive may not work with risk averse BOCs who spent twelve years isolated from competition — if a BOC does not want to compete in the interLATA services market, this provision alone will not force that BOC to open up its local exchange.

3. Will the FCC Voluntarily Relinquish Its Power Over Time?

Although §§ 10 and 11 provide tools for regulatory repeal, the issue remains whether Congress and the telecommunications industry can count on the FCC to use these provisions to voluntarily downsize its role. Since the Act's passage, the FCC has sent mixed signals about its intentions. The FCC's most significant activity to date has been its First Report and Order on Local Competition.[60] This report's length and minutely detailed regulations (for example, a specification on how BOCs must allocate square footage in a central office) indicate that the FCC plans to micro-manage the opening of the local exchange markets.[61] The Eighth Circuit recently struck down several of the FCC's Local Competition Rules pursuant to this report, concluding that the FCC had exceeded its jurisdiction under the Act.[62] Overall, this report creates serious doubts as to whether the FCC will adhere to Congress' intended deregulatory approach.

The recent appointment of four new FCC commissioners provides renewed hope that the FCC will shift gears and streamline its regulatory

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ILECs have enjoyed likely makes ILECs more *risk averse* than the rational actor.

59. A Texas District Court noted that "this last hoop ["public interest" determination] to jump through is met when the FCC says it is met." SBC Communications, Inc. v. FCC, 981 F. Supp. 996, 1002 (N.D. Tex. 1997).

60. *See supra* note 1.

61. *See* G.A. Keyworth, II & Jeffrey A. Eisenach, *The FCC and the Telecommunications Act of 1996: Putting Competition on Hold?*, at "Implementation: Undermining the Law" (Oct. 17, 1996) <http://www.pff.org/pff/21fcc1.html> (emphasizing that the FCC's First Report and Order on Local Competition is 1,400 single-spaced pages and 3,200 footnotes long).

62. *See* Iowa Utilities Board v. FCC, 120 F.3d 753, 792 (8th Cir. 1997). Specifically, the Eighth Circuit struck down FCC pricing and other rules, concluding that the FCC did not have general jurisdiction to implement regulations defining all provisions of § 251, but instead only limited jurisdiction covering §§ 251(b)(2) (number portability), 251(c)(4)(B) (prevention of discriminatory resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). *Id.* at 794.

involvement.[63] Under these new commissioners, the FCC recently took an aggressive deregulatory step by initiating its first mandatory § 11 biennial review of FCC regulations two months early.[64] However, since then the FCC's handling of this review has drawn critics even within the agency itself. Commissioner Harold Furchtgott-Roth and his staff have called the FCC's biennial review initiative, which after a "comprehensive internal review of all existing FCC regulations" singled out thirty-one regulations for possible modification or repeal, a "woefully inadequate effort."[65] In response, FCC Chairman William Kennard, who earlier promised a "top-to-bottom" reevaluation of all FCC regulations,[66] emphasized the benefits of the FCC's more focused approach.[67] Moreover, this debate over the biennial review does not even reach the larger issue of whether and when the FCC will exercise its § 10 discretion to forbear from applying both regulations and the Act's statutory provisions.

Additionally, FCC Commissioner Michael K. Powell recently criticized the FCC's approach in handling carrier petitions under § 271. Powell's concern that the commission is making it too difficult for BOCs to win approval to offer long-distance service indicates that the FCC is still operating under a regulatory mentality, rather than striving to help carriers move towards deregulation. Under his proposed "collaborative" approach, the FCC would work more closely with the BOCs as they

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63. The four new FCC commissioners, each appointed in the second half of 1997, are Chairman William E. Kennard, Harold W. Furchtgott-Roth (an economist), Michael K. Powell, and Gloria Tristani. In addition, statements by lone incumbent FCC Commissioner Susan Ness indicate that she embraces the Act's long-term goal of substantial deregulation. *See supra* note 4.

64. *See* Federal Communications Commission, *1998 Biennial Review of FCC Regulations Begun Early; to be Coordinated by David Solomon* (Nov. 18, 1997) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7094.html>. New Chairman William Kennard declared that "[t]he first biennial review is a key time for the Commission to take a serious top-to-bottom look at its rules. It gives us an opportunity to promote meaningful deregulation and streamlining where competition or other considerations warrant such action." *Id.*

65. *See FCC Staff Targets 31 Regulations for Possible Streamlining*, COMM. DAILY, Feb. 6, 1998, *available in* 1998 WL 10695812; *see also* Seth Schiesel, *F.C.C. Rule Review Assailed By a New Republican Member*, N.Y. TIMES, Feb. 6, 1998, at D3.

66. *See No Ad Hoc Rules Changes — Kennard*, TELEVISION DIGEST, Feb. 2, 1998, *available in* LEXIS, News Library, Curnws File.

67. *See FCC Staff Targets 31 Regulations for Possible Streamlining, supra* note 65. While this author agrees with Chairman Kennard that public notice and comment for every regulation would likely be unproductive, one must question whether this first biennial review has lived up to Sen. Pressler's expectations that "every two years after reviewing every regulation, we will do away with as many as we can." 141 CONG. REC. S8188 (daily ed. June 12, 1995).

draft their petitions to help them comply with the § 271 requirements.[68] Chairman Kennard has expressed agreement with at least part of Powell's deregulatory stance.[69]

Ultimately, even if this new team of FCC commissioners accurately interprets and embraces the Act's long-term goal of substantial deregulation, the Act offers no assurance that this will continue in the future. The recent changing of the guard in the FCC came during a period when the Telecom Act was fresh in the minds of Washington's leaders. However, in five years telecommunications may no longer be a top legislative priority and future appointment of FCC commissioners may not receive the same careful scrutiny. Moreover, the chance that future presidential administrations may hold very different agendas, as well as the political nature of this appointment process itself,[70] creates a realistic possibility that future commissioners will adopt a pro-regulatory approach towards telecommunications.

4. The Telecom Act Does Not Yet Guarantee Substantial Deregulation

While §§ 10–11 illustrate Congress' intent to phase out regulatory intervention over time, these sections fail to carry out this intent with the necessary clarity. Primarily, the Title I provisions leave too much discretion to the FCC, while the Title II provisions do not adequately utilize sunset provisions to guarantee that deregulation occurs.

First, §§ 10–11 impose no real limit on the FCC's power to *add* regulations. In theory, the language of the Act purports to grant the FCC limited jurisdiction.[71] However, the monumental length of the FCC's First Report and Order on Local Competition demonstrates the FCC's

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68. Powell declared that his proposal is a way to seek common ground with petitioning carriers in response to claims from carriers and regulators that the § 271 process is not working, and following the Texas District Court's ruling in SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997). *See* Federal Communications Commission, *Wake Up Call: FCC Commissioner Michael Powell Calls For New "Collaborative Approach" To Section 271 Applications* (Jan. 15, 1998) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1998/ nrmc8005.html>.

69. *See* Schiesel, *supra* note 65.

70. The recent appointment of the new FCC commissioners provides a perfect example of the pitfalls of this process. Majority Leader Trent Lott (Miss.) and Minority Leader Thomas Daschle (S.D.) held up the FCC nominations over a completely unrelated issue: campaign finance reform. *See FCC Nominees Caught Up in Senate's End-of-the-Session Political Wrangling*, TELECOMMUNICATIONS REP., Oct. 13, 1997, *available in* 1997 WL 7758849. The nominations were approved shortly thereafter.

71. *See supra* note 13.

intent to stretch the bounds of its authority. Thus far, the FCC's managed competition approach has added more regulation than it has eliminated.

Second, these sections exert no real pressure on the FCC to *reduce* its regulatory presence over time. Section 11 mandates the FCC to review all regulations, but § 10 allows the FCC to sit and wait for petitions from carriers.[72] Both §§ 10 and 11 are based on an ambiguous "public interest" standard which, despite the Act's redefinition of this standard a. an edict to "promote competitive market conditions,"[73] remains frighteningly similar to the old public interest standard under which the FCC operated freely for the last sixty-three years.[74] Moreover, as an independent regulatory agency, the FCC operates relatively unsupervised and receives strong deference from the courts in many cases.[75] Finally, § 11 does not define a remedy if the FCC fails to perform its mandatory two-year review,[76] a deficiency that has likely become apparent in the eyes of Commissioner Furchtgott-Roth in light of the FCC's first biennial review initiative.[77]

The path Congress has chosen to achieve substantial deregulation runs through the FCC. Congress recognized that it needed help in transitioning to a deregulatory environment; the FCC's experience provided the best (or perhaps only) resource available. However, asking the FCC to suddenly shift from a regulatory mindset built up over the

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72. *See infra* Part IV.A.

73. 47 U.S.C.A. § 10(b) (West Supp. 1997).

74. *See, e.g.*, William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289, 294 (1997), *available at* <www.law.indiana.edu/fclj/pubs/v49/no2/weiner.html> (arguing that "a review of FCC decisions leaves no doubt that the Commission has so tortured the public interest standard through its applications in both broadcast and common carrier regulation that the 'public interest' of the country in communications would be better served today by an amended standard"); Michael F. Finn, *The Public Interest and Bell Entry Into Long-Distance Under Section 271 of the Communications Act*, 5 COMMLAW CONSPECTUS 203, 217 (1997) (analyzing the FCC's "public interest" authority under the Act).

75. *See generally* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (introducing the era of strong deference to agencies — if Congress expressly or implicitly delegated law-interpreting power to an agency, the Court must follow any reasonable agency interpretation of an ambiguous statute); *but see* Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997); SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997). Even when the courts do serve as a check on the FCC, final court action can take years. Such delay of deregulation and competition is precisely what the Act attempts to prevent.

76. For example, Congress could cut the FCC's funding if it delays or forgoes this obligatory review. Additionally, Congress might create an incentive structure for the FCC to streamline regulation by tying funding to its performance in this area.

77. *See* Schiesel, *supra* note 65.

last fifty years to a deregulatory stance that requires it to downsize its own role presents obvious challenges that the Act leaves unanswered. The next section attempts to solve this concern with a proposal that combines the benefits of agency flexibility with a better guarantee of substantial deregulation.

IV. ENSURING SUBSTANTIAL DEREGULATION UNDER THE TELECOM ACT: PROACTIVE AND MANDATORY FORBEARANCE

This paper proposes that the FCC take two aggressive steps towards substantial deregulation: (1) proactively exercise its forbearance discretion under § 10 without waiting for carrier petitions; and (2) promulgate sunset regulations under § 10 to gradually phase out regulation. Similar to its current work with the biennial review process, the FCC should proactively forbear from applying lesser FCC regulations and statutory provisions that should be terminated immediately. For other Act provisions as well as any newly passed FCC regulation, the FCC should apply sunsets to phase out statutory or regulatory intervention as carriers and markets reach pre-defined levels of desired competition. What sunset regulations provide in addition to the Act's existing forbearance provisions is a shift of the status quo to a default condition of deregulation.

A. The Act Authorizes Proactive Forbearance

One unresolved issue with § 10 is when the FCC can or must begin an investigation of carriers and markets under the three-part "public interest" test. Section 10(c) obligates the FCC to undertake this determination when a carrier submits a petition for forbearance to the FCC. The seemingly popular interpretation is that Congress' inclusion of § 10(c) makes carrier filing a requirement before the FCC can begin a forbearance investigation under this section.[78]

However, multiple factors support the contrary interpretation that the FCC is free to initiate its own § 10(a) determinations. First, § 10(c) does not expressly make filing a petition a requirement, suggesting that the intent of § 10(c) was not to limit the FCC's ability to initiate forbearance determinations, but instead to give carriers assurance that their voices

78. The petition filed on behalf of the Independent Telephone & Telecommunications Alliance seems to operate on this assumption. *See* Zesiger, *supra* note 7, at 1 n.2.

will be heard by limiting the FCC's discretion to deny carrier petitions.[79] In contrast, the language of § 271(a) and (d) clearly requires a restricted BOC to file a petition with the FCC before it will consider allowing the BOC to provide interLATA services.[80] Second, as an independent government agency, the FCC retains broad discretion to forbear from applying statutory provisions and regulations in accordance with general principles of administrative law.[81]

Not only is the FCC authorized to act affirmatively under this section, but it *must* exercise this discretion proactively if it hopes to make real progress towards substantial deregulation. The FCC has apparently not looked to initiate § 10 forbearance on its own accord and few carriers to date have filed petitions requesting forbearance.[82] However, in many cases carriers have little incentive to request deregulation[83] since the benefit a carrier gleans in one market can hurt it in another — if an RBOC gains entry into a rival's local exchange market, its own home market will likely be opened up as well.

B. Issues in Promulgating Sunset Regulations

1. Prior Congressional Consideration of Sunset Provisions

Several statements made in the months preceding the Act's passage demonstrate Congress' desire to sunset the Act's provisions once markets become competitive. For example, Rep. Bill Paxon stated that "[i]n areas where regulations are necessary, such as the transition rules while opening the local phone loop, regulations must . . . sunset as

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79. Under this section, the FCC must at least consider carrier petitions. Without this statutory language, agency decisions on whether to enforce a statute are presumptively unreviewable. *See* Heckler v. Chaney, 470 U.S. 821 (1985). Additional language in §10(c) supports this interpretation by prohibiting the FCC from delaying consideration of carrier petitions indefinitely. *See* 47 U.S.C.A. § 10(c) (West Supp. 1997).

80. "Neither a Bell operating company . . . may provide interLATA services except as provided in this section." 47 U.S.C.A. § 271(a) (West Supp. 1997). "[A] Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services . . . ." 47 U.S.C.A. § 271(d).

81. *See generally* Heckler v. Chaney, 470 U.S. 821 (1985).

82. This author knows of only one, that filed by David Zesiger on behalf of the Independent Telephone & Telecommunications Alliance. *See generally* Zesiger, *supra* note 7.

83. Sen. Pressler testified that "[a] lot of companies use Government regulation to hold up competition and to hold up deregulation." 141 CONG. REC. S8188-04 (June 12, 1995).

quickly as possible."[84] Sen. Larry Pressler, discussing the inclusion of sunsets and the biennial review requirement in a 1995 version of the Act, declared Congress' intent to "do away with as many [regulations] as we can."[85] Moreover, earlier drafts of the Act contained explicit sunsets on major statutory provisions. For instance, a sunset on § 245 of the Communications Act of 1995 (the equivalent of § 271 of the current Act regarding BOC entry into interLATA services) was to trigger "in any local exchange market . . . that the Commission and the State determines has become subject to full and open competition."[86]

One might argue that Congress' failure to include sunsets in the final version of the Act demonstrates its intent that sunsets not be implemented. However, the sunset referred to in the 1995 Act was accompanied by a clause restricting the FCC from exercising its forbearance discretion to that section for five years.[87] When Congress dropped this sunset, it also dropped this forbearance restriction. Thus, the final version of the Act constituted a compromise which gave more discretion (and more power, since the role of the states was diminished) to the FCC.

This decision to empower the FCC makes good sense from Congress' perspective for at least two reasons: (1) Congress may not have been ready to define precise, binding sunsets without observing how competition would develop during the transitional period; (2) as an administrative body, the FCC has more information, experience and resources to determine when its own regulations should be phased out. The substance of the sunset in the 1995 bill is essentially covered by the more general § 10 of the current Act. Any action by the FCC to phase out regulation in accordance with § 10 is surely consistent with Congress' deregulatory intent.

2. Statutory Implementation

This section builds on the preceding discussion by examining in further detail how the FCC might promulgate sunset regulations under the Act. Clearly, the FCC can place sunsets on its own regulations. More importantly, the FCC can phase out the Act's statutory obligations under the auspices of § 10. Although the FCC cannot technically place sunsets on the Act itself, the FCC can effectively achieve the same result by adopting regulations which define "public interest" under § 10 and

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84. 141 CONG. REC. H8269 (Aug. 2, 1995).
85. 141 CONG. REC. S8188 (June 12, 1995).
86. 141 CONG. REC. H9954 (Oct. 12, 1995) (text of S. 652).
87. *Id.*

notify carriers in advance when the FCC will forbear from *applying* the Act's provisions to carriers or markets.[88]

At first glance, sunset regulations might appear to undermine the flexibility that § 10 intends to create. However, a close reading of § 10 suggests that its purpose is to avoid forcing the FCC to apply a provision that has outlived its usefulness and to give carriers a stronger voice in deregulation. Viewed in this light, the adoption of forbearance regulations signifies an aggressive and responsible use of this flexibility. Finally, the FCC can retain some flexibility for itself as well through the use of certain types of sunsets.[89]

This paper urges the FCC to embrace the analysis in Part IV.B.1 and to act affirmatively by adopting sunsets. Should the FCC conclude that it is not statutorily authorized to do this under § 10, it would likely also conclude that promulgating sunsets could not be justified as an extension of its general administrative discretion whether or not to enforce a statute.[90] In this case, Congress should add sunset provisions to the Act directly by amending it. Besides the political challenges that a legislative amendment would face, another issue is that "conditional sunsets" require periodic oversight to determine whether pre-defined conditions have occurred. This task is clearly inconsistent with Congress' traditional role. Because Congress would likely delegate oversight back to the FCC, any amendments to the Act must place sufficient limits on FCC discretion.

3. Substantive Issues

The primary issue in phasing out Title II statutory obligations is to define when and how each sunset should be triggered. The simplest and most common approach is a "date sunset" that specifies a set date on which the provision ceases to apply. A few of the Act's sections include this type of sunset.[91] Date sunsets have limited application for at least two reasons: (1) they require the FCC to make an arbitrary prediction as to exactly when markets will reach the desired level of competition; and (2) setting rigid dates encourages manipulative delay by the ILECs.

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88. However, § 10(d) limits the ability of the FCC to place sunsets on certain provisions. *See infra* Parts V.A, V.B.2 for consideration of this obstacle.

89. For example, the FCC may use "conditional default sunsets." *See infra* Part IV.B.3.

90. Agency decisions whether to enforce a statute are presumptively unreviewable. *See* Heckler v. Chaney, 470 U.S. 821 (1985).

91. *See supra* Part III.B.2.

A variation on this is a "conditional sunset" that is triggered once the FCC determines that certain criteria are met.[92] Conditional sunsets improve upon the existing Title I phase-out provisions by defining "public interest" with greater clarity in terms of market competitiveness criteria that will satisfy this standard. Moreover, conditional sunsets can serve as incentives when they are applied to provisions that forbid the BOCs from entering new lines of business.[93] The amount of discretion retained by the FCC with conditional sunsets is inversely proportional to how clearly the FCC defines the criteria on which the conditional sunset is based.

Another way to reduce the FCC's discretion is to shift the status quo (i.e. "default sunset"). Under this approach, a sunset is triggered on a set date or when certain criteria are met unless the FCC can affirmatively demonstrate that phasing out the provision is *not* in the "public interest" or that the criteria have *not* yet been satisfied. The FCC could prove its case by issuing a report. Any carriers or state regulators who oppose this report would have recourse in the courts, where the FCC would bear the burden of proof.

Clearly, provisions may be phased out differently depending on the market or the size of carrier. The benefits from market-tailored sunsets and additional permutations must be weighed against the disadvantages of added complexity. The challenge is to draft sunsets that are detailed enough to limit FCC discretion and add predictability, yet not so complex that they undermine the ultimate goal of streamlining regulation.

This paper does not suggest that sunsets should be instantly applied to all of the Act's provisions. Where possible, the FCC should immediately apply date sunsets on provisions that have a quantifiable utility and apply conditional sunsets where conditions can be easily defined. As competition increases, the FCC can pass additional date and conditional sunsets where necessary. However, this paper's "substantial deregulation" standard also suggests that some regulation should be

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92. The Act makes use of a conditional sunset in § 273(d)(6), stating that manufacturing safeguards and restrictions on standard-setting entities will terminate for a particular activity once the FCC determines that alternative sources of industry-wide standards are available. Additionally, as mentioned previously, the 1995 versions of the Act included conditional sunsets which terminated the restriction on BOCs from providing in-region interLATA services once the FCC determines that a particular local exchange market "has become subject to full and open competition." 141 CONG. REC. H9954 (Oct. 12, 1995) (text of S. 652). Although this sunset improves upon the "public interest" standard, this paper suggests that the FCC should further quantify "competition" into clear marketshare or number of competitor goals.

93. *See, e.g.*, 47 U.S.C.A. § 271(c) (West Supp. 1997).

preserved. Moreover, this standard simultaneously encourages a limited use of incentive-based regulation with cooperation from the FCC[94] in the near term to promote increased competition.[95]

4. The Danger of Collateral Legal Attack in Light of Recent Court Rulings

The largest legal obstacle to this paper's proposal may be the Supreme Court's 1994 ruling in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*[96] Section 203(a) of the Communications Act of 1934 ("1934 Act") required every common carrier to file tariffs with the FCC; section 203(b)(2) allowed the FCC to "modify" this requirement "by general order applicable to special circumstances." The Court concluded that the onset of competition in telecommunications did not constitute "special circumstances" warranting the FCC's elimination of the tariffing requirement for every non-dominant carrier (i.e. every carrier except AT&T).[97]

The *MCI* ruling might be read expansively to preclude the FCC from promulgating "forbearance sunsets" on the major provisions of the Telecom Act in light of Congress' explicit exclusion of statutory sunsets. However, the key difference between this proposal and *MCI* is that the Telecom Act has replaced the 1934 Act. The *MCI* ruling was dictated by a statute that had established telecommunications as a regulated industry; allowing the FCC to eliminate the tariff requirements would directly contradict this framework. The broad reading of the 1934 Act that the FCC called for in *MCI* may even have violated the delegation doctrine.[98]

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94. *See supra* Part III.B.3 (discussing FCC Commissioner Powell's proposition that the FCC change its stance from a regulatory approval panel that strikes down petitions to compete to a collaborative panel that helps carriers comply and move towards increased competition).

95. *See supra* note 58 and accompanying text.

96. *See* 512 U.S. 218 (1994).

97. *See id.* at 229–34.

98. The FCC also defended its 1992 rulemaking in MCI on the basis of the 1934 Act's "broad purpose of promoting efficient telephone service." This argument essentially implies that, through the 1934 Act, Congress delegated to the FCC not just the narrow power to implement the tariff system, but the broader power to regulate telecommunications any way necessary in accordance with this broad purpose. Delegation this broad could be deemed to be devoid of the "intelligible principle" to guide the agency that is mandated by the delegation doctrine. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (arguing that the first sentence of OSHA § 6(b)(5) was an unconstitutional delegation because Congress itself, not an administrative agency, must make the difficult

By contrast, the new Telecom Act was a response to calls for increased competition and reduced regulation; the Telecom Act's primary provisions are meant to provide transitory regulatory assistance to CLECs to offset ILEC's competitive advantages until CLECs can compete effectively on their own. Sunset regulations are consistent with this purpose. Moreover, instead of relying on an expansive interpretation of "modify" and "special circumstances," the FCC could act in accordance with the Telecom Act's explicit statutory provisions which authorize forbearance.[99]

Additionally, the recent Eighth Circuit ruling in *Iowa Utilities Board v. FCC*[100] does not dampen the FCC's authority to deregulate affirmatively. Although this ruling placed a check on the FCC's ability to promulgate new rules under the Act, the court's goals were to halt FCC efforts to usurp more power from the states and to impose additional obligations on ILECs.[101] The court's reasoning surely would not extend to prohibit FCC efforts to deregulate in accordance with § 10.

Finally, adopting sunsets as a means to phase out carriers and markets selectively from the reach of the Telecom Act's provisions does not conflict with a Texas federal district court's recent ruling in *SBC Communications, Inc. v. FCC*,[102] since these sunsets would not single out specific carriers, but instead would be generally applicable to all carriers and markets. Sunsets are more in accord with this court's stance than in conflict with it.[103] Although this court did not entertain the equal

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choice whether to balance cost versus lives saved).

99. In fact, one string of cases stands for the general proposition that government agencies with discretionary power *must* confine their discretion through a legal framework of standards, principles and rules. *See, e.g.*, Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) (agency awards of state-funded housing not made according to "ascertainable standards" violated due process); Morton v. Ruiz, 415 U.S. 199 (1974) (an agency has power to allocate federal funds in a way which excludes intended beneficiaries of those funds but cannot make allocations on an "ad hoc" basis). These cases, while primarily cited in other housing decisions, acknowledge the intersection of the delegation doctrine and procedural due process by arguing that due process requires agency decision-making to be performed according to established criteria.

100. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

101. *See id.* at 794, 815–16. Besides the FCC's pricing rules, this ruling also reaffirmed the line between state and federal jurisdiction under § 251 and upheld the FCC's unbundling rules under § 251(c)(3).

102. 981 F. Supp. 996 (N.D. Tex. 1997) (striking down §§ 271–275 as an unconstitutional bill of attainder which singles out and punishes ILECs).

103. *See id.* at 1002 (criticizing the discretion that the "public interest" standard grants to the FCC); Gary McWilliams, *Yes, Sir, That's No Baby*, NEWSWEEK, Jan. 19, 1998, at 35.

protection claim raised by SBC, sunsets imposing different requirements upon different size markets or carriers should be safe from any equal protection challenge.[104]

Any challenge to sunsets promulgated by the FCC would likely be made on grounds that the sunsets are "arbitrary and capricious."[105] However, generally applicable rules that the FCC promulgates under § 10 of the Act based on its own independent analysis should be free from collateral attack.[106]

5. Administrative and Procedural Issues

In addition to overcoming its own inertia, promulgating sunset regulations presents at least two major obstacles for the FCC: (1) defining accurate time periods and market competitiveness criteria; and (2) the administrative burden of reviewing carriers and markets periodically to see if these criteria have been met. As to the first obstacle, while the FCC should not wait for input from carriers before acting,[107] it should use the notice and comment process to seek out carrier and public input on how to define "competition." Also, the recent competitive growth in the cellular industry should provide a model for what constitutes a desirable level of competition in wireline local exchange markets. Second, this proposal concededly creates extra work for the FCC no matter how it is implemented. However, this work can be minimized by integrating this process into the § 11 biennial review process, which involves many of the same tasks that a § 10 sunset review would require. The FCC should draft sunset regulations to facilitate this integration by choosing sunset dates which correspond with the biennial review process.

V. Implementation — A Proposed Sunset Regulation

Part IV.B.2 of this paper demonstrated that § 10 authorizes the FCC to add sunset regulations. This paper first urges the FCC to either adopt date sunsets or immediately exercise its forbearance discretion to

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104. Most notably, the Fourteenth Amendment protects people, not groups. *See* McCulloch v. Maryland, 17 U.S. 316 (1819). Moreover, carriers could hardly be considered a suspect class, nor are fundamental rights at stake.

105. *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (laying out a test for "arbitrary and capricious" under § 706 of the Administrative Procedure Act).

106. *See id.* at 408–09.

107. *See supra* Part III.B.3.

terminate lesser regulations such as burdensome reporting requirements or procedural rules. As a second step in this proposal, this part explores the limits to which adopting sunset regulations can help achieve substantial deregulation by applying a sunset to a major statutory provision: the § 251(c) unbundling and resale rules. This part examines two types of sunsets: (1) "blanket" sunsets that apply generally; and (2) "Title II"-type sunsets that apply to specific sections of the Act.

A. Should a "Blanket" Sunset Be Adopted?

A blanket sunset would consist of a general sunset provision that terminates: (a) the entire Act; (b) all of Title II; or (c) the FCC itself. A think tank named The Progress & Freedom Foundation ("PFF") endorsed this approach in a report urging Congress to abolish the FCC in three years.[108]

Another approach is to place a four year default sunset on Titles I and II with four year renewals, either by FCC regulation under § 10 or by amending the Act to add a new § 12. Obviously, the thrust of this approach is to make deregulation the status quo — either the FCC or Congress must affirmatively justify continued regulation. In reality, this sunset would not affect the individual provisions of Title II as long as Congress or the FCC revisited the matter; the main purpose of this provision would be to provide built-in protection against government inaction.

The Act presents a major statutory obstacle to adopting a blanket sunset. Under § 10(d), the FCC cannot forbear from applying §§ 251(c) or 271 to a carrier, service or market until that carrier has fully complied with the requirements in those sections. This essentially requires a carrier to demonstrate that it has taken the appropriate steps to foster competition against it: compliance with the competitive checklist, access to unbundled elements and an offer to allow resale. Thus, any form of blanket sunset would be subject to exceptions for any carrier that has not yet satisfied these requirements.

Ultimately, a blanket sunset is neither a sensible nor politically feasible approach. Because of the restrictions of § 10(d), a blanket sunset provides no deregulatory advantage over a section-by-section approach. Moreover, a blanket sunset would overstep Congress' intent of *substantial* deregulation in the long-term.

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108. *See* The Progress and Freedom Foundation, *supra* note 6. While revamping the FCC into a vastly smaller agency might be a desirable approach, this action is a secondary consequence of this paper's proposal and is therefore beyond this paper's scope — the FCC performs many other tasks which will not be examined.

B. Proposed "Title II"-Type Sunset: § 251(c)

1. Substantive Analysis of the Need to Sunset the Unbundling and Resale Rules

The most significant set of obligations that the Act imposes upon the ILECs is the § 251 local competition provisions.[109] As noted earlier, § 251(c) creates three paths of entry into local exchange markets: (1) facilities-based entry with interconnection; (2) access to unbundled network elements; and (3) resale. In progressive order, these options provide a trade-off between a quicker path to entry with less risk but lower profit margin versus greater dependency on the ILEC.

Considerable debate exists over whether these § 251(c) obligations should be phased out over time. The FCC, in its First Report and Order on Local Competition, concluded that § 251(c) does not express a preference for any of these three entry strategies and that, by leaving these options in place, the FCC can "look to the market, not to regulation, for the answer" as to which market entry strategy will prevail.[110]

However, while the unbundling and resale obligations will kick-start competition and serve to offset the superior bargaining power, competitive advantages and risk averse nature of ILECs in the near term, the long-term harms of these rules outweigh their benefits. First, because government-mandated prices for unbundling and resale cannot accurately reflect the true costs of the risks undertaken by the ILECs,[111]

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109. This analysis will concentrate on the § 251(c) provisions, although a similar (but more expansive) analysis could also apply to most of the § 251(b) obligations. Moreover, at least one of the § 251(b) duties, dialing parity, might be beneficial in the long run. Dialing parity, like mandatory interconnection, does not entail the same *free rider* problem as the other § 251(b) provisions. With access to unbundled network elements or resale, a CLEC can wait for an ILEC to build out a network service, then physically benefit from the ILEC's efforts. By contrast, dialing parity and interconnection are more about equal access to customers — the CLEC still has to build out its own network.

110. *See* First Report and Order, *supra* note 1, at 12.

111. The FCC's First Report and Order mandated that unbundling prices be specified according to Total Element Long-Run Incremental Costs ("TELRIC"), a methodology that measures the forward-looking costs of producing the entire quantity of each type of unbundled network element. *See* First Report and Order, *supra* note 1, at 29. The ILECs argued that this model does not account for their "historic" or "imbedded" costs. *See* Iowa Utilities Board v. FCC, 120 F.3d 753, 793 n.8 (8th Cir. 1997) (striking down this pricing rule because the FCC exceeded its jurisdiction under the Act). By comparison, this is a much simpler argument — regulated pricing cannot properly account for risk.

the unbundling rule will chill investment by ILECs in new products and services.[112] Also, the resale rule only creates competition for the marketing slice of the overall service cost, approximately 20% of the total cost.[113] Most importantly, as long as the resale option is available new market entrants have less incentive to invest in new facilities and develop new services.[114] To summarize, placing sunsets on these obligations does not create a preference for facilities-based competition, but merely removes the artificial regulatory preference for unbundling and resale that allows CLECs to free ride off the risks taken by ILECs.

An even more aggressive deregulatory argument exists for terminating the third major obligation under § 251(c), the mandatory interconnection requirement. However, this paper concludes that mandatory interconnection *should not* be phased out in the long-term for at least two reasons. First, interconnection does not create the same free rider problem that the unbundling and resale provisions create — unlike unbundling and resale, carriers do not stand to make instant profit off risks taken by ILECs under the mandatory interconnection requirement. Second, mandatory interconnection is beneficial as a stabilizing device in the long run to prevent one carrier who gains a temporary advantage in marketshare from shutting out all other carriers.

2. This Proposed Sunset Is Consistent with § 10(d) and with Court Precedent

As discussed in Part V.A, a sunset on the §251(c) provisions comes into direct conflict with the limitation in § 10(d). However, unlike a blanket sunset, § 10(d) does not severely limit the application of Title II-type sunsets because this paper generally contemplates that a carrier in a specific market must be subject to competition before a conditional, section-specific sunset is triggered. Thus, a Title II-type sunset would merely guarantee that the FCC would forbear from applying a provision once each carrier *initially* complies with its requirements (i.e. subjects itself to competition).

Additionally, applying sunsets to § 251(c) does not contradict the Eighth Circuit's recent ruling in *Iowa Utilities Board v. FCC*[115] This

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112. *See* Huber, *supra* note 33, at vii. Huber notes that the unbundling rule may already be slowing the development of the Internet. This rule creates disincentives for RBOCs, who otherwise have the strongest incentive to invest in local Internet access facilities. *See id.*; *see also* Lawyer, *supra* note 28.

113. *See* Huber, *supra* note 33, at 54.

114. *See id.* at 66.

115. 120 F.3d at 815–16 (8th Cir. 1997) (upholding the FCC's unbundling rules

court focused on the immediate applicability of the unbundling rules, not their long-term utility.[116] Moreover, as noted previously, imposing sunsets on § 251 does not favor facilities-based competition, but merely removes the regulatory preference for unbundling and resale.

3. Implementation

The thrust of this proposal is to phase out the statutory entitlements of a CLEC to obtain resale rights and unbundled elements from an ILEC once the CLEC has competed effectively for a certain amount of time. Once a market initially becomes "competitive," only subsequent new market entrants should be able to assert statutory resale and unbundled element entitlements.

This paper recommends that default sunsets be imposed on § 251(c)(3)–(4). FCC application of these provisions to carriers and services would be subject to a date sunset of four years,[117] but the FCC could renew these provisions on a market-by-market basis for an additional four years by demonstrating that a market has not yet become "competitive" according to pre-defined criteria (or that a carrier has not initially complied with these provisions, as required by § 10(d)).

These "competitive" criteria must be kept relatively simple. For instance, the FCC should deem a market to be competitive if one of two criteria are satisfied: (1) a baseline number of "competitors" has entered a given market; or (2) if a number of "competitors" less than the baseline exists in that market, these "competitors" cumulatively must have captured a "substantial" component of the regional ILEC's customer base.[118] A "competitor" would be defined as any competitive local

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under the Act).

116. *See id.* Although the court declared that "we do not believe the Act's exclusive goal is facilities-based competition," it then conceded that "Congress may have envisioned facilities-based competition in local telephone markets to occur down the road" and noted that the role of the unbundling rules was "to expedite the introduction of pervasive competition into the local telecommunications industry." *Id.* at 816.

117. Of course, as discussed in Part V.B.2, this sunset will not begin "ticking" for a particular ILEC until the FCC determines that the ILEC has made resale and unbundled elements available, as required by § 10(d).

118. While one article has argued that analyzing market share is the most fundamental way to ensure competition, another article went further, stating that "economists, antitrust scholars, and the courts well know that market share data are generally unreliable as a means of assessing market power within a properly defined market, especially a market that is or was regulated" and concluding that a market may be competitive despite unfavorable market share results. *Compare* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 43 (Nov.

exchange carrier possessing at least five percent marketshare. For example, the FCC would cease to apply the resale and unbundling provisions to an ILEC in any market with at least three "competitors" or if fewer carriers possess at least twenty percent cumulative marketshare.[119]

As alluded to in Part IV.B.5, one downfall to this proposal is the additional administrative burden that these market determinations would impose on the FCC. To minimize this burden, this sunset might be limited to the top fifty metropolitan markets. Regardless, the important issue is that while the FCC would assume an increased workload until sunsets are triggered, this proposal doesn't impose any additional burden or complexity on the carriers themselves. Instead, this sunset combines administrative ease with predictability since each carrier should have a reasonably accurate estimate of its competitors' marketshares.

Finally, once a market becomes competitive and sunsets are triggered, one possible approach is to continue to make unbundling and resale rights available only to subsequent new market entrants. By this time, additional new market entrants would provide gradually smaller benefits to competition; therefore, these market entrants should be allowed to assert unbundling and resale rights for a shorter period of time. For instance, once the baseline of three "competitors" exists in a given market, a subsequent new market entrant might only be able to assert resale rights until it acquires a one-percent marketshare and assert unbundling rights until it acquires two-percent marketshare.

1996) *with* Larson, *supra* note 33, at 48 (citing William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981)).

119. The "competitor" and market share figures suggested are concededly arbitrary. To determine exact numbers, the FCC should look at the cellular industry. The four year initial sunset period would give the FCC time to observe the emergence of personal communications services ("PCS") providers and their effect on the competitiveness of the cellular industry before determining how many competitors and what level of marketshare is required before a market displays indicia of competitiveness.

Also, this four-year period would allow the FCC to learn whether cellular or cable providers who have not necessarily displaced ILEC market share might be considered "competitors" (i.e., perfectly substitutable goods) for purposes of determining whether each market is competitive. *See* Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957) (antitrust case discussing the impact of "substitutable goods" in determining whether a party has monopoly power). Calculating market share is difficult with cellular carriers, since much of a cellular carrier's customer based subscribes simultaneously to wireline services. However, the FCC might determine a way to count only those subscribers that use cellular services as a product substitute for wireline services towards the cumulative "marketshare" requirement.

VI. CONCLUSION

While the Telecom Act signifies a big step in the right direction, even further growth in the telecommunications industry will be lost without the necessary next step towards substantial deregulation.[120] The Act authorized the FCC's managed competition approach as a transitional path; the issue is whether the FCC will take the next step despite inertia and incentives that point in the opposite direction.

This paper urges the FCC to affirmatively exercise its forbearance discretion under § 10 and implement sunset regulations to shift the status quo and the FCC's mindset into a deregulatory mode. The FCC has the power to accomplish this under the current framework of the Act, by adopting sunsets under § 10 that phase out its own regulations and clarifying when the FCC will forbear from applying the Act's statutory obligations. Ultimately, however, it is up to the new FCC Commissioners to embrace this or a similar proposal and make change happen.

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120. One study claims that with complete deregulation, the U.S. economy would grow by 3.3% per year, instead of the 2.9% annual growth rate. MORTON I. HAMBURG & STUART N. BROTMAN, COMMUNICATIONS LAW AND PRACTICE § 8.03[2][b] (3d rel. 1997) (citing *Heritage Briefs Incoming GOP Lawmakers on Telecom Reform*, WASH. TELECOM NEWS, Jan. 9, 1995, *available in* 1995 WL 6613808).

APPENDIX A: MODEL SUNSET ON THE RESALE AND UNBUNDLING PROVISIONS

47 C.F.R. § 10.251c — Sunset on Unbundling and Resale Provisions

(a) Sunset
The Commission will forbear from applying the requirements of section 251, subsections (c)(1), (3) and (4) of this Act in accordance with section 10(a) of this Act on February 1, 2002, except as per subsections (b) and (e) of this regulation. This subsection only applies to incumbent local exchange carriers servicing the list of metropolitan markets in subsection (g) of this regulation.

(b) Renewal
(1) Business Customer Markets
The Commission may choose to continue to apply the requirements of section 251(c)(1), (3) and (4) of this Act for four more years to any incumbent local exchange carrier, or any of its services in any of its geographic business customer markets, that the Commission determines is not subject to "substantial competition" according to subsection (c) of this regulation.

(2) Residential Customer Markets
Section 251(c)(1), (3) and (4) will renew automatically to each incumbent local exchange carrier in the residential customer segment of each of its geographic markets. The Commission may forbear from applying section 251(c)(1), (3) and (4) to an incumbent local exchange carrier's residential service or residential geographic market at its discretion, but the Commission shall give substantial weight to whether "substantial competition" exists for each service or market in accordance with subsection (c) of this regulation.

(c) Definition of "Substantial Competition"
An incumbent local exchange carrier, or any of its services in any of its geographic markets, is subject to substantial competition if:

(1) one competitive local exchange carrier competes directly with the incumbent local exchange carrier and possesses at least 15% marketshare; or

(2) two competitive local exchange carriers compete directly with the incumbent local exchange carrier and cumulatively possess at least 17.5% marketshare; or

(3) three or more competitive local exchange carriers compete directly with the incumbent local exchange carrier and cumulatively possess at least 20% marketshare; or

(4) the Commission otherwise deems that substantial competition exists.

(d) Conflict With Other Sections of the Act

(1) Section 10(d)
Regardless of subsection (c) of this regulation and as required by section 10(d) of this Act, the Commission will not forbear from applying the requirements of section 251(c)(1), (3) and (4) of this Act to any of an incumbent local exchange carrier's services in any of its geographic markets, until:

(A) the incumbent local exchange carrier has provided access to unbundled network elements or resale to at least one competitive local exchange carrier in the market under consideration for forbearance; and

(B) the competitive local exchange carrier has sold "primary voice or data services" in that geographic market by means of such access.

(2) Petitions for Forbearance
Nothing in this section affects the obligation of the Commission to consider a petition for forbearance filed by carrier under section 10(c) of this Act. In considering petitions filed under section 10(c), the Commission shall give substantial weight to whether the petitioning carrier has demonstrated that a particular service or market is subject to "substantial competition" according to subsection (c) of this regulation.

(e) Application to Future Competitive Local Exchange Carriers
Any competitive local exchange carrier which enters and begins to directly compete with an incumbent local exchange carrier in a particular geographic market after the Commission has stopped applying the requirements of section 251(c) to that incumbent local exchange carrier may file with the Commission to receive the rights

of section 251(c)(1), (3) and (4) against that incumbent local exchange carrier in that particular geographic market. The Commission retains discretion whether to grant or deny this request. If the Commission grants this request, the rights automatically expire four years later, and the new competitive local exchange carrier may not file to renew these rights if it has obtained more than 2% marketshare.

(f) Permanence and Renewal
The Commission may not repeal this sunset, except to modify subsection (b)(2) to eliminate automatic renewal. The Commission may, however, appeal to the D.C. Court of Appeals to show very strong cause for four-year renewal of applicability of a sunsetted provision to an incumbent local exchange carrier, or any of its services in any of its geographic markets, despite the existence of "substantial competition" with that carrier, service or market.

(g) List of Metropolitan Markets Covered
This section only applies to carriers in the following geographic markets: [list of top fifty metropolitan markets]

Comments to 47 C.F.R. § 10.251c

1. The purpose of this sunset is to facilitate deregulation. Accordingly, any ambiguity in any of the above terms should be resolved in such a way as to favor deregulation.

2. The language of subsection (b) is crafted to grant the FCC discretion to reapply the requirements of section 251(c) to an incumbent local exchange carrier in the future if substantial competition develops but later terminates.

3. To renew section 251(c) under subsection (b)(1) of this regulation, the Commission must issue a separate report for each incumbent local exchange carrier. Each individual report may address multiple markets and services, but must analyze each market or service individually.

4. The purpose of distinguishing between business and residential customer markets in subsection (b) is to reduce the administrative

burden on the Commission of demonstrating "substantial competition" in every residential market every four years.

5. To qualify as a competitive local exchange carrier under subsections (c) and (f) of this regulation, the carrier must be completely independent of and not derived from the incumbent local exchange carrier in a given geographic market.

6. Marketshare is to be determined by percent of access lines in a relevant market unless a more accurate measure becomes available. The Commission, at its discretion, may deem a cellular or other alternative-mode carrier to be a competitive local exchange carrier in direct competition with the incumbent local exchange carrier.

7. Subsection (f) is meant to limit the Commission's ability to "forum shop" for other courts of appeals.