
THE FIRST GREAT TELECOM DEBATE OF THE 21ST CENTURY

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*“The times they are a-changin’.”*¹ And, as we now know in telecommunications, there is no way back.

I. INTRODUCTION

During the ten years since passage of the Telecommunications Act of 1996 (“1996 Act” or the “Act”),² the telecommunications industry has un-

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¹ BOB DYLAN, *The Times They Are A-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Sony 1990) (1964).

dergone changes of epic proportions. Upon its passage, the 1996 Act unleashed an unbridled wave of exuberance, foretelling industry-wide changes for the better. But other factors, more so than the Act, have brought us to a historic inflection point. Technologies, services, content, and conduits are converging, bringing the public unparalleled choices, but also raising questions as to the effectiveness of and need for regulation. The result has framed the issues for the first great telecommunications debate of the Twenty-First Century.

Upon passage of the 1996 Act, Wall Street, the newly competitive telecommunications industry, and many others widely believed that telecommunications would enter an era of expansion and prosperity.³ After the initial euphoria, the mood quickly changed as the nation's telecommunications industry went through market turmoil and economic disruption. Start-up companies failed, consolidated, or were acquired at bargain prices. Due in small part to competition and in large part to technological advances, the legacy companies saw large volumes of traffic shift to new services or simply disappear; revenues and profits shifted like desert sand in a wind-storm.⁴

Most prominent was the spectacle of AT&T, along with MCI and hundreds of other "new" competitive local exchange carriers ("CLECs"), naively waging life and death struggles against the incumbent Regional Bell Operating Companies ("ILECs," "RBOCs," or "Bells").⁵ It did not take long—perhaps it can be measured in heartbeats—until millions of dollars and other valued resources were gone or otherwise spent in a multitude of federal and state regulatory, legislative, and legal battles. Some of these battles were important; others just the ritual "bleeding" of competitors' financial coffers—an old industry practice.⁶

On the business side, hundreds of CLECs, along with the jobs necessary to run them, were created. Over a short time, however, business models

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. This Act was the most comprehensive of many amendments to the body of federal communications law known collectively as the Communications Act of 1934, as amended. *See* 47 U.S.C. §§ 151–179 (2000).

³ "There was enormous excitement among everyone, everywhere, in government, in finance, in technology in telecommunications." JOSEPH E. STIGLITZ, *THE ROARING NINETIES: A NEW HISTORY OF THE WORLD'S MOST PROSPEROUS DECADE* 93 (2003).

⁴ *See* Paul Starr, *The Great Telecom Implosion*, *THE AMER. PROSPECT*, Sept. 8, 2002, available at <http://www.princeton.edu/~starr/articles/articles02/Starr-TelecomImplosion-9-02.htm>.

⁵ The Bell Operating Companies are listed in § 153 of the Communications Act of 1934, as amended, and include those companies listed therein, their successors, and assigns that provide wireline telephone exchange service, but not their affiliates unless otherwise described in that section. 47 U.S.C. § 153(4)(A)–(C).

⁶ *See infra* Part II.B., "Bleeding" can best be described as the practice of large, well-financed companies tying their less well-off competitors up in regulatory and legal battles that will drain them of their resources and leave them unable to finance their businesses.

evolved to meet competitive challenges, and only the strong survived. The industry introduced bundled services, morphing previously discrete local and long distance telephone services into “all-distance,” flat-rate services following the rate-structure model of cellular carriers.⁷ Many of the newly created CLECs could not keep up with the fast-paced change, and quickly went out of business—some never even having raised money. Other CLECs raised billions of dollars from investors, a good portion of which was lost in these failing ventures; thousands of jobs went by the wayside as well.⁸

Survivors of the competitive industry are currently facing more daunting challenges. Regulatory sea-changes have put into place a “new wire” and “old wire” world dichotomy:⁹ “old” copper wires are regulated while “new” fiber-optic, high speed lines are deemed competitive.¹⁰ Judicial decisions have followed suit, ruling that certain service providers are providing unregulated “information services,” notwithstanding the fact that, from the consumer’s point of view, the legacy and new services are functionally

⁷ “All-distance” flat-rate service providers are telephone companies that offer unlimited local and long distance telephone service for a single monthly rate. Verizon, for example, offers the “Verizon Freedom Essentials,” “Freedom,” “Freedom Value,” and “Freedom Extra” plans that include unlimited local and long distance service for a flat monthly rate. See, e.g., Verizon, https://www22.verizon.com/ForYourHome/sas/sas_FreedomGrid.aspx?FlowID=FreedomGrid (select “District of Columbia” in the drop-down menu) (last visited Apr. 15, 2007) (depicting the flat-rate all-distance plans available to residences in the District of Columbia).

⁸ Steven Rosenbush et al., *Inside the Telecom Game*, BUS. WEEK, Aug. 5, 2002, available at http://www.businessweek.com/magazine/content/02_31/b3794001.htm.

⁹ See *In re* Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 20 F.C.C.R. 2533 (Dec. 15, 2004) [hereinafter *TRO Remand Order*]; *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,853 (Aug. 5, 2005) [hereinafter *Wireline Broadband Order*]; *In re* United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, 20 F.C.C.R. 13,281 (Nov. 3, 2006); *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, FCC 07-30, WT Docket No. 07-53 (Mar. 22, 2007).

¹⁰ See *Wireline Broadband Order*, *supra* note 9, ¶¶ 1–7. See also *infra* Part II.B.

equivalent.¹¹ In *NCTA v. Brand X*, the Supreme Court affirmed the Federal Communications Commission's ("FCC" or "Commission") decision that the provision of broadband Internet access, or at least Internet access at speeds faster than dial-up, by cable providers is an unregulated information service, implying in dictum the same for high-speed access offered by telecommunications providers.¹² A series of industry-shaking mega-mergers and acquisitions followed on the heels of these decisions.¹³ The result is a Twenty-First Century national debate over the related issues and questions regarding the ultimate effect of the tremendous regulatory, technical, and structural changes rocking the nation's telecommunications industry, as well as the consequent issues that remain to be resolved by regulators and policymakers.

The Twenty-First Century debate is an outgrowth of the original "Great Telecom Debate," which lasted from the passage of the 1996 Telecommunications Act through the Supreme Court's refusal to consider the appeal of the D.C. Circuit's *USTA II* decision.¹⁴ In the original Great Debate, legacy carriers and newcomers battled over vague provisions of the 1996 Act pertaining to the terms of entry into local and long distance markets by CLECs and RBOCs,¹⁵ as well as the question of how to spur the introduc-

¹¹ See *U.S. Telecom Ass'n v. FCC (USTA II)*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 U.S. 313 (2004); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967 (2005).

¹² *Brand X*, 545 U.S. at 1002.

¹³ The merger of Sprint and Nextel was approved by the FCC on August 3, 2005. *In re Applications of Nextel Commc'ns, Inc. and Sprint Corp.; For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 20 F.C.C.R. 13,967 (Aug. 3, 2005) [hereinafter *Sprint/Nextel Merger Order*]. The FCC approved the mergers of AT&T and SBC, and Verizon and MCI on October 31, 2005. See *In re SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, 20 F.C.C.R. 18,290 (Nov. 17, 2005) [hereinafter *AT&T/SBC Merger Order*]; *In re Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, 20 F.C.C.R. 18,433 (Nov. 17, 2005) [hereinafter *Verizon Merger Order*]. On March 6, 2006, AT&T and BellSouth announced an agreement to merge. See Press Release, AT&T and BellSouth to Merge (Mar. 6, 2006) (on file with author). The merger was approved just over a year later. *In re AT&T Inc. and BellSouth Corp. Application for Transfer of Control, Memorandum Opinion and Order*, FCC 06-189, WC Docket No. 06-74 (Dec. 29, 2006) [hereinafter *AT&T/BellSouth Merger Order*].

¹⁴ *USTA II*, 359 F.3d 554.

¹⁵ For a good description of the obligations of incumbent local exchange carriers ("ILECs") to provide unbundled network elements to CLECs, see *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16,978 ¶¶ 8-14 (Aug. 21, 2003) [hereinafter *Triennial Review Remand Order*], *vacated and remanded in part, aff'd in part, USTA II*, 359 F.3d 554. Likewise, with regard to RBOC entry into long distance markets, see, e.g., *In re Application by SBC Communications Inc., Southwestern Bell Telephone Company, and South Western Bell Communications Services, Inc.*

tion of advanced services like broadband throughout the country.¹⁶ The first debate ended with the FCC's simultaneous approval of the mergers of legacy carrier AT&T with SBC, the resulting company to be called the "new" AT&T,¹⁷ and Verizon with MCL.¹⁸ The consolidation continues as BellSouth is merged into the "new" AT&T.¹⁹

The new debate is attributable to the fact that in the framework of telecommunications, as in many other contexts, it cannot be doubted that the Internet changes everything.²⁰ At the heart of the new debate is the unequivocal fact that, due in large part to the Internet, today's telecommunications world is not what was envisioned when President Clinton signed the 1996 Act. Remarkably, the term "Internet" only appears twice among the nearly 750,000 words of the Act. Faced with the Internet and the convergence of technologies and services, the new debate arises out of the concern that the Act is ineffective in the digital age.

Academics and industry pundits worry that intra-modal competition²¹ is shrinking; they fear a return to the days of telephone company monopolies and high, value-of-service-based consumer rates. To them, increased regulation appears to be the solution in the digital age.²² Others, concerned about the speed and ubiquity of true nationwide broadband deployment,

d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas, *Memorandum Opinion and Order*, 15 F.C.C.R. 18,354 (June 31, 2000).

¹⁶ Section 706 of the 1996 Act provides that "[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . ." Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 (2000)).

¹⁷ See *AT&T/SBC Merger Order*, *supra* note 13. See also *infra* Part II.A.

¹⁸ See *Verizon Merger Order*, *supra* note 13, ¶ 4.

¹⁹ See *AT&T/BellSouth Merger Order*, *supra* note 13.

²⁰ The "Internet changes everything" has become a popular term of art describing the potential of the Internet to affect our lives in countless ways. Aside from the obvious increase in the availability of information, the Internet has changed the telecommunications landscape by allowing competition across delivery platforms that was not possible before its invention. See *infra* Part II.C.

²¹ The FCC defines "intramodal competitors" as those whose services are either delivered partially or wholly over ILEC facilities, or over wireline platforms using technology identical or similar to those which ILECs have deployed. *Wireline Broadband Order*, *supra* note 9, ¶ 3 n.7. It defines "intermodal competitors" as providers of services similar to those provided by ILECs that rely exclusively on technological platforms other than wireline technologies. *Id.* This definition is incorrect because even wireless and cable providers rely on ILECs for wholesale services.

²² See, e.g., *ACTel Charges Wireline Mergers Will Cause Grave Competitive Harms*, COMM. DAILY, June 15, 2005; see also *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AT&T Corp., Transferor to SBC Commc'ns Inc., Transferee, Joint Opposition of SBC Commc'ns and AT&T Corp. to Petitions to Deny and Reply Comments*, WC Docket No. 05-65, at i (May 10, 2005) (accessible via FCC Electronic Comment Filing System).

seek freedom from regulation along with revisionist changes in policy to spur competition and innovation in telecommunications.²³

While both the pro- and anti-regulation camps may have some merit, perhaps it is prudent to pursue a middle ground: deregulation where competition exists and the ability to regulate where market forces fail. This is nothing new, as it is the policy under the 1996 Act to do just that. In the converging telecommunications environment, however, the latter of these choices poses a jurisdictional problem for the FCC that may prove to stifle competition and innovation.

The FCC's jurisdiction to regulate information services under Title I of the Communications Act of 1934, as amended, currently rests on uncertain ground.²⁴ This article argues that the first and most important step toward providing the public with a speedy resolution of the new debate is for Congress to affirm by statute the authority that the FCC has asserted over information services under Title I.²⁵ This proposal represents a major change in the nation's regulatory philosophy, but it is one that is justified in the new telecommunications environment.

This article is an attempt to portray historically what happened in the wake of the passage of the 1996 Act, why it happened, and to forecast, as best as one can, from a legislative and regulatory standpoint, how to encourage continued innovation while preserving the FCC's ability to address market failure and consumer protection issues as they arise. Part II below describes how regulatory changes, along with technological innovations, have led us to a telecommunications environment in which the FCC's authority to regulate broadband services is in doubt. Part II.A describes the regulatory about-face taken by the Commission, from encouraging same-platform competition in the common carrier area, to making intramodal competition economically unfeasible for CLECs and instead encouraging facilities-based competition across platforms.

In Part II.B, this article describes the actions taken by the Commission to level the playing field across platforms while following the intermodal competition model in the area of broadband regulation. In doing so, the Commission has defined itself into a corner and placed its jurisdiction to regulate broadband services into question. Section II.C discusses the convergence of technologies and its effect on regulation. This section de-

²³ See, e.g., Randolph J. May, et al., *Digital Age Communications Act* (Progress & Freedom Found., Proposal of the Regulatory Framework Working Group, rel. 1.0, 2005), <http://www.pff.org/issues-pubs/other/050617regframework.pdf>.

²⁴ See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv's.* (*Brand X*), 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (pointing to the uncertain ground upon which the FCC's jurisdiction to regulate information services lies).

²⁵ See *id.* at 976. ("Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications . . ." (citing 47 U.S.C. §§ 151-161)).

scribes how deregulation and broadband deployment have enabled, among other things, cable companies to enter the voice services market, voice companies to enter the video market, and wireless companies to enter the broadband market. The result of convergence of this magnitude is to make moot the distinct silos of today's regulatory environment.²⁶

While the current scheme of regulation may be irrelevant, this does not mean that regulation is no longer necessary. Section II.D below describes why the FCC's ability to regulate must be affirmed by statute. The rapid development of technology and the tendency of telecommunications companies to seek economies of scale through consolidation and merger require the presence of an empowered regulator. An empowered regulator is also necessary to ensure certainty and foster innovation. The FCC's authority to regulate information services must therefore be confirmed by Congress, ensuring that it can step in to act in the name of competition and consumer protection where the market fails.

II. THE TWENTY-FIRST CENTURY GREAT DEBATE: A CHRONOLOGY, AN EXPLANATION, AND A PROPOSAL

What happened after 1996 to cause all of the predictions to miss the mark? In actuality, many things happened. What took place can best be described as a regulatory, economic, and technological tsunami. Changes in policy and technology have made competition possible where it was not possible before. Entities providing similar services over different telecommunications platforms appear to thrive even while intramodal competition has become significantly impaired.²⁷

Without doubt, this is not the world envisioned in 1996 by Congress and the President.²⁸ There will, however, be no return to the past—no return to a monopolistic world of “doom and gloom.” So many dramatic marketplace changes and technological innovations have taken place since 1996

²⁶ See Adam Thierer, *Are “Dumb Pipe” Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. TELECOMM. & HIGH TECH. L. 275, 280 (2005) (“The traditional vertical ‘silo’ model of communications industry regulation views each industry sector as a distinct set of entities that do not interact and which should be regulated under different principles.”).

²⁷ See *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliations Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eleventh Report*, 21 F.C.C.R. 10,947, ¶¶ 5, 29, 30–31, 34, 204–212 (Sept. 26, 2006) [hereinafter *Eleventh Annual CMRS Competition Report*] available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf (discussing wireless services that include voice, video, broadband, and data in competition with wireline providers of the same services). See also *infra* Part II.A (discussing the demise of regulatory requirements that supported intramodal competition).

²⁸ CHARLES B. GOLDFARB, CRS REPORT FOR CONGRESS, TELECOMMUNICATIONS ACT: COMPETITION INNOVATION AND REFORM, 11–15 (discussing the legislative history and the Administration's involvement in crafting the Act).

that developments today have taken on the air of inevitability. Like Humpty Dumpty, the historic voice-oriented Bell system has fallen, and cannot be put back together again.

Convergence has given rise to increased intermodal competition, enabling Bell companies to expand their service offerings. Bell and other local phone companies are providing video and high-speed Internet access, along with voice.²⁹ Simultaneously, telephone companies face serious new competition from cable, wireless, satellite, and Internet companies, which are offering the same services.³⁰ Industry convergence is now a fact of life.

In this new environment of fast-paced change, policymakers face the quadruple challenges of: (1) promoting competition;³¹ (2) protecting consumers;³² (3) avoiding the regulatory uncertainty that paralyzed the industry in the past;³³ and (4) recognizing that developments in Voice over Internet Protocol service (“VoIP”),³⁴ Internet Protocol Television (“IPTV”),³⁵ and broadband technology in general mandate that this nation’s telecommunications regulatory foundation and scheme change.³⁶ This is not an inconsequential task—this is huge! There are no easy or completely satisfying solutions. Moreover, continuing technological innovations serve to preclude reliance on traditional regulatory fixes.³⁷ Broadband deregulation, particularly at the retail level, appears inevitable.

²⁹ See *In re Annual Assessment of the Status of Competition in the Market for Delivery of Video*, *Twelfth Annual Report*, 21 F.C.C.R. 2503, ¶ 121 (Feb. 10, 2006) [hereinafter *Twelfth Annual Cable Report*].

³⁰ See *id.* ¶¶ 50, 89.

³¹ 47 U.S.C. § 257 (2000).

³² § 254(i).

³³ See Randolph J. May, et al., *supra* note 23, at 5–7.

³⁴ The FCC uses the term “VoIP” generally to include any IP-enabled service “offering real-time, multidirectional voice functionality, including but not limited to, services that mimic traditional telephony.” *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, *Memorandum Opinion and Order*, 19 F.C.C.R. 22,404, ¶ 4 n.9 (Nov. 9, 2004) [hereinafter *Vonage Order*].

³⁵ “IPTV,” or Internet Protocol Television, is described by the FCC as a means for traditional LECs to provide “further distribution of multichannel video services” over broadband connections. *Twelfth Annual Cable Report*, *supra* note 29, ¶¶ 122–23.

³⁶ John Borland, *Why Policies Must Change*, CNET NEWS.COM, July 27, 2004, http://news.com.com/2009-1034_3-5261375.html.

³⁷ The FCC’s recent *VoIP E911 Order* may prove to be a prime example of the manner in which technology can simultaneously create opportunities, such as the ability to communicate from anywhere in the world using one phone number, as well as problems which cannot be easily addressed by traditional regulatory methods, like the determination of a nomadic user’s location for the purpose of sending emergency response. See *In re IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, *First Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 10,245, ¶ 4 (May 19, 2005) [hereinafter *VoIP E911 Order*].

Policymakers are already confronting issues pertaining to local authority to regulate cable television franchising and access to IPTV by others.³⁸ Policymakers must now consider whether the time has come move toward deregulation of all voice services, regardless of transmission mechanism. If so, they must consider what regulatory authority, if any, should be retained on the federal, state, or local levels. And finally, in what circumstances should the retained authority be exercised?

A. Post-1996 Regulatory Changes

Perhaps the most significant change affecting the telecommunications industry in recent years has been the stark about-face in FCC competition policy. In the past, regulators, policymakers, and CLECs strongly supported non-facilities-based intramodal competition as both a CLEC entry vehicle and a means by which to ensure that residential customers benefited from competitive services.³⁹ This was accomplished from a regulatory perspective by requiring incumbent carriers to make their network elements available for lease by competitors on an unbundled basis.⁴⁰ For carriers like AT&T, who once provided only long distance service, this was the only practical way to reach a nationwide base of residential and small and medium business (“SMB”) customers.⁴¹

Federal policy shifted away from making unbundled network elements and platforms available to competitors;⁴² now, non-facilities based competition has, for all practical purposes, been made impossible or uneconomic—indeed, it is disappearing.⁴³ The primary victims of this policy turnaround were legacy AT&T and MCI, which early-on had focused on local service along with long distance.⁴⁴ As a consequence, AT&T initially

³⁸ See *Triennial Review Remand Order*, *supra* note 15, ¶ 3–4. See also *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, FCC 06-180, MB Docket No. 05-311 (Dec. 20, 2006) [hereinafter *Franchising Order*] (preempting local franchising authority ability to unreasonably refuse to grant a competitive video franchise).

³⁹ See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 F.C.C.R. 15,499, ¶ 1 (Aug. 1, 1996) [hereinafter *Local Competition Order*]. See also MARTIN F. McDERMOTT III, *CLEC: AN INSIDER’S LOOK AT THE RISE AND FALL OF LOCAL EXCHANGE COMPETITION* 175 (Penobscot Press 2002).

⁴⁰ *Triennial Review Remand Order*, *supra* note 15, ¶ 3.

⁴¹ See *id.* ¶¶ 4–6. See also *Local Competition Order*, *supra* note 39, ¶ 10.

⁴² *Local Competition Order*, *supra* note 39, ¶¶ 3–4.

⁴³ See, e.g., *Triennial Review Remand Order*, *supra* note 15, ¶¶ 3–4.

⁴⁴ See Robert W. Crandall & Leonard Waverman, *The Failure of Competitive Entry Into Fixed-Line Telecommunications: Who Is at Fault?*, 2 J. COMPETITION L. & ECON. 113 (2006); Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999–2000);

withdrew from the residential and SMB markets, while MCI attempted to manage the decline of its mass-market base.⁴⁵ Ultimately, both of these companies—one having just emerged from bankruptcy and the other about to fall into that black hole—agreed to mergers that once were described as “unthinkable.”⁴⁶ Ultimately, these mergers were described as encouraging by regulators who were desperately attempting to preserve the benefits of competition for consumers.⁴⁷ Not unexpectedly, though somewhat ironically, the AT&T name survived the merger into SBC⁴⁸ and the internationally recognized brand AT&T will continue upon the merger with BellSouth.⁴⁹ This result was not what most parties foresaw in 1996.

The 1996 Telecommunications Act set forth three primary goals: (1) to open the local markets to competition; (2) to open the long distance markets to the RBOCs; and (3) to promote the introduction of advanced services throughout the country.⁵⁰ The FCC’s task under the 1996 Act was

Brian L. Roberts, *The Greatest Story Never Told: How the 1996 Telecommunications Act Helped to Transform Cable’s Future*, 58 FED. COMM. L.J. 571 (2006).

⁴⁵ See Nicholas Economides, *Telecommunications Regulation: An Introduction*, 813 PLI/PAT 452 (2004); Mark D. Schnieder & Marc D. Goldman, *The USTA Decisions and the Rise and Fall of Telephone Competition*, 22 COMM. LAW. 1 (2004); Shawn Young, *AT&T Posts 80% Drop in Net, Confirms Consumer Retreat*, WALL ST. J., July 23, 2004, at A11; George Mannes & Scott Moritz, *MCI Plans Major Retrenchment*, THE STREET.COM, June 25, 2004, <http://www.thestreet.com/tech/telecom/10168007.html>; Press Release, AT&T News Room, AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets (July 22, 2004), available at <http://www.corp.att.com/news/2004/07/22-13163>.

⁴⁶ When confronted with the question of whether he would approve an RBOC/AT&T merger, then-FCC Chairman Hundt stated: “a combination of AT&T and an ‘RBOC’ is unthinkable.” Reed Hundt, Comm’r, Fed. Commc’ns Comm’n, Remarks at the Brookings Institution: Thinking About Why Some Communications Mergers are Unthinkable (June 19, 1997), (transcript available at <http://www.fcc.gov/Speeches/Hundt/spreh735.html>).

⁴⁷ Chairman Holland of the Pennsylvania Public Utilities Commission noted in his separate statement approving of the SBC and AT&T merger that he was “encouraged that the merged entity we approve today will become a viable competitor in Pennsylvania’s growing competitive telecommunications landscape.” *In re* Joint Application of SBC Commc’ns, Inc. & AT&T Corp. Together with its Certificated Pennsylvania Subsidiaries for Approval of Merger, *Opinion and Order*, Docket No. A-311163F0006, Docket No. A-310213F0008, Docket No. A-310258F0005 (Pa. Pub. Util. Comm’n Oct. 6, 2005) (statement of Chairman Wendell Holland).

⁴⁸ SBC, from SouthWestern Bell Co., was never well known; it was and is still associated by some with the Southern Baptist Convention. See, e.g., Google, <http://www.google.com> (search for “SBC”) (last visited Feb. 22, 2007) (returning the Southern Baptist Convention Web site near the top of the results list). It is unsurprising, therefore, that the AT&T name survived. See Press Release, AT&T—News Room, SBC Communications to Adopt AT&T Name (Oct. 27, 2005), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&articleid=21850>.

⁴⁹ Press Release, AT&T—News Room, AT&T and BellSouth Join to Create a Premier Global Communications Company (Dec. 29, 2006), available at <http://www.att.com/gen/press-room?pid=48008&cdvn=news&newsarticleid=22860>.

⁵⁰ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

one of “extraordinary complexity.”⁵¹ Over the years, the FCC struggled mightily to achieve these three goals. Unfortunately, it was hampered by daunting and disruptive changes in technology, a change in federal administrations and chairmen,⁵² constant litigation and a string of judicial reversals,⁵³ as well as unexpected economic events.⁵⁴

At first, FCC policy favored non-facilities based competition through unbundled network element (“UNE”) requirements. Under Chairman Reed Hundt, the Commission decided that a broad range of network elements should be available to CLECs on an unbundled basis pursuant to Sections 251 and 252 of the 1996 Act.⁵⁵ Deeming the competing companies “impaired” without UNEs, it was concluded that they could not compete effectively without access to UNEs at reasonable rates.⁵⁶ The Commission decided the reasonable rate at which UNEs were to be made available to competitors was the total element long-run incremental cost (“TELRIC”) rate.⁵⁷ A menu of UNEs, called the unbundled network element platform (“UNE-P”), was also created.⁵⁸ From a technical standpoint, UNE-P allowed CLECs greater flexibility than UNEs alone, but the real driving force behind their creation was cost: the TELRIC pricing standard was a money loser for the Bell companies and ILECs.⁵⁹

The UNE rules encouraged a number of CLECs to enter these vast markets; billions of dollars of investment followed.⁶⁰ Wall Street was fixated on providing scores of billions of dollars to fund CLECs. Unfortunately, many venture capitalists forced the CLECs to focus on immediate customer acquisition and network building, to the detriment of the bottom line.⁶¹ The specification of what constitutes a cost is not always obvious,

⁵¹ U.S. Telecom Ass’n v. FCC, (*USTA I*), 290 F.3d 415, 421 (D.C. Cir. 2002).

⁵² Since the passage of the 1996 Act, the FCC has had four Chairmen: two Democrats (Hundt and Kennard), and two Republicans (Powell and Martin). See FCC, Commissioners from 1934 to Present, <http://www.fcc.gov/commissioners/commish-list.html> (last visited Apr. 15, 2007).

⁵³ See, e.g., U.S. Telecom Ass’n v. FCC (*USTA II*), 359 F.3d 554, 594 (D.C. Cir. 2004) *cert. denied*, 125 U.S. 313 (2004); Verizon Commc’ns Inc. v. FCC, 535 U.S. 467, 475 (2002); *USTA I*, 290 F.3d at 417; AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 370–71, 376–77, 379 (1999).

⁵⁴ See Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 835, 871–72 (1997).

⁵⁵ See *Local Competition Order*, *supra* note 39, ¶¶ 24–27.

⁵⁶ See *TRO Remand Order*, *supra* note 9, ¶ 475.

⁵⁷ See *id.* ¶¶ 12, 14. The Supreme Court later upheld the FCC’s rules in *Verizon Commc’ns*, 535 U.S. at 475.

⁵⁸ The UNE-P is a combination of an unbundled loop, unbundled local circuit switching, and shared transport. *TRO Remand Order*, *supra* note 9, ¶ 41 n.130.

⁵⁹ See MCDERMOTT III, *supra* note 39, at 179–80.

⁶⁰ See Shannon M. Heim, *Signaling System Seven: A Case Study in Local Telephone Competition*, 13 COMMLAW CONSPECTUS 51, 51–53, 66–67 (2004).

⁶¹ See MCDERMOTT III, *supra* note 39, at 6.

and the allocation of costs is inherently arbitrary and illusory.⁶² Cost being enigmatic, CLEC revenue deficiencies greatly exacerbated disagreement between the RBOCs and CLECs on pricing and interconnection terms. This disagreement led to lengthy and expensive litigation on almost every aspect of this pricing.⁶³ Ultimately, CLECs had difficulty reaching their customers on what they deemed an economically feasible basis.⁶⁴ Finally and inevitably, in early 2000 the bubble began to burst.⁶⁵ From that point on there has been little or no financing available for CLECs, and many bankruptcies and bargain-sale acquisitions have followed.⁶⁶

During the same period, RBOCs successfully entered the long distance market, methodically meeting 1996 Act guidelines.⁶⁷ Simultaneously, RBOCs challenged the TELRIC basis upon which the UNE pricing structure relied. UNE TELRIC rates were so low, the RBOCs argued, that if required to make broadband networks available to CLECs at TELRIC rates, new broadband build-out would be economically unfeasible for the RBOCs themselves.⁶⁸

RBOCs and CLECs went to battle almost immediately after the Act was signed. Their legal and political battles, as well as those as for public opinion, were ferocious and costly. Incumbents and competitors alike spent millions of dollars on advertising and lobbying for their respective causes.⁶⁹ Pro-CLEC groups funded CLEC lobbying efforts in Washington to both Congress and the FCC.⁷⁰ Advertisements had the dual purpose of swinging public opinion and gaining political support. In the author's recollection, at least one CLEC advertisement found its mark—it focused on national CLEC job losses, and purportedly raised concern at the White House.⁷¹ The RBOCs undertook similar activities individually and jointly

⁶² See, e.g., Sutapa Ghosh, Comment, *The Future of FCC Dominant Carrier Rate Regulation: The Price Caps Scheme*, 41 FED. COMM. L.J. 401, 407–08 (1989) (explaining that the FCC's calculation of rate regulation and costs is arbitrary and subject to error and abuse by the FCC and carriers).

⁶³ See MCDERMOTT III, *supra* note 39, at 7.

⁶⁴ See *id.* at 12–13.

⁶⁵ See *id.* at 5–11; see also STIGLITZ, *supra* note 3, at 91–101.

⁶⁶ MCDERMOTT III, *supra* note 39, at 9.

⁶⁷ *Id.* at 12–13.

⁶⁸ See, e.g., Randolph J. May, et al., *supra* note 23, at 9–10.

⁶⁹ See, e.g., *Phone Monopolists, Again*, L.A. TIMES, Mar. 1, 2002, at B16. CompTel and Voices for Choices (a pro-CLEC group), along with AT&T and MCI, spent millions of dollars on local and national print and media advertising in support of their respective causes. *Id.*

⁷⁰ *Id.*

⁷¹ For a brief discussion of the loss of jobs in the telecommunications industry during the relevant time period, see G. Mitchell Wilk & Carl R. Danner, *The Urgent Need for Reform of Wholesale Telecommunications Regulation in California* (Econ. Policy Inst. Issue Brief # 199 1–2, Sept. 12, 2004), available at <http://www.epi.org/content.cfm/issuebrief199>; Ed Gubbins, *Jobs Grow, But Telecom Gets*

through their national and regional trade associations.⁷² Not to be outdone, the RBOC/ILEC trade association, United States Telecom Association (“USTA”), placed a gigantic billboard supporting its anti-CLEC position in front of the US Airways departure gate at Reagan National Airport—a location where it was sure to be seen by many Washington policymakers. This was just part of their well-funded campaign against competitors and CLECs; developing newspaper opinion pieces and studies bashing the competitors became a cottage industry. Both sides also made significant political contributions.⁷³

Both sides and their advocacy positions seemed to shift with the winds. At first, the National Association of Regulatory Utility Commissioners (“NARUC”), a trade association dedicated to promoting the interests of state and local public utilities commissions and the public they serve,⁷⁴ supported the RBOCs in their attack on TELRIC, while the CLECs supported the FCC.⁷⁵ Later, NARUC supported the CLECs in the UNE-P battle while the FCC ultimately supported the RBOCs.⁷⁶

Left Behind, TELEPHONY ONLINE, May 17, 2004, http://telephonyonline.com/finance/print/telecom_jobs_grow_telecom/index.html.

⁷² See *A Contest of Connections, Millions Spent to Influence Bill on High-Speed Internet Access*, WASH. POST, Feb 27, 2002 (“[AT&T and SBC] poured money into hiring lobbyists and funding candidates’ campaigns [in early 2001].”) [hereinafter *Contest of Connections*].

⁷³ See Joshua E. Barbach, *RBOCs are Spending Money: Find Out Where*, PIPELINE, Aug. 2004, http://www.pipelinepub.com/0804/news_review1.pdf; see also, *Contest of Connections*, *supra* note 72 (putting the money spent by some RBOCs and CLECs on advertising and lobbying at \$7.4 billion for the first half of 2001). For more information on money spent by lobbying firms on behalf of telecommunications clients, see Open Secrets.org, Lobbying Database: Telephone Utilities, <http://www.opensecrets.org/lobbyists/indusclient.asp?code=B08> (last visited Mar. 30, 2007). For money donated to campaigns by telecommunications firms, see Open Secrets.org, Telephone Utilities: Top Contributors to Federal Candidates and Parties, <http://www.opensecrets.org/industries/contrib.asp?Ind=B08> (last visited Mar. 30, 2007).

⁷⁴ Among NARUC’s objectives is “the promotion of coordinated action by the commissions of the several States to protect the common interests of the people with respect to the regulation of public utilities and carriers, and the promotion of cooperation of the commissions of the several States with each other and with [federal agencies].” Nat’l Ass’n of Regulatory Util. Comm’rs, NARUC Constitution (as amended Nov. 13, 2006), <http://www.naruc.org/> (select “About NARUC”: then click on “NARUC Constitution” from the menu that appears on the right).

⁷⁵ See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

⁷⁶ See Press Release, Nat’l Ass’n of Regulatory Util. Comm’rs, NARUC Sends Letter to Congress Clarifying the Facts over UNE-P and TELRIC, <http://www.naruc.org/displayindustryarticle.cfm?articlenbr=15716>; Donny Jackson, *FCC Removes Section 271 Concerns from RBOC Fiber Plans*, TELEPHONY ONLINE, Oct. 25, 2004, http://telephonyonline.com/news/web/telecom_fcc_removes_section/; Donny Jackson, *RBOC Legal Win Could Be Hollow Victory*, TELEPHONY ONLINE, June 21, 2004, http://telephonyonline.com/regulatory/print/telecom_rboac_legal_win/; *Promoting Local Competition: A Means to Greater Broadband Deployment, Hearing Before the S. Comm. on Commerce, Science, and Trans.*, 107th Cong. 2–8 (2002) (statement of Hon. Robert B.

Moreover, neither side was completely unified. Unfortunately, serious divisions arose much too often on the CLEC side between the smaller facilities-based CLECs represented by the Association of Local Telecommunications Service Providers (“ALTS”) and the UNE-P and larger facilities-based service providers represented by CompTel.⁷⁷ Rumors of similar disputes among the RBOCs were rampant as well. By the end of 2003, it seemed most of the major Washington lobbying firms were engaged on behalf of one side or another. The battleground spread from the FCC, to the states, to Congress and, ultimately, to the White House. There were constant meetings and Administration involvement. Both sides had their representatives and partisans active in each skirmish.

Although the CLECs did win the TELRIC and legislative fights, ultimately the RBOCs triumphed in the more important Triennial Review battle before the Powell Commission.⁷⁸ The RBOCs also prevailed in various decisions of the D.C. Circuit Court of Appeals,⁷⁹ and no appeal was taken from those decisions. As a result, RBOC’s mass market switching service was lost to CLECs and UNE-P has been phased out.⁸⁰ Similarly, CLECs’ access to high capacity loops and transport has become severely restricted.⁸¹ AT&T and MCI chose to find merger mates rather than continue to suffer the slow torture of atrophic economic decline.⁸² Some CLECs

Nelson, Comm’r, Michigan Public Service Comm’n and Co-Vice Chairman of Telecomm. Comm. of NARUC). *See also* *In re* Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform, WC Docket No. 93-157, Comments of the Nat’l Ass’n of State Util. Consumer Advocates 7–8 (filed Aug. 18, 2003) (accessible via FCC Electronic Comment Filing System).

⁷⁷ Authors’ personal knowledge. Articles and reports discuss some of the issues upon which disagreement arose. *See A Contest of Connections*, *supra* note 72. *See also* TELECOM POLICY REPORT, IXCS GET A BREAK IN CLEC ACCESS CHARGE PROCEEDING (2004), http://findarticles.com/p/articles/mi_m0PJR/is_20_2/ai_n6035044; *Bells Making More than \$600 Million on UNE-P, CompTel Study Shows*, P.R. NEWSWIRE, May 22, 2003, available at http://www.isg-telecom.com/bells_making_more_than.htm. Moreover, with neither side content, the war between local competitors and RBOCs continued. *See, e.g.*, David Rhode, *The Fight for Fiber and Copper*, NETWORK WORLD, Dec. 25, 2000, <http://www.networkworld.com/power2000/power-strsbc/power-strsbc.html>.

⁷⁸ *See TRO Remand Order*, *supra* note 9, ¶ 36 n.110.

⁷⁹ *See, e.g.*, U.S. Telecom Ass’n v. FCC (*USTA II*), 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 U.S. 313 (2004); U.S. Telecom Ass’n v. FCC (*USTA I*), 290 F.3d 415 (D.C. Cir. 2002).

⁸⁰ Sean Buckley, *UNE-P to UNE-L: The New Battleground*, TELECOM. MAG. (Feb. 2005), available at http://www.telecommagazine.com/Americas/article.asp?HH_ID=AR_462.

⁸¹ *See Triennial Review Remand Order*, *supra* note 15, ¶¶ 43–44.

⁸² *See* SBC Commc’ns Inc. and AT&T Commc’ns Inc., Description of the Transaction, Public Interest Showing, and Related Demonstrations, Feb. 21, 2005, at ii, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517309094 (indicating their decision to merge is based in part upon their “each endur[ing] dramatic declines in market capital”); Verizon Commc’ns, Inc. and MCI, Inc., Public Interest Statement 13–15, Mar. 11, 2005, available at

turned to VoIP-related strategies to replace UNE-P as a means to stay in the residential and SMB markets.⁸³ Just as CLECs' ability to compete over the incumbents' facilities waned, the other shoe dropped. As explained immediately below, the Supreme Court's *Brand X*⁸⁴ decision and the FCC's *Wireline Broadband Order*⁸⁵ may well be the final death knell for intramodal competition.

B. The Twenty-First Century Debate Begins

The Twenty-First Century Debate begins with the *Brand X* decision, where the Court affirmed the FCC's classification of cable broadband Internet access as an "information service" rather than a "telecommunications service."⁸⁶ By classifying cable broadband as an information service, the FCC exempted cable broadband providers from the panoply of regulations and policies under Title II of the Communications Act of 1934, as amended.⁸⁷ This is significant from both a competitive and financial perspective: telecommunications services subject to Title II are treated as "common carrier" services, and thus are subject to guidelines that affect pricing, interconnection with competing providers, and require mandatory contribution to the federal universal service fund, among other obligations.⁸⁸

In upholding the FCC's classification, the Supreme Court validated the FCC's broader efforts to deregulate broadband access. The Court approvingly cited the Commission's logic in finding that it was ultimately "unwise to subject enhanced service[s] to common carrier regulation given the 'fast-moving, competitive market' in which they were offered."⁸⁹ The Court then indicated that this reasoning was sufficient to support the FCC's classification of cable broadband as an information service, despite the potential inconsistency with previous FCC rulings regarding Digital Subscriber Line ("DSL") service as a telecommunications service.⁹⁰

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517495215 (indicating the need for cost savings and synergies in order to compete effectively in their market).

⁸³ See, e.g., *Covad Hopes EarthLink Just First ISP to Spend Millions on VoIP Network Gear*, 6 WASH. INTERNET DAILY 116 (Jun. 16, 2005).

⁸⁴ Nat'l Cable & Telecomms. Ass'n v. *Brand X* Internet Servs. (*Brand X*), 545 U.S. 967 (2005).

⁸⁵ *Wireline Broadband Order*, *supra* note 9.

⁸⁶ *Brand X*, 545 U.S. at 987.

⁸⁷ 47 U.S.C. §§ 201–276 (2000).

⁸⁸ See 47 U.S.C. §§ 201–209, 251(a) (1), and 254(d).

⁸⁹ See *Brand X*, 545 U.S. at 977 (quoting *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations, *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶ 129 (Apr. 7, 1980)).

⁹⁰ See *id.* at 1001.

The *Brand X* Court specifically noted that “the Commission is free within the limits of reasoned interpretation to change course,”⁹¹ and that

[a]ny inconsistency between the [cable modem] order under review and the Commission’s treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service and when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities.⁹²

Less than two months later, the FCC followed the Court’s dictum, adopting its *Wireline Broadband Order*, a Report and Order and Notice of Proposed Rulemaking that extended the *Brand X* ruling.⁹³ The *Wireline Broadband Order* ended what the Commission saw as “regulatory inequities” between facilities-based wireline broadband providers, placed Title II wireline broadband providers and cable broadband providers on an equally deregulated playing field, and established a new minimal “framework for broadband Internet access services offered [to others] by wireline facilities-based providers.”⁹⁴

The FCC thus rejected the twenty year-old *Computer Inquiry II*⁹⁵ regulatory scheme that separated the transmission component of wireline broadband from the service itself. Under *Computer Inquiry II*, the transmission component of information services over wireline broadband remained subject to regulation under Title II, while the information service itself was subject only to ancillary regulation under Title I.⁹⁶ In the *Wireline Broadband Order*, the FCC found that the “information service” versus “telecommunications service” distinction no longer adequately described

⁹¹ *Id.*

⁹² *Id.* at 1001–02.

⁹³ See *Wireline Broadband Order*, *supra* note 9.

⁹⁴ See *id.* See also *id.* at 14,975 (statement of Chairman Kevin J. Martin). The regulatory inequities addressed by the *Wireline Broadband Order* arise out of a 2002 FCC decision classifying Internet over cable as an information service and not a telecommunications service, thus leaving non-cable facilities based wireline broadband providers at a regulatory disadvantage when compared to those providing broadband over cable. See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (Mar. 14, 2002).

⁹⁵ According to Vint Cerf, one of the “fathers of the Internet,” the FCC’s *Computer Inquiry* decisions “contributed strongly towards the commercial introduction, rise, and incredible success of the Internet.” Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L. J. 587, 599 (2004) (quoting Vint Cerf). See also Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167, 169 (2003) (“[The] *Computer Inquiries* have been referred to by some as ‘wildly successful.’”). Both authors worked on the *Computer Inquiry II* decision while at the FCC.

⁹⁶ See generally *Wireline Broadband Order*, *supra* note 9, ¶¶ 21–31 (summarizing the regulatory regime put in place by the now outdated *Computer Inquiry* decisions).

broadband Internet access in today's environment. According to the FCC, DSL broadband service inextricably combines computer processing, information provision and computer interactivity with telecommunications, allowing users to run a variety of applications—from email and Web pages to news groups—without regard for the underlying method of transmission; end users simply receive an integrated finished product.⁹⁷ Identifying this combined final product as the most important factor, the Commission determined that there was no reason to classify wireline broadband Internet access services differently based on the owner of the underlying transmission facilities.⁹⁸

One implication of the ruling is that wireline broadband providers are no longer required to separate the underlying transmission component from DSL broadband service and offer it on a common carrier basis. The *Wireline Broadband Order* allows facilities-based wireline providers to choose whether to offer broadband Internet access on a common carrier (Title II-regulated) or non-common carrier basis.⁹⁹ The FCC seemingly incorporated this flexibility to account for the differing business issues affecting different wireline providers (i.e., rural LECs versus RBOCs). Providers who choose to offer Internet access service on a common carrier basis subject to Title II regulation may now do so, on a permissive detariffing basis.¹⁰⁰

Recognizing that unaffiliated Internet service providers (“ISPs”) rely on the availability of then-tariffed wireline broadband Internet access, the FCC adopted a one-year transition period to allow sufficient time for adjustment.¹⁰¹ During this one-year period, existing transmission arrangements were to be honored on a grandfathered basis, but there was no requirement that new arrangements be made or that existing arrangements be renewed.¹⁰²

Likewise, the FCC held that UNEs must remain available to CLECs under Section 251 so long as a CLEC is offering an “eligible” service.¹⁰³ This holding was essential if CLECs were to have any hope of providing competitive VoIP service. However, that decision is subject to a pre-existing further appeal of the *Triennial Review Remand Order*.¹⁰⁴

⁹⁷ See *id.* ¶ 14–17.

⁹⁸ *Id.* ¶ 16.

⁹⁹ *Id.* ¶ 73.

¹⁰⁰ *Id.* ¶ 5.

¹⁰¹ See *id.* ¶¶ 5–7.

¹⁰² *Id.* This will most likely result in a reduction in the bargaining power of non-facilities based resellers of broadband services; they must now negotiate commercial agreements for access to cable and wireline broadband services.

¹⁰³ *Id.* ¶ 127.

¹⁰⁴ See Ted Gotsch, *Georgia Appeals Court Affirms Ruling in BellSouth UNE Case*, TR DAILY, Oct. 1, 2005, at 23–24, available at <http://www.aspenpublishers.com/PDF/ss01639854.pdf>.

Finally, recognizing that wireline broadband service will no longer be subject to traditional regulation, the FCC seeks to develop a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology. Therefore, in a Notice of Proposed Rulemaking, the FCC asked whether, in order to address consumer issues, it should impose regulations under its ancillary jurisdiction that are similar to existing Title II regulations in the areas of consumer proprietary network information, slamming, truth-in-billing, network outage reporting, section 214 discontinuance, section 254(g) rate averaging, federal and state involvement, and consumer enforcement.¹⁰⁵ This represents a complete reversal in approach from where the FCC started in 1996.

The FCC followed up its Wireline Broadband Order with similar orders holding that broadband over power line-enabled Internet access service and wireless broadband internet access service were also information services.¹⁰⁶ At the same time, the Commission continues to refuse to address the issue of “whether VoIP should be classified as a telecommunications service or an information service.”¹⁰⁷

Clearly, the FCC is troubled by uncertainty as to the scope of its authority.

C. Post-1996 Changes in Competition and Technology

Change has not been limited to regulatory policy. Indeed, technology and market forces have been the drivers of the regulatory process.¹⁰⁸ Contrary to the expectations of CLECs and spurred by technological innovations, the wireline industry experienced a rapid and intense increase in intermodal competition, as cable, VoIP, and wireless companies have aggressively moved into traditional wireline voice markets. Industry boundaries have blurred as these competitors, along with Internet companies, energy com-

¹⁰⁵ See *Wireline Broadband Order*, *supra* note 9, ¶¶ 146–59.

¹⁰⁶ See *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, FCC 07-30; WT Docket No. 07-53 (Mar. 22, 2007) (declaring wireless broadband an information service); *In re* United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, 21 F.C.C.R. 13,281 (Nov. 3, 2006) (declaring broadband over power lines an information service).

¹⁰⁷ *In re* Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, *Memorandum Opinion and Order*, DA 07-709; WC Docket No. 06-55, ¶ 15 n.41 (Mar. 1, 2007).

¹⁰⁸ See, e.g., Written Statement of The Hon. Kevin J. Martin, Chairman, Fed. Comm’n’s Comm’n Before the Comm. on Commerce, Sci. & Trans., U.S. Senate (Sept. 12, 2006) (“[I]n this fast paced technological environment, regulations struggle to keep up”).

panies, and ISPs, offer, or have the capacity to offer, core telecommunications services.¹⁰⁹

ILECs now face a market in which data traffic on the network predominates over voice traffic,¹¹⁰ many customers have abandoned their landlines for wireless services,¹¹¹ and a massive shift of long distance traffic from switched wireline to VoIP has occurred.¹¹² Businesses and consumers have benefited as they now receive and use telecommunications services in ways that were unimaginable just a few years ago. Seventy-seven percent of all adults in the United States now have access to the Internet—an increase from nine percent in 1995.¹¹³ This increase has occurred not only among the young and the affluent, but among low-income and older users as well.¹¹⁴ To the chagrin of the LECs, many college students and young adults have completely abandoned wireline phones and instead rely on cable modems and wireless phones to meet their needs.¹¹⁵ Sophisticated enterprise customers seeking to drive down their telecommunications costs now rely on consultants, equipment manufacturers, or systems integrators, as opposed to traditional wireline carriers, to source their communications services.¹¹⁶ And, with the rapid growth of VoIP, which “is finally ready for

¹⁰⁹ See, e.g., *VoIP Drastically Changing Telecom Landscape*, NEW TELEPHONY, May 9, 2005 at 8, available at <http://www.nxtbook.com/fx/books/virgo/newtelephony-May09-05/>. See also Ind. Analysis & Tech. Div., Wireline Comp. Bureau, *High Speed Services for Internet Access: Status as of December 31, 2004*, 2–3 (2005) available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf

¹¹⁰ See Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477, 478–80 (2006); Jared S. Dinkes, *Rethinking the Revolution: Competitive Telephony in a Voice over Internet Protocol Era*, 66 OHIO ST. L.J. 833, 858–61 (2005).

¹¹¹ See, e.g., Brian Falk, *Wireless Phones Chip Away at Dominance of Landlines*, CHARLOTTE BUS. J., Oct. 25, 2002, available at <http://www.bizjournals.com/charlotte/stories/2002/10/28/focus3.html>.

¹¹² Frost & Sullivan, a global research, consulting and analysis firm asserted in 2005 that VoIP is “expected to emerge as a strong contender for traditional circuit-switched telephony services,” and predicted that 30% of long distance traffic will move “from switched wireline to VoIP by 2011.” See *VoIP Drastically Changing Telecom Landscape*, supra note 109.

¹¹³ Antone Gonsalves, *Number of Online Americans Continues to Grow*, TECH WEB TECHNOLOGY NEWS, May 25, 2006, <http://www.techweb.com/wire/ebiz/188500373>.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., Paige McGregor, *College Life and the Cell Phone Phenomenon*, ASSOCIATED CONTENT, Feb. 9, 2007, http://www.associatedcontent.com/article/139927/college_life_and_the_cell_phone_phenomenon.html.

¹¹⁶ See, e.g., Roger Morton, *Wireless in the Warehouse*, LOGISTICS TODAY, May 2006, at 44–45; Hank Hogan, *Coalescing Networks*, CONTROL ENGINEERING, Aug. 1, 2006, <http://www.controleng.com/article/CA6358271.html>.

prime time,”¹¹⁷ the threat to the wireline companies’ “plain old telephone service” is greater each day.

Each of these competitive threats to the legacy wireline industry is both significant and unique. For example, the actual size of the threat facing the RBOCs in the wireless arena is unclear because AT&T, BellSouth, and Verizon have developed a major presence in wireless through their respective control of Cingular and Verizon Wireless.¹¹⁸ The competitive danger that they face, however, is real. For the first time, there are more wireless than wireline subscriptions in the United States¹¹⁹ and it is estimated that LECs could lose forty percent of their landline customers over the next ten years.¹²⁰ Moreover, the strength of other wireless carriers cannot be underestimated. The Sprint Nextel combination has enabled that company to become an even more formidable competitor, thereby allowing it to provide wireless retail and resale customers with significant competitive alternatives.¹²¹ Cable companies and Mobile Virtual Network Operators are already taking advantage of the Sprint Nextel network.¹²² In addition, competitive wireless broadband service, based on technology perfected in Asia and Europe, is coming to the United States.¹²³

After having “invested almost \$100 billion since 1996 to replace coaxial cable with fiber optic technology and installing new digital equipment in homes and system headends,”¹²⁴ cable company voice telephony, which languished for many years, is quickly gaining ground as a result of VoIP. According to the FCC, “[t]here is...significant evidence in the record indicating that mass market subscription to cable-based VoIP continues to increase nationwide as cable operators continue to roll out these services throughout their footprints.”¹²⁵

¹¹⁷ See BERNSTEIN RESEARCH, VOICE OVER IP: RIPPLE OR TIDAL WAVE? 9 (2004); see also John Walko, *Huge Growth Seen in Retail VoIP*, INFO. WK., July 6, 2005, available at <http://informationweek.com/story/showArticle.jhtml?articleID=165700249>.

¹¹⁸ See *Eleventh Annual CMRS Competition Report*, supra note 27, ¶ 25.

¹¹⁹ In the United States, there were 181.1 million wireless subscriptions in December 2004, compared with 177.9 million ILEC and CLEC subscriptions. BNA DAILY REPORT FOR EXECs., 131 MORE WIRELESS PHONES THAN LANDLINES FOR FIRST TIME A-12 (July 11, 2005).

¹²⁰ *Rewired and Ready For Combat*, BUS. WEEK, Nov. 7, 2005, http://www.businessweek.com/magazine/content/05_45/b3958089.htm.

¹²¹ See Jon Van, *Sprint Nextel Partners with Comcast*, CHI. TRIB., Nov. 3, 2005.

¹²² Sprint Nextel, Comcast, Cox Communications, and other cable companies have joined together to develop new offerings described as a “Quadruple Play.” The offering will include video, wireless voice and data service, high-speed Internet, and cable phone service. See *id.*

¹²³ See Rob Kelley, *Broadband Lag Could Hurt the U.S.*, CNN MONEY.COM, June 17, 2005, <http://money.cnn.com/2005/06/16/technology/broadband/index.htm>.

¹²⁴ *Twelfth Annual Cable Report*, supra note 29, ¶ 10.

¹²⁵ *AT&T/SBC Merger Order*, supra note 13, ¶ 87.

Technology now permits competitive services to be offered from the edge of the network by non-facilities based providers.¹²⁶ This has become known as “BYOB” or “bring your own broadband.” BYOB has permitted VoIP providers, such as Vonage, to offer competitive broadband services.¹²⁷ Many former UNE-P carriers view VoIP as their salvation and are preparing to offer VoIP service, if they have not already done so.¹²⁸ Various wholesale companies are structuring products designed to assist CLECs in converting from UNE-P to VoIP based services.¹²⁹

Internet companies and ISPs have also entered the fray. Google recently agreed to purchase a five percent stake in AOL for \$1 billion, and Yahoo has entered into deals with RBOCs.¹³⁰ Earthlink has been chosen to provide high-speed wireless Internet access across Philadelphia.¹³¹ These companies have the ability to offer suites of communications functionalities including VoIP, instant messaging, and video, impacting not only the RBOCs and cable providers, but also VoIP providers like Vonage.¹³²

Even power companies have started to enter traditional wireline markets through the provision of Broadband over Power Line (“BPL”).¹³³ A final aspect of this new reality is that even offerings that were once considered to be local or regional in nature, such as answering and monitoring services, have become international in scope as technology has “flattened” the world.¹³⁴

In response to this competitive tsunami, wireline carriers are investing billions of dollars in competitive new broadband networks, and have begun

¹²⁶ BLAIR LEVIN ET AL., NET NEUTRALITY: VALUE CHAIN TUG OF WAR (Stiffel, Nicolaus & Co., Inc., 2006), available at <http://www.democraticmedia.org/PDFs/NNtugofwar.pdf>.

¹²⁷ See *Vonage Order*, supra note 34, ¶ 5.

¹²⁸ See Buckley, supra note 80.

¹²⁹ *In re Applications of SBC Communications, Inc. and AT&T Corporation For Consent To Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing License*, WC Docket No. 05-65, CompTel/ALTS Petition to Deny at 19 (filed Apr. 25, 2005) available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517584918.

¹³⁰ *Google Outflanks Microsoft with AOL Deal*, TODAY ONLINE, Dec. 22, 2005, <http://www.todayonline.com/articles/91502.asp>; see also Michael Liedtke, *Yahoo, Bell-South Team Up to Sell High-Speed Internet Access*, USA TODAY, Oct. 17, 2005, available at http://www.usatoday.com/tech/news/techpolicy/business/2005-10-17-yahoo-bell_x.htm?csp=34.

¹³¹ See Assoc. Press, *Philly Picks EarthLink for Wi-Fi*, Oct. 14, 2005, http://abclocal.go.com/wpvi/story?section=_tech&id=3497192.

¹³² See Legg Mason, *Yahoo-Microsoft Interoperability Agreement and the Rise of the P2PC* (Oct. 12, 2005).

¹³³ See *In re Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems; Carrier Current Systems, including Broadband over Power Line Systems*, Report and Order, 19 F.C.C.R. 21,265 (Oct. 14, 2004).

¹³⁴ See THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 48 (2005).

to offer their own versions of VoIP and broadband video.¹³⁵ These high-speed offerings include voice, video, data, and Internet access, and may ultimately be bundled with wireless services.¹³⁶

As a consequence, not only are LECs facing more intramodal competition, but also many value-creating opportunities have shifted from within the network to its edge.¹³⁷ The ability of the LECs to maintain a strong competitive position in the face of these developments—particularly competition from operators of more than one cable system, or Multiple System Operators (“MSOs”)—is uncertain. Even having made significant investments, wireline companies still face growing competition, technological innovation, and other market forces that will continue to pressure them to react by changing their rate structure such that voice becomes a “give-away,” minutes of use and network capacity are treated as a commodity, and wireline prices and profits are lowered accordingly.¹³⁸ These are the same types of pressures that wreaked havoc in the long distance market, and led to the demise of long distance carriers.¹³⁹

D. What’s Next?

Given that most of the predictions made in 1996 were misdirected and inaccurate,¹⁴⁰ it is very difficult to forecast with any certainty what the fu-

¹³⁵ Lorne Manly & Ken Belson, *Calling Out The Cable Guy*, N.Y. TIMES, Nov. 27, 2005, at 1. It is estimated that Verizon will spend \$22 billion and that AT&T will spend \$7 billion through 2010 on these networks. *Id.*

¹³⁶ *SBC Plans IPTV for Businesses*, LIGHT READING, Oct. 19, 2005, http://www.lightreading.com/document.asp?doc_id=82634&print=true; *see also IPTV Projects on All Things Supercomm*, EXCHANGE MAG., July 1, 2005, <http://www.xchangemag.com/articles/571supercomm1.html?wts=20060221094310&hc=97&req=IPTV+and+Projects+and+on+and+All+and+Things+and+Supercomm>.

¹³⁷ *See* Levin et al., *supra* note 126, at 5.

¹³⁸ Jeff Bertloucci, *Save a Bundle on Telecom Services*, KIPLINGER’S PERSONAL FINANCE, Feb. 2007, available at <http://www.kiplinger.com/magazine/archives/2007/02/cable.html> (discussing the savings achieved by customers when telephone and cable companies provide more than one service under the same bill); *Investors Hang Up on Cincinnati Bell*, BUS. WK., Feb. 20, 2007, http://www.businessweek.com/investor/content/feb2007/pi20070220_799626.htm?campaign_id=rss_null (demonstrating that despite the practice of bundling and lowering consumer prices, providers are still struggling to meet earnings expectations).

¹³⁹ *See Company News; Long-Distance Rate Drop Seen*, NYTIMES.COM, Oct. 25, 1986, <http://query.nytimes.com/gst/fullpage.html?res=9A0DE3D91F3FF936A15753C1A960948260> (discussing the reduction in long distance calling rates across the market); Chris Bucholtz, *Lowered Prices, Raised Fists: AT&T, MCI Drop Rates, But Local Companies Still Claim Foul Play*, TELEPHONY ONLINE, July 7, 1997, http://telephonyonline.com/mag/telecom_lowered_prices_raised/ (discussing rate reductions). *See also supra* Part II.A.

¹⁴⁰ Kelly M. Teal, *1996 Telecom Act Turns 10: Reflections on the Old, Predictions on the New*, NEW TELEPHONY, Feb. 8, 2006, <http://www.newtelephony.com/news/62h810492.html>.

ture holds for the telecommunications industry. Clearly, the regulatory and technological trends outlined herein will continue. Industry consolidation will also continue because it represents an appropriate response to the regulatory, competitive, and technological developments outlined above that have forced companies to choose between being relegated to becoming niche players and being truly global participants. This consolidation will take place both at the retail and wholesale carrier level. Likewise, competition and new entry will grow as non-traditional players such as Google, Yahoo, and Earthlink play a larger role. A broad array of new and existing entities have available the technology to offer consumers broad service choices and all on a single bill.

These are not the only changes to be expected. The FCC's approvals of the AT&T/SBC,¹⁴¹ Verizon/MCI,¹⁴² and Sprint/Nextel¹⁴³ mergers, and its *Wireline Broadband Order* and *NPRM*, and the orders and court decisions which predated them,¹⁴⁴ represent the final shift from regulatory support for intramodal competition to complete reliance on intermodal competition at a time when industry consolidation is accelerating and the distinctions among wireline, wireless, and cable services are blurring. According to Legg Mason, "[t]he paradigm envisioned by the 1996 Telecommunications Act is in its ninth inning and a new game is about to begin in earnest."¹⁴⁵

This sweeping policy change will be felt not only across the telecommunications industry, but also on Capitol Hill and in the states. Retail rate deregulation may prove to be inevitable as more and more offerings are classified as information services under Title I. Title I services are not subject to state regulation.¹⁴⁶ Thus, we can also anticipate seeing across-the-board changes in the application of state and local regulation.

If we are to avoid a repeat of the ruinous UNE-type regulatory wars that raged immediately after the 1996 Act became law, regulators and legisla-

¹⁴¹ *In re SBC Communications, Inc. and AT&T Corp.*; Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18,290 (Oct. 31, 2005).

¹⁴² *Verizon Merger Order*, *supra* note 13.

¹⁴³ *See Sprint/Nextel Merger Order*, *supra* note 13.

¹⁴⁴ These orders and cases include: *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*; *Internet Over Cable Declaratory Ruling*; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (Mar. 14, 2002) [hereinafter *Cable Modem Declaratory Ruling*]; *Nat'l Cable & Telecomms. Assn' v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967 (2005), *U.S. Telecom Ass'n v. FCC (USTA II)*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 U.S. 313 (2004); and the *Wireline Broadband Order*, *supra* note 9, ¶ 8.

¹⁴⁵ LEGG MASON, WASHINGTON TELECOM & MEDIA INSIDER 1 (2005).

¹⁴⁶ Information services are "free from state-imposed economic, public utility type regulation, consistent with the Commission's long-standing policy of non-regulation for information services." *Vonage Order*, *supra* note 34, n.118, *aff'd sub nom.* *Minn. Pub. Util. Comm'n. v. FCC*, Nos. 05-1069, 05-1122, 05-3114, 05-3118, 2007 WL 838938 (8th Cir. March 21, 2007).

tors must be guided by two principles. First, regulatory parity must exist among all multichannel video programming distributors (“MVPDs”),¹⁴⁷ particularly between LECs and cable companies. Second, competition must be encouraged, both at the edge of the network and across platforms, in order to mitigate the natural tendency of monopolies and oligopolies to hinder innovation.

There is, however, one issue that Congress must address above all others in order to foster the certainty that stimulates innovation and competition. That is, what is the actual scope of the FCC’s ancillary authority over Title I information services? The FCC is quickly moving forward to abandon its Title II regulation.¹⁴⁸ The uncertainty that surrounds the agency’s Title I authority has become problematic, breeding uncertainty that can lead to stifled innovation and dampened competition. One contrary court decision could undo much of what the FCC is seeking to achieve. The time has come for Congress to address the scope of the FCC’s Title I authority so as to avoid the regulatory gamesmanship of the past.

In *Brand X*, the Supreme Court stated that “the Commission remains free to impose *special regulatory duties on facilities-based ISPs* under its Title I ancillary jurisdiction.”¹⁴⁹ Based on this conclusion, the FCC has held that it “has [the] jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner.”¹⁵⁰

By contrast, in its *Broadcast Flag* decision, the D.C. Circuit noted that the Commission was acting in deference to the Supreme Court’s caution that “the ancillary jurisdiction test...[not be used] to confer ‘unbounded’ jurisdiction on the Commission,” and rejected FCC rules which the court deemed to “rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing.”¹⁵¹ Unfortunately, the Supreme Court majority in *Brand X* did not elaborate on what it meant by the term “special regulatory

¹⁴⁷ A multichannel video programming distributor is defined as “a person . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13) (2000).

¹⁴⁸ According to Justice Scalia, the FCC “has attempted to establish a whole new regime of non-regulation . . . through an implausible reading of the statute.” *Brand X*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting). If this turns out to be a policy misjudgment on the part of the FCC, undoing the mistake can take years. *See supra* Part II.A.

¹⁴⁹ *Id.* at 996 (emphasis added).

¹⁵⁰ *In re* Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities; Review Of Regulatory Requirements For Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision Of Enhanced Services; 1998 Biennial Regulatory Review—Review Of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access To The Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling, *Policy Statement*, 20 F.C.C.R. 14,986, ¶ 4 (Aug. 5, 2005).

¹⁵¹ *Am. Library Ass’n v. FCC (Broadcast Flag)*, 406 F.3d 689, 702–03 (D.C. Cir. 2005).

duties” or define the scope of the Commission’s ancillary authority. Moreover, as Justice Scalia noted in his dissent,

there is reason to doubt whether [the FCC] can use its Title I powers to impose common-carrier-like requirements since 47 U.S.C. § 153(44) specifically provides that a ‘telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services’ [], and ‘this chapter’ includes Titles I and II.¹⁵²

The Commission’s *CALEA Report and Order*¹⁵³ and the even more recent Court of Appeals decision affirming it over a strong dissent¹⁵⁴ demonstrate the problems that the FCC will face as it tries to rationalize its broadband decisions based on current law. In response to a post-September 11th Department of Justice petition, the FCC held that “providers of facilities-based broadband Internet access services and interconnected VoIP services” were subject to the Communications Assistance for Law Enforcement Act¹⁵⁵ even though “they are not telecommunications carriers as defined in the Communications Act.”¹⁵⁶ Although arguably in the public interest, the result was, at least at first glance, in conflict with FCC precedent which held that these were “information services” and, as a result, presumably not subject to CALEA by its very terms.¹⁵⁷ To avoid an “irreconcilable tension,” the Commission held that “a service classified as an ‘information service’ under the Communications Act may not, in all respects, be classified as an ‘information service’ under CALEA.”¹⁵⁸ The FCC reasoned that the definition of “telecommunications carrier” was broader, or at least different, under CALEA because it covered providers, such as broadband Internet access service providers, whose service “replac[e] . . . a substantial portion of the local exchange service.”¹⁵⁹ The Commission then went on to limit its ruling, determining that these providers had no CALEA obligations with respect to services such as Web-hosting or storage; only their switching and transmission components were subject to CALEA.¹⁶⁰

¹⁵² *Brand X*, 545 U.S. at 1005, 1014 (emphasis added) (Scalia, J., dissenting).

¹⁵³ *In re Commc’ns Assistance for Law Enforcement and Broadband Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,989 (Aug. 5, 2005) [hereinafter *CALEA Report and Order*].

¹⁵⁴ *Am. Council on Educ. v. FCC (CALEA Appeal Decision)*, 451 F.3d 226, 228 (D.C. Cir. 2006).

¹⁵⁵ Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. §§ 1001–1010 (2000).

¹⁵⁶ *CALEA Report and Order*, *supra* note 153, ¶¶ 8–9.

¹⁵⁷ “While CALEA’s substantive provisions apply to ‘telecommunications carrier[s],’ they do not apply to ‘information services.’” *CALEA Appeal Decision*, 451 F.3d at 228 (citing 47 U.S.C. § 1002(b)(2)(A)). See also *CALEA Report and Order*, *supra* note 153, ¶¶ 8–9.

¹⁵⁸ *CALEA Report and Order*, *supra* note 153, ¶ 18.

¹⁵⁹ *Id.* ¶ 27.

¹⁶⁰ *Id.* ¶ 38.

Although a majority of the Court of Appeals three-judge panel affirmed the FCC's decision as a reasonable policy choice under *Chevron*,¹⁶¹ in a well-reasoned dissent Senior Circuit Judge Edwards argued that "[i]n determining that broadband Internet providers are subject to CALEA as 'telecommunications carriers' and not excluded pursuant to the 'information services' exemption, the Commission apparently forgot to read the words of the statute . . . Broadband Internet is an 'information service' . . . [and] providers are exempt from the substantive provisions of CALEA."¹⁶² Asserting that the FCC's reasoning was "gobbledygook," Judge Edwards asserted that the FCC's interpretation of CALEA was at odds with the statutory interpretation, further noting that prior to the issuance of its Order, the Commission had consistently held that broadband Internet service was an "information service."¹⁶³ He accused the agency of "attempting to squeeze authority from a statute that does not give it."¹⁶⁴ If Justice Scalia and Judge Edwards are ultimately proven to be correct, the FCC could be left with little or no authority under Title I to address real problems.

The situation is even more complex because the FCC's decision to classify broadband Internet access services as "information services" not only raises questions regarding the FCC's jurisdiction but also that of the Federal Trade Commission ("FTC"). Common carrier services regulated under Title II are exempt from the FTC's jurisdiction, while information services are not.¹⁶⁵ In response to a Congressional inquiry, the Chairman of the FTC stated

[t]he FTC is the only federal agency with general jurisdiction over consumer protection and competition in most sectors of the economy, including broadband Internet access services. In particular, we consider the provision of cable-modem and DSL services generally to be subject to jurisdiction. The *Brand X* and the *Wireline Broadband Internet Access Order* support this view.¹⁶⁶

This jurisdictional debate must be resolved, as soon as possible, in the favor of the FCC as the expert agency if a new and even more sophisticated round of forum-shopping and regulatory confusion is to be prevented.

VoIP brings this issue front and center. VoIP is a broadband application that is dependent upon broadband Internet access, and its retail regulation may prove to be neither necessary nor warranted under Title II.¹⁶⁷ But, as

¹⁶¹ *CALEA Appeal Decision*, 451 F.3d at 232 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 834–45 (1984)).

¹⁶² *Id.* at 236 (Edwards, J. dissenting).

¹⁶³ *Id.* at 237.

¹⁶⁴ *Id.*

¹⁶⁵ Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address Before The Progress and Freedom Foundation's Aspen Summit (Aug. 21, 2006), at 4–6, *available at* <http://www.ftc.gov/speeches/majoras/060821pffaspenfinal.pdf>.

¹⁶⁶ *Id.* at 3.

¹⁶⁷ The FCC found that Pulver.com's Free World Dialup service was an information service. *In re* Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Nei-

indicated by the jurisdictional dispute between Minnesota and Vonage that led to the FCC's *Vonage Order*,¹⁶⁸ the states have a strong interest in maintaining some authority over VoIP services if for no other reason than to protect consumers.¹⁶⁹ If VoIP is deregulated, it will likely be difficult to justify the continued regulation of traditional retail wireline voice; inevitable deregulation may leave the voice consumer completely unprotected. The FCC may also face this conundrum outside the realm of voice, as convergence makes it technologically possible for unregulated entities to provide traditionally regulated services outside the regulatory scheme. This is why the FCC has stubbornly refused to address this issue. There is, however, a solution to this dilemma.

VoIP and voice deregulation should not be synonymous with regulatory abandonment. After all, as demonstrated by problems in the electricity sector, deregulation does not always work as expected.¹⁷⁰ The authority that the FCC has asserted over information services under Title I must be affirmed by statute.¹⁷¹ The FCC must be given the statutory authority to use Title I as a means to step in and address problems in this area as they develop. The FCC's approach to regulation under Title I should be rethought as well; otherwise the distinction between the titles will become meaningless. Instead of the more traditional "just and reasonable" analysis appropriate under Title II,¹⁷² the Commission's actions under Title I should be dictated by antitrust-type standards, and based on economic analysis.¹⁷³ To

ther Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 F.C.C.R. 3307, ¶ 1 (Feb. 12, 2004). In contrast, it preempted state regulation of Vonage's Digital Voice service but did not decide whether the offering was a telecommunications or information service. *Vonage Order*, *supra* note 34, ¶ 14.

¹⁶⁸ The FCC found that "multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states." *Vonage Order*, *supra* note 34, ¶ 14.

¹⁶⁹ See, e.g., News Release, Cal. Pub. Utils. Comm'n, PUC Commissioner Susan P. Kennedy: Track Blocking of Cell Phone Number Transfers, at 2 (Dec. 4, 2004) (noting that the state PUC is "the agency primarily responsible for consumer protection" in telecommunications issues) available at http://www.cpuc.ca.gov/word_pdf/NEWS_RELEASE/32162.pdf.

¹⁷⁰ See Edan Rotenberg, *Energy Efficiency in Regulated and Deregulated Markets*, 24 UCLA J. ENVTL L & POL'Y 259 (2006); Peter Navarro & Michael Shames, *Electricity Deregulation: Lessons Learned from California*, 24 ENERGY L.J. 33 (2003); Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Chaos of Energy Deregulation*, 26 ECOLOGY L.Q. 244 (1999).

¹⁷¹ See *Wireline Broadband Order*, *supra* note 9. See also James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOYOLA U. CHI. L.J. 16 (2003–2004) (discussing how a statutory rule on Internet interconnection will resolve the problem of Title I's inability to provide sufficient regulatory authority).

¹⁷² 47 U.S.C. § 201(b) (2000).

¹⁷³ As an ancillary matter, the time has come to increase the consumer protection role of state PUCs based on national guidelines so as to avoid the market disincentive of fifty different enforcement schemes. State PUCs tend to be the "first line of defense" for telecom-

some, this proposal represents a major change in this nation's regulatory philosophy, but it is one that is justified on the grounds of promoting competition across platforms through regulatory certainty in today's technologically converged environment.

III. CONCLUSION

At the beginning of this article, we noted that the telecommunications industry has reached a historic inflection point. An inflection is defined as a "change of curvature from convex to concave at a particular point on a curve."¹⁷⁴ The direction of the telecommunications industry has changed and it is of little merit to debate whether this change is for good or bad—it simply is! The question for all of us is how to move forward so as to ensure that there is still "available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."¹⁷⁵ Accomplishing this important goal in the new and dynamic telecommunications environment entails a careful balance of market considerations and regulatory certainty: Congress must affirm FCC authority to regulate information services and the FCC must be active in addressing new problems as they arise. The resultant regime will accomplish the quadruple task of enhancing competition, protecting consumers, avoiding regulatory uncertainty that paralyzed the industry in the past, and promoting new technologies. The Twenty-First Century telecommunications debate has been joined; it is our hope that this article contributes to this important discussion.

munications consumers and it makes sense to centralize consumer protection in these agencies. See Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 WASH. U. L.Q. 1 (2003).

¹⁷⁴ THE OXFORD ENGLISH DICTIONARY 938 (2d ed. 1989).

¹⁷⁵ 47 U.S.C. § 151.