PERSPECTIVES

PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

A Little Intellectual Honesty Please…

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In the case of *USTA v. FCC* (*USTA II*),[1] the D.C. Circuit eviscerated the Federal Communications Commission's unbundling rules promulgated pursuant to the Telecommunications Act of 1996. Despite several compelling arguments that this decision should be appealed to the United States Supreme Court, the Bush Administration instructed the Solicitor General to not seek *certiorari*, opting instead for having the FCC develop "clear national rules" that will "create regulatory stability in the telecommunications sector … [and] promote both competition and investment.[2]

> ***"[T]he Bells are in the process of raising their rates, and with USTA II remaining on the books, bigger increases lie ahead."***

The adverse impact of this decision on the prospects for telecoms competition and the U.S. economy (particularly residential consumers and small businesses) is, to put it mildly, *huge*. While the Bells have offered promises to the Administration that they would freeze UNE rates for the next six months to avoid any "marketplace disruption"[3] (*read: rates will not increase prior to the November election*), as one Wall Street Analyst noted, not only are the Bells generally of the mind-set that UNE-P goes away as of January 2, 2005" and that "[a]nything the FCC does now to constrain the Bells from a quick, clean UNE-P kill, or that places new burdens on them by improving the hot-cut process, will cause them to mount significant opposition", but also "there could be some devilish details that cause disputes" during the Bells' so-called voluntary moratorium.[4]

Indeed, Economics 101 tells us that the inevitable result will be that a monopolist can and will raise prices and restrict output – the *sine qua non* of market power and a policy outcome which is clearly antithetical to U.S. consumer welfare.[5] For this reason, we should not be surprised as press from around the country increasingly reports the obvious that the Bells are in the process of raising their rates,[6] and with *USTA II* remaining on the books, bigger increases lie ahead.

Equally as important, by raising wholesale rates for network elements, most "element dependent" entrants won't be able to stay in the market. While big industrial users won't be affected, this forced exodus of competitive choice is going to hit both the mass market and enterprise market hard, and deprive them of savings of over $10 billion a year.[7]

And, as firms exit the market, industry concentration will inevitably increase – an anathema to any self-respecting conservative.[8] For example, as the WALL STREET JOURNAL just reported, because the Bush Administration is allowing *USTA II* to stay on the books:

> MCI will be tempted to scale back or even exit its consumer phone business because costs will rise. That would make a deal

> [with a Bell] more likely, industry insiders say, because the local phone companies that are MCI's most likely buyers don't need its consumer business anyway, and antitrust authorities would be more apt to approve any merger without it.[9]

Finally, investment in new broadband facilities will go down, not up. Indeed, claims that current unbundling mandates discourage investment and competition are just *not* supported by the facts. To the contrary, not only has econometric research shown consistently that the *unbundling obligations have increased investment by both CLECs and ILECs,*[10] but no one has produced any econometric studies (of even marginal credibility) suggesting otherwise.[11]

But wait.

According to the Bush Administration, we need not be concerned because we are in "an era of rapidly changing new technologies like mobile wireless, high-speed fiber optics, and expanded broadband deployment" and therefore "negotiations are the best way to achieve a higher degree of market-based competition within the telecommunications industry."[12]

With all due respect, such a statement is nothing more than "techno-babble" and does not reflect an accurate picture of the state of competition and economic performance of the market. To the contrary, the incentives and ability for the incumbents to exercise their tremendous market power remain very real, and therefore responsible public policy must focus upon sound analysis over rhetoric when the FCC drafts its new rules if telecommunications competition is going to survive and, hopefully, thrive. If not, high phone bills and economic hardship lie ahead.

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Nobody is arguing this is going to be an easy task,[13] but as Justice Felix Frankfurter warned us over fifty years ago, we still cannot view telecoms "competition" in an "abstract, sterile way."[14] Accordingly, if we are going to take yet another bite at the apple in an attempt to draft sustainable rules,[15] then let's at least be intellectually honest about the basic economics of the business.

"Intermodal" Competition?

As noted above, many now argue that there is little need for broad unbundling rules to promote "intramodal" wireline competition because there is now a wide variety of "intermodal" competition from other distribution platforms. For example, according to Representative Fred Upton, Chairman of the powerful Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, the "stovepipe regulation perpetuated by the Telecommunications Act of 1996 needs to be revisited given the evolution in technology and the marketplace that was virtually unforeseen at the time of the Act's creation."[16]

"[T]he empirical evidence overwhelmingly indicates that so-called "intermodal" competition has no effect on Bell company strategic behavior."

However, the fact that two different products can do a similar task for some consumers some of the time is *irrelevant*. Instead, responsible public policy should focus on whether the use of one "intermodal" product will restrain

adequately the exercise of the incumbent Bell companies' market power.[17]

And guess what?

The Bells and their supporters have not produced a shred of evidence demonstrating that consumers view the very limited alternative distribution technologies or "intermodal" competition now available as close economic substitutes for the Bells' fixed line monopolies. To the contrary, the empirical evidence overwhelmingly indicates that so-called "intermodal" competition has no effect on Bell company strategic behavior.[18] Indeed, let's look at the facts:

Wireless:

Many people contend that wireless is a strong substitute for the Bells' fixed line monopolies.[19] However, while US consumers certainly love their cell phones, they simply do not view mobile telephony as a close substitute for their fixed line service. Not only has this point been proven empirically,[20] but Cingular's (*a.k.a.* SBC's and BellSouth's) economic expert for their proposed takeover of AT&T Wireless conceded this very fact when he testified under oath that:

> The relevant product market for the analysis of this transaction excludes wireline services. Although there is some competition between wireless and wireline service, it is not currently sufficient to conclude that a wireless-only product market is too small for antitrust analysis of this transaction. Specifically, consumer substitution from wireless to wireline would not be sufficient to make unprofitable a small but significant and non-transitory price increase by a hypothetical monopoly supplier of mobile wireless voice services. At the present time, wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market.[21]

Or, in layman's terms, as SBC President Ed Whitacre sums it up in clear Texas talk: *wireless is "not going to displace the wireline network. It's certainly going to be a big product, but it's never going to be the substitute. Reliability is one reason."*[22]

Equally as important, you can't have meaningful "intermodal" fixed/mobile competition when, in the glib words of BellSouth President Duane Ackerman, "That's okay. We tend to own both."[23] Indeed, as PHOENIX CENTER POLICY BULLETIN No. 11: *Higher Prices Expected from the Cingular/AT&T Wireless Merger*[24] clearly demonstrated, should the FCC approve the Cingular's proposed acquisition of AT&T Wireless, *then about 70% of wireless subscribers served by national wireless carriers will in the hands of the Bells.* Thus, it strains credulity to believe that the Bells' strategy is to have their wireline operations cannibalize their fixed line monopolies. (After all, why sell a customer one product when you can sell them two?) Accordingly, the inquiry should not be one of intermodal competition, but rather one of intermodal collusion.[25]

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Finally, let's also not forget that the Bells control several key inputs that non-Bell owned mobile carriers need to survive. The first obvious input remains termination costs, as the Bells still control over 80% of all access lines in the United States. Moreover, as demonstrated in PHOENIX CENTER POLICY PAPER NO. 18: *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*,[26] the Bells also have both the incentive and ability to exercise market power for special access services – a crucial input in getting the

traffic from the individual cell sites to the backbone.

VoIP:

Believe it or not, VoIP is not the competitive threat the Bells claim, but is instead their ultimate "straw man."

First and foremost, let's understand that the public Internet was never intended for voice traffic and, therefore, not only is VoIP over the public Internet an incredibly inefficient use of bandwidth, but relatively poor quality of service is part and parcel of the product. Perhaps a comment I found on an Internet bulletin board sums it up the best:

> "I have been using Vonage now for a little over a year and think the service is outstanding. I like being in control of my phone service and not having to deal with SBC. *Only real problem I have had is I get an echo on my side of the call, but I have gotten used to it.*"[27] (Emphasis supplied.)

Maybe it's just me, but this so-called praise for VoIP sounds like the analytical equivalent of "I bought a gorgeous mansion right near the train tracks really cheap, but I hardly hear the trains roar by anymore."

So what does this little anecdote tell us? Unless you are completely fed up with the Bells' monopolistic shenanigans as the commenter above apparently was, given such inherent QOS problems, most consumers are not going to be rushing out to use VoIP when traditional service is readily available.[28]

In contrast, for those companies willing to invest in "managed" VoIP services – *i.e.,* developing sophisticated backbone VoIP platforms that prevent inefficient "tunneling" and loss of bandwidth (and, by extension, poor QOS) – the Bells have convinced the FCC that this is still a "telecommunications service" and therefore they still have to pay the Bells their monopoly rents in the form of $15 billion dollars a year in access charges.[29] In so doing, the BOCs have effectively convinced the FCC to destroy any incentive for firms to invest in new VoIP broadband "facilities" that can compete on a true QOS basis with current products.

And don't assume that the battle will end here. Considering that (1) industry efforts to negotiate a comprehensive solution to solve inter-carrier compensation are currently dead in the water; and (2) technology exists (and is in use today) to monitor VoIP traffic over DSL and cable broadband connections, it is incredulous to think that somewhere, some how, these "fighting duopolists" are going to give up an annual revenue stream of $15 billion in monopoly rents in the form of some sort of access charge/subscriber line charge revenue.[30]

"[C]laims that so-called "intermodal" competition has any contestable effect on Bell company strategic behavior for "last mile" access are false. To the contrary, the Bells are now the dominant players in the "holy trinity" of the telecoms business – i.e., local, long distance and wireless, yet nobody seems to care."

Finally, we need to rememnber that VoIP is *not* a facility but only a *service* provided over a broadband facility. Thus, even if we assume *arguendo* that (a) people don't care about the QOS issue, (b) usage of VoIP over the public Internet explodes, and (c) VoIP over the public Internet drives every single long distance carrier out of the market, consumers only have a choice of two facilities-based broadband providers – the incumbent Bell monopolist or the incumbent cable operator. Accordingly, if policymakers start to accept the Bells' obfuscation of

broadband "facilities" versus "services" as a reason for premature de-regulation (and, therefore, the ultimate elimination of potential entry via unbundling), then the potential for a cable/Bell duopoly to either raise prices and/or restrict access for broadband access is very real.[31]

VoIP as a big threat to the Bells? I think they protest too much.

Broadband Powerline (BPL):

The prospect of broadband over electric utility power lines is indeed enticing and would be extremely beneficial for consumers.[32] There's only one hitch: while BPL trials are now underway, its deployment is *de minimis*.[33] Moreover, various regulatory hurdles – on both the telco and electric utility side – remain, further hindering widespread deployment.[34] As a result, while we wish it could be here, it isn't, and therefore BPL has no (and is unlikely to do so in the near term) contestable effect on Bell company behavior. If it did, it seems the FCC would have mentioned BPL at least once in its June 2004 Report on High Speed Data Access.[35]

Accordingly, claims that so-called "intermodal" competition has any contestable effect on Bell company strategic behavior for "last mile" access are false. To the contrary, the Bells are now the dominant players in the "holy trinity" of the telecoms business – *i.e.*, local, long distance and wireless, yet nobody seems to care.

Commercial Negotiations?

Some say that the Solicitor General's decision was the right move, because the various parties will be forced "to face each other across a negotiating table rather than a courtroom."[36] Indeed, as Verizon CEO Ivan Seidenberg recently testified in front of the Senate Commerce Committee, the SG's decision allows the industry to be "free of economic regulation and permit[s] markets to determine prices."[37]

Oh, if life was only so simple.

While we all would like to see a competitive market with an efficient equilibrium where supply equals demand and parties can act with Oliver Williamson's "bounded rationality"[38], we cannot escape the fact that a single supplier controls the "last mile" access that consumers use to originate and terminate their telephone calls, and that the economics of new entry are complex and difficult to overcome.[39] Contrary to the tele-utopian vision set forth by the Bells, therefore, so long as a huge asymmetrical bargaining power exists between the parties, it should come as no great shock to anyone that so-called arms'-length negotiations between monopolists and competitors will fail.

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An excellent case study of how the Bells' asymmetrical bargain power sabotages new entry can be found in the FCC's efforts to have the various parties "engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements"[40] such as switching.

Basically, deploying your own switch is only economically viable if all of your customers are located in a concentrated geographic area. As Vice President of Sage Telecom Robert W. McCausland, recently noted in the LOS ANGELES TIMES: "With customers spread out, Sage can't justify buying expensive switches and other gear...."[41] Moreover, as even the Bells concede, switching costs are sunk, and therefore not

easily recovered.[42] Equally as important, even if a CLEC attempts a strategy where it simply seeks "last mile" access and provides its own switching capability ("UNE-L"), then the Bells still maintain a *de facto* monopoly over "last mile" access and local transport.[43] For these reasons, several economists have criticized the viability of a business model that relies exclusively on UNE-L.[44]

Yet, despite these difficult challenges, a variety of CLECs are still willing to try to make a go out of UNE-L and call the Bells' hand.

For example, a coalition of several of the big facilities-based CLECs – including Allegiance, KMC Telecom, NewSouth Communications, NuVox Communications, XO Communications, Inc., and Xspedius Communications – proposed a long-term, five-year minimum, agreement, whereby the facilities-based CLECs will agree to pay negotiated prices for high capacity dedicated transmission facilities in exchange for guaranteed access to those dedicated facilities used primarily to serve small to medium sized business customers. Note, however, the goal is to serve business customers, not to serve mass market customers.[45]

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Similarly, AT&T – which, with its large mass market customer base, is more dependent on UNE-P but nonetheless has one of the most mature and comprehensive networks in the country – proposed a plan under which it would pay more for leasing the Bells' switches (UNE-P) in exchange for the Bells agreeing to lower the cost for using the local loop (UNE-L).[46] Several smaller CLECs such as, McLeodUSA, Talk America and Covad (who, as relatively new entrants, do not have extensive networks or client bases) back AT&T's proposal,[47] and FCC Chairman Michael Powell said AT&T's proposal represented a "significant and important" development.[48]

Rather than embrace these offers from CLECs who want to move to facilities-based competition, however, the Bells have rejected these offers out of hand.[49] But why? Isn't having CLECs deploy their own switching equipment exactly what the Bells professed they wanted?

Well, here's the real kicker: Press reports revealed that the Bells never wanted the CLECs to deploy their own switching equipment in the first instance. In fact, they tried to force the CLECs to use the BOCs' embedded facilities exclusively. Indeed, both SBC and Verizon are requiring that CLECs use their networks for nearly all of the CLECs' phone traffic, discouraging the CLECs from installing their own equipment and preventing them from leasing from other providers. As a result, the press reported that many talks with these incumbents died.[50] When push comes to shove, it seems the Bells prefer to keep CLECs' captive because they earn more on UNE-P than they would on UNE-L and, therefore, according to some Wall Street analysts, "appear firm in their opposition to any UNE-L strategy."[51]

What a bunch of anticompetitive hypocrites.

So Now What Do We Do?

Immediately after the Administration announced that it would not seek *certiorari* of *USTA II*, FCC Chairman Michael Powell held a press briefing where he expressed confidence

that the demise of the agency's wholesale rules will not undermine competition in the industry. According to Mr. Powell, "There is competition, there is going to be more competition, it's going to be better than what we had before, and I'll even go so far as to say: this isn't a prediction, it's a promise."[52] Given the preceding discussion, however, Mr. Powell's optimism seems a bit overreaching (if not outright disingenuous).

The incumbents are going to do every thing in their power (including playing in the political arena) to protect their huge margins, and therefore responsible public policy must recognize that that this is a serious game of *realpolitik* with firmly ensconced vertically and horizontally integrated monopolists. The economics are patent for all to see, the Supreme Court recognized this fact in each and every case it addressed arising under the 1996 Act,[53] and so should the FCC recognize this fact when it seeks to again write its unbundling rules.

Indeed, as the Supreme Court expressly stated in *Verizon*, the core purpose of the 1996 Act was *never* fundamentally about the de-regulation of incumbents or to encourage incumbent investments *per se* (although certainly an intended eventual consequence) but, as the Supreme Court observed, to "*reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers*".[54] Why? *Because market structure matters if good economic performance is ever to be produced.*[55]

Successful restructuring cannot be done on the "intellectual cheap" by citing to the miracle of technology[56] or eliminating the concept of "market power" from the public lexicon, however. Instead, while both sides to the debate may have legitimate arguments on individual items, great care and thought must be applied to develop a cohesive analytical framework to solve the problems of the day – something that has been glaringly absent from the dialectic over the past eight years. Let's hope that for this – and, because of the severe adverse impact *USTA II* has on the CLEC sector, probably last – time around, policymakers are intellectually honest and finally give these complex issues the due consideration they deserve.

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NOTES:

* **Lawrence J. Spiwak** ***is president of the Phoenix Center for Advanced Legal and Economic Public Policy Studies. The views expressed in this*** **PERSPECTIVE** ***do not represent the views of the Phoenix Center, its Adjunct Follows, or any if its individual Editorial Advisory Board Members.***

1 359 F.3rd 554 (D.C. Cir. 2004).

2 Press Release: Statement by acting NTIA Administrator Michael D. Gallagher on Solicitor General's decision not to appeal DC Circuit Court decision (9 June 2004).

3 *See* June 9 Letter from SBC President Edward Whitacre to FCC Chairman Michael Powell. For all of the Bells' letters to the FCC promising not to raise rates until after the election, *see* http://www.fcc.gov/commissioners/powell/letters/sg-decision060904.pdf.

4 LEGG MASON WASHINGTON TELECOM & MEDIA INSIDER, *FCC Phase Out of UNE-P Not so Simple* (14 June 2004).

5 *See, e.g.,* T. Randolph Beard, George S. Ford, and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER NO. 12, *Why ADCo? Why Now? An Economic Exploration into the Future of Industry Structure for the "Last Mile" in Local Telecommunications Markets*, (2001) (http://www.phoenix-center.org/pcpp/PCPP12.pdf); *reprinted in* 54 FED. COM. L. J. 421 (May 2002) (http://www.law.indiana.edu/fclj/pubs/v54/no3/spiwak.pdf) (under current market structure, the incumbents will always seek to sabotage).

6 *See, e.g., SBC Back For Another Try At Increasing Phone Rates*, BLOOMINGTON-NORMAL PANTAGRAPH (IL)(18 May 2004); Frank Norton, *Groups Worry About Soaring Phone Rates*, CHARLESTON POST & COURIER (SC) (18 May 2004); Nick Bunkley, *SBC Raises Rates, Pushes For Fee Hikes*, DETROIT NEWS (11 May2004); Todd Wallack, *PUC May Allow SBC to Raise Rivals' Rates*, SAN FRANCISCO CHRONICLE (04 May 2004); Beatrice E. Garcia, *Phone Rate Hike Decision Stands*, MIAMI HERALD (04 May 2004) (reporting that "Florida's utility regulators unanimously decided Monday not to reconsider a decision to let the three major phone companies in the state carry out a massive rate increase"); *Verizon Requests 70% Rate Boost*, SEATTLE POST-INTELLIGENCER (01 May 2004) (reporting that "Verizon Northwest has asked the state to approve a nearly 70 percent increase in the company's overall local telephone service rates").

7 PHOENIX CENTER POLICY BULLETIN NO. 8: *The $10 Billion Benefit of Unbundling: Consumer Surplus Gains from Competitive Pricing Innovations* (27 January 2004) (http://www.phoenix-center.org/PolicyBulletin/PCPB8Final.pdf).

8 Indeed, as Fredrich von Hayek – the Nobel prize-winning father of conservative and libertarian economics – warned nearly 60 years ago, an economic policy that deliberately facilitates the creation and maintenance of monopoly "will, in the end, defeat the potential for competition and deregulation because as monopolies become stronger, it is inevitable that people will become united in a general hostility to competition." And, further warned Hayek, "once competition continues to erode, then the only alternative to a return to competition is control of the monopolies to the state - a control that, if it is to be made effective, must become increasingly more complete and more detailed." F.A. Hayek, THE ROAD TO SERFDOM (University of Chicago Press, Fifth Anniversary Edition 1994) at 46-47.

9 Shawn Young, *Heard on the Street: With Shares Down, MCI Begins to Look Like a Buyout Target*, WALL STREET JOURNAL (14 June 2004).

10 PHOENIX CENTER POLICY BULLETIN NO. 5: *Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P* (Originally released 9 July 2003, updated 17 September 2003) (available at http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin5.pdf); PHOENIX CENTER POLICY BULLETIN NO. 6: *UNE-P Drives Bell Investment - A Synthesis Model* (17 September 2003) (available at: http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin6Final.pdf); G. S. Ford and M. D. Pelcovits, *Unbundling and Facilities-Based Entry by CLECs: Two Empirical Tests* (July 2002): www.telepolicy.com; T. R. Beard, R. B. Ekelund Jr., and G.S. Ford, *Pursuing Competition in Local Telephony: The Law and Economics of Unbundling and Impairment* (November 2002)(www.telepolicy.com); T. R. Beard, G. S. Ford, and T.M. Koutsky, *Mandated Access and the Make-or-Buy Decision: The Case of Local Telecommunications Competition* (December 2002) (www.telepolicy.com); R. D. Willig, W. H. Lehr, J. P. Bigelow, and S. B. Levinson, *Stimulating Investment and the Telecommunications Act of 1996*, Unpublished Manuscript (October 2002); K A. Hassett and L. J. Kotlikoff, *The Role of Competition in Stimulating Telecom Investment*, AEI PUBLICATION (October 2, 2002)

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(www.aei.org/publications/pubID.14873/pub_detail.asp). Hassett *et al.* (2002) perform a simulation rather than using actual data. *See also, Does Unbundling Really Discourage Facilities-Based Entry? An Econometric Examination of the Unbundled Local Switching Restriction*, Z-TEL POLICY PAPER NO. 4 (February 2002) (www.telepolicy.com); *Competition at the Crossroads: Can Public Utility Commissions Save Local Telephone Competition?*, Consumer Federation of America (October 2003) (http://www.consumerfed.org/pr10.07.03.html).

[11] R. B. Ekelund Jr. and G. S. Ford, *Innovation, Investment, and Unbundling: An Empirical Update*, 20 YALE JOURNAL ON REGULATION 383-388 (2003); G. S. Ford, *Do Unbundling Policies Discourage CLEC Facilities-Based Investment?* (Commenting on R. W. Crandall, A. T. Ingraham, and H. J. Singer, *Do Unbundling Policies Discourage CLEC Facilities-Based Investment*?) (available at www.telepolicy.com). *See also* Phoenix Center POLICY BULLETIN NO. 6, *id.*; PHOENIX CENTER POLICY BULLETIN NO. 7: *The Positive Effects of Competition on Employment in the Telecommunications Industry* (15 October 2003) (http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin7Final.pdf); Comments of Robert W. Crandall and Hal J. Singer to PHOENIX CENTER POLICY BULLETIN No. 7 (http://www.phoenix-center.org/critiques/CrandallSinger.pdf); A Response to Drs. Crandall and Singer (http://www.phoenix-center.org/critiques/CrandallResponse.pdf); Comments of Drs. Thomas Hazlett (the Manhattan Institute), Arthur Havenner (Univ. California - Davis), and Coleman Bazelon (HHB I) to Phoenix Center POLICY BULLETIN No. 5 (http://www.phoenix-center.org/PolicyBulletin/HazlettetalComments.pdf); R. Carter Hill Comments PHOENIX CENTER POLICY BULLETIN No. 5 (http://www.phoenix-center.org/PolicyBulletin/HillComments.pdf); Further Comments of Drs. Thomas Hazlett (the Manhattan Institute), Arthur Havenner (Univ. California - Davis), and Coleman Bazelon (Analysis Group) to PHOENIX CENTER POLICY BULLETIN No. 6 (HHB II) (http://www.phoenix-center.org/critiques/HHBII.pdf); A Response to Drs. Hazlett, Havenner and Bazelon (http://www.phoenix-center.org/critiques/ReplytoHHBII.pdf).

[12] *See* Gallagher Statement, *supra* n. 2.

[13] *See, e.g., Turner Broadcasting System, Inc., v. FCC*, 117 S. Ct. 1174, 1189 (1997) (regulatory schemes concerning telecommunications have "special significance" because of the "inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change"); *Denver Area Educational Telecommunications Consortium, Inc., v. FCC*, 116 S. Ct. 2374, 2385 (1996) (Court is "aware . . . of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, *see, e.g.,* Telecommunications Act of 1996 . . . ."); *Columbia Broadcasting, Inc v. Democratic National Committee*, 412 U.S. 94, 102, 93 S. Ct. 2080, 2086 (1973) ("The problems of regulation are rendered more difficult because the . . . industry is dynamic in terms of technological change"); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) ("Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects" of the telecommunications industry).

[14] *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).

[15] Scott Lanman, *Powell Says FCC Will Write New Local Phone Rules*, BLOOMBERG NEWS (10 June 2004).

[16] Drew Clark, *Lawmakers: Tech Convergence Demands Rethinking Of Rules,* TECHNOLOGY DAILY (19 May 2004).

[17] As an illustrative example, take the bus versus airplane analogy. Both provide transit over between cities, but few would argue that the competition between the two would be sufficient to constrain (or allow through merger) an airline monopoly. *But c.f.*, Barry M. Aarons, IPI POLICY REPORT # 175, *Don't Call – Just Send Me an E-mail: The New Competition for Traditional Telecom* (January 27, 2003) (providing anecdotal evidence to argue that because voice, instant messaging and e-mail provide "like" services", they are *a fortiori* close substitutes and are sufficient to mitigate the Bells' market power).

[18] PHOENIX CENTER POLICY BULLETIN No. 10, *Fixed-Mobile "Intermodal" Competition in Telecommunications: Fact or Fiction?* (30 March 2004) (http://www.phoenix-center.org/PolicyBulletin/PCPB10Final.pdf).

[19] *See, e.g.,* Mark Wigfield, *FCC's Abernathy: Court Won't Affect Phone Service Pricing*, DOW JONES NEWSWIRE (18 March 2004) (According to Abernathy, "What really drives [fixed-line] pricing is the competition from wireless").

[20] PHOENIX CENTER POLICY BULLETIN NO. 10: *Fixed-Mobile "Intermodal" Competition in Telecommunications: Fact or Fiction?* (30 March 2004) (http://www.phoenix-center.org/PolicyBulletin/PCPB10Final.pdf).

[21] *See* Declaration of Richard J. Gilbert at ¶ 44 (https://wireless2.fcc.gov/UlsEntry/attachments/attachmentView.jsp?).

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22 *A Wireless World,* BUSINESS WEEK (October 20, 2003).

23 *More Callers Cut off Second Phone Lines for Cellphones, Cable Modems,* WALL STREET JOURNAL B1 (Nov. 15 2001). (quoting Duane Ackerman, Chairman and CEO, BellSouth cynically observing that "Wireless substitution is now a fact. We tend to own both.").

24 http://www.phoenix-center.org/PolicyBulletin/PCPB11Final.pdf.

25 *See* B. D. Bernheim and M. D. Whinston, *Multimarket Contact and Collusive Behavior*, 21 Rand Journal of Economics 1990: 1-26; P. Parker and L. Roller, *Collusive Conduct in Duopolies: Multimarket Contact and Cross-Ownership in the Mobile Telephony Industry*" CEPR Discussion Paper 989 (1994); J. Scott, *Multimarket Contact Among Diversified Oligopolists*" 9 International Journal of Industrial Organization 1991: 225-238.

26 http://www.phoenix-center.org/pcpp/PCPP18.pdf.

27 BROADBANDREPORTS.COM (19 May 2004) (http://www.dslreports.com/comment/2410/43636).

28 *See, e.g.,* Tony Briggs, *Web Phones Nothing to Call Home About*, DAYTONA BEACH NEWS-JOURNAL (22 May 2004).

29 *In re Petition for Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt from Access Charges*, Memorandum and Order, FCC 04-97, ___ FCC Rcd ___ (rel. Released: April 21, 2004).

30 *See, e.g.,* Jonathan Krim, *Will Providers Provide Equally?* WASHINGTON POST (27 May 2004); Eric J. Savits, *Talk Gets Cheap*, BARRON'S ONLINE (24 May 2004)(broadband providers offering their own telephone service "could intentionally slow down packets from independent VoIP service providers, to force rivals to pay an extra fee to let the traffic flow through quickly enough to allow viable voice communication.").

31 *Id.*

32 *Is Entry into Telecoms the Right Strategy for Your Utility?* POWER ECONOMICS (1998).

33 William Glanz, *Electric Companies Begin Offering Broadband Service*, WASHINGTON TIMES (05 April 2004).

34 *See, e.g.,* PBS NIGHTLY BUSINESS REPORT, *High Speed Internet Users May Get a Charge out of Electric Power-lines* (9 April 2004).

35 http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf.

36 9 June 2004 Press Statement of USTA President and CEO Walter B. McCormick, Jr. (http://www.usta.org/news_releases.php?urh=home.news.nr2004_0609).

37 Written Testimony of Ivan Seidenberg, Chairman and Chief Executive Officer, Verizon Communications before the U.S. Senate Committee on Commerce, Science and Transportation (May 12, 2004) (http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85073&PROACTIVE_ID=cecdcbcbc7cec9c8cec5cecfcfcfc5cececbc7cfc9cbc6cecec5cf).

38 Oliver Williamson, THE ECONOMIC INSTITUTIONS OF CAPITALISM (The Free Press 1985).

39 *See* PHOENIX CENTER POLICY PAPER NO. 12, *supra* n. 5.

40 http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245631A1.pdf.

41 James S. Granelli, *Bells Now Aim for Rivals to Use Gear*, LOS ANGELES TIMES (07 May 2004).

42 *See* BELLSOUTH, SBC, QWEST AND VERIZON UNE FACT REPORT (April 2002) at B-1. Thus, for the D.C. Circuit to make such a ridiculous statement that, for example, there "appears to be no suggestion that mass market switches exhibit declining average costs in the relevant markets, or even that switches entail large sunk costs" as a rationale for eviscerating the FCC's unbundling rules is just plain ignorant. *United States Telecom Association v. FCC*, 359 F.3rd 554, 569 (D.C. Cir. 2004).

43 George S. Ford and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER SERIES NO. 18, *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets,* (July 2003) (http://www.phoenix-center.org/pcpp/PCPP18.pdf).

NOTES CONTINUED:

[44] *See Comments of Robert W. Crandall and Hal J. Singer to* PHOENIX CENTER POLICY BULLETIN No. 7 (http://www.phoenix-center.org/critiques/CrandallSinger.pdf); *A Response to Drs. Crandall and Singer* (http://www.phoenix-center.org/critiques/CrandallResponse.pdf).

[45] COMMUNICATIONS DAILY, *Facilities-Based CLECs Offer Proposal to ILECs* (07 May 2004).

[46] Griff Witte, *AT&T to Bid to End Phone Deadlock: Deal Offers Pricing Trade With Rivals*, WASHINGTON POST (April 29, 2004) at E01.

[47] *Covad and McLeodUSA Endorse Facilities-Based Competition*, CONVERGE NETWORK DIGEST (04 May 2004); Press Release: *Talk America Supports AT&T's Compromise Offer* (06 May 2004).

[48] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246686A1.pdf.

[49] *AT&T Proposes Limiting Phone Network Leasing*, REUTERS (29 April 2004).

[50] James S. Granelli, *Bells Now Aim for Rivals to Use Gear,* LOS ANGELES TIMES (7 May 2004). For example, the WALL STREET JOURNAL just reported that the terms of SBC's proposal to Talk America (a small company in Reston, Va., that sells bundled local and long-distance services), SBC would require Talk America to send 90% or more of its phone traffic to SBC's network instead of using its own equipment and not enter similar agreements with rival phone networks. Anne Marie Squeo, *SBC Dispute Undermines Move Toward Local Phone Competition*, WALL STREET JOURNAL (6 May 2004).

[51] LEGG MASON, *supra* n. 4.

[52] Mark Wigfield, *FCC to Begin Work on Interim Phone Rules*, DOW JONES NEWSWIRES (10 June 2004).

[53] *AT&T Corporation, et al., v. Iowa Utilities Board, et al.*, 525 U.S. 366 (1999); *Verizon v. FCC,* 535 U.S. 467 (2002); *Verizon Communications Inc., v. Law Offices of Curtis V. Trinko, LLP,* 124 S.Ct. 872 (2004).

[54] *Verizon v. FCC, id.*, 535 U.S. at 489; 122 S.Ct. at 1661 (2002); *see also Janet Reno et al. v. American Civil Liberties Union,* 117 S. Ct. 2329, 2337-38 (1997) (Telecommunications Act of 1996 was "an unusually important legislative enactment" because its "primary purpose was to reduce regulation and . . . to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting").

[55] *See generally Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, *reh'g denied*, 509 U.S. 940 (1993); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) ("Market structure offers a way to cut the inquiry [of potential, anticompetitive strategic vertical conduct] off at the pass . . . ."). *See also* F.M. Scherer & David Ross, Industrial Market Structure and Economic Performances (3d ed. 1990) (despite antitrust's focus on structural measures such as the HHI, economic concentration is only one aspect of market structure; other relevant features of market structure include product differentiation, barriers to entry, cost structures, vertical integration, and diversification).

[56] *See supra* nn. 2, 16 & 19.

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