Broadband Deregulation—Similar Legislation, Different Results: A Comparative Look at the United States and the European Union

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I. BACKGROUND

The Telecommunications Act of 1996 (Act) promised broad deregulation and increased competition for the benefit of retail and commercial consumers in all sectors of the telecommunications market, be it traditional voice services or more advanced digital services, with the advent of broadband access.[1] In 1996, the European Union (EU) was struggling with its own array of nationalized PTT's well in need of modernization and entry into the brave new competitive world.[2] The EU addressed this similar problem with its own legislation requiring that the markets become fully deregulated by 1998 pursuant to article 86 of the Treaty of Nice (EC Treaty).[3] Since 1996, the United States has seen little growth in competition in the telecommunications market, particularly broadband, and the former Baby Bells of the AT & T breakup have regrouped to only three major operators controlling the majority of copper and fiber lines within the United States.[4] This situation has lead to stagnant monopoly rates and innovation, and a duopolistic market shared with the cable operators.[5] Issues such as Net Neutrality are the

1. H.R. REP. NO. 104-204, pt. 1, at 1 (1995); S. REP. NO. 104-23, at 1-2 (1995). Both reports state within the preamble sections that the primary goal of the Telecommunications Act of 1996 was to promote less regulation, more advanced telecommunications services, and increased competition.

2. PTT is the common term used to identify the former European state-nationalized organizations that delivered the three services of postal, telephone, and telegraph communications and have mostly since been broken up into the three divergent services.

3. Commission Directive 96/19 1996 O.J. (L 74)(EC). EC Treaty article 86 effectively subjects the former state-owned monopolies to EC competition law imposed on all other open market activities, thereby forcing them to be denationalized and surrender a portion of their monopoly.

4. FCC INDUS. ANALYSIS & TECH. DIV.—WIRELINE COMPETITION BUREAU, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2005, at 3 (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf [hereinafter FCC INDUS. ANALYSIS]; OECD Broadband Statistics to June 2006, http://www.oecd.org/document/9/0,2340, en_2649_34225_37529673_1_1_1_1,00.html.

5. *See* FCC INDUS. ANALYSIS, *supra* note 4 (stating that most markets have only two choices, the incumbent telephone company or the incumbent cable operator); *see also* Robert X.

consequences of this lack of competition.[6] On the other side of the Atlantic, several of the EU member states have gone to great lengths to deregulate their markets and have seen significant increases in retail and business competition along with construction of some of the most advanced telecommunications networks in the world. Part I of this Article will look at the evolution and the current status of the EU and U.S. markets. Part II examines why the two systems arrived at such significantly different results, provides some recommendations for what, if anything, can be done to right the telecoms market, and predicts what will happen in the event of continued government inaction.

A. Brief History of U.S. and European Telecommunications Markets

1. United States

Modern U.S. telecommunications history begins with the 1984 Department of Justice antitrust consent decree separating AT & T into the Regional Bell Operating Companies (RBOCs) and a long distance provider.[7] The divestiture resulted from the perseverance of MCI who argued that AT & T, an admitted monopolist, had never been legally granted this right and, therefore, was in clear violation of the Sherman Act.[8] At the time of the lawsuit, MCI was attempting to offer long distance services and interconnect with the AT & T network, while AT & T countered with regulatory, procedural devices to implement cross-subsidization and predatory pricing in order to keep MCI out of the relevant markets.[9] At the time of divestiture in 1984, the market was operating under the 1934 Telecommunications Act, which by 1995 had reached its limits relative to the evolutions of the market.[10] Congress responded to the demands for an overhaul and passed the 1996

Cringley, *Beyond Net Neutrality*, THE PULPIT, Apr. 6, 2007, http://www.pbs.org/cringely/pulpit/2007/pulpit_20070406_001906.html ("In the end the ISPs are going to win [the Net Neutrality] battle . . . . The only thing that will keep them from doing that is competition.").

6. *See generally* Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS 34 (2007), *available at* http://ssrn.com/abstract=1014691.

7. *A Brief History: The Bell System* (2006), http://www.att.com/history/history3.html.

8. WILLIAM J. BYRNES, TELECOMMUNICATIONS REGULATION: SOMETHING OLD AND SOMETHING NEW, THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996, at 39-40 (1999); *see also* MCI Commc'ns Corp. v. AT & T, 462 F. Supp. 1072 (N.D. Ill. 1978) (describing MCI's private antitrust action which prompted the DOJ to start their own action against AT & T).

9. BYRNES, *supra* note 8, at 39-40. AT & T engaged in the practice of predatory pricing in markets in which competition had developed and subsidized their losses with higher market prices in those markets where AT & T had an absolute monopoly.

10. *Id.* at 49-50.

Telecommunications Act intending to radically change the competitive landscape of the telecommunications market.

Around the same time, researchers were developing technologies that would create a new life for the twisted pair copper wires running into almost every American business and home.[11] Dubbed Discrete Multitone (DMT) at the time, and now better known as Digital Subscriber Line (DSL), this new technology would allow a user to achieve speeds of theoretically six megabits per second in 1993, and today a technically and commercially viable twenty-eight megabits per second.[12]

Today, DSL accounts for nearly fifty percent of the total broadband lines within the United States and cable accounts for nearly the same. Ownership and provision of service over the lines remain firmly in the hands of the incumbent telephone and cable operators in business before the Act.[13]

2. The European Union

The European Union member states traditionally held that telecommunications services were essential services and therefore, best provided by the state.[14] Each state had a single, nationalized system subject to rigid tarification and telephone calling that was billed for local and long distance calling.[15] Internet access also remained costly during the dial-up period when most retail access was done over a 56k modem requiring a local call. The user was therefore subject to double tarification through local call tolls as well as ISP access.[16] France, a country which has always prided itself on its advanced telecommunications network, invented the Minitel system (still in use today) jointly with

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11. Most residential locations within Europe and the United States are connected to the telephone companies by a very thin strand of wires called an unshielded twisted pair, or UTP, once thought capable of only carrying basic voice and data transmissions.

12. John Cioffi, *The Great Minds, Great Ideas Project: Bell Labs Laughed at the Idea of Broadband Over Phone Lines—The Need for Speed*, EE TIMES, 2004, http://www.eetimes.com/disruption/essays/cioffi.jhtml; *see also* French ISP Free Telecom, http://adsl.free.fr/offre (last visited Nov. 19, 2007) (offering 28 Mb/s bandwidth to residential customers on completely unbundled local loops).

13. FCC INDUS. ANALYSIS, *supra* note 4, tbl.16.

14. HERBERT UNGERER, TELECOMMUNICATIONS IN EUROPE—FREE CHOICE FOR THE USER IN EUROPE'S 1992 MARKET 30 (1988).

15. *Id.* at 26-28.

16. ISP—Internet Service Provider. ISPs handle the routing of Internet traffic generally from their customers to the rest of the webbed network known as the Internet. Every computer on the Internet must be connected to an ISP somewhere before they are able to access other machines within the Internet network. As a general term, ISP can apply to businesses that specialize in Internet traffic or, more recently, the cable and telephone companies who have added the service of being an ISP for the customers though vertical integration.

French Telecom, pre-dating the Internet as it is today by almost twenty years.[17]

Development and regulation of the networks within the member states occurred largely on a national scale with a focus on universal provision of service.[18] In the mid-1980s, the EU recognized the economic importance of information services and the convergence of basic telephone services with more advanced data and media services.[19] Moreover, the European Commission grew concerned about increasing competition from the U.S. and Japanese markets, and determined that the only way to compete was through unification of the national regulatory schemes and opening the markets to competition.[20]

B. Deregulation on Both Sides of the Atlantic

1. EU Deregulation 1996

In 1996, the European Union Commission took a major step in telecommunications deregulation with the Full Competition Directive pursuant to its powers under article 86 of the EC Treaty.[21] The directive required the opening of all member states' telecommunications markets by the beginning of 1998 and created interconnection guidelines similar to those of the United States.[22]

a. Prior to 2002

Shortly after the passage of the Full Competition Directive, the EU Commission published a green paper[23] intended to inspire preemptive policy changes due to the convergence of services offered over

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17. James Arnold, *France's Minitel: 20 Years Young*, BBC NEWS, May 14, 2003, http://news.bbc.co.uk/2/hi/business/3012769.stm.

18. UNGERER, *supra* note 14, at 33.

19. *Commission Green Paper of the Development of Common Market for Telecommunications Services and Equipment, Towards a Dynamic European Economy*, at 4, COM (1987) 290 final (June 30, 1987). The Commission stated with emphasis that emerging telecommunications technology would "have a major impact on the future tradeability of services in general and on the location of economic activities."

20. *Id.* at 10-11. The Commission identified four major areas where national regulatory schemes were in agreement, notably the opening of markets to competition and recognizing that it "may involve complex problems of regulation."

21. TELECOMMUNICATIONS LAWS IN EUROPE 10 (Joachim Scherer, ed., 5th ed. 2005).

22. *Id.* at 10-11.

23. "Green papers are discussion papers published by the Commission on a specific policy area." European Union Documents—Documents of Individual Institutions, http://europa.eu/documents/comm/index_en.htm (last visited Nov. 19, 2007).

telecommunications including banking, retail sales, and VoIP.[24] Perhaps most importantly, the Commission noted the Internet and its large potential for impact on the local and global economies.[25]

The Commission responded to the conclusions of market convergence in the telecommunications green paper and developed the 1999 Review, published in 2000, which influenced the regulatory package released in a series of directives by the Commission in 2002.[26] The goals set out in the Review were centered on increased competition, limited yet targeted regulation, and uniformity in the implementation of policies.[27] The Review also proposed to consolidate twenty different directives covering wireless, cable, satellite, and traditional telecommunications in order to regulate under a more coherent scheme.[28]

b. Post-2002 Regulation

As a result of the Convergence green paper and the 1999 Review, the Commission overhauled the regulatory framework producing four new directives: Framework Directive, Access Directive, Authorisation Directive, and Universal Service Directive, which were to be transposed into local member state law by July 24th, 2003.[29] The pertinent sections of the Framework Directive and Access Directive are discussed in the following subsections.

i. Framework Directive

The Framework Directive defines the basic principles served by the subordinate directives implementing the regulatory scheme.[30] These basic principles ensure that the National Regulatory Agencies (NRAs) are harmonized in their implementation of the scheme and tie in the

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24. *Commission Green Paper on the Convergence of the Telecommunications, Media, and Information Technology Sectors, and the Implications for Regulation Towards an Information Society Approach*, at ii, COM (1997) 623 final (1997) [hereinafter *Green Paper on Convergence of Telecommunications*]; *see* 47 C.F.R. 9.3, 9.5 (2000) (defining VoIP).

25. *See* 47 C.F.R. 9.3, 9.5 (2000); *Green Paper on Convergence of Telecommunications*, *supra* note 24.

26. *Commission Report, Towards a New Framework for Electronic Communications Infrastructure and Associated Services*, COM (1999) 539 final (Nov. 10, 1999).

27. *Id.* at 15-17.

28. *Id.*

29. Framework Directive, Council Directive 2002/21, 2002 O.J. (L 108/33)(EC) [hereinafter Framework Directive]; Access Directive, Council Directive 2002/19, 2002 O.J. (L 108/7)(EC) [hereinafter Access Directive]; Authorisation Directive, Council Directive 2002/19, 2002 O.J. (L 108/21)(EC); Universal Service Directive, Council Directive 2002/22, 2002 O.J. (L 108/51)(EC).

30. Framework Directive, *supra* note 29.

importance of relying on competition law (EU Antitrust law) to define the appropriate markets and identify Significant Market Power (SMP).[31]

Article 8 of the Framework Directive defines the overall policy to be implemented by the NRAs. The article details a nonexhaustive list of goals to be achieved, notably a "maximum benefit in terms of choice, price, and quality . . . ensuring that there is no distortion or restriction of competition in the electronic communications sector; [and] encouraging efficient investment in infrastructure, and promoting innovation."[32] The General Provisions of the Directive establish the antitrust principles that define how the market should be regulated. Specifically, article 14 defines SMP as either individual or joint dominance that has the effect of allowing the entity or entities to behave "independently of competitors, customers, and ultimately consumers."[33] Following article 14 is a series of articles grounded in EU Antitrust law with respect to Market Definition (article 15) and Market Analysis Procedure (article 16) in order to ensure that EU competition guidelines are applied uniformly within the member States.[34] The Access Directive follows from the Framework Directive in defining how the NRAs are to approach breaking monopolies and encouraging competition.

ii. Access Directive

Article 1 of the Access Directive establishes the binding authority of the NRAs over the regulation of access and interconnection to the networks within a Member State's territory.[35] The Access Directive relates primarily to operators who have been objectively identified under antitrust principles as having SMP already, or at risk of gaining SMP.[36] The Directive gives the NRAs the power to review the market according to the Framework Directive, to impose obligations upon any SMP identified, and to withdraw these obligations once the SMP has been curtailed by effective competition.[37] If an operator has been identified as an SMP within a market, the NRA has the authority to impose the obligations circumscribed by the Commission in articles 9 through 13.[38] NRAs are allowed to impose conditions outside of the bounds of the directive, however, in the interest of consistency for the overall EU

31. *Id.* art. 1, § 14.
32. *Id.* art. 8.
33. *Id.* art. 8, § 2.
34. *Id.* arts. 15-16.
35. Access Directive, *supra* note 29, art. 1.
36. *Id.* art. 8.
37. *Id.*
38. *Id.*

regulatory scheme, the Commission has the final word.[39] Article 12, specific to competitor access to unbundled network elements (UNEs),[40] privileges facilities-based competition identifying access to the local loop and access to indispensable protocols separately.[41] Where the local monopoly has maintained its foothold on the market and competition remains limited, the EU will grant an NRA more liberal measures than defined in article 12 to curtail the monopoly.[42] In a recent application of this derogation authority, the Commission endorsed Germany's plan to allow UNE-P or bitstream access to an array of the incumbent's, Deutsche Telekom's, network elements at the protocol level.[43] Deutsche Telekom took a proactive approach to maintaining its market share through political lobbying of the German NRA, predatory pricing, and more importantly, aggressive development of highly advanced services such as VDSL, which is capable of speeds of fifty megabits/second.[44] The German market had been one of the last of the Western European markets to truly open access to the incumbent's network and, therefore, a particularly heavy obligation was placed on their network.

c. France—A Sample Transposition (French Regulation)

As EU directives are generally not directly binding law, they must be transposed into a member state's local law, which gives the state some latitude on the implementation. France is on the forefront as one of the most competitive broadband markets in the world after the partial denationalization of France Telecom (FT) as dictated by the European Treaty. The transposition resulted in a major overhaul of France's Code des Postes et Télécommunications as of July 2004 to implement the

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39. *Id.*

40. UNE is a generic term used often by both European and U.S. telecommunications regulators and market actors. It applies to any point on the network where a service provider may connect to an existing, usually the incumbent's, network. It may be simply a telephone switch connecting a retail customer's phone line with the telephone company, a high-speed line connecting one ISP to another, or access to the DSL modem for third-party provision of Internet services in place of the incumbent telephone provider.

41. *Id.* art. 12. Simple unbundled access to the local loop, whether twisted copper pair, fiber optic, or cable, would be deemed UNE-L, or a facilities based implementation. The EU countries have generally favored this type of competition in the interest of promoting new technologies. UNE-P, or platform based competition, is based on access to certain equipment and protocols such as DSL and its variants, SDSL, VDSL, etc. *Id.*

42. *Id.*

43. *Id.*

44. *See EC Endorses Access of New Market Entrants to Deutsche Telekom's Broadband Networks*, IHS, Sept. 14, 2006, http://electronics.ihs.com/news/2006/eu-en-german-broadband-competition.htm?WBCMODE=PresentationUnpubl [hereinafter *United Kingdom and German*].

European Union-wide changes.[45] Consistent with EU objectives, article L. 32-1 defines the goals as, inter alia, real competition for the benefit of the consumers, innovation and investment in the infrastructure, and nondiscriminatory access to all consumers.[46] As a fundamental change to the code, the term "telecommunication" was changed to the more general term "electronic communications."[47] In other words, any signal that passes over a given network would be covered by the regulation regardless of the content (voice, television, Internet) transmitted.[48]

Article 11 (article L. 34-8) reestablishes the rules of interconnection between electronic communication providers and requires that the contracts be negotiated as private contracts between private parties.[49] However, in the event that the French NRA determines that interconnection is indispensable to achieve the objectives of article L. 32-1, it may impose certain contractual conditions either on its own accord, or via advisory from the antitrust commission.[50] Similar to section 252 of the United States Telecommunications Act of 1996, discussed in Part I.B.2. of this Article, article L. 34-8 also allows for regulatory authority intervention in the event of either failure of contractual negotiations or alleged breach of contract.[51] Under the Code, the regulatory Commission may then fix the technical and financial conditions, however the network operator may be relieved of interconnection obligations if reasonable technical or financial justifications are asserted.[52]

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45. Law No. 2004-669 of July 9, 2004, *Loi relative aux communications électronique et aux services de communication audiovisuelle* [*Law on Electronic Communications and Audiovisual Communication Services*], J.O., July 10, 2004 (Fr.), *available at* http://www.arcep.fr/fileadmin/reprise/lois/Loi-ce-090704.pdf [hereinafter *Law on Electronic Communications*].

46. *See* CODE DES POSTES ET TÉLÉCOMMUNICATIONS art. L 32-1, § II (1)-(14), *available at* http://translate.google.com/translate?hl=en&sl=fr&u=http://www.lexinter.net/servpub/code_des_postes_et_telecommunications.htm&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dcode%2Bdes%2Bpostes%2Bet%2Btelecommunications%26hl%3Den%26sa%3DG (last visited Nov. 10, 2007).

47. Law No. 2004-669 of July 9, 2004, J.O., 2004 (Fr.).

48. *See id.* art. 2 (modifying CODE DES POSTES ET TÉLÉCOMMUNICATIONS art. L. 32 to define electronic communications as emissions, transmissions or sign receptions, of signals, writings, images, or sound, by way of an electromagnetic path).

49. ARCEP, Decision 06-0044 of Jan. 10, 2006, pp. 4-5, *available at* http://www.arcep.fr/index.php?id=recherchedecisions&L=1 (insert "06-0044" in "Number of decision or opinion" field).

50. *Law on Electronic Communications*, *supra* note 45, art. 11.

51. *Id.* (modifying art. L. 34-8(a) to state that under article 10, the French NRA (ARCEP) must respond to article L. 36-8 dispute resolution requests within four months).

52. *Id.* (modifying art. L. 34-8(b)).

After the transposition of the 2002 EU directives, the ARCEP, formerly ART,[53] issued a decision reiterating FT's significant market position and the obligations that would be imposed under the new regulatory scheme.[54] Despite the 2002 EU Directives, France's deregulation policies had been moving forward since 1998 under the ART, now renamed the ARCEP. Under the regulatory scheme for broadband access, the ARCEP has affirmed three primary entrance mechanisms for competitors, options 1, 3, and 5.[55] Option 1 provides a tariff structure for UNE-P[56] access, meaning the incumbent, FT, provides the hardware at the local loop and backhaul services to the ISP, where the ISP provides Internet access only.[57] Option 3 allows ISP and other network providers to handle both Internet access and backhaul services[58] with France Telecom handling the local loop access point.[59] Finally, Option 5 allows for total unbundling of the local loop, either partial (FT continues voice service), or total (competitor takes complete control of consumers connection). Under the pre-2004 regulatory scheme, FT had reintegrated its ISP subsidiary Wanadoo, however, in light of the strong implications of antitrust principles in the new law, and from the antitrust Commission's recommendations, FT is now required to maintain separate accounting books for the two services.[60]

In the ARCEP's Decision 05-0277, the Commission recognized the importance of facilities-based competition, UNE-L, and chose to privilege this through incentives relative to the unbundling of the local

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53. Autorité de Régulation des Communications Électroniques et des Postes, www.art-telecom.fr (last visited Nov. 19, 2007). ART renamed the ARCEP by Law No. 2004-669 of July 9, 2004.

54. ARCEP, *supra* note 49, at 4.

55. ARCEP, Notice 03-1298 (Dec. 9, 2003), *available at* http://www.arcep.fr/index.php?id=recherchedecisions&L=1 (insert "03-1298" into "Number of decision or opinion" field) [hereinafter ARCEP Notice].

56. UNE-P uses the existing infrastructure of the incumbent telecommunications provider and generally the retailer resells the telecommunications service as a middleman. UNE-P has become far less favorable more recently as it has no real chance of creating a competitive market and can only be a crutch for emerging market players to develop a revenue stream such that the competitor can finance their own facilities and participate in UNE-L. *See* discussion *infra* Part II.C.

57. ARCEP Notice, *supra* note 55.

58. Backhaul Services are telecommunications infrastructure services to connect for example a residential set of DSL lines back to the ISP or other telecommunications carrier. These would generally be used by commercial ISPs to route their customer traffic back to the ISP and on to their own Internet connection.

59. ARCEP Notice, *supra* note 55.

60. ARCEP, Decision 05-0277 of May 19, 2005 (noting a strong risk with respect to horizontal and vertical integration for predatory pricing, cross-subsidizing, and price squeezes).

loop.[61] The Commission also stated its awareness that UNE-P based initiatives were subject to be criticized as an artificially competitive market, and, therefore, the future was in the UNE-L competition.[62] Despite this realization, the Commission chose to not alter the existing UNE-P market to avoid "[destabilization vis-à-vis technical implementation and economic and commercial interests of the market players and their business models]."[63] The Commission stated that FT would be obligated to create an offer to competitors to move them off of UNE-P to a UNE-L based agreement under the general goals of art. L. 32-1 and art. 38 of the Code des Postes et Télécommunications.[64] The result of the French NRA's regulation is assessed following the discussion of the U.S. regulatory activities.

2. United States—1996 Telecommunications Act and FCC Regulation

Since the 1970s the FCC has distinguished between standard telecommunications and value-added "information services," concluding that the two merited slightly different regulatory schemes. The goal of this differentiation recognized the general natural monopoly of telecommunications provisions, and the competitive aspects of data and information processing.[65] The initial period of the diverging scheme is referred to as *Computer I*, in which transmission of data fell under general telecommunications regulation (Title I) and actual processing of data remained exempt from a common carrier status (Title II).[66] The goal of any network service provider (telephone, data, etc.) who may come within the purview of the Telecommunications Act, whether that of 1934

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61. *Id.* art. II-A-2-a. UNE-L requires that the competitor build at least some of its own facilities rather than using the existing infrastructure of the incumbent carrier. Generally speaking a UNE-L facilities-based competitor would only use what is known as the "last mile" of the incumbent's cabling to the end customer and, therefore, would provide the modems and other hardware necessary to provide the telecommunications service.

62. *Id.* art. II-A-2-a, e. Facilities-based competition through unbundling of the local loop is a necessary condition of a fluid market and true dynamic competition on the merits.

63. *Id.*

64. *Id.* art. II-A-2-e. The Commission based its decision on reasons for which obligations can be placed on an actor with SMP under CODE DES POSTES ET TÉLÉCOMMUNICATIONS article 38(V)(a)-(b), (d), and more notably, article 38(V)(d), providing for the necessity to preserve sustainable competition.

65. Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 262, 264-65 (2005).

66. *See id.* at 263-65. Services classified under the "information services" category are referred to as being under Title I regulations of the Telecommunications Act of 1934, while those which are considered "common carrier" are Title II of the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996.

or as revised in 1996, is to avoid what is known as Title II regulation which is considered "telecommunications"/"common carrier" regulation.[67] Title I regulation under the Act, known as "information services" regulation, is in fact very little regulation at all and does not carry with it obligations of service or tariff regulation.[68] Therefore, a service regulated under Title I has free rein over to whom the services are provided and at what price. Given the disparity between these two regimes, the FCC and market actors have struggled to place services in their proper category, leading to a series of "Computer X" phases in U.S. Telecommunications regulation.[69]

In the beginning of 1980, *Computer II* followed up to the divestiture of AT & T, in which AT & T was required to separate its data processing services into independent subsidiaries and provide basic data transmission services to competitors on a nondiscriminatory basis with respect to its subsidiaries.[70]

Since the passage of The Telecommunications Act of 1996 (the Act), and with converging technologies providing essentially the same services, some covered under the Act and some not, the FCC has issued a number of rule-making orders in an attempt to reconcile congressional intent with reality.

a. The Act

The Telecommunications Act of 1996 contains a few key provisions that relate to opening the local broadband markets to competition, namely sections 10, 251, 252, and 706.[71] Contrary to the EU directives, the Act may impose obligations on all telecommunications carriers[72]. However, the obligations may be waived in the event that a carrier meets the substantive requirements of parts (a) and (b) and follows the forbearance procedure of section (c) as defined in section 10 of Title I.[73] Section 10(b) relates specifically to the FCC's finding that forbearance

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67. Christian R. Eriksen, Note, *Cable Broadband: Did the Ninth Circuit Beat the FCC to the Punch in Last Mile Regulation?*, 6 TUL. J. TECH. & INTELL. PROP. 283, 291 (2004) ("This classification brought with it the common carrier obligations that cable companies where seeking to avoid in the first place.").

68. Reiter, *supra* note 65, at 262.

69. *Id.* at 263-65.

70. *Id.* at 265.

71. Telecommunications Act of 1996, 47 U.S.C. § 253 (2000).

72. *Id.* § 3(44). A telecommunications carrier is any carrier offering telecommunications services. *Id.* § 3(46). The distinction of carriers with a de facto monopoly position within the local markets are covered under § 271 which deals with special obligations relating to the Bell Operating Companies (BOC's) referred to here under their commonly accepted acronym ILEC.

73. *Id.* § 10.

will promote competition within a given market and should apply to emerging competitors and, in the event that it were to ever happen, to an ILEC who has lost a dominant position within a market.[74]

Notwithstanding the forbearance provisions of section 10, section 251 of the Act details the interconnection requirements for telecommunications carriers, special obligations for ILECs, as well as the obligations to unbundle necessary network elements such as local loops, backhaul, transmission services, and any other identifiable network element. Section 251 has been the source of a significant amount of dispute and litigation between the ILECs, CLECs, and the FCC since passage of the Act.[75] In circumscribing the limits of network access to competitors, the FCC has focused on which network elements are necessary to competition through its impairment test as required under section 251(d)(2)(B).[76] Under the supervision of the D.C. Circuit Court of Appeals, the FCC defined impairment as "[a] lack of access to an [ILEC] network element pos[ing] a barrier or barriers to entry, including operational and economic barriers, that [is] likely to make entry into a market uneconomic."[77] The FCC also clarified that when referencing UNEs, the impairment standard, consistent with section 251(c)(3), relates to the provision of "telecommunications services."[78] While a literal interpretation of section 251(c)(3) is clear, if a "telecommunication service" is reclassified as an "information service," then the section 251 obligations become ambiguous.[79] In the order *In the Matters of Appropriate Framework For Broadband Access to the Internet over Wireline Facilities*, discussed later in this Article, the FCC implied that their change of broadband services to an "information services" regulatory regime, or Title I, did not give rise to any change in a carriers section 251 obligations.[80] However, section 251, which is arguably the heart of opening the networks to competition, is squarely within Title II obligations. While the specific order did not change these obligations, the FCC has an open door to further circumscribe unbundling obligations for services falling under the "information services" qualification. As of

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74. *Id.* ILEC is the common industry acronym referring to the Incumbent Local Exchange Carrier, the most common actors currently are Verizon, AT & T, and Qwest.

75. *Id.* CLEC is the common industry acronym for Competitive Local Exchange Carrier.

76. *Id.* § 251(d)(2)(B).

77. *In re* Unbundled Access to Network Elements, 20 F.C.C.R. 2533, 2545 (2005), *aff'd*, Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

78. *Id.* at 2550.

79. *Id.*

80. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14859 (2005).

the writing of this Article, the FCC Rules continue to only exclude ILEC unbundling obligations with respect to the provision of mobile wireless services and interexchange connections, and in theory there still remains section 251 obligations with respect to broadband.[81]

Notwithstanding the FCC's refinement of the impairment standard and the complex analysis procedure for unbundling various high speed transmission loops, in *In re Unbundled Access to Network Elements*, the Commission also made a significant policy change eliminating UNE-P based unbundling obligations and gave ISPs and ILECs twelve months to modify their interconnection contracts.[82] What this order meant was that the ILECs were now free to charge whatever resale price they chose for the interconnect, thereby reducing any hope of a profit margin for the CLECs. ILECs exercised this option in all markets except those in which they had no interest in serving. The FCC concluded that based on the record, CLECs had made significant deployment of their own facilities and, therefore, could compete effectively on a UNE-L basis.[83] As a result of this rule change, many of the CLECs who had based their initial business models on UNE-P or a combination of UNE-P and UNE-L have entered into severe financial difficulty or ceased doing business altogether.[84]

Section 252 of the Telecommunications Act establishes the procedure to create interconnection agreements as foreseen by section 251.[85] As per section 251(c)(1), the parties, and specifically the ILEC, are required to negotiate in good faith.[86] Generally, all interconnection agreements are subject to the state regulatory Commission approval.[87] The FCC Rules specify that the ILEC must not intentionally obstruct or unnecessarily delay negotiations.[88]

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81. 47 C.F.R. § 51.309 (West 2007).

82. *In re Appropriate Framework for Broadband Access*, 20 F.C.C.R. at 2641. This step by the FCC is in direct contrast with the French ARCEP which chose to leave UNE-P in place and allowed the market to push the CLECs into UNE-L, or facilities-based, competition. The most likely reason for this natural move from UNE-P to UNE-L is the low margins and lack of an ability to differentiate the product from the competitors found under UNE-P. UNE-P based competition also requires the reseller to be subject to the technology infrastructure and therefore provides no real long term advantage.

83. *Id.* This applied to both voice and data transmission at the time of the order. It is now changed due to *National Cable & Telecommunications Ass'n v. Brand X Internet Services*. 125 S. Ct. 2688 (2005).

84. CLEC Poster Child Trinsic Files for Bankruptcy Protection (Feb. 9, 2007), http://www.phoneplusmag.com/articles/850/72h912491727010.html.

85. 47 U.S.C. § 252(a) (2000).

86. *Id.* § 252(c)(1).

87. *Id.* § 252(e).

88. 47 C.F.R. § 51.301(c)(5) (West 2007).

Finally, section 706 gives the FCC the umbrella policy goal to make available advanced telecommunications services to all Americans, and in particular to the primary and secondary public education sectors.[89] In addressing section 251 obligations placed on the ILECs, the FCC traditionally balances those obligations with the policy goals as defined in section 706.[90] The FCC has generally interpreted the section 706 policy implementation as an obligation of the ILECs to advance the technology and considers obligations to unbundle vis-à-vis CLECs a hindrance to this policy goal.[91] As the statute says to "all Americans," the FCC sees the ILECs best positioned to fulfill the "all" requirement.[92]

b. The Distinction Between "Information" and "Telecommunication" Services

While the EU directives recognize the convergence of traditional telephone service, broadband access, and associated "information services," the FCC has chosen the opposite direction. One of the most important distinctions the FCC makes is between "telecommunications services" and "information services," which determines the regulatory scheme under which they will fall.[93] Classification as an "information service" places the service within the general Title I of the Act. Title I requires minimal regulatory limitations as compared to Title II, common carrier obligations traditionally imposed on the ILECs.[94] The FCC has also engaged in the incremental understanding (via rulemaking orders) that nontraditional telecommunications services, e.g., broadband, merit a distinct regulatory scheme. This has caused the CLECs to modify their business models with each new rulemaking exercise.[95] The United States Supreme Court finally decided on behalf of the FCC in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[96]

c. Policy Shift—The *Brand X* Decision

In 2002 the FCC published a declaratory ruling which classified the provision of broadband Internet access via a cable modem as an

89. 47 U.S.C. § 157 (codifying § 706 of the Telecommunications Act of 1996).

90. *In re* Unbundled Access to Network Elements, 20 F.C.C.R. 2533, 2545 (2005), *aff'd*, Covad Commc'ns Co. v. FCC, 450 F.3d 528 (C.A.D.C. 2006).

91. *Id.* at 2545 n.26.

92. *Id.*

93. *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14861-65 (2005).

94. *Id.*

95. *In re Unbundled Access to Network Elements*, 20 F.C.C.R. at 2573-74.

96. 545 U.S. 967 (2005).

"information service" and, therefore, beyond the scope of the Title II provision of the Act.[97] Numerous CLECs and ILECs objected to the order and appealed, after which the case was assigned to the Court of Appeals for the Ninth Circuit.[98] The Ninth Circuit, relying on their construction of the definition of an "information service" in *AT & T v. City of Portland*,[99] rather than applying the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[100] deference test, overturned the declaratory ruling and remanded to the FCC for further proceedings. Based on its holding in *City of Portland*, the Ninth Circuit determined that while its statutory interpretation of 47 U.S.C. § 153(20) ("information service") was not the only one possible, that the court had not determined the underlying statute to be ambiguous on its face and, therefore, preempted a contrary interpretation by the FCC.[101] In a 6-3 decision, the Supreme Court reversed the Ninth Circuit and validated the FCC's Order that the provision of broadband Internet access over coaxial copper cables fell under the definition of an "information service".[102] The Supreme Court determined that the Ninth Circuit was not bound by its decision in *City of Portland* because they had not explicitly held that the statutory definition of an "information service" under the Act was not ambiguous.[103] Therefore, the FCC was entitled to *Chevron* deference of their interpretation.[104] The FCC's reasoning in classifying cable based broadband as an "information service" was that "[t]he wire is used . . . to access the World Wide Web, newsgroups, and so forth, rather than 'transparently' to transmit and receive ordinary-language messages without computer processing or storage of the message."[105] Under the majority's understanding of how the Internet functions, they determined that the FCC's interpretation had a sound basis and, therefore, was a valid and enforceable interpretation of the statute.[106]

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97. *Id.* at 976.

98. *Id.* at 968 (showing CLEC's objection because they wanted access to cable UNEs to operate as ISP's and ILEC's objected arguing unequal treatment between DSL regulation and cable modem regulation).

99. 216 F.3d 871, 880 (9th Cir. 2000).

100. 467 U.S. 837, 838 (1984).

101. 216 F.3d at 879.

102. *Brand X Internet Servs.*, 545 U.S. at 1000-01.

103. *Id.* at 985-86.

104. *Id.*

105. *Id.* at 989.

106. *Id.* at 1000-01.

d. Post-*Brand X*, Post-Computer Inquiry III

The FCC responded to the Supreme Court's *Brand X* ruling by an about face on the *Computer III* regulatory scheme and reclassified the ILECs' broadband offering under Title I "information services" regulation.[107] In effect, the FCC's establishment of a sort of *Computer IV* regime eliminates the interconnection obligations relative to Internet broadband transmission services currently provided by the ILECs to CLECs operating as ISPs. The FCC stated in the order that this ruling has no effect on CLECs' access to UNEs, and presumably access to the local loop.[108]

The FCC order specifically distinguishes between wireline Internet broadband services, which contain transmission plus some other services, from those services such as certain high capacity special access services reserved for transmission purposes only.[109] Relying on *Brand X* and the Act's definition of "information services," the FCC determined that the value-added nature of capabilities to, inter alia, generate, acquire, transform, and process information constituted something more than a basic telecommunication service.[110]

Within the same order the FCC continued to establish what could be considered a *Computer IV* regime for provision of wireline broadband Internet access service. As discussed previously, in the 1970s, *Computer I* established a limited regulatory regime that only required the BOCs of the period to separate their business of telecommunications services and the data processing for profit businesses.[111] The *Computer II* regime further refined the entity separation model for the BOCs and required other facilities-based providers to provide transmission services, but not data processing services, on a nondiscriminatory basis.[112] Finally, during the *Computer III* regime, which continued after the passage of the Act, it was required to establish Open Network Architecture (ONA) based systems, where interconnection for the provision of "enhanced services"

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107. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853 (2005); *see also* FCC ELIMINATES MANDATED SHARING REQUIREMENT ON INCUMBENTS WIRELINE BROADBAND (2005), http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf, *available at* www.westlaw.com (search for "2005 WL 1866078") (showing a separate release in which the FCC noted that the primary goal served is putting xDSL services and cable modem services on equal regulatory footing).

108. *Appropriate Framework for Broadband Access*, 20 F.C.C.R. at 14859.

109. *Id.* at 14860-61.

110. *Id.* at 14862-64.

111. *Id.* at 14867.

112. *Id.* at 14868.

or under the Act "information services," on a nondiscriminatory basis.[113] The ONA requirement prior to 1996 required unbundling of certain network services "not unlike section 251's unbundling obligations."[114] The FCC concluded, relying on the growing intermodal nature of broadband services, that the *Computer II* and *III* inquiries were no longer appropriate to the provision of wireline broadband Internet access.[115] In short, the ILECs were relieved of nearly all obligations to provide competitors nondiscriminatory access to their networks for the provision of broadband services.

C. Select U.S. and EU Markets Today

1. France

France is currently one of the leading European countries with respect to broadband penetration and sophistication of technology.[116] There are currently approximately eleven broadband service providers operating on a national scale and covering the major urban centers along with access to FT's rural network for reselling of DSL services.[117] The list of broadband providers includes cable-based operators who, because of more aggressive measures to break FT's bottleneck within the DSL offering, caused a significant stagnation in cable operators' market penetration.[118] Prices range from 14.83 euros[119] per month (Club Internet Unbundled) to 48.91 euros per month (AOL with unlimited telephone) with download rates between 1 megabit/second (Orange) to 28 megabits/

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113. *Id.* at 14869-71.

114. *Id.* at 14870.

115. *Id.* at 14873-78. The FCC stated that emerging technologies such as wireless, broadband over power lines (BPL), and satellite transmission, which each had different and less cumbersome regulatory regimes, were supplanting the services, which had been traditionally served by the ILECs.

116. ARCEP, Market Report, June 10, 2005, *available at* http://www.arcep.fr/index.php?id=7712.

117. ISPs' offers within France including services offered, price, and yearly cost of service, *available at* http://www.linternaute.com/guides/categorie/247/fournisseurs_acces_internet_-_fai.html?ordredesproduits=marque (last visited Oct. 14, 2007). France Telecom, the former state monopoly, resells its DSL service under the brand name "Orange."

118. Market Report, *supra* note 116. From Q1 2004 to Q1 2005 cable growth has been approximately fourteen percent compared to DSL which has grown by nearly seventy percent over the same period.

119. For the purposes of this Article, exchange rates are not used to calculate the cost in U.S. dollars. Though outside of the scope of this Article, actual consumer buying power and indexed prices are more appropriate and would not fool a reader into thinking that because one euro is worth more than one dollar on the currency exchanges, that somehow a local consumer feels the effect.

second (Free).[120] As of 2003, France was also a leader in facilities-based competition through local loop unbundling (LLU) with additions of approximately 5000 lines per month.[121] Subject to certain rules, most operators are allowed to connect to the endpoint customer without requiring a prior telephone subscription with the incumbent France Telecom.[122] The average price paid by a consumer for a broadband connection was approximately twenty-four euros before taxes as of September 2006.[123]

Free, arguably the most innovative competitor in the market, offers the highest speeds available in France, along with unlimited telephone calls and high definition television. They have not changed their price from their entry into the market at 29.99 euros per month though continue to offer a steady progression of new services.[124] Free is a facilities-based provider offering service to nearly two million subscribers, accounting for over eighteen percent of the market.[125]

With respect to market shares, the ARCEP published a study for the purpose of antitrust review that detailed the value chain of broadband provision.[126] It identified the local loop, backhaul transmission, and ISP Internet access services.[127] For these services FT controlled over seventy-five percent, sixty-six percent, and fifty percent respectively.[128]

2. United Kingdom

The United Kingdom is subject to the same EU deregulation directives as France and has transposed them in the Communications Act

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120. Though not shown on L'internaute's report, Free now offers in limited service areas 28 megabits/second. *See* French ISP Free Telecom, http://adsl.free.fr/offre/ (last visited Nov. 19, 2007) (offering the bandwidth to residential customers on completely unbundled local loops).

121. HOUSE OF COMMONS TRADE & INDUS. COMM., UK BROADBAND MARKET, HC 321-1, at 12 (2003-04), *available at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmtrdind/321/321.pdf [hereinafter UK BROADBAND MARKET].

122. A customer may keep their FT line, but if they choose to remove it, their total monthly telecommunications service bill will be reduced by about 15 euros. Most operators provide triple-play, telephone, television, and Internet, which makes the FT line redundant.

123. This number should not be looked at in the abstract. In France, 24 euros is total cost of the services. Contrast that with prices advertised and published by providers and the FCC in the United States where the quoted cost does not include the cost of local telephone service, which is mandatory in order to receive DSL services and generally adds an additional $15-$20.

124. Illiad, First Half 2006 Results—Free Telecom, http://iliad.fr/finances/2006/FREE_09-2006.pdf (last visited Nov. 11, 2007).

125. *See id.*

126. ARCEP, Analyse des Marchés Pertinents (2004), http://www.arcep.fr/fileadmin/reprise/publications/c-publique/bilan-cpubliquehd-1104.pdf.

127. *Id.*

128. *Id.* at 13.

of 2003.[129] The local incumbent, British Telecom, controls most of the physical network and is subject to significant obligations to open its network and provide a mix of wholesale options to competitors. As of 2003, LLU was nearly nonexistent with a mere 7100 lines compared to France's 200,000.[130] The House of Commons concluded that the lack of LLU was primarily because "BT has clearly been less than co-operative in the past and an OECD report concluded that it 'has found practical ways to resist policy' . . . [and] BT managed to inject enough delay into the process ["of LLU"] to prevent entry ahead of its own broadband product launch."[131] In Ofcom's "Evaluating the Impact of the Telecom's Review, an Interim Report One Year On," published October 2006, the UK NRA cited nearly one million lines under LLU compared to three years previous.[132] Of the ISPs, currently twelve are actively investing in LLU, and have coverage of approximately fifty-five percent of the population.[133]

BT controls approximately twenty-three percent of the broadband market and the incumbent cable-based provider, NTL, now has a nineteen percent market share, down from thirty-eight percent in 2003.[134] As of October 2006, the CLECs accounted for over fifty percent market share and include three significant market entrants who were not in operation in 2001.[135]

From the consumer perspective, the average line speed is now two megabits/second with an average price for a one megabit/second line at fifteen pounds sterling (15£).[136] This is compared to five hundred twelve kilobit (512 Kb/s) and twenty-three pounds sterling (23£) per month at the end of 2004.[137] Ofcom attributes the significant increase in average speed and decrease in price to "greater competition in the fixed line telecoms market, at the deepest level of infrastructure, creat[ing] new investment in emerging technologies and innovation in broadband

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129. Communications Act, 2003, cl. 21, § 4 (Eng.).

130. UK BROADBAND MARKET, *supra* note 121, at 12.

131. *Id.* (internal quotes omitted).

132. Office of Communications (Ofcom), *Evaluating the Impact of the Telecoms Review* 3 (Oct. 18, 2006), *available at* http://www.ofcom.org.uk/telecoms/btundertakings/impact1006/impact1006.pdf (noting that despite LLU of one million lines that provisioning of LLU by BT still remains poor and has significant room for improvement).

133. *Id.* at 31.

134. *Id.* at 35.

135. *Id.*

136. Ofcom Policy Evaluation, *The Consumer Experience—Telecoms, Internet and Digital Broadcasting* 31 (Nov. 16, 2006), *available at* http://www.ofcom.org.uk/research/tce/tidb/tce.pdf.

137. *Id.*

services and price competition. [Ofcom is] looking to achieve this by ensuring access to BT's local loop on a wholesale level and through LLU."[138]

3. United States

The U.S. market is currently going through significant changes related to market consolidation of the former RBOCs and adjustment to a series of policy changes within the FCC. Contrary to Europe, the market is made up of several natural monopolies as a result of the AT & T divestiture. The RBOCs originally accounted for several regional markets but now number three, namely Verizon, Qwest, and BellSouth.[139] The U.S. market also differs from European markets by showing a significantly higher cable based broadband coverage at 50.9% of total available high speed lines.[140] DSL lines within the U.S. account for 38.8% of the total available lines, and of these, the ILECs control 96.3% and account for a total market share of 45.5%, compared to cable's 57.5%.[141] Until the *Brand X* decision, the franchised monopoly cable operators and the ILECs were divided by disparate regulatory regimes. Other technology "lines," not including fiber optics, account for 1.2% of the market.[142]

Prices for a high speed connection with a speed of at least 1.5 megabits per second range from $32.95 in New Orleans, $36.95 in New York City, and $17.14 in Northern Virginia.[143] In certain select markets, facilities-based competitors offer broadband access, however, they currently account for less than five percent of the national market and

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138. *Id.* at 34.

139. BellSouth is currently awaiting government approval of its merger with AT & T (formerly SBC/AT & T) and this Article assumes that, given the Verizon/MCI merger, BellSouth's request will be approved.

140. FCC INDUS. ANALYSIS, *supra* note 4, at 3. The FCC's high-speed line threshold is 200 kilobits/second in the faster of the upload or download directions. The report is based on information provided by the service providers and does not account for actual use of a high speed line, only the existence of the line itself. The combined cable and DSL based line ownership accounts for various reports explaining that the FCC reports ninety-eight percent coverage by the cable/ILEC duopoly.

141. *Id.* The ILECs also have ownership in certain cable interests, fiber optics, and wireless allowing them to have a greater market coverage than actual twisted pair copper DSL lines.

142. *Id.* chart 6. "Other" is anything that is not Fiber, DSL, or Cable. "Other" may include BPL, wireless, and anything else that can deliver 200 kilobits or better.

143. Rates are based on sample phone bills and/or online quotes available from the ILEC or Cable Provider. In the case of ILECs, all require subscribing to voice service which averages $20 for a basic line with no options. After taxes (local and federal) the bill generally tends to be near $50 whether cable or DSL with no special options such as premium channels or fixed IP address.

coverage is sporadic.[144] Within all markets, not including cable or other competitors, line availability (not market penetration) accounts for four percent of the national available broadband lines.[145] In the current market, being a CLEC broadband service company is not an enviable position. Earthlink, perhaps one of the most well known CLECs operating in several large U.S. markets, is giving up in several of them, including the much publicized San Francisco public WiFi.[146]

The Federal Trade Commission recently posited that the primary reasons for large disparities between the U.S. market and its Asian and European neighbors were due to the United States' "larger geographic size, and relatively dispersed population."[147] The ARCEP of France, however, did their own study of the U.S. market and identified the difficulties as primarily the dominant position held by the cable companies before the introduction of DSL technology and subsequent deregulation, and the failure of deregulation due to (1) overly complex regulation, (2) lower quality of the U.S. network infrastructure, and (3) local loops much longer than those found in France.[148] Specifically with respect to the complex regulation, the ARCEP noted the problem of three levels of red tape with the FCC, the Public Utilities Commission, and municipalities holding franchising authority.[149] The result of this complexity was incessant litigation, which continues today, and the final abandonment of unbundled access.[150]

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144. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS, COMMITTEE ON THE JUDICIARY, U.S. SENATE—TELECOMMUNICATIONS—WIRE-BASED COMPETITION BENEFITED CONSUMERS IN SELECTED MARKETS 36, GAO-04-241 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04241.pdf [hereinafter GAO REPORT]. The GAO surveyed several CLECs in 2003, some of which are still in existence. Starpower merged with RCN, Altrio is now out of business, and Everest has become a business only provider abandoning the consumer retail market.

145. FCC INDUS. ANALYSIS, *supra* note 4, tbl.6 (showing cable statistics are removed as most cable-based provisions are the product of the former local exclusive franchises granted to the cable "monopolies").

146. *Earthlink Slashing 900 Jobs, Closing S.F. Office*, S.F. BUS. TIMES, Aug. 28, 2007, http://www.bizjournals.com/sanfrancisco/stories/2007/08/27/daily14.html?ana=from_rss.

147. FTC STAFF REPORT, CONNECTIVITY COMPETITION STATEMENT, FTC STAFF REPORT 119 (June 2007), http://www.ftc.gov/reports/broadband/v070000report.pdf.

148. ARCEP Mission de l'ARCEP aux Etats-Unis (Mar. 2007), http://www.art-telecom.fr/uploads/tx_gspublication/rapport-usa-vf-mars07.pdf. The length of the local loop is important in the quality and speed of DSL service. A local loop more than a few miles long will not support high speeds.

149. *Id.* at 16.

150. *Id*; *see also* Grant Gross, *Verizon Sues FCC over Open-Access Auction*, YAHOO NEWS, Sept. 14, 2007, http://news.yahoo.com/s/pcworld/20070915/tc_pcworld/137213.

II. ANALYSIS

In 1997 the European Commission stated in its *Green Paper on Convergence* that "[i]f Europe fails to [embrace the global market changes], or fails to do so rapidly enough, there are real risks that our businesses and citizens will be left to travel in the slow lane of an information revolution."[151] According to the Organisation for Economic and Co-operative Development, the United States now ranks tenth, behind several European and Asian countries, in terms of broadband market penetration.[152] Moreover, the U.S. Broadband market began to show signs of stagnation in mid-2005 with growth nearing twenty percent, compared to around forty percent in years previous.[153] While twenty percent would seem reasonable for any market, the bulk of the new subscribers go to either the incumbent cable or DSL providers.[154] Growth in the wireless areas is less than clear due to emerging technologies, primarily Intel's WiMax, however, the ILECs currently control over ninety-seven percent of the wireless connections.[155]

A. The FCC Has Chosen Its Fight: ILECs vs. the Cable Monopolies

Relying on its gut instincts rather than real data from other successfully competitive markets, the FCC has chosen to allow the incumbents to take each other on.[156] Had the FCC looked east across the Atlantic it would have found few, if any, markets that chose to allow the natural monopolists the power to determine technology direction and how the new competitive market would be shaped. The FCC reiterates often its desire to promote intermodal competition as if it is the silver bullet to perfect competition.[157] However, given the convergence of

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151. *Green Paper on Convergence of Telecommunications*, *supra* note 24, at iii.

152. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), OECD BROADBAND STATISTICS TO JUNE 2006, http://www.oecd.org/document/9/0,2340,en_2649_34225_37529673_1_1_1_1,00.html (last visited Nov. 19, 2007).

153. Marguerite Reardon, *Study: Broadband Penetration Slowing*, CNET NEWS, Sept. 21, 2005, *available at* http://news.com.com/Study+Broadband+penetration+slowing/2100-1034_3-5875981.html.

154. FCC INDUS. ANALYSIS, *supra* note 4, tbl.1.

155. *Id.* tbl.6. ILEC connections are not reported for wireless, but non-ILEC divided by total gives non-ILEC a market share of around 2.7%.

156. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14959 n.116 (2005) ("Courts have recognized that the Commission's decisions must sometimes rest on judgment and prediction *rather than pure factual determinations*." (citing FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981) (internal quotes omitted) (emphasis added))).

157. Intermodal competition pushes cable, telecommunication, BPL, and any medium capable of broadband speeds to compete with each other.

xDSL and cable capabilities, it seems that the FCC bases its decisions on technology of ten years ago when 128 kilobits/second was reserved for those at the top of the technology pyramid.

The FCC contends that deregulating the broadband portion of the ILEC directly satisfies the obligations imposed under section 706 of the Act.[158] However, contrary to prior orders, section 706, which promotes the implementation of advanced telecommunications services, e.g. broadband, must be balanced with the obligations of section 251, which allows for competition within the telecommunications service provided.[159] The FCC order also bases its conclusions on already existing intermodal competition in the form of wireless, powerline (BPL), and satellite access broadband offerings.[160] While wireless is an emerging competitor, the primary retail sources of this technology are provided by the subsidiaries of ILECs, namely Verizon. WiMax has yet to emerge as a competing technology and will surely run into rights of way hurdles experienced by the CLECs four years ago. At least one industry expert also believes that WiMax may not live up to expectations with respect to bandwidth and cost.[161] However, this same expert is willing to entertain Sprint/Nextel's two to three billion dollar foray into the WiMax market by using its existing wireless installations.[162] Powerline broadband access, once considered the savior of competition, remains in very early test phases with speeds that are currently not competitive with xDSL or cable offerings within the relevant market.[163]

While pitting the ILECs and cable incumbents against each other is not tested within the European markets due to low cable broadband penetration, it is unlikely that such a scenario would survive the scrutiny of the EU regulators. Article 14 of the Framework Directive specifically identifies the possibility of two or more undertakings with joint dominant

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158. *Appropriate Framework for Broadband Access*, 20 F.C.C.R. at 14865.

159. *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978, 17088-89 (2003).

160. *Appropriate Framework for Broadband Access*, 20 F.C.C.R. at 14872-74.

161. Robert X. Cringley, *Bound and Gagged: WiMax Isn't What It Seems, But Then Nothing Else Is, Either, I Cringley*, THE PULPIT, July 6, 2006, http://www.pbs.org/cringely/pulpit/2006/pulpit_20060706_000349.html.

162. Robert X. Cringley, *Sprint Nextel's Hidden Advantage: Maybe There's a Way To Make WiMax Work Well After All*, THE PULPIT, Aug. 18, 2006, http://www.pbs.org/cringely/pulpit/2006/pulpit_20060818_000528.html.

163. *See* Ed Gubbins, *Powerline Promises on Broadband Broken*, TELEPHONY ONLINE, May 22, 2006, http://telephonyonline.com/mag/telecom_powerline_promises_broken/. High-speed chips were not available until the beginning of this year which would allow for 50-80 Megabits/second, compared to the current 500-800 kilobits/second (ten times slower) which is not competitive with the 1.5 Megabits/second which has become a de facto standard for residential broadband.

positions.[164] As Annex II of the directive points out, joint dominant positions, or SMP, can be found under article 1 if the market structure is such that it is "conducive to coordinated effects."[165] The FCC currently ignores the possibility of conscious or unconscious "coordinated effects" with respect to cable and DSL providers though it asserts that "cable modem and DSL providers are currently the market leaders for broadband Internet access service and have established rapidly expanding platforms."[166] U.S. antitrust doctrine establishes that mere parallel activity between competitors in an interdependent market (e.g., cable and telephone) is not in and of itself sufficient to prove a violation of section 1 of the Sherman Act.[167] However, creation or maintenance of an oligopolistic market structure conducive to coordinated effects under the guise of increased competition should not be within the policy goals of government authorities.

As discussed above, several European state monopolies successfully resisted opening their networks to competitors up to as late as 2003.[168] In each case, once prior impediments were eliminated, the relative markets exploded with lower prices and higher speeds for consumers. Detailed economic analysis is not required here as there is clear proof in the reality. Opening up the monopolists' network provides more advantages than allowing the monopolist to argue that they are best positioned to give the consumers what they want.

The Federal Trade Commission, relying on the same statistics published by the FCC, assumes there is significant competition and, therefore, no need for Net Neutrality regulation.[169] Similar to the FCC, the FTC relies on technologies which have been discussed for several years and have yet to make any significant impact on the market.[170] The FTC also addresses directly European and Asian markets where there are considerably higher speeds and lower prices, cautioning that the United States is not easily comparable due to the lack of population density

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164. Framework Directive, *supra* note 29, art. 14.

165. *Id.* annex II. The Framework Directive does not explicitly require actual parallel activity, the risk thereof (conscious or unconscious) is sufficient to impose obligations on a market participant deemed to have joint SMP.

166. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14880 (2005).

167. *Cf.* Twombly v. Bell Atlantic, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006).

168. *See United Kingdom and German*, *supra* note 44.

169. In re Broadband Industry Practices Before the FCC, Ex parte Filing of the Department of Justice at 4 (2007), http://www.usdoj.gov/atr/public/comments/225767.pdf [hereinafter In re Broadband Industry Practices Filing].

170. *Id.* WiMax, BPL, and other technologies suggest a market in "considerable flux."

throughout the continental United States. However, what the FTC fails to address or explain is the lack of any difference between rural U.S. areas and the major urban centers. Cities such as New York, Washington D.C., and Chicago still suffer from a two-player market. Also cited are foreign government subsidies financing the installation of new infrastructure such as fiber optic lines. However, the report does not address the indirect subsidies received by the U.S.-based ILECs through the Universal Service Fund and the residential rate hikes associated with promises to build the advanced network.[171] Moreover, the Department of Justice (DOJ) argues in its brief to the FCC on Net Neutrality that imposition of regulations will prohibit broadband providers from discriminating against various forms of content and will discourage innovation and improvement of the network.[172] The DOJ suggests that with regulation the cost will be almost wholly shifted to the consumer.[173] However, to date the cost of building the networks that the ILECs now own has been wholly borne by the customers.

B. How Can an ISP Survive?—Distinction on Policy Dithering

With limited access to the local loop, ISPs must now find a way to maintain an end-to-end connection to the Internet. Where a CLEC cannot prove impairment in order to gain access to an essential UNE under section 251 of the Act, the CLEC must negotiate an agreement for leased access to the UNE, possible facilities co-location leasing costs, and transmission services. The CLEC can attempt to build its own infrastructure or ally itself with an already existing facilities-based competitor such as Covad Communications. With respect to infrastructure building, given the patchwork of municipal regulation of rights of way and traditionally offering favorable conditions to the incumbent unless litigation is pressed, building an infrastructure under the current regime may encounter insurmountable entry barriers to a new entrant or existing CLEC who must now renegotiate contracts.

As in the United States, member states of the EU generally have determined that the only sustainable method of promoting competition in the broadband market is through LLU and wholesale rates which

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171. Josee Valcourt, *Verizon Communications Seeks Rate Changes in New Jersey*, HOME NEWS TRIB., Sept. 6, 2000. Bell Atlantic, now Verizon, promised to wire New Jersey with fiber optics in return for deregulation of business rates and rate hikes on consumers to finance the construction.

172. In re Broadband Industry Practices Filing, *supra* note 169, at 4.

173. *Id.*

encourage facilities-based competition.[174] However, rather than tinkering with the EU's equivalents of sections 251 and 252 with respect to negotiation of LLU, France and the United Kingdom have neither eliminated UNE-P based competition nor bifurcated regulation of broadband markets.[175]

C. "Information Service" vs. "Telecommunications Service"

The FCC has founded its latest round of orders on the distinction between an "information service" and a "telecommunications service" while practically ignoring the oligopolistic nature of the incumbent cable and telephone providers. In contrast, the Europe Union countries do not distinguish between modes of transmission, or what type of service is provided over a given medium. Europe's regulatory scheme turns only on significant market power, at which point a provider is subject to more stringent public obligations related to open access of their network and disclosure of financial and technical information.[176]

1. The Problem with the Distinction

After the thirty years of the FCC's Computer Inquiry evolution, the Supreme Court demonstrated in *Brand X Internet Services* why the "information service"/"telecommunication service" distinction has outlived any utility it may have ever had. Twenty-five pages of majority and dissenting opinion written by nontechnical jurists over why an information service is like or is not like pizza delivery shows how unworkable the Telecommunications Act is.[177] This author certainly disagrees with the majority's conclusion that Internet access is somehow fundamentally different than telephone access because of the insertion of a Domain Name Server (DNS) between the consumer and a Web site.[178]

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174. *See, e.g.*, ARCEP, *supra* note 60, art. II-A-2-e; *see also* Ofcom Policy Evaluation, *The Consumer Experience—Telecoms, Internet and Digital Broadcasting* 31 (Nov. 16, 2006), *available at* http://www.ofcom.org.uk/research/tce/tidb/tce.pdf.

175. *See* ARCEP, *supra* note 60, art. II-A-2-e. As examples, France and the United Kingdom have both recognized that UNE-P is not real competition but they have also stated that they will not remove incumbents UNE-P pricing obligations in the interest of not destabilizing the market. Instead, the regulation will include incentives to move competitors over to UNE-L and discourage new UNE-P based interconnections.

176. *See* Access Directive, *supra* note 29, arts. 8-13.

177. Nat'l Cable & Telecom Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005); *id.* at 1011 (Scalia, J., dissenting) ("This is nonsense.").

178. *Id.* at 987-88 (majority opinion). The majority and the FCC posit that Internet access includes data manipulation and storage as well as the DNS provided to "find" Web sites. This somehow inherently makes the Internet different from a telephone call because a phone book may be used to find a number, or because of the fact that most telephone calls go through software

However, with respect to arguments of both the majority and the dissent, while an automobile "bundled" with an engine may not pose a problem in a competitive market, a manufacturer who has a monopoly on both the engine and the car may be subject to certain sanctions in the event of a violation of section 2 of the Sherman Act.[179] The Supreme Court was constrained by the Act and the issues raised thereunder, but given the decision, there is little room to hope for improved competition except through legislative modification of the Telecommunications Act to overcome deficiencies exacerbated by the courts and the FCC.

2. SMP—Ex Ante or Ex Post?

Despite *Brand X Internet Services* and the subsequent FCC policy shift, a new door opens to controlling anticompetitive behavior. With deregulation comes the possibility of ex post analysis of deregulated markets through antitrust review.[180] The major actors in the broadband market are currently under Title I regulation and therefore not under a comprehensive regulatory scheme. Consistent with *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[181] and its progeny, the FCC has effectively eliminated any abrogation of antitrust review.[182]

To date, neither the FTC nor the DOJ have launched any significant investigation of the broadband markets and these agencies appear to be content with the level of competition within the telecommunications markets.[183] Moreover, the FCC's conclusion that there is "fierce competition" within the broadband market suggests that the sister

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switched networks, which also involve the storage and manipulation of data in order to complete a call. This type of convergence demonstrates that any number of examples and combinations are possible to define a service as "telecommunication" or "information" which has no other effect than clouding real issues. Jay T. Cohen, Comment, *A Supreme Choice Between the Blue Pill and the Red Pill:* Brand X Internet Services v. FCC, 8 TUL. J. TECH & INTELL. PROP. 189, 204-05 (2006) ("Scalia thought it perfectly clear that cable modem service offers telecommunications.").

179. *Brand X Internet Servs.*, 545 U.S. at 989. The issue in Brand X Internet Services was clearly not about competition or antitrust, though those are the fundamental problems within the broadband market.

180. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW—AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 785A (2005).

181. 540 U.S. 398 (2004).

182. Covad Commc'ns v. BellSouth, 374 F.3d 1044, 1049 (11th Cir. 2004) (concluding that a broad and comprehensive regulatory scheme abrogates antitrust scrutiny (quoting *Trinko*, 540 U.S. at 411-15)).

183. *See* Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT & T's Acquisition of BellSouth, *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218904.pdf (last visited Nov. 15, 2007) [hereinafter Barnett Statement] (concluding that the merger is not likely to have any significant impact on the market); *see also* In re Broadband Industry Practices Filing, *supra* note 169, at 4 (assuming competition without analyzing whether there actually is any and discounting successes in foreign markets).

agencies have no reason to investigate further.[184] The DOJ argues that tiered services for content transmission are similar to express and normal options available at the post office.[185] Such a comparison is inappropriate as it makes two invalid assumptions. The statement assumes that there is competition in the relevant market and it assumes that the market is taken on a national basis.[186] Multiple FCC orders and comments also cite the emergence of wireless broadband access across the nation, however, as discussed previously, this market is also largely controlled by the ILECs.[187]

Discussing ex ante regulation in reference to the FTC's opinion on Net Neutrality, Commissioner Liebowitz points out that ex post antitrust enforcement could be long and drawn out due to a likely rule of reason analysis.[188] In such a case, there probably would be little, if any, short term benefit to the consumer.[189]

The European Union has addressed the problem differently. NRAs retain primary jurisdiction over regulatory enforcement, however when regulatory efforts fail to break anticompetitive behavior, the problem is turned over to either the national competition commission or in the case of interstate issues to the European Commission. The EU, in sanctioning the former state monopolies, recognizes that ex ante regulation in certain

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184. FCC, Closing Remarks of Commissioner Deborah Taylor Tate—Accenture Global Convergence Forum 2006, 2006 WL 1667395 (F.C.C.) ("[B]roadband platforms are engaged in fierce competition. In addition to telephone and cable providers, broadband access is increasingly being delivered to consumers via satellite, wireless, fiber or over powerlines. In 2004, satellite and wireless connections to the Internet increased by 50% and fiber or powerline—BPL—connections by 16%."). Commissioner Tate grossly overstates the state of the BPL and fiber markets and misleads by suggesting that Fiber and BPL are somehow real competition to the cable and telephone based broadband markets. *See* FCC INDUS. ANALYSIS, *supra* note 4, tbl.1. BPL lines number approximately 5859 lines as of December 31, 2005, compared to 19 million DSL lines. While BPL lines increased by nearly 25% between June 2005 and December 2005, 0.012% of the market would not create "fierce competition."

185. In re Broadband Industry Practices Filing, *supra* note 169, at 10.

186. For competition in the mail transport industry there is arguably competition for express services, which several regional, national, and global providers (e.g., FedEx, DHL, and UPS, which all have global coverage) and, therefore, likely providing a national or global relevant market. *But see* Frischmann & Van Schewick, *supra* note 6, at 34 ("[T]he disciplining effect of competition—to the extent it exists—depends on the amount of competition in the local market for Internet access services, not, as Yoo contends, on the amount of concentration in the nationwide market for Internet access services.").

187. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14873 (2005).

188. Jon Leibowitz, Comm'r, FTC, Concurring Statement Regarding Staff Report: Broadband Connectivity Competition Policy, http://www.ftc.gov/speeches/leibowitz/V070000 statement.pdf (last visited Nov. 11, 2007).

189. *See id.* Of other interest in this concurring statement from the FTC, Commissioner Leibowitz asserted that most markets are duopolistic and there are incentives for those with market power to discriminate.

cases must be supplanted by ex post measures handled not by NRAs but by the agency best qualified to assess alleged anticompetitive behavior. Moreover, unlike *Trinko*, the European regulation has not foreclosed private antitrust suits against the incumbent provider.[190] It would be easy to conclude that applying competition law makes sense in the case of former state monopolies, but the procedure should function well in any given market.[191] As stated previously, SMP is defined as a market player that can act independently of the market itself.[192] The ILECs show evidence of SMP based on their relative market shares of the broadband market, limited or nonexistent reaction to competition,[193] and decisions that have no business justification.[194] While not an example of a CLEC attempting to gain access to an ILEC's network, the Ruby Ranch Internet Cooperative Association gives a candid look of the anticompetitive behavior that an ILEC is apt to engage in. Qwest had denied DSL service to the neighborhood for a lack of commercial interest. Rather than cooperating with making it possible for the Coop to provide their own DSL, the ILEC utilized all procedural devices available under the Act and local Colorado regulatory rules to maximize the rental price paid for unused copper lines for which Qwest had no previous or foreseeable revenue.[195] While Ruby Ranch is a small and remote Coop, the

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190. Cour d'Appel de Paris [C.A.] [Appeal jurisdiction for judgments made by the Competition Commission] 2005/23571, July 4, 2006, *available at* http://www.conseil-concurrence.fr/doc/ca05d59_ft.pdf. One of FT's arguments to reverse the Competition Commission's sanction was that the NRA had jurisdiction over unbundling and therefore was the sole entity responsible for administration of the procedure. The court rejected this and dismissed the claim for abuse of judicial procedure.

191. Press Release, ADSL Broadband Internet Access—The Conseil de la concurrence Fines France Télécom 80 million Euros for Abuse of a Dominant Position (Nov. 8, 2005), *available at* http://www.conseil-concurrence.fr/user/standard.php?id_rub=149&id_article=495. BT accepted "Undertakings" imposed by Ofcom after being referred to the Competition Commission for violation of the Enterprise Act of 2002. Deutsche Telekom AG was fined ten million euros for the price squeeze of wholesale and retail broadband products over the period of 1999-2002. *See* EU Decision 2003/707/EC for the Commission Decision of May 21, 2003 Relating to Proceeding Under Article 82 of the EC Treaty.

192. *See* Framework Directive, *supra* note 29, art. 1.

193. GAO REPORT, *supra* note 144, at 14. ILECs interviewed for the report did not see broadband competitors as a source of competition because of their "*very small presence* focused only in scattered markets." *Id.* (emphasis added).

194. *See* Andrew Kinney, *How To Setup Your Own Neighborhood Broadband Co-op*, ADVANTAGECOM NETWORKS, INC., July 2002, http://www.wallawallainternet.com/articles/broadband-co-op.shtml ("This [newsletter] was inspired by the antics of Qwest, the anti-competitive local telephone monopoly that refuses to service small towns like Walla Walla, WA, with broadband Internet access service and routinely lobbies for laws that would put small town ISPs out of business.").

195. Interview with Carl Oppedahl, Colorado's Ruby Ridge Internet Cooperative, Slashdot (Aug. 22, 2002), http://interviews.slashdot.org/interviews/02/08/22/1431255.shtml. Qwest demanded $24.13 per unbundled line despite the fact that the retail cost of the line was $19.00.

procedural devices that exist within the Act allow the ILEC's to treat *any* interconnection agreement in the same manner.

3. Ex Post Target—Tying Arrangements

Tying arrangements are defined generally as the use of a monopoly in one market to gain monopoly power in another through tied products.[196] As the Supreme Court explained, the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.[197] Borrowing the FCC's own logic and rationale of a rapidly changing technological landscape, more mobile consumers and wireless options require flexible product offerings; that suggests that it is logical that consumers may no longer want or need voice service on their existing twisted pair copper lines. The penetration of cellular phones and VoIP solutions, as well as the FCC's requirement that VoIP providers comply with e911 regulations, puts the tying of the voice line in order to get DSL access directly within the Supreme Court's definition of an invalid tying arrangement.[198] Commissioners Copps and Adelstein agree with these arguments but were outvoted 3-2 when the FCC overturned several state regulations requiring ILECs to offer DSL service without voice service.[199] In the order, the majority ruled in favor of the ILECs based on preemption and section 251 unbundling rules imposed on the ILECs rather than any sound foundation in antitrust principles.[200]

The complete deregulation of the broadband frequencies of the copper wire with a regulated voice frequency has introduced an additional danger, encouraging the ILECs to engage in cross-subsidization. The price of basic telephone service will remain fixed by

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The price was nonnegotiable, contrary to section 252 of the Act, and required the co-op to submit to the Colorado PUC for a ruling, which Qwest appealed two times within the space of three months.

196. Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984).

197. *Id.*

198. *See* 47 C.F.R. 9.3, 9.5 (2000) (defining a VoIP provider).

199. *See* Statement of Michael J. Copps & Jonathan S. Adelstein, Comm'rs, FCC, BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, FCC 05-78 (Mar. 25, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-78A2.doc. Commissioners Copps and Adelstein dissenting in part, "In this decision, the Commission unwisely flashes the green light for broadband tying arrangements." *Id.*

200. *Id.*

regional regulation, however the ILECs will be free to adjust their DSL price offerings to manage their margin. While margin manipulation would be tempered by cable provider offerings, at a current average of around $50 per month for equivalent speeds, the ILECs are presumably left with room to maneuver. Outside of a handful of CLECs, no ILEC will sell DSL service within the United States, without requiring the purchase of the voice service along with its associated taxes.[201]

D. Conclusions

The European Union, once a region of nationalized public utilities services, is now home to some of the most competitive telecommunications markets in the world. While it is easy to conclude that the job was easier due to former single entity state owned monopolies, AT & T was once the equivalent of a state owned monopoly.[202] With the current state of legislation and FCC regulation, there remain only a few options: (1) rewrite the Telecommunications Act and/or (2) increase antitrust scrutiny in the telecommunications sector.

1. Rewrite the Telecommunications Act

The United States is currently operating under a legislative scheme that was enacted in 1934 and cobbled together for a new era in 1996.[203] Critics of changing the Act may argue that it is far too difficult to revamp nearly one hundred years of legislative and regulatory evolution. However, the European Union took that very step in its consolidation of over twenty directives in order to arrive at a more manageable and pro-consumer regulatory regime. As demonstrated by the FCC's policy dithering and the Supreme Court's difficulty in dealing with the 1996 revisions, it is clear that Congress must engage in revamping the system. Internet activity is becoming ubiquitous in the world order with

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201. *See, e.g.*, BellSouth, http://www.bellsouth.com (last visited Nov. 19, 2007). DSL cannot be purchased without the inclusion of local telephone service costing $12.64 which with taxes and surcharges amounts to $20.58, before including an additional $32.95 for BellSouth's FastAccess DSL Ultra. Cox, the local Cable provider in New Orleans, while offering a standalone Internet service, charges $49.95 or roughly equal to the BellSouth offering, with voice service.

202. United States v. AT & T, 524 F. Supp. 1336, 1346-47 (D.D.C. 1981) (stating that AT & T argued they were in fact a state-granted monopoly sanctioned by the FCC).

203. AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) ("It would be [a] gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.").

significant impacts on commerce, politics, and communication.[204] Leaving the direction of such a critical piece of the U.S. economy in so few hands seems contrary to free markets of trade, information, and ideas. If the U.S. market were correctly regulated and competitive, would there even be a debate about Net Neutrality?[205] Competition theory states that it does not. If one competitor is not willing to carry the traffic of an Internet service at a competitive price, another competitor will always jump in to gain the business.[206] Such a debate has been a boon for academics and politicians, allowing for large amounts of ink to be spilled on the subject. Piling new regulations onto already ineffective and overly complicated rules best navigated by the ILECs themselves for their own benefit is not the solution.

Broadband technology will continue to drive world markets in the foreseeable future and will continue to develop faster than traditional markets.[207] Therefore, this area of development certainly merits a shorter legislative life cycle than it has received.

2. Antitrust Scrutiny

Government antitrust regulation of anticompetitive behavior in the telecommunications sector has been relatively nonexistent in light of

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204. U.S. DEPT. OF COMMERCE, CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES (Nov. 16, 2006), http://www.census.gov/mrts/www/data/html/06Q3.html (showing the retail, e-commerce market will account for over $100 billion in sales); Daniel W. Drezner & Henry Farrell, The Power and Politics of Blogs (July 2004), http://www.utsc.utoronto.ca/~farrell/blogpaperfinal.pdf ("Under specific circumstances—when key weblogs focus on a new or neglected issue—blogs can socially construct an agenda or interpretive frame that acts as a focal point for mainstream media, shaping and constraining the larger political debate."); *see also* Frischmann & Van Schewick, *supra* note 6 ("The social opportunity costs of allowing network owners' to dismantle the Internet's infrastructure commons, [in the absence of Net Neutrality regulation], may be tremendous but incredibly difficult to measure precisely because so much of the value generated by Internet users is not fully captured in market transactions.").

205. Robert X. Cringley, *Net Neutered: Why Don't They Tell Us Ending Net Neutrality Might Kill BitTorrent?*, THE PULPIT, June 22, 2006, http://www.pbs.org/cringely/pulpit/2006/pulpit_20060622_000352.html ("Net Neutrality is a concept being explored right now in the U.S. Congress, which is trying to decide whether to allow Internet Service Providers to offer tiers of service for extra money or to essentially be prohibited from doing so.").

206. AREEDA & HOVENKAMP, *supra* note 180, ¶ 423. Supercompetitive prices are not possible if other suppliers can move in and provide the same service or product. The current Internet market for ISPs is sustained through customer subscriptions at both ends of the connection: content provider, e.g., Google and consumer. Under the anti-Net Neutrality lobby, the ILECs are essentially asking for price increases on the traffic that passes between the endpoints, similar to a troll at an exclusive toll bridge. If other suppliers *could* move in, then the troll would no longer have exclusivity.

207. Ben Charny, *MarketWatch*, THOMSON FIN. NEWS, Nov. 17, 2006 (estimating that e-commerce retail sales will see a growth of around twenty-five percent in 2006, far beyond the growth rate of the GDP).

broad FCC regulation. The FCC recently relinquished its control over the broadband market, yet since that time, the market has seen little, if any, change.[208] The Department of Justice and Federal Trade Commission should now exercise their jurisdiction and analyze the anticompetitive behavior that currently exists today, whether in the form of exercising monopoly power to gain further control of the broadband market, or collusive behavior in the de facto cable/telecoms duopoly. However, it is unlikely that this will occur if the majority of the commissioners continue to argue that there is competition and mischaracterize the relevant market.

Moreover, both antitrust enforcement agencies have given a pass on recent mergers within the ILECs.[209] While the DOJ may say that it foresees no substantial impact on competition in the telecommunications market, it does not necessarily make it the reality.[210]

208. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853 (2005).

209. Barnett Statement, *supra* note 183 ("After thoroughly investigating AT & T's proposed acquisition of BellSouth, the Antitrust Division determined that the proposed transaction is not likely to reduce competition substantially.").

210. *Id.* (showing that the DOJ uses similar talking points of presence of other competitors and the emergence of new technologies); *cf.* FCC, *supra* note 184.