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George J. Alexander

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ARTICLES

ANTITRUST AND THE TELEPHONE INDUSTRY
AFTER THE TELECOMMUNICATIONS
ACT OF 1996*

George J. Alexander†

TABLE OF CONTENTS

I. INTRODUCTION ...................................... 228
II. THE PURPOSE OF THE TELECOMMUNICATIONS ACT OF
1996 ................................................ 228
III. NONCOMPETITIVE ASPECTS OF THE ACT AND OF
TELEPHONE SERVICE IN GENERAL .............. 231
   A. United States v. American Telephone & Telegraph
      Company .................................... 232
   B. Disclosures to Competitors .................... 233
   C. Interconnection Among Telecommunication
      Carriers ........................................ 236
      1. Rural Services .............................. 236
      2. Universal Service ........................... 239
   D. The Role of the BOCs and the Affiliates ....... 240
IV. IS THERE IMPLIED ANTITRUST IMMUNITY IN THE
TELECOMMUNICATIONS ACT? ...................... 243
   A. Implied Immunity ............................ 243
   B. State Action Immunity for Antitrust .......... 246
   C. Local Governments and Individuals are Not
      Immune ........................................ 248
V. CONCLUSION ........................................ 251

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† Elizabeth H. and John A. Sutro Professor of Law, Santa Clara University. The author
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I. INTRODUCTION

The Telecommunications Act of 1996 (hereinafter "Telecommunications Act" or merely "the Act") proposes to establish a system in which competition sets price and quality standards for a broad industry including telephone services. Presently, issues extraneous to competition arise out of a context of state or federal regulation or out of the market power of firms in the industry. In the future anticipated under the Act, such issues will be minimized. Most of the regulation is designed to end and steps are provided to ensure the establishment of competitive markets. In those markets, as in the rest of the economy, antitrust rather than direct governmental management is to ensure proper functioning. This article examines the meaning of antitrust ordering in the context of the Act.

II. THE PURPOSE OF THE TELECOMMUNICATIONS ACT OF 1996

The synopsis announces the purpose of the Act: "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The Act sets a national policy framework for opening telecommunications markets to competition. It is expected that high quality voice, data, image, graphic, and video telecommunications services will result. International competitiveness should markedly improve. Mixed with these apparently procompetitive goals, are goals of achieving affordable service, spurring economic growth, creating jobs, and increasing productivity. An economic optimist might find these further goals merely a reflection of the sorts of benefits a competitive market would naturally produce - although efficiency might instead decrease the number of jobs. Finally, the goals include delivery of a better quality of life through the preservation and advancement of universal service to allow more efficient delivery of educational, health care, and other social services. These aims, while laudable, cannot easily be linked to freeing telecommunications from...
regulation. Indeed, providing universal service may only be accomplished by governmental insistence since the costs of including the most geographically remote and economically impoverished persons may be quite unprofitable. As the Act expresses the goals in operational terms, it becomes clear that universal service is to be provided, if the market does not meet the need, by a return to regulation.  

While the Act deals with many forms of communications, including cable services and broadcast services, the core of the Telecommunications Act is the deregulation of telephone-based services, which comprise the best developed and most regulated services in the economic (as opposed to political) sense. Consequently, only telephone-based services will be considered in this article. To some extent the other forms of telecommunications have an effect on telephone services. After a history of forced separation from each other, cable services and telephone services are designed to become potential competitors for each others' markets. The use of telephone lines to supply the content presently sold by cable companies seems well advanced; the application of cable to telephone uses does not, although not much more than an efficient switching mechanism for cable lines would be required. As technology evolves, the forms of communication governed by the Act will become more interchangeable, but the problems of the short run will set the competitive climate. These more immediate problems are the exclusive focus of this article.

The Act recognizes that local telephone service is predominantly a monopoly service and that the offspring of the government's AT&T divestiture, the Bell Operating Companies (BOCs), colloquially known as "Baby Bells," were created as monopolies of local service in a regulated framework.  (States regulated the BOCs, and through that regulation and through some provisions of federal law, states retained considerable authority over local rates and service.) The Act is designed to deregulate local services as well. In order to accomplish that end, it is necessary to consider the continuing need for state authority to enforce universal service requirements and their relationships with the BOCs. Although all forms of regulation are designed to be transitory, states will be important participants in interim regulation. Independently, the power of the BOCs is a force to be considered. With an eye to a deregulated future, the Act proposes to allow

7. It would not be the only portion of the Act blatantly regulatory. The Act also establishes far-reaching regulations of sexual expression. See id. at 136 (to be codified at 47 U.S.C. § 641).
the BOCs' entry into nonlocal, interlata service. Their present prominent position poses problems, and the Act limits their access to competitive markets until their monopoly power is neutralized. Professor Sullivan argues the BOCs should be dropped from inter-exchange service altogether.

In most respects, the Telecommunications Act proposes immediately to substitute competition in telephone service and among various forms of telecommunications services for the need to regulate. Thus, when fully implemented, the Act may eliminate most bases for concern about rate regulation. The Act, however, anticipates that there will be a role for both the federal government and the states in guaranteeing sufficiency of service to customers of modest means and those who live in rural and remote areas of the country. Also, certain provisions regulate the phasing in of competition by imposing constraints on presently powerful companies in the companies' evolution to local competitive status.

In instances in which service would otherwise be inadequate, the Act provides for state creation of new utilities called "eligible telecommunications carriers." Those so designated are obliged, at the risk of financial sanctions, to serve designated customers at appropriate prices. States are also free to create additional eligible telecommunications carriers, even carriers with overlapping areas of service.

Monopoly local service should become competitive service through a process of contracting between existing carriers and interested entrants. The law imposes many obligations of fair dealing on existing carriers and charges them to negotiate in good faith to divest themselves of their exclusivity. It occurred to Congress that not all local carriers would eagerly undertake their charge. Consequently, the

10. The local service areas are designated local access and transport area (LATA). (Within the state there may be multiple LATA's and, consequently, service among them -- inter-LATA service.) See United States v. Western Elec. Co., 569 F. Supp. 990 (D.D.C. 1983).
12. See Lawrence A. Sullivan, Elusive Goals Under the Telecommunications Act: Preserving Long Distance Competition Upon Baby Bell Entry and Attaining Local Exchange Competition: We'll Not Preserve the One Unless We Attain the Other, 6-7 (unpublished manuscript, on file with the Santa Clara Computer and High Technology Law Journal).
13. See, e.g., Telecommunications Act, supra note 1, at 64-65 (to be codified at 47 U.S.C. § 251(f)).
15. Id. at 80 (to be codified at 47 U.S.C. § 214(e)).
16. Id.
17. Id. (to be codified at 47 U.S.C. § 214(e)(2)).
18. Id. at 62 (to be codified at 47 U.S.C. § 251(c)(1)).
states' Commissions are given authority to assist in the negotiations,\(^\text{19}\) to act as arbitrator of problems, and finally to be intervenors in the process if it stalls.\(^\text{20}\) States continue to control the rates charged by eligible telecommunications carriers.\(^\text{21}\) States are also obliged to insure that telephone service not exclude areas more costly to serve, and Commissions "shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service."\(^\text{22}\) In another section, the Act preserves state regulatory authority to protect the public safety and welfare, ensure the continued quality of services and safeguard consumers — all traditional state functions.\(^\text{23}\) In all of these respects, states will (for a year and subject to FCC review) be able to make decisions that could burden newcomers who had not been involved in local service and who might be less well-known or popular with state regulators.

### III. Noncompetitive Aspects of the Act and of Telephone Service in General

Even if one were to take the future contemplated by the Act as certain, more problems are likely to arise in the implementation stages of the law as the presently common tensions of federalism, and between government and industry, continue to intrude on the competitive model. A cursory examination of the law demonstrates that, however pure the competitive concept may once have been, specific provisions are now designed to accomplish noncompetitive objectives and some of the objectives are inconsistent with the competitive model. Thus, there is likely to be a number of problems interfering with the competitive approach proposed. This article examines the role antitrust will play in resolving those problems.

Telephone service has been a product of antitrust for many years. For most of this century, the market for telephone service was domi-

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19. \textit{Id.} at 66 (to be codified at 47 U.S.C. § 252(a)(2)).
20. \textit{Id.} at 66-67 (to be codified at 47 U.S.C. § 252(b)).
21. \textit{Id.} at 67-68 (to be codified at 47 U.S.C. § 252(d)).
22. \textit{Id.} at 80 (to be codified at 47 U.S.C. § 214(e)(3)).
23. \textit{Id.} at 70 (to be codified at 47 U.S.C. § 253(b)).

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

\textit{Id.} § 253(b).
nated by AT&T.²⁴ The phone company served both local areas and
the domestic long distance market.²⁵ To a limited extent, phone ser-
vice was regulated by the federal government through earlier versions
of the Communications Act.²⁶ States regulated intrastate phone ser-
vice in roughly the same manner in which they regulate other utilities.
The combination of regulation did little to avoid some of the problems
of monopoly power. As a result, telephones used in the United States
did not evolve significantly.²⁷ The equipment and options opened to
consumers seem quite modest compared with what has been made
available since the AT&T breakup. More importantly, with control of
phone lines, AT&T suppressed the development of the entire commu-
nications industry.²⁸

A. United States v. American Telephone & Telegraph
Company²⁹

In 1978 the Justice Department brought suit under the antimonopo-
lysing provision of the Sherman Act³⁰ and four years later won a
consent decree.³¹ In the decree the local service of the telephone com-
pany was divested to a number of BOCs and some other companies.
AT&T and the new Baby Bells remained subject to the jurisdiction of
the federal district court, which balanced their impact by modifying
the decree from time to time.³² Antitrust law had been used in its
usual manner to break up the telephone system. However, the result
of this case was unique in the annals of antitrust in that the Justice
Department and the District Court judge, Judge Green, used the decree
and its modifications as a means of re-regulating a portion of the in-
dustry that antitrust had theoretically freed from improper
regulation.³³

²⁴. Ilene Knable Gotts & Alan D. Rutenberg, Navigating the Global Information Super-
²⁵. Id. at 280.
amended at 47 U.S.C. §§ 151-613 (1988)).
²⁷. Gotts & Rutenberg, supra note 24, at 280-81.
²⁸. Id. at 285.
³¹. 552 F. Supp. 131.
³². Id. at 143. In light of the Act, the Justice Department has now filed a request to cancel
the decree. Division Seeks Termination of Consent Decrees Against AT&T, 70 ANTITRUST &
³³. 552 F. Supp. 131.
After considerable dissatisfaction with the status quo in telephone regulation and in a generally deregulatory mood, both houses of Congress passed the Telecommunications Act of 1996.\textsuperscript{34} The Act finds that: "Competitive communications markets, safeguarded by effective Federal and State antitrust enforcement, and strong economic growth in the United States which such markets foster are the most effective means of assuring that all segments of the American public command access to advanced telecommunications technologies."\textsuperscript{35} Section 601(b) provides: "Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."\textsuperscript{36} Section 601(a) of the Act makes exceptions, but only for the Act's provisions that alter further administration of the court's telecommunications decrees.\textsuperscript{37}

B. Disclosures to Competitors

Despite the strong indications of reliance on antitrust, the Act contains a number of regulatory provisions either not directly consistent with antitrust or, in some cases, inconsistent with the competitive premises of antitrust law. For example, Bell Operating Companies are required to assist competitors by timely disclosures of new technology and implementation plans.\textsuperscript{38} Even monopolists are not required by antitrust law to disclose new technology.\textsuperscript{39} Nonmonopolists might violate Section 1 of the Sherman Act\textsuperscript{40} by discussing future plans with competitors because such conversations could be tantamount to establishing market division with competitors\textsuperscript{41} and could be tantamount, in concentrated markets, to a preliminary step in price fixing.\textsuperscript{42} Under other provisions, states are allowed to issue orders to accomplish service objectives that contravene competitive norms. Outside regulated industries, no one is allowed to direct desired outcomes; outcomes are

\textsuperscript{34} The Telecommunications Act of 1996 passed in the Senate on June 15, 1995 (141 Cong. Rec. S8480) and passed in the House of Representatives on July 14, 1995. It was signed by the President on February 8, 1996.


\textsuperscript{36} Telecommunications Act, supra note 1, at 143 (to be codified at 47 U.S.C. § 601(b)(1)).

\textsuperscript{37} Id. (to be codified at 47 U.S.C. § 601(a)).

\textsuperscript{38} Id. at 95 (to be codified at 47 U.S.C. § 273(c)).

\textsuperscript{39} Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

\textsuperscript{40} 15 U.S.C. § 1.

\textsuperscript{41} See American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

supposed to follow from market forces. The Federal Communications Commission is directed to supervise and, in some cases, to override state orders. It is difficult to predict the extent to which the FCC is free to ignore antitrust, given express provisions invoking antitrust and the absence of provisions providing immunity. The Commission itself cannot be an antitrust defendant; it is not clear, however, whether those under the Commissioner can be sued in antitrust and forced to conduct themselves in a manner opposite from what the Commission desired.

For example, consider the new section 652 which, among other provisions, bars acquisitions, joint ventures, partnerships, and joint use of facilities for local telephone exchange carriers wishing to acquire more than ten percent of a cable operator in the same area. It later provides an exemption for rural systems, and then allows the Commission to waive the restrictions altogether under certain circumstances. The most open ended of these circumstances is if "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The law indicates that these provisions (and others) do not affect the antitrust laws.

Anticipating that the goals of universal service may well not result from a competitive distribution of telephone companies, the Act creates the status of "eligible telecommunications carrier." While the designation appears laudatory, it actually carries with it the usual indicia of utility regulation. The carrier must provide universal service at an approved price and can only relinquish the designation by permission. One of the benefits of becoming an eligible telecommunications carrier is the requirement that other carriers make available "such public switched network infrastructure, technology, informa-

44. Government agencies do not prosecute the organs of government but rather those responsible for administering them.
45. See infra text accompanying note 123.
46. Telecommunications Act, supra note 1, at 119-21 (to be codified at 47 U.S.C. § 652)).
47. Id.
48. Id. at 120 (to be codified at 47 U.S.C. § 652(d)). It exempts places with under 35,000 inhabitants. Id.
49. One cause for waiver is that the incumbent cable operator or local exchange carrier would be subjected to "undue economic distress." Id. at 121 (to be codified at 47 U.S.C. § 652(d)(6)). Another is that the system would not be economically viable. Id.
50. Id.
51. Id. at 143 (to be codified at 47 U.S.C. § 601(b)).
52. Id. at 80-81 (to be codified at 47 U.S.C. § 214(e)).
53. Id. at 81 (to be codified at 47 U.S.C. § 214(e)(4)).
tion, and telecommunications facilities and functions” at reasonable prices. 54

On the other hand, states are strictly limited in interfering with the growth of competition. In a key section, the Act provides: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.” 55 It also empowers the Commission to preempt any such law. 56

This key provision regarding the “removal of barriers to entry” 57 is probably the broadest provision in support of antitrust in the Act. It can be read to remove the state action exemption in antitrust 58 to the extent that state acts would legitimate barriers such as refusals of permits, fees that a carrier would find difficult to pay, administrative barriers based on concerns about adequate local coverage of service or zoning considerations. In other words, section 253 appears to override all local concern other than facilitating telecommunications service. It is difficult to reconcile section 253 with provisions that the state set requirements for universal service, “protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 59 All of those concerns appear to require, or at least allow, management decisions to substitute for market place determinations. Whatever the effect on state action, one would assume an even harsher rejection of state authorized local action. It is not indicated whether the ability of the FCC to preempt state acts prevents them from becoming the basis for antitrust suits against participants.

54. Section 259(a) provides:

The Commission shall prescribe, within one year after the date of enactment of the Telecommunications Act of 1996, regulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e).

Id. at 77-78 (to be codified at 47 U.S.C. § 259).

55. Id. at 70 (to be codified at 47 U.S.C. § 253(a).

56. Id. at 70-71 (to be codified at 47 U.S.C. § 253(d)).

57. Id. at 70-71 (to be codified at 47 U.S.C. § 253).


59. See Telecommunications Act, supra note 1, at 70 (to be codified at 47 U.S.C. § 253(b)).
C. Interconnection Among Telecommunication Carriers

As the Act is designed to substitute competition for regulation in all phases of telecommunications, it is interesting to note the obligation of interconnection among carriers. The state is given a significant role in the process. It may be requested by either party to participate in the negotiations and to arbitrate differences. Failure to cooperate with the state as arbitrator is a failure to negotiate in good faith. The concept of bargaining “in good faith” is not new to this Act. Whether its labor law antecedents quite apply to the current problem is not clear to the writer. In labor law, there is some public interest in keeping the parties in contact as opposed to in the streets. However, the interest here is principally in achieving an appropriate result – to which the continued attendance of the parties may not be as relevant.

1. Rural Services

There follows a right to provide an exemption for rural carriers. This concern is expressly left to the states. It may signal the retention of some practices under present law that are highly inefficient and anything but competitive. The Wall Street Journal recently recounted some problems with rural phone subsidies. Since rural subsidies are now given to the smaller companies, sometimes on the basis of their comparative costs, there has been an incentive to spend funds. That may have provided advantages to smaller customers. Often rural service serves the affluent rather than the poor. Large companies subsidize the required rural service by charging their other customers. Smaller ones draw from a federal fund collected from larger carriers for that purpose.

60. Id. at 66 (to be codified at 47 U.S.C. § 252(b)).
61. Id.
63. Telecommunications Act, supra note 1, at 64-65 (to be codified at 47 U.S.C. § 251(f)).
64. Id.
66. Id. The Journal gave the following examples: Beehive Telephone Company, in Westover, near Partoum, Utah, has a modern system that “enables 40 student West Desert High to install a two way educational TV system. It lets accountant Dean Howard hook up his computer to Salt Lake City. And rancher Linda Bronson pays only $15.85 a month for basic phone service that includes automatic redialing of a busy number.” It may run lines to summer homes in Zion Park at a cost of $430,000. Id.
67. Id.
68. Following the AT&T breakup, the FCC set up the National Exchange Carriers Association, which collects fees from long distance carriers and sends monthly checks to local ones. Id. Companies benefit by showing costs at least 15% over national costs and those with fewer than
efficiency. Some large companies have pocket subsidies but the conventional wisdom is for them to sell the companies to rural carriers better able to extract subsidies. In terms of the economic incentives the Act is designed to promote, prior practices point in the wrong direction. Not only do they distort costs but they also distort the choice of carrier.

Rural service is not handled much better under the Act. The Act generally favors efficient carriers, which are usually of substantial size. The rural service requirements seem to build in many of the present problems. Under the Act the vehicle for assuring rural service is state guidance. States are allowed to achieve proper rural service by exempting carriers from burdens that prevent their serving rural populations. The Act allows such exemption for reasons of unfair competition, adverse economic impact on users, technical infeasibility, or broadly considerations of the public interest. The present system is an example of political stasis. It would almost seem that the Act, in its richness of goals, leaves states free to arrive at a similar compromise. What does public interest mean in this context? What sort of economic impact on users does the bill incorporate? What considerations of technical infeasibility is a state better able to adjust than the market place would? Are different states free to apply their own philosophy and how will that affect the information highway?

Further, the Act provides that:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.

50,000 customers get more money regardless of costs. On the other hand, while cable companies are thought of as potential competitors which will drive down the cost of telephone service elsewhere, the House version expressly forbids cable connection to telephone service in small cities. The matter is highly charged politically. The primary organization of smaller companies is the Organization for the Protection and Advancement of Small Telephone Companies. It estimates that the cost of their services would rise 72% without the subsidies. While they make the claim in the name of poor people who would otherwise be without service, they oppose direct subsidy to the poor.

Reportedly, the FCC is becoming concerned about the incentive structure it has created and is considering substituting a schedule that expressly evaluates the factors that lead to higher costs for rural service, for example annual rainfall or the nature of the terrain, and simply reimbursing the costs associated with them.

Telecommunications Act of 1996, supra note 1, at 64 (to be codified at 47 U.S.C. 251(c)).

Id. at 79 (to be codified at 47 U.S.C. § 261(c)).
In antitrust, there is a longstanding debate on the meaning of the statutes' ubiquitous goal of "competition." On the one hand, it has been interpreted to mean protection of the process that maximizes consumer welfare irrespective of its costs to those who are in business. On the other, it has been interpreted to mean preserving small business, thus allowing the maximum numbers to be in "competition" with each other. The two goals are often inconsistent. It would seem that "competition" in this section is defined as protecting competitors, rather than fostering efficiency, though the general construction of the statute would lead one to conclude that efficiency was its intended goal.

Rural service is not the only consideration that elicits provisions seeming to subordinate efficiency to other political goals. While there is strong language to protect all companies who wish to be carriers and states are expressly forbidden to prevent any proposed carrier's entry into service in the state, the state may condition the right to entry on a commitment to provide universal service, "protect the public safety and welfare, ensure the continued quality of telecommunication service, and safeguard the rights of consumers." While the rural service provisions use of "competition" may have adopted the surprising alternative meaning of the word, the use of "competition" in this context is truly enigmatic. Do the listed provisions never require the choice of one carrier over another? If such a choice is required in the name of public safety (for example, one company has trucks more appropriate to the terrain of the locale), how can that choice be made competitively neutral for the other carrier(s)? One can hardly limit the choices that might be appropriate when considering the public welfare. Again, how can such choices possibly be competitively neutral? Can choices made to accommodate quality of service or to protect the rights of consumers (whatever they may be) be less straining of neutrality? A state could provide a version of neutrality by


74. See Chief Justice Warren's pronouncement in Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition, through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.").

75. See Telecommunications Act, supra note 1, at 70 (to be codified at 47 U.S.C. § 253(b)).

76. One might note that the Constitution limits congressional spending to providing for the general welfare. U.S. Const. art. I, § 8. If the definition of "welfare" includes all things for which Congress spends money, it is perhaps even difficult to find goals that are not in the public welfare.
adopting a descriptive rule under which any carrier could theoretically qualify. For example, instead of choosing the carrier with trucks better adapted to the terrain, states could require the use of such trucks; in many cases, no other carrier would bother to make the required purchases fearing that it would simply find itself outside still another newly drafted rule.

2. Universal Service

Universal service is another goal of the legislation which, like rural service, has not been made consistent with the free market thrust of the Act. The Act gives the states control of accounting rules to ensure that universal service not bear more of its share of common costs and expressly prohibits subsidy of competitive services.\(^7^7\) The state’s power to adopt regulations is expressly subordinated to the Commission.\(^7^8\) The Act invades carrier rate making or policy setting to regulate an outcome. In the process, it cannot help but distort the deregulation heralded by the law. If universal service is a public goal, and it will not be served without subsidy, some form of state or federal action is required. One alternative form of action would be to have the government tax to provide a compensating subsidy for those the market would not reach without it. The tax could be levied on all telephone carriers, on home owners, or on the general public without diluting the allocative efficiencies of market pricing. Instead, the Act provides for the designation of eligible telecommunications carriers who have a utility role in providing necessary services when other carriers do not provide them.\(^7^9\)

The state is also given authority to see to several matters of state and local interest during the conversion from regulation to competition. It is given a significant role in the process. It may be requested by either party to participate in the negotiations for transfer of assets required for service and to arbitrate differences.\(^8^0\) Failure to cooperate with the state as arbitrator is a failure to negotiate in good faith.\(^8^1\) Whether or not the concepts of negotiating in good faith works in a labor context, it here is asked to accommodate at least the two equally important interests of labor and management, neither of which is supposed to be subordinated. Here, all that the negotiations are designed to do is insure that properties that are made available by the statute are

\(^7^7\) Telecommunications Act, supra note 1, at 75 (to be codified at 47 U.S.C. § 254(k)).

\(^7^8\) Id. at 73 (to be codified at 47 U.S.C. § 254(f)).

\(^7^9\) Id. at 80-81 (to be codified at 47 U.S.C. § 214(e)).

\(^8^0\) Id. at 66-67 (to be codified at 47 U.S.C. § 252 (b)).

\(^8^1\) Id.
fairly valued. Surely that can be accomplished by a less subjective process than bargaining in good faith and can be administered by a less interested party than the state. If the idea is to require transfer of assets when assets seem necessary to states, would not a valuation procedure such as the one in eminent domain suffice?

The Act leaves to the states the pricing of universal service as well as the extent of the contribution from other carriers to support the provider of universal service. States and the Commission are expressly charged to ensure that rates for telephone service are "just, reasonable, and affordable." No concern seems to be expressed for the fact that the goals may well be incompatible. How should the state define affordable? What if, even with ample competition, costs would keep rates above what the state considers affordable? If insufficient competition exists, the Commission or a State may establish the rate that a carrier may charge to ensure fair rates.

D. The Role of the BOCs and the Affiliates

Perhaps the most difficult matter to adjust to the goals of the Act is the role that the BOCs are to play in the future of telecommunications. The consent decree created them and left them monopolists subject largely to state control. Now the monopoly of intrastate calls is to be taken from them and they are to be given a role in competing in each other's markets or the market their predecessor company held. The transition is no easy matter. Even the statute demonstrates some ambivalence though it attempts at least to state that competition, and not regulation, is the desired means of accomplishing their integration. Professor Sullivan argues persuasively that allowing them a role in the competition for interexchange service would threaten that competition.

The Act itself provides many safeguards. (Section 272(a) requires that, if a Baby Bell is to keep its local service it may not provide — directly or through an affiliate — any new interlata service other than out-of-region services, manufacturing or alarm service.) If a Baby Bell wishes to provide any of the services mentioned, it must do so through an affiliate. Further, the affiliate must keep separate books, have separate officers and employees, and maintain arm's

82. Id. at 67-68 (to be codified at 47 U.S.C. § 252(d)).
83. Id. at 73 (to be codified at 47 U.S.C. § 254(f)).
84. Id. at 71 (to be codified at 47 U.S.C. § 254(b)).
85. See id. at 93 (to be codified at 47 U.S.C. § 272(a)).
87. Sullivan, supra note 12.
88. See Telecommunications Act, supra note 1, at 92 (to be codified at 47 U.S.C § 272(a)).
89. Id. at 93 (to be codified at 47 U.S.C. § 272(a)).
length relations (which are reduced to writings kept open for public inspection) with the Bell Company. An affiliate may not obtain credit in a manner that allows the creditor to have recourse to the Bell Company in the event of default. This appears to mean that the affiliate can gain no advantage in the capital market from their affiliation. An affiliate may not restrict sales of telecommunications equipment, "including software integral to the operation of such equipment and related upgrades," to any local exchange carrier. Both the Bell Operating Company and any affiliate are required to protect the proprietary information submitted with contract bids from release not specifically authorized by the owner of such information. BOCs and affiliates are allowed to collaborate with other manufacturers only with respect to research and development.

Finally, all dealings between the Bell Company and the affiliate must be made on a nondiscriminatory basis, unbundled as much as is feasible, and competitively useful information must be equally available to nonaffiliates. In short, the Act tries to deprive the Bell Company of any integration advantage.

Professor Sullivan points to the fact that the BOCs are presently monopolies protected by technological, economic, and regulatory barriers. Although alternative forms of telephone exist, for example fiber optic networks, they are limited to business-dense areas. Similarly, cellular service remains an addition to basic service not a substitute for it. Thus, local carriers, including the BOCs, have effective control of their markets. It is not clear to the writer, in this period of exploding technological developments, that alternative forms of communication will not soon be viable competition to telephone communication. Further, Professor Sullivan argues, since the interexchange market is presently highly competitive, the BOCs are not needed to leaven that competition.

Professor Sullivan’s concern about the BOCs acquisition of the right to further expand lies in the use they could make of their present

90. Id. (to be codified at 47 U.S.C. § 272(e)(5)).
91. Id. at 92-93 (to be codified at 47 U.S.C. § 272(b)(4)).
92. Id. at 100 (to be codified at 47 U.S.C. § 273(e)(4)).
93. Id. (to be codified at 47 U.S.C. § 273(e)(5)).
95. Telecommunications Act, supra note 1, at 93-94 (to be codified at 47 U.S.C. § 272(e)).
96. Sullivan, supra note 12.
97. Id.
power both locally and in the interlata market. The types of problems presented include cross-subsidization of interexchange services by higher local prices and self-preference by the BOCs, especially if they enter manufacturing of equipment (an endeavor presently prohibited). Such problems, he suggests are not subject to effective regulatory oversight. Both in terms of limited resources and because records do not easily reveal subsidies and self-preference, he doubts that regulators can keep the growing Operating Companies in check.

One might argue that the Bell Operating Companies individually lack market power in the national interexchange market. Professor Sullivan responds that each is large in its region and that the opportunities for self-preference and cross-subsidization in those areas are of independent significance and are also difficult to detect.\textsuperscript{98} Further, if one succeeded, others would likely follow the example.

It is not clear that the Operating Companies will remain small in the new market. Bell Atlantic and Nynex are discussing merger.\textsuperscript{99} If they merged, the size of the combined company would be second only to AT&T, its former parent.\textsuperscript{100} It would control Nynex's six states, including New York, and Atlantic's mid-Atlantic area, including New Jersey and Washington, D.C.\textsuperscript{101} According to the \textit{Wall Street Journal}, about one-third of all domestic calls originate or end in that combined area.\textsuperscript{102}

Professor Sullivan argues most persuasively when he recalls that the history of AT&T immediately before the divestiture decree illustrates precisely the kinds of problems he fears from the Baby Bells. AT&T, faced with the FCC's efforts to open the communications market to competitors, could no longer count on being able to appropriate all the returns from its research and development investments. While that state of development increased the research and development efforts of competitive companies, the real burst of positive innovative efforts awaited divestiture. Professor Sullivan explains the events as freeing competitors of their ambivalence about their own ability and competitive pressure to innovate to supply the BOCs (themselves precluded from manufacturing). AT&T no longer had a bottleneck monopoly of access to telephone lines.

History may, in this regard, be more persuasive than economic theory. While he arrives at a quite plausible economic theory to ex-

\textsuperscript{98} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
plain the lack of innovation of telecommunications competitors – they were uncertain whether AT&T could block the products of their innovation with its bottleneck – Professor Sullivan apparently does not consider the possibility that the size and power of AT&T, divorced from its control of telephone lines, might itself have provided a sufficient disincentive.

It has become customary to accept classical economic analysis as correctly describing such relationships. The author wonders whether such theory is adequate to encompass all important factors in such large reorganizations as are occurring in the telecommunications industry. Most importantly, one should wonder whether antitrust is adequate to the task of making the Act function. Perhaps an independent reason supporting Professor Sullivan’s conclusion concerning the BOCs is that large size such as the size of the Baby Bells may stifle the utility of antitrust to help achieve a truly efficient market.

IV. Is There Implied Antitrust Immunity in the Telecommunications Act?

Whether it is adequate to the task or not, antitrust is a selected medium of correction in the Act. Section 601(b) indicates that antitrust is a key factor in assuring appropriate telecommunications. Several preliminary questions about its utility and application suggest themselves. How does the antitrust application relate to the numerous forms of regulatory exception to the law? Is a state, in applying its regulatory functions, directly or indirectly subject to the antitrust law? If a state is not itself subject to antitrust law, may it in its regulatory functions immunize private actors for what would otherwise constitute antitrust violations?

A. Implied Immunity

Although, by folklore, antitrust has achieved an exalted position in the minds of many, antitrust law is merely statutory; there is no reason for courts to disapprove its limitation by Congress. While Congress can simply exempt a field from antitrust as it did with labor, it generally provides for immunity under limited circumstances and only in the context of prescribed, usually regulatory procedures. There are some instances in which a statute makes the relationship clear by providing antitrust immunity to the regulators and their regulatory decisions. Such exculpating provisions exist, for example, in

the Interstate Commerce Commission Act,105 the Federal Communications Commission Act,106 and the Shipping Act of 1984.107 There are laws that by their silence on the subject allow courts to surmise the intention to prefer regulation to antitrust; when the courts find that intention, the regulators are said to have implied immunity.108

The Telecommunications Act has a provision that addresses the relationship of the Act to antitrust and certainly forecloses express immunity but it may not be dispositive of the implied immunity question. Section 601(b) provides, with exceptions not here relevant: “nothing in this Act or the Amendments made by this Act shall be construed to modify, impair; or supersede the applicability of any of the antitrust laws.”109 This provision can be read as providing against implied immunity. (The author, on the other hand, would have thought that when implied immunity was found, it would be construed not to modify, impair, or supersede antitrust laws but rather that Congress intended an approved procedure that did not warrant antitrust challenge.) In fact, even if the issue of implied modification is not resolved by statute, it seems easily resolved on the merits.

Even when AT&T had a national monopoly of phone service there were no express provisions of immunity for the FCC that would apply to the telephone industry. Arguments for the industry’s implied immunity were nonetheless made, based on the comprehensive system of governmental regulation pertaining to telephone service. In United States v. American Telephone and Telegraph Co.,110 Judge Greene addressed the issue of whether the telephone company was immune from antitrust law based on the regulated status of the industry. He held that immunity could not be implied from such regulation.111 Judge

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109. Telecommunications Act, supra note 1, at 143 (repealing 47 U.S.C. § 221(a) and amending 15 U.S.C. § 18)).
110. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982) (the decision that began the line of cases leading to the partially competitive United States’ telephone system as it existed before the Telecommunications Act).
111. Judge Greene’s rationale in United States v. American Tel. & Tel. Co. is precise. He states that:

The problem created by the tension between their antitrust laws and economic regulation has been long recognized. See, e.g., United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 1, 4-5 (1971). Broadly speaking the antitrust laws are rooted in the proposition that the public interest is best protected by competition, free from artificial restraints such as price-fixing and monopoly. The theory of regulation, on the other hand, presupposes that with respect to certain areas of economic activity the judgment of expert agencies may produce
Greene's analysis concerning the rareness of implied immunity is excellent. A perusal of cases makes that quite clear.\textsuperscript{112} His attempted hornbook statement of instances in which immunity will be implied is impressive but not predictive of actual results.\textsuperscript{113} His conclusion that the provision of telephone service did not warrant implied antitrust immunity seems settled by history. Not only did Judge Greene's opinion remain unappealed, but he also became the virtual director of the reorganized industry in administering the consent decree entered after his decision. He has continued to be the one judge in the federal system who has dealt with the industry day after day for a generation. The claim that antitrust immunity applies appears to have ended with his denial. If the immunity argument was of no avail in the previous era of much greater regulation, the argument seems clearly not appli-

\begin{quote}
results superior to those of the marketplace, and that for this reason competition in a particular industry will not necessarily serve the public interest. Because of these divergent objectives, it could be, and has been, argued that whenever the Congress has established a scheme of regulation through an independent commission, it must be deemed to have determined that the antitrust laws should not apply to the industry thus being regulated. That, however, is not the law.

The Supreme Court has repeatedly noted that, "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."\textsuperscript{114} Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973), quoting United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963).

Regulated industries "are not per se exempt from the Sherman Act" (Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 456 (1945)), and they are not necessarily exempt even if the conduct complained of in an antitrust context has been expressly approved by the agency charged with the regulation of the particular industry.

Regulated conduct is, however, deemed to be immune by implication from the antitrust law in two relatively narrow instances: (1) when a regulator agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest.


\textsuperscript{115} It is difficult to see why the Federal Power Commission cases do not qualify for immunity on both criteria. The results are otherwise. See California v. Federal Power Comm'n and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Even more difficult to explain is why immunity would be implied for private actors under the Securities and Exchange Act according to dictum in Silver v. N. Y. Stock Exch., 373 U.S. 341 (1963). A more accurate statement would be that the few cases in which immunity is implied are \textit{sui generis} and extremely infrequent.
cable after the new Act which applies regulatory measures far more sparsely.

Having concluded that the antitrust laws survive an attack based on the statute’s having provided immunity, there remains the question of which law takes precedence in the event of a dispute. If the Justice Department disagrees with an FCC interpretation of the law, believing that what the commission would permit would violate antitrust law, may it bring suit against the conduct under the antitrust principles? While the Act announces the primacy of antitrust, it still seems unclear what result to expect of this provision. Consider the Public Utilities Commission’s authority to supervise natural gas company interconnection. What if a private antitrust suit precedes regulatory permission? In the natural gas case, the Supreme Court indicated that antitrust prevailed. Indeed, the Justice Department did not even have to allow the commission to express its expert opinion.

B. State Action Immunity for Antitrust

Aside from the question of how the regulatory role of the Federal Communications Commission is to be resolved with the antitrust laws, there remains a similar question with respect to state provided immunity from antitrust. Curiously, federal courts have created a state right to accomplish an immunity not authorized by federal statutes for acts federal courts think ought to be resolved through state regulation rather than the application of competition rules. Since the United States Constitution provides for state adherence to federal legislation under the Supremacy Clause, one might suppose that state attempts to block the application of federal antitrust law would be declared void. There is certainly no affirmative federal constitutional right that could easily explain a state’s ability to deny congressional legislation

114. There is one instance in which the statute begins to resolve this question. Before a BOC may enter interexchange service it must pass an FCC checklist for competitiveness in relation to local competitors. Telecommunications Act, supra note 1, at 88 (to be codified at 47 U.S.C. § 271(c)(2)(B)). In applying that checklist, the FCC is directed to give “substantial weight” to the opinion of the Justice Department. Id. at 89 (to be codified at 47 U.S.C. § 271(d)(2)). Even that provision does not settle who has priority in resolving a disagreement. In another instance, the Act provides that BOCs should engage in network planning with others “consistent with the antitrust laws.” Id. at 99 (to be codified at 47 U.S.C. § 273(e)(3)). Does that provision imply that the Justice Department can sue if it disagrees with the FCC that the required planning was consistent? May a court decide that an antitrust suit (as opposed to an administrative hearing) is a preferred manner of determining what is “consistent with the antitrust laws?” What is the effect of this section on others which do not expressly invoke antitrust consistency, given the several references indicating that the entire Act is to be read consistently with the antitrust laws?


116. U.S. Const. art. VI, cl. 2.
in this area. The Sherman Act\(^{117}\) was declared a valid application of congressional power under the commerce clause\(^{118}\) at a time when manufacturing was still thought to be outside Congressional oversight because it was local.\(^{119}\) The Tenth Amendment, the only other apparent basis for state constitutional authority over commerce, while lifted from its near total rejection by the Supreme Court,\(^{120}\) is clearly far too limited to support so broad a role.\(^{121}\)

Nonetheless, the United States Supreme Court has found a state right that blocks federal antitrust enforcement. States are themselves immune from antitrust law.\(^{122}\) That result can be attributed to the fact that Congress appeared to have no interest in regulating the states' conduct by the acts. Beyond their own immunity, however, states can also immunize private actors and local government from antitrust application.\(^{123}\) The Court has not always been so generous to state authority, however. In *Schwegmann Brothers v. Calvert Distillers Corp.*,\(^{124}\) the Court denied the state the right to enforce nonsigner fair trade prices.\(^{125}\) The decision might be characterized as evidencing insufficient supervision of the price as in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*\(^{126}\) It might also be characterized as evidencing an insufficient state interest in the interference with interstate commerce inherent in allowing fair trade restrictions on pricing freedom without most customers' agreement.\(^{127}\) The ample indications in the Act that it does not invalidate, supersede or modify antitrust law may be no more dispositive relative to the states than they were with respect to the FCC. It is important to recall the


\(^{118}\) Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).


\(^{120}\) In the period of reconsideration, following President Franklin Roosevelt's reelection in 1936, the Court, in *United States v. Darby*, 312 U.S. 100, 124 (1941), had declared the amendment a mere truism that anything not delegated to Congress was not surrendered.


\(^{123}\) Id.

\(^{124}\) 341 U.S. 384 (1951).

\(^{125}\) Id.

\(^{126}\) 445 U.S. 97 (1980).

\(^{127}\) One might wonder whether there is a limit on state granted antitrust immunity in the nature of the constitutional limits on burdening interstate commerce. In that regard, consider the Court's recent insistence that, like implied immunity stemming from federal regulatory statutes, state authority to grant immunity is not lightly to be inferred. See *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). This issue is beyond the scope of this article.
extent to which federal courts have created state action immunity as one considers the new state role in implementing the Act.

C. Local Governments and Individuals are Not Immune

Although state governments are immune and can immunize others from antitrust, local government units are not immune and, of course, cannot grant immunity. As a result, if local governments violate antitrust provisions, they are liable, and those outside government who participated in creating the offense are also liable in antitrust. Private parties not acting at state direction are subject to the usual remedies in antitrust. They can be criminally prosecuted by the Department of Justice. They can be held liable for civil penalties by the federal government, and they may be subject to administrative proceedings by the Federal Trade Commission, whose antitrust jurisdiction largely overlaps that of the Department of Justice. Local Governmental units themselves, those acting at their direction, and employees acting in their official capacities are not subject to penalties because of the Local Government Antitrust Act of 1984, but are still subject to injunctive relief under the Sherman Act.

Not all state laws that appear to allow municipalities to commit antitrust offenses provide immunity. To immunize, state law must be affirmatively expressed and clearly articulated. Local government was once required to prove that the state supervised its activity but now appears relieved of that duty. The two remaining requirements, of affirmative expression and clear articulation, are still in the process of definition. For example, when a power utility's rate schedule indicated it would replace light bulbs free of charge to its customers, the fact that the state had mandated the free light bulb distribution was unpersuasive. The Court held that the utility had originated the

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135. Id.
idea and the state merely acquiesced. In California Retail Liquor Dealers Association v. Midcal Aluminum, the Supreme Court struck down California's wine licensing law. The state required by its provisions that either the seller of wine set a schedule of prices or that a fair trade contract be made with any wholesaler. Either provision would establish the only authorized retail price for the wine. Finding that the state did not actively supervise the price setting, i.e., it left price setting to private parties, the Court held that the state action doctrine did not apply.

Municipalities have been found guilty of antitrust violations in recent years. Perhaps closest to issues that might be raised under local telephone deregulation, the City of Boulder enacted an emergency ordinance prohibiting expansion of cable television service. Although the city had a home rule status in the state, which allowed the city to enact most statutes open to enactment by the state, the Court held the city to answer antitrust complaints. The Court found that the home rule provision was, at best, mere permission to enact the ordinance in question; it fell far short of clear articulation and affirmative expression.

In City of Lafayette v. Louisiana Power & Light Co., the Supreme Court upheld an antitrust claim for tying. The city required those on the outskirts of the city to purchase electricity from the city's utility as a condition to being continued as customers of the city's water and gas. The court found that there was not enough indica-

137. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). One must wonder, in any event, whether a state would be allowed more affirmatively to establish a monopoly in light bulb supply given the dearth of state regulatory need to control bulb distribution.


140. Midcal, 445 U.S. 97 at 105. The Court has not been entirely clear on its definition of active supervision. In Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985), it accepted routine approval, without additional review by the state, as adequate supervision of rates jointly set by carriers. In a later case, however, the decision was ascribed to a procedural fluke; Justice Kennedy, writing for the Court in FTC v. Ticor Ins. Co., 504 U.S. 621 (1992), indicated that the Court had rejected the defense on the grounds that the policy was not affirmatively articulated, and so spent little time concerning itself with the supervision point. In 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987), the Court refused state enforcement of a requirement that prices be at least 112 percent of posted wholesale prices as enough when there was no supervision of the setting of wholesale prices. In Patrick v. Budget, 486 U.S. 94 (1988) the Court also rejected supervision of hospital peer review procedures when the state only demonstrated that it monitored proceedings in which peer review of hospital procedures was involved and the state did not show equal review of private peer review proceedings.


142. Id. at 56.


144. Id.
tion that the state had considered the anticompetitive stance of the city and approved it. But in *Town of Hallie v. City of Eau Claire*, the Supreme Court held a city immunized from antitrust laws even though the city acquired a monopoly sewage treatment plant and required those customers who wanted to tie their systems to the plant to purchase the city's sewage collection and transportation services. The Court found a provision in the Wisconsin statutes that the Court read expressly to allow the sort of activity in which the city engaged. The competing services of neighboring towns were consequently barred from relief.

If a local government is authorized to act in a manner inconsistent with the antitrust laws, within the meaning of *Town of Hallie v. City of Eau Claire* antitrust immunity does not depend on whether the city acts wisely or imprudently. Even if it appears that the city might have acted corruptly to enhance the interests of private parties rather than the interests of the city, immunity will not be compromised. The Supreme Court has ruled that it will not allow such matters to be litigated because the Court does not want federal courts embroiled in examining the legislative motives of local governments.

The local franchising authority will first have to inquire whether it has state authority to disregard the strict dictates of anti-merger law. In anti-merger cases, the FCC has authority to preempt a state's conclusion. Assuming either the state or commission does have such authority, the next question is whether the Justice Department is able to invoke section 7 of the Clayton Act despite the approval. At least with respect to these merger-related issues, private antitrust suits are unlikely, and only the Justice Department, the FTC, and states applying their own antitrust law will have options to pursue enforcement of antitrust.

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145. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
151. See supra text accompanying notes 147-49.
154. Since merger provisions deal with concentration that poses an incipient threat to competition, as opposed to a realized one, private parties usually fail in their efforts to prove their own damage as is required by the private damages provision of section four of the Clayton Act, 15 U.S.C. § 16.
V. Conclusion

Not considered in this article is the ability of private parties to bring antitrust suits for antitrust damages. While the Act provides its own remedy for those injured by violation of antitrust, there is no indication that private antitrust suits are any more preempted than those by the federal government or the states. Indeed, private enforcement is traditionally described as simply an extension of governmental efforts to ensure that the laws are followed.

There are many issues that might raise antitrust concerns under the Act. Congress considered a number of them in the law itself although, as indicated, Congress has not definitively answered them. Consider § 652(e)(6)(iii) which allows the Commission to waive telephone-cable interchange size limitations if it finds that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." This section allows a local franchising authority (in the case of the purchase or acquisition of a cable operator or a joint venture to provide cable service) or a State Commission (in the case of the acquisition of a local exchange carrier or a joint venture to provide telephone exchange service) to approve or disapprove a purchase, acquisition, or joint venture. The local franchising authority will first have to inquire whether it has state authority to disregard the strict dictates of anti-merger law. Assuming it does have such authority, the next question is whether the Justice Department will invoke section seven of the Clayton Act despite the approval. The latter issue will also apply to state approval.

Section 259 provides that:

[T]he Commission shall prescribe, within one year after the date of enactment of [this Act], regulations that require incumbent local exchange carriers [mostly BOCs] to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by the such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services.

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156. Id.
157. Id. at 121 (to be codified at 47 U.S.C. § 652(d)(6)).
158. See supra notes 142-51 and accompanying text.
159. See supra note 116 and accompanying text.
160. See supra notes 135-41 and accompanying text.
161. Telecommunications Act, supra note 1, at 77-78 (to be codified at 47 U.S.C. § 259).
services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier.\textsuperscript{162}

The Commission is also to ensure that the "local exchange carrier makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier."\textsuperscript{163} If efforts are made to avoid these outcomes, will antitrust be applicable? The Commission is given authority to waive many requirements of the Act on an appropriate finding.\textsuperscript{164} In some instances, the Commission is empowered to override inconsistent state decisions.\textsuperscript{165}

In addition to the problems highlighted by the Act itself, there is considerable room for antitrust violations. Considerable collaboration is required in the Act, and more is authorized. Certainly there is room for a claim of the various forms of restraints of trade prohibited by section one of the Sherman Act.\textsuperscript{166} There may be a proliferation of agreements to fix prices, divide territories, boycott competitors, tie products to services, and make exclusive dealing until a market grows strong enough to make them infeasible. Monopolization claims, or at least claims sounding in attempt to monopolize, seem likely. These are the sorts of claims that antitrust would normally resolve in an unregulated market. It remains to be seen whether these issues can be resolved appropriately, given the provisions of the new Act.

\textsuperscript{162} Telecommunications Act, \textit{supra} note 1, at 77-78 (to be codified at 47 U.S.C. \textsection 259(a)).

\textsuperscript{163} \textit{Id.} at 78 (to be codified at 47 U.S.C. \textsection 259(b)(4)).

\textsuperscript{164} \textit{See, e.g., id.} at 64-65 (to be codified at 47 U.S.C. \textsection 251(f)).

\textsuperscript{165} \textit{See, e.g., id.} 70-71 (to be codified at 47 U.S.C. \textsection 253(d)).