THE TELECOMMUNICATIONS INDUSTRY IN 1993: THE YEAR OF THE MERGER

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"Vision is trivial. Doing it is the hard part."
- James L. Barksdale[1]

Experiencing unprecedented change in an era of convergence, the telecommunications industry will long remember 1993 as the year of the merger.[2] The mergers of today permit the efficient and economical exchange of technology in an era where the liquidation of billions of corporate dollars to acquire entire companies is no longer practical. The abundance of recent mergers can be distinguished from the mergers and acquisitions of the past decade in two respects: 1) the majority of these mergers are "strategic alliances, usually within the acquirer's own industry and are aimed at creating an even stronger resulting entity;"[3] and 2) these mergers involve market shares rather than cash as "the currency of choice in most deals."[4] These deals are being forged out of a desire to control information, data and services through dominion over both the medium and the means of distribution.[5]

Mergers such as that of AT&T-McCaw, if successful, promise to incite the Regional Bell Operating Companies ("RBOCs")[6] into unbridled competition among themselves, as they attempt to challenge AT&T's dominance over the long-distance market, join forces with cable television carriers, invest in cellular, and establish wireless consortiums. At the same time, AT&T has its eye on the local loop[7] where competition is intensifying and where the RBOCs currently control ninety-eight percent of all local service.[8]

The pending union of AT&T and McCaw, a $12.6 billion stock swap announced August 18, 1993,[9] promises to create a nationwide wireless network that will result in formidable new competition to existing cellular operators. AT&T's proposed merger, the fifth largest in United States history,[10] establishes a combination of wireless and long distance that is bound to shake up the $7.8 billion cellular industry.[11]

The merger comes at a time when the other large long-haul players, namely MCI and Sprint, have also decided to invest in cellular and wireless technology. The technological investments of the three dominant interexchange carriers ("IXCs") could result in significantly lower prices and new service options for the consumer. The telecommunications companies are competing for what they see as the ultimate goal—"universal follow-me roaming"—a wireless phone service that can operate at any time and in any location.[12]

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[1] Anthony Ramirez, *Deal May Quicken Pace of Wireless Revolution*, N.Y. TIMES, Aug. 18, 1993, at D5. Mr. Barksdale is the President and Chief Operating Officer of McCaw, and will be the head of AT&T's wireless operations. John T. Mulqueen, *Users Skeptical of Mega-Merger Payoff*, COMM. WEEK, Aug. 23, 1993, at 146.

[2] It has been described as a "feeding frenzy." Mary E. Thyfault, *It's Your Call — A Second Communications Revolution Will Offer Business True Freedom of Choice*, INFO. WEEK, Jan. 3, 1994, at 13, (quoting John Loewenberg, CIO of Aetna Information at Aetna Life & Casualty Co. in Hartford, Conn.)

[3] Gregory Zuckerman, *At Long Last, M&A Activity Turns Positively Feverish*, INVESTMENT DEALERS' DIGEST, Oct. 18, 1993, at 21.

[4] *Id.* at 21, 22.

[5] Jack Egan, *Merger Mania Entertains Hollywood*, U.S. NEWS & WORLD REP., Oct. 25, 1993, at 48.

[6] The current seven RBOCs are the result of the consolidation of AT&T's twenty-two Bell Operating Companies (BOCs) following divestiture in 1984. United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.C. Cir. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[7] The local loop extends from the central office of the local exchange to the end user and back to the exchange. *In re* Policy and Rules Concerning Rates for Dominant Carriers, *Memorandum Opinion and Order*, 8 FCC Rcd. 7474, para. 128 (1993).

[8] Thyfault, *supra* note 2, at 12.

[9] Eileen Messmer & Bob Wallace, *AT&T Grabs All of McCaw*, NETWORK WORLD, Aug. 23, 1993, at 31.

[10] *Id.*

[11] Josh Hyatt, *AT&T Heads Home Again; For Consumers, the Merger Could Offer a Wide Array of New Competition*, BOSTON GLOBE, Aug. 17, 1993, at 33.

[12] *Id.*

Bell Atlantic's proposed $26 billion stock swap with TCI, a merger of the giant regional phone company and the nation's largest cable television conglomerate, came to a halt on February 23, 1993, when the two companies were unable to agree on a price tag for the deal. The two companies announced that the Federal Communication Commission's ("FCC" or "Commission") recent decision to slash cable prices by seven percent significantly reduced the value of TCI's cable properties.[13]

The proposed merger was an even larger bid for digital-era dominance than that of AT&T-McCaw,[14] and had been labeled the boldest gamble yet on the coming convergence of computers, telecommunications and the media.[15] In its desire to bring about a revolution in home entertainment and information through digital technology, and to become a programming powerhouse in the world of interactive media, Bell Atlantic had hoped, and yet may succeed with another partner, to set the standard for the creation of a modern communications company, the likes of which the industry has never seen.[16]

This onslaught of mergers can be attributed to several different factors. The wave of new technology, ranging from cellular and wireless to digital and fiber optics, has spurred on this era of merger hysteria, compelling communications companies to pool both technological and economic resources in order to compete more effectively. However, the reason provided for many of these mergers—to advance technological achievements and to speed up the arrival of the "information superhighway"[17]—may simply be an excuse for controlling the technology, because by doing so, mega-companies are more likely to force the smaller competitors out of the game.

Significantly, these mergers may reflect a desire on the part of many communications companies to retreat to the vertical integration practices that are characteristic of the pre-divestiture Bell System.[18] In their attempts to achieve sheer economic omnipotence over the rest of the industry, merging companies have the potential for substantial private advantage at the expense of the public interest. If permitted, these mergers may succeed in stifling competition in the marketplace, rather than enhancing it—the very danger that Judge Harold Greene sought to protect through the 1982 Modified Final Judgment ("MFJ").[19]

This Comment seeks to explore the significance of these mergers as the communications industry heads towards an era of convergence and technological revolution. Part I explains the technological innovations that have served as a catalyst for the mergers. It then discusses the implications of both telephone company ("telco") and cable mergers on the MFJ, and the possibility of a reversal or revision of the MFJ as AT&T attempts to regain its footing within the local loop and the RBOCs seek access to the interexchange marketplace.

Part II examines the role that the AT&T-McCaw merger is playing in the migration towards wireless communications and the impact this merger will have on the cellular market and the bypassing of the local loop. Part II also analyzes the effect that cable and telco mergers will have on the union of the two industries, altering forever the landscape of the local exchange. It then discusses the abundance of other industry mergers of noteworthy significance, includ-

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[13] Sandra Sugawara & Paul Farhi, *Bell Atlantic, TCI Call Off Merger*, WASH. POST, Feb. 24, 1993, at A1.

[14] Linda Grant, *A Surge in Shares Drives the Deals*, U.S. NEWS & WORLD REP., Oct. 25, 1993, at 49.

[15] Mark Landler & Bart Ziegler, *Bell Ringer! How Bell Atlantic and TCI Hooked Up-And What It Means for the Information Age*, BUS. WEEK, Oct. 25, 1993, at 33-34.

[16] *Id.* at 36.

[17] Sugawara & Farhi, *supra* note 13, at A1. Bell Atlantic Chairman and CEO Raymond Smith stated that the proposed merger with TCI would speed up the arrival of the information superhighway. *Id.*

[18] *See generally* Louis Galambos, *Theodore M. Vail and the Role of Innovation in the Modern Bell*, BUS. HIS. REV., Mar. 22, 1992. Vertical integration usually occurs when a company acquires another company that is either a customer or supplier, an act which may substantially foreclose competition. ERNEST GELLHORN, ANTITRUST LAW & ECONOMICS, IN A NUTSHELL SERIES 342-43 (3d ed. 1986). Because the newly merged entity no longer may have to engage in business with any other companies, competition is altered among the acquiring company's suppliers, customers and competitors. *Id.*

However, because some vertical mergers may be the result of internal expansion, a practice generally unchallengeable under antitrust law, only those vertical mergers whose anticompetitive practices outweigh possible advantages may be legally prohibited. *Id.* at 344.

[19] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.C. Cir. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The MFJ modified the 1956 Consent Decree (United States v. Western Electric Co., Civil Action No. 17-49, C.A. 82-0192 (D.C. Cir. 1956)) of a 1948 antitrust lawsuit against AT&T, which had limited the company to providing regulated common carrier communications services only, and precluded Western Electric from manufacturing equipment other than that used by the Bell System. In essence, the terms of the MFJ restricted AT&T to providing interexchange (long-distance) services. The RBOCs were permitted to provide exchange telecommunications and exchange access (local service) but were forbidden to enter the interexchange market. The MFJ effectively announced the era of divestiture.

ing MCI-British Telecom ("BT"), Sprint-Centel, and Paramount-Viacom, and how their visions compare to that of AT&T. Part III examines the future impact of such mergers, including the antitrust and regulatory implications thereof, and the market reaction from the perspective of both competition and the consumer.

This Comment concludes that the impact of these mergers will depend largely on their ability to achieve results that will satisfy the general public, the FCC's universal service standard, and the public interest standards, in terms of vigorous competition, technologically sound service and increased savings to consumers. Of equal significance is the position that Congress, the Department of Justice ("DOJ"), and the court systems ultimately will adopt with regard to the antitrust implications of the mergers.

I. TECHNOLOGICAL AND HISTORICAL OVERVIEW

A. Wireless Technology

The development of wireless technology has provided a wide variety of options for business users in the communications industry. Wireless communications is made possible with the use of tiny devices called microwave chips,[20] and the majority of wireless commodities utilize digital technology, a means of encoding information in a communications signal through the use of bits, or binary digits.[21] Because digital information is numerically simplistic, this method of transmission is able to provide more efficient and flexible networking than analog transmission,[22] and thus, is replacing the current switching system of the telephone industry.[23] The question is not whether there will be a big future in wireless, but rather which companies will play a part.[24]

1. *Cellular*

In the decade since its advent on the market, the cellular telephone has become more than a high-tech business tool for those negotiating business in traffic;[25] the cellular telephone has become both a professional and personal lifeline for many owners. Traditionally, cellular telephone service has relied upon the analog system, a method of modulating radio signals, which produces inferior sound and has far less capacity than the digital systems preferred by some telecommunications companies.[26]

Industry reports confirm that approximately fifty percent of all cellular users are making personal calls, although the majority of users still operate their cellular phones primarily for business purposes.[27] In 1992, more than eleven million Americans owned cellular phones, a growth of more than forty-six percent from 1991.[28] Operating costs have decreased significantly, with average monthly bills down from $300 to $100 over the past two years.[29] The cost of the cellular hardware ranges from $20 to $2,000.[30] The disadvantages of the service are the in-

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[20] Aaron Zitner, *Cutting the Cords: Area Firms Scramble to Become Players in New Wireless World*, BOSTON GLOBE, Aug. 24, 1993, at 35.

[21] These "bits" are expressed in the binary language of computers as a series of "0s" and "1s." Philip Moeller, *The Age of Convergence*, AM. JOURNALISM REV., Jan.-Feb. 1994, at 26. The bits respond to the presence or absence of electrical energy inside of the computer, and are assembled into larger groups of information interpreted by the computer. *Id.* These larger bits are known as "bytes," the size of which are ever-increasing, due to advances in computer technology. *Id.*

[22] Mark Fleischmann, *The Trouble With Multimedia*, WASH. POST, Jan. 6, 1994, at T10.

[23] Moeller, *supra* note 21. Switching is a term used to describe the activity performed by an exchange whereby a signal or telephone call is routed from one terminal located in a central building in each community and connected to another terminal. Frank G. McKay, *New Wave Coming in Data-Voice Switching; Telecommunications Switching*, TELEPHONE ENGINEER & MGMT., Oct. 15, 1984, at 71.

[24] Moeller, *supra* note 21.

[25] Joanne Ball Artis, *Cellular Phones Expand Reach*, BOSTON GLOBE, Aug. 25, 1993, at 29.

[26] Edmund Andrews, *The AT&T Deal's Big Losers*, N.Y. TIMES, Aug. 25, 1992, at D1. One such favored digital system is the time division multiple access system ("TDMA") favored by such companies as McCaw and Southwestern Bell and formerly by Ameritech. Charles F. Mason, *Ameritech Drops TDMA, Says Technology is Inferior to Analog; Time Division Multiple Access*, TELEPHONY, July 26, 1993, at 8. The TDMA system divides the specific time period on a particular frequency into different sections, with different phone conversations assigned to each section. *Revolutionizing Communications; Either a Convenience or a Necessity, Cellular Technology May Be in 3.5 Million Hands This Year*, HFD-THE WEEKLY HOME FURNISHINGS NEWSPAPER, June 8, 1992, at A4. An alternate digital system, known as the code division multiple access digital system ("CDMA"), has been less thoroughly tested than TDMA and designates a special and distinct code at the opening of each conversation. *Id.* The CDMA system would thus compel all signals other than the assigned conversation to bypass the subscriber's antenna. *Id.* CDMA technology currently is supported by Bell Atlantic, Pacific Telesis and U.S. West. *See* Mason, *supra*, at 8.

[27] Artis, *supra* note 25, at 29.

[28] *Id.*

[29] *Id.* Perhaps equally as important, the availability of cellular phones has altered highway travel forever, with users now able to report accidents, traffic jams, and drunk drivers to fellow motorists, highway authorities and family members. *Id.*

[30] *Id.*

trusive nature of the cellular telephone and the fact that the cellular telephone owner must pay whether they make or receive a call.[31]

2. *Personal Communications Services*

Personal communications services ("PCS") have been broadly defined as a family of mobile and portable radio services that will enable individuals to communicate from any place at any time.[32] While cellular and enhanced specialized mobile radio service providers have heretofore utilized analog transmission and currently are developing microcell applications, PCS uses the more efficient digital signals and will rely upon the development of microcell technology in the 2 GHz microwave band.[33]

PCS phones use different radio frequencies than cellular and more transmitters to minimize disruptions, regardless of the user's location.[34] Competition to existing cellular, paging and private radio services may result in lower consumer prices as well as increased efficiency of the mobile services.[35] The FCC has predicted that PCS will "usher in an era of mobile telecommunications technology that will permit access to an array of voice, data, and video communications services, regardless of where a subscriber may be located."[36]

The Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act") adopted by Congress on August 10, 1993, authorized the Commission to utilize competitive bidding procedures to award PCS licenses.[37] Most significantly, in its *First Report and Order*, the Commission permitted cellular licensees[38] to compete for PCS licenses outside of their existing cellular service areas, or in any area where the cellular licensee serves less than ten percent of the population of the PCS service area.[39] Many different types of companies, including AT&T, McCaw[40] and MCI, are vying for the PCS licenses that the FCC will auction off in 1995.[41]

Although the experts tend to disagree on whether PCS will ultimately replace cellular,[42] there is little doubt that, priced correctly and transcending its cur-

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[31] *Id.* This is a situation that cellular carriers such as U.S. West have already begun to change. *Briefs*, NETWORK WORLD, Aug. 23, 1993, at 31. U.S. West has recently launched a program entitled "Caller Pays" in Boise, Idaho, whereby cellular customers will pay only for those calls made from their cellular phones. *Id.* Cellular callers will be informed that a toll will be assessed to them for any call made to a subscriber's cellular phone. *Id.*

[32] Andrew C. Barrett & Byron F. Marchant, *Emerging Technologies And Personal Communications Services: Regulatory Issues*, 1 COMMLAW CONSPECTUS 4 (1993). PCS encompasses a range of services, from pocket telephones and advanced paging and data communications to handheld computers, and has been compared to a new kind of mobile phone, smaller, lighter and cheaper to operate than the cellular phone. Laurent Belsie & Mark Trumbull, *PCS Reaches Out For Cellular User*, CHRISTIAN SCI. MONITOR, Sept. 14, 1993, at 8. The lightweight mobility of PCS will enable providers of the service to offer a more portable, person-to-person communications service. Barrett & Marchant, *supra*, at 4.

[33] *Id.* Microcells are tinier and greater in number than those cells used in cellular telephones. *Id.* There are more cell sites, thus, microcells permit frequencies to be used more often, resulting in an increased system capacity. *Id.* Microcell technology makes the network more expensive to build, yet results in a clearer signal and a lighter, more compact phone because the signal does not have as far to travel. *Id.*

[34] Anthony Ramirez, *A Wireless Telephone Venture Excites Experts, Not Investors*, N.Y. TIMES, Sept. 13, 1993, at D4. PCS will be able to provide a variety of information services, including voice mail, video, and data services, which are expected to rival cellular telephones.

[35] Barrett & Marchant, *supra* note 32, at 5.

[36] *Action in Docket Case—New Personal Communications Services Established* (GN Dkt. No. 90-314), FCC News, Sept. 23, 1993, at 1.

[37] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993). On September 23, 1993, the FCC held hearings in order to establish rules and policies regarding the award of PCS licenses and set the licensing term at ten years, with provisions for renewal expectancy similar to those already in place for cellular. *Action in Docket Case*, *supra* note 36, para. 3.

[38] The FCC defines cellular licensees as "entities which have an ownership interest of 20 percent or more in a cellular system." *Action in Docket Case*, *supra* note 36, para. 3.

[39] *Id.* Cellular licensees are also permitted to compete for one of the 10 MHz PCS channels in their existing service area, while local exchange carriers are given the same opportunity to bid for PCS as any other applicant, except insofar as they have cellular holdings or licenses. *Id.*

[40] AT&T PCS Vice President Lewis Chakrin has stated that AT&T will join McCaw in filing for PCS spectrum outside of McCaw's existing cellular markets. *See generally McCaw/AT&T Merger: Its Implications for PCS*, PCS NEWS, Sept. 2, 1993.

[41] Since the Fall of 1992, MCI has been testing PCS and has "signed agreements in principle" with approximately 150 companies in order to create a nationwide PCS consortium. *Id.* Such companies include LECs, cable television companies (including Viacom, Jones Intercable and Times Mirror Cable), paging companies and utilities. David Baron, *Rules for PCS Allocation Announced; FCC Announces Regulations for Radio Spectrum Distribution for Personal Communications Services*, DIGITAL MEDIA, Oct. 21, 1993, at 21. The goal of the consortium is to compete against AT&T-McCaw and the RBOCs in the burgeoning PCS industry. *Id.*

[42] The Arthur D. Little Company estimates that within the decade half of all homes will possess at least one wireless device, and cellular phone subscribers will increase by 24 million subscribers, up from the current figure of 11 million today. *Id.*

rent definition as a consumer service or personal telephone number, PCS could effectively compete with cellular service for business users.[43] Cellular may be more expensive than other wireless options currently in place, such as radio networks, but it remains more flexible and better suited to handle large data transfers and interactive data communications than its radio counterparts.[44]

3. *Direct Broadcast Satellites*

A direct broadcast satellite ("DBS") system is a radio communications system in which high-powered geostationary satellites are able to retransmit signals from earth directly to small "dishes" or earth stations that are mounted on subscribers homes or buildings.[45] Since the first system began operating in 1983,[46] DBS has become commercially feasible due to the existence of relatively inexpensive receiving equipment, and thus, may be a viable alternative to cable.[47] Many practitioners in the cable industry anticipate that DBS ultimately will compete head-to-head with cable, by cutting into the current number of cable subscribers, and by making it increasingly difficult for cable to compete with broadcasters for advertising.[48]

DBS's initial subscribers will be the non-cable and the satellite-based non-Television Receive Only households that are willing to install a satellite receiver for DBS service, either because a cable operator does not service their location, or because they are dissatisfied with the cable or the Television Receive Only programming offerings.[49] DBS competition is significant because it may reduce the ability of many cable companies to compete effectively with the telcos, and thus, preclude the necessity of the problematic cable rate regulation that is currently a topic of great concern among cable companies, regulators and consumers. At a minimum, the existence of DBS may compel cable companies to act less like a utility and to devote more effort to programming,[50] and, ultimately, to merge with companies such as telcos in order to effectively compete.

B. The Current Trend Toward Wireless

The emergence of cellular and radio-based networks and other wireless communication options such as PCS will have a profound effect on the landscape of the business environment. The primary reason for such an impact is the elimination of the need for the telephone, computer or facsimile user to be bound to his or her desk by copper or fiber cables.[51]

Telecommunications has begun the transition from analog to digital technology, improving the speed and accuracy of transmitting data through the network in a process similar to that of "switching from writing longhand to shorthand, packing more punch in a given space."[52] The significance of mergers such as AT&T-McCaw lies in the blurring of the regulatory borders between cable and telephone and wireless,[53] and in encouraging other mergers or joint ventures to spring up between the local carriers and cable television or cellular operators.[54] Such activity will inevitably increase competition and ultimately enhance the benefit to the consumer with an increase in the availability of service options.

C. Cable

1. *Fiber Optics*

Fiber optics is a term for the transmission of digital information such as voice and data, whereby light waves are modulated and transmitted over fibers of

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[43] Belsie & Trumbull, *supra* note 32, at 8.

[44] Lynne Gregg, *Mixed Signals From Wireless Communications*, NETWORK WORLD, June 15, 1993, at 51.

[45] Lawrence P. Blaskopf, *Defining the Relevant Product Market of the New Video Technologies*, 4 CARDOZO L. REV. 7 (1985). The laser disc quality of DBS is specifically designed for home reception. Harry A. Jessell, *DBS; To Be or Not To Be*, BROADCASTING & CABLE, Nov. 15, 1993, at 22.

[46] T. Barton Carter et al., THE FIRST AMENDMENT & THE FIFTH ESTATE 509 (3d ed. 1993).

[47] *Id.* at 509-11.

[48] *Regional Rollout Planned; DBS Leaders Predict Satellite Service Will Have Big Impact on Cable*, COMM. DAILY, Mar. 25, 1994, at 5.

[49] Michael Elasmar, *DBS! But Is It Viable?*, SATELLITE COMM., July 1993, at 3A. Despite the fact that DBS should be able to entrench itself in underserved rural locations, some broadcasters believe that DBS will not entice current cable subscribers unless such customers are largely dissatisfied, and that the 30% of households not currently subscribing to cable will be unwilling to spend hundreds of dollars for a satellite service. Jessell, *supra* note 45, at 22.

[50] *From Utility to Programmer; After 'Tough' Retransmission Deals, Fox V.P. Says Cable Must Change*, COMM. DAILY, Oct. 8, 1993, at 4.

[51] Gregg, *supra* note 44, at 51.

[52] Dan Dorfman, *Pro Pushes Telecommunications*, USA TODAY, Aug. 20, 1993, at 2B.

[53] *Id.*

[54] Matthew Katz, *Multimedia: the Future of Information Delivery to Homes and Businesses*, LASERDISK PROF., Nov. 1993, at 14. *See also* Baron, *supra* note 41, at 21.

fine glass[55] surrounded by a metal sheath.[56] This high-tech fiber is becoming the cable of choice because it has the greatest capacity of any known transmission medium[57] and is less susceptible to electrical interference. Fiber optics differs from coaxial cable, most often used to connect television sets, because fiber optic cables do not conduct electricity, whereas coaxial cable transmit electrical impulses.[58]

As cable companies position themselves to enter the wireless and data-communications market, they will rely upon a combination of fiber-optic, coaxial and wireless transmission facilities.[59] Despite the fact that most cable operators find themselves trailing the RBOCs in their ability to provide traditional communications services, cable companies possess a technical advantage with high-bandwidth connections into residences, and are better positioned to enter the wireless market of PCS.[60]

The mid 1990s may prove to be a watershed for the cable industry as, for the first time, competition from the marketplace compels true pricing; the industry will continue to thrive and make money, but not with the same pervasiveness as in the past. Most cable companies cannot afford to invest in new infrastructure, especially in the wake of the recent cable rate gouging, thus, one solution is for the cable industry to get into telephony. The quickest and most efficient way for the cable companies to gain access to this valuable infrastructure, and thus ensure their own viability as effective competitors in this era of convergence, is by merging with a telco.[61]

Cable operators, such as TCI and Time Warner Entertainment, have articulated a vision in which high-capacity fiber optic cables will not only deliver games and programming, but will act as two-way paths for financial and database communications from the home.[62] As the technology that fuels and makes possible the mergers between cable and telco, the potential for fiber optics, once unleashed, cannot be underestimated.

2. Cross-ownership - The Chesapeake and Potomac Decision[63]

On August 24, 1993, Bell Atlantic acquired the right to provide video programming in part of its Virginia service area, by successfully striking down the 1984 statutory telephone/cable television cross-ownership ban.[64]

In essence, the *C&P Telephone* decision makes it

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[55] Moeller, *supra* note 21, at 24.

[56] Sandra Sugawara, *A Power Play for the Information Highway? Some Utilities Plan to Use Their Fiber-Optic Systems to Rival Cable and Phone Firms' Projects*, WASH. POST, Dec. 29, 1993, at D1.

[57] Fleischmann, *supra* note 22, at T10. One MCI specimen containing 40 fiber optic strands has the capacity to carry nearly 1.3 million phone conversations or 1,920 television channels. Robert Samuelson, *Lost on the Information Superhighway*, WASH. POST, Dec. 16, 1993, at A25. In addition to having a faster transmission rate, fiber optic cables have approximately eight thousand times the capacity of copper cables. Elisabeth Geake, *Lusting for Information? Possibility of Telecomputing in the Future*, NEW SCIENTIST, Jan. 16, 1993, at 44.

[58] Sandra Sugawara, *A Power Play for the Information Highway?*, WASH. POST, Dec. 28, 1993, at D1. Invented by scientists at Corning, Inc., in 1970, fiber optic technology is fundamental to the success of cable and telecommunications mergers because its huge bandwidth capacity facilitates delivery of virtually any audio, video or computer service to homes and businesses. Samuelson, *supra* note 57, at A25. Such resplendent technology makes fiber optics the true foundation for the information superhighway. *Id.* However, some engineers do not necessarily see fiber optics as the Holy Grail, because they believe that the real power in the local infrastructure lies in the switching and in the digital compression. Telcos also understand that the wiring of subscribers with fiber optic cable is both expensive and often impractical, because laying fiber optic cable can cost as much as $3,000 per subscriber, whereas laying a new cable line costs approximately $500 per subscriber. S. Ronald Foster, *CATV Systems Are Evolving to Support a Wide Range of Services; Delivering Voice and Other Service Over Cable Television Systems*, TELECOM., Jan. 1994, at 95.

[59] Eric Smalley, *Cable Firms Plot Data Course; Obstacles Include Nationwide Coverage*, PC WEEK, Dec. 13, 1993, at 45. The current practice of cable company networks is to run fiber optics from the cable central offices out to the neighborhoods where coaxial distribution networks and drop lines connect to customers. *Id.* Cable television companies intend to upgrade the coaxial cables, ultimately replacing them with fiber optics. *Id.*

[60] *Id.* Cox Cable, an early developer of PCS, is one of three companies awarded preference by the FCC in bidding for portions of the radio spectrum being made available for PCS.

[61] In so doing, cable companies will add the plain old telephone service ("POTs") component of wireless technology, to a fiber or coaxial broadband cable system. John Williamson, *U.K. Cable Telephony; A Window on the Future*, TELEPHONY, Oct. 5, 1992, at S6.

[62] George Mannes, *Two-Way TV*, VIDEO MAG., Jan. 1994, at 46.

[63] Chesapeake and Potomac Telephone Co. of Virginia v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *appeal pending*.

[64] Cross-ownership of content and distribution has traditionally been a legally volatile mixture. Michael Schrage, *The Baby Bells Go Hollywood, and We're Talking Deals, Baby*, WASH. POST, Aug. 26, 1993, at B3. In 1984, when the cable industry was in its infancy, the FCC sought to protect the fledgling industry through the 1984 Cable Act, which restricted cable-telco cross-ownership in order to prohibit telcos from supplying programming within their respective regions. Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39, 54 (1993). Ten years later, the cable industry no longer requires such extensive

possible for telephone companies across the country to seek full rights of free speech and to compete on the same playing field as other mediums of mass communications, including cable operators,[65] in providing programming to consumers. Additionally, the *C&P Telephone* decision enabled local exchange carriers ("LECs") to vie for a position as full-fledged players, in the switched broadband marketplace.[66]

The ruling by U.S. District Judge T.S. Ellis increases the effectiveness and the immediate impact of proposed mergers, and perhaps more importantly, could result in providing the consumer with superior choice, service and price options in the wake of increased competition.[67] It remains to be seen, however, whether this decision ultimately will foster healthy competition and reduced rates for consumers, or whether it will encourage monopolistic behavior on the part of merging cable and telephone companies. The full impact of the *C&P Telephone* decision may never be determined, however, if it is overturned on appeal.

D. The Modified Final Judgment

The 1982 Modified Final Judgment ("MFJ") was an attempt to curb perceived antitrust practices of AT&T,[68] then "the largest corporation in the world by any reckoning,"[69] in violation of the Sherman Anti-Trust Act of 1914.[70] Judge Greene was fully aware that such an undertaking had enormous implications, including the potential for private gain at the expense of the public interest.[71] To this end, he proposed a modification of AT&T's settlement with the DOJ that met his standard of an effective antitrust remedy; a remedy that "effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest . . . ."[72]

The MFJ relegated AT&T to the field of interexchange carriage, with the former BOCs now divested of their parent company and broken up into the seven RBOCs and the twenty-two Bell Operating Companies ("BOCs").[73] The new AT&T was free to enter into any business but electronic publishing, and while the BOCs would handle all intraLATA ("Local Access and Transport Area") traffic and services, AT&T would be responsible for supplying all interLATA traffic in competition with other IXCs, such as MCI and what is now called Sprint.[74]

The MFJ also severely restricted the line of business activities of the BOCs.[75] The BOCs could supply or market but could no longer manufacture telecommunications equipment or customer premises equipment ("CPE").[76] The BOCs were permitted to provide exchange telecommunications services and

protection, a fact that has prompted the FCC to reconsider its cable-telco cross-ownership policy. *Id.*

[65] David A. Irwin & Michael G. Jones, *Bell Atlantic Court Case Wins 'MCI Execunet Award'*, WASH. TELECOM NEWS, Sept. 6, 1993, at 3; The *C&P* court held that the cross-ownership ban violated Bell Atlantic's First Amendment right to free expression. 830 F. Supp. 909.

[66] Irwin & Jones, *supra* note 65, at 3. The significance of the *C&P* decision is extraordinary, as it further blurs the lines between common carriage and mass media, and sets the stage for a possible future recognition of unobstructed First Amendment rights for broadcasters as well as all other video programmers. Ultimately, the government may be hard-pressed to continue to justify the "must carry" provisions of the Cable Act of 1992, with the cable operators bound to comply with a complex system of rate regulations, while watching from the sidelines as telcos build state-of-the-art video distribution systems. *Id.* at 4. The *C&P* decision was not about a mere transformation of the local telephone company into the local cable company. Rather, this decision affects the ownership of content, and the battle is over which company will own the software and programming transmitted to the consumer's television set or personal computer. Schrage, *supra* note 64, at B3.

[67] Cindy Skrzycki, *Ruling Opens Cable TV Rivalry*, WASH. POST, Aug. 25, 1993, at A6.

[68] Specifically, the complaint alleged that AT&T had monopolized a broad variety of telecommunications services and equipment in violation of section 2 of the Sherman Act. United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 139 (D.C. Cir. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[69] *Id.* at 151-152.

[70] 15 U.S.C. §§ 1-7 (1988).

[71] 552 F. Supp. at 152.

[72] *Id.* at 153.

[73] *Id.* at 141-42, 200-01.

[74] *Id.* at 170-72, 186.

[75] Since 1982, Judge Harold Greene has proven to be quite lenient on the RBOCs, and already has lifted one of the line of business restrictions regarding information services, although the content of these services is still restricted. David A. Irwin, *Court Decisions: AT&T/Dept. of Justice Settlement*, TELECOMM. REG. MONITOR, Nov. 1988, at 2-15, 2-22.2-22.3. Additionally, in the first triennial review of the MFJ, Judge Greene found that the RBOCs should be permitted to enter into any non-telecommunications field without the prior permission of the court. *Id.*

[76] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 190-91 (D.C. Cir. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). RBOCs are currently forbidden to sell or manufacture any telecommunications equipment, a restriction that may change if H.R. 3626 passes. *See infra* notes 184-185 and accompanying text.

exchange access, but were forbidden to offer interLATA or interexchange telecommunications services.[77]

Since the imposition of the MFJ, the BOCs have campaigned vigorously to eliminate these restrictions—a campaign that is in full force today.[78] Divestiture permitted AT&T to enter into the field of data processing and computers,[79] to maintain a high profit long-distance business,[80] and to get rid of the bottleneck local exchange. Through its proposed merger with McCaw, AT&T is poised on the brink of violating the MFJ restriction that limits AT&T to providing services in the interexchange market.[81] The merger would give AT&T a firm grasp on virtually every important new technology, and would ensure AT&T a key role in shaping the future of wireless, PCS and mobile computing.

Despite the DOJ opinion that AT&T cannot acquire McCaw assets without first obtaining a waiver of the MFJ decree,[82] AT&T's current position is that it is unnecessary to seek a reversal of the MFJ provisions restricting the company to provision of interexchange services.[83]

In considering the current antitrust concerns of AT&T's merger with McCaw, it is significant to note that the 1982 settlement was a modification of the 1956 Consent Decree of a 1949 antitrust case against AT&T[84] that limited AT&T to providing regulated common carrier communications services.[85] The legal analysis of AT&T's settlement with the DOJ in 1956 is relatively obscure because the court did little more than "rubber stamp" the settlement, a deed which prompted the enactment of the Tunney Act.[86] The 1956 Consent Decree, however, included neither the divestiture of Western Electric nor any other structural relief originally requested by the government.[87] In 1982, Judge Greene specifically stated that the settlement history between AT&T and the DOJ did "not foster a sense of confidence that the assessment of the settlement and its implications may be left entirely up to AT&T and the Department of Justice."[88] For this reason, it appears likely that Judge Greene will assume an active role in determining the success of the AT&T-McCaw merger.

It is the opinion of some that the best solution may be to unlock both the interexchange and the local loop, thus precluding the necessity of enforcing the provisions of the MFJ while encouraging competi-

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[77] 552 F. Supp. at 227, 229. This meant that the LECs had to turn all signals over to the IXCs and remain confined to intraLATA service areas. The BOCs were dominated by equal access requirements, compelling them to provide exchange and information access on an unbundled, tariffed basis, equal in type, quality and price, to all interexchange carriers and information service providers. *Id.*

[78] The possibility that AT&T will find a position for itself in the local loop has caused the RBOCs to declare that in the interest of fairness and competition, the RBOCs should be permitted to enter the long-distance market. In 1993, five of the RBOCs—BellSouth, Bell Atlantic, Pacific Telesis, NYNEX and Southwestern Bell collectively petitioned the FCC to adopt rules facilitating their reentry into the interexchange business. Victor J. Toth, *Ending the RBOC Long Distance Quarantine*, BUS. COMM. REV., Oct. 1993, at 51. Ameritech filed separately and the seventh RBOC, U.S. West, is apparently waiting to see how the others fare before taking any action of its own. *Id.* Bell Atlantic already has filed a petition with Judge Greene seeking a waiver of the current restrictions on interLATA traffic. David A. Irwin, *Bell Atlantic/TCI Merger: How Government Will Get Involved*, WASH. TELECOM NEWS, Oct. 25, 1993, at 1-2. This is rapidly becoming an era that will unleash the potential of wireless bypass, perhaps the single greatest threat to the Bells, and thus the RBOCs would like to see an unbundling of services to enable them to achieve diversification and to compete effectively. Steve A. Sazegari, *The Shape of Competition in the Local Loop*, BUS. COMM. REV., Mar. 1992, at 47.

[79] Stanley Welland, *Life After Divestiture*, INFO. WEEK, Jan. 6, 1992, at 48.

[80] *See generally* Jeff Kaplan, *The Uncertain Future of Centrex*, NETWORK WORLD, Mar. 14, 1984.

[81] 552 F. Supp. at 226-27.

[82] Memorandum in Opposition to AT&T's Motion for Waiver of Section 1(D), United States v. Western Electric Co., Inc. (D.D.C. filed Jan. 5, 1994) (No. 82-0192 HHG).

[83] *AT&T Says McCaw Merger Will Go Through Despite MFJ Problem*, COMMON CARRIER WEEK, Jan. 10, 1994, at 4. AT&T responded to the filing by stating its belief that a waiver of the MFJ is not required: "Even if a waiver were required, we would expect there would be no significant problem in getting it quickly approved. . . . We remain confident that there is no impediment to closing the AT&T-McCaw merger by [mid-year]." *Id.*

[84] *See infra* notes 112-13 and accompanying text.

[85] United States v. Western Electric, Civil Action No. 17-49, C.A. 82-0192 (D.D.C. 1956) ("1956 Consent Decree"). The complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies, in violation of sections 1, 2, and 3 of the Sherman Act. 552 F. Supp. at 135-36.

[86] 15 U.S.C. § 16(b)-(d) (1988). Through the Tunney Act, Congress sought to ensure that the DOJ's use of consent decrees would promote the goals of antitrust laws and enhance public confidence in the fair enforcement of these antitrust laws. 552 F. Supp. at 148. Congress did so by ordering disclosure by the DOJ of both the rationale and the terms of the proposed consent decree in order to reduce secrecy, and by requiring explicit judicial determination that each decree was in the public interest, in order to avoid judicial "rubber stamping" of settlements. *Id.* at 148-149.

[87] 552 F. Supp. at 137-138.

[88] *Id.* at 153.

tion from all players on both sides of the exchange.[89] Proponents of opening up the local exchange believe that it is in the best interest of the free marketplace and theorize that such action ultimately should result in extending the best possible service in the form of price breaks to the consumer.[90] On the other hand, opponents believe that simply unlocking the local loop will never make it ripe for competition because the dynamics of the local exchange make the vast majority of it fundamentally immune to competition,[91] and because the FCC currently is too absorbed to enforce any safeguards, structural or nonstructural.[92]

II. CURRENT DEVELOPMENTS - THE MERGERS

The recent wave of mergers suggests an environment far different from that of the deal driven 1980s,[93] but underneath all the verbiage, these deals still may reflect the traditional desire for market clout, albeit with a technological twist. These mergers are premised upon the gamble that emerging technologies "will reward those with the nerve to plug in."[94] Although it remains to be seen whether this merger frenzy will last, some believe that investors discouraged by current low interest rates will seek the higher returns that stocks have to offer, thus driving up share prices and continuing to fuel the present merger euphoria.[95]

A. The AT&T-McCaw Merger

AT&T Chairman Robert Allen has a vision of "anytime, anywhere communications."[96] The proposed merger of AT&T and McCaw brings to the existing cellular market the heretofore missing element of long-distance, and ensures AT&T a key role in shaping the future of PCS and mobile computing. This investment promises to provide AT&T with the capability to deliver end-to-end wireless service, from the end user's CPE to network services.[97]

The merger gives AT&T, better known for its long-distance service, control over the nation's largest cellular telephone company, while enabling McCaw to market its wireless services under AT&T's name and to utilize the vast resources of Bell Laboratories.[98] The proposed merger would result in the ownership of cellular operations in 105 markets nationwide,[99] and would enable both companies to use their resources more efficiently.

In addition, this merger will stimulate competition within the entire wireless industry.[100] Unquestionably, AT&T has the best ability of any of the interexchange carriers to capitalize on the growing user interest in wireless services and products, because it has been active in the wireless market for years and has experience in many different market segments.[101] The real significance of the merger inevitably lies in the potential for increasing competition in the cellular industry and the possibility of lower prices—all of which only can benefit the consumer.

Competitors' fears that AT&T is seeking to reenter the local telephone market may be unfounded, due to the fact that AT&T is unlikely to be able to offer local telephone service directly to customers, because McCaw's cellular networks traditionally are not suitable for this task.[102] In order for AT&T to

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[89] Mike Moeller, *No Turning Back*, COMM. INT'L, Feb. 1994, at 14.

[90] Toth, *supra* note 78, at 51.

[91] At the present time, the capital investment in both the local loop and the switching equipment have made the market of the LECs virtually unassailable. Chris L. Kelley, *The Contestability of the Local Network; The FCC's Open Network Architecture Policy*, 45 FED. COMM. L.J. 89, 135 (1992). The local loop is generally regarded as a natural monopoly because the principal resources needed to connect local end users to nationwide central office switches prevent reproduction of the local network. Paul Stephen Dempsey, *Adam Smith Assaults Ma Bell with His Invisible Hands: Divestiture, Deregulation and the Need for a New Telecommunications Policy*, 11 HAST. COMM./ENT. L.J. 527, 593 (1989). The economic barriers to entering the local loop may be created not by the technology itself, but instead by the tremendous expenses required to create a new system able to compete with the existing residential telephone network. *Id.* It is Dempsey's belief that, at some point, a less costly alternative system may be derived from cable television, two-way radio or satellites that will be able to compete within the local loop. *Id.*

[92] Toth, *supra* note 78, at 51.

[93] Grant, *supra* note 14, at 49. Today's players are using rapidly appreciating stock as currency, instead of the junk bonds and huge debt that characterized the mega-deals of the past decade. *Id.* In addition, much of this merger activity is concentrated solely in the industries of health care and telecommunications. *Id.*

[94] *Id.*

[95] *Id.*

[96] Bart Ziegler, *AT&T's Bold Bet*, BUS. WEEK, Aug. 30, 1993, at 26.

[97] Messmer & Wallace, *supra* note 9, at 31.

[98] *Id.*

[99] *Id.*

[100] Bob Brown, *Long-Haul Carriers Plot Wireless Paths*, NETWORK WORLD, Nov. 23, 1992, at 25-26.

[101] *Id.* at 25.

[102] Letter to the Editor, *AT&T Local Services Are Not At Hand*, COMM. WEEK, Nov. 30, 1992, at 39.

compete in the local market, AT&T will need to create a "modular, distributed network" that relies upon wireless technology and that functions "parallel to the existing local exchange network."[103] This is not likely to come cheap,[104] and AT&T officials themselves acknowledge that it will not be easy to build a network that will make all of these new services possible.[105]

Industry analysts predict that the newly merged AT&T will not attempt to compete directly with local phone service systems that remain heavily regulated, but will instead try to tap into certain segments of wireless consumers.[106] To that end, AT&T may produce wireless devices geared for specific business users, such as taxi drivers and package handlers.[107]

Nonetheless, the RBOCs, particularly NYNEX,[108] BellSouth and Bell Atlantic, remain vocal in their expectation that the AT&T-McCaw merger ultimately will provide wireless service that bypasses the switches owned by the local exchanges.[109] The RBOCs want a reversal of the restrictions imposed upon them through the MFJ so that they can compete on an equal footing with AT&T and the other IXCs in the interexchange services market.

In an effort to compel AT&T to obtain approval from Judge Greene before merging with McCaw, BellSouth filed a petition with the U.S. District Court for the District of Columbia on December 2, 1993, arguing that such a merger would violate the MFJ, and would require a modification or waiver of the decree before it could be approved.[110] BellSouth stated that while it has no interest in obstructing the AT&T-McCaw merger, it is seeking to ensure "competitive equity and the ability to operate under the same rules."[111]

On April 5, 1994, Judge Greene agreed with the position adopted by the RBOCs and ruled that AT&T's purchase of McCaw "would indeed violate the plain and express language of the [MFJ] decree."[112] However, Judge Greene's ruling left open the possibility that he may yet approve the merger, once AT&T has clearly proven to him that the union with McCaw would be in the public interest.[113]

Where nearly all state regulatory agencies have approved the merger,[114] and where the DOJ has made it clear that AT&T must obtain a waiver of the MFJ before its merger with McCaw can be completed,[115] it remains to be seen whether Judge Greene and the FCC will allow the AT&T/McCaw merger to come to fruition.

B. The Bygone Bell Atlantic-TCI Merger

Like AT&T, Bell Atlantic believes it can achieve its vision of becoming the world's best communications and information company.[116] On October 13, 1993, Bell Atlantic, TCI[117] and Liberty Media[118] announced a corporate union designed to create a

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[103] *Id.*

[104] Hyatt, *supra* note 11, at 33.

[105] Mulqueen, *supra* note 1, at 1.

[106] Hyatt, *supra* note 11, at 33.

[107] *Id.*

[108] NYNEX is the parent company of New England Telephone and New York Telephone.

[109] Hyatt, *supra* note 11, at 33.

[110] *AT&T Says McCaw Merger Will Go Through*, COMMON CARRIER WEEK, Jan. 10, 1994, at 4. The specific provision in contention is the MFJ prohibition of AT&T acquiring any assets of divested Bell Operating Companies. *Id. See also* DOJ's Response to BellSouth's Motion For a Declaratory Ruling, United States v. Western Electric Co., Inc. (D.D.C. filed Jan. 5, 1994) (No. 82-0192 HHG). BellSouth argues that because McCaw has a minority interest in cellular properties in which Ameritech, Bell Atlantic, BellSouth, Pacific Telesis and SouthWestern Bell hold minority interest, AT&T cannot obtain financial interest in any of the RBOCs without first obtaining a waiver from this specific MFJ provision. *Id.*

For its part, AT&T has insisted that prohibition applies only to the reacquiring of local exchange assets held *at the time of divestiture* in 1984. *AT&T Says McCaw Merger Will Go Through*, COMMON CARRIER WEEK, Jan. 10, 1994, at 4. However, the DOJ disagreed, finding that AT&T's interpretation "strains the plain language of the (MFJ) . . . ." DOJ's Response to BellSouth's Motion, at 4.

> The most reasonable reading of section I(D) is that it applies to any acquisition of the stock or assets of a BOC, irrespective of when or how the stock or assets in question came to be owned by the BOC. . . . Moreover, the acquisitions at issue here would result in AT&T and a Regional Company becoming partners in the provision of an exchange and an exchange access service.

Id. at 8.

[111] DOJ's Response to Bellsouth's Motion, *supra* note 110, at 4.

[112] John Burgess & Sandra Sugawara, *AT&T, McCaw Cellular Deal Is Blocked by Federal Judge*, WASH. POST, Apr. 6, 1994, at A1, A6.

[113] *Id.*

[114] *AT&T Says McCaw Merger Will Go Through Despite MFJ Problem*, COMM. DAILY, Jan. 7, 1994, at 3.

[115] *See* Memorandum in Opposition for AT&T's Motion for Waiver of Section 1(D), United States v. Western Electric Co., Inc. (D.D.C. filed Jan. 5, 1994) (No. 82-0192 HHG).

[116] Raymond Smith, COMM. WEEK, Jan. 3, 1994, at 25.

[117] TCI is the largest cable television company in the world, serving more than 20% of U.S. cable customers, with 1,200 cable systems serving 10 million subscribers in 48 states, Puerto Rico, and the District of Columbia. *The New Bell Atlantic: Wow! Merger With TCI, Liberty Media Changes Us Forever*, BELL

premier communications, information and entertainment company.[119] The proposed $26 billion merger was one of the largest in corporate history, with a combined total of twenty-two million cable, wireless and phone customers spread across fifty-nine of the nation's top one hundred markets, and was expected to be completed in late 1994.[120] The transaction effectively would have combined TCI's cable properties and Liberty Media's programming assets with those of Bell Atlantic.

This landmark deal would have resulted in a much-needed upgrade to the local telephone infrastructure, and a wealth of high-tech gadgets for the consumer, including video-on-demand and home shopping.[121] In addition, the two companies had expressed their intent eventually to provide nationwide broadband technology for business and home users as an alternative to the BOCs.[122]

By uniting telephone, cable and wireless networks in both the national and international markets with cutting edge video-on-demand and new interactive multimedia technologies, Bell Atlantic and TCI believed their alliance would have accelerated the implementation of both the new "information superhighway" as well as full-service networks of new products and services.[123] But the reality may be that the failure of the proposed merge ultimately will benefit the consumer by keeping viable the competition between cable and video-on-demand offerings.[124]

Although the merger with TCI did not come to fruition for Bell Atlantic, it is unquestionable that another cable/telco merger is not far behind. The proposed deal undoubtedly benefitted Bell Atlantic by prompting the company to begin its quest to overcome legal and regulatory obstacles, such as seeking a federal waiver of the MFJ restriction that prohibits its regional phone companies from interexchange transmission.[125]

Some believe that the failure of this merger may serve to check the recent wave of merger mania among communications companies, many of whom had felt pressure to compete with the high-profile Bell Atlantic-TCI deal.[126] Despite the deceleration in large corporate mergers, increased competition among telephone, cable and entertainment companies, as well as technology itself, inevitably will provide those services sought to be achieved by the Bell Atlantic-TCI merger.[127] In addition, historically it has been the small companies that have been the technological innovators and not the immense conglomerates who, if they do create a new product or service or technology, tend to sit on a discovery until it suits their pecuniary purposes.[128]

C. Additional Telco Mergers

Two additionally notable telecommunications mergers also took place in 1993, between MCI and BT, and between Sprint and Centel, Inc. These mergers reflect an effort to increase competition within the interexchange market. Furthermore, by pooling resources to add cellular and wireless com-

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ATLANTIC WEEK, Oct. 18, 1993.

[118] Liberty Media has extensive programming interests in the Black Entertainment Network, the Family Channel, QVC, the Home Shopping Network and many sports programming channels. *Id.* The company also has a partial ownership interest in 17 cable companies serving some three million subscribers. *Id.*

[119] *Id.*

[120] *Id.*

[121] Mary Thyfault, *Cable Ready — Bell Atlantic-TCI Promises Business a Much-Needed Upgrade to the Local Phone Infrastructure*, INFO. WEEK, Oct. 18, 1993, at 12.

[122] *Id.*

[123] *Id.* Bell Atlantic's Raymond Smith indicated that his company will complete fiber optic video network capabilities in some areas within its region next year, and within Bell Atlantic's foremost 20 markets by 1998. *Id.*

[124] This is because video-on-demand and cable offerings provide essentially the same service, although video-on-demand may be marginally more expensive. Rich Brown, *Executives Peer Into Future; Disagree Over Cost, Timing of Predicted 500 Channels*, BROADCASTING & CABLE, Dec. 6, 1993, at 10. Therefore, because phone companies such as Bell Atlantic are now able to provide video-on-demand, and because cable companies such as TCI provide cable services, a merger of the two could result in a monopoly of the video market in a given service area. This could have significant implications for the consumer in terms of price and viewing choice, in addition to the effect of cutting out any possible competition from smaller video and cable service providers.

[125] COMM. DAILY, Jan. 24, 1994, at 4. On January 20, 1994, Bell Atlantic filed a petition with the DOJ requesting a waiver of the MFJ decree in order to provide long distance telephone service outside of its region and to deliver satellite programming nationwide. *Id.* In its petition, Bell Atlantic indicated that the desired waiver would "let merged companies pursue plans to compete aggressively with other telephone companies outside Bell Atlantic's region and with existing cable companies inside its region." *Id.* Bell Atlantic needed this approval because the satellite distribution system used by programmers such as TCI is considered to be a form of long-distance service. *The New Bell Atlantic: Wow! Merger with TCI Changes Us Forever*, BELL ATLANTIC WEEK, Oct. 18, 1993.

[126] Sugawara & Farhi, *supra* note 13, at A11.

[127] *Id.* at A1.

[128] Case in point: AT&T's Bell Laboratories developed the concept of cellular in 1947, then sat on it until the first tests were conducted to explore commercial applications in 1962. Charles Maslin, *Outline of the History of Cellular* 2, 1993, at 2 (citing *A Brief History of Cellular* (CTIA)).

munications to their existing networks, these companies have become more attractive to consumers of interexchange services.[129] These mergers arguably are in response to actions taken by AT&T and the RBOCs and are further indications of the trend towards vertical integration.

1. *The MCI-British Telecom Merger*

On June 2, 1993, MCI sold a twenty percent stake in the company to BT for $4.3 billion in cash. Analysts have characterized the deal, which is to be completed by early 1994, as evidence of the need for major telecommunications players to create alliances in order to compete effectively in the global marketplace.[130]

The deal enables MCI and BT not only to combine revenues—primarily from voice services—in order to compete on a more even footing with rival AT&T, but also to establish a customer base on both sides of the Atlantic, something AT&T has yet to achieve.[131] Pinning its hopes on the new digital wireless technology of PCS networks expected to become a reality in 1994, MCI wants to use this new wireless technology as an access link into MCI's long-distance network.[132] In August 1993, an MCI spokesperson indicated that after the FCC has allocated the radio frequencies for PCS, MCI's main strategy for wireless communications was to assemble a consortium[133] that would offer low-cost PCS services.[134] The pending deal between AT&T-McCaw could put pressure on MCI to invest in cellular operations which MCI sold off to McCaw[135] in the 1980s.[136] MCI has indicated its desire to invest in cellular with much of the cash it will receive from its new partner, BT.[137] Although AT&T has taken the lead in the wireless revolution, MCI, like Sprint, should be able to move more quickly than its colossal rival, AT&T, due to its smaller infrastructure.[138]

Like AT&T and Bell Atlantic, MCI also believes in a "sweeping strategic vision" that will facilitate the company's attempt to deliver voice, data and video services over the MCI network.[139] In an effort to step up competition in the local exchange market, MCI announced its intention in January of 1994 to invest $20 billion in its long-distance network over a six year period in order to increase the carrying capacity of its current system, and to assemble new networks in twenty metropolitan areas.[140]

While both MCI and some users expect MCI's plan ultimately to result in lower prices and greater quality, as with AT&T's plan, it remains to be seen whether the company's savings from access charges will be passed on to the consumer, and whether such actions constitute vertical integration practices or truly are in the public interest.

2. *The Sprint-Centel Merger*

As of April 21, 1993, Sprint, the nation's third largest long-distance carrier, and Centel, the Chicago-based cellular provider, effectively became one company with the creation of Sprint Cellular Co.[141] Having acquired Centel for approximately $3 billion in stock, the merger strengthened Sprint by greatly increasing its cash flow.[142] The merger made Sprint the first telecommunications company able to offer customers a complete package of local, long-distance and cellular services.[143] The question is, however, does such seamless service represent vertical integration?

Sprint Cellular's President Dennis Foster stated that the company would concentrate on expanding the choice of wireless services offered, including digital, personal telephone service, flexible rates, single billing and seamless service.[144] Foster also indicated

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[129] Robin Gareiss, *Users Like MCI Plan to Take On Local Carriers*, COMM. WEEK, Jan. 10, 1994, at 1.

[130] *MCI Gets 4.3 Billion in Cash; BT MCI Purchase, Providing Cash Infusion And Global Partner*, COMM. WEEK, June 3, 1993, at 1.

[131] *Global Carriers: The Race Is On*, DATA COMM. July 1993, at 64.

[132] Brown, *supra* note 100, at 25.

[133] For further details of this consortium, *see* Baron, *supra* note 41.

[134] *Id.*

[135] Brown, *supra* note 100, at 26.

[136] *Id.*

[137] Kent Gibbons, *AT&T To Acquire No. 1 Cellular Firm; McCaw Deal May Open a Wireless Era*, WASH. TIMES, Aug. 17, 1993, at A1.

[138] Brown, *supra* note 100, at 26. Because MCI and Sprint have smaller infrastructures than AT&T, if MCI and Sprint chose to integrate new wireless technologies into their networks, they should be able to do so more quickly than rival AT&T. *Id.*

[139] Gareiss, *supra* note 129, at 1.

[140] *Id.* Some believe the significance of this decision may rival that of Bell Atlantic and AT&T. *Id.*

[141] Industry Update, NETWORK WORLD, Mar. 22, 1993, at 25.

[142] John T. Mulqueen, *Will Sprint-Centel Benefit Users*, COMM. WEEK, June 1, 1993, at 8.

[143] Linda Wilson, *Look, Ma, No Layoffs — Centel Uses Automatic Dialers to Centralize Functions, Not Staff*, INFO. WEEK, Dec. 7, 1993, at 73.

[144] COMM. DAILY, Mar. 10, 1993, at 8.

that Sprint Cellular would be looking to form alliances with other companies, saying, "the future belongs to innovative companies that can forge alliances quickly to develop and bring ideas to the market first and best."[145] Ironically, Sprint sold off its cellular operation in the 1980s to none other than Centel, and through its recent merger is seeking to recapture the cellular market it gave away.[146]

As with the AT&T-McCaw merger, analysts and some network business managers have indicated that this deal does not necessarily mean that any new services will be developed from the combined company.[147] The idea that "nothing stands out" in terms of immediate benefit to users has been a recurring theme chanted by many who view these telecommunications mergers as insignificant until the tangible benefit to the consumer, whether in the form of product or savings, has been proven.[148]

D. Additional Cable Mergers

Mergers such as Paramount-Viacom and U.S. West-Time Warner are clearly about one principle—content; whoever owns it, controls it. Thus, the coveted deals with the major Hollywood studios over programming are considered to be lucrative, yet, because of the scarcity of the resource, acquiring the programming rights to film and television performances can be quite expensive.

1. *The Paramount-Viacom Merger*

Nowhere is the desire to control the content sent over the superhighway more evident than in the battle over Paramount. On February 15, 1994, after a bitter five-month battle with rival QVC, Inc., cable television company Viacom, Inc.[149] acquired Paramount Communications, Inc. for the arguably inflated price of $10.1 billion.[150] The contest between QVC and Viacom over Paramount provided the industry with powerful evidence of the lengths to which communications companies will go in order to provide the films, game shows, and cable series to consumers via delivery-on-demand.[151]

Paramount is such a desirable possession because few companies are able to rival Paramount's wealth of programming assets.[152] As John C. Malone, Chief Executive Officer of TCI has stated: "Over time, the hardware (to deliver programming) will become generic. The key is going to be programming software."[153] In the end, however, the contest was simply a numbers game, with both Wall Street and Viacom shareholders favoring the lower Viacom bid because it offered more cash and thus greater protection should Viacom stock perform poorly,[154] which it has.[155]

The Bell Atlantic-TCI deal made the Paramount-Viacom merger more interesting, permitting Viacom to raise concerns about the monopolistic intentions of TCI because TCI owns a one third interest in QVC and was a key financial backer in QVC's pursuit of Paramount.[156] QVC's failed deal, like that of Bell Atlantic-TCI is important because if QVC had succeeded in its efforts to capture Paramount, and if Bell Atlantic had completed the merger with TCI, TCI would have had absolute control over content as well as infrastructure. Thus, arguably, Bell Atlantic-TCI would have been a vertically-integrated entity.

2. *The U.S. West-Time Warner Merger*

On September 15, 1994, U.S. West acquired a 25.51% interest in Time Warner, Inc., for $2.5 billion in cash, providing U.S. West with vital access to the vast cable,[157] entertainment and media operations

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[145] *Id.*

[146] Brown, *supra* note 100, at 26.

[147] Mulqueen, *supra* note 142, at 8.

[148] *Id.*

[149] Viacom owns programming assets such as MTV and Showtime, in addition to cable systems which serve 1.2 million households. Paul Farhi, *Blockbuster, Viacom Plan to Merge*, WASH. POST, Jan. 8, 1994, at A1.

[150] Paul Farhi, *Viacom's Bid Wins Paramount*, WASH. POST, Feb. 16, 1994, at A1.

[151] Moeller, *supra* note 21, at 24. On January 7, 1994, the boards of both Viacom and Blockbuster Entertainment approved the details of their merger. Farhi, *supra* note 150, at A1. Last Fall, Blockbuster committed $600 million to Viacom in the wake of the battle with QVC over Paramount, thus insuring a future for itself when cable and telcos are capable of transmitting innumerable films over their wires, thus making video stores somewhat obsolete. *Id.*

[152] Paul Farhi, *Egos, Interactive Visions Fuel Bitter Paramount Fight*, WASH. POST, Feb. 2, 1994, at F1. As "[t]he owner of one of Hollywood's Golden Age studios, Paramount is one of perhaps only six companies on earth capable of producing and distributing American-made films and TV programs around the world." *Id.*

[153] *Id.*

[154] Paul Wiseman, *QVC Stands Pat on Bid for Paramount*, USA TODAY, Feb. 14, 1994, at B1.

[155] Farhi, *supra* note 152.

[156] Wiseman, *supra* note 154, at B1.

[157] Time Warner's cable division services 7.1 million customers nationwide. *A Cascade of Mergers and Alliances Make 1993 A Watershed for Telecoms*, INFO. NETWORKS, Jan. 10,

of Time Warner.[158] In exchange for its programming, this merger provides Time Warner with a healthy cash infusion and an infrastructure already in place, and enables the company to utilize the expertise of U.S. West in constructing and operating switched networks and telephone operations.[159]

The significance of the U.S. West-Time Warner merger is similar to that of the failed Bell Atlantic-TCI proposal—the union of a cable or entertainment company's invaluable programming resources with that of the expensive infrastructure and expert operational capabilities of an RBOC.[160] If the U.S. West-Time Warner alliance is successful in building interactive networks to transmit communications, information and entertainment,[161] the merger most likely will secure an enviable position on the information superhighway.

III. FUTURE IMPACT OF THE MERGERS

The average time for completion of each of the proposed mergers is estimated to take between nine and twelve months, due to the need for approval from the FCC and the DOJ, as well as from state regulatory agencies.[162] In addition, under the Hart-Scott-Rodino Act,[163] parties seeking to engage in mergers or joint ventures surpassing $100 million are required by law to notify the DOJ's antitrust division and the Federal Trade Commission.[164] FCC Commissioner Quello has said that although the FCC "must keep an open mind" to any opposition, a merger such as that of AT&T and McCaw "possesses great future potential for national and global growth."[165]

A. Antitrust Concerns

Both AT&T and Bell Atlantic have come under intense scrutiny for the antitrust ramifications of their proposed mergers. Congress, the FCC and the DOJ will be reviewing all aspects of mergers such as the AT&T-McCaw and the Paramount-Viacom unions for possible antitrust violations. One issue is whether mergers between cable and telcos support free market competition or create "mega-monopolies."[166]

1. Antitrust Statutes

The Sherman Act, enacted on July 2, 1890, provides that "every . . . combination in the form of trust or otherwise . . . in restraint of trade or commerce among the several States or with Foreign Nations is declared to be illegal."[167] Section 2 of the Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, shall be deemed guilty of a felony . . . ."[168] Pursuant to the Act, corporations engaged in illegal monopolies may face up to ten million dollars in fines.[169] In practice, the Sherman Act has failed as an effective safeguard against mergers that might mar competition, because courts generally have interpreted the Act to forbid mergers *only where* they were designed to create a monopoly and intended to do so.[170] Most mergers are able to survive such a feeble standard.[171]

The Clayton Act, enacted on October 15, 1914, provides that "[n]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . or assets of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition or to tend to create a

1994, at 3.

[158] Barrett, *supra* note 64, at 46.

[159] *Id.*

[160] The FCC has granted an 18 month waiver of the cable cross-ownership rules to U.S. West. *A Cascade of Mergers and Alliances Make 1993 A Watershed for Telecoms*, INFO. NETWORKS, Jan. 10, 1994, at 3.

[161] *Id.*

[162] AT&T has stated that by December 31, 1993, all states with the single exception of California had approved the merger with McCaw, and that the only regulatory approvals remaining were DOJ's review of the antitrust implications of the merger and the FCC's review of applications for transfer of control of McCaw radio licenses. *BellSouth Wins and Loses; AT&T Says McCaw Merger Will Go Through Despite MFJ Problem*, COMM. DAILY, Jan. 7, 1994, at 2.

[163] 15 U.S.C.S. § 1311 (1993). This Act supplements the Clayton Act of 1914 (15 U.S.C. § 12) and clarifies antitrust terminology and responsibilities of the DOJ agents involved in the enforcement of antitrust law.

[164] Carla Lazzareschi & Jude Shriver, *AT&T Will Buy McCaw Cellular for $2.6 Billion*, L.A. TIMES, Aug. 17, 1993, at A1. The government can approve, negotiate to restructure the deal, or sue to block it. *Id.*

[165] *Id.*

[166] M.E.T., *Sidebar; Don't Pop The Cork Yet*, INFO. WEEK, Oct. 18, 1993, at 13.

[167] 15 U.S.C. § 1 (1988 & Supp. IV 1993).

[168] 15 U.S.C. § 2 (1988 & Supp. IV 1993).

[169] *Id.*

[170] GELLHORN, *supra* note 18, at 339-40.

[171] *Id.*

monopoly."[172] The Clayton Act raised the relatively low standards set by the Sherman Act by making it possible to restrain mergers which "merely lessened" competition.[173] Thus, the Clayton Act is more effective than its predecessor, because the Act enables a merger to be halted before any significant damage to competition has occurred.[174] While the language of the two statutes taken together would appear to preclude the existence of almost any merger, as a general rule, mergers can serve useful and legitimate social and business purposes without impairing competition.[175] The task of antitrust merger law thus is to eliminate only those mergers whose adverse affect on competition substantially outweighs its benefits.[176] With a current crop of proposed mergers that closely resemble vertically integrated entities—Paramount-Viacom, U.S. West-Time Warner—and the possibility of another merger similar to Bell Atlantic-TCI, the real question is whether the government should allow this trend to continue.

2. *Legislative and Executive Action*

Congress also is concerning itself with the antitrust implications of these mergers, through the introduction of two bills, H.R. 3636 and H.R. 3626. The House Subcommittee on Telecommunications and Finance currently is in the process of debating H.R. 3636, the "National Communications Competition and Information Infrastructure Act of 1993," a bill that essentially would lift the 1984 Cable Act's ban on joint ownership of telephone and cable facilities in the same service area.[177] Under H.R. 3636, telephone companies would be able to provide video programming directly to subscribers in their telephone service area,[178] but also would have to provide access and interconnection to alternate carriers such as cable companies.[179] If Congress passes H.R. 3636 and the Fourth Circuit affirms the *C&P* decision, the telco industry in essence will have slain their Goliath, thus easing their passage through the regulatory approval process.

H.R. 3626,[180] entitled the "Antitrust Reform Act of 1993," effectively would supersede the MFJ in permitting the BOCs to provide interexchange telecommunications through the acquisition and resale of telecommunications equipment.[181] The BOCs are pinning their hopes on the passage of H.R. 3626, and should the bill prevail, AT&T may no longer be the only king on the interexchange throne.

One central goal of the Clinton administration is the development of the National Information Infrastructure ("NII").[182] If the NII is any indication, it is quite probable that "over the next three years, the federal government will move to a much more centralized, interventionist approach than that which has prevailed for the past 2 decades."[183] Recent speeches by Vice President Gore support this contention and signify that the approach taken by the Clinton administration is anything but laissez-faire.

In a December 1993 speech at the National Press Club in Washington, D.C., Vice President Gore stated that the Clinton administration supported long-term removal of judicial and regulatory restraints that prevent telecommunications companies from entering each other's businesses.[184] Gore acknowledged, however, the necessity of balancing free competition with regulations created to shield the public from potential monopoly abuses.[185] Gore stated that the Clinton administration's proposals to reform the communications marketplace would be guided by five specific principles: 1) to encourage private investment; 2) to promote and protect competition; 3) to provide open access to the network; 4) to preserve and advance universal service in order to avoid creating a society of information "haves and

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[172] 15 U.S.C. § 7 (1988).

[173] GELLHORN, *supra* note 18, at 342.

[174] *Id.* The Clayton Act was applicable to both vertical and horizontal mergers. *Id.*

[175] *Id.* at 334-35.

[176] *Id.* at 335-36.

[177] H.R. 3636, 103d Cong., 1st Sess. (1993). Democratic Representative Edward J. Markey, Chairman of the House Subcommittee on Telecommunications and Finance, intends to hold hearings on the issue of media concentration and its impact on consumers and competition. Markey also had intended to hold hearings on the implications of the Bell Atlantic-TCI merger in particular. As of this writing, the Committee still was conducting hearings on H.R. 3636.

[178] *Id.* § 102.

[179] *Id.*

[180] H.R. 3626, 103d Cong., 1st Sess. (1993). This bill is sponsored by Representatives Brooks and Dingell.

[181] *Id.* § 101. This provision goes into effect 18 months after the enactment of this Act. *Id.* Within five years the BOCs would be allowed to provide interstate telecommunications within their own territories, and after a one year period, the BOCs would be permitted to manufacture or provide CPE. *Id.* § 102.

[182] NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPT. OF COMM., THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION (Sept. 15, 1993).

[183] COMM. DAILY, Jan. 5, 1994, at 5.

[184] *Vice-President; NII Judicial, Regulatory Restraints to be Removed*, INFO. NETWORKS, Jan. 8, 1994, at 10.

[185] *Id.*

have nots"; and 5) to encourage flexible and responsive government action so that the newly adopted regulatory framework can keep pace with the rapid technological and market changes that pervade the telecommunications and information industries.[186]

In another speech before the Academy of Television Arts and Sciences, Gore indicated the administration's intent to open up the local telephone exchanges, with the expectation that increasing competition will result in continuing advancements in technology, in the quality of services and in lower costs.[187] At the same time however, he emphasized that the Clinton administration would "insist upon safeguards to ensure that new corporate freedoms will not be translated into sudden and unjustified rate increases for telephone consumers."[188]

Acting on the Clinton administration's desire to rewrite the Communications Act of 1934 to include a new provision that would regulate entities such as merged telco and cable companies,[189] the Senate recently has proposed legislation that would implement the first comprehensive revision of the Communications Act since its inception in 1934.[190] One major problem with such a proposal, however, is that it is nearly impossible to create a long-term, stable, regulatory environment when revolutionary technology and market merger frenzy make it "almost impossible to totally update the policy framework in one sweeping effort."[191]

3. *Agency Action - FCC*

In determining whether to approve these mergers, the Commission must consider the eminent goals of the public interest, universal service, fostering competition, and efficiently managing valuable spectrum. The Communications Act of 1934 is premised upon the phrase "the public interest, convenience and necessity,"[192] a standard that the Commission must adhere to in all of its decisions. The public interest is an elastic standard that changes over time,[193] and thus must be reevaluated in this era of telecommunications convergence and momentous technological transformation.

The question of whether the merger of technological giants such as AT&T-McCaw and the formerly proposed Bell Atlantic-TCI are truly in the public interest remains to be seen.[194] According to NBC West Coast President, Donald Ohlmeyer, if the Bell Atlantic-TCI merger had been approved, "you [would have had] 2 guys deciding what 50 million people are going to see. . . . That's kind of scary."[195] He may not be alone in his assessment.

The Communications Act of 1934 mandated the FCC to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[196] Universal service is the public policy goal of providing widespread availability of basic, quality telephone service to every American household at a reasonable price.[197] As basic telephone service is up-

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[186] *Vice President Proposes National Telecommunications Reform*, THE WHITE HOUSE, OFFICE OF THE VICE PRESIDENT, Jan. 11, 1994, at 1. *See also Background on the Administration's Telecommunications Policy Reform Initiative*, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, (NTIA White Paper). In his January 11, 1994 speech before the Academy of Television Arts and Sciences, Gore stated: "[i]n the information marketplace of the future, we will obtain our goals of investment, competition and open access only if regulation matches the marketplace. That requires a flexible, adaptable regulatory scheme that *encourages* the widespread provision of broadband, interactive digital services." *Vice President Proposes National Telecommunications Reform*, THE WHITE HOUSE, OFFICE OF THE VICE PRESIDENT, Jan. 11, 1994, at 7.

[187] Vice President Al Gore, Remarks at the Television Academy on the Administration's Vision of The National Information Infrastructure (Jan. 11, 1994).

[188] *Id.*

[189] *Id.*

[190] Statement of FCC Chairman Reed Hundt before the Senate Committee on Commerce, Science and Transportation, *Public Notice* (Feb. 23, 1994), para. 1. Labeled "The Communications Act of 1994," proposed bill S. 1822 attempts to reform three essential aspects of telecommunication law: 1) it returns to Congress primary responsibility for creating national communications policy; 2) it provides the FCC with the legislative authorization needed to effectively open up monopolistic markets to competition, while ensuring consumer protection; and 3) it emphasizes the U.S.'s commitment to the goals of universal service and to the ideal that all Americans should reap the benefits of the emerging technology revolution. *Id.* paras. 13-14.

[191] COMM. DAILY, Jan. 5, 1994, at 5.

[192] 47 U.S.C. §§ 151, 302 (1988).

[193] *In re* Limitations on Commercial Time on Television Broadcast, *Notice of Inquiry*, 8 FCC Rcd. 7277, para. 6 (1993).

[194] As of this writing, AT&T's application for transfer of control of McCaw's cellular licenses is still pending due to requests from several RBOCs to extend the reply deadline to Jan. 18, 1994. *See In re* Application for Consent to Transfer Control, (AT&T & McCaw), ENF-93-44 (pending). Thus the Commission has yet to state whether such a merger is in the public interest.

[195] *'Shivers in Hollywood'; Violence Is an Issue in Critics' Tour for NBC*, COMM. DAILY, Jan. 11, 1994, at 5.

[196] 47 U.S.C. § 1 (1988).

[197] Warren G. Lavey, *The Public Policies That Changed the Telephone Industry Into Regulated Monopolies: Lessons*

graded and becomes obsolete in the wake of cellular and fiber optic technology, the question becomes where does universal service end, and with what technological medium? Arguments such as spectrum scarcity,[198] traditionally offered by the FCC to justify its regulation of the broadcast industry, become less credible as the profusion of technology becomes more ubiquitous and the methods of transporting programming and information more abundant.[199]

The concept of universal service must not be lost along the "information superhighway," for then technology becomes a reward for only those who can afford to climb aboard. National Telecommunications and Information Administration ("NTIA") Director of International Affairs, Jean Prewitt, questioned: "[d]oes [convergence] hold promise for closing the gap or merely redefining the terms of telephone efficiency for rich and poor? If that's true, we all lose."[200] It ultimately will be up to the FCC to determine if, and to what extent, such mergers are conducted in accordance with the ideals of universal service.[201] Now that the future promises an abundance of communications innovations, the challenge for the Commission will be to tailor the old regulatory policies, once premised on a system of communications scarcity, into more "appropriate reregulation."[202] The key to such regulation will lie in precisely identifying to what extent regulators should intervene in a medium rapidly approaching ubiquity.[203]

FCC Commissioner Andrew C. Barrett sees the future role of regulators as focusing on competitive market entry conditions, service quality and the possible implementation of targeted subsidies, instead of monitoring issues such as cost and price for monopoly local exchange services.[204] Barrett believes that "[t]he future role of regulators is likely to evolve more toward oversight of several multimedia broadband providers and wireless PCS service providers."[205]

Referring to the difficult decisions on telecommunications regulation currently facing the FCC, Barrett stated that the goal must be to "maintain balanced regulatory policies."[206] The question then becomes, who has the capacity and the resources to regulate monopolistic entities such as Paramount-Viacom and future mergers similar to the one proposed by Bell Atlantic and TCI? Many industry analysts do not believe that the FCC has the capacity or the resources to undertake such a monumental task,[207] and at the moment, whether any regulatory body does is uncertain.[208]

Inevitably, the nation's telecommunications policy must adequately reflect and serve the "public interest, convenience and necessity,"[209] however, that standard may be rearticulated in 1994 and in the future. Through careful scrutiny of whether mergers foster continued and healthy competition and satisfy the venerable goal of universal service, Congress, the Commission and the DOJ ultimately will determine whether these mergers are in the public interest. Should these mergers fall short of such standards, the odds are against successful governmental and

From Around 1915, 39 FED. COM. L.J. 174 (1987). *See also* Statement of FCC Chairman Reed Hundt, *supra* note 190, para. 18.

[198] Spectrum scarcity is the conventional policy behind the idea that, because there is a limited amount of spectrum available for public use (necessarily because the government itself has chosen to limit the amount of spectrum offered for public consumption), the government may chose to grant licenses to whomever it believes to be most worthy, *i.e.*, whoever most completely satisfies the public interest, convenience and necessity analysis. The government may regulate the activities of the licensee of a broadcast or cable medium because the licensee is a "public trustee" of the airwaves or cable system, a mere operator, never truly an owner. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[199] For a detailed discussion of the defects of the scarcity rationale, *see* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982).

[200] *U.S. As 'Developing Nation'; Telecommunications Gaps Remain Major Hurdle Among Developing Nations*, COMM. DAILY, Jan. 21, 1994, at 4.

[201] While the proposed S. 1822 leaves the primary responsibility for defining universal service to the states, Chairman Hundt believes that the states must work with the FCC to formulate and administer a national universal service policy that is consistent. Statement of FCC Chairman Reed Hundt, *supra* note 190, paras. 18-19.

[202] Paul Saffo, *Looking Ahead to the Next Decade*, COMM. WEEK, Jan. 3, 1994, at 52.

[203] *Id.*

[204] Barrett & Marchant, *supra* note 32, at 4.

[205] *Id.*

[206] *Rate Rules 'Oversold'*, COMM. DAILY, Jan. 10, 1994, at 3.

[207] This task is arguably different from that presented to the FCC at the time of divestiture because in 1994 there are more players engaging in various kinds of heretofore unattempted mergers, crossing the ownership boundaries of cable and telco in an effort to converge different types of technology. Here, the FCC would be charged with regulating a multitude of vertically integrated entities, as opposed to one divested AT&T and seven RBOCs.

[208] Chairman Hundt has emphasized that both the FCC and the states must have the regulatory flexibility and discretion to manage and supervise the transition to effective competition, in order to ensure that rates remain just and reasonable. Statement of FCC Chairman Reed Hundt, *supra* note 190, paras. 6, 29.

[209] 47 U.S.C. §§ 151, 302 (1988).

regulatory approval.

B. Impact On Competition

While the RBOCs may be the losers in the AT&T-McCaw merger, it is equally possible that the merger will provide the RBOCs with the opportunity that they have been seeking, namely to be permitted to enter the interexchange market from which they have been barred since the divestiture of AT&T in 1984. By extending its network directly to consumers through McCaw's cellular phone systems, the RBOCs theorize that AT&T is developing a direct link to the local exchange.[210] The proposed union of AT&T and McCaw does more for the RBOCs than all the years of battling Congress and the courts since the late 1980s, for it provides the Bells with *quid pro quo* ammunition in their quest to enter the interexchange arena.[211]

With one half of all cellular licenses originally reserved for the RBOCs,[212] they have been able to invest heavily in cellular services, all seven RBOCs ranking among the nation's ten biggest cellular companies.[213] Each of the RBOCs and GTE appear to have developed their own agendas for participating in the explosive growth of the wireless communications market. Industry executives note, however, that Bell Atlantic is close to a deal with BellSouth and many independent telephone companies to build a nationwide consortium for advanced wireless services, whose primary goal is to bid for PCS radio licenses.[214]

In the short term, the proposed merger of AT&T-McCaw threatens the cellular market share of the RBOCs and GTE, because the new AT&T would be a unified rival with sufficiently deep pockets and geographic reach to produce advanced wireless services throughout the United States.[215] Over the long haul, if wireless telephones are able to replace the traditional wired phone systems, it will be possible for AT&T to reach its customers by bypassing the local exchanges and thus saving itself billions of dollars in access fees, a savings that may or may not be passed on to the consumer.[216]

The loss of access charges[217] would deprive the RBOCs and GTE of their biggest and most profitable source of revenue,[218] a blow which could result in a $1 billion loss in annual revenues for each RBOC, and a decrease of $300-400 million in annual post-tax profits.[219] If cellular and other competitive technologies continue to find ways to bypass the local exchange, the RBOCs will soon experience an acute cash flow reduction—one that the RBOCs believe will disadvantage both the economy and the consumers.[220]

As both the Commission and the states promote marketplace competition by knocking down *de jure* barriers into the local loop, they become more likely to rid the RBOCs of the remaining vestiges of the MFJ that effectively have prohibited them from competing fully in other markets.[221] However, with the RBOCs heavily entrenched in a local exchange

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[210] Ziegler, *supra* note 96, at 28. AT&T Chairman Robert Allen attempted to assuage fears about the re-emergence of AT&T into the local exchange markets by emphasizing that because 99% of all cellular calls begin and terminate in the wired local network, cellular service is secondary to the local exchanges. Mulqueen, *supra* note 1, at 146. MCI Chairman Bert Roberts stated that even if AT&T does take away some local traffic, the proper resolution would not permit the RBOCs access into the long-distance market, as this would recreate pre-divestiture monopoly and would devastate, not foster, competition. Nancy Hass, *The Solomon Solution*, FINANCIAL WORLD, Oct. 12, 1993, at 32. At present, the overwhelming majority of all local customers still make use of the LECs to complete their local calls, thus, Roberts sees no reason for any regulatory reconsideration until and unless these customers actually switch to an alternative, non-LEC provider, such as an IXC. *Id.*

[211] *Id.* If AT&T is physically able to bypass the local loop in extending its interexchange service directly to all of McCaw's cellular customers, the RBOCs argument that they should be permitted to offer service outside of the local exchange has greater merit.

[212] *In re* Amendment of the Commission's Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries, *Report and Order*, 98 F.C.C.2d 175, paras. 30-41 (1984). Some observers believe this to be the primarily reason why price competition failed to develop in the cellular market as initially anticipated.

[213] Edmund L. Andrews, *The AT&T Deal's Big Losers*, N.Y. TIMES, Aug. 25, 1993, at D1, D3.

[214] *Id.*

[215] *Id.*

[216] *Id.* It is equally possible the average customer may never see any price reduction, despite the fact that this windfall to AT&T and the other interexchange carriers may be significant.

[217] Access charges are paid to the LECs from the IXCs in order to enable local customers to complete long-distance calls on the local network. Moeller, *supra* note 89, at 14. Currently, interexchange carriers are compelled to pay nearly forty cents out of each dollar of revenue to the RBOCs for access. *Id.* These access charges and intra-lata toll calls account for 40-55% of LECs' telecommunications services revenues and 35-45% of total revenues. Each RBOC could witness a 20% reduction in network access and toll revenues over the next 5-10 years. Martyn F. Roetter, Ph.D., synopsis of *The Future of the RBOCs: Collapse of the Cocoon*, DR REP., July 1993.

[218] *Id.*

[219] *Id.*

[220] Hass, *supra* note 210, at 32.

[221] FCC Chairman Reed E. Hundt approves of promoting competitive entry into both the interexchange and the local ex-

that is historically immune from competition,[222] it is the *de facto* barriers to entry that are fraught with difficulties and will take more time to overcome.

FCC Commissioner Barrett stated that "[i]t is likely that the natural monopoly of the local exchange market eventually will evolve into a local multimedia and wireless services market, with multiple competitors."[223] Barrett believes that advances in technology make both the local exchange and wireless communications market fertile ground for companies seeking new market recesses.[224]

Addressing the prevailing fears that AT&T once again will become the pre-divestiture dinosaur it had been prior to 1984, there are compelling policy arguments on both sides. On the one hand, the RBOCs enjoy an extremely pervasive local monopoly, and to keep them from extending such a monopoly any further, perhaps they should be restrained from entering into areas such as data transmission, equipment manufacture and long-distance service.[225] But equally as compelling is the argument that the RBOCs should be released from their regulatory restraints as a means of keeping AT&T honest, and ensuring competition.[226] Telecommunications megadeals comprised of large cable companies, such as TCI, Time Warner and Viacom, involve cable companies planning to use their cable networks to build their own interactive systems in conjunction with local access provider partners.[227] Such plans require the obtaining of PCS licenses, which will become cheaper and easier if the cellular companies are forbidden to compete in the bidding for the licenses.[228] Computer and software conglomerates such as Microsoft, Apple, and IBM, can be counted on to rival Bell Atlantic with cutting edge programming systems.[229] In addition, new challengers are bound to appear on the horizon, as the assault on the boundaries of the marketplace continues.[230] As the communications industry experiences profound transformation, two central implications for this current communications revolution may be worthy of consideration:[231] first, the future growth in communications lies not in people speaking to people, but rather, in machines speaking to machines on behalf of their human owners; and second, within the next decade or so, the medium of communications will be less of a conduit between locations, and more of a destination in and of itself—a place where professional and personal interactions occur.[232] An appropriate recognition of these basic premises may prove to be critical in understanding the metamorphosis of the communications marketplace.

C. Articulating The Vision For The User

1. *Wireless Technology*

With AT&T, MCI and Sprint all demonstrating an interest in wireless technology, some believe that their strategic business decisions should increase competition in the local loop.[233] The fostering of local competition may result in lower prices for both long-haul and local services because wireless communications may enable long distance carriers to reduce, if not eliminate, the immense access fees they currently pay to the local carriers.[234] It is also hoped that competition stimulated by the single-vendor approach being pursued by such companies as AT&T, Bell Atlantic and MCI will cause a drop in costs and an improvement in services.[235] Users stand to benefit from the involvement of long-haul carriers in the wireless market, because IXCs generally are more sophisticated about data services than are local carri-

change by lifting the remaining line-of-business restrictions of the MFJ, and by returning the primary regulation of the RBOCs to the FCC. Statement of FCC Chairman Reed Hundt, *supra* note 190, paras. 14, 20-21. Hundt also supports the RBOCs in their quest to provide interexchange services and equipment manufacturing, but over a period of time and subject to adequate procedural safeguards that would preclude them from wielding their market power in the local exchange to undermine competition in new markets. *Id.* paras. 20-21, 23.

[222] *See* Kelley, *supra* note 91 and accompanying text.

[223] Federal Communications Commissioner Andrew C. Barrett, Remarks at the Institute for International Research (Feb. 2, 1993).

[224] *Id.*

[225] Robert Reno, *Communications Policy Seems to Be On Perpetual Hold*, NEWSDAY, Aug. 26, 1993, at 46.

[226] *Id.*

[227] Landler, *supra* note 15, at 35.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] Saffo, *supra* note 202, at 52.

[232] *Id.* Voice conversations account for less than one-half of all communications between the U.S. and Japan on AT&T's long lines, with the majority of all traffic generated by facsimile. *Id.*

[233] Moeller, *supra* note 89, at 14.

[234] Brown, *supra* note 100, at 49. MCI estimates that access charges paid to local exchange carriers currently account for approximately forty-five cents of every dollar taken in by the company. Gareiss, *supra* note 129, at 1.

[235] *Id.* If MCI succeeds in its campaign to loosen regulations on the types of local services it may provide, the company predicts that business users in those cities soon to be serviced by its local network are likely to see a "double-digit" percentage drop in local access costs by 1996. *Id.* at 61.

ers.[236] This interest by the primary IXCs, however, does not necessarily translate into innovative technological gadgets for the telecommunications user, because historically most big ideas have originated with small companies that grew into significant market players, such as MCI and Sprint.

For the most part, however, it appears that managers of corporate networks are quite skeptical about the wireless networking capabilities of the new AT&T.[237] To these skeptics, this technology remains a novelty, characterized by minimal short-term impact[238] and uncertain long-term advantages, and few expect AT&T to benevolently pass any access charge savings on to the user.[239] Despite the fact that future services, such as PCS and mobile technology, promise to yield benefits to business users, as advocated by Robert Allen in his "anytime, anyplace" communications slogan,[240] such visionary goals are often quite difficult for the average user to understand, let alone articulate.[241]

2. *Cable*

The recent *C&P* decision by Judge Ellis, permitting Bell Atlantic to offer cable programming in the Virginia area where the company provides local phone service, provides the opportunity to increase competition in the video programming market and to curtail the effect of local cable monopolies.[242] Because the majority of local cable subscribers are served by only one cable company in their service area, the significance of the *C&P* decision is that it is ultimately about more choices for the consumer.[243]

But is society willing to pay any price for technology? Despite the fact that long-distance companies have laid over 95,000 miles of fiber optic cables across the country, an expense of billions, few would have a problem in justifying the wisdom of such an expenditure since these long lines already carry huge volumes of traffic.[244] Upgrading residences with fiber optic cables may be harder to rationalize. While the upgrade is a necessary step in paving the way for the information superhighway, it is an incredibly expensive undertaking.[245] Virtually all of the cost will be borne by the private sector, with telcos and cable companies estimated to spend as much as $50 billion on the construction of advanced networks nationwide within the next five years.[246]

In addition, with the average American family currently spending approximately $55 per month for phone service and $31 per month for basic cable, they may not want to pay additional fees for new innovations such as video-on-demand or interactive television.[247] If the convergence between cable and telecommunications companies succeeds, it is likely that the home television set will become a two-way conduit for more new programs, products, games and services than most consumers can imagine or, quite possibly, even desire.[248] And for a society in which many cannot even program their VCRs,[249] the ease with which these new technologies must be obtained and performed, with a minimum of effort and expense, cannot be underestimated.

Access to 500 channels and a wealth of information does not necessarily create an informed or prototypical civilization, nor does it mean that the average viewer will choose to "motor along the information superhighway."[250] Because new technologies have a

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[236] *Id.*

[237] Mulqueen, *supra* note 1, at 1, 146.

[238] For his part, Sprint Chairman William Esrey viewed MCI's plan in the same positive light as all other local access plans made by telcos, cable, cellular and PCS companies, but negated the possibility of any short-term impact. Gareiss, *supra* note 129, at 1.

[239] *Id.*

[240] *Id.*

[241] David Burger, *Everything Converging, But Toward What End*, COMM. WEEK, Aug. 30, 1993, at 1.

[242] Skrzycki, *supra* note 67, at A6.

[243] *Id.*

[244] Samuelson, *supra* note 57, at A25.

[245] *Id.* One estimate sets the cost at $1000 per household, making the total cost of wiring all 96 million households in the United States an outrageous $100 billion. *Id.* Others place the cost in the hundreds of millions. *Electronic Superhighway Will Be Costly*, TELECOMM. ALERT, Jan. 3, 1994.

[246] *Id.*

[247] *Id.*

[248] Mannes, *supra* note 62, at 46.

[249] Moeller, *supra* note 21, at 25.

[250] In fact, the research has shown that the American public neither wants nor cares about access to 500 channels. Don West & Kim McAvoy, *Staking a Claim On the Future; Role of Broadcast T.V. in a Multimedia World*, BROADCASTING & CABLE, Apr. 19, 1993, at 20. One such example is GTE's ambitious Main Street project in Cerritos, CA, which offered interactive television services over the past four years. A test that GTE claimed would "shape future telecommunications for the whole country" can hardly be described as a success when few residents of the community have subscribed (only 350 out of Cerritos' 7300 cable subscribers are users) and most do not even get cable TV. John Lippman, *TV of Tomorrow' Is a Flop Today; GTE"s California Experiment in Two-Way Cable Finds Few Takers, Many Skeptics*, WASH. POST, Sept. 1, 1993, at F1. "Subscribers who have lived with GTE's high tech system report they would rather rent movies from the video store because it is cheaper, or sit down at the kitchen table to pay bills instead of entrusting the task to their televisions." *Id.* Project head Don Bache admitted that such projects are based primarily upon

tendency to create chaos and confusion in the name of change and to necessarily retard progress by breeding new economic, legal, technical and societal problems, the impact of innovative technologies is not immediately recognizable.[251] Such long-term repercussions indicate that taking the needs of the user into account is absolutely critical to a successful communications revolution. Along the way to achieving technological greatness, the human consumer must not be forgotten. As experimental products and services vie for attention, it must be remembered that users also have a powerful stake in the multimedia future.[252]

As one journalist eloquently noted, "[t]he truth—both grim and hopeful—is that technology is what we make of it and we are what we are."[253] And the truth is, there is no way of knowing in the present, how successful or desirable this proliferation of technology will prove to be to the consumer of the future.

IV. CONCLUSION

As the telecommunications industry undergoes explosive changes, the significance of the aforementioned mergers cannot be underestimated. The landscape of the entire telecommunications industry stands to change, and with it, the regulations of the past. While AT&T continues to be a dominant force, especially in the wake of its proposed merger with McCaw, current trends in the marketplace indicate to some observers that perhaps the time has come for Congress, the governmental agencies and the court systems to divorce themselves from traditional regulations designed to protect and foster competition in a monopolized, or at least a heavily dominated telecommunications industry. Likewise, perhaps it is time to lift completely the ban on cross-ownership and to permit telcos and cable companies to unite in order to break the chains of local monopolies.

It is imperative, however, that the antitrust implications of such mergers be thoroughly examined. If such mergers are merely unions bent on pursuit of vertical integration undermining the public interest, they themselves are inherently monopolistic and cannot be permitted to exist simply to destroy previously existing monopolies. Because the task of antitrust merger law is premised upon the need to safeguard the free competition so essential to the preservation of our democratic, political and social institutions, the goal must be to approve only those mergers whose benefits to the public outweigh their probable adverse consequences. The issue ultimately to be decided is whether the mergers discussed herein are in the public interest and, if so, whether they should be permitted to occur at all.

The manner in which the market and the individual user respond to such mergers will be measured largely by the success achieved in the development of promising wireless communications services such as PCS, the timeliness with which the tangible benefits of such systems can be passed on to the consuming public and, ultimately, whether the corporate vision is truly aligned with the public interest.

This is no longer a POTS—plain old telephone service—world. Today's common carriers must be broad-based suppliers of all kinds of services. Without an infrastructure capable of supporting current technology, cable companies may have to unite in order to compete. The rapid and pervasive abundance of proposed mergers between telephone, cellular and wireless communications companies, and major players within the cable, and film industries is evidence that the telecommunications industry will be more expansive within the next five years than heretofore thought possible.

speculation and said, "I don't know whether we can prove demand exists for all these services." *Id.*

[251] Samuelson, *supra* note 57, at A25.

[252] Fleischmann, *supra* note 22, at T10.

[253] *Id.*; "For good or ill, couch potatoes are going to become power potatoes." Mannes, *supra* note 62, at 46.