

turn pass the costs on to their end-user customers. LCI acknowledges as much: “The ‘Fast Track’ plan admittedly has more limited value as a device to encourage NetCo to reduce its rates to economic cost.”⁵⁴

LCI fails to provide any assessment of the economic impact of its proposal on consumers, other than to suggest that it will result in the creation of a level playing field among all telecommunications providers who provide residential and business local service in all parts of the country. LCI does not explain whether CLECs or customers will be willing to pay the resulting prices for services, whatever they may be as a result of LCI’s proposal. But in avoiding this issue, LCI hedges its bet and preserves its business options. If NetCo’s rates for wholesale services increase substantially as a result of these systems development efforts and the reorganization costs as a result of the split, LCI and other new entrants can choose not to purchase services from NetCo and not to enter or further expand their services in the local market. They make no commitment and give no assurance that they follow through after a BOC sets LCI’s plan in motion.

VI. IT IS BAD PUBLIC POLICY TO REGULATE, EITHER THROUGH MANDATORY OR VOLUNTARY RULES, BASED ON A BELIEF THAT CERTAIN PROVIDERS WILL VIOLATE EXISTING LAWS OR NEED FURTHER INCENTIVES TO MAKE BUSINESS DECISIONS THAT ARE WHOLLY WITHIN THEIR CONTROL

LCI’s proposal is unnecessary and ill-advised under existing law and public policy. The 1996 Act itself establishes temporary structural obligations on the

⁵⁴ Id. at 34.

RBOCs for the provision of certain services,⁵⁵ and the antitrust laws adequately protect against anticompetitive conduct.

The 1996 Act prescribes structural safeguards for the provision of interLATA,⁵⁶ alarm monitoring services,⁵⁷ certain information services,⁵⁸ and certain manufacturing activities.⁵⁹ These safeguards are time-bound and expire in accordance with standards set in the 1996 Act. Even with the substantial changes Congress imposed on the telecommunications and cable industries when it adopted the 1996 Act, it recognized that the antitrust laws continue to apply, and specifically ensured in Section 601(b) of the 1996 Act that nothing in the statute would be construed to modify or supersede any antitrust law (except to remove any immunity for mergers of telephone companies).

The antitrust laws do not prohibit “bigness” or the existence of market power, but rather limit conduct that is unreasonably exclusionary. United States v. Grinnell Corporation, 384 U.S. 563, 570-71 (1966).

Even assuming, arguendo, that U S WEST has market power in a relevant antitrust market, a position with which it disagrees, it is well-settled law that a

⁵⁵ The separated affiliate requirement for electronic publishing expires four years after the date of enactment of the 1996 Act -- 47 U.S.C. § 274(g)(2). The separate affiliate requirement for in-region interLATA services expires three years after a BOC is authorized to provide interLATA services -- 47 U.S.C. § 272(f)(1). The separate affiliate requirement for interLATA information services expires 4 years after the date of enactment of the 1996 Act -- 47 U.S.C. § 271(f)(2).

⁵⁶ 47 U.S.C. § 271.

⁵⁷ 47 U.S.C. § 275.

⁵⁸ 47 U.S.C. § 274.

⁵⁹ 47 U.S.C. § 273.

firm with market power may provide multiple products and enjoy the integrative efficiencies that inhere in single firm operation. Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 712 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1978) (“the possessor of lawfully acquired monopoly power . . . is not forbidden from improving his efficiency in manufacturing or marketing, even though the effect of doing so will be to maintain or improve his sales.”); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

Indeed, as the Berkey court noted:

[A] large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity -- more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share . . .

LCI's proposal suggests that either (1) the 1996 Act does not provide adequate incentives for an incumbent local exchange provider to enter the long distance business, or (2) neither the 1996 Act nor the antitrust laws are adequate to protect telecommunications markets from improper activity on the part of incumbent local exchange providers. Therefore, LCI argues that the Commission should enhance the carrot, and perhaps raise the bar on the stick.

It is bad public policy to regulate, whether through mandatory rules or by implication through “voluntary” tests that become de facto standards, based on a belief that certain providers will violate existing laws or need further incentives to

make business decisions that are wholly within their control (whether, when, and how to enter the long distance business). Such a regulatory response is especially pernicious when it could act to deny a BOC the integrative efficiencies that other firms are accorded under the antitrust laws.

VII. LCI'S PROPOSAL IS AT ODDS WITH HOW CONGRESS ENVISIONED THE TELECOMMUNICATIONS INDUSTRY WOULD DEVELOP AS A RESULT OF THE 1996 ACT

The choices offered to new entrants by Sections 251 and 252 to enter the local market were designed by Congress to complement and provide the incentive offered by Sections 271 and 272 to the BOCs to enter the in-region interLATA market.

When the Conference Report for the 1996 Act was brought to the floor of the United States Senate for a vote, Senator Pressler, sponsor of the bill and chairman of the Conference Committee, said that the bill would remedy the historical "economic apartheid regarding telecommunications"⁶⁰ that kept the BOCs out of interLATA long distance and kept the long distance companies out of the local exchange service market. He said: "This bill attempts to get everybody into everybody else's business and let in new entrants."⁶¹

Congress expected a convergence of local and long distance services as the IXCs get into the local business and the BOCs get into the interLATA business and, as a result, Congress also anticipated less need for regulation.

⁶⁰ 142 Cong. Rec. S686 (daily ed., Feb. 1, 1996) (Statement of Senator Pressler).

⁶¹ Id.

However, the convergence which has occurred has principally involved the consolidation of IXCs.⁶² And rather than facilitating the BOCs' entry into the interLATA business, LCI's proposal reinvigorates the apartheid, because it compels each BOC who chooses to implement LCI's plan to fragment its business among multiple entities with redundant operations. For example, LCI's proposal requires a BOC to create two corporate entities to provide local service (NetCo and ServCo). One of those local service providers is permitted to package local and intraLATA services (ServCo)⁶³ but the other entity is prohibited from packaging services (NetCo).

The proliferation of BOC-related entities as a result of LCI's proposal, some of whom would be regarded as a BOC,⁶⁴ some as a successor to a BOC and therefore an ILEC,⁶⁵ and some not a successor to a BOC but a LEC,⁶⁶ is contrary to the industry goals which Congress hoped to achieve.

⁶² For example, on Nov. 10, 1997 WorldCom and MCI issued a joint press release announcing that the parties had reached agreement on WorldCom's bid to acquire MCI. On Dec. 22, 1997 LCI announced that it had completed its acquisition of USLD Communications Corp., which provided long distance service in the southwest and northwest U.S. LCI World Wide Web Site, LCI Press Release (Dec. 22, 1997).

⁶³ LCI Petition at 20.

⁶⁴ HoldCo, the holding company, would be a BOC and an ILEC and would be "fully subject to all provisions of the Act." *Id.* at 14. All of the obligations in Sections 251 and 252 would apply to HoldCo. *Id.* at 20.

⁶⁵ NetCo would be a BOC successor and an ILEC and "would provide interconnection and network elements, as well as meet the other obligations of Sections 251 and 252." *Id.* at 19, 20. "NetCo would be regulated as the [sic] ILEC, including pursuant to Sections 251 and 252." *Id.* at 23. "[T]he obligations of Section 251(c) will continue, but enforcement will be simplified and focused on NetCo." *Id.* at 26.

VIII. CONCLUSION

LCI's proposal is at odds with the substantive requirements of the 1996 Act, with the Orders of the 8th Circuit Court of Appeals, and with Congressional intent. LCI's proposal also deprives the BOCs of the fundamental right to make choices about how they will structure and conduct their business which new entrants such as LCI continue to enjoy. Moreover, LCI's proposal is fundamentally anticompetitive, because it discriminates against non-facilities-based providers of local service by effectively eliminating resale as one of the paths by which new entrants can provide local service.

Even if the Commission ignores these infirmities and endorses LCI's proposal, the Commission's action must result in the following conclusions:

(1) For BOCs who choose not to implement LCI's proposed plan, the plan can never be used by the Commission as a de facto standard to determine whether the BOCs meet the checklist and the public interest test under Section 271, because the Commission would be required to enforce the terms and conditions of LCI's plan as against the BOC who chose to implement it. LCI's proposal changes substantive requirements in the 1996 Act without Congressional sanction and violates the 8th Circuit Court's Orders, and the Commission is, therefore, without authority to enforce it as to any BOC who voluntarily chooses to implement it.

⁶⁶ ServCo "would not bear the obligations of an ILEC under Sections 251 and 252." Id. at 20, 48. "ServCo will not be considered a 'successor or assign' or ILEC 'replacement' for purposes of Section 251(h), and therefore will not be subject to those Section 251(c) obligations." Id. at 25, 48.

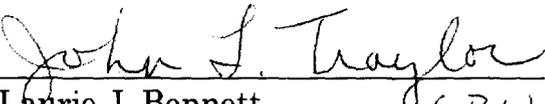
(2) For BOCs who choose to implement LCI's proposed plan: (a) new entrants such as LCI offer no assurance that they will purchase services from the new BOC wholesale entities at the prices which will be required to cover the costs of restructuring and new systems design and development or that they will enter or remain in the local market; (b) new entrants such as LCI offer no assurance that they will not oppose a BOC's 271 application and further delay a BOC's efforts to obtain interLATA relief; and (c) the BOC receives no assurance from the Commission under LCI's plan as it is presently structured that the BOC will be granted authority to provide interLATA services.

In the final analysis, the price which LCI proposes to extract from the BOCs through its proposal is unreasonable and unfair.

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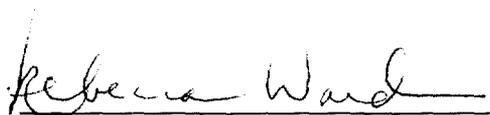
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Of Counsel,
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March 23, 1998

CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 23rd day of March, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served, via first class United States Mail, postage prepaid, upon the persons listed on the attached service list.

A handwritten signature in cursive script that reads "Rebecca Ward". The signature is written in black ink and is positioned above a horizontal line.

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