Phone Plus Magazine: 11/1999

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The New Robber Barons

By Neil S. Ende

NOT SINCE THE DAYS of the robber barons has an industry group flexed its monopoly muscle with such complete impunity. Indeed, in virtually every aspect of their conduct, the regional Bell operating companies (RBOCs) have leveraged and abused their monopoly power to effectively destroy any real hope of true competition in the local telephone markets. As a result, more than half a decade after the passage of the Telecommunications Act of 1996, we are not measurably closer to true competition in local telecommunications markets.

By most measures, the prospects for real competition in local telecommunications markets are far lower today than they were in years past. Indeed, while numerous independent companies sought to provide service to local telecom customers in the years immediately following the passage of the act, many of those companies are now out of business, in bankruptcy or in serious financial distress. And, while the RBOCs have certainly shown an interest in expanding into new local markets by acquiring their brethren (i.e., other RBOCs), thereby further limiting competition, they have shown little real interest in competing with the incumbent carrier in those markets. Moreover, regulators at all levels have not only failed to enforce existing statutory requirements and regulatory schemes intended to facilitate competitive entry, but in many instances have rewarded the very carriers that have ignored and flaunted their statutory and regulatory obligations.

How Did We Get Here?

The Telecommunications Act was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers ... ." The mechanism for doing so was the implementation of statutory and regulatory schemes that would encourage, and in some circumstances require, the RBOCs to take those measures necessary to permit viable competition to develop in their local telecommunications markets. However, both because of fundamental flaws in the act and because regulators have refused to enforce its mandates, the act has failed to move the industry toward real competition.

In passing the Telecommunications Act, Congress chose to provide access to the long-distance market as an incentive for the RBOCs to open local markets to effective competition. This incentive was embodied in Section 271 of the act, which provided that the RBOCs would be allowed to provide interLATA services within their service region once they demonstrated to the FCC that they had opened up their local markets to

competition. The theory behind Section 271 was that the lure of potentially huge in-region interLATA revenues would be strong enough to incent the RBOCs to allow competition in their local markets.

This theory was seriously flawed, for at least three important reasons.

- First, despite decades of regulatory proceedings in which the RBOCs claimed they could not make money serving local markets--claims that were never factually supported and rarely if ever true--the RBOCs have not only failed to open these markets to local competition, they have fought every effort to create such competition. Why? The reason is simple. Local service markets are and always have been huge cash cows from which the RBOCs, as monopolies, derive obscene revenue and rates of return. In contrast, in interLATA markets -- where competition has existed for several decades -- rates have been driven toward the actual cost of producing the service. Thus, in most instances, the RBOCs have made the economically rational judgment that they were better off preserving their monopolies -- and continuing to charge "monopoly rents" for local services- than they would be in foregoing these monopoly rents in return for the uncertainties of the interLATA world.
- Secondly, the RBOCs have correctly concluded that they can have the best of both worlds. Indeed, if history -- both recent and long term -- has taught the RBOCs anything it is that there are few costs to ignoring statutory and regulatory requirements. Take Southwestern Bell for example. Although many regulators would tell you that Southwestern Bell is and has been among the staunchest defenders of its local monopoly, its parent company, SBC, was allowed to acquire both Pacific Bell and Ameritech and to enter the interLATA market in Texas. Southwestern Bell, however, has failed to take any measurable steps to meet key conditions applicable to its merger with Ameritech.
- For example, one of the conditions imposed by the FCC on SBC's "merger" with Ameritech was that SBC would provide facilities-based local services to selected cities outside of its region within 30 months of the October 1999 merger, with the first three of these cities in operation within a year of the merger. SBC completely missed the one-year deadline and clearly will not meet the 30-month deadline, which comes due in April. Nonetheless, the FCC has not imposed any fine on SBC for its failure to meet the one-year deadline and there is no indication that it will do so, or that SBC will face any other negative consequences when it fails to meet the April deadline.
- The third reason for the failure of local competition is that the RBOCs have correctly concluded that neither the FCC nor state regulators have either the political will or the ability to enforce the requirements of the Telecommunications Act in a manner that will ensure that its goals are met. Indeed, it is widely recognized that the RBOCs view the fines for violating the Telecommunications Act -- which totaled nearly a half billion dollars from December 1999 through May 2001 -- as nothing more than a cost of doing business, and a small one at that.

The Bad Acts Continue

As competitors in the interLATA markets, RBOCs wear several hats. On the one hand, they now compete directly with traditional interLATA carriers like AT&T, MCI and Sprint, and the many smaller carriers reselling their services. At the same time, however, they retain their role as the incumbent local carrier through which their customers, as well as the customers of their interLATA competitors, must presubscribe. In antitrust parlance, they have retained control of an essential (bottleneck) facility, the central office, required by their competitors. The RBOCs continuing control of these essential facilities, along with their new role as interLATA competitor, has created an irresistible opportunity for monopoly abuse.

Not surprisingly, Southwestern Bell has not been able to resist this opportunity. For example, in the months since Southwestern Bell obtained interLATA authority, numerous resellers report significant new problems in getting their Letters of Authority (LOA) processed by Southwestern Bell in a timely manner despite the explicit requirements of the FCC's regulations. These resellers report their LOAs often sit with Southwestern Bell for weeks and even months before processing begins. Once processing begins, they report SBC often unilaterally rejects them, in direct contravention of the FCC's regulations prohibiting the local telephone company from assessing the validity of an LOA.

Further, these resellers report they have received numerous complaints from their customers that, prior to the implementation of their requested PIC change, Southwestern Bell has contacted them and solicited them to take a competitive service directly from Southwestern Bell. In other circumstances, upon implementation of the PIC change, customers have received a recorded message from Southwestern Bell advising them their long distance service has been changed, that they may have been "slammed," and suggesting they contact Southwestern Bell on a toll-free number for additional information. When the customer dials the toll-free number, he/she is connected with a Southwestern Bell telemarketing organization, which offers the customer its competitive long-distance service.

If that were not enough, when Southwestern Bell rejects an ANI, it often assesses a significant "PIC dispute" charge. These charges often total in the thousands of dollars in the aggregate and are entirely without basis. Nonetheless, given its absolute practical control over the PIC implementation process, Southwestern Bell is able to demand that these charges be paid on the specific and stated threat not to implement any additional ANIs if they are not.

Southwestern Bell's conduct represents a new level of anticompetitive abuse even in a industry with a decades-long reputation for such abuses.

What Should Be Done?

The telecommunications industry is at a crossroads. Absent immediate corrective action, there is little chance that real competition will emerge in local markets in the foreseeable

future. The FCC and state regulators must rigorously enforce the requirements of Section 251 of the Telecommunications Act and implement procedures that ensure that such enforcement proceedings occur promptly following the filing of a complaint. With respect to interLATA markets, to the extent that RBOC entry appears to be inevitable, the FCC should immediately take control over the PIC implementation process, either directly or through an independent private organization. Absent such action, the RBOCs will continue to use their monopoly power to harm their competitors and the competitive marketplace.

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