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The Baby Bells Are Coming To Broadband: Have We Learned Nothing?

By Neil S. Ende

Ever since the Consent Decree was issued nearly twenty years ago, the Baby Bells have largely been precluded from offering interLATA services. The reason for the restriction was simple and well grounded in the antitrust laws and accepted competitive theory. In short, the Consent Decree, succeeding regulatory decisions and the Telecommunication Act of 1996 were all premised on the principle that, for real competition to exist across telecommunications markets, the opportunity for competition had to exist both in the local and the long distance markets. Thus, the Baby Bells were precluded from offering interLATA services until the local markets which they served were open to competition.

The hope was that opportunity to enter lucrative long distance markets would incent the Baby Bells to open up their local markets to competition. The reality has, of course, been quite different. Long distance markets, while large and potentially lucrative for the Baby Bells, were already open to competition by large, well-financed, players. Moreover, as time passed, it became ever more apparent that the competitive forces at play in the long distance markets were creating ever stronger downward pressure on prices and margins.

In contrast, local markets, which were not subject to competitive forces, were becoming ever more lucrative. Indeed, while prices continued to fall in the long distance markets, in proceeding after proceeding, the Baby Bells were able to convince state public utility commissions that substantial rate increases were required to maintain the economic viability of the local telephone services provided to their monopoly customers.

At the same time, the Baby Bells were able to forestall competitive entry into their local markets, claiming that such entry would threaten the economic viability of their local service offerings. Of course, these were the very same Baby Bells who for years had been telling public utility commissions that they were losing money in providing local services—a claim that was rarely substantiated. Why were they now fighting tooth and nail to maintain their monopoly control over these same markets? Because, these markets were always extremely profitable and were becoming ever more profitable as regulators lined up to authorize substantial rate increases.

How were the Baby Bells able to pull this off? Presence, economic power and political influence.

With their local monopolies intact and producing ever greater profits, the Baby Bells had little economic incentive to open these markets to competition in return for a ticket to enter the intensively competitive long distance markets. So, the Baby Bells continued to stonewall every real effort at local entry while racking up record profits in their local service offerings. Indeed, a recent Association of Local Telecommunications Services (“ALTS”) study found that the Bells still served about 92 percent of the local phone market.

Not satisfied with their hammerlock on the local markets, the Baby Bells continued to set their sites on the long distance markets. And, indeed, over the past few years, they have begun to make inroads. Despite what some would describe as illusory efforts to open local markets, both Southwestern Bell and Verizon have been allowed to provide in region long distance voice services in a number of states.

During this same period, much of the growth in telecommunications had been occurring in the data and Internet markets. As a consequence, the Baby Bells launched a major effort to gain entry into these markets. Taking on the mantle of the “underserved” and the so-called “digital divide,” the Baby Bells commenced a massive lobbying effort to convince Members of Congress and the public that they should be allowed to enter these markets, and that their entry ticket should be punched without regard to whether they had opened their local markets to competition.

These efforts appear to be bearing fruit. As recently as last week, House Telecommunications Subcommittee approved H.R. 1542, the Internet Freedom & Broadband Deployment Act of 2001. The Act represents a major victory for the incumbent Bell companies as it would remove the current restrictions on the provision of telecommunications services, including data and internet services, across LATA boundaries. Specifically, the Act finds that, “[h]igh speed data services and Internet access services constitute unique markets that are likewise incompatible with the prohibition on Bell operating company provision of interLATA services.” On this basis, the Act would, “clarify[] that the prohibition on Bell operating company provision of interLATA services does not extend to the provision of high speed data services and internet access services.”

For the purposes of the Act, the term “high speed data service” is defined as, “any services that consists of or includes the offering of a capability to transmit, using a packet-switched or successor technology, information at a rate that is generally not less than 384 kilobits per second in at least one direction. The Act defines the term “Internet” as “collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.”

The Act’s primary sponsor, House Energy and Commerce Committee Chairman Billy Tauzin ILECs explained the thinking behind the Act as follows, “ILECs must provide their facilities, even brand new facilities, on an unbundled basis to competitors at regulated prices. ILECs must resell their broadband services to competitors at wholesale rates, which no other carrier is required to do. In addition, the Bells are prohibited from offering long-distance data services, which deprives them of the efficiencies that can be gained from offering end-to-end services. These restrictions give the ILECs little incentive to deploy new services and facilities. Why spend the money to roll out broadband when your competitors can use your own network to take your customers? These types of rules might have made sense for basic telephone service. But cable companies control 75 percent of the broadband market, so the ILECs cannot be considered dominant by any stretch of the imagination.”

Competitive carriers fear that the Act will lead to the “remonopolization” of a critical portion of the telecommunications market. The Association of Communications Enterprises (“ASCENT”), whose membership includes many competitive telecommunications carriers and internet service providers, has described the Act “disastrous for competitive carriers and their suppliers” predicting that it “would remonopolize the Bell networks.” According to ASCENT, the Act would not only “eliminate the critical quid pro quo established by the 1996 Telecom Act whereby the Bells could not get into long distance until they opened their local markets to competitors,” but it would also (i) exempt the Baby Bells from the obligation to provide advanced data services to competitive carriers via unbundled network elements or wholesale discounts; and (ii) eliminate the obligation currently imposed on the Baby Bells to allow their lines to be shared by competitive carriers to provide data services to end-users

The Baby Bells have also found a friend at the FCC. The FCC’s new Chairman, Michael Powell, has signaled an intention to weaken enforcement of the provisions of the Telecommunications Act requiring the Baby Bells to allow competitive entry into local markets before they will be allowed to enter long distance markets.

What does all this mean? It appears that fewer than twenty years after the Consent Decree, we are returning to a telecommunications marketplace dominated by an ever shrinking number of major players. These players, and the Baby Bells in particular, will control an ever greater percentage of the marketplace, both local and long distance, and the smaller players, who have stimulated much of the growth and innovation in the industry, will continue to be forced out of the market. Of course, the ultimate victim will be the consumer, who will have fewer competitive choices, will see fewer product innovations and will pay higher prices. Did we learn nothing from the Consent Decree? Is this really what we want?

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