## Comments on

# "THE FUTURE OF TELECOMMUNICATIONS REGULATION"

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The thoughtful and perceptive article by Roger Noll deals with the implications of monopoly in telecommunications at a level of sophistication that is quite beyond the usual public affairs discussions that are taking place in the political arena these days; in those the terms "monopoly" and "competition" have become slogans more than analytic concepts.

Indeed, it is important to distinguish between Noll's basic conclusion that for some time there may remain some monopoly elements which will have to be taken into account in a regulatory way, and the widely accepted non sequitur, namely that "plain old rate-of-return regulation and entry control" is needed. The conclusion that residual elements of monopoly call for some regulatory action should not be confused with a defense of a particular system of cumbersome and counterproductive controls that has historically developed in this country. There are many alternatives, some of which are likely to be preferable. The identification of remaining monop-

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oly elements thus constitutes a challenge to figure out new solutions, rather than a basis for the continued application of old remedies.

Certainly there is nothing in Noll's article that would support entry controls. One could argue from it for the need for some forms of rate regulation, but not necessarily rate-of-return regulation as we have known it.

The central practical conclusion of Noll's article with which I am in agreement from my political science perspective is that AT&T should be allowed to enter competitive fields from which some interests are trying to exclude it. Noll's economic argument and my political analysis lead us to the same conclusion by different (though in no way incompatible) paths. I find Noll's argument fully persuasive, but I would like to bolster it by a different set of considerations.

Historically, when a communications medium in this country was under monopoly control, the principle of common carriage was applied. The monopolist, whether it was the government-owned post office or the private telegraph carriers, was obliged to provide service to all customers, including its own opponents, without discrimination. That seems to me to be the appropriate kind of regulation when there is in fact a significant degree of monopoly over the use of a medium. I would like to make three points about it.

1. Non-discrimination and interconnection requirements on common carriers have proved to be enforceable.
2. They constitute a very different kind of regulation from that of tariff setting and entry and exit controls.
3. In the case of communications media activities, entry and exit controls are quite unconstitutional, as indeed is tariff setting for most such activities.

If I am right about the unconstitutionality of entry controls, and if those nondiscrimination requirements are indeed effective ones, then the solution is traditional common carrier regulation. There would be a difficult dilemma only if the effective kinds of regulations were just the unconstitutional ones.

Roger Noll's article does seem to share the widespread feeling that nondiscriminatory access requirements are difficult to enforce, but at the same time he makes some important points to the contrary. He notes the remarkable progress that was made in the 1970s toward opening up opportunities for competitive carriers that depended for their very existence on interconnection with the major systems with which they were competing. There is no doubt that there were problems, but given the award in the MCI case, regardless of what the final outcome may be, it would be hard to maintain that monopoly carriers can easily disregard the normal common carriage rules. They do so at very great peril.

More to the point than the enormous size of the MCI award is the fact that MCI and the other competitive carriers managed to make their way despite rather ambivalent enforcement in the 1970s of the common carrier principle. I would not want for a moment to minimize the importance of what the FCC and the courts did in transforming a monopoly market into a competitive one, but it would be quite wrong to say that the authorities in the past 15 years were clear and single-minded as to where they were going. Certainly the Public Utility Commissions (PUCs) were not at all sure that breaking up the integrated universal system was a good idea. Nor was Congress, as it started to think about these matters; the number of sponsors of the Consumers' Protection Communications Act (the so-called Bell Bill) was certainly an indication that the competition that has come into existence was not fully planned. Even the FCC was not sure where it was going. It was a surprise to the FCC when it discovered that the decision that it had made to allow specialized common carriers to offer leased line service turned out to apply also to ordinary message service; that was not the intent. All in all, if common carrier requirements for interconnection without discrimination have worked in the last decade, there is little reason to doubt that they could work if they became the centerpiece of regulatory policy. One implication might be more emphasis on requiring monopoly activities to operate in a fishbowl. The current emphasis on improving accounting procedures is an example. In general, the emphasis can be put on making it hard to discriminate by insisting on open arrangements between a monopoly and its customers rather than on prohibiting the monopoly from engaging in business activities where it proves itself efficient.

My first point, then, is to suggest that we are often too defeatist about how effective reasonable market rules can be. It is not necessary or sensible to divorce monopolistic and competitive activities totally, nor to assume that monopolistic activities must be put under public utility-type regulation. This argument is relevant to some current telephony issues, but even more so to the evolving situation of CATV. The cable industry makes the absurd case that it is not a monopoly in a properly defined market. It points out that for each service it currently delivers there is some alternative delivery method. But obviously no one else has the advantage of having 100 channels going by every house. One can visualize a railroad magnate in the nineteenth century saying that he had no monopoly because anything he could carry could also be carried by horse carts.

Indeed economists may argue about whether there is "natural monopoly" in cable or in any other part of the telecommunications system. But the costs of having the streets dug up more than once are social costs that hit the general public, not the firms who can be charged. That being the case, there is no question that more than one cable system will rarely be allowed, and so the cablecaster does have bottleneck control over what publishers will be able to distribute over that highway.

More accurately, the cablecaster will have bottleneck control to the extent that the franchising authority does not insist on common carriage principles. On the other hand, the cablecasters have every reason to be frightened when they hear such arguments being made. They are justified in worrying that the next step would be putting them under rate regulation in the usual public utility mode. If that were to happen, and there were a sharp separation of carriage and content enterprises, the cabling of American cities would stop. Keeping cable systems out of the profitable part of the business, namely programming, would destroy the industry. So here again we reach the conclusion that cable franchisees must be required to make their facilities available to others on a nondiscriminatory basis, but that to do so in a way that does not allow the cablecaster into all phases of the business would be a terrible error.

Historically, it has been true that in some common carrier regulations the carrier has been prohibited from engaging in businesses in competition with his customers. Railroads have not been allowed to engage in express business, for example. We have suggested that that is not always good economic policy. Even more important than that, in the case of communications carriers, it would be in direct violation of the First Amendment. Congress simply has no power to prevent anyone from communicating.

If Congress, as it rewrites the Communications Act, forbids AT&T or the local operating companies from going into the burglar alarm business, or the real estate business, or the manufacturing business, it might be unwise, but it would be a constitutional exercise of the commerce power. But for Congress to prohibit any organization from going into the publishing business is beyond its power. The First Amendment does not say "Congress shall make no law abridging freedom of speech or of the press, except in the case of large organizations."

The proponents of such a regulation are aware of the problem and argue that they are not prohibiting any company from publishing, but only from publishing over its own lines; they say that it is just a regulation on business and on manner, not on publishing as such. That argument is quite absurd. If someone accesses an AT&T-owned electronic yellow page computer, is there any way to either know or forbid that the enquirer's call has at some point used an AT&T Long Lines circuit? At the computer the route of the enquiry is not known.

I would therefore argue on political grounds for some of the same conclusions that Noll reaches on economic grounds. Regardless of the persistence of elements of monopoly, there is no legal basis for keeping anyone out of publishing. Furthermore, it is often poor policy to impose artificial separations of activities, even constitutional. Allowing AT&T, cablecasters, or others who might have some control in a market to pursue businesses that they can do well, does not necessarily imply either that they can keep others out, or that they have to be put under rate-of-return, entry and exit regulation. There are more imaginative and even proven alternatives for assuring common availability of carriage.