

ENTRY DECONTROL AND DEREGULATION:
CONCEPTS IN COLLISION

BY

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This paper analyzes the impact of the current federal policy of entry decontrol in the telecommunications industry and concludes that rather than "deregulating" the industry, it is likely to create a more complex regulatory environment than before. Those who expect the removal of entry barriers to decrease the extent of government involvement will therefore be disappointed.

What is emerging is a complicated and shifting mix of industries, partly regulated and partly unregulated, and firms with multiple communications functions in both competitive and noncompetitive markets, all subject to a multiplicity of public policy expectations and controlled by an array of regulatory agencies with differing goals.

The reason that true deregulation can not be achieved is that open markets do not serve all the needs of public policy. One such continuing need is the correction of market failure caused by natural monopolies. A natural monopoly is an industry which produces an output for which there are no ready substitutes, and which is characterized by continuously falling average costs. The firm that gains the largest market share therefore has the lowest costs and is able to drive its competitors out of the market. As the sole survivor it is then able to charge higher prices and to produce less than the competitive output, and, in the communications industry, exercise censorial power over the contents of its output.

The traditional response to a natural monopoly is rate regulation, under which a governmental authority controls the monopolist's pricing policies (and directly or implicitly, also output). This leads enterprising firms to seek alternative ways to exercise their market power. One method is for them to integrate vertically into an unregulated industry,¹ which provides the ability to manipulate prices and expenses in order to shift monopoly profits into their

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unregulated operations. The regulatory response to this problem has been to create structural barriers, usually with the goal of preventing regulated firms from entering unregulated industries.

A second public policy that has led to government intervention in the communications industry is the goal of universal availability of telecommunications. The Communications Act of 1934 mandates the FCC to

...make available to...all the people of the United States, a rapid, efficient, Nationwide wire and radio communications service...at reasonable charges...²

State regulators have used this rationale to hold down basic phone rates, even if this necessitated cross-subsidies. They perceived, quite clearly, that there is a strong public sentiment to keep basic telephone service at low rates. This is not simply a matter of subsidizing some political constituencies; the value of a communications system rises with the number of its participants. Each additional subscriber contributes positive externalities to other subscribers by being potentially available to them, and subsidizing marginal subscribers may make perfect economic sense.

Regulation and Entry Decontrol

For nearly a century, telephone service was subject to rate regulation, and its predominant firm, AT&T, was restricted in its activities. When the company attempted to expand control over the entire industry, it was blocked by the Justice Department, leading to the famous Kingsbury Commitment by Bell to maintain the status quo.³ This was reaffirmed by the 1956 consent decree,⁴ which prevented the company from offering unregulated products and services. Confined to this area Bell has nevertheless dominated local and long distance service as well as terminal equipment.

The control of terminal equipment might be dated from the 1956 Hush-A-Phone and 1968 Carterfone decisions⁵ which permitted non-telephone companies to attach peripheral equipment onto Bell System equipment. Despite these rulings, discriminatory tariffs still restricted entry, but since 1977, when the FCC finally assumed the role of approving and registering non-telephone equipment itself,⁶ parts of the terminal equipment market are now becoming competitive.

In the long distance telephone markets, entry decontrol began with the FCC proceedings in Above 890 (1959), MCI (1969), Specialized Common Carrier Services (1971), and Dom-sat (1972).⁷ These decisions opened entry into privately operated specialized services--markets which the FCC felt were distinct from those served by AT&T.

When in 1974 MCI petitioned the FCC for the right to compete with Bell in one of its traditional markets--

regular long distance traffic--the agency initially denied the petition. In the so-called Execunet decisions⁸, however, the D.C. Court of Appeals reversed the FCC; all telephone companies are now required to provide access to all qualified long distance operators at FCC-regulated tariffs. Despite this opportunity for entry, AT&T retains an overwhelming share of the long distance market.

The local distribution market, which has perhaps the strongest natural monopoly characteristics of any part of the communications sector, has also been opened to new technologies. The FCC is presently processing applications for cellular radio licenses--a Bell-developed technology for mobile telephones--and digital termination systems (DTS)--a high speed data transmission system with switching capabilities. Both permit the bypass of the local telephone and exchange loops, creating the opportunity for communications networks entirely independent of Bell.

These actions served to open AT&T's traditional markets to competitors; but there was no symmetry. Bell strongly complained that entry decontrol should not be a one-way street. In particular, the increasing overlap between communicators and computers led AT&T to seek entry into the field of new computer technologies, where its presence would increase competition and innovation.

After the convoluted proceedings of the Computer I and II Inquiries⁹, the FCC freed Bell from some of the constraints of the 1956 consent decree and permitted it to enter the "enhanced service" markets. To avoid the problems that would be created by AT&T's presence in both regulated and unregulated markets, the company was required to set up a fully separated subsidiary.

Moving from telephone service to broadcasting, we observe a very different set of restrictions. Unlike telephone, broadcasting does not suffer from natural monopoly characteristics. If anything, the problem is to control the many potential entrants who will otherwise step on each others' toes. The price of broadcasters's product--advertising rates--is not regulated. In fact, the amount of radio advertising time has been restricted by the FCC, thus raising its price.¹⁰

In the absence of rate regulation, the principle restrictions that broadcasters face are those of product quality and market extension. These are enforced primarily through a public interest standard, including the Fairness Doctrine, which requires broadcasters to allow opposing viewpoints to be heard.¹¹ Similarly, the Prime Time Access Rule prevents any network from foreclosing access to a broadcaster's nightly programming schedule.¹² In addition, the expansion of television firms is restricted: The cross-ownership of media outlets in a single locality is severely limited, and the number of stations any single firm may own is restricted to seven AM, seven FM, and seven TV stations nationwide.¹³

Entry to the radio part of the broadcasting industry

was almost opened in 1980, when the FCC gave initial approval to a plan to decrease frequency bands for each station from 10 kHz to 9 kHz; however, this decision was reversed after strong opposition from the broadcast industry. Still, this does not leave listeners at the mercy of a small group of oligopolists. Radio may be in that respect a special case. There are more than 9,055 radio stations in the U.S., and 116 markets have 10 or more radio stations. Since 85% of the population resides in the top 100 markets, it can be said that most of the population enjoys a fairly competitive offering of radio programs.¹⁴

Technological restrictions on spectrum space and signal strength are considerably more limiting in the commercial television industry. To supplement the 765 television stations which leave 60% of all households with access to four or fewer stations¹⁵, the FCC has now accepted applications for new "low power television" stations, but whether they will prove to be any more of a competitive factor than UHF stations are is somewhat doubtful. A significant competitive effect on commercial television is being exerted by the entry of the new cable television technology.

In cable television, the natural monopoly characteristics of the medium give operators substantial market power in the video programming market, particularly in areas of limited over-the-air reception and in the pay-programming market segment. Cable has been subject to regulations at all levels, many with the goal of keeping them from becoming competitors to broadcast television; thus, for a decade, the FCC has also limited the operators' ability to import "distant" signals and pay services.¹⁶ Similarly, state and local authorities have imposed their own set of obligations on cable operators, including institutional loops, local programming studios, and a gross-revenue franchise fee. This began to change after 1977, when the D.C. Court of Appeals freed the industry from most of the FCC restrictions on pay-cable services in HBO v. FCC.¹⁷

In 1979 the Supreme Court removed another set of federal requirements that differentiated cable from broadcast television when it held in FCC v. Midwest Video¹⁸ that the FCC could not impose certain common carrier-like obligations on cable.

Following these decisions, the FCC began to initiate a dismantlement of the remaining cable regulations, including the repeal of the limitations on distant signal importation.¹⁹ This permitted the cable operator to shift its position from merely distributing a limited group of networks to selecting and marketing a diverse group of programs not available over the air, often including its own subsidiary networks.

In addition to freeing cable from many regulatory requirements, the FCC has removed many barriers to the entry of other technologies to permit them to provide competition in video distribution markets. Subscription television (STV) operators, who broadcast scrambled signals to subscribers,

had previously been limited to markets with four or more commercial TV stations and required to offer at least 28 hours a week of conventional programming. These restrictions were deleted in 1982 and 27 stations presently serve 1.3 million subscribers in 18 markets.²⁰

Spectrum space has also been granted to two new technologies. Multipoint Distribution Systems (MDS) have been allowed to distribute programming by microwave transmission²¹ and an increase in their spectrum allotment is contemplated. Similarly, the FCC recently approved the entry of direct broadcast satellite (DBS) by accepting license applications from companies such as Comsat and Western Union.²²

At the same time, satellite master antenna (SMATV, a kind of mini-cable television) operators have been invading cable television's turf.²³ SMATV operators use large dish receivers on multiple dwelling units and distribute the satellite-delivered networks to residents without crossing a public right of way, and thus without requiring any license or FCC permission.

The Emerging Regulatory Environment

Despite the elimination of many structural entry barriers, open markets are not a panacea for the public policies that were served by the previous regulations. Some policies, such as cross-subsidies to favored groups, cannot be provided without government intervention. Other policies, which require competitive markets, will not be served, because of the entrenchment of a monopolist. As long as vestiges of monopoly power exist they must be regulated, and when such monopolists compete with unregulated new entrants the deregulatory policies will require that the conduct of the monopolists be carefully monitored to insure against anti-competitive behavior.

The elimination of legal entry barriers to many markets creates two situations which regulators are now forced to deal with--the entry of new and typically relatively small unregulated firms into regulated markets dominated by large established monopolists, and the regulation of both in new markets.

Opening regulated markets to unregulated firms poses a number of regulatory questions. First, should the new and old firms now be treated similarly or differently? If new firms were subject to the same regulations and rate structure as the old, there would seem to be little chance for them to establish any market presence. Lower costs would be of no help if firms could not attract customers with lower prices. On the other hand, if the entry of a new unregulated firm was permitted to trigger complete deregulation of the old firm, then the latter would immediately be free to exercise its monopoly power in those markets where there was no competition and also exercise substantial market power where it was able to dominate the new entrants. Even pro-

ponents of Baumol et. al.'s "contestability" theory²⁴--who claim that monopolists would be pressured into acting as if they faced competition if potential entry were easy--realize that this is inapplicable to those markets in the communications industry in which high economic entry barriers exist. High fixed costs and substantial consumer loyalty protect local telephone companies and cable franchises against major threats of entry, at least for the time being.

One way to deal with this problem is to deregulate only the competitive segments of the market, or those markets where entry barriers are low. Radio broadcasting appears to be a reasonable competitive market and so it has been significantly deregulated.²⁵ Some terminal equipment markets, such as for private exchange terminals, are also reasonably competitive (the market share of manufacturers affiliated with telephone companies dropped from 93% in 1968 to 56% in 1979), and may be suitable for deregulation; yet how is one to articulate a standard that distinguishes that market from others, such as key phones and dial-in-hand telephones, where telcos maintained 1979 market shares of 89% and 96% respectively?²⁶ Bell enjoys strong consumer loyalty, or merely benefits from consumer apathy, so that its market share does not tell the whole story. According to one expert, "...AT&T will continue to enjoy significant monopoly price-setting power even as its market share declines. The Bell System currently has the market power to set prices at more than 200% over cost."²⁷ In fact, most residential users continue to pay annual rental fees for telephones that exceed the total purchase price of the phone.

Even more difficult than attempting to draw that line is regulating the dominant firm's behavior before the market becomes adequately competitive. The FCC's problems in deregulating the long distance telephone market provide a good example of this. If competition is to be welcomed because of the downward pressure it exerts on prices, then MCI's entrance into ordinary long distance service has certainly served its purpose. MCI's rates were generally 35% below AT&T's long lines rates and at times as much as 50%. Yet how were regulators to permit AT&T to respond?

If AT&T were forbidden to meet MCI's prices then what purpose was competition serving? The 90% share of the market which AT&T served would not benefit from competition. Resources would be inefficiently wasted if MCI were encouraged to duplicate services that AT&T could provide at lower cost.²⁸ Yet to allow AT&T to meet MCI's prices would create two other problems. First, it would eliminate substantial excess profits that regulators desired AT&T to generate to subsidize local services. Although this aspect of the problem should be reduced by the 1982 consent decree which will require all long distance carriers to pay equal access charges and thereby equalize potentially mandated subsidies, the second will remain.

This second danger is that if AT&T were permitted to

meet or to undercut the new entrant's price it would be able to foreclose access to the market merely by threatening to draw upon its market power in a price war.²⁹ Of course regulators could try to carefully monitor dominant firms to insure against such predatory pricing, but the presence of significant joint costs would make predatory pricing here very difficult to detect. It might not be at all clear to regulators whether a dominant firm's price cuts were anti-competitive tactics to foreclose a market or the desired results of competition forcing lower prices.³⁰ This issue will be presented to regulators when the new digital termination technology enters the local telephone distribution service market, and also when MDS and SMATV enter the video distribution market.

Two other problems which arise when a newcomer enters a segment of a monopolist's market will not disappear even after the segment becomes competitive; both concern the cross-subsidies between the monopolist's unregulated and regulated segments.

First there is the problem that the monopolist will use cross-subsidies to shift profits from the regulated market to the unregulated. The difficulty with preventing such conduct led to the Justice Department's effort to force divestiture of AT&T, but short of that solution such cross-subsidies are difficult to detect.

The problems are particularly difficult for local regulators of cable television. Not only do they typically have miniscule staffs,³¹ but they face the problem in a particularly complicated form. This is so because cable operators can cross-subsidize their related unregulated program subsidiaries in a variety of forms. More than 75% of all cable systems today still have 12 or fewer channels,³² many of which are reserved for local broadcasters under the "must carry" rules.³³ There is therefore great demand for the remaining channels. When a cable operator owns its own program network it has a great incentive to prefer it to other competing networks.

Evidence of such potential includes, for example, Group W Cable (formerly Teleprompter) reportedly advising all of its cable systems not to enter into access agreements with Cable News Network since its then prospective merger partner (and now parent) Westinghouse was introducing the competing Satellite News Channel in a joint venture with ABC.³⁴ Group W was accused of similar tactics against the movie channel Showtime. Most recently, Warner Amex has seen the number of subscribers to its Movie Channel decline, reportedly due to its replacement by a competing movie channel "Spotlight" on systems owned by the five large cable companies who own "Spotlight."³⁵

In the face of such problems of programming monopoly, some structural solution, such as a form of separation of hardware cable operator and software program packager may emerge.³⁶ If regulators are unable to pursue this effectively then the regulators' role may well be assumed by the

courts as competing program suppliers contest anti-competitive practices in private antitrust litigation.

Another problem is the maintenance of subsidies for public policy reasons. As markets become competitive it becomes increasingly difficult for any competitor to overcharge some customers in order to generate a subsidy, unless all competitors are required to do so. To generate funds for cross-subsidy, then, it might be necessary to impose some form of tax on all competitors who chose not to offer universal service. Thus if new entrants like SMATV and MDS decided to try to "cream-skim" the most profitable buildings or neighborhoods in the video market, they could be required to share the cost of providing cable service to unprofitable subscribers.³⁷ In the telephone service market, DTS and cellular radio firms could be charged access fees for interconnection to the LOC, and if they were able to circumvent such interconnection then they too might be charged a "universal service" tax. Again, this would impose new rules and regulations.

Another subsidy question that must be faced is the potential siphoning of the most desirable television events from "free" commercial broadcasters to pay-television.³⁸ Congress may possibly legislate that events such as the World Series and Superbowl are national treasures that belong to the people and may therefore not be taken from commercial television, but such regulations would have difficult Constitutional barriers to overcome.³⁹ As pay television forces many viewers to pay for programs, regulators will be faced with the difficult public policy question of what universal service obligations mean in terms of TV content, and how they will be financed.

Another difficult regulatory problem that arises when new entry is permitted into a previous monopoly market is network maintenance. When AT&T controlled the entire long distance network as well as most local switching facilities it could dictate quality standards. Knowing it could not blame others for problems with equipment, it assumed the responsibility for the necessary system monitoring.

This ceases to be the case when the network is not integrated anymore. For better or worse, quality and other equipment specifications can no longer be chosen by engineers and executives within a single company. Instead, competing technologies may be proposed, and standards must somehow be set. Forcing a network and equipment standards to be selected by a regulatory body may provide a greater opportunity for maximum innovation, but it may also transform the selection process from a technical and economical one to one based on internal regulatory politics. Decisions concerning standards for the new information services videotex and tele-text are presently before the commission and may be decided as much for political reasons, including international trade relations, as for technical reasons.

In addition to assuming an increased role in setting

technical standards the FCC will also be forced to intervene in actual network maintenance controversies, as competing firms may now blame each other for any technical problems that arise in the network.

In addition to opening old markets to new competition the FCC has also given approval to the use of many new communications technologies, which will provide new services to complement and supplement the old. Still, the establishment of new markets presents two categories of new regulatory problems. First, there is the need to allocate the resources necessary for the technology and second, the necessity to ensure that the new market provides services at competitive price levels.

Allocating the resources required by the many new technologies has not been unnecessarily difficult for a while, because there has been enough room for several entrants, but this situation is rapidly changing.

For example, although there are presently more well-positioned satellite orbital slots than there are satellites in service or ready to be launched, the demand for space on satellites has been rising rapidly. When all slots have been filled the FCC will be forced to allocate them among competing firms.

Some claim that this may never be necessary because of the increasing capacity of satellites as they carry a greater number of "transponders," yet this only transforms the problem into one of allocating the spectrum space available for satellite use.

Allocation of spectrum space has previously been handled by providing "deserving" technologies with frequency segments at no charge,⁴⁰ but the FCC is facing the problem of competing demand for spectrum space from different technologies. MDS users want their allocation increased, and if cellular radio is successful there will be great consumer pressure for increased capacity there. Developers of high resolution television have also asked for a frequency segment for their service.

One of the difficult tasks to be faced will be reclaiming portions of the spectrum now occupied by underutilized or obsolete services. Present users are unlikely to voluntarily give up their valuable turf, and will probably fight to retain what they consider their vested rights in the political forum.

To eliminate such politically difficult regulatory problems, economists and engineers have suggested that deregulation should permit the entire spectrum to be allocated by the market. Engineering plans have been proposed and the idea seems theoretically attractive.⁴¹ But as it would force present users to pay for their space, there has been strong opposition to it. Furthermore, it would also cause problems similar to the network maintenance issues discussed above. If spectrum use could shift from broadcast radio to citizen band radio or from broadcast television to a high resolution

TV then consumers could find their equipment obsolete. Such a problem could be solved by FCC oversight and by a careful articulation of the property rights created by the new technologies, but the FCC has shown little effectiveness for such action.

On the contrary, the agency recently repealed, in the name of cable deregulation, the syndicated exclusivity rules, which defined the property rights of the owners of video programs.⁴² This replaced market allocation of program broadcast rights with a compulsory license fee arrangement,⁴³ administered by the Copyright Royalty Tribunal--an agency established by the Copyright Act of 1976.

Whether this represents a temporary move or a conscious effort to subsidize cable operators by providing them with special access to broadcast programming at below market rates, it is clearly a step away from a deregulated market. The CRT has even been criticized by its own chairman and it represents a cumbersome administrative solution to pricing decisions that could more easily be set in a competitive market where program owners sold broadcast rights to broadcasters.⁴⁴

It is important that the FCC not repeat this mistake, for rights and other regulations it is promulgating will have to deal with international settings. It will have to help decide the status of international copyright protection, and resolve whether satellite broadcasters will have to be licensed in each country which receives their programming; or, if not, how interference will be prevented between two broadcasters distributing continent-wide signals on the same frequency.

Once these inter-market specifications and regulations have been confronted, the problem of spectrum allocation within an industry must be faced. The spectrum provided for television and radio broadcasting did not satisfy the demand and so allocations were made according to a public interest standard. Today the allocation of cellular radio licenses will probably require a similar procedure.

The FCC intends to award only two licenses for each locality, one of which will be guaranteed to the local telephone company and applications for the remaining licenses have been flooding into the agency. The private sector appears to attach a high value to them, but as licenses will not be sold the agency will presumably be forced to monitor the quality of service and administer periodic renewal procedures if the licenses are not permanent.

Once licenses have been allocated and entry has been established, there is the problem of ensuring fair competition. In the case of cellular radio this will necessitate monitoring licensees to ensure that vertically integrated companies do not give preference to their subsidiaries. Both cellular radio licensees will probably desire interconnection to the local operating company's network so the regulatory agency will have to scrutinize the local companies

to prevent them from giving preferential treatment to their own cellular system, thereby unfairly injuring their competitors. This should be a very difficult task.

To prevent anti-competitive tactics by AT&T's unregulated entry in "enhanced services," the Computer II decision required it to set up a fully separated subsidiary. Yet while the FSS device may eliminate some explicit direct subsidiaries it has been severely criticized by many, including the General Accounting Office.⁴⁵ According to the GAO, an FSS has the same incentives to act anticompetitively as a normal subsidiary would. The use of FSSs is merely an accounting device to permit regulators to improve their ability to monitor inter-corporate conduct and prevent cross-subsidies, but such supervision requires considerably more expert manpower than the FCC will be able to assign to the task.

Among the more difficult regulatory problems that the GAO anticipated were the allocation of research and development and marketing expenses between parent and subsidiary. Proper allocation of joint costs has always been a difficult regulatory problem, but in the past such decisions were less significant because the entire entity was regulated and mistakes tended to cancel out across the enterprise. With the creation of unregulated FSSs, however, the firm's incentive to cross-subsidize increases significantly. Although the FSS would be managed by a staff ostensibly distinct from the personnel of the regulated firm, it is unclear how effective that separation would actually be. The executives of the subsidiary might well have incentives to favor the parent to gain advancement in the parent company's hierarchy. The detailed financial reporting that would be provided by the FSS does not appear sufficient insurance against such practices.

As inadequate as the FSS device may be, however, it is better than the standards of the present modified consent decree, which does not require any separation. Judge Greene's recent modification permits local operating companies to do more than was originally agreed upon between AT&T and Justice; in letting a local operating company enter unregulated markets in which there is "no substantial possibility that it could use its market power to impede competition," he creates a standard that will probably be honored more "in the breach." Political pressures on state public utility regulators to keep ordinary service rates down will encourage them to permit BOCs to enter any markets that might generate profits which could be used to provide such subsidies. Their judgment of what was a "substantial possibility" would probably receive considerable deference.

The conceptually neatest way to prevent cross-subsidy between regulated and unregulated segments of a firm would be absolute separation through divestiture, but that might be excessively costly in terms of foregone economies of scope and the cost and uncertainty of any litigation required.

Conclusion

Whatever advantages the current deregulatory policies will produce by removing structural barriers and opening most markets to competition, they will also create a substantial new set of problems that will require regulatory responses. Government intervention will be required to mediate conflicting demands between industries, to control the market power of regulated firms as they enter unregulated markets, and to ensure that public policy goals continue to be met by the communications system.

The industry environment is being transformed into a volatile mix of partly regulated industries, partly regulated firms, and multiple regulating agencies. Add to that the role, sophistication and influence of communications firms, the accelerating pace of technological innovation in the field, the special public interest in communications in the "age of information" and in the free speech essential to a pluralistic society, and one can predict that the future process of regulation in communications will be highly complicated and passionate. It may well make many of the critics of present regulation nostalgic for the bygone good old days of black and white television sets and black rotary telephones. Anyone who expects that present entry decontrol will dismantle regulation will be in for a rude shock. If anything, the opposite may be the case. This is not so much good or bad as it is unavoidable.

1. See Ordover and Willig, Notes on Non-Price Anti-Competitive Practices by Dominant Firms, presented at the Telecommunications Policy Research Conference, Annapolis, Md., April 1981.
2. 47 U.S.C. § 151.
3. Essentially legalized by the 1921 Graham-Wills Act. For a more detailed discussion of the history of telephone regulation, see Walters, "Freedom of Communications," in R. POOLE, INSTEAD OF REGULATION (1982).
4. U.S. v. Western Electric, et. al., Modification of Final Judgment, U.S.D.C. (N.J.) Civil Action No. 17-49 (Jan. 24, 1956).
5. Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956). Use of the Carterfone Device, 13 F.C.C.2d 420 (1968).
6. See North Carolina Utilities Commission v. F.C.C., 537 F.2d 787 (1967), cert. denied 429 U.S. 1097 (1976).
7. Allocation of the Frequencies in the Bands Above 890 Mc., 27 F.C.C. 359 (1959), 29 F.C.C.2d 190 (1960). Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), 21 F.C.C.2d 190 (1970). Specialized Common Carriers, 29 F.C.C.2d 870 (1971), aff'd sub-nom. Washington Utilities and Transportation Commission v. F.C.C., 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975). Establishment of Domestic Communications Satellite Facilities by Non-

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8. Government Entities, 35 F.C.C.2d 844 (1972).
MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (1977),
cert. denied 434 U.S. 1040 (1978). ("Execunet I"); MCI
Telecommunications Corp. v. FCC, 580 F.2d 590 (1978),
cert. denied 439 U.S. 980 (1978) ("Execunet II").
 9. 77 F.C.C.2d 384, on reconsideration 84 F.C.C.2d 50 (1980),
on further reconsideration 88 F.C.C.2d 512 (1981), review
pending sub nom. Computer & Communications Industry
Ass'n v. FCC, D.C. Cir., Nos. 80-1471 et. al.
 10. The FCC previously limited commercial minutes on radio
to a maximum of 20 minutes per hour 47 C.F.R. § 0.281(a)
(7). The National Association of Broadcasters, the
industry's trade association, set voluntary standards
for TV to similar effect before Judge Greene, of AT&T
fame, recently struck them down as a restraint of trade.
 11. 47 U.S.C. § 315(a).
 12. 47 C.F.R. § 73.658(k).
 13. 47 C.F.R. § 73.35, 73.240, 73.636. See generally FCC
STAFF, REPORT ON CABLE TV CROSS-OWNERSHIP POLICY (Nov.
17, 1981).
 14. See MAJORITY STAFF OF THE SUBCOMMITTEE ON TELECOMMUNI-
CATIONS, CONSUMER PROTECTION, AND FINANCE OF THE
COMMITTEE ON ENERGY AND COMMERCE OF THE U.S. HOUSE OF
REPRESENTATIVES, TELECOMMUNICATIONS IN TRANSITION: THE
STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUS-
TRY, Nov. 3, 1981 [henceforth House Report], at 274, 330.
 15. Id., at 282, 345.
 16. For a general discussion of the regulatory history of
cable television see Besen & Crandall, The Deregulation
of Cable Television, 44 LAW AND CONTEMPORARY PROBLEMS
77 (1981).
 17. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977)
cert. denied 434 U.S. 829 (1977).
 18. 440 U.S. 689 (1979).
 19. See Malrite T.V. of New York v. FCC, 652 F.2d 1140 (Cir.
2 1981). Repealed the distant signal rules, 47 C.F.R.
§§ 76.59(b)-(e), 76.61 (b)-(f), and 76.63 (1980) and the
syndicated exclusivity rules, 47 C.F.R. §§ 76.151-76.161
(1980).
 20. See CABLEVISION, Jun. 28, 1982, at 18. See more general-
ly, House Report, supra note 14, at 302-03.
 21. See House Report, ed., at 304.
 22. See CABLEVISION, July 5, 1982 for the most recent dere-
gulatory actions. See more generally Billings, Direct
Broadcast Satellites and Their Impact on Other Tech-
nologies, presented at Telecommunications Policy
Research Conference, Annapolis, Md., April 1981.
 23. See, e.g., CABLEVISION, Aug. 9, 1982, at 15-22 PLUS (sic.).
 24. See BAUMOL, PANZAR & WILLIG, CONTESTABLE MARKETS AND THE
THEORY OF INDUSTRY STRUCTURE (1982). See also criticism
of that theory in William Shepherd, Concepts of Compe-
tition and Efficient Policy In the Telecommunications
Sector, in E. NOAM, ed., REGULATION AND THE NEW TELE-

COMMUNICATIONS NETWORKS (forthcoming).

25. See Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981).
26. See Trebing, A Critique of Structure Regulation and Consent Decree Policy, in E.NOAM, ed.
27. Id.
28. For a detailed explanation of this problem see Almarin Phillips, The Impossibility of Competition in Telecommunications: Public Policy Gone Awry (unpublished manuscript 1982).
29. Milgrom & Roberts, Predation, Reputation, and Entry Deterrence, 27 J. ECON. THEORY 280 (1982).
30. Demsetz, Barriers to Entry, 72 AM. ECON. REV. 47 (1982).
31. Even a city of the size of New York, after many years of service in Manhattan, still has a regulatory body--the Office of Telecommunications--with a professional staff of one person. See Schwartz, Is Cable TV Doing Enough in Manhattan, N.Y. Times, Nov. 8, 1981, § 2, at 1.
32. See TELEVISION DIGEST, TELEVISION FACTBOOK 1980, Vol. 49(2), at 86-1.
33. 47 C.F.R. §§ 76.51-76.65 require mandatory carriage of all broadcasters with substantial local audiences.
34. See Noam, "Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television" forthcoming in FEDERAL COMMUNICATIONS LAW JOURNAL.
35. See Multichannel News, July 19, 1982, at II-61.
36. For a comprehensive discussion of strict separation see K. Kalba, Separating Content from Conduit? (Kalba Bowen Ass., Cambridge, Mass.), Nov. 8, 1977. See also FCC STAFF, supra note 13, at 134-38.
37. Such an "entertainment" tax has been advocated by cable operators and was imposed in Burbank, Ill., see Multichannel News, July 5, 1982, at 17.
38. This issue was presented in the HBO case, supra note 17.
39. Including the First Amendment and property rights protected by the Fifth Amendment. Id.
40. Users were merely considered trustees acting in the public interest.
41. See Mueller, Property Rights in Radio Communication: The Key to the Reform of Telecommunications Regulation, (CATO Institute, Washington, D.C., Jun. 3, 1982); DeVany, et. al., A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study, 21 STAN L. REV. 1499 (1969).
2. See supra note 19.
3. See The Copyright Act of 1976, 17 U.S.C. § 111(c).
4. See, e.g., Geller, The Copyright Controversy: Making Cable TV Pay, REGULATION, May/Jun. 1981, at 35.
5. See REPORT TO THE CONGRESS, BY THE COMPTROLLER GENERAL, LEGISLATIVE AND REGULATORY ACTIONS NEEDED TO DEAL WITH A CHANGING DOMESTIC TELECOMMUNICATIONS INDUSTRY, (Sept. 24, 1981) at 100-136.