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Regulatory and Institutional Change

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For all of its undoubted importance, the MFJ was not the beginning nor the whole of the transformation in telecommunications. Though the MFJ is currently at the center of controversy over regulatory policy, both it and the controversy now surrounding it are the products of changes in the economic, political, and legal environment of telecommunications that long antedated the breakup of the Bell System and are independent of it.[1]

I say "long antedated" with some hesitation. All things are relative, and relative to the magnitude of the transformation, the events took place in a rather short period of time. Virtually all of the important economic events occurred in less than a score years, and most of the major policy decisions within little more than a decade (roughly from the early 1970s to the early 1980s). Traditional accounts identify a

series of major FCC decisions going back as far as *Hush-A-Phone*[2] in 1956, the *Above 890*[3] decision in 1959, *Carterfone*[4] in 1968, and continuing through the 1970s with such decisions as *Specialized Carriers*[5] in 1971, *Execunet*[6] in 1977, and culminating in *Computer II*[7] in 1980. I do not think any one of these decisions was a decisive influence in the evolution of telecommunications to its present state. However, if pressed to select one that could mark a critical turning in regulatory policy, I would choose the first *Execunet* case in 1977. It might not be the most important single decision in this period, but of all the decisions and events it more than any other signaled that the trend towards full competition would not be halted. Perhaps next in importance was *Computer II*, cutting loose the last vestige of terminal equipment regulation and creating the framework for competitive supply of services as well. After these two decisions were implemented, the antitrust case was almost anticlimactic.

The transformation of telecommunications policy has not been without its ironies. One is that the advent of competition has not diminished the importance or the magnitude of regulation, but merely altered its character. In fact, regulation has become far more active and energetic than anything seen in AT&T's salad days, when it was not only the center of attention, but virtually the only object of notice.

Prior to the 1970s, FCC regulation of interstate telecommunications consisted mostly of what it called "continuous surveillance."[8] This was a fairly laid-back form of regulation in which the Commission professed to regulate AT&T's interstate rates by taking credit for extracting voluntary rate reductions made possible by rapidly declining interstate service costs, which were in turn the product of technological improvements in long-distance transmission and switching capability. This regulatory policy changed somewhat in the mid-1960s, when the FCC embarked upon a formal investigation of AT&T's rate level and structure.[9] However, even the inauguration of formal rate proceeding, important as it was, did not alter the basic regulatory policy or the regulatory apparatus for implementing that policy. It was the introduction of competition that sparked the modern era of active FCC regulation.

Consider, as an illustration, the growth in the size of the FCC's Common Carrier Bureau. In fiscal 1970, a year that represents, if not the beginning of the modern era, at least the beginning of the beginning —the bureau's Washington staff numbered 131 persons out of a total Washington office complement of 1,098. Seven years later it grew to 244. That was not exceptional growth, perhaps, considering that the overall Washington staff grew to 1,596. Yet by fiscal 1989, when the

overall Washington staff declined to 1,236, the Common Carrier Bureau continued to grow, to 297. The budget figures tell a roughly similar story. In 1970, Common Carrier activities accounted for roughly $2.6 million out of a total agency budget of $24.6 million; in 1977 the Common Carrier budget was $7.7 million out of a total of $56.9 million; in 1989 the Common Carrier budget rose to $21.3 million while the agency's budget was $99.6 million. Thus, as competition grew, the regulatory apparatus grew as well, growing even as a portion of the total: from around 10.5 percent in 1970 to about 21.4 percent in 1989.[10]

My brief career at the FCC, in precisely the middle of the 1970s, came at a particularly interesting time in the evolution from the old regime to the new. The earlier *Carterfone* and *Specialized Common Carrier* decisions had stirred enough political interest to prompt the occasional attention of Commissioners to the emerging issues of competitive policy in telecommunications. At the same time, the earlier initiation of formal rate proceedings drew some attention to traditional problems of monopoly regulation. As a result, issues that had once been virtually the exclusive preserve of the Common Carrier Bureau were starting to percolate up to the top levels of the agency. Nevertheless, despite this occasional notice of Common Carrier affairs, this period was still one where those affairs were subordinated to the concerns of mass communications; the most trivial controversy in broadcasting preempted all but the most important issues in telecommunications on the Commission's weekly agenda. Anyone interested in pursuing the emerging issues in telecommunications policy, whether they involved authorization of new competitive services or investigation of AT&T tariffs, had to resign to doing so in the company of a handful of staff specialists.

In part, the perverse ranking of priorities was a consequence of the sheer impenetrability of some of the issues then surfacing in telecommunications, as contrasted to the simplicity of broadcast regulation. Anyone could claim the requisite authority to make a judgment about, say, children's television. But trying to determine whether authorization of competition in private line services should include "FX" (foreign exchange) and "CCSA" (common control switching arrangement) services was a task far more perplexing. It was not, however, simply a matter of preferring to spend time on those matters you could understand instead of those you could not; it was also a matter of responding to what the political environment indicated was of primary concern. Professional bureaucrats are not politically accountable to the electorate; nor are political appointees, for that matter. But neither the bureaucrat nor the appointee are wholly insulated from or indifferent to

popular sentiments. Agency officials may not closely follow the election returns but they do read newspapers, and like most ordinary people they are influenced by what they read about themselves; they like to be seen as doing things that others regard as important. It is no mystery then that, other things being equal, FCC Commissioners will tend to direct their attention to those things that have public salience. Herein lies much of the gravitational power of mass communications issues in the earlier era (and, to a still considerable extent, today). An FCC decision on broadcast network programming guaranteed newspaper notice and public attention. A decision on AT&T's rate structure might receive newspaper notice—in the back pages of the financial news—but little general public attention.

However, the pre-divestiture times were changing, without doubt. Competition brought new players into the inner circle of the regulatory community, and at the same time stimulated public interest in the community at large.[11] Stimulated by both communities, the FCC responded in the only way it knew how, with more activity of its own. Competition begat regulation, or at least more regulatory activity.

My discussion thus far has focused on the growth of *federal* regulation of telecommunications consequential to the evolution towards competition. I should comment upon *state* regulation where institutional change has been even more noteworthy. Unable to compile data comparable to the illustrative figures I cited for the FCC, I will do what most legal scholars do—tell a story.

Prior to my appointment to the FCC in 1974, my only firsthand experience with state telecommunications regulation was in Minnesota in the late 1960s where I first taught law. Minnesota was not then known to be in the forefront of activist regulatory states, but neither was it in the rear. In the field of telecommunications, Minnesota, traditionally a progressive state favoring the political transition of active economic regulation, was, if not dormant, at least very subdued. Having some interest in regulation at the time, I had occasion to inquire into the state's regulatory apparatus, circa 1969. I learned that Minnesota's Public Service Commission had a grand total of *three* persons assigned to the telephone-telegraph division responsible for regulating the local telephone company, Northwestern Bell. Of those three, one was a secretary, one an accountant, and the other a person of no particular calling who was assigned the task of reading Northwestern Bell's annual reports and other published matters. Minnesota was not in the vanguard, but some other states—Texas for instance—had no state regulation at all. Instead, the regulatory burden rested on the

cities which were expected to exercise control through their franchising power, an aspect of their control over use of public streets.

The state regulatory presence became more noticeable in the 1970s, though I cannot honestly say I, as an FCC Commissioner, noticed it much. Perhaps it was my parochial attitude to think that all action—such as it was—took place at the federal level. It seemed to me, at the time, that the states' principal role was to quarrel with the FCC over how much local service should be cross-subsidized by rates on interstate service. Certainly that was the central agenda of NARUC, as was manifest from their utmost resistance to any FCC policy or decision that might adversely affect the subsidy.

It was, of course, such subsidy that made it possible for Minnesota to "regulate" Northwestern Bell with three staff members. The fact that intrastate service was heavily cross-subsidized by interstate service rates greatly reduced the need to maintain or increase intrastate rates, to the immense relief of local regulators who were neither well-disposed nor well-equipped to regulate. To be sure, some states like New York and California and a few others were reasonably active in their own right, independent of the FCC. Still, the structure of the industry made it unnecessary for them to bear the full burden of regulating local rates. With the entire system of local exchange and interstate service dominated by a single firm, it was relatively simple to shuffle the costs of the former to the latter, and with that shuffle to transfer the main burden of regulation on to the FCC. The mechanism of the subsidy was the separations and settlement arrangements which were deliberately manipulated to shift a disproportionate share of non-traffic-sensitive plant costs to interstate service. (The percentage of non-traffic-sensitive costs allocated to interstate service rose from 5 percent in 1952 to a high of 27 percent in 1982; the percentage of interstate use rose from about 3 to 7 percent in that period.)[12]

Of course, this cross-subsidization was premised on continuing AT&T's traditional monopoly. When the FCC began to authorize (limited) competition in interstate service markets, the subsidy was doomed. Amazingly, the subsidy continued to increase even as competition was being introduced. Between 1965 and 1975 the percent of non-traffic-sensitive costs (hence rate burden) which were shifted to interstate service had nearly tripled![13] Nevertheless, it was inevitable interstate competition would erode the basis on which the historic subsidy of local service rested by forcing interstate rates to be lowered towards cost of service. This put pressure on local rates, which in turn put pressure on local regulators.

As a supporter of the new competition, I was not then personally sympathetic to the states' concerns. Now that age has sweetened my disposition, it occurs to me that I might have been a little more understanding; I might have recalled my former home state of Minnesota and those three staff members of its State Public Service Commission who would be overwhelmed by the business of state regulatory responsibility in the new competitive era. It is small wonder the FCC's introduction of competition into interstate service and equipment markets in the 1970s was a traumatic event for state regulators.

Though competition inevitably would increase the states' regulatory activity, it seems remarkable that competition should also increase federal regulatory activity. The irony of this will not be lost on anyone who was educated to think of regulation and competition as substitutes, not complements, of each other. In the early years, the FCC viewed competition as an alternative to regulation. That is the way conventional economics sees it also. From that perspective, one would expect that as competition grew it would displace regulation. That is not quite what has happened, as I suggested earlier. As the role of competition in telecommunications has expanded, regulation has grown with it. In telecommunications, competition and regulation have turned out to be complementary goods, like bread and butter.

The character of regulation has changed, of course; the emphasis shifted from regulating AT&T's monopoly rates to regulating its competitive rates. Not "AT&T the Monopolist," but "AT&T the Competitor" became the focal point of regulatory concern. In a sense, the monopolist and the competitor were two sides of the same coin. The asumption was that AT&T's monopoly power in switched service markets gave it a competitive edge in specialized service and equipment markets. Be that as it may, the central point is that regulation shifted from its more or less static role of protecting *consumers,* to a much more dynamic role of protecting *competitors*. The fact the two roles were ultimately supposed to converge does not change the fact the character of the FCC's work changed dramatically. And as it changed, it also grew.

There has been deregulation. I do not mean to imply otherwise. Regulatory control over equipment supply has, for all practical purposes, disappeared. Interstate service regulation has diminished. *Computer II* and *Computer III*[14] later curtailed regulatory surveillance of competitive services. And the FCC's recent adoption of an incentive form of price regulation (price caps) for AT&T in lieu of traditional rate-of-return regulation promises a degree of deregulation for rates.[15] Yet, when the dust clears from these deregulatory activities, one must

be struck by the fact that regulation seems to be a great deal more active and pervasive than in the monopoly era—*even at the federal level where competition is prevalent.*

I suppose, when one reflects upon it, that this is not really mysterious—ironic, but not inexplicable. Monitoring "AT&T the Monopolist" may have been a daunting challenge, but at least here the FCC could devote its total energies—such as they were—to the task. And the task was a well defined one. Protecting the consumer against monopoly overcharge or service inadequacies—the latter a rather minor problem—involves complexities that require intelligence, but not necessarily a lot of regulatory hands. Being able to concentrate on one entity does have its advantages. As Mark Twain once quipped, the admonition not to put all one's eggs in one basket is a fool's advice; it only scatters one's investments and one's attention. The wise man says—according to Twain—"put all your eggs in *one* basket—and *watch* that basket!" The FCC, however, chose to follow the wisdom of multi-basket diversification, hoping to spread the burden of regulation among multiple "market regulators" *cum* competitors. It soon learned the truth behind Twain's epigram. Increasing the number of players in the game only increased the number of players and plays to be watched, and to which it had to respond—or thought it had to respond. Hence we got more, if different, regulation along with more competition.

Witness the *Computer III* approach and the ONA rules, which are intended to promote the MFJ's provisions regarding equal access by all competitors to the network. ONA is designed to assure that all carriers have access to basic service elements (BSEs) on an unbundled basis, on essentially the same terms as enjoyed by BOCs themselves. The ONA rules provide a nonstructural alternative to the very costly structural requirements of *Computer II*. These new rules may be an improvement on the old. But they are not necessarily more deregulatory. Indeed, the implementation of ONA may well entail a degree of regulatory surveillance similar to that of the 1970s, before *Computer II*.[16]

So too with price caps. Though this scheme again seems to me superior to traditional rate of return regulation, it remains to be seen whether it will entail significantly less regulatory activity. Everything depends on how much continuing adjustment in the price cap the FCC finds is required by economic or political circumstances.[17] And we have reason to think from its report adopting the price cap scheme that the FCC intends to monitor the results of price cap regulation very closely. No doubt its assurances of "continuing surveillance"—to revive an old term—are a response to the considerable political opposition to price cap regulation, but that simply underscores the point that political

circumstances could undermine what otherwise seems to be a quite sensible measure of deregulation.

In theory, the antitrust suit should have relieved at least some of the awkwardness of this ironic situation, in which we had both the *Sturm* and *Drang* of competition and the depressing burden of regulation. Distrusting regulation in general (and the FCC in particular), the DOJ aimed at a "structural solution" that would permit competition to proceed without reliance on regulatory surveillance. A clean cut through this Gordian knot of intertwined competition and regulation required a breakup of AT&T in such a way as to separate the monopoly segments from the competitive segments, so the former could not disrupt the free play of competition. Once this was accomplished the regulatory task of the FCC would become marginal. State regulation of the local exchange monopoly would continue, but competition would supplant the need for regulation in all other markets, interstate and intrastate together.

Such was the theory. In practice it has not worked out quite so cleanly. States have taken on new regulatory responsibility,[18] and, as I have noted, there have been important curtailments in the FCC's regulatory surveillance. Yet there remains a significant amount of regulation precisely in the areas thought to be under competitive forces, and the aggregate level of regulation for the industry as a whole appears to have increased. Indeed, we now have a new regulator as a consequence of the antitrust suit, Judge Harold Greene. The irony marches on.

Of course, as indicated by his comments in the opening chapter of this volume, Judge Greene firmly believes the purpose of the MFJ was to make the industry safe *for* competition, not safe *from* regulation. There is something to be said for this view. Still, I rather doubt this was what the DOJ contemplated when it filed the case in 1974, or what it contemplated on the eve of the trial when the head of the antitrust division, William Baxter, promised to "litigate to the eyeballs" in order to get the relief requested.[19] As it happens, he got more than he wished and perhaps a bit more than was required. Certainly the *present* administration seems to think the relief obtained was more than required. The current Justice Department is one of the leading critics of Judge Greene's new regulatory machine.[20]

Proposals to divest Judge Greene of his authority over MFJ conditions are influenced not only by the questions of separation of powers and appropriate institutional responsibilities. In fact, the present controversy is generated less by Judge Greene's view of his role than by his substantive views on the basic policy questions—in particular his continued refusal to remove the general restrictions barring regional hold-

ing companies or their operating companies from equipment manufacturing, interexchange service, and information services. On the basic policy issue, I find it somewhat difficult to fault Judge Greene's judgment that these restrictions are entailed by the justification for the divestiture itself. If the Justice Department is correct in asserting that the restrictions are not necessary, it comes perilously close to saying that divestiture was an unnecessary exercise in the first place. If it is true that competition by the RHCs and BOCs is not a significant threat to competition, why was AT&T not allowed to continue to own and operate the BOCs?

This question is not answered simply by saying conditions were different in the early 1980s. Of course they were. But most of the changes that have occurred have not been the consequence of divestiture, but of an ongoing evolution towards competition that was set in motion by the FCC and by technological innovation wholly independent of and prior to the MFJ. The Justice Department's request for modifying terms of the MFJ that go to the very heart of its original case for divestiture is thus deeply ironic.

Irony aside, I have some doubt the affirmative case for permitting BOCs to enter these restricted fields is so compelling as to overwhelm the concerns that gave rise to the case.[21] However, my assignment here does not permit me to set sail on these troubled waters. I will limit myself to some abstract observations about antitrust and regulation and about institutional roles.

I expect the line-of-business restrictions will be phased out in time. The qualifier "in time" is, however, all important. To paraphrase Lord Keynes' celebrated quip: in time we are all dead. Experience with antitrust regulatory decrees in other cases is unfortunately not reassuring on this score. Consider as one illustration the consent decrees entered against eight major motion picture companies following *United States v. Paramount Pictures*,[22] a landmark in the film industry in much the way that the MFJ is in telecommunications. Following the Supreme Court's decision in 1948, ordering the separation of film production and distribution from theatrical exhibition, each of the Paramount defendants entered into consent decrees governing licensing practices, future acquisitions, and related matters. The individual decrees were entered between 1948 and 1952, but they, like the Supreme Court's earlier decision, rested on a complaint filed in 1938, based on practices as they existed in the 1930s.[23] More than fifty years after the complaint the decrees are still the subject of court actions to enforce or modify the original decrees.[24]

The problem of obsolescence is bad enough in a field like the motion

picture industry; it is worse in a field like telecommunications where rapid technological change entails swift and important change in economic conditions, and they in turn demand responsive legal accommodations. To appreciate the problem here, one need only recall the 1956 *Western Electric* consent decree which forbade AT&T from competing in unregulated markets.[25] Whatever the merits of that restriction in 1956, the rapidly changing economic and technological conditions of the industry made it an anachronism by the 1970s, and threatened to retard the very competition it was intended to promote. The 1956 restrictions were, of course, eliminated as a condition of the 1982 decree. Whether they would have been eliminated otherwise is not clear. The FCC, recall, undertook to interpret the decree in its *Computer II* decision in a fashion that enabled AT&T to offer unregulated services and equipment; and the New Jersey District Court that had jurisdiction over the decree gave a similar interpretation. Still, it is not at all clear, that those interpretations would have prevailed over continued DOJ opposition.

The question of modification is confused by the uncertainty over burden of proof: what are the applicable standards for obtaining a modification? For contested modifications, the general standard, laid down by the Court in 1932 in *United States v. Swift*, is strict: "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [a court] to change what was decreed. . . ."[26] It is debatable whether the *Swift* standard applies to the MFJ inasmuch as it contains a provision specifically addressing the criteria for modification which provisions arguably supplant the *Swift* standards. Also, one might argue that *Swift* was really intended to address only those cases where modification is opposed by the government. Here, of course, the government supports modification. However, all of this is probably moot. The MFJ itself provides that the restrictions will not be removed until there is no "substantial possibility" that a BOC could use its monopoly power to impede competition in the market it seeks to enter, and Judge Greene appears to be committed to an interpretation of this criterion that makes it roughly the same as the *Swift* standard.

Judge Greene may be reversed by a higher court, or by Congress. In 1986 the Court of Appeals for the District of Columbia affirmed his refusal then to make modifications.[27] However, more recently the Ninth Circuit remanded his Triennial Review Opinion's rejection of lessening MFJ restrictions on information services.[28] The outcome is uncertain, but my current expectation is that Judge Greene will adhere to his original opinion and will be affirmed. As to Congress, the most one

could realistically expect is enactment of some version of current proposed legislation giving the FCC jurisdiction over the MFJ. This would be a dubious contribution unless Congress also gives some policy directions. Unfortunately, as we have learned from failed congressional initiatives in the 1970s (the famous "Bell bill" and the Van Deerlin "rewrite" of the entire Communications Act),[29] the odds of Congress taking meaningful action in this area are so small as to confound even Jimmy the Greek.[30]

Quite apart from the merits of the MFJ restrictions and the consequences of keeping them in place, one must be troubled that routine policy decisions are being made by a federal court judge. It is not that he is not knowledgeable in telecommunications policy. On the contrary, his opinions indicate he is uncommonly knowledgeable. And one could hardly say he lacks experience; I cannot think of any regulator in a position of comparable authority who has had a longer or more intense exposure to these particular issues. But this is not quite to the point of the question whether he should be engaged in this enterprise. Equally it is not to the point to ask whether the FCC and its state counterparts are preeminently expert or wise. For better or worse—and it is probably a bit of each—they are the ordained ministers of regulatory control.

To be sure, a court necessarily assumes some regulatory role as an incident of its adjudicatory powers—here, adjudication and enforcement of the antitrust laws. This is Judge Greene's defense of his present active role, as indicated in his remarks in chapter 1, and his defense is not without some merit. Given the complexity of the MFJ, it is not objectionable for the Court to retain jurisdiction to interpret and enforce the decree for a period of time sufficient to ensure that the mandate has been fully implemented. Yet, Judge Greene seems to have defined for himself a role beyond that of interpreter and enforcer of the MFJ—in itself a fairly capacious role—to that of policymaker, evaluating and acting on request for waivers of MFJ restrictions as deemed fit in the changing circumstances. Whatever the merits of the individual actions taken, Judge Greene's self-conscious effort to pronounce regulatory policy in this matter is troubling. Perhaps one should not place great weight on the manner of judicial expression, but it has not gone unnoticed by critical observers that Judge Greene's opinions on the MFJ restrictions have a style of reasoning hard to distinguish from that of the FCC, or any other agency engaged in the crafting of regulatory policy.

It may be the MFJ itself invites a kind of continuing judicial regulation with its Triennial Review program, but it surely does not demand

it. On this score, the point-counterpoint between William Baxter and Judge Greene in this volume over where and when the idea for the Triennial Review program originated is largely irrelevant. Nor is it particularly relevant whether the Justice Department and AT&T *intended* active judicial oversight. An antitrust case that requires a whole new regulatory scheme as a means of enforcing the relief ordered is probably a case that should not have been brought in the first place. And if, after the fact, it turns out that the decree is becoming a basis for a new regulatory scheme, it should be abandoned.

Judge Greene is undoubtedly correct that with or without a formal review program a court must consider petitions for modification and change, which in turn requires periodic regulatory choices to be made. But as Baxter points out, Judge Greene seems to have created an environment that invites continued and detailed regulatory involvement given by the members of Judge Greene's rulings on the MFJ. Between July 1983 (when AT&T's reorganization plan was approved) and June 1990 (the latest reported decision as this is printed), there have been over forty separate opinions dealing with the interpretation, enforcement, or modification of the decree, over half of which resulted in some modification of the original terms of the MFJ.[31] Judge Greene's initial insistence on modifying the clean-cut terms of divestiture, and his subsequent willingness to entertain modifications on the basis of changing cost-benefit configurations, may or may not be sound as a matter of regulatory policy. But they seem out of character with the judicial role, and at least somewhat at odds with a central point of the case itself.

Whether or not Judge Greene remains an important player in the regulatory game in years to come, I would not look for the disappearance of regulation any time soon—not at the federal or the state level. I return to the ironic note sounded at the outset, that in this field competition and regulation seem to have become complementary not substitute goods. The present controversy over line-of-business restrictions on the RHCs and the BOCs may be special inasmuch as it involves an "outsider"—Judge Greene—in the regulatory game, but I doubt his leaving the game will terminate the play. For all the moves of the FCC away from traditional regulation, its regulatory energies seem to be as fully engaged as ever in monitoring the new competitive environment. And, of course, at the local level (intraLATA) most states have retained the traditional regulatory functions.

As usual in public affairs there is good news and bad news. The good news is that we have made exceptional progress in the past twenty years in telecommunications technology and services, and more is

foreseeable. The bad news is that the future seems right now to be more in the hands of lawyers than in the hands of producers and consumers. To the ancient Chinese curse—"may you live in interesting times"—has been added a distinctively American twist—"and may your lawyers be fruitful and multiply."

Philip L. Verveer

As Glen Robinson has discussed, Judge Greene's District Court, the Antitrust Division of the Justice Department, the FCC, the state regulatory commissions, and the Congress all have contributed to the evolution of policy since the AT&T divestiture was announced in January 1982. The early days were marked by a good deal of institutional harmony, but the era of good feeling among governmental institutions with jurisdiction over telephony proved short-lived. From 1985 onward, there has been increasing conflict and uncertainty over respective roles, and more than a little misunderstanding, mistrust, and even meanspiritedness. The causes of the upset, I suggest, are, first, dramatically different views about the existence, extent, and social utility of scope economies in the offering of telephone service and the activities forbidden to the BOCs by the MFJ; and second, uncertainty—some genuine, some contrived for advocacy purposes—about the extent of the authority enjoyed by Judge Greene, the FCC, and the states. Some of these uncertainties and conflicts can be highlighted by briefly reviewing both Judge Greene's evolving role with the states, the DOJ, and the FCC, and the potential significance of the *Louisiana Public Service Commission*.[32]

During the initial Tunney Act review of the proposed consent decree, the FCC and several state regulatory commissions (as well as the FCC) argued that Judge Greene lacked the authority to enter the decree absent a finding by the regulators, in the exercise of their own jurisdiction, that the provisions of the proposed decree would serve the public interest. Relying principally on the supremacy clause, as well as Section 4 of the Sherman Act,[33] Judge Greene rejected these arguments[34] and concluded that "those provisions in the proposed decree which are necessary to vindicate the federal interest in the enforcement of the antitrust laws will be approved notwithstanding the fact that they may conflict with the state laws or interest."[35] However, in his opinion, Judge Greene indicated a willingness to accommodate state interests where possible, stating that "in its overall consideration of the public interest, the Court will also take into account that a particular provi-

sion may be merely peripheral to the federal interest but have a substantial adverse impact on state laws."[36] The District Court later cited the states' concerns in support of its decision allowing the divested BOCs to engage in the provision of printed Yellow Pages directories and the provision of CPE.[37] And subsequent to the MFJ, state regulators generally have been more sanguine about Judge Greene's continuing role than have decisionmakers at the FCC. The differing regulatory attitudes probably are due to differences in perceived jurisdictional overlaps. For many years, the FCC has claimed primacy over the states in substantive areas affected by the MFJ.

Relations between Judge Greene and both the DOJ and the FCC have been strained.[38] As Robinson suggests, continued presence of a powerful new player—viewed by some as an interloper—on the telecommunications federal regulatory scene made some tension between Judge Greene and other federal policymakers inevitable. But the continuing debate over Judge Greene's administration of the consent decree and the BOC line-of-business restrictions has been further fueled by a fundamental divergence of views with respect to the central tenets which underlie the decree—i.e., the notion that regulatory mechanisms are incapable of preventing anticompetitive behavior by the BOCs in adjacent competitive markets, and the related notion that the social costs of allowing BOC entry in such circumstances exceed whatever efficiencies may be associated with BOC integration into related markets.

The second Reagan administration's Justice Department, under Attorney General Edwin Meese, virtually abandoned the decree within three years of divestiture. While I will not attempt to set forth the evidence here, the rapid (in my view) and wholly unanticipated (to most observers) abandonment went beyond merely urging Judge Greene and the Congress to change the MFJ. It resulted in considerable laxity in the DOJ's administration of the decree from 1986 onward. As Charles Brown and William Baxter observe in chapter 1, this development was exceedingly unfortunate from the perspective of those who hoped the MFJ would quiet the competitive controversies which had wracked the telecommunications industry for decades. It created what economists sometimes call a "commitment issue," and predictably, the uncertainty has affected the conduct of the BOCs, their competitors, their suppliers, and their customers.

It seems clear, particularly in light of Mr. Baxter's and Judge Greene's comments in this volume, that the decree was entered on the basis of an informed judgment (or perhaps, as Mr. Baxter suggests, a calculated "wager") that, on balance, the procompetitive effects of the divestiture and the BOC line-of-business restrictions, as modified by the District

Court, would more than offset whatever efficiencies or other benefits might be lost by prohibiting BOC integration into related markets.[39]

Throughout the initial post-divestiture period, the Justice Department had rather aggressively maintained that position. But arguments advanced by the DOJ during the 1987 Triennial Review of the consent decree brought into full relief a complete metamorphosis in the department's view of the decree—of the efficacy of regulation, the wisdom of the decree's structural approach, and the appropriateness of the institutional arrangements for administrating the decree's provisions, in particular the BOC line-of-business restrictions. The department conceded that the BOCs retained monopoly control of the local telephone network within their respective regions,[40] and acknowledged "the BOCs' opportunities for discrimination and cross-subsidization still exist to varying degrees with respect to certain types of currently prohibited activities, especially activities within a BOC's region."[41] However, the department argued the level of risk to competition had been reduced as a result of "the divestiture and the independence of the BOCs from each other as well as from AT&T,"[42] developments that were, of course, part and parcel of the structural solution advanced by the department and embodied in the consent decree, *along with* the BOC line-of-business restrictions. In urging that the BOCs should be permitted to enter the immediately adjacent equipment manufacturing and information service markets, the department indicated a new-found faith in regulatory mechanisms, most of which predated the divestiture, together with certain new FCC programs which had yet to be fully developed or tested.[43]

As the DOJ began to abandon its support of the decree, the FCC simultaneously became more aggressive in urging that it, and not Judge Greene, should determine the extent to which the divested BOCs are permitted to enter adjacent competitive markets. In February 1986, Chairman Mark Fowler endorsed H.R. 3800, introduced by Representatives Swift and Tauke, providing for removal of the consent decree prohibitions on BOC entry into information services and equipment manufacturing upon a determination by the FCC, in consultation with the Secretary of Commerce and Attorney General, that such action would not harm competition or ratepayer interests.[44] Later in 1986, Chairman Fowler joined DOJ in supporting S.2565 (the Federal Telecommunications Policy Act of 1986) introduced by Senate Minority Leader Dole, to shift to the FCC the responsibilities of the Justice Department and the Court under the decree.[45] And upon the issuance of Judge Greene's 1987 Triennial Review decision, new FCC Chairman Dennis Patrick told the United States Telephone Association (USTA):

> I am, quite frankly, surprised by the apparent acquiescence of some of the Bell Operating Companies in the ongoing administration of the MFJ. The Court has long since left the arena of antitrust law and assumed an ongoing regulatory role. Granting freedom here and denying it there, every day it seems the Court makes decisions that have critical impact upon the evolution of the network, and upon the public that network serves. These decisions are made without reference to the public interest standard and the specific statute the Congress enacted to direct federal communications policy, and without reference to other aspects of the industry that, along with MFJ related issues, provide an integrated picture that must, necessarily, be analyzed as an integrated whole.[46]

On the heels of Chairman Patrick's speech, the NTIA, under Al Sikes, filed a petition for declaratory ruling with the FCC, urging it to issue an order authorizing the BOCs to provide information services, and making an explicit finding that "the District Court's information services restriction represents a cumbersome, unnecessary layer of regulation in irreconcilable conflict with the requirements of the Communications Act."[47] On December 1, 1987, the FCC issued a public notice inviting public comment on the NTIA petition.[48] While certain of the BOCs continue to express support for NTIA's petition, a number of industry experts (including several BOCs) take the position that it is inadvisable and "counterproductive" for the FCC to precipitate a jurisdictional confrontation with the District Court. Despite the fact that Mr. Sikes is now the FCC Chairman, FCC action in response to the NTIA petition is not anticipated, and the BOCs have focused their efforts on getting Congressional action to remove MFJ restrictions.

The District Court was by no means mute in the face of such attacks. In an opinion issued in December 1987, Judge Greene noted (as he has in chapter 1 of this volume) that the consent decree "is one of the few judicial judgments to bear the stamp of authority of all three branches of government."[49] He added that he would "continue, as [he] has done in the past, to make every effort to avoid or minimize interference with FCC jurisdiction and operations where this can be done without jeopardizing the core provisions of the decree."[50]

The Court of Appeals has yet to shed further light on the jurisdictional relationship between the antitrust court and the FCC, in the context of the pending appeals of the District Court's Triennial Review decisions.[51] Barring an unlikely reversal by the Court of Appeals, it would appear the ball will remain with Judge Greene, unless and until Congress takes it away. For a variety of reasons, transfer of decree

responsibilities to the FCC is likely to occur, if at all, at a measured pace. If the status quo continues, with Judge Greene retaining his current jurisdiction, the Bush Justice Department may be a "wild card" in the equation. Some movement back toward the pre-1985 DOJ support of various components of the MFJ is possible, although it is unlikely the DOJ will go back to its original aggressive defense of the MFJ restrictions.

Coincident with the MFJ's reconfiguration of the telecommunications industry, its major players, and the services those players were permitted to provide, the Supreme Court in 1986, in *Louisiana Public Service Commission*[52] overturned decades of jurisprudence and reconfigured the comparative authority of the FCC and state regulatory agencies. The timing could not have been worse. It came in a period of unprecedented technological change, telephone company diversification, and deregulation. The Court infused the dramatically altered regulatory terrain with an added degree of uncertainty. In fact, the direct public policy residue of the *Louisiana* decision is far more troubling and far more urgently in need of attention than anything which has fallen out of the MFJ.

The Communications Act does not provide clear definition of where federal authority over interstate communications ends and where state authority over intrastate communications begins.[53] Nevertheless, for decades the FCC had pushed out the limits of its authority. By the time the MFJ was approved and implemented, a fair statement of the prevailing jurisprudence was that federal authority must prevail over state authority if the economic efficiency of the telecommunications network is involved.[54] Individual state agencies and NARUC often appealed FCC preemptions, but almost always without success.

While its ultimate effect is still unknown, the *Louisiana* decision appeared to constitute a jarring adjustment in the distribution of federal and state regulatory authority. The Court determined that Congress granted the FCC a broad mandate to create a rapid and efficient telecommunications network, but not so broad as to prohibit any state action which frustrates the FCC's ability to create an efficient network. The Court found that Section 2(b) explicitly reserved broad authority to establish charges, including depreciation, to the states; the FCC could not preempt this authority by assuming it could take all necessary measures to further federal policy.[55]

In its Third Computer Inquiry, the FCC has attempted to preempt state regulation of enhanced services (an analogue to the MFJ's information services), state structural separation requirements for carriers

providing basic and enhanced services, and state nonstructural safeguards inconsistent with federal policies.[56] With regard to the FCC's preemption of state regulation of enhanced services, the Commission has urged among other things that state regulation would jeopardize efficiency in enhanced service offerings. The agency claims the facilities used by carriers for basic and enhanced services are inseverable, and therefore cannot be subject to inconsistent regulation by separate authorities.

Overall, it is not excessive to fear the confusion and instability which has followed *Louisiana* has compromised some of the short-term promise of the divestiture, and of the widened authority to undertake gateway and related services bestowed on the BOCs by Judge Greene in his Triennial Review orders. Under most circumstances, one might expect the FCC or Congress to exert leadership in addressing a so obviously sub-optimal situation. It has not happened. Congress has shown no inclination to face the political hazards involved in reducing the authority of state commissions. The FCC, a good deal more insulated from politics, failed to react to *Louisiana* decisively because of conflicting doctrinal predilections. Throughout the Reagan administration, the FCC treated efficiency, defined in standard economic terms, as the summum bonum of common carrier policy. By the time of the *Louisiana* decision, it also had adopted the administration's federalist tendencies, notwithstanding the longstanding pattern of successful preemption of state regulation recited earlier. The Commission thus responded to *Louisiana,* not by defending its jurisdiction as aggressively as the decision would permit, or by appealing to the necessity for national rules to produce efficient outcomes, but by doing nothing.

In vacating and remanding *Computer III,* the Ninth Circuit did not do more than should have been expected of it to render Section 2(b) and the *Louisiana* decision suitable for the emerging milieu of nationally offered enhanced services. As a result, the Bush administration FCC will have to provide far stronger leadership on the issue than its predecessor. If it does not, the Supreme Court or Congress will have to revisit the preemption issue, and, during the interim, enhanced services will suffer for want of uniform national rules.[57]

Finally, a few comments are in order on Robinson's point that divestiture seems to have been accompanied by more rather than less regulation. Almost certainly in the last five years every state in this country has examined—many at a quite fundamental level—different ways to regulate or deregulate its telephone utilities. And, given the old Bell System's striking abilities in public advocacy and its nearly preternatural abilities at controlling, managing, and coordinating the public

policy activities of its far flung operating companies, it is reasonable to believe we would be seeing much less diversity in terms of the state's approaches to regulation than we do today.

Robinson's point about the volume of regulatory activity is correct. We certainly seem to have more of it, but it is often less constraining. If one were to chart out carefully, at least at the federal level, the rate regulation of AT&T since 1984, I strongly suspect it would reveal activities less constraining than formal.[58]

On another level, the FCC has expended vast effort in trying to create accounting rules to allocate between regulated and nonregulated businesses the joint costs incurred by the local exchange companies subject to its jurisdiction.[59] But it is the consent decree itself which resulted in the increase of unregulated activities, which in turn led to the accounting rules. In fact, much of the additional regulatory activity since 1984 is a reaction to more activity by the local exchange telephone industry in the marketplace.

A. Gray Collins

As I think back on it now, divestiture was just one more episode in a continuing series of changes in the industry structure and the players of the telephone industry. I consider divestiture an event that merely sped up some things which were going to happen anyway.

A few days after divestiture was announced, the magnitude of the implementation problems began to become apparent. It only took a few hours for certain key leaders inside and outside the Bell System to recognize the seven regional companies and AT&T would become very competitive with each other. Almost immediately, questions were raised about the restrictions on the twenty-two operating telephone companies. The prevailing perception was they would not have the opportunity for growth and vitality that many felt were needed for a good business investment and a good place to work. Some concerns were expressed that the BOCs were being eliminated as the only effective competition for AT&T, and were being placed in a position where they would have to buy most of their equipment from AT&T, at least for the foreseeable future.

The task of divestiture was enormous. We had to divide up the physical plant, set up new corporations, assign people, issue stock; there was a multitude of this kind of activity. We had to implement access charges, and we had to bill those $20 billion of access charges using a new billing system that did not exist prior to divestiture. We

also had to divide up Bell Labs and the AT&T headquarters. I want to focus on this partition of staff because in the institution that existed prior to divestiture, the BOC's were not stand-alone organizations.

In 1982, the newly created BOCs had no strategic or long-term planning capabilities. They were really the line-implementation organizations. The AT&T headquarters was the hub, the planner, the signal caller. We had to set up eight (AT&T and the seven regionals) separate corporations, and they had to stand alone and exist in the marketplace where there was increasing competition and uncertainty. And we knew the new corporations would end up competing with each other as they are today.

New organizations had to be put in place and policymaking and planning apparati established. Today, that might not appear to have been a major problem. But it must be remembered only the new Southwestern Bell and Pacific Telesis regions actually had organized central headquarters. What is currently the Bell Atlantic region was actually made up of seven jurisdictions and three formal telephone company organizations (four C&P companies, Bells of Pennsylvania and Diamond State, and New Jersey Bell). Among other things, we needed to install a management process, a marketing and product-line management process, a financial management process, a policymaking process, and a strategic planning process. I believe the tasks of implementing divestiture consumed the old Bell System for about two years. But we made it work.

Somehow, the nation had decided in the early 1980s, I believe by default, that competition in telecommunications and the information industry would be the national policy. Unfortunately, in my opinion, there was not, and still is not, a vision of what the policy should achieve. As a result, the industry structure continues to evolve in what I consider a most disadvantageous fashion. It evolved through a court process, based on antitrust law and without the vision of a fully competitive marketplace. As Glen Robinson points out, we have made great strides forward, but must we place the future of the nation's telecommunications infrastructure "in the hands of lawyers" instead of the producers and consumers?

Today, with divestiture, we have more major industry players in the game, and more regulation and more regulators. We have the FCC, DOJ, the Court, Congress, and the administration at the federal level, and the state PUCs and the state governments at the state level. All of these parties are involved in the regulatory process, and all of these parties have some oversight on our industry. Each of them has different

perspectives and different interests, and rightly so, for they serve different primary constituencies.

In addition to more regulation and regulators, the relationships between these regulators, and the industry players have changed as well. Prior to divestiture, AT&T dealt with the FCC, Congress, the administration, and the Court. The BOCs handled the state relationships, including the PUCs, and state and local governments. At divestiture, we had to reorganize. The RBOCs had to create organizations to handle FCC/Federal Relations, while AT&T had to develop a state relations function.

At first, the newly established RBOCs attempted to use the Washington-bound Bellcore organization to focus their Washington activities. It did not work in those early days because seven Regional Companies were learning and struggling for identity. We would each go to see public policymakers and they would tell us that we did not have the same priorities, we did not have the same objectives, and we were divided. I would like to think we have learned our lesson. Today, the RBOCs are very close together on major issues, and we know it only serves our opponents when we are not unified. We are doing a better job of coming together. It might be time to try that coordinated Washington office idea again. I believe it would serve our interests.

The regulatory institutions have also changed their relationships to each other in the post-divestiture era. As I recall, conflict between the FCC and the state PUCs erupted a few weeks after divestiture. That process of conflict included subscriber line charges, separations, preemption by the FCC of deregulatory activities—particularly CPE, and the state regulators' involvement in preserving the Yellow Pages for the telephone companies. Conflict between Congress and the FCC intensified between 1986 and 1989. The FCC's decision to abandon the Fairness Doctrine in broadcasting, along with some FCC-Congressional personality conflicts, price caps, and subscriber line charges are all factors which have fueled the conflict.

The Washington art of "stakeholdering" through third parties has emerged and has been perfected since 1985. And as a result, the number of apparent players in the game and the number of points of view have multiplied. And as we all have found, each player has the opportunity to be disruptive because there are so many policymakers and policy forums.

We have two players who really were not very involved in policy matters before divestiture, Judge Greene and the DOJ. With their inclusion in the process comes confusion. The DOJ has said it was OK to do

something, we did it, and the Court said we should not have done it. The whole policymaking process offers the opportunity for confusion, mischief, and delay. And frankly, I do not believe that to be in the best interest of the nation, the consumers, or the competing players.

It is my view, in spite of what some others in this volume may suggest, that markets and technologies *have* changed since 1982—or 1980 when we really got serious about studying antitrust and divestiture. Changes have occurred much faster than anyone could have possibly predicted six to eight years ago. The Information Age is upon us. It is already being implemented in other countries. And a local network is an efficient alternative for bringing the Information Age in the United States to the general public, and to business and government as well.

The RBOCs' competitors, acting as I would expect, are trying to delay and block the removal of the line-of-business restrictions on the RBOCs. They really do not want competition from RBOCs even with the appropriate safeguards. The result is that the nation's apparent policy of competitive structure is actually stalled, to the benefit of foreign providers and the detriment of consumers.

I believe the RBOC institutions have developed to the point where we now have a vision of what our business can be, and what we can offer in the way of products, services, and technologies in the future marketplace. I do not believe the institutions of the policymaker have developed as quickly and as completely as have the RBOCs. The competitive environment which we want to help create, and in which we wish to participate will be delayed until we get a better policymaking apparatus. That will probably happen when policy is made by persons more directly responsible to the public, as for example, Congress.

The RBOCs have developed their corporations while continuing to provide excellent service. It is already apparent that the RBOCs are preparing for a more competitive marketplace for communications services. We have the resources and the incentives to develop the communications infrastructure needed for the twenty-first century. The continuing restrictions first placed on us in 1982 are not in the national interest.

Richard E. Wiley

The most significant regulatory and institutional change since divestiture, in my judgment, is the presence (some might be tempted to say "omnipresence") on the telecommunications and information scene of

Judge Harold Greene. Since 1984, like it or not—and there are many takers on both options—the Judge has been the single most important individual and authority in the field.

The "easy" reaction to this circumstance is that Judge Greene is a self-appointed and self-important judicial and regulatory czar, who has arrogated to himself all the policymaking power possible while, concomitantly, removing it from the rightful holders of authority, Congress and the FCC. Given the centrality and significance of the Judge's role, and all the public attention that has surrounded his activity, it is not surprising that such an opinion is held by many people—and not just by those who want so much to see the AT&T consent decree, the object of Judge Greene's constant attention, go away.

However, it seems to me there are a number of "hard" responses to this view of the Judge and his continuing activity relative to the decree. These responses, reflecting perhaps certain institutional failings or miscalculations on the part of other entities, may be both distasteful and disputatious. Nevertheless, they must be confronted.

The first and most obvious point to be considered is that the Judge was not the author of the MFJ. Instead, he merely approved and entered the decree which, in large measure, was the product of the litigating parties, AT&T and the Department of Justice. It also was a document agreed to, however reluctantly perhaps, by the heads of all the RHCs. For what it may be worth, I personally have always had some misgivings concerning the wisdom of the divestiture, and I obviously am far from alone in this viewpoint. But the fact is that both AT&T and the Justice Department desired an end to the government's prolonged antitrust action against the company, and believed the MFJ represented an appropriate resolution.

Given all that was involved in the litigation and the settlement, is it reasonable to expect that it all would end so soon? The 1956 AT&T consent decree endured for over twenty-five years (indeed, it was terminated only with the entry of the MFJ). As Glen Robinson points out, if Justice is now correct in asserting that the line-of-business restrictions on the RBOCs are no longer necessary, the department comes very close to saying that the divestiture of AT&T was really not necessary in the first place.

Rightly or wrongly, AT&T was broken up for the sake of intercity competition. And the DOJ's demand for drastic structural relief reflected its fundamental distrust of the efficacy of both federal and state regulation of the huge carrier. The result of this distrust was to thrust on Judge Greene the responsibility to enforce the structural solution crafted by the department and the company.

One must now ask what has changed since 1984 that might justify a termination of the decree. Is it technology, marketplace conditions, regulatory developments, or, in reality, is it simply the attitude of the DOJ and other federal governmental bodies toward the basic concepts which underlie the consent decree? In my judgment, the latter is clearly the case.

The second "hard" fact that must be faced is that, over the last two decades, there has been a general absence of Congressional leadership in the development of overall telecommunications policy. While Congress in the 1980s has passed modern deregulatory legislation for such industries as banking, airlines, railroads, and motor carriers, it utterly failed to do the same in the communications field. The creaky old Communications Act of 1934—enacted prior to the advent of television, computers, satellites, and all the other technological marvels of the last half century—is still the governing statutory regimen. Accordingly, in the absence of comprehensive Congressional direction, the FCC crafted its procompetitive and deregulatory course, and the AT&T consent decree was entered—together, they represent the primary communications policy determinants over the last twenty years. But, given the reality of legislative inaction, it seems to me unfair and unrealistic to blame Judge Greene (or, indeed, the Commission) for an alleged "power grab." Nature, after all, does abhor a vacuum.

Third, it must be recognized the FCC and the RBOCs themselves may hold some of the important keys to bringing the MFJ and the line-of-business restrictions to an end. In particular, if ever effectuated, the nonstructural safeguards contained in the Commission's *Computer III* effort, and especially the ONA concept, ultimately could convince Judge Greene that at least the information services restriction is no longer necessary.

However, these competitive protections must be "real." In this regard, I would agree that ONA—given the limited time that the RBOCs were accorded to develop it—should be viewed as very much an evolutionary concept. The FCC, state regulatory agencies, and the regional companies all must cooperate in making such an evolution efficacious if they are to gain the confidence of the Court and various industry participants. Should Congress prematurely remove Judge Greene's authority over the consent decree, it could be argued that the incentive on the part of the RBOCs to mature the ONA concept, and to effect a truly competitive enhanced service marketplace might be somewhat lacking.

The fourth "hard" fact is that the Court's oversight of the consent decree has not been a static one. While the pace of change understand-

ably may not have satisfied the RBOC community, Judge Greene's waiver grants and decisions, like his "Gateways" order, exemplify a continuing willingness to modify the decree (either on the merits or in the face of political pressure, depending on your perspective). I would expect additional changes or clarifications ahead.

In the final analysis, I anticipate that the MFJ and Judge Greene's involvement in it are both of finite duration—sometime during the decade of the 1990s, the end may come. As always in the telecommunications field, technology holds the greatest promise for bringing such a development to fruition. Hopefully, further technological advancements will continue to mandate a competitive industry which, in turn, will allow government (at all levels and in all branches) gradually to withdraw its regulatory hand. Incidentally, how soon this might be true with respect to the MFJ's long-distance prohibition, likely to be the last restriction to go, remains a question mark, given the uncertainty of competition's future at the local level.

One final comment: while life has occasionally cast me on the other side of regulatory and policy issues from the regional carrier family, I must pay some well-justified tribute to what these companies have accomplished since 1984. Predicted by many at the time of the divestiture to be "tomorrow's railroads," the RBOCs have made the whole concept of the consent decree work better than anyone might have expected. More or less from scratch, the carriers have developed their fledgling corporate enterprises into some of the largest and most dynamic companies in America. The fact that many significant federal government officials today are calling for an end to the MFJ restrictions also demonstrates conclusively that they have learned quickly and effectively to play the so-called Washington "lobbying game."

Thus, the future would seem to be with the RBOCs—a future, as indicated, that someday may be MFJ-free. In the meantime, however, the presence and impact of Judge Greene continues.

Edward F. Burke

I was intrigued by Glen Robinson's account of the Minnesota Commission and its three so-called telecommunications specialists in the mid-1960s. I would have been happy to have such an enormous staff to help me. During my tenure as Chairman of the Rhode Island Public Utilities Commission from 1977 to 1988, I had on my staff only one telecommunications specialist. Fortunately, I also had two top-notch CPAs on

my staff, who eventually became very knowledgeable in the intricate field of telecommunications revenue allocation and related matters. Unfortunately, for many years no other New England Public Utility Commission employed any CPAs. This became a matter of growing importance in the post-divestiture era with the increasing need for careful scrutiny of cost allocations between the regulated and nonregulated sectors of NYNEX, to prevent cross-subsidies flowing from monopoly activities to nonregulated ventures.

It was a simpler age in 1977 when I joined the Rhode Island Commission, seven years before divestiture, but the seeds of competition had been sown, and litigation and FCC inquiries were already the harbinger of major changes in the structure of the telecommunications industry. It was clear to me, as I grappled with my first telephone rate case, that rapid technological advances were about to transform the industry radically, and a new Information Age was emerging.

I and many of my colleagues felt grossly ill-prepared to meet the challenges with which we were confronted, in regulating telecommunications, in dealing with the significant difficulties being faced by the nuclear power and natural gas supplies, and in ruling on requests for skyrocketing utility rate increases at a time of high inflation and serious unemployment. Small wonder resignations under fire and decisions by governors not to reappoint commissioners were commonplace. Calls for regulatory change and reform filled the halls of state legislatures. How we commissioners were to cope with this crisis of confidence, and how we were to master our multiple and burgeoning responsibilities became our top priority.

We in Rhode Island had one advantage over some of our colleagues in other states. As the smallest state, we had long since learned that we could not or should not try to go it alone. In fact, our legislature provided a special fund of $20,000 per year to be used at the discretion of the PUC Chairman to foster regional cooperation in regulatory matters. Clearly, I felt this was of paramount importance in relation to telephone issues. Since New England Telephone (NET) was operating in five New England states, and making rate filings for new equipment which were substantially similar in each, it made sense to consolidate hearings to pool the several states' limited resources, and to look at the big picture of NET and beyond that, to its parent AT&T. I considered the piecemeal state-by-state approach to be parochial, ineffective, and unsuited to modern times.

As early as 1977, we in Rhode Island asked NET to outline long-range company plans and to compare the modernity of plant in Rhode Island to that in other NET states. We worked to develop cooperative

analysis of regional and national telecommunications among the New England states through our regional New England Conference of Public Utilities Commissioners. We worked closely with our Attorneys General; we finally convened in 1979 several regional hearings relative to the attachment of non-Bell equipment to the telephone system and the level of credits to be applied for using non-Bell telephones in ratepayer residences. Needless to say, this effort was met at first with resistance by NET.

We also became increasingly aware that such issues as modernization of plant, the treatment of new services, rural telephone pricing and quality of service, and the onset of and necessary transition to competition, were issues of national as well as regional concern. Through the many forums and publications of NARUC and especially through its Committee on Commumications, we shared our experiences and concerns and groped for common solutions.

The late 1970s and early 1980s saw increased staffing support for the NARUC Communications Committee. Extensive study sessions were devoted to the issues I have mentioned, as well as to the role of modern communications systems in economic development. Consumer groups pressed us with concerns about the possible demise of universal service due to burgeoning rates, and the need for lifeline or special economy service.

In 1981, one major event helped to galvanize state regulators and forced us to utilize, collectively, the skills and networking mechanisms which we had been developing. I refer to the concerted effort of AT&T's large telephone companies to divert Yellow Pages' revenues from state regulatory control. The lobbying effort on behalf of this legislation which nearly passed was enormous. Lobbyists in Washington imported local telephone officials by the carload.

It took a major effort by state regulators, working at first individually and then collectively, to defeat this incredibly bad piece of legislation. To be sure, we had allies among the consumer groups and within Congress, but it was the last ditch "do or die" outcry from state commissioners and certain governors, mayors, and local legislators, whom state regulators recruited to the effort, which in the end averted disaster. We learned from this adventure that state regulators could unite and, when they did, they could have an impact.

All this was a forerunner to the dramatic events which took place early in 1982, when the proposed consent decree between AT&T and the Justice Department was announced. I had just assumed the presidency of NARUC, and I am proud of the part we played. We did not wait for events to transpire. We felt it vital to reassess and restructure

the role of the state regulator in order to meet the challenges of divestiture, competition, and advancing technology.

To that end, I called a meeting of state regulators in Washington within three weeks of the January 8, 1982 announcement. Over one hundred commissioners and staff responded. We analyzed issues and developed an overall strategy. I must stress that the process included countless hours of efforts by regulators operating in a manner of cooperation and coordination which, in retrospect, seemed impossible to obtain. It required dialogue with AT&T, the Justice Department, Judge Greene, members of Congress, the public, and the media.

NARUC recognized it would be impossible to prevent divestiture, and perhaps imprudent to try. However, it was essential to ensure that the local operating companies—the BOCs—be assured appropriate staff, sufficient initial cash flow, and necessary freedom of action to enable them to remain economically viable and to function effectively in the post-divestiture period.

To that end, we were in the forefront of the successful effort to modify the consent decree to leave Yellow Pages' revenues to the BOCs and to allow them the privilege of selling, if not manufacturing, terminal equipment. We felt these measures were essential because of the continuing central role of the BOCs in the American telephone network. Some of us would have preferred to further "unshackle" the BOCs, and this remains a continuing item of discussion and debate on the NARUC agenda.

We also availed ourselves the opportunity to comment on the plans of reorganization which AT&T submitted to the Justice Department and, ultimately, to the Court. I believe we helped AT&T to make uncertain modifications in the plan of reorganization in the public interest. We especially appreciated that Charles Brown of AT&T interrupted a trip to a college reunion to speak at our February 1982 NARUC meeting in Washington. It was a beneficial visit. He convinced us of his desire to be evenhanded in the division of materials and personnel between post-divestiture AT&T and the new RHCs and their BOCs.

Finally, we worked closely with AT&T, the independent telephone companies, the Justice Department, and the FCC to attempt to smooth the path toward divestiture. I think these efforts were somewhat successful. We all remember the initial concerns after the announcement of the consent decree relative to possible deterioration of service quality. A number of problems did develop, especially in relation to installation and servicing of large terminal equipment systems by AT&T. There was also some confusion as to responsibility and accountability for terminal equipment and wiring. But I think it is fair to say such

problems have been significantly less than anticipated. As discussed elsewhere in this volume, quality of service across the United States seems to this point at least to have remained essentially high.

Of course, the spirit of cooperation between federal, state, and industrial policymakers in smoothing the path to transition was greatly influenced by the firm guidance of Judge Harold Greene. I believe he performed many affirmative acts in his oversight position. While I greatly admire the Judge, it seems to me an unhealthy situation for any individual, no matter how talented or dedicated, to have such a central role relative to the telecommunications industry.

NARUC also made its voice heard in the halls of Congress. We thought there was a need for comprehensive communications legislation if universal service at affordable prices was to be maintained. To that end, we worked closely with Senator Packwood and members of his committee and Congressmen Dingell and Wirth and some of their colleagues, in the development of legislation to deal with problems related to bypass and to the special concerns of smaller, high-cost factor telephone companies. We were guided by a prevailing view that the FCC's plans for end-user access charges (later renamed subscriber line charges), if fully implemented, would have an unnecessarily severe impact on residential customers and could eventually make telephone service unaffordable for millions of Americans.

While these efforts did not succeed, the overwhelming passage by the House of the Universal Telephone Preservation Act bill (H.R. 4102) in November of 1983,[60] and the potential passage of a NARUC-supported Packwood bill in the Senate in early 1984, had a salutary effect. It led to a discussion between FCC Chairman Mark Fowler and Senator Dole and Senate leaders, who were anxious to head off Congressional action at the onset of divestiture. The result was the famous "go-slow" letter to the FCC which requested no flat-rate end-user charges on residential and single line business phones in 1984, a four-dollar cap on such charges until at least 1990, and a reduction in proposed interconnection charges. The letter also noted with approval, the actions which the FCC had taken in recognizing "certain low-income telephone customers who make few interstate calls might be unable to afford any flat monthly charge." Also noted were Commission efforts to explore "lifeline" service alternatives, and the planned monitoring of possible threats to "continued universal availability of affordably priced telephone service." [61]

The letter was issued just in the nick of time. The Packwood bill lost by a mere two votes. Chairman Fowler and his fellow Commissioners acceded in essence to the major requests of the Dole letter signato-

ries and most importantly, deferred imposing flat-rate end-user charges on residential and single-line business customers until at least 1984.

In short, some members of Congress and Chairman Fowler bought time. Perhaps it was important to buy that time. We in NARUC adjusted immediately to this turn of events, and we four Commissioners representing the states on the Federal State Joint Board on Separations, lobbied to have our jurisdiction enlarged to encompass the access charge docket as well. This effort, which was supported by the NARUC Executive Committee and included extensive discussion with Chairman Fowler and his staff, resulted in substantial success. On April 2, 1984, the FCC announced:

> The Commission, while reaffirming its basic access charge principles, has asked for additional public comments and Joint Board recommendations on certain aspects of the following: the plan for implementing end user charges for residential and single-line business subscribers; the framework for a lifeline exemption or other assistance for low income subscribers; additional assistance for small telephone companies.

The FCC also asked the Joint Board to undertake a comprehensive review of the existing separations procedures for all central office equipment (COE) and recommend changes in these rules. Issues involving the allocation of interexchange plant costs were also referred to the Joint Board. Later, other more specialized Joint Boards were established.

The discussions among state regulators and then between their representatives and Chairman Fowler and his colleagues, were, I think, historic. We in NARUC were determined to continue our efforts to challenge federal preemption issues in the courts and our later success in the *Louisiana Public Service Commission* case. The case was good for state regulator morale, and we also sought comprehensive telephone legislation. However, we resolved to make divestiture work, and attempted to work cooperatively with the FCC on issues which could not wait for legislative or judicial determination.

It was not easy. Some of my state colleagues preferred rhetoric, fruitless legislative initiatives, and litigation to compromise and consensus, but most of us pressed on. A personal rapport which gradually evolved between the three Fowler-led FCC commissioners and their four state counterparts and their staffs on the Joint Boards, was most important. So too was the bipartisan composition of the Joint Boards. For example, when conservative Republican Mark Fowler and solid Democrat Edward Burke and our colleagues reached consensus on key issues, it helped to convince other parties in Congress and in the states that our recommendations had merit.

I think our Joint Board access charge decisions helped to alleviate concerns relative to bypass. We heeded the requests of the industry concerning the immediate dangers of depooling and deaveraging by incorporating in our orders many of their internally agreed-upon suggestions. I am especially proud of the success of the federal lifeline programs, which were truly federal-state products. These helped to preserve and extend universal service and, by 1990, are being used by more than 3 million subscribers.[62]

That, I submit must be the goal of the process. It is not easy for state regulators to downplay local interests and vote in the national interest. However, I think that is what we attempted to do. We were not always successful, but I believe that our sincerity and our dedication to developing nationally acceptable policies were perceived by most of the interested players, and helped to create a climate of reasonableness.

Looking back over the post-divestiture period, I have one major regret. It seemed to me in the period after the announcement of the approval of the MFJ in August 1982, that state regulatory processes needed to be modified to relate to the holding company structure under which the local BOCs were to function after January 1, 1984. In 1983, Rhode Island Governor J. Joseph Garrahy wrote his fellow governors in the states in which NYNEX affiliates were to operate:

> I suggest that the time has come to address common concerns relative to a regional company on a regional basis. It would appear that the rate of return to which New England Telephone is entitled ought to be uniform throughout the five state region. Certainly common costs throughout the five state region ought to be apportioned fairly amongst the states.

He went on to propose that rate filings in the five states be synchronized as to time, in order to allow coordinated review and pooling of technical resources by Attorneys General and other public interest advocates. I hoped there would be regional hearings.

Despite very strong editorial support in a number of newspapers and from segments of the regulatory community, we never achieved our goal. That goal would have made sense not only for the NYNEX situation, but also in the other RHC areas. At least I can say that there has been some state-to-state cost allocation analysis cooperation with regard to the Regional Holding Companies and their local telco affiliates, and NARUC continues to advocate close regional cooperation on cost allocation, competitive service, and diversification-related issues.

By and large, I remain an optimist. I agree with Robinson that, although state regulation has and will continue to change in form and

focus, it still will remain important and significant to the stability of the industry for years to come. My successors in state regulation will continue to be hard pressed by their multiple responsibilities. There will be no miracle answers, but I know they will preserve and contribute significantly to major telecommunications policy decisions. They are, for example, hard at work analyzing the many issues surrounding ONA. I hope those of us who preceded them in the 1980s will have made their task easier.

ENDNOTES

1. I have reviewed some of the major events and decisions in Robinson, "The Titanic Remembered: AT&T and the Changing Worlds of Communications," *Yale Journal on Regulation* (1980), 5:517.

2. *Hush-A-Phone Corp. v. FCC,* 238 F.2d 266, 269 (D.C. Cir. 1956) (AT&T tariff prohibiting attachment of passive device to telephone handset as unreasonable restriction on customer phone use).

3. Allocation of Frequencies in the Bands Above 890 Msc., 27 FCC 359 (1959), modified, 29 FCC 825 (1960).

4. Use of the Carterfone Device in Message Toll Tel. Serv., 13 FCC 2d 420 (1968).

5. Specialized Common Carrier Servs., 29 FCC 2d 870, 31 1106 (1971), *aff'd, Washington Util. & Transp. Comm'n v. FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975).

6. *MCI Telecommunications Corp. v. FCC,* 561 F. 2d 365 (D.C. Cir. 1977) *(Execunet I);* see also *MCI Telecommunications Corp. v. FCC,* 580 F. 2d 590 (D.C. Cir.) *(Execunet II), cert. denied,* 439 U.S. 980 (1978).

7. See Amendment of Sec. 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), *aff'd sub. nom. Computer & Communications Indus. Ass'n v. FCC,* 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983).

8. For a brief discussion see Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 2884-86 (1989); G. Brock, *The Telecommunications Industry* (Cambridge, Mass.: Harvard University Press, 1981), pp. 179–80.

9. See AT&T, 2 FCC 2d 173 (1965) (initiating investigation into interstate rate return); AT&T, 9 FCC 2d 30 (1969) (decision in initial phase 1-A of investigation).

10. Figures are from the official budgets and FCC annual reports for the years in question. The fiscal 1989 total budget figure of $99.6 million excludes a special $1.2 million indefinite appropriation to relocate an FCC monitoring facility from Ft. Lauderdale to Vero Beach, Florida.

11. An indication of just how much changed in public attitude from the 1970s to the 1980s is given by the public reaction to the FCC's 1983 residential telephone access charge decision. When the FCC announced its decision there was a public demonstration in front of the FCC's building. By contrast when,

nearly a decade earlier, the FCC allowed AT&T to raise its rates, the only person outside the industry to notice was Ralph Nader.

12. See Crandall, "The Role for U.S. Local Operating Companies," in R. Crandall and K. Flamm, eds., *Changing the Rules: Technological Change, International Competition and Regulation in Communications* (Washington D.C.: Brookings Institution, 1989), pp. 114, 123. I interpret this continued transfer of cost/rate burden as simply due to the continued increase in productivity of interstate service relative to local exchange service. The transfer was at war with the emerging policy of promoting competition which had to undermine the rents from interstate markets that were used to support local service.

13. See Crandall, supra.

14. Amendment of Sec. 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) 104 FCC 2d 958 (1986), *modified*, 2 FCC Rcd 3035 (1987), *further reconsid. denied*, 3 FCC Rad 1135 *vacated and remanded, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

15. Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rad 2873, 3379 (1989). Essentially price cap regulation sets average rates for defined groups ("baskets") of services according to a retail price index minus a "productivity" factor of 3 percent. The basic idea is to create an incentive for the regulated firm to invest in efficient methods and technologies by allowing the firm to retain part of the cost savings realized by its efficiencies. This overcomes the opposite bias in rate of return regulation. In a sense, price cap regulation returns the FCC to its old "continuing surveillance" form of rate regulation. For a good short description of the price cap concept of rate regulation see Noll, "Telecommunications Regulation in the 1990s," in P. Newberg, ed., *New Directions in Telecommunications Regulation* (Durham, N.C.: Duke University Press, 1989), 1:36–42. The future success of the Commission's ONA initiatives was put into question by the Court of Appeals holding (supra note 14) that the *Computer III* decision to permit the BOCs to integrate their regulated and unregulated activities were unlawfully arbitrary and capricious, and that FCC's preemption of state regulation of enhanced services exceeded its jurisdiction under the Communications Act.

16. The ONA and the regulatory surveillance problems are briefly discussed in Noll, supra at 43–46. See also the summary of Gerald Brock, Chief of the FCC's Common Carrier Bureau, in Hearing on Modified Final Judgment Before the Subcomm. on Communications of the Senate Comm. on Commerce, Service and Technology, 100th Cong., 2d sess., pp. 159–63 (1988).

17. See Noll, supra at 42.

18. The Supreme Court's surprising (and in my view incorrect) refusal to allow the FCC to preempt state regulation of carrier depreciation of telephone equipment, see *Louisiana Public Service Commission v. FCC, 476 U.S. 355* (1986), suggests that states may play an even larger role than had been contemplated by the FCC. That suggestion was reinforced by the Ninth Circuit's 1990 ruling on *Computer III* (supra note 14).

19. For the Antitrust Division's theory and strategy under Baxter's leadership, see P. Temin, *The Fall of the Bell System: A Study in Prices and Politics*

(New York: Cambridge University Press, 1987), pp. 217–49. (Baxter's famous threat to litigate to the eyeballs is quoted on p. 225.)

20. See, e.g., "Ringing the Bells," *National Journal*, February 4, 1989, pp. 272–77. The Justice Department has joined with the regional RHCs in seeking to overturn Judge Greene's refusal to modify the MFJ, both in court and in Congress. See Hearings on S.H. 52565 Before the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 2d sess. (1986); *United States v. Western Electric Co.*, No 83–5388 (D.C. Cir.).

21. See Robinson, supra note 1 at 536–40. Whether to relax or eliminate the line-of-business restrictions is a matter of evaluating the benefits of more competition in the restricted fields against the risk that BOC entry would distort competition because of their control of the local exchange network. The latter question is critically dependent on the effectiveness of the FCC's ONA scheme, about which we know nothing yet. The former question must be broken down according to the different lines of business. Probably the strongest case for BOC entry is in the field of information services where there is a significant possibility that the BOCs could spur what seems to be an underdeveloped market. At the same time one should recognize that information services can be and are provided by independent suppliers; if the market is underdeveloped, it may be simply that consumer demand does not match technological potential. It is not obvious how the BOCs could rectify this "problem"—if it is a problem.

22. 334 U.S. 131 (1948).

23. For a short description of the *Paramount* litigation and subsequent consent decrees see *United States v. Loew's Inc.*, 1988–2 Trade Cases ¶68,360.

24. It is reported that Judge Palmieri, who until his death in 1989 was responsible for administering the decrees (as he had been since the early years of their history) ruled on as many as seventy-four petitions by *Paramount* defendants in a single year! See Hammond and Melamed, *Antitrust in the Entertainment Industry*, Gannett Center Journal, pp. 138, 156 (*The Image Factory*, Gannett Center for Media Studies).

25. *United States v. Western Electric Co.*, 1956 Trade Cases ¶68,246 (D.N.J. 1956). The 1956 decree, the outcome of an antitrust action initiated in 1949, forbade AT&T from offering non-communications services or products except as an incidental aspect of a tariffed (regulated) communications venue.

26. 286 U.S. 106, 119 (1929).

27. See *United States v. Western Electric Co.*, 797 F.2d 1082 (D.C. Cir. 1986).

28. See *United States v. Western Electric Company*, et al., 900 F.2d 283 (1990).

29. Officially styled the "Consumer Communications Reform Act of 1976," the "Bell bill" was drafted and promoted by AT&T. The initiative was correctly seen to be a ratification of AT&T's traditional views on the glory of monopoly and the unworkability of competition, and as such was doomed almost from the outset. The Van Deerlin rewrite effort, a broadly pro-competitive measure, supplanted the Bell bill on the legislative agenda. But it proved too ambitious. For a history of both efforts see Temin, supra at 113–31.

30. This negative prediction is perhaps overstated. I would not look for any Congressional *policy* guidance, but, short of such policy guidance, Congress might take "meaningful" action by transferring jurisdiction over the MFJ from Judge Greene to the FCC, as has been proposed. Nevertheless, even that limited action seems unlikely at the present time.

31. This number is based on a Westlaw search for reported decisions, adjusted to exclude opinions dealing with purely procedural matters having no substantive implications.

32. An extended version of my discussion is contained in a Columbia University Center for Telecommunications and Information Studies' Working Paper.

33. 15 U.S.C. § 4.

34. Arguments advanced by the states were based upon the 10th Amendment, Sec. 2(b) of the Communications Act, and the state action exemption from the antitrust laws initially articulated in *Parker v. Brown*, 317 U.S. 341 (1943).

35. *United States v. AT&T*, 552 F. Supp. 131, 153–60 (1982) *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

36. Id. at 160.

37. Id. at 192, n. 250. In their submissions to the Court several states maintained the proposed decree's prohibition of such activities would undermine the financial viability of the BOCs or produce substantial increases in local telephone rates. I tend to disagree with William Baxter's suggestion in chapter 1 that allowing the BOCs into CPE and Yellow Pages, and departing from "the quarantine theory" caused the institutional frictions we have witnessed since divestiture. The Court's action may have served to accelerate the process, but I agree with Judge Greene that the BOCs would still have pressed to escape the line-of-business restrictions.

38. In approving the MFJ, the Court noted the FCC's preliminary conclusion, in its amicus curiae brief, that "the basic settlement appears to be fair and reasonable" and accordingly concluded that "the court need not and will not decide specific questions of possible conflict at this time." 552 F. Supp. at 211, citing brief of FCC as amicus curiae at 9. However, Judge Greene's Court made it clear that while there is no reason to anticipate a conflict between the decree and federal regulation, if such a conflict were to arise, "in view of the Commission's limited authority in regard to the structural matters in the telecommunications industry, the judgement of an antitrust court would prevail." Id. at 212.

39. Indeed, in 1982, the Department was (perhaps rightly) convinced the "wager" embodied in the consent decree was sufficiently well-calculated that it should be applied across the board (i.e., to prohibit any and all BOC diversification into competitive markets).

40. The Justice Department's consultant, Dr. Peter Huber, found that "only one-tenth of one percent of intraLATA traffic volume, generated by one customer out of one million, is carried through non-regional company facilities. . . . " 673 F. Supp at 540 (citing Huber Report at 3.9, table IX.5.).

41. Report and Recommendations of the United States Concerning the Line

of Business Restrictions Imposed on the BOCs by the MFJ, February 2, 1987, p. 5.

42. Id. at 4. That seven independent companies emerged from the divestiture was a function of a choice made by AT&T. The consent decree would have permitted AT&T to spin off its local exchange assets in a single company had it chosen to do so. Thus, the Department's heavy reliance on yardstick or benchmark competition in the Triennial Review filing represented a new appreciation for its value.

43. In 1982, the Justice Department stated that its alternative settlement proposal—the so-called "regulatory alternative"—"did not approach even remotely the effectiveness of the proposed modification in achieving conditions that would assure full competition in the telecommunications industry." DOJ Competitive Impact Statement, 47 Fed. Reg. at 7170, 7181 (1982). During the ensuing Tunney Act proceedings, the Department was even more explicit on this point, stating that, "Indeed, the very basis for divestiture is that the competitive problems inherent in the joint provision of regulated monopoly and competitive services are otherwise insoluble." Response of the United States to Public Comments on Proposed Modification of Final Judgement, 47 Fed. Reg. at 23336 (1982).

In rejecting the arguments advanced by the Justice Department and the BOCs, Judge Greene said the regulatory safeguards and FCC proposals upon which Justice's revised position relied "are entirely inadequate: they either predate the decree and were found at the trial to be ineffective; they are not sufficiently comprehensive; they contain large loopholes; or they are a long way from being promulgated, let alone being implemented." *United States v. Western Electric Co.*, 673 F. Supp. 525, 579 (D.D.C. 1987). The Court also expressed considerable dismay at the Justice Department's abandonment of the line-of-business restrictions. Id. at 536, n.40.

44. A similar bill, H.R. 3687, introduced by Rep. Wyden, would have removed the consent decree restrictions, to the extent permitted by state regulators in each jurisdiction in which the BOCs operated, subject to regulations designed to prevent cross-subsidization of the BOCs unregulated services.

45. In support of the proposed legislation, Assistant Attorney General Douglas Ginsburg urged that "the present dual regulatory system be restored to a unitary system based on the expert agency—the Commission—that can best assure that the regulatory regimes embodied in the [D]ecrees are implemented in a manner consistent with other telecommunications-related regulations." Testimony of Douglas H. Ginsburg, Assistant Attorney Gencral, Antitrust Division, Concerning S. 2565, the Federal Telecommunications Policy Act of 1986 before the Committee on Commerce, Science and Transportation, United States Senate (September 10, 1986), p. 6. Mr. Ginsburg further argued that permitting the FCC to administer the decrees would allow "important factors to be taken into account in carrying out the [D]ecree's regulatory schemes that cannot now be addressed by the [D]ecree court, such as the national security interest, the interests of local telephone users, and the significant role of telecommunications and international trade." Id. pp. 7–8.

46. *The American Spirit in Telecommunications*, address by Dennis R. Patrick, Chairman, Federal Communications Commission, Before the United States Telephone Association 90th Annual Convention (October 13, 1987), p. 6.

47. Petition for Declaratory Ruling of the National Telecommunications and Information Administration (November 24, 1987) at 28.

48. FCC Public Notice, Mimeo. No. 768 (December 1, 1987).

49. *United States v. Western Electric Co.*, 675 F. Supp. 655, 661 (1987).

50. Id.

51. *United States v. Western Electric Company et al*, No. 87–5388 et al. (D.C. Cir.) April 3, 1990 (slip opinion).

52. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355.

53. In Secs. 1 and 2(a) of the Communications Act of 1934 [47 U.S.C. SS151, 152(a)], Congress vested exclusive authority to regulate interstate telecommunications in the FCC, but Sec. 2(b) [47 U.S.C. S 152(b)] of the Act reserved to the states' jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication by wire or radio of any carrier." This dual regulatory scheme has proved enigmatic because interstate and intrastate communications are not readily distinguishable; in fact, both types of communications utilize the same facilities.

54. See *North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976) ("NCUC I") and *North Carolina Utilities Commission v. FCC*, 552 F. 2d 1036 (4th Cir. 1976), *cert denied*, 434 U.S. 874 (1977) ("NCUC II") for important examples of the expanse of federal authority.

55. 476 U.S. at 374.

56. Third Computer Inquiry, Order on Reconsideration, 2 FCC Rcd. 3035 (1987). In June 1990, *Computer III* was overturned by the Ninth Circuit *California v. FCC*, 905 F.2d 1217, partly on the grounds that the FCC had overstepped its jurisdiction over intrastate services.

57. This is not to say that the FCC's regulation of the juncture of basic and enhanced services (ONA and comparably efficient interconnection in the current *Computer III* context) invariably has been better than the state equivalents. In some instances, in my view, the state agencies have proposed major improvements. See, e.g., Florida Public Service Commission Order No. 21815 in Docket No. 880423-TP, September 20, 1989 (Information Services).

58. See, e.g., AT&T Communications Tariff 12, 4 FCC Rcd. 4932 (1989).

59. Joint Cost Order, 2 FCC Rcd. 129B, recon. 2FCC Rcd. 6283 (1987), *further recon.* 3 FCC Rcd. 6701 (1988). Appeal is pending in the D.C. Circuit as *Southwestern Bell Corp. v. FCC*, Nos. 87–1764 and 89–1020.

60. U.S. Congress, House, Committee on Energy and Commerce Report No. 98–479, "Universal Telephone Preservation Act of 1983" (98th Cong., 1st Sess.), November 3, 1983.

61. The letter, urging reconsideration and delay until after the 1984 elections, was drafted by Senator Dole and signed by thirty fellow senators.

62. We had our perilous moments. I was prepared to dissent from the major Joint Board decision of March 1987, which increased the subscriber line charge

to residential subscribers to an ultimate level of $3.50 per month. I left the room and walked off to write my dissent when it appeared that I was the lone holdout for reducing the top level below $3.80. Mark Fowler followed me. After some tough talk he agreed to lower the cap to $3.50. I faced my moment of truth. There had been substantial concessions made to my views relative to "Link-Up America" provisions, and the extent of the monitoring process relative to the effectiveness of our orders. I decided that consensus remained important, so I agreed to concur with my colleagues in voting a $3.50 maximum.