## Chapter 6

# THE NEW TELECOMMUNICATIONS ACT AS A REGULATORY FRAMEWORK

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While the subject of this article is the legislative effort to rewrite the Communications Act of 1934 in the common carrier field, there cannot be sensible discussion of that topic without taking into account the *Modified Final Judgment* (herein "modification") in the Department of Justice's antitrust suit against American Telephone and Telegraph (AT&T). Indeed, the House bill, H.R. 5158, having been considered after the proposed modification, is based upon, and directed toward, that modification.

The area of telecommunications policy is so complex that one can easily get lost in the details. Therefore, at the risk of oversimplification, this article will focus on broad issues. It will first set out what the author believes to be sound guiding principles for reform in this area; it will then evaluate the legislative proposals and the antitrust modification against those principles. Finally, an attempt will be made to predict the outcome of the process. There is one final and

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obvious caveat: the changing nature of the legislative process at the time of preparation of this article. In such circumstances, the focus must necessarily be on process and principle rather than detail and statutory language.

## SOUND GOVERNMENT PRINCIPLES FOR REFORM

There can be great disagreement as to what constitutes *sound* principles to govern the reform effort. Necessarily, then, the following discussion reflects the author's own view,[1] and is both oversimplified and not all-inclusive.

*Competition should be relied upon, wherever feasible.* Competition is obviously the norm, much preferred to monopoly and the use of economic regulation to substitute for the marketplace. Competition spurs innovation, efficiency, and pricing at marginal costs. And competition is clearly feasible in the interexchange telecommunications area because of the new technological advances since World War II—microwave, coaxial cable, satellite, fiber optic, and above all, the computer (integrated circuitry).

The present Communications Act (of 1934) does not specify competition as the guiding principle but rather only refers to the public interest. Court decisions make it clear that the FCC is not simply to rely upon competition as the goal but rather to vouch for its benefits in the particular situation.[2] And while the competitive genie is clearly out of the bottle, never to be returned,[3] it does not follow that the statutory standard should not be clarified in this important respect. First, the Act should be consistent with the realities of the regulatory situation. Second, without such a standard, some future Commission might attempt not to eliminate competition (a practical impossibility) but rather to hamstring it in new decisions. The recent experience with the Interstate Commerce Commission's wavering in its deregulatory actions, while by no means conclusive at this stage, indicates the concern that can arise and that should be dealt with by firm legislative guidance.

*Regulated competition should be avoided. The goal is to move as quickly as possible to the marketplace for all products and services, and especially for those in the new information areas.* This guideline again requires little explanation. Regulated competition is

the worst of all possible worlds. The goal is to move the industry as quickly as possible to the marketplace, to a situation where products or services can be rapidly introduced in response to new technological advances, and stand or fall on the basis of competition.

Two matters, one general and one specific, point out this crucial consideration. Data processing and data communications are merging, because both are based on the same technology, the integrated circuit. The data communications industry is regulated but the data processing industry is not, so that the merging trend requires a policy choice: to extend regulation to cover all components, or to move entirely to the marketplace. In light of the overriding need to allow quick response to technological advances, the clear choice is the latter. One simply cannot imagine a data industry where a federal agency gives permission to enter and both assures and limits the return on new products and services.

Specifically, there is a strong need to avoid the stultifying experience of episodes like *DataSpeed 40/4*.[4] It makes no sense to have a governmental agency conduct a lengthy hearing to determine whether a new product is more a telephone or a computer, when quite rightly it is both, since the technology demands such efficient use of the device. It is also poor policy for the agency to extend its regulatory jurisdiction to cover data processing. Shortly after the long debacle on 40/4, IBM introduced its own model, without having to seek governmental permission and without any limit to either earnings or losses on the device. Clearly a house so divided represents a complete policy failure.

It follows that in competitive areas such as equipment or new information services, the marketplace should govern *now*; and in all other areas of this field, the nation should be moving as quickly as possible to the marketplace. The basic reason has already been stated: the benefits of competition and the detriment of "regulated competition." But here one must note two considerations that stem from our particular situation with respect to inflation and trade. These considerations were most aptly stated in Congressional testimony:

> . . . We must continue to strive for improved productivity. Telecommunications can contribute markedly to that goal. But to do so, the industry must be allowed quick entry and response in the marketplace, rather than be forced into what critics have labelled "an ad-

> ministrative minuet.'' The Nation's future depends to a large extent on our being successful in the rapidly developing information technology and services areas. Other nations, such as Japan and in Western Europe, have recognized this fact and have targeted these industries for expansion. If we are to meet this competitive challenge at home and abroad, we must set our own house in order. It is for these reasons that enactment of [reform] legislation is so important. There is no other action that Congress could take better to facilitate American industry's ability to compete more effectively in these critical areas. (Letter of Secretary of Commerce, on July 20, 1980 at p. 2 to Senate Commerce Committee.)

Here again the present Act is silent or worse; thus, it has been construed by at least one court to require continuing economic regulation (entry, rate of return) of all common carriers.[5]

*Present regulatory patterns, inconsistent with the competitive environment, must be replaced.* The present method for division of revenues between interstate and intrastate jurisdiction, and between the partners in the toll process (the separation and settlement process) must be replaced in view of the new competitive environment. Indeed, the first order of business is to replace the interstate/intrastate scheme with an interexchange/local exchange concept. State lines are simply arbitrary for the purposes of toll calls, and the different toll rates due to state jurisdictions make no sense.

As for the separations process,[6] it is concededly an arbitrary method of shifting very substantial costs to the interstate jurisdiction in order to promote universal service at reasonable rates, and in particular to hold down local rates in rural areas. The sums so transferred are large and are increasing markedly, and clearly bear no relation to costs. But a competitive environment drives out such arbitrary subsidy schemes. Thus, it is important to move to a cost-driven system of access to local facilities, one that promotes economic efficiency and does not give off false economic signals. If a subsidy scheme is retained, it should be short in duration, with the flexibility to phase out rapidly as competitive forces require. Even as an interim scheme, it should be open, targeted, and publicly administered for those rural and other areas in real need of assistance.

*The treatment of AT&T must be consistent with the above principles: moving toward marketplace reliance, wherever feasible and as*

*rapidly as possible, yet assuring fair competition.* If the common carrier telecommunications industry resembled the airlines or trucking field, it would be simple to implement the above principles. But it does not, because of the presence of one very dominant company, AT&T. AT&T, with its partners, garners 96.3 percent of all interstate traffic (AT&T alone has about 90 percent), and represents, in number of telephone stations, close to 80 percent of the telephone industry. Its annual interstate revenues are $21.5 billion, and its total revenues are $46.5 billion.[7]

If, then, deregulation were to be immediately implemented, there would be at the least the following problems:

1. AT&T is able to cross-subsidize from its large *de facto* monopoly base in interstate traffic. There are joint common costs to be assigned here between the competitive area and the monopoly (in transmission, computing, research, and manufacturing facilities); the assignment of such costs between the two sides of the company calls for business judgment, difficult to review administratively and thus readily used for unfair competitive advantage.
2. AT&T controls roughly 80 percent of the essential facilities for local distribution that its rivals must depend upon for the last "crucial mile" into the business or home; abuses can arise here.
3. Because of its vertical integration (Western Electric), abuses can arise in the competition to sell equipment to the various affiliates within the Bell System. Over 84 percent of all such purchases come today from Western.[8]

While action must be taken to deal with the above serious problem areas, among others, it is not a matter of preventing or restricting AT&T's competition in the established telecommunications area, in equipment, or in the new enhanced (data processing) services. To follow that course would mean that we had not deregulated the field; 80 percent of it would remain shackled, and unable to make the full and needed contribution to improved productivity and trade. Further, it would deprive the public of a strong competitor and innovator. It would protect IBM from significant competition while, at the same time, AT&T's field is being opened to full competition

from IBM, ITT, Exxon, and others. It would represent government-mandated market segmentation, wholly at odds with emerging technologies.

Thus, the policy guidelines toward AT&T are threefold: (1) take immediate but transitional steps to ensure fair competition; (2) allow AT&T to respond quickly and on a deregulated basis in competitive areas like Customer Premises Equipment (CPE) and the new information or enhanced services; and (3) move as rapidly as possible to full deregulation of AT&T, including the transmission services that must now be regulated: Message Toll Service (MTS), Wide Area Telephone Service (WATS), and private line.

These then are the basic guidelines.[9] New policy should reflect those guidelines for the long-range future and manage the difficult transition to full competition with them in mind.

## EVALUATION OF LEGISLATIVE AND ANTITRUST EFFORTS

It is difficult to compare the efforts in this field because the play is still unfolding, and the actions are all interrelated. S. 898 passed the Senate on October 14, 1981, over three months before the January 8, 1982, bombshell of the Consent Decree agreement in the antitrust suit. Clearly, substantial parts of S. 898 are outmoded in light of the modification. H.R. 5158 does take into account the January 8th proposal, but it has passed only the Subcommittee phase, and its future is uncertain for this session of Congress. Thus, it also is subject to change.[10] And indeed so is the modification in light of the Tunney Act provisions[11] and the great number of comments received. This article necessarily deals with the situation as it stands. It will first treat the areas of greatest agreement, and then the main disputed area, the AT&T provisions. Finally, while the article focuses on broad issues, a more detailed comparison of the bills and *Computer II*[12] is set out in the attached appendix.[13]

### Areas of large agreement

Both S. 898 and H.R. 5158 call for reliance on competition, wherever feasible. This certainly is in accord with the modification and FCC policies.

As to avoidance of "regulated competition" (*leaving aside the AT&T facet*), both bills call for deregulation and reliance on the marketplace. All carriers (other than AT&T and its partners in MTS/WATS) could be deregulated, in light of their lack of market power. CPE (with specified transitional provisions) and data processing would explicitly be put beyond all regulatory jurisdiction. Again this is fully in accord with the modification and the Commission's policies in *Computer II*.

Under both bills, intrastate tolls would come within federal jurisdiction, and the separations system would be replaced with a cost-based access charge. In order to ensure the continued universal service at reasonable rates, the FCC would be empowered to impose a surcharge, which would be distributed to eligible companies in rural and other areas (Appendix A, pp. 239-241).

This latter provision does raise a most serious policy issue. If the subsidy is significant, interexchange users will seek to avoid it, if they possibly can. With new services—such as the Satellite Business System (SBS) network, Data Termination Services (DTS), cable TV, Multipoint Distribution Service (MDS), broadcast subcarrier operators, and cellular radio—there will be ever-increasing opportunities to do so. It is understandable that politicians would desire to cushion the impact of change, and to have an orderly, "quiet" transition. It is also understandable that they would seek to accomplish this in an indirect fashion, to avoid a direct subsidy in the budget (and thus an increase in the deficit). But in proceeding as H.R. 5158 does, Congress would be building in future trouble, for it would be acting inconsistently with the principle that the system must come clean and be cost driven in a competitive environment, and that it must cease giving off false economic signals.

I would suggest the following as a sound way to proceed: if there is to be a subsidy, it should not only be open, soundly targeted, and publicly administered, but the Commission should be left with maximum flexibility to phase it out in light of changing circumstances. It is thus a mistake to specify a standard (110 percent of the national average) and require, as H.R. 5158 apparently does, that the Commission must administer the fund so as to hold costs to that figure (with a cap based on the 1981 separations process). S. 898 seems to permit the Commission greater discretion in imposing the surcharge. But better still, Congress should face reality and direct the Commis-

sion to exercise its discretion and to provide, over an appropriate length of time, a fair, competitive environment. Congress should also make clear to the states that the long-range solution is to move local charges to a system whereby the subscriber pays for the basic non-traffic-sensitive access plant, and then pays on a usage-sensitive basis for all other use, local or interexchange. The present scheme is most unfair, and does not permit the poor and the elderly, among others, to control their phone bills.[14]

The modification requires the Bell Operating Companies (BOCs) to provide exchange access and services "on an unbundled, tariffed basis that is equal in type, quality, and price to that provided by AT&T . . ." (par. II(A)); the charge for each tariffed service must be "cost justified" on an element-by-element basis and must be non-discriminatory in effect (App. B., par. B(2)). These tariffs are to replace the division of revenues process (App. B., par. B(1)). Thus, the modification calls for the end of the revenue pooling process among the Bell Companies, while the FCC's access charge proposal in Docket No. 78-72[15] contemplates uniform, nationwide access charges and pooling of access revenues.

The Commission's proposal does not promote efficiency, since under pooling the exchange companies are not allowed to reap the benefits of any improvement. Further, the process would give off false economic signals (with market distortion, depending on whether the actual costs of local exchange service are below or above the average nationwide costs, and on the differing costs or capital among companies). Given a second chance by the modification, the Commission should clearly opt for a cost-based system of access charges for all BOCs and independents, without pooling.[16] It is encouraging that the Commission's new notice not only looks in the proper direction but squarely raises the concept of charging the subscriber directly for the cost of access to the local switch, in contrast to the current practice of allocating the cost of non-traffic sensitive plant on the basis of usage.[17]

## The Treatment of the AT&T Issues

As stated, comparison is most difficult in this area. First, some areas of agreement should be noted. The Senate bill, the House bill, and the modification all allow AT&T to enter the CPE and enhanced (data processing) services field, and sweep aside the barrier of the

1956 decree. All specify interconnection with exchange carriers "equal in type, quality, and range of supporting services" by specified dates (see Appendix A, pp. 245-246). Further areas of agreement can readily be gleaned by examining Appendix A.

Perhaps the best way to compare the various efforts is simply an overview of each in chronological order. S. 898 was passed before the modification and therefore does not take into account the divestiture of the BOCs. To prevent cross-subsidization, it uses a fully separated subsidiary (FSS or sub) for all competitive areas (such as CPE, enhanced services like Advanced Communications Service (ACS), and information services like electronic yellow pages (Appendix A, pp. 228-229). The formation of the sub and its functioning vis-à-vis the parent are spelled out in great detail (see Appendix A, pp. 226-235, 241-243). The sub would be permitted to have its own transmission facilities after a specified period (Appendix A, p. 235). The bill also seeks to thwart cross-subsidization by requiring Western to sell substantial amounts outside the Bell System, and thus establish a market price (Appendix A, p. 247). It would open the Bell System to outside manufacturers by the blunt device of requiring a specified percentage of outside purchases for a set period (Appendix A, p. 247). And it would continue the economic regulation of MTS/WATS but would require the FCC at two-year intervals to determine whether deregulation is appropriate (Appendix A, pp. 235-236).

Von Clausewitz said that to win an offensive, one must have 3 to 1 superiority over the defenders. Proponents of legislation have to deal similarly with the defenders, those who will block unless their particular interests are met, for it is much easier for industry groups to block legislation than to pass it. This phenomenon is reflected in S. 898 by provisions prohibiting AT&T from providing burglar alarm or cable television services, or from accepting advertising on price and availability in any electronic Yellow Pages service (Appendix A, pp. 236-238). Since the FSS concept is to ensure fair competition in a hybrid (enhanced) data processing service like ACS, one could logically ask why it will not do so also for excluded areas such as burglar alarm service or electronic advertising. While an explanation can always be given (i.e., the information area is particularly sensitive and thus calls for special precautions), the real reason is simply the clout of the newspaper industry, the cable TV industry, or the lobbying arm of the burglar alarm business.

In short, S. 898 lets AT&T into CPE and the enhanced or information services on the basis of no economic regulation (entry, rate of return), seeks to prevent cross-subsidy through an FSS regulatory approach, employs rate regulation of MTS/WATS and specific regulation of interconnection and procurement, "buys off" the opposition of powerful opponents by provisions concerning, for example, the cable TV and newspaper industries, and finally hopes to move the industry, including AT&T, over time, to full deregulation.

The antitrust modification was entered January 8th, undoubtedly because AT&T despaired of the legislative process in light of the first draft of the House bill, H.R. 5158. This version, released December 10, 1981, amounted to a declaration of war on AT&T: it called for either several subs or one sub with substantial and growing outside ownership, and several other provisions that were anathema to AT&T. AT&T concluded that its salvation lay with the antitrust suit rather than with the legislative process. And to reach settlement, it also concluded that it was just too big; it would never be allowed to respond rapidly to new technology in the marketplace until it drastically restructured its huge monopoly (combined assets exceeding IBM *and* Exxon). It therefore threw off the structure so carefully put together by its early twentieth century leader Theodore Vail.

The modification is quite straightforward: it is a division of the company between the exchange companies (BOCs) and the rest of AT&T (Long Lines, Western, Bell Labs).[18] There are further provisions for access charges and interconnection of the BOCs with interexchange carriers. There are no restrictions on AT&T, because in Justice's terms, the modification separates "the workably competitive" (interexchange from the monopoly (exchange), or "the inevitably regulated from the potentially competitive."[19] There are serious restrictions on the BOCs, which could only provide interexchange telecommunication services or information services; manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.[20]

The Justice Department's Competitive Impact Statement (CIS)[21] asserts (at 25): ". . . [T]he proposed modification's requirement that the divested local exchange monopolies be limited to the provision

of exchange telecommunications and activities that are natural monopolies subject to actual tariff regulation will prevent the creation anew of incentives and abilities in the BOCs to use their monopoly power to undercut rivals in competitive markets."

As for H.R. 5158, it was revised after the January 8, 1982, modification; thus the bill, premised upon the modification, also modifies it. The bill gives the FCC considerably greater powers than S. 898 or the present Act to promote competition and to regulate the dominant carrier's monopoly activities (e.g., the FCC would have power to regulate switching and to approve or reject any tariff before it went into effect)[22] (Appendix A, pp. 244, 248-249). H.R. 5158 also uses a separate subsidiary to protect against cross-subsidization from the *de facto* monopoly interexchange base; unlike S. 898 or *Computer II*, it is Long Lines that becomes the separated entity (over the protests of AT&T, which asserts that Long Lines needs integration with Western and Bell Labs to continue rendering its superior service) (Appendix A, pp. 228-229). It also specifies that Long Lines cannot bypass the local distribution facilities until 1988 or, if extended by the FCC, 1990 (Appendix A, pp. 236-238). As for the rest of AT&T, it would remain restricted in providing information services (e.g., no electronic Yellow Pages) (Appendix A, pp. 236-238). Final deregulation of AT&T is not explicitly promoted but would depend on its reclassification as a nondominant carrier, which in turn depends upon meeting national standards of available alternatives (Appendix A, pp. 235-236).

The BOCs are both hindered and helped. The hindrance is removal of their FCC-granted preference in the important new cellular area (Appendix A, pp. 236-237). The help consists of revising the modification to give the BOCs printed Yellow Pages[23] and the Class IV office (toll office interface with the local network) and to allow them to sell (but not to manufacture) customer premises equipment after a five-year period (Appendix A, pp. 233-234). Further, assets would be evaluated and transferred, after the BOCs were spun off (Appendix A, pp. 233-234).

## Analysis of AT&T Treatment

In the author's view, there need not be extended discussion of either S. 898 or H.R. 5158, because neither bill is apt to become law in anything like its present form. S. 898 is flawed because it

was enacted prior to the modification and requires substantial revision (for example, in regard to the 1956 Consent Decree and the purchase provisions). It would appear that the Senate might start again, perhaps after House action, and this time proceed with a much simpler bill. That would be an improvement, since what is called for are sound guidelines, with the details left to the action of the agency, which must be given considerable flexibility to adjust implementation in light of new experiences and circumstances in this dynamic field. One should not, however, count on the bill remaining in a short, overall guideline form: the history here is that the lobbying industries insist on a detailed "pound of flesh," or interpose strong opposition; and that history may well be repeated. Finally, one should anticipate that the "protectionist" provisions that benefit newspapers, cable television, and others, will remain or will be added somewhere along the line.[24] So also will access and surcharge requirements, but one hopes that the latter will be couched generally, so as to give the FCC the authority to wind down the subsidy over time, as competitive circumstances require.

H.R. 5158 does not suffer from passage before the modification and contains some meritorious provisions (e.g., printed Yellow Pages to the BOCs and more effective FCC tariff regulation). But the bill is less deregulatory in regard to all carriers, including AT&T: it points much less in the direction of final deregulation of AT&T, and indeed, holds on unnecessarily to many present restrictions. Thus, the bill would forbid AT&T to have transmission facilities outside of Long Lines. Why, if there is no unfair competition involved? The stated reason—to preserve AT&T's core network—assumes too little faith in competition, which is coming rapidly to this area.[25] So also, the bill constrains competition in local distribution by restricting AT&T—and AT&T alone—from bypassing for five to seven years the present local exchange companies; competition from all quarters should be welcomed in this monopoly field. The bill is still managing a cartel in this respect. Finally, while reasonable arguments can be made for a number of other provisions, the provisions come very late in the game, and thus disrupt the also reasonable courses that have been taken with, for example, cellular radio, transfer of assets, and the use of a separate sub for the competitive part of AT&T (as provided in *Computer II*) rather than for Long Lines (as proposed in the bill). AT&T is vigorously opposing the bill with its lobbying campaign of shareholders and its various

affiliates. So also is the union, the Communications Workers of America (CWA). If von Clausewitz is correct, H.R. 5158 cannot be enacted with its present provisions.

This analysis makes the modification all the more important, because it *will* become operative. The modification represents a most constructive step forward: by spinning off the operating companies, it provides the framework for fair effective competition between interexchange carriers (since the essential "tails" will no longer be under the control of the dominant interexchange carrier and seller of telecommunications equipment to the BOCs).

There is an underlying incorrect assumption of the modification that should be addressed, because that assumption leads to a basic flaw. The assumption is that the modification has divided the company into two parts, one competitive (AT&T) and the other a monopoly (the BOCs). The flaw is the treatment of the BOCs, which is anticompetitive and disserves the public interest.

## The Treatment of the BOCs Under the Modification

The three restrictions on the BOCs have already been set out. The reason for both the first restriction on interexchange telecommunications and that part of the second which prohibits manufacture of products or CPE is obvious.[26] If the BOCs were able to enter immediately into interexchange services and/or CPE manufacturing, one main objective of the modified decree—to remove the BOCs' incentive to favor their own affiliates—would be thwarted. My strong disagreement is thus limited to the third restriction on information services and to that part of the second restriction prohibiting BOCs' sale of CPE.

Santayana has said that those who do not learn from the past are condemned to repeat its mistakes. To enter this portion of the modified decree in its present form would be to repeat the mistake of the 1956 Consent Decree.

It is generally acknowledged that the 1956 Consent Decree disserved the public interest. The interested Congressional committees have consistently reached that conclusion,[27] as have the FCC,[28] the executive branch (both the Carter and the Reagan Administrations),[29] and indeed, with the January 8th modification, the Justice Department. AT&T has stressed that its main interest in the settle-

ment is the elimination of the 1956 decree restrictions, so that it can enter, without regulation (entry and rate of return) the new information field (e.g., ACS and videotex).[30] Technology—the revolution in modern electronics—is driving AT&T to a new dynamic with the quick introduction of new services and products in the marketplace.

However, this same fast-paced technological change confronts not only AT&T but the entire telephone industry, including GTE, United, Continental, and others. It also involves the BOCs. Yet they, and they alone, would be precluded from offering a local or regional ACS or other enhanced service. The BOCs are under the tightest possible "1956 decree" restrictions.

On its face, this approach has clear detriments. First, it removes seven important competitors who could contribute markedly to the goals sought by a competitive marketplace: innovation, prices driven down to marginal costs, efficient services and products, etc. Suppose the Department of Justice were to launch tomorrow an antitrust suit that sought to prevent General Telephone of California from offering new enhanced services (e.g., Telenet and videotex) and to restrict that company solely to exchange (including access) services. Such an action would be regarded as disserving the competitive goals of the antitrust laws, yet that is precisely what the Justice Department is seeking for Pacific Telephone and Telegraph (PTT), for example. PTT is in the same market position as General, although PTT has no manufacturing or interexchange facilities.

It is important to bear in mind that the competitors for information services have not yet emerged in the market in the way CPE and interexchange competitors have. Surely, the ultimate goal is to maximize the number of such services available to the consumer. Competitors should be excluded only for the most compelling reasons.

Thus, the nature of local exchange service is changing. Consumers are demanding services that complement plain old telephone service; many of these services would be considered "information services" under the proposed modification. If allowed to develop freely, the BOCs could offer security and alarm services; paging systems; facsimile, digital, and data transmission; access to valuable data banks, including electronic Yellow Pages; slow scan video service; interactive functions; and more.

There is a second detriment, that of the effect on the BOCs. I am not here arguing that the BOCs will not be viable. The BOCs will have continuing and critically important local telecommunications

responsibilities and may be able to expand upon these in new areas (e.g., the new cellular or Advanced Mobile Phone Services). Questions of viability will turn largely on the actions of the FCC toward access charges or of the State Public Utility Commissioners (PUCs) toward the rate of return on exchange services.

Rather, my concern stems from the nature of the BOCs under the third restriction. The BOCs should have the same right to enter the "information" marketplace that AT&T, IBM, and GTE have. When a BOC is denied the opportunity to be on the cutting edge of new developments, when its market opportunities are so drastically and artificially segmented, it becomes a different company, unable to attract maximum investment or aggressive, innovative managers. And this in turn adversely impacts competition and the public interest.

Further, the restriction on providing information services may inhibit the BOCs' adoption of new technologies. For example, the proposed modification allows information storage, or changes in the form of the message, only if such changes are an "inherent aspect" of the transmission process. However, as soon as a BOC storage function becomes part of a service offering, or any change is made in the form of a message "as sent and received," the result would be a prohibited information service, one beyond the legal authority of any BOC to provide. In this situation, the BOCs may be slowed down or prevented from completing the transformation to, for example, a digital network.

Another detriment is the difficulty of market segmentation. To give but one illustration, the settlement permits the BOCs to provide directory assistance (white pages) as part of their exchange operations, but not Yellow Pages (CIS at 29, n. 24). But this dichotomy fails to recognize changing technology: over time, directory assistance will surely be electronic. In this form, the business being listed may well desire some advertising reference in connection with its electronic listing. This is efficient, and it serves the public. But such efficiency will be thwarted by the market segmentation now being proposed. If the newspaper industry petitioned the Department of Justice for such a restriction of AT&T, it would undoubtedly be rejected as "protectionism." But such "protectionism" is now to be imposed upon the BOCs.

In the face of these detriments, there must be very strong countervailing considerations for the restriction. Certainly there are substantial problems involved in BOC entry into the competitive

information/enhanced services area. The BOCs now control essential exchange facilities, particularly those going into residences, and, unless they are prevented, they can cross-subsidize using this monopoly exchange base.

But the central issue is this: on balance, are competition and the public interest better served by suppressing entirely the competitive contribution of the BOCs or by employing other devices that give substantial assurance of fair competition while permitting the BOCs entry? The use of protective measures such as those the FCC specified for GTE or AT&T in *Computer II* will markedly serve the public interest in BOC participation in this area. Thus, these measures (e.g., the separate subsidiary) will ensure that the essential exchange facilities are made available, on the same basis and terms, to the BOCs' competitors,[31] and will very largely deal with the cross-subsidization issue. Of course, requiring a separate subsidiary does not solve all problems, including those of incentives for self-dealing. No solution will eliminate all possible controversy. Transitions are messy, and until effective competition comes to the exchange area, litigation can be expected. But such litigation is preferable, I submit, to the Draconian solution proposed by the Department of Justice: complete suppression of important competitors. That solution may be tidy and certain, but so is death; life here is messy competition by all.

The fallacy of the Department of Justice approach is seen by the analysis of the AT&T situation. The Department of Justice is kidding itself when it asserts that the AT&T interchange situation is now workably competitive. It is surely on the road to workable competition,[32] and the FCC should be alert to removing restrictions promptly when that time comes. But it is not here now, as the expert agency has found, and without challenge in either court or Congress.[33] There is thus an undisputed finding that interstate service entails a *de facto* monopoly situation in which AT&T can engage in unfair cross-subsidization unless a fully separated subsidiary is employed.[34]

Thus AT&T, quite properly, is allowed to engage in the new enhanced services if it uses an FSS approach; yet each BOC is to be barred. Why? Certainly the fully separated subsidiary approach will work equally well in the case of the BOCs. Indeed, the BOCs appear to have less of an ability to hide subsidies than does the pre-

divested AT&T; further, they lack research and manufacturing facilities.

Moreover, the underlying premise of the settlement—that a division has been made between competitive and monopoly services[35]—is incorrect. The BOCs face rising competition of a significant nature.[36] This competition will come from cable distribution,[37] from radio transmission (e.g., cellular, digital termination, private digital microwave, broadcast subcarriers, vertical blanking intervals, and multipoint distribution systems) and, in the near future, from fiber optics. Ultimately, such competitive technologies will provide the end link to satellite transmission (e.g., Satellite Business Systems types of services). Competition will first involve large business users and user sites,[38] but over time it will come to residential customers, chiefly through cable and advanced radio techniques. Its growth is inevitable, and will be affected not only by technological but regulatory developments, particularly the elimination of the present false economic signal as a result of the operation of the arbitrary separations and settlement process.[39]

My view that the BOCs should be permitted to offer enhanced services does not rest or depend upon this increasing competition in local telecommunications. But certainly my position is bolstered by that consideration, for it strengthens the parallel with AT&T: both interexchange and exchange *over time* will encounter ever-increasing competition. There is little profit and no merit in trying to distinguish between the pace of such competition in the two situations.

The CIS recognizes the shifting nature of exchange telecommunications (at 31):[40]

> The limitations the proposed modification places on the divested BOCs are predicated on the existence of the BOCs' status as regulated monopoly carriers. Technological change presently under way, however, may cause the local distribution function of the divested BOCs to lose its monopoly character and, perhaps, eventually result in its deregulation. Under Section VII of the proposed modification, a divested BOC may petition the Court for such "further orders and directions as may be necessary . . . for the modification of any of the provisions" of the proposed decree. The Department of Justice intends to give careful attention to changing technical, competitive, and regulatory conditions as they may apply to the divested BOCs, to review carefully suggestions by a BOC that there is no longer a

> sound economic and antitrust basis for the complete retention of the restrictions imposed by Section II, and, if appropriate, to join in requests for modification. Whether or not the Department joins in any such proposal for modification, it remains within the power of the Court to remove any restrictions it determines are no longer necessary to effectuate the purposes of the proposed modification and that are contrary to the public interest.

The foregoing is certainly apt about the restriction on interexchange and manufacture of CPE. The District Court, the Justice Department, and other interested persons should be alert to a modification or elimination of these restrictions as soon as appropriate. (See n. 25, *supra*.) Certainly the experience of the 1956 decree should not be repeated.

But such a way of proceeding is unsound policy when it comes to the third restriction (and that on the sale of CPE). Unlike the case of the first two restrictions, designed to ensure fair interconnection of the interexchange carriers and fair procurement, there have been no abuses and no need to correct past situations in regard to new information or enhanced services. It is correct, as I have acknowledged, that future problems can arise with the BOCs and these new services, just as they can arise with these services and AT&T. It is thus important to deal with these possible problems. But to go further and suppress the competition of the BOCs in this important new area would be just as wrong as it would be in the case of AT&T.

Finally, the argument is advanced that with this division, a bright line has been drawn; litigation will end; and all parties will now proceed, secure in their respective areas—the regulated and the unregulated. I believe that the Department of Justice has simply exchanged one form of litigation for another.

For if we have learned nothing else from the nearly two decades during which the FCC struggled with its computer inquiries, we should have learned by now that regulators—or judges, for that matter—do not draw clear or "bright" lines between communications and data processing (as the original Computer Inquiry sought to do) or between telecommunications service and information service (as the new decree would require).

Under the proposed consent decree, the BOCs and the state regulators will have an incentive to read the definition of regulated "exchange telecommunications service" as broadly as possible, so

as not to deny the BOCs and their customers new offerings. The state regulators will feel the same pressure that members of the FCC did during their time on the definitional cross.

The result will be a new round of litigation. Parties will complain to the Department of Justice of such BOC or state commission actions. The Department of Justice will act or not, depending on its construction of the definition in the proposed settlement. And the District Court will be called upon to rule definitely in areas that defy definiteness because of dynamic technological and related changes.

Further, the result of this fuzzy line and regulatory pressure may well be an expansion of regulation. Since the BOCs can enter only *regulated* markets, the number of such markets will begin to grow. State regulators will act to protect their turf just as the BOCs will act to protect their markets. As a result, competing, unregulated vendors (such as cable systems, private networks, even companies providing inside wiring) may find that they, too, are regulated and forced to file tariffs. Or, they may be barred altogether from competing just to protect the health of the BOCs and keep basic phone rates low.

I therefore strongly believe that the modification should be revised in two respects—to allow the BOCs, with appropriate protection for competition, to enter information (enhanced) services and to market CPE.[41]

## FINAL PREDICTIONS

It is most difficult to predict future developments here. Thus, I have been wholly surprised by such developments as the January 8th modification. So with that strong caveat, I hazard the guess that there will be no legislation. A new short bill will be kept in readiness in the Senate, and H.R. 5158 will make some further progress in the House. But the belief in no final passage stems from a combination of factors: the opposition of AT&T (and, perhaps more important, of the Communications Workers of America), the fact that there are so many competing legislative claims on this Congress in an election year; the large differences between Senate and House in approach, etc. A Damon Runyon character once said that "everything in life is 6-to-5 against," and that aphorism would appear apt to legislation in this field.

Assuming, then, no legislation, the antitrust settlement would be of crucial importance. The court has been inundated with Tunney Act comments, and has called for further, more specific filings by the end of June 1982. While the court under the Tunney Act (Antitrust Law Amendments of 1974) is to ". . . make an independent determination as to whether or not the entry of a proposed consent decree is in the public interest as expressed by the antitrust laws," there is not likely to be any drastic change. First, because it is a consent agreement, there are obvious practical limitations on how much it can be changed if the parties are to continue to consent to be bound by its terms. Second, the forum is an antitrust case, and not the Congress rewriting the Communications Act. Accordingly, issues such as whether AT&T should engage in mass media services would appear inappropriate for the court on the record before it; rather, they seem policy issues for resolution by the Congress. It would be my guess that what is most likely is a closer judicial supervision of the implementation provisions and a re-examination of some restraints at specified intervals.

In that respect, it is hoped that there will be the two modifications of the restrictions on the BOC. It has been suggested by some that these two restrictions should be maintained for some short period (e.g., three to five years), and then "sunsetted" in the decree. Certainly, that would be far preferable to the present indefinite ban. But, for the reasons developed in this article, the restrictions should be eliminated *now*. Every year of their existence bars needed and desirable competition.

In sum, Congress should act to establish telecommunications policy; but as has been the case for the last six years, it will probably fail to make this breakthrough. If that failure happens, then one must hope for the following: that the modified consent judgment will include the above-described revision in regard to the BOCs; that the FCC will continue with its fully separated subsidiaries concept (if sustained by the court[42] and strengthened as has been urged[43]) and with its revision of access charges,[44] and will be alert to future deregulatory moves as circumstances dictate; and finally, that Congress, after these actions, with pass a bill in the 98th Congress dealing with intrastate toll, defense, and other issues calling for legislative guidance. All of that certainly embodies a great deal of hope.

## COMPARISON BETWEEN H.R. 5158, S. 898, AND COMPUTER INQUIRY II

| H.R. 5158 | S. 898 | COMPUTER INQUIRY II |
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| | **OBJECTIVES** | |
| The bill provides for significantly broader FCC authority to establish and promote competitive conditions. The other stated purposes are to maintain and improve universal service, guarantee reasonable and affordable rates, bring about a wide variety of service and product offerings, encourage federal/state regulatory cooperation, promote a diversity of information sources, advance the commercial and technological leadership of the United States in domestic and foreign markets, and support the national defense, emergency preparedness, and the safety of life and property through the use of telecommunications. (*Sec. 101*).* | The bill proposes to increase reliance on marketplace forces and the private sector, to the extent that there is effective competition, and to provide all telecommunications services and continuing improvements in telecommunications technology, while assuring the availability of basic telecommunications service at reasonable rates and meeting vital national defense and security needs. (*Sec. 201*).** | The decisions propose to create an environment conducive to provision of customer premises equipment (CPE) and "enhanced" services on a competitive basis, and to remove artificial restriction on the use of communications and computer technology. (*F.D. ¶ 100-101*)*** |

*H.R. 5158 references ("Sec.") are to the 1934 Communications Act as it would be amended by the "Telecommunications Act of 1981" as reported out of the House Subcommittee on Telecommunications, Consumer Protection and Finance on March 25, 1982.

**S. 898 references ("Sec.") are to the 1934 Communications Act section numbers as amended by the Telecommunications Competition and Deregulation Act of 1981 which passed the Senate on October 7, 1981.

***CI-II references are to paragraph numbers of the Final Decision ("F.D. ¶") of April 7, 1980 and the Order on Reconsideration ("Rec. ¶") of October 28, 1980 as amended by the FCC decision on Further Reconsideration ("F. Rec. ¶") of October 7, 1981.

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| | **REGULATORY JURISDICTION** | |
| The bill alters the present federal/state jurisdictional boundary. The FCC has authority regarding interexchange and international transmissions where competitive markets cannot be relied on to achieve the purposes of the act. The Commission shall delegate all authority over services and facilities located within a state to any state commission which accepts such uniform standards established by the Commission. Neither the Commission nor any State shall regulate enhanced services or associated products, terminal equipment, inside wiring, or resale or shared use of interexchange or enhanced service. (*Sec. 201, 221 and 231*).<br><br>State commissions have exclusive authority over the offering of exchange transmission services including establishing exchange areas, except as otherwise provided in the bill—*e.g.*, provision of exchange access to interexchange car- | The bill alters the present federal/state jurisdictional boundary. The FCC would regulate interexchange and foreign telecommunications services. States would retain regulatory jurisdiction over intraexchange services, including responsibility for determining exchange boundaries. (*Sec. 221 and 231*).<br><br>The FCC and state commissions are precluded from regulating CPE or information services, which are not considered part of transmission facilities. (*Sec. 234(a)(1)*). The FCC is permitted to determine what basic services should be universally available at reasonable terms and conditions, and whether such services should be regulated (*Sec. 236*). | The fundamental change is that network services are divided into "basic" (*F.D. ¶ 93-96*) (which remain regulated) and "enhanced" (*F.D. ¶ 97-98*) (which are detariffed but remain subject to regulation). Enhanced services will not be subject to Title II regulation but will be subject to more general Title I regulation (*e.g.*, Cable TV) in the form of structural separation and market oversight. (*F.D. ¶ 122-128*). A waiver process for the basic/enhanced distinction is provided so that AT&T could petition to provide an enhanced service through the basic network if certain conditions are met. (*Rec. ¶ 21*). The FCC would exercise jurisdiction over eventual detariffing of both state and federal CPE. (*F.D. ¶ 184-189*). States may wish to impose additional safeguards on carriers to protect their ratepayers.* (*F. Rec. ¶ 83, 86*). |

riers. For five years after enactment, state commissions may continue to regulate interexchange services originating and terminating within state boundaries. (*Sec. 231*).

In addition to the broad jurisdiction and regulatory discretion granted to the FCC in the bill, the FCC may increase the bill's requirements if it determines such an increase is an effective and appropriate response to the circumstances addressed. (*Sec. 510*).

## CARRIER CLASSIFICATION

Within six months of enactment the FCC must classify all carriers which own interexchange facilities as dominant carriers, regulated carriers, or deregulated carriers. AT&T would be the only dominant carrier. Regulated carriers would be interexchange carriers offering a regulated service. A regulated service is a transmission service offered as of January 1, 1982 by a carrier participating in jurisdictional separations where there is a lack of adequate alternative facilities from unaffiliated carriers. A regulated

AT&T is classified as a dominant regulated carrier. All carriers which currently derive revenues from separation and settlements are classified as regulated carriers. All other carriers would be classified as unregulated carriers. The FCC may classify or reclassify as a regulated carrier any carrier which provides basic service or which owns or controls telecommunications facilities for which there is no reasonably available alternative. (*Sec. 203*).

AT&T is the only carrier classified as "dominant" for purposes of the requirement to provide enhanced services and customer premises equipment through a fully separated subsidiary. (*Rec.* ¶ *70*).

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carrier is to remain so classified until it no longer offers any regulated service. The FCC may establish subcategories of regulated carriers and additional criteria to be used in classifying carriers. (*Sec. 212*).

AT&T can offer transmission services or own or operate transmission facilities only through a separate carrier subsidiary, which must be established within 180 days following AT&T's designation as a dominant carrier. This carrier subsidiary may manufacture and market only common carrier services and facilities.

Separation requirements between AT&T, the carrier subsidiary, and any other affiliates include:

- no joint venture or partnership, except for foreign ventures,
- no employees or financial structure in common,
- no ownership or use of property in common except transmission

**S. 898**

## STRUCTURAL SEPARATIONS

The bill contains criteria for separating any fully separated affiliate (FSA) from the dominant regulated carrier or its affiliates and a requirement that AT&T file a plan with the FCC demonstrating its proposed method of compliance with the separation requirements. An FSA must have no more than one director in common, no common officers or employees, and must maintain separate books and records. An FSA cannot own property jointly with its parent or regulated affiliates and must carry out directly its own marketing, sales, maintenance, operations, advertising, installation, production, manufacturing and R&D. The FSA may not enter into any joint venture or partnership except

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AT&T is the only telecommunications carrier which is required to form an "arms-length" separate subsidiary for provision of enhanced network services and CPE. (*Rec. ¶ 66-72*). FCC has determined, but may change (*F.D. ¶ 207; Rec. ¶ 63*), certain separation requirements, generally requiring that the FSS operate independently in the provision of enhanced services and CPE. The subsidiary may purchase equipment the parent sells to the general trade as long as software or firmware contained therein is not customized, but is generic. The subsidiary may contract with a manufacturing affiliate to perform proprietary R&D on a compensatory basis for products and pro-

services which are provided under tariff without discrimination,

- no common marketing, sales, advertising, accounting, personnel hiring or training, purchasing, maintenance, tariff preparation, or operations,
- all dealings by contract to be filed with the FCC and made available to the public,
- must maintain separate books, records, and accounts and must have conducted an annual audit,
- may carry out institutional advertising with the dominant carrier, provided the costs are shared in proportion to earnings and the advertising is not service-specific.
- A dominant carrier may not obtain any security issued by the carrier subsidiary unless market value is paid, *but* the subsidiary may not issue any security to any person unless approved by the Commission.
- must file various reports required by the Securities Exchange Act and be subject to disclosure and penalty provisions of that act. (*Sec. 251*).

as permitted by the bill, in times of public peril, disaster or national emergency or for activities outside the U.S. Aside from these restrictions the FSA and its affiliates can conduct business with its dominant regulated carrier with respect to the furnishing of goods, services, and facilities, providing such transactions are pursuant to contract filed with the FCC, auditable, compensatory and contain no preference based on affiliation. These contracts may, under rules to be established by the FCC, be made public. AT&T must first file a plan with the FCC demonstrating that it has established an accounting system to insure proper cost allocations of the Act. (*Sec. 227*).

cesses not using software. (*F.D.* ¶ *244-248; Rec.* ¶ *91*). Other separation requirements include: separate books of account (*F.D.* ¶ *236*), separate officers (*F.D.* ¶ *249*) and operating, marketing, installation and maintenance personnel (*F.D.* ¶ *239*) and separate computer facilities for the provision of enhanced services. (*F.D.* ¶ *241*). A further requirement is that all transactions, contracts agreements, accounting entries or other arrangements between the FSS and its parent and other affiliates involving the transfer of money, personnel, assets, resources or anything of value must be filed with the FCC within 30 days after such an agreement is made. (*F.D.* ¶ *252*).

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| The dominant carrier is required to maintain and file with the Commission a description of protocols and technical connection requirements for use of transmission services and facilities and to report any material changes when a decision is made to adapt or implement any change. The FCC is also authorized to establish additional standards to prohibit disclosure to any affiliate information concerning protocols and technical requirements for connection with or use of transmission services and facilities until such information has been made available to the public. (*Sec. 252*). | | |
| There is no further separation requirement imposed although the FCC is permitted to take such actions as are necessary to prevent anticompetitive practices between the carrier subsidiary and other affiliates and to protect common carrier service users from bearing any costs not associated with the carrier subsidiary. (*Sec. 231(i)*). For enhanced services the bill requires separate charges, accounts and records, but no separate subsidiary. (*Sec. 226*). | | |

| | FSS/FSA VERTICAL INTEGRATION | |
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| There is no requirement to split functions of Western Electric and Bell Labs, except that any dealings between those AT&T affiliates and the carrier subsidiary would have to be on a separate basis as provided in Sec. 251, including a requirement that all dealings would have to be under an auditable, cost supported contract, reported to the FCC and available to the public. (*Sec. 251*). | In addition to other structural separation requirements the fully separated affiliate must:<br>• Not offer any interexchange service like or similar to a service previously provided under tariff for two years following enactment with a possible two year extension by the FCC. Regulated carriers are required to continue such services under tariff for a two year period.<br>• Perform for itself or acquire from non-affiliates all final assembly and related design activity and software programming for its exclusive offerings within four years of enactment.<br>• Produce for itself or acquire from non-affiliates subassemblies including all subassembly-specific research and development for its exclusive offerings within six years of enactment. However, the FCC may permit the FSA to buy subassemblies from an affiliate if that affiliate offers them to non-affiliates at arm's length and on the same terms and conditions. | There is no requirement to split the functions of Western Electric and Bell Labs; the FSS may continue to use services, products and research and development capabilities of BTL and WECo with the exception of non-generic software. (*F.D. ¶ 247-248; Rec. ¶ 86, 89-91*). |

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| | • Produce for itself or acquire from non-affiliates components including any related functions and activities for its exclusive offerings within six years of enactment. The FCC may permit the FSA to buy components from an affiliate if the affiliate offers them to non-affiliates at arm's length and on the same terms and conditions. Thereafter, all applied research and development, manufacturing and any related functions or activities in support of unregulated products or services are to be conducted through an FSA or non-affiliate unless such products or services are for use or sale outside the U.S. (*Sec. 228*). | |
| | An FSA is exempt from the patent licensing requirements of the 1956 Consent Decree which still apply to the regulated entity. International operations are exempted from the Consent Decree, the Robinson-Patman Act and the separate subsidiary requirements. | |

CORPORATE FORMATION and TRANSFER of ASSETS

Although there is no explicit FSS formation requirement, the bill adds provisions which alter the procedures of the proposed Modified Final Judgment. Facilities, personnel, and books of accounts are to be allocated between AT&T and the BOCs before divestiture of the BOCs. Securities are then to be exchanged so that each includes an interest in only one BOC or AT&T. An SEC determination must be made that such exchange does not violate the Securities and Exchange Act, after which the BOCs are to elect new officers and directors. Then representatives of AT&T and the BOCs would present proposed values of the separated assets to the Transitional Joint Board (TJB). Within six months, the TJB would present its advisory opinion on the value of the assets to the Department of Justice which has responsibility for the final decision.

Notwithstanding any court order, BOCs which published printed directory advertisements as of January 1, 1982, may continue to publish them. BOCs are to continue to offer in-place terminal

Following enactment, in order to provide deregulated telecommunications services, information services and CPE, AT&T must file a plan with the FCC demonstrating a proposed method of compliance with the Act. After receiving comments the FCC must act on the plan within 180 days, and if not approved, AT&T may file an amended plan which must be acted on within 30 days. The plan must demonstrate: 1) an accounting system which ensures compliance with the Act and a complete separation between the FSA and its parent, 2) compliance with the separation requirements, 3) fair and proper valuation of assets, and 4) fair and proper initial capitalization. A three-member Assets Evaluation Board, selected by the FCC, at least one of whom is chosen on the recommendation of National Association of Regulatory Utilities Commissioners (NARUC), will determine the value of any assets transferred from AT&T to an FSA. Evaluations of this board will be binding upon the FCC and state commissions unless the FCC finds them arbitrary, capricious or inconsistent with the Act. (*Sec. 228*).

An implementation docket will be commenced 60 days from the release of the Order on Further Reconsideration (10/30/81) to determine the appropriate transition methods and the valuation of all assets to be transferred to the FSS. (*F.D.* ¶ *166; Rec.* ¶ *49, 54*). A Federal State Joint Board has been convened to recommend necessary separations and settlements changes to the FCC. (*F.D.* ¶ *63; Rec.* ¶ *52*). Development costs for formation of the FSS (*F.D.* ¶ *258*) and enhanced services must be reported to the Commission and accounted for in a capitalization plan to be filed with the FCC *180* days prior to formation of the FSS. Generally, the transition period extends from the present until *1/1/83*. (*F.D.* ¶ *164, 266; Rec. 105; F. Rec.* ¶ *69*). As of *1/1/83* "enhanced" services and new CPE (*i.e.*, on customer premises or in carrier inventories) will be detariffed. Enhanced services and CPE may be detariffed prior to this date if the separate subsidiary requirements are met. (*Rec.* ¶ *49); F. Rec.* ¶ *70*). New "enhanced" services offered after 7/18/80 will not be tariffed. In the case of

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| equipment under tariff until it is fully depreciated or sold to the customer. When fully depreciated, and in any event no later than January 1, 1990, all in-place terminal equipment must be sold publicly. Five years after enactment BOCs may sell new terminal equipment through a separate subsidiary. The BOCs shall also retain ownership of public telephones and all switching facilities within an exchange area used primarily to route transmissions to or from such exchange area unless the Attorney General rules otherwise. (*Sec. 291*). | | AT&T, non-tariffed "enhanced" services and new CPE must be offered through a separate subsidiary. AT&T filed a petition for further reconsideration with the FCC requesting the transition for embedded and new CPE to be simultaneous rather than bifurcated. This petition was denied by the FCC on 10/7/81. Within 75 days of release of the order, AT&T must file with the FCC a plan for sharing administrative systems and installation/maintenance for business services. (*F. Rec.* ¶ *60*). |
| | **DEPRECIATION** | |
| The Commission—assisted by a person to be hired by contract—is to design a system of records and accounts to accomplish a complete and proper allocation between costs for all regulated and unregulated facilities, services and equipment within 2 years of the effective date. The method adopted shall provide for full recovery of property costs not later than the | Recovery of all embedded capital investment on a remaining life basis shall be treated as an allowable expense for ratemaking purposes. New property may be depreciated for ratemaking purposes under any method approved by the FCC. A specific provision is included to assure capital recovery at rates comparable to those used by unregulated entities. (*Sec. 220*). | Capital recovery questions were deferred for consideration in implementation proceedings and are addressed in other dockets. (*F.D. 166–67*). |

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| end of the remaining life of the property involved. The determination of life of invested property shall reflect changes in technology, competition and economic viability. (*Sec. 223*). | | |

**FSS/FSA TRANSMISSION FACILITIES**

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| Only AT&T's carrier subsidiary may own any transmission facilities and this subsidiary cannot market any product or service other than common carrier services and facilities. (*Sec. 251*). | No restrictions are placed on the ownership of facilities by the FSA, but any such facilities would be subject to FCC approval under its Title III licensing procedures. In addition the FSA may not provide services or facilities like or similar to those of the dominant regulated carrier over its own facilities for a period of two years. The transition period may be extended an additional two years by the FCC if the dominant regulated carrier services or facilities are not subject to effective competition. (*Sec. 228(g)*). | The FSS is prohibited from owning its own transmission facilities (*F.D.* ¶*230*), except for facilities between multiple customer buildings at a common location (like an industrial park). A waiver to provide a customized transmission network for a single customer can be applied for by the FSS. (*Rec.* ¶ *82-83*). The subsidiary is not precluded from building transmission facilities for a customer so long as the FSS does not own or operate the facilities. (*F.D.* ¶ *229, 253; Rec.* ¶ *76, 101*). |

**FURTHER DEREGULATION**

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| There is no explicit provision calling for future deregulation of a dominant carrier's service, but a dominant carrier can be reclassified as a common carrier, *i.e.*, non-dom- | Within two years of enactment, the FCC must examine all regulated services to determine which services are subject to effective competition. Any such services (in any | No further detariffing is envisioned in the orders which are characterized by a forebearance from regulation approach. The FCC, however, as a part of the Title I |

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| inant (see Carrier Classification—Sec. 212). While there is no mandatory review of services of common carriers, the FCC may permit the deregulated offering of transmission services by a common carrier where there is substitutable service (in terms of quality, cost and geographic range) by unaffiliated carriers and sufficient offerings to ensure that costs will not be borne by users of common carrier services. (*Sec. 212*). | geographic area) are to be deregulated after a transition period of six months. A similar review is required at least every two years or upon petition by any party. (*Sec. 235*). In addition, inside wiring installed two years after enactment may not be subject to regulation and may not be provided by the dominant regulated carrier. (*Sec. 234*). | jurisdiction, will maintain market oversight and has reserved the right to impose further or new forms of regulation in the future as needed. (*F.D. ¶ 174, fn. 64*). |
| | **CONSENT DECREE** | |
| The bill assumes no 1956 Consent Decree and modifies the implementation of the Modified Final Judgment in regard to the BOCs (see Corporate Formation/Transfer of Assets). Several limitations are placed on AT&T. The FCC may establish a preference which increases the diversity of persons authorized to use the electromagnetic spectrum, or any portion of the spectrum, if it determines that such preference will promote the purposes of the bill. Any rule, regulation, or order prescribed or | The 1956 Consent Decree shall not bar AT&T or any affiliates from providing any telecommunications service and equipment, customer-premises equipment, information service, or other business incidental to such activities, provided that those which are not basic telecommunications services are offered through fully separated affiliates. The FSA requirement does not apply to Cincinnati Bell and SNET. Neither AT&T nor any affiliate may provide alarm or cable service in any area in which they | The FCC interprets the 1956 Consent Decree as not prohibiting AT&T from offering "enhanced" network services and CPE on a detariffed basis through a separate subsidiary. Enhanced services and CPE are seen as either incidental to regulated telecommunications services or, in the alternative, remaining subject to regulation, albeit a different form of regulation. (*F.D. ¶ 276-278; see also F.D. ¶ 159, 173-74, 182*). This FCC interpretation of the Consent Decree has been affirmed by the New |

issued by the FCC after April 1, 1981—*e.g.*, cellular mobile—which is inconsistent with this objective shall be null and void. (*Sec. 264*).

Any carrier except AT&T and the BOCs may offer any information publishing service over any transmission facility it owns. Neither AT&T nor the BOCs may provide such a service through any transmission facility it uses to provide regulated service. Notwithstanding this restriction, AT&T and the BOCs are permitted to provide directory listings or assistance, and electronic directory information; and for a limited period of five years following enactment, also may provide audio information of a specific type, and in the same exchange area in which they were providing the service as of December 1, 1981. Yellow Pages and public telephone would be assigned to the BOCs. AT&T would be the only carrier not permitted to bypass the BOCs' local facilities until 1988 which the FCC could extend to 1990. (*Sec. 263 and 291*).

provide exchange service. AT&T also may not offer in any of its exchange areas any "mass media" services or products, defined as TV and radio broadcasting, pay television, printed and electronic publications (including newspaper and periodicals and any service or product like or similar to a newspaper or periodical). AT&T may provide facilities for the provision of mass media, services and products to non-affiliates on a non-discriminatory basis. Services such as weather, time, any audio information service of the type which AT&T or any affiliate was engaged in on April 7, 1981 (such as Dial-It), printed directory advertising and electronic directory information may be provided only through an FSA other than an FSA providing telecommunications services or information services. The term "electronic directory information" includes general business and product categories, distributors and dealers under the general categories, and customer name, address, telephone number, and trademark or service mark. The term "electronic directory information" does

Jersey district court that oversees the decree over Justice Department opposition.

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| | not include information about specific products or services or prices or any advertising. Such specific information may not be provided by AT&T or any affiliate, although such information may be provided by others who control the content and substance of the information provided by means of AT&T facilities such as computer storage. AT&T's regulated telephone carrier services may continue to provide directory listings or assistance consisting of name, telephone number, and address as these services are excluded from the definition of mass media. The FCC has authority to decide in disputed cases whether any proposed service or product is a mass media service or product. (*Sec. 229*). | |
| | **TERMINAL EQUIPMENT** | |
| BOCs are to continue to provide in-place terminal equipment under tariff until it is fully depreciated or sold to the customer under sale prices the state commissions are required to fix. When fully depreciated or, in any event, not | The FCC and state commissions are specifically prevented from regulating customer premises equipment (CPE), although state regulators can require exchange carriers to provide a basic lifeline service. After the second anniver- | All new CPE detariffed as of *1/1/83* must be offered by AT&T through an FSS. New CPE may be detariffed prior to this date if the subsidiary requirements are met. Existing embedded CPE and that installed before 1/1/83 remains |

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| later than 1/1/90, all in-place terminal equipment not sold to the customer is to be disposed of in a public sale. Five years after enactment BOCs may sell (but not manufacture) new terminal equipment, which must be provided through a separate subsidiary. Public telephones are to remain with the BOCs. | sary of enactment, AT&T can provide such services and CPE only through a fully separate affiliate. (*Sec. 234*). | subject to regulation pending further proceedings in FCC. AT&T filed a petition for further reconsideration requesting a single transition date for embedded and new CPE. This petition was denied by the FCC on 10/7/81. (*Rec.* ¶ *48-51; F. Rec.* ¶ *69, 70*). |
| The FCC shall establish rules and procedures to insure that a regulated carrier or any manufacturing affiliate of such carrier shall make available for six years a supply of spare parts. Technical and production specification information must also be made available upon reasonable request and for reasonable compensation to any person. (*Sec. 242, 272 and 291*). | Tariffed CPE on date of enactment must continue to be made available under tariff for a minimum of two years, except for AT&T for which a period of three years plus a possible two year extension by the FCC applies. (*Sec. 235*). | |
| | **ACCESS CHARGES** | |
| A system of access fees is to be established to achieve equality of treatment among all interexchange carriers, to compensate exchange carriers for the costs of distributing interexchange transmissions, and to ensure the continued universal | The present telephone industry mechanism for support of basic telecommunications services—separations and settlements—would be replaced within two years by a system of exchange access fees based on costs or average | Addressed in separate FCC docket. |

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| availability of exchange services at reasonable and affordable rates. Initial tariffs to be filed with the FCC by exchange carriers are to go into effect no later than 1/1/86 with a three year phase-in period. In establishing fees or approving fees submitted by exchange carriers, the FCC shall be bound by the formulas established and maintained by the Transitional Joint Board in accordance with statutory criteria provided in the bill.<br><br>A National Telecommunications Fund is to be established and administered by the Transitional Joint Board to assist smaller exchange carriers in maintaining reasonable and affordable rates. The Fund is to have three accounts, *i.e.*, one account to ensure that to the extent the costs for the distribution of interexchange service and exchange service per main station for any carrier and its affiliates exceed 110 percent of the national average, such costs will not be borne directly by exchange ratepayers or by access fees, a second account | cost schedules in accordance with practices established by the FCC in consultation with a Joint Board convened under Section 410(c) of the Act. Decisions of the Joint Board are subject to review and modification by the FCC. In establishing the practices to ascertain and apportion costs between exchange service and exchange access, the FCC may consider establishing charges at rates which will provide exchange carriers with the level of revenue received in 1980. The FCC also may impose a surcharge on access charges to assure that implementation of the Act does not result in unreasonable increases in charges for basic telephone service (*i.e.*, in excess of 110 percent of the national average for comparable service). (*Sec. 222*). | |

to minimize disparities in charges which arise due to greater costs of providing connecting links to and from rural or other remote areas, and a third account to provide for an orderly transition from the level of payments from jurisdictional separation and settlements procedures to the level of payments available under the system of exchange access fees. Eligible exchange carriers included are those which certify that their costs for exchange facilities per customer access line exceed 110 percent of the national average and 1) have less than 50,000 customer access lines or 2) received approval for loans or guarantees under the Rural Electrification Act prior to 1/1/82. (*Sec. 233 and 234*).

## INFORMATION FLOW

AT&T must maintain and file with the FCC a description of protocols and technical requirements for connection with or use of its transmission services and facilities. In addition AT&T must report to the FCC regularly on a wide range of subjects, including decisions to

Dominant carrier (AT&T) must file with the FCC descriptions of operational protocols and technical interfaces required for interconnection with its regulated services, report any changes affecting existing or future interconnectability, provide construction program sum-

Information affecting possible changes to the network that would affect either intercarrier interconnection or connection of customer premises equipment to the network, and information concerning Bell construction plans must be disclosed to the public. (*F.D.*

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adopt or implement any material changes in such protocols or requirements, summaries of construction programs, or other information. No AT&T subsidiary, division, or affiliate may disclose to any other AT&T subsidiary, division, or affiliate any reportable information until the information has been made available to the public. In addition, the FCC may establish additional standards to prohibit disclosure of any commercial information between a carrier affiliate and any other affiliate of a dominant carrier unless such information is made available to competitors at the same time and subject to the same terms and conditions. (*Sec. 252*).

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maries and any other information regarding its regulated services required by the Commission. No information regarding operational protocols or interface requirements or any anticipated modifications may be disclosed by AT&T or its affiliates to an FSA or affiliate providing manufacturing or R&D support for an FSA except that the information may be filed with the FCC and released by the FCC. (*Sec. 214*). The dominant carrier is also prohibited from disclosing commercial information acquired in the provision of regulated telecommunications service to any FSA if it would provide the FSA with an unfair advantage. The Commission may require that certain types of information (*e.g.*, directory listing) be made available generally at reasonable, nondiscriminatory charges, terms and conditions. (*Sec. 227(f)*).

No results of research or engineering studies, the costs for which are used in determining charges for regulated services, shall be made

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¶ *246*). Customer proprietary information may not be made available to the FSS unless made available to competitors on the same terms as to the FSS. (*F.D.* ¶ *249*).

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| | available to an FSA prior to the time when such results are made available to competitors. If such results are made available to an FSA, competitors shall be provided with the results free of charge. (*Sec. 227(j)(3)*). | |
| | **EMPLOYEE PROTECTION** | |
| Employee protection concerns resulting from dominant carrier restructuring and divestiture requirements are addressed by the bill. Protection is provided with respect to employee job security, wage rates, seniority rights, termination compensation, relocation, and benefits following transfer from a carrier or affiliate to another company. (*Sec. 277*). | Employee protection concerns resulting from dominant carrier restructuring requirements are addressed by the bill. Employee protection provisions cover such items as job security, wage rates, seniority rights, termination compensation, and relocation and employment benefits for a period of from five to seven years following the transfer of an employee from a dominant carrier to a fully separated affiliate. (*Sec. 230*). | Not addressed. |
| | **ACCOUNTING SYSTEM** | |
| The FCC is required to develop within two years of enactment a system of accounts and records to accomplish a complete and proper allocation of costs for regulated and unregulated facilities, services and equipment. (*Sec. 223*). | A system of accounts for regulated carriers is to be established by the FCC within one year of the bill's enactment. At a minimum, the accounting system must enable complete allocation of all revenues and costs—including joint and com- | Addressed in separate FCC docket. |

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| | mon costs—between regulated and unregulated goods and services. (*Sec. 220*). | |
| **FACILITIES CONSTRUCTION APPROVAL** | | |
| Existing FCC authority to pre-approve carrier construction is expanded from interstate lines to interexchange transmission facilities, defined to include switching. (*Sec. 301(62)*). | Regulated carriers, other than AT&T, may begin construction of new transmission facilities upon notification of the Commission. While the Commission may require AT&T to obtain prior construction approval on a project-by-project basis, a long term facilities construction plan can be used with Commission approval. (*Sec. 214*). | Not addressed. |
| **ANTITRUST NEUTRALITY** | | |
| Specific bill language prohibits the bill from being construed to affect the application of any federal or state law or to affect in any manner the ability of a court of the United States to determine liability or to grant relief—including structural relief—in antitrust litigation involving a telecommunications carrier. The bill is not to be construed as expressing the sense of Congress with respect to any pend- | Specific language prohibits the bill from being construed to affect the applicability of U.S. antitrust laws or any defenses or remedies—including structural remedies—or expressing the sense of Congress with respect to any pending or future litigation. (*Sec. 404*).<br><br>The bill also includes a provision permitting the dominant regulated carrier and any person who owns | Not addressed. |

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| ing or future litigation. No antitrust action or relief granted is permitted to interfere with implementation of the Act, but compliance with FCC order is not a defense in antitrust litigation. (*Sec. 302*). | or controls a dominant regulated carrier to direct and manage the operations of the entire enterprise. (*Sec. 202*). | |
| | **INTERCONNECTION** | |
| Any carrier or business entity which owns or offers inside wiring must on reasonable request provide interconnection to any transmission service or facility or terminal equipment meeting FCC technical standards. The FCC is granted authority to specify or approve the manner, rates, terms, and conditions for such interconnection and may waive requirements in the case of small business entities.<br><br>Beginning January 1, 1988 or 30 days after receiving any written request, whichever is later, every exchange carrier must provide on an unbundled, tariffed basis access to any exchange, along with such technical information as the FCC determines necessary, which is | All exchange carriers must interconnect their regulated services upon reasonable request, and may not discriminate with respect to charges, terms and conditions. Not later than September 1, 1984, every exchange carrier must begin to offer to all interexchange carriers exchange access on an unbundled tariff basis that is equal in type and quality to that provided to its own interexchange services and those of any affiliated interexchange carrier. Every end office must provide such access by September 1, 1986 except where a waiver is granted pursuant to the Act. Dialing parity is required at such time as the national numbering (area-code) plan is revised. Interconnection requirements apply | Addressed in separate FCC docket. |

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| equal in type, quality, and range of supporting functions to access provided to its own interexchange services or those of its affiliates. Carriers must permit customers to obtain access to each of the components and segments of regulated services, including interexchange services, as is practical. (*Sec. 222 and 232*). | to any telecommunications carrier and to any facility or private system including all CPE. (*Sec. 207*). | |
| **NONREGULATORY REMEDIES** | | |
| In addition to establishing broad policies to protect the rights of users of unregulated services, the bill creates a new federal civil cause action for injunctive relief and civil damages on behalf of any interested person for violation of a broad scope of activities required by the bill. The right to bring such a law suit in Federal Court is in addition to any right such person may have under any other statute or common law. The court is granted further authority to award costs of litigation to any party bringing such cause of action, including attorneys and expert witness fees. (*Sec. 283*). | Not addressed. | Not addressed. |

## PROCUREMENT

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| Common carriers which are affiliated with manufacturers of facilities are to procure on a non-discriminatory basis facilities to be used in the provision of any service under tariff.<br><br>The FCC shall prescribe regulations to ensure that common carriers and exchange common carriers procure facilities in a competitive manner. (*Sec. 243*). | Not later than six months after the date of enactment, AT&T must adopt and implement a purchasing policy for itself and its affiliates, not including any FSA, for the fair and non-discriminatory procurement of telecommunications products. Not later than the second calendar year following enactment and for ten years thereafter a system of mandatory outside procurement quotas with a 20 percent cap is to be in effect. Quota categories are to be prescribed by the FCC with the exception of electronic switching for which the categories are to be on an item by item basis. (*Sec. 231*). In addition, the second calendar year following enactment, a second system of market check procurement quotas for telecommunications products takes effect. The quotas are based on a series of ratios relating to Western Electric sales to Bell System Companies and sales outside the Bell System. (*Sec. 239*). | Addressed in separate FCC Docket. |

## TARIFF FILING PROCESS

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| Regulated carriers may use either of two tariff filing methods. Under one method the carriers must [file a tariff with economic cost support data and] await an FCC decision before the tariff becomes effective—suspension to 180 days is permitted. [The FCC must provide users with public notice and an opportunity to seek rejection of or a hearing on any such tariff. Suspension of the tariff is permitted for up to 4 months from the proposed effective date for such a hearing.] Under the other method, which AT&T may use only at the discretion of the FCC, the tariff goes into effect on the date specified by the carrier with up to a 30 day suspension period permitted at the FCC's discretion.<br><br>Neither the FCC nor any state commission can consider revenues or profits from unregulated products and services (except printed | Regulated carriers proposing new or revised tariffs must file all cost and revenue data and any other pertinent information the FCC may require. On receipt of the filing the FCC must provide public notice and an opportunity for comment 30 days following the notice. Not later than 90 days after the filing the FCC must make an initial determination accepting the tariff as filed, accepting the tariff conditionally, rejecting the tariff, or prescribing a different tariff. No new or revised tariffs proposed following enactment are to take effect until accepted by the FCC. Whenever the FCC requires additional information it shall extend the period for not more than 90 days. Upon request for good cause, the FCC shall hold hearings concerning the lawfulness of proposed tariffs and render its determination not later than 180 days after the completion of the hear- | Not addressed. |

directory advertisements) in determining carrier revenue requirements. (*Sec. 211*).

ings. The burden of proof in any such hearing with respect to the lawfulness of a tariff shall be on the filing party. While the hearing is pending, tariffs initially accepted or prescribed shall have effect. Upon reasonable request, regulated carriers must file with the FCC to modify any tariff to provide any variation in its regulated offerings. Neither the FCC nor any state commission is allowed to consider any revenues derived from unregulated activities (except revenues derived from Yellow Pages which may be considered for a period of 4 years from the date of enactment). In addition, the FCC may exempt any regulated carrier from the tariff process. (*Sec. 210*).

Neither the FCC nor any state commission is permitted to include any profits or revenues associated with any unregulated products or services of a separate subsidiary or affiliate in determining the revenue requirements of a regulated carrier, unless it has filed a tariff with the FCC or state commission which includes costs associated with an unregulated product or service. (*Sec. 211*).

## FOOTNOTES

1. Thus, the views expressed reflect those of the author, and not of the Washington Center for Public Policy Research, Duke University, or any funding organization. The views were proposed in June 1982, and do not reflect judicial or legislative events subsequent to that date.

2. *RCA* v. *FCC* (Three Circuits Case), 346 U.S. 86 (1957).

3. See, e.g., *MTS & WATS Market Structure*, Docket No. 78-72, 81 FCC 2d 177 (1980); *Deregulation of Telecommunications Services, Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981).

4. *American Telephone & Telegraph Co. (AT&T) Revisions to Tariffs FCC No. 269 and 267 Relating to DataSpeed 40/4,* 62 FCC 2d 21 (1977), aff'd. sub. nom. *International Business Machines et al.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978).

5. See *AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978). The Commission regards the statement in this case as *dictum*. See *IBM* v. *FCC*, Nos. 77-1540, Br. for FCC and the U.S. in Opposition, filed July 1978, at 5, 7.

6. It is not the purpose of this article to discuss the complex separations process. For a description of the process and its difficulties, see Gabel, R., *Development of Separations Principles in the Telephone Industry*, Institute of Public Utilities, East Lansing: Michigan State University, 1967.

7. See *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry,* A Report by the Majority Staff of the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce, U.S. House of Representatives, November 3, 1981 (House Staff Report), at 56, 105.

8. *Ibid.,* at 165.

9. As stated, this article does not deal with all important principles. For example, legislative safeguards may be needed to ensure that the increasingly competitive environment does not have a significant adverse impact upon the ability of the nation's telecommunications facilities and systems to function effectively under conditions of national defense emergencies and natural disasters.

10. At this writing, Chairman Dingell is circulating significant

amendments for the consideration of the full Committee. See *Telecommunications Reports,* May 3, 1982, 5-6.

11. S. Rept. No. 93-293, 93rd Congress, 1st Session, p. 5 (1973).

12. *Second Computer Inquiry,* 77 FCC 2d 384, 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981) (herein *Computer II*). This is the FCC's administrative effort to cover a great deal of the ground embodied in the bills. It is now on appeal. *Computer and Communications Industry Assn. (CCIA)* v. *FCC,* D.C. Circuit No. 80-1471, filed May 15, 1981.

13. The appendix material was developed by AT&T, in an impartial manner; it has been revised slightly by the author. For a similar comparative presentation, see *Major Telecommunications Proposals,* May 5, 1982, National Telecommunications and Information Administration (NTIA). This latter version is more detailed, but consequently was deemed too bulky to serve as an appendix here.

14. There have been suggestions that the interexchange carrier should be proscribed from bypassing the local network. Such protectionism is the poorest possible policy; more, not less, competition is needed in local distribution.

15. The Commission proposes that the present local exchange revenue requirement for MTS/WATS be spread among four categories of service (MTS/WATS, FX/CCSA, private line, and OCC-ENFIA) through a system of exchange access charges for these services based on nationwide averaged local exchange costs; the revenues would be pooled, and AT&T would administer the division of revenues from the pool among local exchange carriers. See: *Second Supplemental Notice of Inquiry and Proposed Rulemaking* in Docket No. 78-72, 77 FCC 2d 224 (1980). But see note 17, *infra.*

16. As stated, I would favor non-traffic-sensitive costs being recovered in flat monthly charges, with the subscribers then paying for usage, local and interexchange, on a metered basis. If, as is so today, some non-traffic-sensitive costs are to be recovered from usage charges, in order to reduce flat monthly charges, Rochester Telephone Corporation has advanced an interesting scheme: Let the states administer all exchange access charges, with one qualification—"local exchange network usage charges shall be non-discriminatory among *all* users of the network." (Statement of Rochester Telephone Corp. in En Banc Meeting of March 24, 1982, on proposed settlement, at

11-12). Thus a state could not burden interexchange users without also equally or proportionally burdening local and intrastate toll users, and it is, of course, most sensitive to the local user.

17. *Fourth Supplemental Notice of Inquiry and Proposed Rulemaking* in Phase I of FCC CC Docket 78-72, FCC Report No. 17022, May 28, 1982.

18. Since this is not the subject of this article, the modification will not be further detailed here.

19. Statement of Assistant Attorney General William Baxter, before the Senate Subcommittee on Communications, Science and Transportation, February 4, 1982.

20. Modified Final Judgment, II, D, (1), (2), and (3), at 4-5.

21. In line with the Tunney Act, the Justice Department timely filed a statement setting forth its view of the impact of the proposed modification on competition. *United States* v. *AT&T,* Civil Action No. 74-1698, 82-0192, Competitive Impact Statement, filed by the U.S. Department of Justice, February 10, 1982.

22. For example, it does not deal with the 1956 Consent Decree, but simply assumes that it does not exist (Appendix A, p. 236).

23. The BOCs could enter electronic Yellow Pages only upon a determination that adequate alternative local distribution facilities were available. Section 263(e) (4).

24. Indeed, AT&T Chairman Brown acknowledged before the ANPA meeting that he had no stomach for a "turf fight" with the newspapers over electronic Yellow Pages. *Broadcasting Magazine,* May 3, 1982, p. 87.

25. See, e.g., Kelley, D., "Deregulation After Divestiture: The Effect of the AT&T Settlement on Competition," OPP Working Paper No. 8, FCC, April 1982.

26. See CIS, at 38-39, 41. While the reason is obvious, a strong countering argument can be made, and indeed, has been by the FCC in its Tunney Act submission. The BOCs will all be starting from scratch in interexchange or manufacturing. They could provide much needed competition to AT&T. And while there clearly would be risks of abuse, regulatory actions could be taken, and the benefits could outweigh the risks. Are not the public interest and competition better served by allowing GTE to engage in these activities, even though it has substantial local distribution facilities? Is not the public interest advanced by allowing AT&T to engage in any activi-

ties, even though it has a *de facto* monopoly today in MTS/WATS? While the arguments have considerable cogency, the author believes that it would be better tactics to follow an evolutionary approach: bar the BOCs for some initial period of time, but be alert to "sunset" the above restrictions (the FCC suggests five years). To seek elimination of *all* BOC restrictions might well undermine the consent nature of the process.

27. See H.R. 13015 (96th Congress, 1st Session), H.R. 3333 (96th Congress, 2d Session), H.R. 6121 (96th Congress, 1st Session), H.R. 5158 (97th Congress, 1st Session), S. 611 (96th Congress, 2d Session), S. 622 (96th Congress, 2d Session) and S. 898 (97th Congress, 1st Session).

28. *Computer II, supra.*

29. See, e.g., Message of the President to the Congress on Communications Regulatory Reform of September 21, 1979, p. 3 (Weekly Compilation of Presidential Documents *15,* 1979 p. 699); Statement of Commerce Secretary Malcolm Baldrige before the Senate Commerce Committee, June 11, 1981.

30. Thus, in explaining its rationale for accepting Justice's proposed modification, counsel for AT&T stated: "The technology of telecommunications has so merged with the technology of data processing that if we [AT&T] end up with the 1956 consent decree we are a withering corporation waiting for its demise and nothing more." Mr. Saunders, transcript, *U.S.* v. *AT&T,* Case No. 74-1898 (DDC) vol. 134, P.M. Sess., January 12, 1982, p. 25027.

31. In its Tunney Act submission (at 36-37), the FCC points to its rules requiring telecommunications carriers that provide any enhanced services to afford equal access to all their transmission services, including local transmission, as a condition on their authority to offer enhanced services. (*Computer II, supra,* 77 FCC 2d, 475). It argues (p. 37) that these rules are "an adequate safeguard against interconnection abuses by divested BOCs," and that whatever the outcome of the appeals from the *Computer II* decision, Paragraph II(A) of the modification has essentially the same requirements.

32. See Kelley, *op. cit.,* n. 25.

33. The FCC has found that interstate service involves a *de facto* monopoly situation and that therefore to guard against cross-subsidization, AT&T must employ a separate subsidiary (*Computer II, supra,* 77 FCC 2d 384 (1980)). This conclusion of *Computer II*

is not challenged in the pending appeal, *CCIA et al.* v. *FCC,* Case No. 80-147 (D.C. Cir. 1981), by any party, including the Department of Justice.

34. Significantly, the CIS (p. 39) not only recognizes the ability of AT&T to cross-subsidize off "basic long distance services (MTS/WATS)" (AT&T provides more than 90 percent of all intercity telecommunications services—n. 10, p. 11, CIS), but carefully hedges its position stating only that the "proposed modification would thus, *over time* eliminate [this] source of potential cross-subsidization . . ." (emphasis supplied). Over time, the BOCs will also lose their ability to cross-subsidize.

35. Thus, in Congressional testimony, Assistant Attorney General William Baxter classified local distribution as a "natural monopoly." Statement of William Baxter, before the Senate Committee on Commerce, Science and Transportation, February 4, 1982.

36. See Statement of Andrew Smith, President, Pacific North West Bell Telephone Company, before the U.S. House of Representatives, Subcommittee on Telecommunications, Consumer Protection and Finance, February 23, 1982, p. 6.

37. For example, Manhattan Cable has already interconnected 20 corporations in 50 different buildings in New York City to provide satellite-fed data communications in response to surging high-volume business demand for increased transmission capacity.

38. For a detailed presentation of the growth patterns and possibilities, see the NTIA filing of August 17, 1981, in FCC Docket No. 80-286, at 23-26, and Appendix C.

39. *Ibid.*

40. See also statement of William Baxter, before the Subcommittee on Telecommunications, Consumer Protection and Finance, U.S. House of Representatives, March 10, 1982:

> Structural solutions are costly, not only in direct and obvious ways, but also in the loss they may entail to efficiencies that can come from integration. Moreover, there is always a danger that solutions will outlive their usefulness, and that their costs will be felt long after the problems they address have been resolved. Our legal history is replete with instances in which regulatory solutions have been perpetuated, often to protect private economic interests, long after the problem to which the solution was initially addressed has disappeared.

41. As stated, I recognize why the BOCs should not now recreate their own Western. The purpose of the settlement is to open up procurement, and remove incentives for the BOCs to favor their own manufacturing affiliate. But see n. 26, *supra*. However, it does not follow that the BOCs should also be precluded from selling CPE purchased from non-affiliates. What is the necessity for removing the BOCs from this market? None is stated in the CIS. Again, the settlement constitutes an action inconsistent with the competitive market in this respect.

42. See *CCIA* v. *FCC*, note 12, *supra*.

43. See, e.g., NTIA Petition of January 8, 1981, seeking additional safeguards.

44. See note 16, *supra*.