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DEREGULATION OF THE ELECTRONIC MEDIA IN THE UNITED STATES: AN OVERVIEW AND STATUS REPORT

Michael Botein*

INTRODUCTION

In recent years, regulation of the U.S. electronic media has changed from the New Deal's social welfare orientation to the "Chicago School's"[1] economic efficiency approach. This reasoning assumes that an open marketplace inevitably produces competition among suppliers, which in turn optimizes consumer satisfaction. Any type of governmental regulation thus is an anathema to the Chicago School, except in the case of a natural monopoly -- that is, a situation in which a market can function efficiently only with a single firm.

In terms of both mass media (i.e., radio, television, cable television) and common carriers (i.e., local exchanges, long distance service, terminal equipment), U.S. authorities increasingly have attempted to rely upon the perhaps internally inconsistent notion of "marketplace regulation." The primary government agency in this respect is the Federal Communications Commission (FCC), a five-member authority which regulates both mass media and common carriers. In very simplistic terms, the Commission regulates the entry and programming of broadcast stations through a licensing scheme, and the rates and practices of common carriers through a certification program.[2]

Both statutory provisions and political pressures prevent the FCC from getting out of either the licensing or the certificating business. Nevertheless, the agency has attempted to decrease its regulatory role as much as possible.

This deregulatory thrust naturally has impacted differently upon mass media and common carriers. As to the former, it has focused mainly upon eliminating program content requirements; as to the latter, entry and rate restrictions. The following discussion outlines the policy debate and the FCC's actions.

As the House Subcommittee on Telecommunications suggested in 1981, "deregulation is not an end in or of itself."[3] It is less than clear that the FCC's recent deregulatory actions have achieved their professed goal of substituting effective competition for government regulation. At the same time, the Commission's deregulatory efforts may have created some unexpected and negative side effects. An overview and analysis of both mass media and common carrier deregulation thus may be useful.

I

MASS MEDIA

A. CHANGES IN THE FCC's MASS MEDIA REGULATORY APPARATUS

The FCC initially embraced marketplace regulation for broadcasting during the regime of FCC Chairman Charles Ferris, who served during President Carter's term. Ferris transformed the FCC's Office of Plans and Policy into an office of "Chief Economist," and brought a substantial number of economists into the highest levels of FCC decision making. The next and current Chairman, Mark Fowler, was appointed by President Reagan; he also has endorsed an open entry philosophy. Chairman Fowler advocates a marketplace approach under which broadcasters are viewed not as public trustees, but as marketplace competitors.

As a result of this new regulatory philosophy, the Commission has consolidated regulation of all video services in a new Mass Media Bureau, which includes "branches" for cable, broadcast television, low power television (LPTV), direct broadcast satellites (DBS) and other new technologies.[4] The FCC believes that this consolidation will lead to more efficient processing of licenses, reduction of duplicative recordkeeping, less confusion among consumers, more flexibile staff utilization and an orderly development of emerging video technologies. The Commission's recent delay in processing applications for new FM and LPTV stations, however, casts some doubt upon the success of this management technique. Moreover, this approach creates doctrinal fuzziness, since it places both mass media (e.g. conventional television) and common carrier (e.g. DBS) services under one administrative roof.

B. PROGRAMMING POLICIES

1. The Radio Deregulation Proceeding

In its radio deregulation proceeding the Commission eliminated its internal processing "guidelines," which had required stations to propose at least eight percent (for AM stations) or six percent (for FM stations) non-entertainment programming, and no more than 18 minutes of advertisements per hour. Formalistic requirements for "ascertainment" of community leaders' opinions and for a general survey of the public also were eliminated, as was the Commission's program log requirement.[5]

These Commission actions were upheld by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in 1983.[6] The court approved the Commission's reliance upon market conditions in the radio industry to justify deregulation. The FCC had noted the radio industry's explosive growth -- especially in terms of increases in the number of FM stations and of alternative sources for informational programming.[7] In addition to establishing the Commission's authority to adapt its regulations to industry changes, the D.C. Circuit recognized that marketplace forces might force licensees to provide program diversity.

Similarly, in FCC v. WNCN Listeners Guild[8] the Supreme Court of the United States upheld the Commission's refusal to review radio format changes -- such as classical versus popular music -- when a station license was transferred to a new owner or subject to a renewal application. Calling the market the "allocation mechanism of preference," the Commission had found that

competition already had produced a "bewildering array of diversity" in entertainment formats.[9] In the Commission's view, the market was more flexible than government regulation, and responded more quickly to changing public tastes. The Supreme Court agreed.[10]

2. Low Power Television

The Commission's "marketplace" rationale has some interesting twists. For example, the FCC recently created a low power television (LPTV) service, consisting of several thousand new stations with five to ten mile service radii[11] -- somewhat similar in concept to the new local public FM stations in France. The FCC then relied upon its creation of LPTV to justify further deregulation of other services, such as radio. This type of regulatory Moebius strip makes eminently good sense if authorization of new stations actually leads to new services; in the case of LPTV this may not be the case, however, since only a few hundred stations have gone on the air.

The Commission adopted minimal programming requirements for LPTV. The FCC reasoned that "government surveillance" of LPTV stations would interfere with marketplace conditions, and that LPTV stations had to be sensitive to local needs in order to survive. The limited coverage of the new service, the Commission observed, warranted a departure from the FCC's general mandate of providing programming to all elements of a community.

The Commission also adopted flexible ownership policies for the new service, by allowing local broadcast stations to own LPTV stations. Because of the new service's uncertain viability, the FCC concluded that the detriments of

cross-ownership would be outweighed by the benefits of permitting experienced broadcasters to develop the service.

3. Children's Television

In 1983 the FCC ended a thirteen-year inquiry into children's television by declining to require a minimum amount of children's programming. Instead of adopting rules, the Commission stressed each station's continuing duty to serve the needs of the child audience. The Commission concluded that the economic incentives of an advertiser-supported broadcasting system encouraged production of specialized programming for children. In particular, the Commission relied upon: (1) the growth in the number of commercial stations; (2) progamming on noncommercial stations; (3) cable television programs; and (4) child viewing of "family" television.[12]

4. Deregulation of Television

In June, 1984, the Commission eliminated minimum program percentages, ascertainment requirements, commercial time restrictions and program log rules for commercial television stations -- thus paralleling the rule changes previously adopted for radio.

In justifying its action, the FCC noted several factors. First, it pointed to the increasingly competitive nature of the video marketplace. Second, it observed that changing competitive conditions might inhibit broadcast television's ability to compete with other unregulated or less regulated

technologies, susch as videocasette recorders or cable. Third, the Commission relied upon Congress' policy against unnecessarily intrusive government regulation. Fourth, the FCC noted that the rules presented a compelling case for reassessment, because the programming guidelines and commercialization policies related to sensitive content control issues. Finally, the Commission pointed out that broadcasters apparently were presenting more informational, local and nonentertainment programming than required, and less commercial material than permitted.[13]

5. Reply Time Under the Fairness Doctrine

The Commission instituted a proceeding in 1984 to reexamine the fairness doctrine obligations of broadcast licensees.[14] (The fairness doctrine requires broadcasters to cover "controversial issues of public importance," and to provide reply time to statements on such issues.)[15] In initiating its reexamination of the 35-year-old policy, the FCC noted that "significant new developments and changes in the electronic and print media over the past decade have contributed to an extremely dynamic, robust, and diverse marketplace of ideas that may call into question the continued necessity of the doctrine as a means of insuring the attainment of First Amendment objectives."[16]

Because of strong political opposition from many members of Congress -- who naturally had an inherent interest in obtaining free reply time -- the FCC shelved its proposed repeal in late 1985. It did so in an opinion, however, which suggested that the doctrine was unconstitutional, and invited judicial challenges to the doctrine. Several parties responded to the Commission's invitation by

suing to invalidate the fairness doctrine on constitutional grounds. And in a plea for legislative help, the Commission stated that it lacked jurisdiction to repeal the statutorily-based doctrine, but urged Congress to do so.

It may seem anomalous for an administrative agency to argue against the validity of its own statute. Because the fairness doctrine appears to be a statutory standard, however, the FCC must attack its enabling act in order to achieve its deregulatory goals. To say the least, this situation has created a difficult position for the FCC in the fairness doctrine challenges.

6. Subscription Television

Subscription television (STV) stations operate on conventional television channels, but offer scrambled "pay" programming, which is receivable only by subscribers with decoding equipment. STV stations generally charge about fifteen dollars per month for a mixture of recently released movies and live sporting events. Cable television naturally presents major competition to STV. The recent failure of many STV stations as their markets were wired for cable indicates that STV is a transitional technology, bridging the gap between broadcast television and cable television.

Part of the problem may stem from the Commission's past restrictions on STV, because it feared that STV would kill off "free" advertiser-supported television. Recognizing the counter-productive effect of its STV rules, the FCC recently deregulated STV, in order to give free rein to marketplace forces. STV stations thus are now free to: (1) operate in communities with less than four other commercial television stations; (2) offer only scrambled programming;

(3) sell as well as lease decoders; and (4) operate without identifying community needs as to STV programming.[17] More recently, the Commission exempted STV stations from conventional television signal quality standards,[18] on the theory that consumers could vote with their dollars for quality signals.

Deregulation of STV is significant in its assumption that STV competes with alternative forms of home video entertainment such as cable, and that an STV licensee should be on an equal footing with its competitors. Whether STV can compete with multi-channel media is far from clear, as evidenced by the many recent failures of STV stations. For STV, deregulation may have been too little and too late.

C. TECHNICAL STANDARDS

Traditionally, the FCC has set technical standards for both transmitting and receiving equipment, not only to prevent electrical interference, but also to protect consumers. The FCC's recent decisions on technical standards reflect its belief that the marketplace should determine these issues. For new communications services, the Commission merely has established minimum performance standards. In the case of existing services, the FCC has begun to examine the validity of many technical standards, and has proposed to retain some of them only as voluntary guidelines.

For example, after a half-decade of deliberations, the FCC decided to allow the marketplace to choose an AM stereo system for the U.S. Faced with five inconsistent systems proposed by five competing manufacturers, the Commission simply set minimum performance standards that all five systems

could meet.[19]

The FCC recognized that its refusal to choose might result in no system's being widely enough adopted to sustain AM stereo. But the Commission preferred this outcome to endorsing a particular technical system in order to encourage its adoption.

The Commission employed a similar "open marketplace" approach in authorizing direct broadcast satellites. It declined to impose technical standards upon DBS, since such standards might have stifled development of the service. The FCC stated that a flexible approach would permit DBS operators to respond to technological advances and encourage the introduction of new services.[20] (This debate is somewhat theoretical now, since virtually all proposed DBS operators have abandoned their plans.)

In authorizing videotex transmissions by conventional broadcast stations, the Commission also left the choice of technical systems to individual stations.[21] The FCC stated that a marketplace approach would allow stations to tailor videotex services to their specific needs and to respond to changes in demand. In the Commission's view, a marketplace approach provided the best mechanism for resolving the trade-offs among system features and prices -- decisions that are extremely difficult for regulators. The FCC also stated that its hands-off approach would hasten introduction of the service, by avoiding years of administrative delay in specifying uniform standards.

A marketplace approach also emerged in the Commission's authorization of multichannel television sound (popularly referred to as "TV stereo").[22] Consistent with its AM stereo, DBS and videotex decisions, the FCC declined to select a uniform technical system. The Commission proposed to impose

technical rules on TV stereo only to the extent necessary to ensure integrity of service and preventing of electrical interference.

The Commission's approval of TV stereo was relatively painless because of careful planning by the private sector. Unlike AM stereo, the TV stereo proceeding was marked by general industry agreement. Through the Multichannel Sound Subcommittee of the Electronic Industries Association, industry representatives presented the FCC with a proposed uniform technical system, known as the Broadcast Television Systems Committee (BTSC) system.

The different experiences with AM and TV stereo may point up one of the problems with blanket deregulation: namely, that "marketplace regulation" cannot operate unless a market already exists. AM stereo might have been implemented as easily as TV stereo if an underlying economic framework had existed. The Commission thus may need to look closely at whether a marketplace actually exists before leaping into deregulation.

Finally, the Commission instituted a proceeding in April of 1983 to eliminate many of its engineering rules and policies. The FCC proposed to delete all transmission system requirements for AM, FM and television stations, and began an inquiry into the continued usefulness of rules on issues such as: minimum performance standards for equipment and services; equipment interoperability requirements; interference control regulations; and spectrum efficiency rules.[23]

D. OWNERSHIP RULES AND POLICIES

The Commission's ownership rules have attempted to insure diversified

control of the media and promote ideological as well as economic diversity.[24] The Commission has revised several significant ownership rules and policies under the marketplace rationale.

1. Elimination of the "Trafficking" Rule

In late 1982, the Commission deleted the "trafficking" rule, which had required that broadcast licenses be held for at least three years before being sold.[25] (The rule had attempted to insure that investors did not speculate on broadcast stations, to the public's detriment.) The Commission concluded that in a new competitive environment the public interest was served best by allowing marketplace forces to regulate station sales. Under the new approach, buyers of broadcast licenses may sell them almost immediately.[26] Whether Congress would acquiesce in this approach if many stations were resold, however, remains to be seen.

2. Modification of the Ownership Attribution Rules

In 1984 the FCC comprehensively changed its rules specifying the ownership interests in broadcast, cable television and newspaper properties that will be considered -- that is, "attributed" to a party -- in determining whether media transactions violate its ownership rules. The new rules shrink the amount and type of interests which are attributed to a party under the Commission's ownership rules. Prompting the revisions was the Commission's recognition that both the broadcasting industry and the investment community have changed

dramatically, as well as the FCC's belief that relaxing the benchmark "might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital."[27]

3. Elimination of the "Top-50" Policy

In addition to its cross and common ownership restrictions, in the past the FCC has attempted to limit concentration of station ownership in the nation's largest and most lucrative markets. The "Top-50" policy required entities seeking to acquire a fourth TV station (either UHF or VHF) or a third VHF station in the 50 largest television markets to show that the benefit of the acquisition would "overcome the detriment with respect to the policy of diversifying the sources of mass media communications to the public."[28] The policy's effectiveness was somewhat questionable, however, since most waiver requests got rubber-stamp approval. In abolishing this policy, the FCC emphasized that changes in the video marketplace had lessened concentration levels in the 50 largest markets.[29]

4. Modification of the Common Ownership Restrictions

Almost since time immemorial, the Commission has limited the total number of broadcast stations which a single entity may own. Under the old "seven-station" rule, no company could have more than 7 AM stations, 7 FM stations and 7 TV stations (only five of which could be VHF). Although the

multiple ownership rules had seemed untouchable, in July of 1984 the Commission increased the limitation to 12 AM, 12 FM and 12 TV stations.[30] Responding to strong Congressional pressure, the FCC quickly modified the rule to provide an alternative limit of 25 percent of the nation's viewers,[31] and allowed ownership of up to 14 broadcast stations and an audience of up to 30 percent for entities controlled by racial or ethnic minority group members.

In modifying the seven-station rule, the Commission again relied upon changes in the video marketplace, which it viewed as making the rules "obsolete." Underlying the FCC's decision was the belief that multiple ownership at the national level would not reduce the number of independently owned radio, TV and cable outlets available to consumers, and might create economies of scale.

5. Rejection of Limitations on Multiple Ownership of Cable Systems

Shortly before loosening the multiple ownership restrictions for broadcasters, the FCC decided not to adopt similar rules for cable operators.[32] The Commission concluded that "while the amount of concentration in the cable television industry is increasing, it is still not a concentrated industry."[33] The FCC relied largely upon reports by its Network Inquiry Special Staff and Office of Plans and Policy. The Commission also noted that it had reviewed --and consistently approved -- merger proposals by cable television operators. Moreover, the Commission expressed concern that multiple ownership limits would limit economies of scale.

6. Repeal of Limitations on Regional Ownership of Broadcast Stations

In April of 1984, the FCC repealed the regional concentration-of-control rules.[34] These had prohibited the acquisition of a broadcast facility if it resulted in common ownership of three stations, where any two were within 100 miles of the third and any of the three stations' primary service area overlapped another's.[35] In initially proposing to eliminate the rules, the FCC relied upon changes in the marketplace.[36] As a result of these changes, the Commission stated, "the potential influence of any given combination of commonly owned outlets is diluted and our concern with the impact of such combinations on diversity and levels of competition declines accordingly."[37]

II

COMMON CARRIERS

Although the FCC has applied basically the same "marketplace regulation" theory to common carriers as to mass media, the differences between these media naturally have resulted in divergent applications of the theory. As discussed above, the Commission's major deregulatory policies in broadcasting have focused on programming and ownership. In common carriage, however, the FCC has been more concerned with economic and structural issues -- i.e., rate regulation and entry restrictions. In the case of both mass media and common carriage, however, the Commission has attempted simultaneously to decrease its control over firms' activities -- e.g., programming and charges -- and increase new entry.

A. DIVESTITURE AND DEREGULATION OF AT&T

The Commission's primary regulatory responsibility, of course, traditionally has been the American Telephone and Telegraph Company (AT&T). As a result, many of the Commission's old regulatory -- and new deregulatory -- activities have focused on AT&T and its relations with both present and potential competitors. As a result, the FCC's activities in this field have had to mesh closely with the divestiture of AT&T.

American Telephone and Telegraph had operated for twenty-five years pursuant to a 1956 "*Consent Decree*," which terminated an antitrust suit brought by the Justice Department in 1949. The pre-divestiture AT&T was substantially

different than today's often confusing mixture of entities. AT&T was perhaps the most vertically integrated telecommunications corporation in the world, since it provided literally everything from equipment to long distance transmission to local exchange service. Western Electric (now AT&T Technologies) produced both terminal and switching equipment; Long Lines Division (now AT&T Communications) provided ninety percent of the nation's long distance traffic; Bell Labs (the only AT&T entity to survive without a name change) did basic research, through a complex series of contracts with the other AT&T components; and 22 wholly or majority owned local telephone companies -- such as New York Telephone Company or Southern Bell -- provided local exchange service to one or more states.[38]

The divestiture ended the most significant portion of AT&T's vertical integration -- namely, the common ownership of the local exchange companies and the equipment as well as long distance service providers. At least in theory, this removed a number of perceived conflicts of interest, such as local exchange companies' paying inflated prices for Western Electric equipment.[39]

The divestiture came about in a relatively complicated procedural fashion. In 1982, AT&T settled a 1974 antitrust case under a "Modification of Final Judgment" (MFJ).[40] This technically was an amendment to the 1956 Consent Decree. The MFJ required AT&T to divest its 22 local exchange Bell Operating Companies (BOCs), which now are owned by seven "Bell Regional Holding Companies" (RHCs). (It is not yet clear whether an RHC is a common carrier.)[41] AT&T also kept several key entities: its research and development arm, Bell Labs; its manufacturing arm, Western Electric; its regulated long-distance

operation, Long Lines Division; and a new entity for providing enhanced services (AT&T Information Services). The FCC supported the settlement, but urged that the BOCs also be permitted to enter unregulated fields.

While the Justice Department was pursuing its case, the FCC was imposing structural restraints on AT&T. The FCC found it necessary during the 1970's to decide how AT&T could provide data processing and other computer-based "enhanced" services. AT&T could provide only telecommunications transmission service under the 1956 Consent Decree. Because of the capabilities of electronic switching and because of customer demand for new services, AT&T increasingly felt pressure to offer enhanced services. These services were provided at first through AT&T's common carrier offerings -- over the objections of the data processing industry -- and were considered communications services. The FCC addressed this dilemma in its first and then second Computer Inquiry. Ultimately, the Commission developed a distinction between "basic" or communications services, and "enhanced" or computer-driven services. AT&T could provide only basic services through its regulated offerings. Enhanced services had to be provided by an unregulated and "fully separated" subsidiary.[42]

Despite strenuous objections by many service providers, the FCC in 1983 changed the effect of the Computer II "basic" and "enhanced" classifications. If a carrier provided "enhanced" rather than "basic" service, it no longer needed -- and indeed, no longer could obtain — an authorization pursuant to the certification processes of Section 214 of the Communications Act. Since most new value added carriers in fact were providing "enhanced" services by utilizing both data processing and telecommunications, they thus fell within this category.

The FCC has currently is reconsidering the overall Computer II policy. The

Commission recognizes that several events -- including the AT&T divestiture and the emergence of both domestic and international ISDNs -- may render the structural separation requirement obsolete, or a burden on efficient operations. Some observers believe that the separate subsidiary requirement soon will disappear.[43]

Most recently, in August of 1985 the Commission initiated yet another rule making proceeding, Computer III, to re-examine restrictions on both AT&T's and the BOC's activities.[44] In general, the FCC's proposals would allow both AT&T and the BOCs not only to offer enhanced services jointly, but also to operate without any requirement of a separate subsidiary in some circumstances. In addition, the Commission suggested abolishing the separate subsidiary requirement and replacing it with detailed regulatory requirements.[45]

B. COMPETITION FOR AT&T

Even before the AT&T divestiture, the FCC had opened the door to new entry -- and thus new competition for AT&T -- in terms of both long distance service and telephone equipment. In the process, the Commission created an increasingly competitive and often confusing market.

First, and perhaps most important, the Commission broke AT&T's virtual monopoly on long-distance service by allowing other companies -- known collectively under the imaginative rubric of "other common carriers" (OCCs) -- to offer competitive long distance services.[46] These companies include MCI, Sprint, and Allnet. In order to insure that these firms can compete effectively with AT&T, the FCC requires the divested Bell Operating Companies to provide

them with "equal access" -- that is, connections with the BOCs' local exchange service with the same signal quality available to AT&T.[47]

Reselling of domestic long distance transmission is allowed and extensive. Carriers must sell even to resellers which compete with them, and many OCCs in fact resell long distance service bought from AT&T at bulk discounts. Resellers do not require any authorization from the FCC. They merely need to file a notification with the FCC if they hold themselves out to the public.[48]

Of particular importance are the rates for equal access to local exchange networks by long-distance carriers. In the past, complex financial accounting rules ("separations and settlements") arguably provided an internal subsidy from AT&T's long-distance service to the BOCs. Complicated FCC tariffs also governed the access charges paid by the OCCs. After divestiture, this system was revamped, with equal access charges for carriers to be phased in as equal access to the BOCs for non-Bell long distance carriers was introduced.[49] Furthermore, a new system of customer access charges partially substitutes carrier-paid access fees for the use of local exchange networks.

At least in theory, introduction of customer access fees forces all long-distance carriers to compete on an equal footing, since they are not subject to different charges for use of local exchange facilities. (The FCC has allowed state commissions to waive consumer access charges, however, for low-income families.)[50] Because of the extremely large amounts of money at issue to the carriers, and because of redistributional impact of access fees, access charges have become very controversial. The OCCs fear that by being forced to pay the same as AT&T -- compared to roughly half as much in the past -- they will lose their price advantage with consumers and suffer market erosion. The OCCs

contend that the BOCs' provision of better technical facilities to them does not justify equalization of access costs.

Indeed, some observers believe that full implementation of access charges will allow AT&T to charge the same as -- or even less than -- the OCCs. One possible result of this scenario, of course, would be the elimination of all or most of the OCCs -- thus eventually returning AT&T to its prior monopoly position.

This not only would defeat the FCC's whole purpose in authorizing the OCCs' entry, but also would have a significant economic impact on consumers. One of the byproducts of access charges has been increasing "bypass" of local exchange companies -- through direct connection by cable, fiberoptics or microwave to AT&T or the OCCs -- in order to avoid access charges.[51] Bypass in turn increases the remaining customers' share of fixed costs, increasing prices still further and making additional bypass economically attractive. In a worst case scenario, the combination of access charges and bypass might create an inflationary spiral for local exchange rates -- thus pricing many moderate-income consumers out the the market.

C. TECHNICAL STANDARDS

The FCC also has promoted new entry into the equipment market. Part 68 of the FCC's rules sets minimum technical standards that equipment must meet in order to be connected to any public switched network.[52] The FCC's objective is to provide uniform interconnection standards to protect the telephone network from improper terminal equipment and wiring.

Because interconnection standards are uniform, terminal equipment users

have nondiscriminatory access to the telephone network. Equipment sellers must "register" their products with the FCC, however, before marketing them.[53] Registration requires the disclosure of a unit's technical specifications, so that the FCC's staff can identify any possible system degradation prior to installation of the equipment. But there is no approval process to go through.

Part 68's objectives and the registration requirements are relatively recent developments in U.S. common carrier policy. Prior to the FCC's Carterphone decision,[54] AT&T and the OCCs developed their own interconnection standards, and manufactured or procured equipment compatible with those standards. Competitive terminal equipment suppliers had no access to the telephone network, since users could connect only equipment leased from AT&T.

The U.S. market for local exchange equipment was characterized in the past by a fairly competitive situation only in the procurement of equipment for non-AT&T telephone exchange companies. AT&T was precluded from that market, but -- perhaps as a result -- many other companies were active in it, including foreign suppliers such as Ericsson and Northern Telecom. On the other hand, the vast Bell system and all of its customers -- comprising 80% of the total market -- were foreclosed to other suppliers by their ties to AT&T's manufacturing subsidiary, Western Electric. The Carterfone case and subsequent liberal equipment approval policies opened up customer terminal equipment to a large variety of suppliers.[55]

The AT&T divestiture radically changed the market for local exchange equipment. By severing the link between the BOCs and AT&T, it freed the former from having to buy from Western Electric (now AT&T Technologies). Although most analysts expected the BOCs to cling to AT&T as their equipment

supplier, the BOCs in fact have embraced a wide variety of non-AT&T equipment quite rapidly.[56] Part of the reason is that they are responsible to their state regulatory commissions to use the least expensive qualified supplier.

Network standards are coordinated for the BOCs by Bell Communications Research (Bellcore). There appears to be no sign that Bellcor is using this role to favor AT&T or other U.S. manufacturers. Neither the executive branch, the FCC, nor the state commissions has shown a desire to set standards beyond those already in place.

CONCLUSION

In both the mass media and common carriage areas, the FCC has attempted to implement marketplace regulation with a quasi-religious fervour. Although the Commission necessarily has approached these media in somewhat different fashions, two common themes run through its deregulatory agenda.

First, the Commission has attempted to decrease restrictions on the type of services which existing firms may offer. On the mass media side, it has allowed television broadcasters to offer videotex and TV stereo. At the same time, it has authorized AT&T to provide "enhanced services."

Second, the FCC has tried to increase the sheer number of media firms. With the mass media, this effort has focused mainly upon opening up frequencies for new types of stations -- e.g., LPTV and DBS. As to common carriers, the FCC has been concerned mainly with removing past restrictions, most notably as to providers of long distance service and terminal equipment.

Whether one's ideological commitment is to the New Deal's social welfare orientation or the Chicago School's economic efficiency approach, removal of unnecessary government restrictions is a worthy goal -- particularly as to sensitive free speech issues in the mass media. But questions remain as to the FCC's effectiveness in identifying and implementing true marketplace competition. In some cases, the Commission simply may have misjudged what it perceived to be a market.

In its fervor to "reregulate," "deregulate" and "unregulate," the FCC may not have considered some of its actions' side effects, a phenomenon characterized by the regulatory cognoscenti as the "law of unintended

consequence." Although these effects do not necessarily counterbalance the benefits of deregulation, their weight must be thrown onto the policy making scales.

First, the Commission may have relied too much upon new entry and competition as a cure-all. On the mass media side, the scope and vitality of the new media are less than clear. STV stations are encountering stiff competition from cable and MMDS. Most LPTV stations have tiny audiences. And plans for DBS are on hold. The much-heralded new video marketplace thus may boil down to the continued growth of cable television and the strong sales of VCRs. Whether cable or VCRs are effective competition for broadcasting, however, is less than clear. On the one hand, cable is a passive medium and produces little or no programming. On the other, it has facilitated the development of several dozen new satellite services -- ranging from the Cable News Network to the Christian Broadcasting Network -- which supply diverse programming to cable subscribers. And although VCRs provide access to otherwise unavailable material, they naturally cannot offer news or current events. Moreover, the cost of both cable and VCRs may keep them beyond the means of many U.S. viewers for the foreseeable future.

Similarly, the common carrier field may turn out to be less competitive than the Commission had hoped. If consumer access charges eliminate most of AT&T's long distance competition, the FCC will face a worst case scenario of monopoly control of -- and higher prices for -- both long distance and local exchange service.

Second, the FCC's forebearance from regulation may frustrate the formation of a competitive marketplace in some situations. Indeed, the current

chaos in AM stereo seems to flow largely from the Commission's refusal to adopt uniform technical standards. Consumers may not get the opportunity the FCC had in mind for them -- namely, of voting with their dollars for the best system. The Commission's accommodation of an industry-recommended standard for multichannel television sound, however, is an alternative to the pure marketplace approach espoused in the AM stereo proceeding. It also reflects a recognition that the market may require FCC-selected standards to encourage entry and to protect consumers. The FCC may have overlooked the fact that regulation is a means of making as well as policing a market. After all, its policies in liberalizing registration of telephone equipment helped to create a highly competitive market for telephone equipment.

Finally, deregulation can be a double-edged sword. The mere existence of an administrative rule often deters litigation within an industry. U.S. courts usually refuse to hear cases against regulated firms if a plaintiff's claim is covered by an agency rule, on theories of "primary administrative jurisdiction" or "exhaustion of administrative remedies." Deregulation thus often leads to litigation, as both competitors of a firm and members of the public turn to the courts with their grievances. Moreover, litigation not only is much more expensive in terms of legal fees than agency proceedings, but also has much greater risks -- e.g., awards of treble damages and attorneys fees under the antitrust laws -- as several common carriers recently have discovered. Although it is impossible to quantify developments at this early stage, the amount of litigation -- particularly antitrust litigation -- in the communications field has increased substantially during the past few years. Precisely for this reason, some communications practitioners view deregulation as a "Lawyer's Relief Act."

The benefits and burdens of deregulation thus are not clear. As the old baseball saying goes, "it ain't over 'til it's over . . . .," and the process of deregulation is far from over. On the positive side of the ledger, deregulation has unleashed some dynamic competitive forces, which previously had been caged by artificial or obsolete rules. On the negative side, however, the full implications of these changes only now have begun to play out. The bottom line is still unknown.

FOOTNOTES

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1. This nomenclature derives from the fact that the principal proponents of deregulation -- i.e., Milton Friedman and Richard Posner -- are or were on the faculty of the University of Chicago. E.g., R. A. Posner, Economic Analysis of Law (1973).

2. Botein & Noam, U.S. Regulation of International Telecommunications (unpublished 1986).

3. Staff Report, House Subcommittee on Telecommunications, Consumer Protection and Finance, Telecommunications in Transition: The Status of Competition in the Telecommunications Industry xii (Comm. Print 97-V, Nov. 3, 1981). See also E. Krasnow, L. Longley, H. Terry, The Politics of Broadcast Regulation 240-69 (3d ed. 1982).

4. Order, 47 Fed. Reg. 47828 (1982).

5. Deregulation of Radio, 84 F.C.C.2d 968 (1981), aff'd in part, remanded in part, Office of Communication of the United Church of Christ v. FCC, 707

F.2d 1413 (D.C. Cir. 1983). The Court remanded that aspect of the decision eliminating program logs, and instructed the FCC to conduct a further proceeding to determine what records should be retained to demonstrate service to the community.

6. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

7. Deregulation of Radio, 84 F.C.C.2d 969 (1979).

8. 450 U.S. 582 (1981).

9. 450 U.S. at 590.

10. Id. at 595.

11. Low Power Television Service, 51 Rad. Reg. 2d (P&F) 476, 484-85 (1982).

12. Children's Television Programming and Advertising Practices, Report and Order (Docket No. 19142), FCC 83-609, released Jan. 4, 1984, aff'd sub nom. Action for Children's Television v. FCC, No. 84-1052, slip op. (D.C. Cir. March 27, 1985).

13. Report and Order (MM Docket No. 83-670) FCC 84-293, released Aug. 21, 1984; see also Report and Order (BC Docket No. 81-496), FCC 84-924, released Aug. 22, 1984 (deregulation of noncommercial television ascertainment and programming requirements).

14. Notice of Inquiry (Gen. Docket No. 84-282), 49 Fed. Reg. 20317 (1984).

15. 47 C.F.R. § 73.1910 (1985).

16. Notice of Inquiry, supra note 14, at para. 1.

17. Subscription TV Service, 90 F.C.C.2d 341 (1982).

18. Fourth Report and Order, 95 F.C.C. 2d 457 (1984).

19. AM Stereophonic Broadcasting, 51 Rad. Reg. 2d (P&F) 1 (1982).

20. Direct Broadcast Satellites, 90 F.C.C.2d 676, 716-17 (1982).

21. See Teletext Transmission, 53 Rad. Reg. 2d (P&F) 1309, 1327-28 (1983).

22. Second Report and Order (Docket No. 21323), FCC 84-116, released Apr. 23, 1984. See also Further Notice of Inquiry, 48 Fed. Reg. 37475 (1983); Notice of Inquiry, 42 Fed. Reg. 38606 (1977); Notice of Proposed Rulemaking, 44 Fed. Reg. 70201 (1979); First Report and Order, 46 Fed. Reg. 39145 (1981).

23. Notice of Inquiry and Proposed Rulemaking, 48 Fed. Reg. 14399 (1983).

24. See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965); Multiple Ownership of Standard AM, FM and Television Broadcast Stations, 45 F.C.C. 1476, 1476-77 (1964).

25. Transfer of Broadcast Facilities, 52 Rad. Reg. 2d (P&F) 1081 (1982).

26. 47 Fed. Reg. at 55930.

27. Report and Order (MM Docket No. 83-46), FCC 84-115, released Apr. 30, 1984.

28. Multiple Ownership of TV Broadcast Stations, 22 F.C.C.2d 686, 700 (1968).

29. Top 50 Ownership Policy, 75 F.C.C.2d 585, 590 (1979), aff'd sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982).

30. Report and Order (Gen. Docket No. 83-1009), FCC 84-350, released Aug. 3, 1984.

31. Order (Gen. Docket No. 83-1009), FCC 85-400 (Aug. 9, 1984).

32. Diversification of Control of Community Antenna Television Systems, 52 Rad. Reg. 2d (P&F) 277 (1982).

33. Id. at 280.

34. *Report and Order* (MM Docket No. 84-19), FCC 84-15, released May 1, 1984, *appeal pending sub nom*. *National Association of Better Broadcasting v. FCC*, No. 84-1274 (D.C. Cir. filed June 29, 1984).

35. *See First Report and Order* (Docket No. 20548), 63 F.C.C.2d 824 (1977).

36. *Notice of Proposed Rulemaking*, (MM Docket No. 84-19), FCC 84-10, released Jan. 17, 1984, at paras. 2, 21-23.

37. *Id*. at para. 20.

38. W. Bolter, *Telecommunications Policy for the 1980's* (1984).

39. See discussion in text at n.54 et seq., *infra*.

40. *United States v. AT&T*, Civ. No. 74-1698 (D.D.C. 1984), modifying *United States v. Western Electric Co, Inc.*, Civ. No. 17-49 (D.C.N.J. 1956).

41. *U.S. West, Inc. v. FCC*, 778 F.2d 23 (D.C. Cir. 1985).

42. See *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II Inquiry*), 77 FCC 2d 384 (1980); 84 FCC 2d 50 (1980); 88 FCC 2d 512 (1981); *aff'd*. sub. nom. *CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

43. E.g., Remarks of Dr. Alan Pearce, in New York City, December 12, 1985.

44. *Computer III*, Docket No. 85-229, FCC 85-397 (August 16, 1985).

45. See Marks & Casserly, *An Introduction to the FCC's Third Computer Inquiry, The Computer Lawyer*, October, 1985 at 1 et. seq.; Wiley & Polsky, *Understanding the Computer III Inquiry*, *Telematics*, November, 1985 at 3 et. seq.

46. E.g., *Memorandum Opinion and Order*, 91 FCC 2d 232 (1982).

47. E.g., S. Simon, *After Divestiture* (1985).

48. D. Irwin, *Telecommunications Regulatory Monitor* II - § 8 et seq. (1985).

49. *Id.*, at II-13 et. seq.

50. *Report and Order*, CC Docket Nos. 78-72, 80-286 (1985).

51. E.g., Davis, *Making Sense of the Telecommunications Circus*, *High Technology*, September, 1985, at 22-25.

52. 47 C.F.R. § 68.2(a)(1),(2),(3),(4) (1985).

53. 47 C.F.R. § 68.200 (1985).

54. 13 FCC 2d 420 (1968).

55. E.g., *Universal Payphone*, 58 P & F RR 2d 76 (1985).

56. *Computer World*, March 14, 1984, at 63.