IS THE THIRD TIME THE CHARM? A COMPARISON OF THE GOVERNMENT'S MAJOR ANTITRUST SETTLEMENTS WITH AT&T THIS CENTURY*

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The 1982 settlement of the government's antitrust suit against the American Telephone and Telegraph Company (AT&T)[1] appears to have revolutionary implications for the telephone system, reversing almost a century of increasing integration of the telephone network. Historical analysis, however, suggests a more cautious evaluation. This settlement is the third of its kind. Twice before, the Department of Justice has reached an agreement with AT&T, each time ending legal action arising out of the limitations of telephone regulatory policy. The two previous settlements promised important structural changes in the telephone industry that did not materialize. The most recent settlement also promises sweeping changes. The question to be addressed, then, is whether those promises will prove to be as empty as their predecessors, and whether the changes that do occur in the industry are the result of the settlement.

This article examines the two previous agreements and compares them to the current one, a comparison that suggests important implications about the recent agreement. Section I recounts the events leading up to the Kingsbury Agreement between the government and AT&T in 1913 and analyzes the effects of that settlement on the telephone network. Section II discusses the 1956 consent decree that ended the antitrust action brought by the government against the Bell System (Bell) in 1949. In these sections the argument is made that neither of the earlier agreements achieved the goals of the cases they settled and that any changes that did appear following the settlements were largely

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[1] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

the result of other forces. Section III details the similarities between the recent settlement and its two predecessors and uses those parallels to suggest some predictions for the future. The final section offers more general conclusions.

I. THE 1913 AGREEMENT AND CONSENT DECREE

Federal regulation of telephonic transmissions began with the Mann-Elkins Act of 1910.[2] By defining telephone companies as common carriers, the Act granted the Interstate Commerce Commission (ICC) jurisdiction over them.[3] The ICC, however, exerted little influence over the telephone system, intervening only when the Commission received complaints.

The Mann-Elkins Act was passed at a time of vigorous competition among rival telephone companies, that competition stemming from the expiration in 1893 and 1894 of the most important Bell patents.[4] With the expiration of these patents, Bell's share of the expanding market for telephone service declined steadily until 1907.[5] By 1912, however, Bell's efforts to consolidate and extend its domination of the industry gave the Bell System control over roughly four-fifths of both exchange and toll wires.[6] Bell's avowed policy became one of acquiring and purchasing "opposition companies" wherever it could be done legally and with the acquiescence of the public.[7]

The Justice Department initially did not see any conflict between AT&T's policy and the Sherman Act,[8] and it rejected applications for antitrust actions against AT&T. Attorney General George W. Wickersham did not, however, simply ignore the

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[2] Act of June 18, 1910, ch. 309, 36 Stat. 539 (codified as amended in scattered sections of 49 U.S.C.).

[3] *Id.* § 7, 36 Stat. at 544-45; *see* Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate*, 1978 DUKE L.J. 1, 6-9; 90 CENT. L.J. 370 (1920).

[4] *See* Hough, *The Law and the Telephone*, 50 AM. L. REV. 425 (1916).

[5] FCC, INVESTIGATION OF THE TELEPHONE INDUSTRY IN THE UNITED STATES 128-29 (1974). One author argues that this does not imply that 1907 represents the nadir of Bell's power in the industry, on the theory that entry into the industry was becoming more difficult and long-distance service, where Bell's advantage was relatively great, was becoming more important. G. BROCK, THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE 121 (1981).

[6] *See infra* table accompanying note 30. *See generally* Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 L. & CONTEMP. PROBS. 340 (1969).

[7] FCC, *supra* note 5, at 133-39; AT&T, 1910 ANNUAL REPORT 21. A sense of the issues and personalities involved in this period of mergers can be found in H. MACMEAL, THE STORY OF INDEPENDENT TELEPHONY 138-202 (1934).

[8] Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

problem. In January 1913, the Attorney General reacted to complaints from independent telephone companies by writing to the chairman of the ICC, Charles Prouty, urging that body to undertake a thorough investigation of the telephone industry.[9] Wickersham argued that many of the questions raised about AT&T's allegedly anti-competitive operations "can not be appropriately dealt with by the law department of the government, but should be made the subject of regulation."[10]

Before the year was out, however, the Justice Department filed an action against AT&T and its affiliates under the Sherman Act, charging unlawful conspiracy to restrain and monopolize trade in the transmission of telephone messages among the several states.[11] A number of independent telephone companies had constructed long-distance lines and were competing against AT&T for long-distance customers in the Pacific Northwest. According to the Justice Department's complaint, the Bell companies had harassed those firms by refusing to interconnect Bell lines with those of the independents, by lowering competitive rates, by furnishing poor service when ordered to interconnect their lines, and by otherwise acting in an illegal manner.[12] That pattern of activity allegedly culminated in the acquisition by the Bell System of the victims of its transgressions, independent telephone companies—most notably one called Northwestern Long Distance.[13]

While government witnesses testified in the antitrust case and the ICC pursued its investigation, Nathan Kingsbury, a vice-president of AT&T, and Attorney General J. C. McReynolds held a series of meetings.[14] At the same time, through written correspondence and meetings, the Attorney General elicited the views of the independent telephone companies on how best to protect their interests.[15] By December of 1913, an arrangement between AT&T and the government had been negotiated. The Kingsbury Commitment, as it came to be called, was set out in a letter from Kingsbury to the Attorney General, dated December 19, 1913.

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9 Letter from George W. Wickersham to Charles A. Prouty (Jan. 7, 1913).

10 *Id.*

11 Original Petition, United States v. AT&T (D. Or. 1913) (suit terminated by consent decree Mar. 26, 1914).

12 *Id.* at 16-19, 26.

13 *Id.* at 20-25.

14 Letter from Nathan C. Kingsbury to Attorney General J.C. McReynolds (Dec. 19, 1913).

15 Letter from the Independent Telephone Association of America to the Assistant to the Attorney General G. Carroll Todd (Dec. 18, 1913).

In that letter, AT&T agreed to dispose of its holdings in Western Union, to refrain from acquiring competing telephone companies, and to offer toll-line connections to qualified independent telephone companies.[16] Contemporaneous letters from the Attorney General to Kingsbury and from President Wilson to the Attorney General acknowledged AT&T's commitment.[17]

The immediate effect of the agreement was to terminate the ICC investigation and the antitrust proceedings.[18] The latter ended in a consent decree whereby the Bell System agreed to abolish its exclusive service contracts for toll service; to offer future contracts assuring equal access to Northwestern and other non-Bell companies; and to divest itself of ownership of Northwestern, as well as an independent company in Spokane, Washington, and certain other properties.[19]

One provision of the consent decree foreshadowed the difficulties that emerged from the decree's implementation. That provision gave to the citizens of Spokane the right to decide by voting whether or not it would be in their best interest to allow their local phone company to be consolidated into the Bell System.[20] The voters chose consolidation and the court accepted their petition for modification of the consent decree in September, 1914.[21] A further modification in 1922 permitted a Bell company to reacquire Northwestern.[22] Thus, the immediate structural elements of the settlement were undone in fewer than ten years.

Purportedly, the long-term aim of both the Kingsbury Commitment and the consent decree was to preserve competition in telephone communication, both by assuring to all firms equal access to local networks and by limiting the expansion of the Bell System. That goal had two problems. First, as the immediate modification of the consent decree suggested, the public had little desire for duplication of local telephone service.[23] The Attor-

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16 Letter from Nathan C. Kingsbury to Attorney General J.C. McReynolds (Dec. 19, 1913).

17 *Id.*; Letter from Woodrow Wilson to J.C. McReynolds (Dec. 19, 1913).

18 Interstate Commerce Comm'n, Press Release (Apr. 1915).

19 Decree, United States v. AT&T (D. Or. 1914) (consent decree entered Mar. 26).

20 *Id.* ¶ 11.

21 Order Modifying Decree, United States v. AT&T (D. Or. 1914) (order of Sept. 7 modifying decree of Mar. 26).

22 Order Modifying Decree, United States v. AT&T (D. Or. 1922) (order of Oct. 20 modifying decree of Mar. 26, 1914).

23 From the turn of the century until 1915, urban experimentation with competi-

ney General recognized this limitation in his 1914 Annual Report, where he stated that the Kingsbury Commitment was not intended to preclude consolidation of local telephone communications.[24] On the other hand, there had been high hopes that the Commitment would promote the development of an independent toll network that could compete against Bell. It may be, however, that the Commitment had the opposite effect, at least from the perspective of the financial structure of Bell's independent competitors.

Investors in the independent companies, we may assume, were motivated by the hope that they would ultimately receive a return on their investments. That return might have been realized by the sale of the company. To the extent that the Kingsbury Commitment forbade Bell to acquire independent toll companies, potential investors in those firms were denied from the outset one of the most likely buyers. Even if the Commitment did not actually bar any particular merger, the chance that a sale to Bell could involve antitrust litigation would likely have chilled the enthusiasm of investors in the independent companies.[25] Absent a significant commitment from investors, the in-

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tion in the provision of local telephone service was widespread. This meant that two, and occasionally three, telephone companies solicited customers from a given city or town for service on its own local network. The local network of each competing company was self-contained and was not connected to that of its competition. Each company strung its own wire network, often producing a haze of wires on city streets that threatened to block the sun. The problems encountered by municipalities with competing suppliers of local telephone service can be demonstrated by reference to a photograph of a New York City street taken in 1888. The photograph reveals a sky beclouded by telephone wires. *See* J. BROOKS, TELEPHONE, THE FIRST HUNDRED YEARS plate 14 (1976). Had there been competition in New York City, the number of wires would have been nearly doubled. Local competition, or "dual service" as it came to be called, proved inconvenient to the subscribers as well, for it meant that one had to subscribe to each of the competing telephone companies if one were to be able to reach all of the city's telephone subscribers. Accordingly, regular telephone users, particularly businesses, had two telephones where we customarily see only one today. The Kansas Supreme Court described its feelings about dual service, "[t]wo telephone systems serving the same constituency place a useless burden upon the community, cause sorrow of heart and are altogether undesirable." *Janicke v. Washington Mut. Tel. Co.*, 96 Kan. 309, 310, 150 P. 633, 634 (1915).

[24] 1914 ATT'Y GEN. ANN. REP. 14 ("local communities generally free to have one telephone system" as long as connections are made "with all long-distance interstate lines").

[25] This chilling effect became the subject of congressional discussion in 1921. *See Consolidation of Competing Telephone Companies: Joint Hearings on S.1313 Before the Committee on Interstate Commerce*, 67th Cong., 1st Sess. 17-18 (1921).

dependent companies would have felt financially constrained from undertaking, expanding, and upgrading their plants.

The failure of the Kingsbury Commitment to catalyze the emergence of a viable long-distance network to compete against the Bell network may also have been the result of the Commitment's focus on mergers to the exclusion of Bell's interconnection policies. Beginning in 1907, Bell's competitive strategy included restricting its companies from granting connections to those independent firms that either competed with Bell companies or were interconnected with Bell's competitors.[26] This meant that any company that might have been willing to join a large toll network which competed against Bell would have had to forego the benefits of any future interconnection with a company in the Bell System.

Finally, the Justice Department's goal of maintaining competition conflicted with the desire of another government agency to integrate the nation's telephone networks into a single system. During the United States' participation in the First World War, the government operated the telephone networks through the Wire Control Board, chaired by the Postmaster General.[27] The Board's attitude was exactly opposite to that taken by the Justice Department.[28] In the Board's view, government operation and control of the telephone system would "undoubtedly cause the coordination and consolidation of competing systems whereever possible."[29]

The results of those competing objectives can be seen in table 1 below.

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26 AT&T, *supra* note 7, at 21-23.

27 *See* 88 CENT. L.J. 335 (1919).

28 Postmaster General Albert S. Burleson, described by one commentator as an "old-fashioned southwestern populist," spearheaded efforts begun in 1913 to nationalize the telegraph and telephone systems. In his view, transmission by wire was a natural extension of the duties of the Post Office. His goal was at least temporarily realized on July 22, 1918, when President Wilson assumed control of the wires. J. BROOKS, *supra* note 23, at 148-51.

29 Postmaster General Bulletin No. 3 (Aug. 7, 1918); Postmaster General Bulletin No. 4 (Aug. 15, 1918).

Table I[30]
Bell System Percentage Shares of the National Network

Date	Local Exchanges Wires	Toll Wires	Stations (Telephones)
1912	79	84	—
1917	84	89	—
1922	85	92	65
1927	91	94	73
1934	—	—	78

The Bell System increased its share of the telephone network by each of the three indices in the years following the Kingsbury Agreement and the associated consent decree, and its share of toll circuits was greater than its share of individual telephones. Both the relative levels of the three indices and their trends demonstrate that the Justice Department's stated goals in its 1913 negotiations had little relevance to the future development of the industry.

It should be noted that the trends documented in table 1 had the continued approval of the rest of the Federal government. The telephone networks were returned to private operation after World War I, and Congress exempted the acquisition policies of telephone companies from the antitrust laws in the Willis-Graham Act of 1921,[31] provided that the ICC approved the acquisitions.[32] The ICC heard 275 acquisition cases between 1921 and the formation of the Federal Communications Commission (FCC) in 1934, almost all of them involving acquisitions by the Bell System.[33] It approved 272 of them.[34] In a massive investigation of the telephone industry conducted during the first five years of its existence, the FCC concluded that AT&T had adhered to the agreements of 1913-14.[35]

[30] The sources for table I are: AT&T, BELL SYSTEM STATISTICAL MANUAL 502 (1964) (stations); UNITED STATES CENSUS BUREAU, 1927 CENSUS OF ELECTRICAL INDUSTRIES table 26 (data for 1922 and 1927 exclude independent companies with less than $10,000 gross income); UNITED STATES CENSUS BUREAU, 1917 CENSUS OF ELECTRICAL INDUSTRIES table 24 (local exchange and toll wires; data for 1912 and 1917 exclude independent companies with less than $5000 gross income).

[31] Act of June 10, 1921, Pub. L. No. 15, ch. 20, 42 Stat. 27 (1921) (amending Transportation Act of 1920, Pub. L. No. 152, ch. 91, § 407, 41 Stat. 456, 482 (repealed 1934); *see* Loeb, *supra* note 3, at 12.

[32] Act of June 10, 1921, Pub. L. No. 15, ch. 20, 42 Stat. 27 (1921) (amending Transportation Act of 1920, Pub. L. No. 152, ch. 91, § 407, 41 Stat. 456, 482) (repealed 1934).

[33] This information is derived from a manual survey supervised by the author of all relevant ICC reports between the years 1921 and 1934.

[34] See *supra* note 33.

[35] 3 FCC, TELEPHONE INVESTIGATION: SPECIAL INVESTIGATION DOCKET 1, RE-

The Kingsbury Commitment and its associated consent decree in many respects parallel the current settlement. Legal action against AT&T originated on the borderline between regulatory and judicial authority, without clear boundaries being set. The objective of the Department of Justice was the same as it is today: to establish competition in inter-exchange telephone service. Both agreements extricated all the parties from the antitrust proceeding and seemed to set a new direction for the Bell System and public policy. The redirection of public and private policy, however, did not materialize for the period after the earlier agreement. The Bell System continued its policy of acquisition and consolidation with the support of several branches of government. The results are shown in table 1. Thus, the 1913-14 agreement simply ended the antitrust suit without achieving the goals of that litigation.

II. The 1956 Agreement and Consent Decree

A different problem with telephone regulation became apparent in the years following the Second World War. As prices rose, state regulators were subjected to repeated requests for rate hikes by telephone operating companies.[36] From its earliest days, the Bell System had attempted to bring telephone service to as many people as possible.[37] This policy, known as "universal service," has also been a primary goal of state regulators since the turn of the century and was written into the Federal Communications Act of 1934.[38] The FCC and state regulators have promoted universal service by holding down the price of local telephone service.

Faced with repeated applications for higher monthly telephone rates, the state regulators looked for alternatives to simply granting the companies' requests. One approach, looking to the relationship between local service and interstate toll service, was the attempted shifting of costs into the interstate jurisdiction where they would affect long-distance rather than local rates.[39] A

PORT ON CONTROL OF TELEPHONE COMMUNICATIONS, CONTROL OF INDEPENDENT COMPANIES 40-41, 43-44 (1937).

[36] *See* NATIONAL ASS'N OF R.R. AND UTILS. COMM'RS, PROCEEDINGS OF THE FIFTY-NINTH ANNUAL CONVENTION 342, 349, 354 (1948); NATIONAL ASS'N OF R.R. AND UTILS. COMM'RS, PROCEEDINGS OF THE SIXTY-FIRST ANNUAL CONVENTION 16 (1950); NATIONAL ASS'N OF R.R. AND UTILS. COMM'RS, PROCEEDINGS OF THE SIXTY-SECOND ANNUAL CONVENTION 45 (1951).

[37] AT&T, *supra* note 7, at 22-27.

[38] Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-610 (1982)).

[39] The ability of state and Federal regulators to adjust the profitability of the

second approach, looking at the relationship between local service and the equipment used to furnish it, sought to reduce the prices that the telephone companies paid to Western Electric, Bell's manufacturing arm, for equipment.

The second approach, unlike the first, probed the limits of telephone regulation. While interstate telephone service was regulated by the FCC, Western Electric was not regulated at all. Inasmuch as it was neither a common carrier nor a public utility, it did not fall within the jurisdiction of state or Federal commissions. State regulatory agencies complained to the Department of Justice that they could not gather enough information on Western Electric's costs to determine whether the prices Western charged the operating companies were reasonable.[40]

The FCC's investigation of the telephone industry in the 1930's examined the relationship between Western Electric and the rest of the Bell System.[41] The Commission found that the relationship was designed to use the local rate-setting procedures to extract monopolistic profits for Western's telephone products.[42] In 1882 the parent company, then called the American Bell Telephone Company, granted to Western the exclusive right to supply the telephones and telephone equipment used in the Bell System.[43] The FCC challenged the "professed purpose" of the contract—to assure the Bell System of an adequate supply of telephones—and found that the actual purpose was to "assure the Western Electric Co. a monopoly in the supplying of equipment to the operating licensee companies of the Bell System."[44] The terms of the contract also assured that only the Bell System

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local companies and AT&T arose out of the fact that much of the plant and equipment that is used for local calling is also used for long-distance calling. The most obvious example is the telephone instrument itself. The allocation of the cost of such jointly used plant and equipment between local and interstate operations affects the profitability of local and long-distance service even though local and long-distance rates are held constant. Debate over the "proper" allocation of joint costs became heated in the 1940's and persists today. *See generally* R. GABEL, DEVELOPMENT OF SEPARATIONS PRINCIPLES IN THE TELEPHONE INDUSTRY (1967); J. SICHTER, SEPARATIONS PROCEDURES IN THE TELEPHONE INDUSTRY: THE HISTORICAL ORIGINS OF A PUBLIC POLICY (1977); Temin & Peters, *Cross-Subsidization in the Telephone Network*, 21 WILLAMETTE L.J. —— (1985) (forthcoming).

40 NATIONAL ASS'N OF R.R. AND UTILS. COMM'RS, PROCEEDINGS OF THE SIXTIETH ANNUAL CONVENTION 92-95 (1948).

41 FCC, *supra* note 5, *passim*.

42 *Id.* at 585-89.

43 *Id.* at 237. The contract was amended in 1908 without substantially changing any of the terms essential to the Commission's discussions. *Id.* at 238.

44 *Id.* at 237-38.

companies would have access to Western products.[45] The Commission concluded its condemnation of the vertical structure of the Bell System by charging that Western's accounting practices served to inflate the cost of telephone equipment sold to the operating companies.[46] Those inflated figures, the Commission contended, resulted in the setting of higher local rates than would have resulted had the state regulators used the actual cost of Western-manufactured equipment, which was "much lower" than Western's reported costs.[47]

Incited by and armed with the FCC's findings, state regulators appealed to the Attorney General for action by the Justice Department, which brought a complaint against Western Electric and AT&T in January 1949.[48] The complaint, based on the FCC's findings in the 1930's, charged that Western and AT&T had monopolized trade in telephone equipment.[49] It sought to separate Western Electric from AT&T and Bell Telephone Laboratories, the research branch of the Bell System.[50] Once separated, Western Electric was itself to be split into three competing units which would sell equipment to AT&T and the Bell operating companies by competitive bidding.[51] The government also asked the court to force AT&T to relinquish its control over the operating companies' telephone equipment specifications.[52] Lastly, the government demanded that Western Electric and Bell Laboratories license their patents to competitors on a reasonable basis.[53]

All parties to the suit viewed the divestiture of Western Electric as the central focus of the case.[54] As the government's lead attorney said, "the basic purpose of the suit is to introduce some competition in the purchase [of telephone apparatus and equipment] by the Bell operating companies and the long lines department of AT&T."[55] This statement suggests the Justice

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45 *Id.*

46 *Id.* at 321-22.

47 *Id.* at 322.

48 See Complaint, United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan. 24) (complaint filed Jan. 14, 1949), *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24).

49 *Id. passim.*

50 *Id.* at 68-69.

51 *Id.* at 69-71.

52 *Id.* at 68-71.

53 *Id.* at 71-72.

54 *See generally* Oppenheim, Timberg & Van Cise, *Divestiture as a Remedy Under the Federal Antitrust Laws*, 19 GEO. WASH. L. REV. 119 (1950).

55 *The Consent Decree Program of the Department of Justice: Hearings Before the Antitrust*

Department had decided that Western Electric both enjoyed a monopoly in the sale of telephone equipment and was beyond the control of state and Federal regulation. The government, therefore, hoped to substitute the discipline of competition for the unattainable discipline of regulation.[56] AT&T also saw divestiture as the focus of the case, although, understandably, it did not refer to any need to introduce competition into the telephone equipment market.[57]

The case never went to trial. It was settled through a negotiated agreement between AT&T and the Justice Department. The settlement received court approval in 1956.[58] The negotiations appear to have centered on the issue of divestiture until November 1955, when Attorney General Brownell abandoned the government's demand for divestiture. The reason the government changed its position is not clear, although the FCC and the Defense Department seem to have played important roles.[59]

In a related development, much of the original motivation for the suit had disappeared when the FCC adopted the alternative approach to the problem of rising local rates.[60] Through a series of "separations" agreements with AT&T and state regulators, the FCC approved a plan that shifted costs from intrastate to interstate services, thereby reducing the need to raise local rates.[61] The critical negotiations took place in 1951 while the antitrust suit was in progress.[62] Thus, the original goal of the antitrust action, the lowering of local rates, was accomplished through regulation. From the point of view of traditional microeconomic theory, the regulatory solution could only be ap-

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Subcommittee of the House Committee on the Judiciary, 85th Cong., 2d Sess. 3613 (1958) (statement of Mr. Baldridge) [hereinafter cited as *Antitrust Hearings*].

56 For the economic theory behind the interchangeability of regulation and competition for the purpose of controlling markets, see F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 518-42 (1970).

57 STAFF OF ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 33 (Comm. Print 1959) [hereinafter cited as ANTITRUST REPORT].

58 United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan. 24), *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24).

59 ANTITRUST REPORT, *supra* note 57, at 51, 55-59, 63-65, 71-78. See also *id.* at 39, where the subcommittee suggests that AT&T may have received "special and preferred treatment" from the Department of Justice as a result of improper conduct.

60 *See supra* notes 39 & 40 and accompanying text.

61 *See generally* R. GABEL, *supra* note 39 (history of allocating costs through "separations"); J. SICHTER, *supra* note 39 (same); Temin & Peters, *supra* note 41 (same).

62 *See* United States v. AT&T, 552 F. Supp. 131, 136-38 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

proximate and probably temporary. The essential difficulty, that of properly pricing Western Electric's sales to the operating telephone companies, remained.

Whatever the cause of the government's change in position, it was accompanied by a change in the perceived boundary of regulation, just as the first antitrust suit against AT&T in 1913 involved a change in the perceived boundary of the Justice Department's authority. In a letter to Brownell, written at his request on November 30, 1955, the FCC asserted "that adequate powers reside in regulatory authorities to deal with the matter of Western's prices and profits, insofar as they may affect the investment and expenses of affiliated operating telephone companies."[63]

An earlier draft of the letter, prepared by Bernard Strassburg, chief of the Rates and Revenues Branch of the FCC's Common Carrier Telephone Division, had questioned whether the regulators had the resources to conduct effectively inquiries into Western's costs, inquiries they were legally permitted to make.[64] He further observed that the FCC lacked sufficient information to speculate on whether Western's prices were above or below the price that a competitive market would set. These passages were deleted in the final version of the letter,[65] possibly because the FCC wanted to strengthen AT&T's position.

Agreement on a consent decree was reached soon after the Attorney General abandoned the government's demand for the divestiture of Western Electric.[66] The consent decree had two parts. First, it restricted AT&T to "the furnishing of common carrier communication services" and Western Electric to the manufacture and sale of equipment to the Bell System.[67] Second, it provided for a royalty-free licensing of all Bell patents.[68]

Brownell defended his decision not to press the divestiture demand on the grounds that the court would not have granted it and that Western was supplying telephone equipment at prices

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63 Letter from the FCC to Attorney General Brownell (Nov. 30, 1955), *reprinted in* ANTITRUST REPORT, *supra* note 57, at 348.

64 ANTITRUST REPORT, *supra* note 57, at 74-75, 77.

65 *Id.*

66 *See* United States v. AT&T, 552 F. Supp. 131, 136-38 (1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

67 United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246, at 71,137-38 (D.N.J. Jan. 24), *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24).

68 *Id.* at 71,132, 71,139-41.

beneath those that a competitive market would charge.[69] The credibility of the latter point becomes doubtful when viewed in the light of Strassburg's draft letter. Assistant Attorney General Stanley Barnes seemed similarly disingenuous in his post hoc attempt to shift the focus to Bell's patents, which, in testimony before a Senate subcommittee, he claimed to have been "the heart of [matter],"[70] even though he had referred two years earlier to compulsory patent licensing as "window dressing" that would do little to bring competition into Western's market.[71]

Like the Kingsbury Agreement, the 1956 consent decree terminated the investigation and prosecution of AT&T and the Bell System companies. Unlike the earlier agreement, however, it did not even address the concerns that prompted the filing of the suit: the difficulty state and Federal regulators faced in determining the reasonableness of prices charged by Western Electric to AT&T and the Bell operating companies.

The immediate effects of confining the non-government businesses of AT&T and Western Electric to common carrier communications were that Western had to stop making railroad signalling equipment and had to spin off its sound recording and typesetting operations while the telephone companies had to give up their private communications business.[72] These activities accounted for a very small part of those firms' businesses in 1956.[73] An AT&T representative stated three years later that if those restrictions were to have had a serious limiting effect on the Bell System, it would have been on the System's ability to enter different lines of business in the future.[74] Moreover, the agreement's fallibility was demonstrated almost immediately when the California Supreme Court permitted Pacific Telephone to continue offering mobile communications systems, even though they were not a common carrier service, on the grounds that the systems were subject to state regulation and the consent decree expressed no intention to prohibit the Bell System from offering

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69 ANTITRUST REPORT, *supra* note 57, at 86-87.

70 *Id.* at 33 n.14.

71 *Id.* at 60, 342.

72 *Id.* at 98.

73 Western Electric's 1956 sales totaled $2370 million. Gross sales of the proscribed lines of business totaled approximately $19.05 million annually, less than one per cent of 1956 total sales (railroad signalling equipment—$250,000; sound recordings—$16 million; Teletypesetter Corp.—$2.8 million). *Id.* at 98 nn. 34-36.

74 *Id.* at 98 n.39.

regulated services.[75]

The consent decree's patent provisions also seemed to have had little effect.[76] There are several explanations. First, the decree's requirements differed little from Bell's existing patent policy.[77] Second, the Bell System was permitted to require licensees to grant it reciprocal rights in the licensee's own patents.[78] Lastly, even for pre-decree patents, which had to be licensed for no royalty, the Bell System could charge a fee for providing technical information necessary to utilize the patents.[79]

It might have been hoped that the patent requirements of the consent decree would have had the effect of bringing competition to the telephone market by giving competitors the ability to manufacture anything that Western Electric could produce. The ability to manufacture, however, does not necessarily carry with it the ability to sell. Potential manufacturers complained that there was no market for telephone equipment made by independent suppliers.[80] It would take a series of court and FCC decisions over the next two decades to introduce some competition into the market for terminal equipment.

In its broad outline, the 1956 consent decree followed the pattern of the earlier Kingsbury Commitment. It arrested an antitrust action against AT&T which had arisen in the gray area between regulatory and antitrust policy. More specifically, the antitrust suit had arisen as a result of apparent limitations of regulatory authority that led to antitrust questions. The settlement had little relevance to the original issues of the case, appearing instead to offer a revision of industry structure. Events, specifically the growth of separations, had largely mooted the original problem.[81] And the settlement, finally, promised far more than it

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75 Commercial Communications Inc. v. Public Util. Comm'n, 50 Cal. 2d 512, 327 P.2d 513 (1958), *appeal dismissed and cert. denied*, 359 U.S. 341 (1959).

76 United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246, at 71,139-42 (D.N.J. Jan. 24), *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24); *see* ANTITRUST REPORT, *supra* note 57, at 108, 120; Note, *Antitrust: Consent Decree: The History and Effect of* Western Electric Co. v. United States, 45 CORNELL L.Q. 88, 93-95 (1959).

77 *See* United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246, at 71,139-43 (D.N.J. Jan. 24), *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24).

78 *Id.* at 71,140.

79 *Id.* at 71,141-42.

80 ANTITRUST REPORT, *supra* note 57, at 108.

81 *See supra* note 39. The change in separation payments mooted the original purpose of the case in the following way. State regulators had believed, and the FCC had found, that local ratepayers were subsidizing Western Electric through the

delivered. In all these characteristics, the 1956 consent decree recalled the earlier agreement and consent decree.

III. The 1974 Suit and the 1982 Settlement

The government's 1974 antitrust suit against AT&T[82] grew out of yet another ambiguous zone between antitrust and regulatory authority. In this disputed terrain, the Justice Department and the FCC operated with uncertainty and disregard of each other, generating the confusion that led to legal action. As a result of the regulatory policy established in the 1950's, relatively low local rates had been funded through an elaborate system of subsidies from the more profitable parts of the telephone network.[83] This regulatory scheme became unstable when the FCC began to embrace the traditional goal of the Justice Department's antitrust policy—competition. At the prompting of the Federal courts in the *Carterfone* decision,[84] in 1968 the FCC started to encourage competition against AT&T.[85] Without relaxing its general policy in favor of universal service,[86] the FCC began to accept applications from prospective entrants into Bell's most profitable markets on a piecemeal basis.[87] AT&T reacted in defense of the nationwide network it controlled by resisting interconnection with these new competitors.

Furthermore, AT&T's promise to confine its business to telephony as defined in the 1956 consent decree—an agreement easily made at the time—had become an irritation by the mid-

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mechanism of inflated prices charged by Western to the local companies for equipment. Changes in separations procedures created a subsidy running in the opposite direction, through the mechanism of shifting AT&T's long-distance revenues to the local companies. *See supra* notes 36-39 and accompanying text.

82 United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

83 *See supra* note 39.

84 Carterfone v. AT&T, 250 F. Supp. 188, 192 (N.D. Tex.), *aff'd*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

85 *In re* Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420, *petition for reconsideration denied*, 14 F.C.C.2d 571 (1968).

86 See *supra* note 38 and accompanying text.

87 *See, e.g.*, *In re* Applications of Microwave Communications, Inc., 18 F.C.C.2d 953 (1969); Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). The FCC received 46 separate applications for permission to build microwave systems. *Id.* at 1145 n.1. See Specialized Common Carrier Servs., 29 F.C.C.2d 870, 915, *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), where the Commission acknowledged the likelihood that Bell's high profit markets would be relatively more attractive than other Bell markets to potential competitors.

1970's. The rapidly advancing technology of telecommunications had made the definition of telephone service difficult. AT&T, having traditionally followed new technologies to the point of commercial application, was naturally inclined to view markets created by the new technologies as within the scope of its telephone business. The nascent ambiguity of the 1956 decree, however, meant that entry into those markets required FCC approval. In the case of AT&T's entry into the market for enhanced network services and data processing, obtaining approval required at least ten years of hearings.[88]

The conflicts between AT&T, its competitors, and the government finally erupted in over forty private antitrust suits against AT&T, in addition to the 1974 action brought by the Justice Department. The wording of the government's complaint[89] against AT&T provides little insight into precisely what the government hoped to achieve by bringing the suit. Rather, it attacked a broad range of actions taken by AT&T during the previous seventy years.[90] If granted, the relief prayed for would have left little of the existing telephone network intact. Not only did the complaint repeat the 1949 suit's demand for the divestiture of Western Electric, but it also asked that the operating companies, Bell Laboratories, and AT&T's operating divisions be separated from each other.[91] The complaint further sought that Western Electric, Bell Laboratories, and the operating companies themselves be broken up into an unspecified number of pieces.[92]

This interpretation of the government's motives identifies the case as part of the government's generalized attack on big business and regulation during the early 1970's.[93] That period

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88 See *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Servs. and Facilities, 28 F.C.C.2d 291 (1970) (*Computer I*), *final decision and order*, 28 F.C.C.2d 267 (1971), *aff'd in part sub nom.* GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir.), *decision on remand*, 40 F.C.C.2d 293 (1973); *In re* Section 64.702 of the Comm'rs Rules and Regulations, 77 F.C.C.2d 384 (*Computer II*), *final decision modified*, 84 F.C.C.2d 50 (1980), *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* Lousiana Pub. Serv. Comm'n v. FCC, 461 U.S. 938 (1983).

89 Complaint, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) (complaint filed Nov. 20, 1974), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

90 *Id.* at 11-13.

91 *Id.* at 14-15.

92 *Id.*

93 *See generally* Comment, *Storming the AT&T Fortress: Can the FCC Deregulate Competitive Common Carrier Services?*, 32 FED. COMM. L.J. 205 (1980).

witnessed major government antitrust suits against IBM,[94] breakfast-cereal makers,[95] and oil companies,[96] in addition to the deregulation of the trucking[97] and airline industries.[98]

The lack of focus in the AT&T case did not prevent the litigation from becoming a millstone around the necks of both the Justice Department and AT&T. Indeed, it probably helped. By the time Assistant Attorney General William Baxter took charge of the government's case, both parties seemed ready for a settlement, despite Baxter's celebrated statement of his intention to "litigate the case to the eyeballs."[99]

Baxter brought the case into sharper focus. He found the source of AT&T's monopoly power to be in its control over the local networks, which had been protected from competition as a result of state regulation for over seventy years.[100] Following the precedent of the 1956 consent decree, Baxter approved of the connection among AT&T's operating divisions, Western Electric, and Bell Laboratories. The theory of the agreement between the Justice Department and AT&T, presented to the court on January 8, 1982, followed this simple scheme: by isolating control over the local networks from the rest of the Bell System, Baxter hoped to reduce AT&T's dominance over the rest of its markets while allowing AT&T to compete freely within them.[101] The

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94 *See, e.g.*, *In re* IBM, 687 F.2d 591 (2d Cir. 1982) (district court judge ordered to conclude antitrust action against IBM after 13 years of litigation).

95 *See, e.g.*, FTC v. J.E. Lonning, 539 F.2d 202 (D.C. Cir. 1976) (administrative proceeding alleged that three manufacturers had a "shared monopoly" in the ready-to-eat cereal markets).

96 *See generally* Adams, *Vertical Divestiture of the Petroleum Majors: An Affirmative Case*, 30 VAND. L. REV. 1115 (1977); Greening, *Increasing Competition in the Oil Industry: Government Standards for Gasoline*, 14 HARV. J. ON LEGIS. 193 (1977); Ritchie, *Petroleum Dismemberment*, 29 VAND. L. REV. 1131 (1976).

97 *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified at and amending scattered sections of 49 U.S.C. §§ 10101-11707 (1982)); Cutler, *Regulatory Mismatch and Its Cure* (Book Review), 96 HARV. L. REV. 545, 550 (1982).

98 *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at and amending scattered sections of 49 U.S.C. app. §§ 1301-1552, 1701-1743 (1982)). *See generally* 41 J. OF AIR L. & COM. 573, 573-873 (1975) (untitled symposium on airline regulation); 43 J. OF AIR L. & COM. 641, 641-690 (1977) (additional commentary on airline deregulation); *Colloqium: The Deregulation of Industry*, 51 IND. L.J. 682, 682-755 (1976).

99 N.Y. Times, Apr. 10, 1981, at 1, col. 6.

100 A. VON AUW, HERITAGE & DESTINY: REFLECTIONS ON THE BELL SYSTEM IN TRANSITION 112 (1983).

101 Stipulation of Parties, United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan. 24) (stipulation filed Jan. 8, 1982, consenting to entry of modification of final consent judgment), *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24).

court explicitly adopted Baxter's reasoning in its approval of the proposed settlement.[102]

It remains to be seen, however, whether the announced goals of the settlement can be achieved by the terms of the agreement. The Kingsbury Agreement and the 1956 consent decree also had grand designs, but neither achieved more than the removal of unresolved issues from the antitrust arena. There are two categories of reasons that suggest that the recent consent decree may not achieve its objectives with any more success than the two previous antitrust settlements. First, the court has contaminated the theoretically pure nature of the proposed settlement with its insistence upon modifications. Second, the Bell System is very large and very old, and it is traveling along a well-established trajectory with considerable inertia.

Turning first to the court's modifications of the proposed decree, it is evident that the court attempted to blur the clear isolation of the local monopolies from the competitive markets of the industry. The court made fleeting reference to the need to allow the inter-exchange market to operate freely, but it has become obvious that the court was willing, if not anxious, to permit the institution of a subsidy from the long-distance ratepayer to the local ratepayer.[103] The FCC appears to have preempted this decision, imposing an "access charge" on local ratepayers to avoid such a subsidy.[104] If the court has its way, however, long-distance carriers will pay a charge to the local companies with which they interconnect.[105] Although the court stated at one point that such charges must be cost-justified, it has stated repeatedly that the cross-subsidy should be set at a level high enough to ensure that local rates do not increase after the divestiture.[106] The effect of the settlement as approved by the court, therefore, would not even affect the structure of telephone rates. Instead, it would perpetuate the system of subsidies that contributed so profoundly to the regulatory crisis that produced the

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102 The court stated that "[p]ast restrictions on AT&T were justified primarily because of its control over the local Operating Companies." United States v. AT&T, 552 F. Supp. 131, 170 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

103 *Id.* at 169.

104 *In re* MTS and WATS Mkt. Structure (Phase I), 93 F.C.C.2d 241 (1982).

105 United States v. AT&T, 1983-1 Trade Cas. (CCH) ¶ 65,333, at 69,973-75 (D.D.C. Apr. 20); United States v. AT&T, 1983-2 Trade Cas. (CCH) ¶ 65,756, at 69,862-63, 69,876 (D.D.C. opinion filed July 8).

106 United States v. AT&T, 552 F. Supp. 131, 169 n.161 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

government's suit in 1974.[107] That rates are in fact changing is the result of FCC policy rather than the antitrust settlement.

Another deviation lies in the court's treatment of telephone directories. In an effort to hold down local rates, the court required Bell's directory advertising business, which was generating two billion dollars annual revenue, to remain with the operating companies.[108] Although the "Yellow Pages" depend on the operating companies for subscriber information, the market for directory advertising is not part of the operating companies' natural-monopoly business. Independent directories, similar to the "Yellow Pages," have begun to appear in many areas. The court's action gives operating companies the incentive to favor their own directory business over that of the competition. Moreover, an industrial structure built on cross-subsidization recalls the conditions that the recent settlement was designed to avoid. Such a deviation from the underlying principles of the settlement may not appear, by itself, overly threatening to the settlement's basic purposes; nevertheless, it betrays a lack of recognition that such attempts to protect the local ratepayer undercut the theoretical structure of the settlement.

Not only has the court deviated from the theory of the settlement by seeking to make the local networks financially dependent on competitive markets, but it also has shackled one of the competitors even after having claimed to have removed that competitor's monopoly power. The court has demanded that AT&T be excluded from electronic publishing for a period of at least seven years.[109] This restriction harkens back to the confinement of AT&T to "telephone" business in the 1956 decree. As stated above, the ambiguity of the 1956 restriction contributed to the uncertainties that produced the 1974 case. It does not take a great deal of imagination to recognize the contribution that the current restriction on AT&T could make to a new gray area between the regulators and the courts.

The second category of problems facing the 1982 settlement concerns AT&T's corporate inertia. In 1916 Judge Rose observed:

> In administering the anti-trust acts, a number of great and powerful offenders against them have been dissolved. So far

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107 *See supra* notes 83-87 and accompanying text.

108 United States v. AT&T, 552 F. Supp. 131, 193-94, 231 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

109 *Id.*

> as is possible to judge, the consuming public has not as yet greatly profited by their dissolution. It is perhaps not likely that any benefit could have been expected until in the slow course of time the ownership of the newly created corporations gradually drifts into different hands.[110]

To apply this observation to the current divestiture one need only substitute "management" for "ownership," because the holders of AT&T stock are so numerous as to leave control of the Bell System in the hands of its upper level managers.[111] Moreover, employees at all levels of AT&T and its various subsidiaries, known for their long service, generally feel a strong loyalty to the Bell System. That feeling has been reinforced by Bell's policy of rotating its management from company to company within the system according to the system's needs.

The Bell System is now showing signs of reconstituting itself in its old form, despite the severance of AT&T from the operating companies. Like the Hydra, the operating companies seem to have regenerative powers. At the national level, we find a coordinating body called Bell Communications Research (Bellcore), originally called the Central Service Organization.[112] The Defense Department had argued for a single contact point for the country's telephone network in order to serve the nation's security needs in times of emergency.[113] Of the 8800 projected employees of Bellcore, however, only 2200 were intended to serve the needs of the Defense Department.[114] Furthermore, the independent telephone companies are not represented in Bellcore, nor are any interexchange carriers other than AT&T. Bellcore is hardly a duplicate of AT&T, but

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110 United States v. American Can Co., 230 F. 859, 902 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).

111 *Cf.* Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L. REV. 1, 2 (1951) ("The *Standard Oil* decree had the fatal flaw of leaving economic control over the successor companies with the same interests that had exercised control over the parent company prior to dissolution.").

112 *See* United States v. AT&T, 1983-2 Trade Cas. (CCH) ¶ 65,756, at 69,871-74 (D.D.C. opinion filed July 8).

113 In each of the three efforts to break up AT&T, the military and defense establishments have been unnamed yet influential parties. *Compare* 88 CENT. L.J. 335, 335 (postal system control of telephone system during WWI intended to aid military) *with* United States v. AT&T, 552 F. Supp. 131, 136-37 (D.D.C. 1982) (detailing Defense Department efforts during Korean War to encourage settlement of 1949 suit), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) *and* N.Y. Times, Apr. 10, 1981, at D3, col. 1 (discussing Department of Defense concerns over "strategic importance of an effective, integrated communications network").

114 *See* United States v. AT&T, 1983-2 Trade Cas. (CCH) ¶ 65,756, at 69,871-74, 69,893 n.246 (D.D.C. opinion filed July 8).

it will provide a structure for much of the intercompany communications that had previously gone through AT&T.

Beneath Bellcore, the Bell System has grouped the operating companies into seven regions. All of the stock of the operating companies of each region is held by regional holding companies.[115] Thus, the holding-company structure attacked by the settlement of the government's antitrust suit is reproduced in seven smaller, yet still massive, versions.[116]

This reproduction of the industry's previous organization may well frustrate the attempt to separate sharply the competitive and regulated segments of the industry. The restrictions placed on the operating companies by the settlement do not specifically address the question of holding companies. Will the holding companies be subject to the same restrictions, or will they be free to enter any business of their choosing? If the holding companies invest in inter-exchange carriers, a reason to discriminate between competing carriers in giving access to the local networks would be recreated. A similar problem would arise should the holding companies invest in any business dealing with the local companies, such as telephone equipment supply or electronic publishing companies.

Keeping the operating companies themselves out of the inter-exchange business may also prove difficult. Recent statements from operating-company managements reveal their intention to offer long-distance service in competition with unregulated carriers.[117] Under the Plan of Reorganization approved by the court, the local companies are permitted to offer inter-exchange service within the boundaries of their service areas.[118] At present, these toll routes produce some five billion dollars of revenue annually.[119]

Furthermore, the operating companies will be allowed to provide themselves with long-distance lines between local-service areas.[120] If the operating companies choose to supply this service for

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115 Plan of Reorganization at 451-71, United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982) (reorganization plan filed Dec. 16), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

116 *Cf.* Hale, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 COLUM. L. REV. 615 (1940) (discussing dissolution of horizontally integrated corporations).

117 White, *Local Bell Companies Begin Push to Re-Enter Long-Distance Market*, Wall St. J., Feb. 2, 1984, at 33, col. 4.

118 United States v. AT&T, 1983-1 Trade Cas. (CCH) ¶ 65,333, at 69,971 (D.D.C. Apr. 20).

119 *Id.* at 69,971 n.23.

120 United States v. AT&T, 1983-2 Trade Cas. (CCH) ¶ 65,756, at 69,866 (D.D.C. opinion filed July 8).

their own use, they could decide to provide enough capacity to handle their peak-load needs. Excess capacity would exist at other times, and one could imagine that regulators might be persuaded to permit the operating companies to sell their unused capacity to the general public.

Thus, the holding companies and the operating companies may become regional "Bell Systems," resembling the former national system. They will be inclined to cooperate with one another because they will not compete against each other in any meaningful sense. In contrast to the court-ordered break-ups of American Tobacco,[121] Standard Oil,[122] and Alcoa,[123] the new telephone holding companies will not be selling in the same market;[124] thus, they cannot be expected to compete to the extent that the firms created in those other industries compete against each other. Moreover, the formal institutions in the new telephone industry appear designed to facilitate inter-firm cooperation.[125]

Aside from the proliferation of new corporate names, the major consequence of the settlement appears to be the increase in local rates accompanying the introduction of "access charges."[126] Those charges, however, were not part of the settlement. They were instituted by the FCC in opposition to the court's wishes and must therefore be considered distinct from the settlement itself.[127]

IV. Conclusion

History is not a sure guide to the future, and historians are not prophets. Yet the aphorism that those who do not know history are condemned to repeat it indicates the folly of the oppo-

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121 United States v. American Tobacco Co., 221 U.S. 106 (1911).

122 Standard Oil Co. v. United States, 221 U.S. 1 (1911). *See generally* Wilgus, *The Standard Oil Decision; The Rule of Reason*, 9 Mich. L. Rev. 643 (1911).

123 United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

124 See United States v. AT&T, 1983-2 Trade Cas. (CCH) ¶ 65,756, at 69,858 (D.D.C. opinion filed July 8), where the court justifies its requirement that the Operating Companies affix geographic designations in their uses of the name "Bell" by stating that "[w]ith respect to exchange telecommunications, exchange access, and directory advertising, the Operating Companies and the Regional Companies will, by definition, be limited to clearly defined geographic areas." The only exception noted by the court to the regional isolation of the divested companies is the possibility that they may wish to sell equipment in other regions than their own. *Id.*

125 *See supra* notes 112-16 and accompanying text.

126 Wall St. J., Dec. 17, 1984, at 26, col. 3.

127 *Cf.* United States v. AT&T, 552 F. Supp. 131, 169 n.161 (D.D.C. 1982) (regulators free to retain or change inter-exchange revenues), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

site extreme. History, while an uncertain guide, is preferable to no guide at all.

This is particularly true if one considers the current restructuring of AT&T. The changing corporate form of AT&T and the proliferation of new corporate entities with strange names appears to presage major changes in the telephone industry. And changes there surely will be. But the extent to which competition will be the guiding principle of telecommunications remains to be seen. Twice before the government has tried to use antitrust prosecution to resolve uncertainties in defining the limits of regulation. The problem in 1913 was the acquisition of local operating companies. The problem in 1949 was the inability of regulators to assess equipment costs. And the problem in 1974 was the attempted entry of competing telephone companies.

The proposed solution in 1913 proved to be unworkable and was quietly forgotten. The proposed solution in 1956 was not even considered to be an adequate measure at the time it was presented;[128] instead the problem was largely mooted by the introduction of cross-subsidies from long-distance service that obviated the need to reduce the cost of equipment purchases. Those cross-subsidies, it must be recalled, were instituted by telephone regulators, not the court. The solution of 1982 seems to lack the precision and power needed to sever cleanly the competitive and regulated parts of the telephone industry. The removal today of the cross-subsidization instituted by the FCC in the 1950's would be, perhaps appropriately, the FCC's doing. Analysts of the antitrust settlement need to distinguish between the actions of the FCC and effects of the settlement itself.

As in the previous instances, the principal effect of the recent antitrust settlement was termination of the antitrust suit. In addition, the settlement has forced a thorough corporate reorganization of AT&T. Whether this corporate reorganization, as opposed to changes in telephone technology and FCC policies, will alter the nature and extent of competition in the telephone industry, however, is still an open question. The historical parallels suggest that the settlement itself will have a lesser impact than the naive observer might suppose.

The role of antitrust action in heavily regulated areas may well be different from its role in the economy generally. The process of bringing a suit may serve as a catalyst for discussion

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128 *See* Note, *supra* note 76, at 93 (attributing immediate commencement of congressional hearings to "apparent relative passivity of decree").

and as an inducement for regulatory change. The results of that process, rather than the settlement of the suit itself, may be the relevant point.

The resulting settlement, in this scheme, emerges as a method of terminating the suit once it has achieved its indirect purpose. Of course, the power of the suit to force changes elsewhere may depend on the potential for the settlement to do more. The Department of Justice, therefore, could never publicly embrace this theory without destroying it. Only after the fact can outside observers be permitted to ask if, yet again, this is the process by which the many branches of government have altered the direction of telephone regulation.