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A LESSON FROM THE LANDMARK AT&T BREAKUP:

Both a Sector-specific Regulator *and*
Antitrust Enforcers Were Needed



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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
INTRODUCTION	4
PART I. THE "BELL" SYSTEM: AT&T's MONOPOLY	4
PART II. THE FCC's FRAMEWORK	5
A. Long Distance	5
B. "Enhanced/Information" Services	7
C. Telephone Equipment Used by Telephone Service Customers	7
D. Telephone Equipment Used by Telephone Service Customers with Data Processing Capability	8
PART III. THE DIVESTITURE ORDER BY THE COURT	9
A. The Reorganization of AT&T and the Divestiture	10
B. Promoting Competition	10
1. Long Distance	11
2. Information Services	12
3. Customer Premises Equipment	12
Part IV. A MODEL FOR "TECH"	12

EXECUTIVE SUMMARY

The antitrust case that resulted in the breakup of AT&T in 1984, brought by the Department of Justice, is regarded as one of the most, if not *the* most, successful antitrust cases in history.¹ Today’s policymakers face the challenge of addressing Big Tech’s exertion of its power through those same (and additional proposed new) antitrust laws. As is demonstrated below, it was not antitrust laws or the DOJ alone that brought about the success of the AT&T suit; rather, it was a combination of regulatory activity by the sector-specific regulator, the Federal Communications Commission, paired with that litigation that paved the way for reining in the harms caused to consumers and innovation by AT&T’s monopoly. This deeper understanding of the case’s history demonstrates that the synergy between regulation and antitrust enforcement will be necessary to develop some of the key remedies needed to rein in the problems Big Tech is creating for consumers and innovation today.

There are, of course, important differences between the story of AT&T and today’s clashes over Big Tech. Perhaps the most important is that when the antitrust case against AT&T was begun in 1974, it already had the benefits (discussed in detail below) of over a decade of FCC regulation, and by the time of the settlement of the case in 1982, over two decades of FCC regulation, but *as of now* there is no regulatory agency dedicated to issues raised by tech. While the antitrust cases launched against platforms like Facebook and Google would certainly have benefited from a regulatory backdrop akin to that present in the AT&T case, it is by no means necessary. Regulation and antitrust are synergistic enterprises—the lack of one should never be taken as a reason to delay the other. The choice between pursuing regulation or antitrust is a false one. The correct answer is to do both as quickly and efficiently as the political realities allow.

The FCC began its efforts that ultimately led to the injection of competition into the telecommunications market in the early 1960s through dozens of complex, multi-party proceedings. Those proceedings began as efforts to address issues arising under the Communications Act. At the time, the FCC’s mandate under the Communications Act of 1934 did not use the word “competition.” The FCC’s mandate was “to make available, so far as possible to all the people of the United States. . . a rapid, efficient. . . communications wire and radio communications system with adequate facilities at reasonable charges.”

In aid of implementing its statutory responsibilities, the Commission brought competition to several lines of business in which AT&T was already engaged or attempting to expand: long-distance phone service; providing and servicing the telephone equipment at the

¹ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

location of customers of AT&T's 22 Bell Operating Companies or "BOCs," which provided local telephone services; and what was then an emerging data processing industry. At the time, AT&T provided more than 80% of all kinds of telephone services in the United States and garnered more than 80% of the revenues from those services.

In each of these three areas, the FCC began with modest goals in pursuit of its own statutory responsibilities. In long-distance service, the FCC started out in 1960 allowing private parties to build their own private networks which were like internal communications systems except they connected different premises of the same entity, thus allowing multi-campus companies and other entities to avoid paying long-distance charges for their internal communications. But making the availability of this benefit available to others led the agency logically to a next step, allowing specialized communications carriers to provide these "private networks" in competition with AT&T to entities who couldn't build and operate their own. In one notable instance, the FCC balked at the efforts of specialized carriers to expand the scope of their authority to offer additional services and it required Court of Appeals intervention to keep the FCC on the competitive track, but through this incremental process and after years of FCC proceedings, in 1978 the FCC began proceedings whose result was to be the conditions for full-fledged and total long-distance service competition among multiple long-distance carriers.

Developments in each of the other two areas followed a similar pattern. The FCC began by directing AT&T and the Bell Operating Companies (the BOCs) to allow a simple device for enabling private radio lines to connect to land-line telephones to be connected at a customer's premises. This led to allowing simple devices and telephones *owned by consumers* to be attached to the telephone lines in their homes and businesses to replace the BOC-supplied equipment manufactured by a company also owned by AT&T: Western Electric. Complex equipment suitable for communications-intensive activities followed. The net result was an independent manufacturing and distribution industry competing with the Bell Operating Companies to satisfy demands for on-premises telephones and telephone systems used by individuals and businesses.

As for data processing, the FCC did not allow the BOCs (or other telephone companies) to offer data services (or hybrid data processing services combined with telephone communications service) as any part of their regulated telephone service. This would prevent telephone companies from inflating the rates for local telephone services in order to have funds that could be used to subsidize the development and other costs of the data processing services. But as a result of pursuing its statutory goal of preventing practices that could raise rates, the Commission allowed providers of data processing services to be able to more effectively compete with telephone company data processing services.

It was against the backdrop of this regulatory history that the Department of Justice filed its antitrust suit in 1974 seeking to break up AT&T's ownership of the Bell Operating Companies, Western Electric and Bell Laboratories, the research and development arm for the

whole AT&T enterprise. In January 1982, the DOJ and AT&T reached a settlement agreement that called for the divestiture of the Bell Operating Companies. It also relieved the BOCs of any obligations to use Western Electric equipment or Bell Labs' services. Additionally, the BOCs were not allowed to go into the long-distance business and AT&T was not allowed to go into the business of providing local telephone service.

The divestiture of the BOCs from AT&T and the prohibition on BOC entry into long-distance services were critical in fostering the opportunity for a more competitive telecommunications market. Divestiture removed the incentive of the BOCs to provide poorer interconnection to their networks for AT&T competitors, presumably with prodding to do so by AT&T, an incentive that was a major inhibitor to full long-distance competition. Similarly, prohibiting the BOCs from entering the long-distance business was another tool in mitigating this incentive for degradation of service to potential competitors as was the prohibition on the BOCs from manufacturing any telephone equipment so they would have no inherent reason to prefer one manufacturer over another.

But the Modified Final Judgment, or MFJ, as the court divestiture order came to be called, also needed to make sure the post-divestiture market not only prevented anti-competitive activities but also did not disrupt—indeed, fostered—competition in the long-distance market, the telephone equipment market, and the data processing market that had already emerged as a result of the FCC's actions under its empowering statute. There was a ready solution. The MFJ essentially incorporated most of the FCC's regulatory scheme.

In long-distance service, the court adopted the same test the FCC was evolving toward in its long-distance proceedings. It required the BOCs to give to all long-distance companies, including AT&T, the same or "equal access" to the BOCs' telephone exchange service to reach end users of long-distance services.

For data processing services, the court essentially relied on the definitional structure and regulatory scheme the FCC had developed after 14 years of proceedings in barring the BOCs but not AT&T from providing data processing. The court similarly relied on the FCC's definitions of customer equipment and built on the FCC's regulatory scheme for preventing the post-divestiture BOCs from preferencing their own manufactured equipment. It added another important layer by prohibiting the BOCs from manufacturing any telephone equipment.

The combination of a regulatory agency pursuing its statutorily defined mission and the DOJ independently pursuing its mission led to a highly successful result in an industry that was then the most technologically complex and advanced in the world. It is likely the same result could be obtained if an independent agency pursued defined objectives for Big Tech alongside efforts by the DOJ to pursue antitrust remedies.

As developed below, the kinds of questions that require resolution to address the many issues beyond competition, such as the limits and potential of interoperability or different economic models in Big Tech, may be particularly suited for similar kinds of complex and multiple proceedings of the kind conducted by the FCC.

INTRODUCTION

Effective competition in technologically complex industries is best achieved by a regulatory agency that, while in pursuit of fulfilling its statutory mandates, can acquire deep knowledge of the industry and the development of workable solutions through rulemaking and standard setting and other proceedings backed by vigorous enforcement. For example, a regulatory agency's rulemaking or standard setting proceeding can address issues such as the limits and potential of interoperability, or different economic models, in Big Tech. But those efforts need to be backed up and used in combination with antitrust laws enforced by antitrust enforcement regulators to address issues or remedies typically beyond the agency's reach, such as divestitures. An overview of the history of the divestiture by AT&T of its 22 wholly or partially owned Bell Operating Companies (the BOCs), ordered by an antitrust court, shows that the experience gained in both earlier and concurrent but independent regulatory proceedings at the FCC formed the basis for the divestiture and made it successful. At the time, AT&T's network was the most technologically advanced and complex of any industry and was also subject to regulation by the FCC.

PART I. THE "BELL" SYSTEM: AT&T'S MONOPOLY

Pre-divestiture, AT&T owned through its companies every element of the telephone network in the areas it served, which was virtually the entire country down to the wire installed in every house and building and including the telephone instruments themselves. Each of the Bell Operating Companies was granted a monopoly to provide local telephone service within a multistate area, or a single state, or in at least one case, a single metropolitan area. AT&T provided the "long-distance" connections and calling services within and between each BOC's operating area and the local service areas within each BOC's territory. AT&T's resulting dominance in long-distance services meant subsidies could flow from either AT&T or from any of the BOCs legally established monopolies into any area where AT&T might possibly face a competitive long-distance threat. AT&T and the BOCs could also provide inferior access to any

potential long-distance competitor or other communications service provider whose service needed interconnection to local networks to complete a call to or from a subscriber to the BOC's local telephone service.

AT&T also used its control over the BOCs to dominate the equipment business. AT&T required the BOCs to require local telephone service customers to use equipment bought from and manufactured by another AT&T affiliate, Western Electric. AT&T also required the BOCs to buy and use network call processing equipment—which included call processing, transmission, and other equipment—manufactured by Western Electric. The research and development work for all the communications equipment, both customer premises equipment and network call processing equipment, was done by a third entity, Bell Telephone Laboratories, owned by AT&T and Western Electric.

There were a small handful of other modestly sized telephone companies (mostly grouped through holding companies, *e.g.*, General Telephone and Electric (GTE), Continental, United). There were also about 1,600 hundred small, local telephone companies serving some small cities and towns and mostly rural areas. Some of these companies operated relatively modest regional or intrastate long-distance networks, often in partnership with AT&T. All of these other companies together provided about 18% of domestic telephone service and garnered about 16% of all phone service revenues. All these companies—the so-called “independents”—interconnected with each other mostly through the AT&T long-distance network.

PART II. THE FCC'S FRAMEWORK

A. LONG DISTANCE

The FCC's focus during its first 25 or so years had been on regulating rates. The prevailing belief was that telephone service was a “natural monopoly.” But in the early 1960s, the FCC, in recognition of its responsibilities to optimize use of the frequency spectrum, ruled that instead of using some high-frequency radio bands for additional UHF TV channels, it was better to devote them to allowing companies to operate their own “private company networks.”² (A private network is in essence an internal communications system between various branches and facilities of a company.) Soon, companies came along that wanted to make this private network capability available to smaller enterprises that could not afford to build and operate their own private networks. Recognizing its statutory mandate to make available a “radio

² *Allocation of Frequencies Above 890 MHz*, 27 F.C.C. 2d 359 (1959) *on recon.* 29 F.C.C. 825 (1960) (Above 890).

communications service with adequate facilities at reasonable charges,” the Commission allowed competition to established carriers so long as there was some beneficial effect. This led to the emergence of a class of “specialized common carriers.”

During the 1970s, one of these specialized carriers, MCI, found a way for BOC and AT&T customers to use BOC-provided local telephone services to dial into the specialized carrier’s facilities. The customer could then make a long-distance call to parties who were customers of another BOC at the distant end point of the call. Anyone who had standard telephone service could now use the specialized carrier’s facilities to make long-distance calls that formerly had to use the AT&T network. Even the specialized carrier's customer was no longer limited to using the private facilities for its "on-net" purposes.

There followed several years of battles at the FCC between AT&T and the carriers newly trying to offer these broader long-distance services. There were trips to the U.S. Courts of Appeals where the FCC’s use of competition to implement its policies was upheld. But in one episode, the FCC tried to retreat from the expansion of competitors into new lines of long-distance services. The Commission resisted efforts by specialized carriers to use their authority to offer specialized services to expand into broader long-distance offerings. Eventually, the right of these specialized carriers to provide this type of service was upheld by the U.S. Courts of Appeals.³

Despite these requirements, the local BOCs still did not cooperate with the new competitors in providing access to the technical interconnections necessary to get calls through smoothly, if at all, from the competitors’ networks to reach the called party, who was generally a local telephone service customer of the BOC. Compared to the quality of interconnection given to AT&T to access the local service customers, the quality was clearly inferior.

By the time of the Modified Final Judgment, the FCC had experience and knowledge about how to integrate calls needing local BOC services to either reach the long-distance network or go from the long-distance network into the local exchange of the called party, who was reached via the local telephone service provided by the BOCs. When the government and the defendants in the 1984 antitrust case announced their settlement, the FCC was well along in proceedings to require access to the BOC and other local exchanges to be based upon a system of access charges. The FCC designed these charges to address discrimination by the BOCs in the charges to different long-distance carriers as compared to the access provided to AT&T.⁴

⁴ See, e.g., *MTS and WATS Market Structure*, First Report and Order and Third Supplemental Notice of Inquiry and Proposed Rulemaking, FCC Dkt. No. 78-72, 81 F.C.C. 2d 177 (1980); *MTS and WATS Market Structure*, Second

B. “ENHANCED/INFORMATION” SERVICES

In 1966, the FCC became concerned about the convergence between communications services and data processing. The emergence of computer processing as a separate line of business from communications presented a challenge. The Commission ruled in 1976 that data processing was not a communications service.⁵ This meant any processing service had to be offered separately from and not be associated in any way with the charges for telephone communications service or long-distance services. The latter two services must be offered under terms that must be filed with regulatory agencies under set price lists, known as tariffs. The prices for the services were set to allow the carrier to earn a fixed rate of return on the capital invested and recoup the cost of providing the service. These regulated services must be offered at the same price to all end user customers. Thus, data processing services were like any other product and could be sold to different customers at different prices just like any other product in the market and were subject to the full rigors of the marketplace.

C. TELEPHONE EQUIPMENT USED BY TELEPHONE SERVICE CUSTOMERS

In 1969, the FCC for the first time required a BOC to allow a customer to connect the customer’s own equipment to BOC or AT&T equipment.⁶ The Commission stated that “a customer desiring to use an interconnecting device to improve the utility to him of. . . the telephone system. . . should be able to do so, so long as the interconnection does not adversely affect the telephone company’s operations or the telephone system’s utility to others.” The word “competition” does not appear in the decision and the Commission did not mention a “right to

Supplemental Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 224 (1980); *See also Memorandum Opinion and Order, MTS and WATS Market Structure*, 93 FCC 2d 241 (1983); *Memorandum Opinion and Order, MTS and WATS Market Structure*, 97 FCC 2d 682 (1983).]

⁵ *Final Decision and Order, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (1971) *affirmed sub nom GTE Services Corp v. FCC*, 474 F. 2d 724 (2d. Cir. 1973).

⁶ *Use of the Carterfone Device*, 13 FCC 2nd 420 (1968). The device was a cradle into which a regular telephone handset from a regular BOC landline could be inserted to pick up a voice from a mobile radio and vice versa. The person on the mobile radio could have a conversation with the person on the other end of a landline telephone call.

compete.”⁷ But AT&T apparently sensed what was coming; it required a “protective connecting arrangement,” or “PCA,” a small electronic box that allegedly protected the telephone network from any harmful interference that might be caused by such “foreign attachments” and collected a monthly fee for use of the PCAs to discourage customers from connecting non-BOC equipment.

It took six more years, to 1975, and multiple proceedings and panels of experts before the FCC was able to prescribe a standard interface for “simple” customer premises equipment (CPE)⁸ and a non-discriminatory demarcation point between the BOC and customer premises wiring to overcome these efforts by AT&T to hinder competition. In further and later FCC proceedings, standard interfaces for sophisticated equipment used in communications-intensive offices and businesses were added. Without mentioning the word “competition” when it started out, the Commission had created the conditions for a vibrant competitive market for all manner of telephone equipment, simple and complex, to emerge.

D. TELEPHONE EQUIPMENT USED BY TELEPHONE SERVICE CUSTOMERS WITH DATA PROCESSING CAPABILITY

That, however, did not address all the issues. If data processing capabilities were incorporated into customer equipment supplied to customers of telephone services, and the data processing functionality was added to the telephone equipment, it would mean consumers were buying data processing services as part of the equipment that they were able to get as part of their tariffed telephone services so long as the customer equipment was still offered as a regulated, tariffed service. Both independent vendors of data processing services and sellers of telephone equipment that compete with the BOCs would have difficulty penetrating the market. Moreover, AT&T and the BOCs would have the incentive to subsidize development and other costs associated with developing and embedding the data processing capability in customer premises equipment by allocating those costs into the costs of providing the telephone service.

In 1980, the Commission took two steps. First, it deregulated and took out from regulated accounts all the costs and the revenues telephone companies derived as a result of offering any

⁷ Ironically, the case had been referred to the Commission by an antitrust court for a determination whether the AT&T prohibition was a violation of the Communications Act.

⁸ The standard interface is the small spring-loaded plug which goes into the interface on a plastic plate in the wall, the latter of which is connected to the telephone wiring from the network. Larger pieces of equipment, such as processors supporting full internal communications with multiple desk sets, etc. require larger interfaces.

customer equipment. This meant neither *costs of* nor *revenues from* customer equipment went into the accounts overseen by regulators to try to make sure carriers were not setting rates to end users too high and earning returns that exceeded legal limits on monopoly or quasi-monopoly services. This had several effects. Whether customer equipment did or did not have data processing capability, it would not be obtained as part of telephone service and competitors could offer it as well and connect it to the telephone network under the Commission's CPE rules. Moreover, removal from regulated accounts also helped prevent AT&T or the BOCs from subsidizing the development or other costs of providing this sophisticated equipment by shifting costs to their tariffed, monopoly telephone services.⁹

The Commission's second step was to deregulate all services that combined any data processing with communications services, calling the latter "enhanced services" and labeling communications services "basic" services. Only basic services could be sold as a regulated service consumers paid for as telephone services. This helped prevent cost-shifting subsidies from taking place in the network and put competitive providers of data processing capability in a stronger position.¹⁰

PART III. THE DIVESTITURE ORDER BY THE COURT

The antitrust cases were initiated in November 1974, by which time the FCC was well along in making competition part of its rubric as it implemented its statutory responsibilities in communications. Seven years or so after the antitrust suit was initiated, the Department of Justice and AT&T and the other defendants put before the court the agreement that, with a few relatively minor substantive modifications, would become the final divestiture decree, or as mentioned above, the Modified Final Judgment or MFJ, as it is more commonly known.

The decree had to address two major policy and practical goals. The first goal was to stop the anticompetitive activities and AT&T's dominance as well as prevent their reemergence. Concurrent with that goal, the second goal was to enhance and facilitate the continuation and

⁹ For largely the same reasons—to prevent cross subsidy and discrimination and stimulate competitive offerings—the demarcation point, standard interface standards, and separation of service and equipment requirements were imposed on the non-BOC independent telephone companies in those areas of the country where they are the local telephone company.

¹⁰ *Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) *affirmed sub nom Computer and Communications Industry Association v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982).

expansion of competitive forces that were already encroaching at either end of the BOC's legally conferred local exchange monopoly: on one end, at the customer's premises, the origin or termination point of telephone communications and, on the other end, the place where the local exchange began and ended, at the long-distance connections that connected local exchanges to each other and moved a call along from the calling party to the called party.

A. THE REORGANIZATION OF AT&T AND THE DIVESTITURE

The central provision of the MFJ proposed to address the first goal of the decree: stopping the anticompetitive activities and dominance by eliminating the poisonous synergy between AT&T and the BOCs that was the source of the market distortion and that had to be prevented from reemerging. AT&T would divest itself of any interest in the BOCs. The BOCs would be divided into what ultimately became seven different "Regional Bell Operating Companies," totally autonomous entities from AT&T and from each other. The BOCs were freed of any requirement that they buy equipment from AT&T or Western Electric—neither CPE nor the network processors used by the BOCs to process calls through the telephone network. But the BOCs could *not manufacture* any equipment.

AT&T was barred from acquiring any interests in any of the BOCs. Conversely, there were strict limitations on the BOCs entering any other business besides the local exchange business, and in particular, entry into long-distance service, the manufacture of communications equipment, or entry into providing "enhanced services" as the FCC had defined those services in its *Computer II* ruling.¹¹

B. PROMOTING COMPETITION

The same three lines of business— long distance, customer premises equipment, and information services (really data processing)—as the FCC had addressed were the same specific ones whose competitive emergence had to be protected and enhanced as the second major

¹¹ As a condition of approving the MFJ, the court required that the BOCs be allowed to publish telephone directories and that the BOC could enter into a business if it petitioned the court and showed the BOC could not use its monopoly power to impede competition in the line of business it sought to enter.

objective of the MFJ. The solution was, fortunately, at hand. The court had only to look to the framework the FCC had developed over the prior 15-20 years or so.

Years had been spent defining and carving out these three lines of business from local exchange or long-distance services, as explained above. Defining what interconnection between a long-distance carrier and a local exchange carrier needed to look like to allow long-distance service competition, or defining what was customer premises equipment, inter-exchange or long-distance service, and what was enhanced (or information) services as opposed to basic communications (or telecommunications services) had involved a step-by-step process, multiple proceedings, and participation by every segment of these industries, supplemented by legions of outside experts, and state and other governmental entities. And, of course, hundreds of FCC employees with technical expertise in particular industry segments had done the analysis of the *hundreds of thousands* of pleadings, studies, and other technical data submitted in each of the proceedings.

1. LONG DISTANCE

To facilitate long-distance service competition, the MFJ required “each BOC [to] provide to all interexchange carriers and information services providers exchange access, information access, and exchange services for such access on . . . [a] tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.” The BOCs had about two years to achieve this objective. Even so, the court recognized that there would be instances where this goal could not be achieved and provided that when the timetable could not be met, the BOCs had to give appropriate discounts to reflect the disparity in access between any other carrier and AT&T.

As the antitrust case proceeded over the years, the FCC was in the process of implementing its own vision of long-distance competition, as recounted above. As the court was following its own long-distance service competition North Star in finalizing the MFJ, the FCC was also well along in its journey; it was in the throes of conducting a proceeding to determine how quickly the BOCs could get to implementing equal access and what steps would be necessary. Moreover, the Commission had just conducted a proceeding and set the discounted rates the BOCs could charge other long-distance carriers in light of the less than equal exchange access still being provided at the time.¹²

¹² See *Exchange Network Facilities for Interstate Services*, CC Docket No. 78-371, 71 FCC 2d 440 (1979). Under the FCC’s rules, “enhanced services” referred to providing value added services to end user information or data while it traversed the telephone networks or using the computer processing capabilities of the telephone network to process end user data or allowing an end user to interact with any data stored on the network. Under the rules, if a BOC or

2. INFORMATION SERVICES

The FCC's information services rules, 14 years in the making, that governed BOC and AT&T's provision of enhanced services, were in full effect when the MFJ agreement between the parties to the antitrust suit was presented to the court.¹³ Although the court used different nomenclature and reworded the FCC's definition, the substance remained the same, and the court relied on it in upholding the MFJ's prohibition on the BOCs' participation in providing information services and allowing AT&T to do so.

3. CUSTOMER PREMISES EQUIPMENT

As with the information services rules, the FCC rules on customer premises equipment or CPE were fully in effect when the MFJ agreement between the parties to the antitrust suit was presented to the court. Moreover, the FCC's efforts had already resulted in meaningful levels of competition in the customer equipment market. Nothing in the MFJ changed the FCC rules' effect of allowing interconnection through the standard interfaces. The FCC's *Computer II* rules had required the BOCs and AT&T to market CPE through a totally separated subsidiary. But the BOCs were prohibited from marketing CPE under the proposed decree. The court found that since the BOCs were prohibited from manufacturing CPE and no longer constrained by any obligation to buy Western Electric equipment under the proposed decree, the BOCs could be important competitors to offset AT&T's marketing power and should be allowed to sell CPE. The court made that a condition of approval of the MFJ.

PART IV. A MODEL FOR "TECH"

The synergy between regulation and antitrust is apparent in the AT&T case. The FCC, implementing its own regulatory mandate, laid the groundwork for competition and created a degree of competition in the communications industry *unthinkable* when the process started. But it also took antitrust enforcement and court action to address the core issue the agency was not, at least to that point, willing (and in the view of many, legally able given the scope of its statutory mandate and/or politically unwilling to take the risk) to address: severing the relationships that imposed an inherent limitation of the markets evolving into fully competitive markets—ordering divestiture and the breakup of AT&T into multiple entities, with the separated entities banned

AT&T wanted to offer such services, it had to do so through a "separate subsidiary" that operated more or less totally at arm's length from AT&T or any of the BOCs.

from entering some lines of business in which affiliates of the previously commonly owned entities were engaged.

The technology sector is in many respects in the same position AT&T was in during the 1960s before the FCC embarked on using its regulatory powers to expand access to and create competition in the industries it regulates.¹⁴ The tech industry is clearly one of, if not the most, technologically sophisticated industries in the world. Although there are efforts to apply the current laws (and even new laws) to the tech sector, enforcers and the public would benefit from more expertise and detailed knowledge of the industry to increase the effectiveness of those laws in bringing about more competitive conditions or addressing other important concerns.¹⁵ Indeed, there are a lot of gaps in what we know, even about how the industry or its technology works although there is a lot of informal information from “leakers” and “whistleblowers” and to some extent in academic literature.

When a court determines divestiture is in order, the court benefits from guidance as to how to divide the company and what ongoing obligations will be appropriate. A regulatory agency can do the formal information gathering and intensive study needed to have the best chance of success in these circumstances. Divestitures can be extensive, but success turns on getting the details right. Equally important, hands-on experience with partial steps not intended to lead to addressing antitrust remedies or vindicating competitive principles but rather using competition to address a particular issue that arises in the course of regulatory activities can prove to be invaluable tools if and when antitrust enforcement also comes into play.

It was, for example, in the course of performing its regulatory duties that the FCC took many of the actions that later allowed the court simply to incorporate existing regulatory mechanisms as part of effective antitrust relief. Neither the FCC’s CPE proceedings, nor its *Computer Inquiries*, nor its efforts to facilitate competition and new services in long-distance markets, had anything to do with the goal of providing tools to facilitate relief or developments

¹⁴ There is at least one important difference: the government had tried to use the antitrust laws once before against AT&T without notable success. In 1949, the government had brought an antitrust action against AT&T and sought relief primarily aimed at AT&T’s monopolization of the equipment market. Seven years later, and with little activity in the intervening years, the suit was settled and dismissed with the AT&T structure still in place. The “politics” and other variables around the suit were substantially different than the 1974 suit. But the “politics” and other variables might have played out differently had there been 10 or 15 years of regulatory proceeding airing some of the difficulties that existed under the structure of AT&T with the possibilities of a differently structured industry and the attendant consumer and other benefits.

¹⁵ See e.g., Sherman Anti-Trust Act, 15 U.S.C. §2 (2012). Both of the major antitrust cases against Facebook and Google are primarily Sherman Act §2 cases.

in the antitrust action. Indeed, as recounted above, they were the agency responses to issues before it as it exercised its own responsibilities under its authorizing statute.

The AT&T-FCC divestiture experience gives us every reason to believe that a digital regulatory agency with a well-defined authority for overseeing the tech sector would also contribute to the more effective use of antitrust law, should antitrust enforcers act to bring about enhanced consumer benefits. It seems safe to assume, for example, that an effort similar to the FCC's will be required to develop rational regulation of tech. Big Tech is rife with areas that are going to require step-by-step evolution, not unlike the FCC's baby steps, and sometimes backward steps, in equipment markets, data markets, or the long-distance markets to see what will work.

Consider, for example, interoperability. Interoperability is often cited as an important component not just of reducing the market power of dominant social media platforms but also as a way of bringing about more competition.¹⁶ The general and intuitive idea is that most people want to be on Facebook because that is the social media platform used by the other people in most people's "social network." But what would interoperability with Facebook look like?

Advocates of interoperability acknowledge that guardrails and regulatory oversight are important to make sure it doesn't become an avenue for data abuses. Interoperability requirements for dominant digital platforms can be most effective if they take seriously the need for privacy protections and make efforts to safeguard user data against abuse. Interoperability without these guard rails could open users up to fraud. It's also important to take content moderation into account with interoperability requirements, such as by ensuring that platforms retain the right to do content moderation even on content that arrives through interoperability with a competing platform.¹⁷ So policies that use interoperability as a tool to create competition should include oversight by an agency whose mandate is oversight of digital platforms.¹⁸

Wikipedia lists nine sections in defining Facebook's Structure, including News Feeds, Friends, Wall, etc. In the section on Applications, there are 13 listings, including Events, Marketplace, Places, Moments, and Gaming. The section on General Features has 26 listings,

¹⁶ See, e.g., Alex Petros, *Why We Can't Be Friends: We Need Interoperability in Digital Markets*, PUBLIC KNOWLEDGE (Feb. 23, 2021), <https://publicknowledge.org/why-we-cant-be-friends-we-need-interoperability-in-digital-markets/>; Charlotte Slaiman, *Interoperability = Privacy + Competition*, PUBLIC KNOWLEDGE (April 26, 2019), <https://publicknowledge.org/interoperability-privacy-competition/>.

¹⁷ See Charlotte Slaiman, *Facebook and Twitter Made the Right Decision. Big Tech is Still Too Powerful*, PUBLIC KNOWLEDGE (Jan. 12, 2021), <https://publicknowledge.org/facebook-and-twitter-made-the-right-decision-big-tech-is-still-too-powerful/>.

¹⁸ See Petros, *Why We Can't Be Friends: We Need Interoperability in Digital Markets*, *supra* note 16..

including Credits, Listen with Friends, Status Updates, Call to Action Button, and Off-Facebook Activity.¹⁹ Each of the entries describes different functionalities or features. Facebook users probably use the features in different combinations and may be interested in other platforms with different or additional functionalities if they can have interoperability with the Facebook features they use. The availability of different combinations of functionalities (including some apparently not known to even many Facebook users)²⁰ may be enough to convince competitive platforms to emerge, while different combinations may cause other competitive platforms to emerge. What combinations should or could be available is the kind of issue a digital regulatory agency could address in a generic inquiry/rulemaking or even on a case-by-case basis. Even if there are not enough new entrants, or other factors continue to raise competitive concerns to justify intervention by the antitrust authorities, the regulatory experience is going to inform or help structure the nature of the relief, as it did in AT&T's case.

Moreover, a digital regulatory agency that embraced looking at different kinds and “packages of interoperability” could change the terms of competition. Email users on one email system are able to communicate with users of other email systems. Similarly, T-Mobile-Sprint customers are able to communicate with subscribers to other mobile services. As a result, neither email providers nor mobile providers compete on the basis of *who can be reached on the network*, and don't keep customers on their respective networks because it is the only way those customers can communicate with their friends or business contacts. Rather, people stay with a particular email or mobile provider based on other factors such as coverage, tone quality, simplicity of use, and so on.

Determining what degree of interoperability is needed to stimulate entry will likely be a step-by-step process, just as the FCC had to roll out long-distance services first for specialized carriers to see what had to happen to make fully competitive carriers possible. The level of resistance of local telephone companies to providing local access to the then-new long-distance service carriers was high. But the FCC experience and getting a start in addressing it gave the AT&T court a starting point and a standard to adopt that made easier the transition to meeting the MFJ standard and rolling out full long-distance service competition.

Data collection and data portability are other examples of areas that will undoubtedly also require some experience and different regimes to address the myriad issues. There are currently

¹⁹ Wikipedia, https://en.wikipedia.org/wiki/List_of_Facebook_features#Applications last visited March 8, 2022.

²⁰ See, e.g., Eric Griffith, *15 Hidden Facebook Features Only Power Users Know*, PCMAG (May 12, 2021), <https://www.pcmag.com/how-to/hidden-facebook-features-only-power-users-know>; Jason How, *12 Secret Facebook Features EVERY Marketer Should Be Using*, POSTPLANNER, <https://www.postplanner.com/secret-facebook-features-for-marketers/>; and Leanne Peard, *A List of the Latest Facebook Features You Might Not Know Exist!*, NEAL SCHAFFER (Nov. 14, 2021), <https://nealschaffer.com/facebook-features/>.

swirling debates over the amount and type of data collection that should even be permitted. For example, should there be some data that is “necessary” for commerce in the ordinary course of trade and that can be collected in the ordinary course? If so, does that include sensitive data like health information, sexual practices/preferences, etc., which might require separate and explicit consents? Where does financial data fit in? Should companies collecting that kind of data have special requirements, or should there be a special warning if the site does not meet some minimum standard of security? Drawing these kinds of lines might be necessary.

Perhaps there is a need to go broader. We are already seeing debates about whether there are types of data that should not be allowed to be used in “targeted advertising.” Indeed, there are arguments about whether data should be used at all for targeted advertising or whether the system of contextual advertising should be the norm, particularly for certain categories of products. Similarly, there are calls for data portability but controversy over whether there should be classes of data that are portable but perhaps not completely removable from the platform that collected the data. Would the “free” internet be affected? Would free and “paid” internet access emerge as separate markets, much as apps are now available with or without ads?

All these issues are sure to fall at the feet of a digital regulatory agency to address. But coming to resolution on any of them is not necessarily a smooth process. It required years of experimentation and step-by-step progress, and, sometimes, step-by-misstep backwards, for the FCC to get its work done. The process was not even; it was jerky and had to work its way through fits and starts and “do-overs.” Mistakes were made, and sometimes incompetence seemed to reign. There were excessive delays, like the five years between *Carterfone* and the development of standards for the standard interface at the network for even ordinary desktop telephones. It took a long time to articulate the relevant distinctions, such as between telecommunications and information services, to optimize the consumer benefits and bring some semblance of market discipline to the multi-faceted benefits “telecom” was capable of delivering. The FCC sometimes stumbled as it moved along the path, as when the Court of Appeals had to push the FCC to follow its *Specialized Common Carriers* and related rulings to their logical conclusion. And the agency’s instinct to proceed cautiously before causing either consumers or the industry too much disruption was sometimes used to cover the agency’s affliction with the same “regulatory capture” that afflicts many of its regulatory kin.

A new digital regulatory agency will undoubtedly have some similar experiences. Some platforms may require special treatment and special definition. Public Knowledge has suggested there is a need for a regulatory agency targeted at least at a defined class of digital platforms.²¹

²¹ Feld, Harold, *The Case for the Digital Platform Act: Breakups, the Starfish Problem, & Tech Regulation* (May, 2019).

The flexibility to revisit, regulate in detail, step back, jerk forward, etc. is a flexibility courts generally do not have. During the proceedings set up by the court to allow for a public comment period, it was suggested that a detailed injunction with court supervision was a better remedy than a drastic divestiture. The court could use a series of special masters to oversee compliance. The court rejected this suggestion, pointing out that it would require a “vast staff” that duplicated the FCC staff, and even then, there could be no assurance that the continued integration of AT&T with the other entities could catch the anticompetitive activities.²²

In contrast to a relatively flexible regulatory agency, courts are much more rigid. There are rules of evidence and formalities that put tight constraints on what even comes before the court. The remedies courts can invoke are limited to a relative handful of measures. Courts typically are not set up to conduct multiple proceedings, often involving multiple and different parties, such as having *Computer Inquiries*, multiple CPE and related proceedings, and multiple proceedings regarding long-distance services, all going on at the same time in order to see how each affects the others. Nor will a court have specialized expertise in the area of the subject matter coming before it.

In the end, the AT&T court adopted a solution that could not have happened had the FCC not been busy long before and during the trial preparing an environment that made the divestiture a viable solution. An active regulatory agency over the digital world, pursuing its own mandate and objectives, could likewise provide antitrust laws and the courts that administer them with effective tools to allow greater freedom for the courts to ensure the effectiveness of the antitrust laws.

²² 552 F. Supp 167-68. *See also Id.* nn,154-157.