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Introduction

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In his luncheon talk at the conference, presented here in slightly revised form, Judge Posner discusses his personal involvement with the events that led up the Justice Department's major antitrust suit against AT&T that culminated in the breakup of the telephone monopoly. The stages of his involvement included participation in the work of President Johnson's Task Force on Communications Policy, consulting for AT&T in the lawsuit itself, and his negative advice to the chairman of AT&T on the latter's plans to enter the computer industry.

The Bell System Divestiture: Background, Implementation, and Outcome
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By 1982, the Bell System had operated an integrated telecommunications network connecting almost everyone in the United States for almost 100 years. That system had been designed and operated as a monopoly, but by the 1960s, new technologies were being developed which led to pressure to allow competitive entry. After many incremental changes, the Bell System divestiture—complete separation of long-distance service and manufacturing from local service provision—was finally adopted as a way of implementing this transition. Divestiture was complex and costly. Although service levels were largely maintained, much litigation ensued as competitors jockeyed for market position. In the end, additional new technologies finally allowed competitive markets to develop.

An Oligopoly Analysis of AT&T's Performance in the Wireline Long-Distance Markets After Divestiture
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The antitrust law books promise competition from breaking up the monopoly firm in a Sherman Act case remedy. Not in this case; the question is what "kind" of oligopoly.

Will Access Regulation Work?
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The FCC is transitioning from a rate regulation regime to an access regime. A rate regulation regime gives all customers full access to network facilities (common carrier) at regulated rates—generally, rate base rate of return regulation. An access regime is one in which all competitors are given full access to incumbents' networks, with little or no retail rate regulation, thereby allowing competition (over incumbents' networks) to discipline the market. Is this a good idea? Is it likely to work? What is the evidence for this?

Toward a Unified Theory of Access to Local Telephone Networks
By Daniel F. Spulber & Christopher S. Yoo 43

Over the past several decades, regulatory authorities have imposed an increasingly broad array of access requirements on local telephone providers. In so doing, policymakers typically applied previous approaches to access regulation without fully considering whether the regulatory justifications used in favor of those previous access requirements remained valid. They also allowed each access regime to be governed by a different pricing methodology and set access prices in a way that treated each network component as if it existed in isolation. The result was a regulatory regime that was internally inconsistent and vulnerable to regulatory arbitrage. In this Article, Professors Daniel Spulber and Christopher Yoo trace the development of these access regimes and evaluate the continuing validity of the rationales traditionally invoked to justify mandating access to local telephone networks (e.g., natural monopoly, network economic effects, vertical exclusion, and ruinous competition) in a world in which competition among local telephone providers is a real possibility. They then apply a five-part framework for classifying different types of access based on the branch of mathematics known as graph theory that models the interactions among different components. This framework shows how different types of access can have a differential impact on network configuration, capacity, reliability, and cost. It also captures the extent to which networks constitute complex systems in which network components interact with one another in ways that can make network behavior quite unpredictable. In addition, the framework demonstrates how mandated access can increase transaction costs by forcing local telephone providers to externalize functions that would be more efficiently provided within the boundaries of the firm.

Did AT&T Die in Vain? An Empirical Comparison of AT&T and Bell Canada
By Eli M. Noam 119

Did the Divestiture of AT&T achieve its purpose? It is helpful to turn to Canada, whose telecommunications industry and regulation were similar but which did not experience a divestiture. Since AT&T was split up in 1982-4, national telecom market concentration in the U.S. has bounced back to a national duopoly structure, with an HHI concentration index of 2,986, higher than for Canada's similar national duopoly with an HHI of 2,463. Local telecom wireline competition is greater in Canada, as are broadband and wireless penetrations. Real revenue for all of AT&T's successor companies grew only half as much as in Canada. AT&T successors' combined market capitalization rose only one third as much as did Bell Canada. U.S. telecom prices are more favorable to business, low-use consumers, and mobile users, but less favorable to high-use consumers, especially those making long distance calls. AT&T's research development sector was decimated while Canada has preserved some reduced in-house research. Employment in the U.S. declined slightly after 1997, whereas in Canada it rose over 20%. Taken together, this comparison does not indicate that the AT&T divestiture created advantages relative to Canada.

Essential Facilities and *Trinko*: Should Antitrust and Regulation Be Combined?
By Timothy J. Brennan 133

The Supreme Court's 2004 decision in *Trinko* represented a radical change from prior doctrine ensuring that antitrust laws applied in regulated industries. The change resulted from a failure to appreciate that regulation and antitrust can be complements. Regulation can boost the value of antitrust by creating incentives to refuse to deal in order to reap monopoly profit otherwise proscribed by regulation. Ironically, the essential facilities doctrine rejected by the *Trinko* court and the *Trinko* decision both imply that regulation and antitrust should be done by the same entity, either antitrust enforcement or a regulator. An effective essential facilities remedy entails price regulation, and the test of whether a facility is essential requires assessing whether cutting price would increase output. The clash between the pro-market culture of antitrust and the planning aspect of regulation suggests that combining both within the same institution is ill-advised, but the debate will go on.

The AT&T Consent Decree: In Praise of Interconnection Only
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This article examines the consequences of the Bell consent decree of 1982. In the short run, the decree sought to end the AT&T's Corporate domination of the telecommunications network. But it did so in an overambitious way that chose to break up the basic system into constituent parts even though the preferred remedy was a more modest initiative that would have opened the network up to interconnection by rival carriers. In charting the wrong path, the consent decree set the course to the 1996 Telecommunication Act, which magnified the original error by forcing elaborate sales at below-market prices of unbundled network elements in addition to allowing for the interconnection remedy. The absence of a competitive solution for telecommunications markets makes it all the more important to design the proper set of public interventions, where once again simple rules dominate more complex remedial arrangements.

Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC
By Philip J. Weiser 167

A central challenge for competition policy merger review is to structure the analysis of merger remedies so that the antitrust agencies play an effective and central role, with regulatory agencies complementing—as opposed to overlapping or contradicting—their judgments. At present, the U.S. system sometimes veers towards a worst-case scenario where federal antitrust authorities—the FTC and DOJ—impose regulatory remedies that overlap with regulatory policy and regulatory agencies perform duplicative merger reviews

and impose remedies unrelated to the mergers themselves. Moreover, antitrust merger remedies themselves are often not developed through a transparent, consistent, or predictable process. Consequently, as developed in this Article, there is compelling need for institutional reform of antitrust merger remedies in general and in particular with respect to how the FCC oversees mergers between telecommunications companies.

Are Regulators Forward-Looking? The Market Price of Copper Versus the Regulated Price of Mandatory Access to Unbundled Local Loops in Telecommunications Networks
By Jerry A. Hausman, J. Gregory Sidak, and Timothy J. Tardiff......... 199

Around the world, since 1996, regulators have mandated that incumbent local exchange carriers (ILECs) offer competitors access to their network at regulated prices that reflect forward-looking cost. Regulated prices for unbundled network elements are based on total element long-run incremental cost (TELRIC), which in turn is calculated using engineering models that estimate the costs of a hypothetical carrier employing the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the ILEC's actual wire centers. These cost models require detailed estimates of the equipment and installation prices of the numerous components that are used in a telecommunications network. When there is uncertainty about how these prices will change over the period for which costs and prices are required, the resulting cost estimates used for setting the regulated prices of unbundled network elements can be very inaccurate. Similarly, when regulators in other jurisdictions are considering such rates as "benchmarks," it is necessary to make adjustments to account for such large differences in critical input prices, so that the benchmark rates will be representative of the costs that actually will be incurred by efficient carriers offering unbundled elements in those jurisdictions. The precipitous rise in the price of copper since 2003 exemplifies this need to reevaluate the inputs used by regulators in their cost model, as well as the inferences drawn from those models. These increases differ from the type of constant annual expected input price growth (or decline) situation that some cost models used outside the United States have accommodated with "tilted annuity" methods. Rather than a gradual anticipated price increase, copper prices escalated rapidly and are likely to remain well above the levels that regulators used to set existing loop rates. Accounting for such evidence would change the forward-looking costs of a hypothetically efficient ILEC network that one of the most prominent U.S. state regulatory commissions—the California Public Utilities Commission (CPUC)—established in 2006. Similarly, in 2007, the Commerce Commission in New Zealand employed a benchmarking methodology for the pricing of unbundled loops that failed to account for the increased price of copper. A global trend may be emerging among telecommunications regulators to ignore the input requirements of their own forward-looking cost models. Such a trend would be consistent with a version of regulatory opportunism in which regulators are forward-looking only when doing so produces lower regulated prices over time. The risk of regulatory opportunism and the high price of copper together create a strong incentive for an ILEC to replace its copper loops with optical fiber. Although some CLECS could be adversely affected by such a decommissioning of copper loops, an ILEC has no duty under U.S. antitrust or telecommunications law to keep copper loops in service for the benefit of its competitors.

Notes

"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation
By Dave E. Hutchinson 229

On November 4, 2008, the Supreme Court heard arguments in *FCC v. Fox Television Stations*, which centers on whether or the FCC's policy allowing fleeting expletives to be found actionably indecent is arbitrary and capricious. The Second Circuit found that the fleeting expletives policy is arbitrary and capricious as a matter of administrative law. The Supreme Court decision will provide much needed guidance for what constitutes a reasoned basis in the indecency regime's contextual approach. This Note argues that—despite the FCC's recognition that time and context changes the meaning of language—the FCC's indecency regime is at loggerheads with broadcasters because it fails to base the words targeted for indecency on some factual basis. This Note reviews the doctrine of arbitrary and capricious review, and places the arguments from *FCC v. Fox* in that light. Notably, the FCC apparently misconceives of arbitrary and capricious review—construing it as a reasonableness review rather than a hard look review. Finally, it suggests that a responsible arbitrary and capricious review should affirm the Second Circuit, and require an indecency policy predicated on facts, which would serve to strengthen the basis for the FCC's indecency determinations and would provide clearer guidance to broadcasters.

Leave Me Alone! The Delicate Balance of Privacy and Commercial Speech in the Evolving Do-Not-Call Registry
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In 2004, the Tenth Circuit held that although the newly enacted do-not-call registry restricted commercial speech, the restriction was narrowly tailored and thus fell within the bounds of the Constitution. Since that decision, the Federal Trade Commission has amended the do-not-call registry to abolish the provision that required individuals to re-register every five years, and in 2008, Congress passed the amendment. This Note argues that the five-year re-registration requirement is a substantial factor in the registry's narrow tailoring. By removing the requirement, questions as to the restrictions constitutionality reemerge.