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Communications Law: A Requirement for Affirmative Determination of the Public Interest in Restricting Services by Facilities Certification

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COMMUNICATIONS LAW: A REQUIREMENT FOR AFFIRMATIVE DETERMINATION OF THE PUBLIC INTEREST IN RESTRICTING SERVICES BY FACILITIES CERTIFICATION—*MCI Telecommunications Corp. v. FCC,* 561 F.2d 365 (D.C. Cir. 1977), *cert. denied,* 98 S. Ct. 781 (1978).

INTRODUCTION

The dynamic technology of the communications industry does not readily lend itself to the accomplishment of rigid regulatory objectives.[1] The rapid evolution of new forms of communication precludes specific legislative controls[2] and hinders administrative efforts to maintain workable regulatory policies in the public interest.[3]

In *MCI Telecommunications Corp. v. FCC,*[4] the District of Columbia Circuit considered the regulatory problems associated with microwave transmission systems, one of the most dynamic communication technologies. It decided that the public interests supporting administrative policies in the field should not merely be assumed; specifically, the public interest in continuing a monopolistic industry structure must be affirmatively determined before it can operate as an effective constraint on potential competition. Because the industry structure in public message telephone service has never been affirmatively determined to be in the public interest, American Telephone and Telegraph's traditional monopoly in the area has been compromised as a result of the decision. Expanded competition in other forms of telephone service is also a viable prospect.

THE CASE

Microwave Communications, Inc., obtained a series of facilities certifications from the Federal Communications Commission, as re-

1. These objectives are usually stated in broad terms. As an example, it has been said that "[t]he theory upon which U.S. regulatory actions have been based in the past is that the establishment (and maintenance) of a regulated monopoly provides more efficient utilization of communications resources, at lowest cost, without the duplication of carrier facilities associated with unregulated competition." S. MATHISON & P. WALKER, COMPUTERS AND TELECOMMUNICATIONS: ISSUES IN PUBLIC POLICY 187 (1970).

2. "Presumably Congress could later, in the light of actual regulatory experience, enact more detailed standards to guide the regulatory agency. This was the hope expressed . . . . The reality has been otherwise." IV B. SCHWARTZ, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 2374 (1973).

3. An overview of the Federal Communications Commission's response to a revolution in one communication form is provided in D. LEDUC, CABLE TELEVISION AND THE FCC 5-22 (1973). The author suggests that resource limitations do not allow the Commission to act, but only to react, as new problems evolve. *Id.* at 29-31.

4. 561 F.2d 365 (D.C. Cir. 1977), *cert. denied,* 98 S. Ct. 781 (1978).

quired of common carriers entering the interstate communication service industry.[5] The certificates authorized MCI to build point-to-point microwave transmission systems for the purpose of providing private line[6] business and data communication services. In September, 1974, MCI filed revisions to its applicable interstate service tariffs,[7] propos-

5. The facilities certification section of the Communications Act, section 214, provides the most direct regulatory power held by the Commission. Section 214(a) states in part:

> No carrier shall undertake the construction of a new line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . . .

47 U.S.C. § 214(a) (1970). Section 214(c) adds in part:

> The Commission shall have power to issue such certificate as applied for, or refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

47 U.S.C. § 214(c) (1970).

6. Private line service is "[a] service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2 (1977). Private line service is to be distinguished from public message service which is "[a] service whereby facilities are offered to the public for communication between all points served by a carrier or by interconnected carriers on a nonexclusive message by message basis, contemplating a separate connection for each occasion of use." *Id.*

Private lines are not synonymous with private systems. Private systems essentially provide private line services to their users, which include government, railroads, and other large businesses, but a major difference lies in the private ownership of facilities. *See* note 24 *infra.*

7. Tariffs are the published schedules of carrier rates and services, together with explanations and limitations on the manner of customer use. The tariff mechanism of the Communications Act, sections 203-205, 47 U.S.C.A. §§ 203-205 (West 1962 & Supp. 1978), like the facilities certification section, is a major source of the Commission's regulatory authority. Unlike the facilities certification section, the Commission's regulation of tariffs is generally post facto. Section 203(a) states in part:

> Every common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . for interstate and foreign wire or radio communication . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C.A. § 203(a) (1970). Section 204(a) states in part:

> Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing . . . may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such

ing rates for a new package of communication services called Execunet.[8] The revised tariffs became effective on October 1, 1974.

In early 1975, American Telephone and Telegraph[9] complained to the FCC that Execunet was not a private line, but an interstate public message telephone service[10] which MCI could not properly offer. Following a period of informal ex parte consideration of the complaint, the FCC forwarded AT&T's allegation to MCI for comment. In July, 1975, after a series of written responses by MCI, the FCC rejected the revised tariffs and ordered MCI to cease and desist offering Execunet service.[11] This decision was based on the private line purpose of MCI's facilities which had been expressly written into several of its facilities certifications.[12]

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order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective.

47 U.S.C.A. § 204(a) (West Supp. 1978). Section 205(a) states:

Whenever . . . the Commission shall be of [the] opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation . . . .

47 U.S.C.A. § 205(a) (1970).

8. With Execunet a subscriber using any push-button telephone (or rotary dial phone and tone generator) can reach any telephone in a distant city served by MCI simply by dialing a local MCI number followed by an access code and the number in the distant city. Execunet customers are billed for each call on a time and distance basis, subject to a monthly minimum.

MCI Telecommunications Corp. v. FCC, 561 F.2d at 367 (footnote omitted). "In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand." MCI Telecommunications Corp., 60 F.C.C.2d 25, 26 n.1 (1976), *rev'd on other grounds,* 561 F.2d 365 (D.C. Cir. 1977), *cert. denied,* 98 S. Ct. 781 (1978).

9. AT&T, United States Independent Telephone Association, Data Transmission Company, and Southern Pacific Communications Company ultimately joined as intervenors in the case. Of the $35,639,012,902.00 in operating revenues received by the 62 national telephone service carriers during 1976, $33,506,601,269.00 went to AT&T, its subsidiaries, and the associated companies that comprise the Bell System. FCC, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 29 (1976).

10. *See* notes 6 & 8 *supra.* This note assumes, as the FCC ultimately determined, that Execunet is a public message telephone service in competition with AT&T's MTS and WATS services. But the FCC's determination was contested throughout by MCI and, as an issue of fact, is very close. *See* Vol. 1 Supplemental Appendix at 704-10, MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), for a detailed comparison of the characteristics of Execunet and MTS, prepared by MCI, which indicates significant differences in the nature of the services. The circuit court adopted the FCC's determination.

11. MCI Telecommunications Corp., No. 75-799 (F.C.C. July 2, 1975) (letter order).

12. In the various Commission orders granting section 214 applications of the

MCI petitioned for review of the cease and desist order in the United States Court of Appeals, District of Columbia Circuit, alleging various procedural violations by the FCC.[13] The court stayed the order in part and, on the Commission's motion, remanded the proceedings for reconsideration. On remand, the Commission took written submissions and heard oral arguments, but denied MCI's motion for an evidentiary hearing. In July, 1976, it once more rejected the Execunet tariff.[14] This time, however, it was evident that express private line restrictions could not be found in all of MCI's facilities certifications. The cease and desist order, therefore, was alternatively affirmed on the basis of an implicitly developed Commission policy limiting MCI, and carriers in its class, to private line services.[15] MCI again petitioned for review.

THE DECISION

The circuit court reversed the decision of the FCC and once again remanded the case for reconsideration. In its analysis, the court took a limiting view of the FCC's statutory authority and of the purported exercise of that authority by which the Commission believed it had created an enforceable policy against Execunet.

The court initially decided that it is within the Commission's power to reject a tariff, if the tariff offers a service for which prior approval

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MCI carriers to construct and operate facilities (e.g., 32 F.C.C.2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972)), appears language similar to the following:

"The service proposed is essentially private line for the transmission of data, fascimile, control, remote metering, voice and communications."

Id. at 2-3.

13. The alleged procedural violations were that "the Commission had failed to comply with Section 4 of the Administrative Procedure Act, its own rules governing informal complaints, its own rules governing ex parte contacts, Sections 204 and 205 of the Communications Act, and the Due Process Clause." MCI Telecommunications Corp. v. FCC, 561 F.2d at 369 (citation and footnotes omitted). The court's final determination was essentially procedural. However, despite MCI's insistence, it ignored these particular issues. *See, e.g.,* Brief for Petitioners at 14-35; Supplemental Brief for Petitioners at 27-38, 53-65; Reply Brief for Petitioners at 1-10, 23-32, MCI Telecommunications Corp. v. FCC, 561 F.2d at 369.

14. MCI Telecommunications Corp., 60 F.C.C.2d 25 (1976), *rev'd,* 561 F.2d 365 (D.C. Cir. 1977), *cert. denied,* 98 S. Ct. 781 (1978).

15. The Commission asserted that the implicitly developed policy was apparent in its landmark decision in Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975), in which the common policies regarding expanded competitive entry in the microwave communications field were extensively addressed:

Our discussion in the *Specialized Common Carrier* decision makes it quite clear that we intended and did open competition only in the limited portion of AT&T's

is required and approval has not been obtained.[16] But it also decided that, at the threshold, the Commission's authority to create a prior approval requirement for new services is in itself very limited. Under section 214(c) of the Communications Act, the FCC does have authority to create service restrictions "as in its judgment the public convenience and necessity may require."[17] The exercise of that authority, however, deviates from a general congressional scheme of tariff freedom, under sections 203-205,[18] and limited facilities regulation, under section 214(a).[19] Therefore, "the Commission must strictly follow the terms of Section 214(c), and it cannot impose any such restriction unless it has affirmatively determined that 'the public convenience and necessity [so] require.'"[20]

The source of the phrase "affirmatively determined," and a lucid definition of its operative meaning, are not explicitly provided in the opinion. Nonetheless, the court did impliedly equate the lack of "an affirmative finding" of public interest with a "failure to consider the public interest,"[21] and decided that the Commission's service restrictions here would not meet the affirmative determination requirements of section 214(c).

The court then turned to the purported private line restriction of MCI and found that this restriction was never affirmatively determined to be in the public interest.[22] MCI had proposed only private line service when obtaining its facilities certifications. In addition, only private line services were brought before the FCC by carriers in MCI's class at the time that the implicit restriction policy was developed.[23] Together, these facts could be argued in support of the proposition that competition in private line service had been determined to be in the public interest; but the extended proposition that competition only in private line service is in the public interest does not necessarily follow. Without an affirmative determination of the latter proposition, MCI could not be restricted to private line services.

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and Western Union's business represented by private line services. For example, our analysis of possible revenue diversion (29 F.C.C.2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that the SCC would not compete directly with the established carriers' message services. MCI Telecommunications Corp., 60 F.C.C.2d at 36.

16. MCI Telecommunications Corp. v. FCC, 561 F.2d at 374; *accord,* Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

17. 47 U.S.C. § 214(c). *See* note 5 *supra.*

18. *See* note 7 *supra.*

19. *See* note 5 *supra.*

20. MCI Telecommunications Corp. v. FCC, 561 F.2d at 377.

21. *Id.* at 378.

22. *Id.* at 379.

23. *See* note 15 *supra.*

THE ANALYSIS

The following analysis is generally framed in the same manner as the circuit court's decision. The issues for consideration are: (1) whether the Commission has authority to restrict service offerings over authorized facilities without an affirmative determination of the public interest in such restriction; and (2) whether the Commission had affirmatively determined that the restriction of MCI's facilities to private line service would be in the public interest. Because of the conclusions reached below, especially with respect to the extent of the Commission's authority, it is appropriate to address the issues in reverse order and first determine the nature of the purported restriction of MCI.

A. The Restriction of MCI.

Microwave transmission was developed as a weapons technology during the Second World War. AT&T's exploitation of the technology for long distance communications, immediately after the war, was largely limited to high density routes between major population centers. Right-of-way companies, and others similarly situated with available capital and sufficient private intercommunication needs,[24] soon thereafter began the arduous process of securing FCC certification for privately owned microwave facilities. The FCC's reaction to applications for private systems during this period was one of reluctant accomodation[25] partly founded in a fear that the private systems would significantly divert revenues supporting AT&T's development of microwave for public telephone service. Licenses for private systems were issued, but on an experimental rather than permanent basis[26] and subject to revocation if the fear of "cream skimming"[27] materialized.

Obstacles to the development of private systems were lifted in 1959 as a result of the *Allocation of Frequencies in the Bands Above 890 Mc.* decision.[28] The Commission there decided that the cream skimming threat was not significant because the number of private systems,

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24. "The major prerequisites for the construction of a private microwave system are heavy requirements for point-to-point carrier capacity over a given route plus the financial ability to invest large amounts in the system's construction in addition to its operating expenses." S. MATHISON & P. WALKER, *supra* note 1, at 182.

25. M. IRWIN, THE TELECOMMUNICATIONS INDUSTRY 79 (1971).

26. K. BORCHARDT, STRUCTURE AND PERFORMANCE OF THE U.S. COMMUNICATIONS INDUSTRY 37 (1970).

27. *Id. See also* M. IRWIN, *supra* note 25, at 79-80. The cream skimming metaphor is particularly concerned with the competitive drain of revenues from high density routes. It was feared that AT&T would be left with only low volume routes, where the cost of service was higher per unit, but where the price had been maintained artificially low under AT&T's nationwide rate averaging structure.

28. 27 F.C.C. 359 (1959).

and consequent loss of AT&T revenues, would still be limited by capital requirements and interconnection prohibitions.[29] But the determinative conclusion in liberalizing access to microwave frequencies was not minimization of the adverse effects of private system competition with AT&T's existing monopoly in public telephone service. Rather, the positive effects of competition in the areas of microwave technology which AT&T was neglecting were dispositive.[30]

This element of innovative impetus provided by liberalized licensing later became the focal consideration in erosion of AT&T's monopoly position in private line service. In 1964, MCI applied to the FCC for permission to build and operate 11 microwave transmission facilities between St. Louis and Chicago. MCI's proposal was not for a private system. Instead, the facilities were to be used for business and data communications by multiple subscribers whose individual communication needs were not sufficient to justify the capital investment required for individual private systems. In this regard, MCI's position would be comparable to that of AT&T as a common carrier of private line communications.

In 1969, the FCC granted facility certifications for the proposal in *Microwave Communications, Inc.*[31] However, the Commission clearly defined MCI's new position as that of a "limited common carrier."[32] Again, the dispositive issue in the grant was not the possibility of competition with AT&T but the opportunity for introducing new services which AT&T was not providing:

> Lower rates for the services offered is not the sole basis for our determination that MCI has demonstrated a need for the proposed facilities, but the flexibility available to subscribers, and the sharing and the part-time features of the proposal have been considered to be significant factors as well. Here, the potential demand for the new service is not generated solely by reason of lower rates for a like service, but because

29. A microwave relay system only provides for communication between the relays. Access to the relay system, by telephone apparatus at each end point, must be accomplished by interconnection through landlines or local exchange service. This presented no problem for private systems because the end point telephones were privately owned and could be connected through landlines. However, competition with AT&T on a common carrier basis would not be feasible without interconnection through local exchange facilities. Most of these facilities belonged to AT&T and its tariffs prohibited interconnection until 1969. S. MATHISON & P. WALKER, *supra* note 1, at 104.

30. "There is yet another consideration which impels us to our determination. We feel that expanded eligibility will afford a competitive spur in the manufacturing of equipment and in the development of the communications art." Allocation of Frequencies in the Bands Above 890 Mc., 27 F.C.C. 359, 414 (1959).

31. 18 F.C.C.2d 953 (1969).

32. *Id.* at 953.

> there is a "need for service which, if not met, would result in a serious deficiency in the communication services available to the public." It may be, as the telephone companies and Western Union argue, that some business will be diverted from the existing carriers upon the grant of MCI's applications, but that fact provides no sufficient basis for depriving a segment of the public of the benefits of a new and different service.[33]

Within two years after the decision in *Microwave Communications, Inc.*, the FCC was forced to elaborate on the principles behind expanding participation in private line microwave communications. Over 1700 facilities certification applications, including additional requests by MCI and 17 of its affiliates, were pending before the Commission at the time of the landmark *Specialized Common Carrier Services*[34] decision. In resolving common policy and procedural questions, prior to consideration of the individual applications, the Commission determined "that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity."[35]

Although the Commission did not explicitly define "specialized communications," each of the 46 proposals involved was for private line business and data communications services to be offered on a limited common carrier basis. Once more, the Commission emphasized that the introduction of new services in this area, and not competition with AT&T's existing public telephone services, was the primary objective.[36] The Ninth Circuit's affirmation of *Specialized Common Carrier Services,* in *Washington Utilities & Transportation Commission v. FCC,*[37] similarly defined the restricted scope of the new entrants' services,[38] and interpretation by the Third Circuit affirmed the interconnection rights of the specialized carriers insofar as interconnection would serve the limited private line purposes of their facilities.[39]

Throughout the period of policy development with respect to microwave facilities authorizations, therefore, expanded participation

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33. *Id.* at 960-61 (citation omitted).

34. 29 F.C.C.2d 870 (1971), *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975).

35. *Id.* at 920.

36. *Id.* at 875.

37. 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975).

38. "The business involved is that of providing specialized private or leased line communications services through microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service." *Id.* at 1155.

39. Bell Tel. Co. v. FCC, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975). *See* note 29 *supra,* concerning the interconnection problem. The FCC had already determined in Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), that private line interconnection would be in the public interest. *Id.* at 965.

has been allowed in order to develop new types of services. Formal determinations of the public interest during certification proceedings were appropriately directed primarily toward evaluation of the effect of expanded participation in the types of service contemplated.

The assumption underlying the limitation of these public interest determinations was that competition with AT&T, in public message telephone service, would not occur. This assumption is evident in the recognition of barriers to entry in *Allocation of Frequencies in the Bands Above 890 Mc.*,[40] the characterization of MCI as a "limited common carrier" in *Microwave Communications, Inc.*,[41] and the restricted scope of the *Specialized Common Carrier Services*[42] decision. Moreover, in each step of the expanded participation policy the Commission thought it necessary to formally determine that allowance of service considered would present no significant cream skimming threat to AT&T's public message telephone services. Therefore, it is also *a posteriori* apparent that the Commission, at least implicitly, had assumed that the occurrence of direct competition would adversely affect AT&T, and thereby adversely affect the provision of nationwide public telephone service.

The District of Columbia Circuit rightly decided in *MCI Telecommunications Corp. v. FCC* that these assumptions were never investigated and could not therefore, in the court's view, be considered as affirmative determinations of the public interest involved. Nonetheless, these assumptions were influential in the Commission's controlled abandonment of the preexisting AT&T monopoly in private line telephone service.

It follows, then, that the restriction of *MCI*, that may be construed from the existence of these assumptions, is ineffective if it must be preceded by an affirmative determination of the public interest. But the restriction, while not based on an affirmatively determined public interest, is not a sudden invention of the FCC based on a public interest fortuitously discovered for the sole purpose of restraining MCI in the instant case. The effectiveness of the restriction therefore depends on the extent of the FCC's authority to restrict absent an affirmative determination of the public interest.

B. Principles of Tariff Freedom and Limited Facilities Regulation.

The District of Columbia Circuit concluded that the FCC has no authority to restrict services that may be offered over authorized

40. 27 F.C.C. 359 (1959).
41. 18 F.C.C.2d 953 (1969).
42. 29 F.C.C.2d 870 (1971), *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. F.C.C., 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975).

facilities without an affirmative determination of the public interests supporting such restriction. If this conclusion is correct, then the court's decision is also correct because there has been no affirmative determination of the public interest in restricting MCI. If, however, the FCC's power is not limited in the fashion suggested by the court then the lack of an affirmative determination of the public interest in restricting MCI to private line services might not have been fatal to the enforceability of such restriction.[43]

The major source of FCC authority over communications common carriers is Title II of the Communications Act,[44] initially passed by Congress in 1934. The legislative record of the Act is sparse, due to the brief period of time that the bill was before each house,[45] and to admitted congressional ignorance on the subject of the legislation.[46] Nonetheless, the record and the regulatory scheme of the Act itself do indicate to some extent the intent of Congress in creating an administrative regulatory authority over communications. The District of Columbia Circuit's limited view of FCC authority was reached by a synthesis of the congressional purposes it perceived in the tariff and facilities certification provisions of the Act.

First, based on the genesis of the tariff mechanism, the court found a congressional intent to discourage Commission interference in carrier initiated tariff revisions. The tariff system in the Communications Act was adapted from the Interstate Commerce Act.[47] The Interstate Commerce Act tariff provisions have been consistently interpreted as allow-

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43. The court stated that its reversal of the Commission's orders should not be construed as a determination that the public interest would be either for or against the private line restriction. That determination was left to the Commission on remand in the event it elected to further investigate the matter. MCI Telecommunications Corp. v. FCC, 561 F.2d at 380. The Commission has opened a rulemaking proceeding, MTS and WATS Market Structure, 43 Fed. Reg. 46, 9505 (1978), to perform the investigation.

44. 47 U.S.C.A. §§ 201-223 (West 1962 & Supp. 1978).

45. The Dill bill was debated only briefly in the Senate, the entire debate taking place on May 15, 1934 . . . . In the House, the debate was even briefer being limited to only two hours on June 2, 1934. The shortness of the debate in both houses is most striking, bearing in mind the importance of the bill, which worked a complete transformation in the regulation of communications.

IV B. SCHWARTZ, *supra* note 2, at 2375-76.

46. As a Congressman, he conceded, he knew little about radio and the problems involved in regulating it and other communications. The only solution was to form a commission to gather information in the field. It was much safer to give the commission powers "than to attempt with what little knowledge we have to lay down a code which will cover all sorts of conditions and all sorts of individual practices."

IV B. SCHWARTZ, *supra* note 2, at 2374 (quoting Congressman Schuyler Merritt).

47. 49 U.S.C. §§ 15(1), 15(7) (1970). *See* S. REP. NO. 781, 73d Cong., 2d Sess. 4 (1934); H.R. REP. NO. 1850, 73d Cong., 2d Sess. 5-6 (1934).

ing common carriers in commerce to freely initiate new rates and services without prior approval of the Interstate Commerce Commission.[48] The Second Circuit, in *AT&T v. FCC*,[49] applied this interpretation directly to the similar provisions of the Communications Act, with a caveat against FCC violation of the apparent congressional purpose:

> In enacting Sections 203-205 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[50]

Despite the purpose perceived, the Second Circuit did permit the FCC to erect prior approval requirements if expressly provided for elsewhere in the Act.[51]

Second, because *AT&T v. FCC* involved only prior approval for rate revisions, expansion of this noninterference principle to new services, when offered over existing facilities, was left to the court in *MCI Telecommunications Corp. v. FCC*, as a question of first impression. The involvement of facilities necessitated an interpretation of section 214 and its effect on the principle of carrier freedom in tariffs.

In this regard, the court viewed section 214(a)[52] as merely another example of the noninterference principle which had been promulgated earlier in *AT&T v. FCC*:

> Section 214 establishes the Commission's regulatory charter over entry into the common carrier communications field and states that no carrier shall construct, extend, or acquire a line unless the Commission has first affirmatively determined that such entry would be in the public interest. The primary purpose of Section 214(a) is prevention of unnecessary duplication of *facilities*, not regulation of services. Because of this, Section 214 would appear to have a limited office with respect to regulation of service offerings on existing lines.[53]

Finally, section 214(c)[54] was recognized by the court as an express source of authority for the type of service regulation sought by the

48. *See, e.g.*, United States v. S.C.R.A.P., 412 U.S. 669 (1973); Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (1963).

49. 487 F.2d 865 (2d Cir. 1973).

50. *Id.* at 880 (footnote omitted).

51. *Id.* at 876-81.

52. *See* note 4 *supra*.

53. MCI Telecommunications Corp. v. FCC, 561 F.2d at 375 (emphasis in original).

54. *See* note 5 *supra*.

FCC.[55] Nonetheless, by relating the limited purpose of facilities regulation in section 214(a) to the principle of tariff freedom embodied in sections 203-205, the court found an implicit congressional plan to limit Commission authority in the regulation of services. Because the exercise of section 214(c) power would necessarily be an exceptional measure deviating from this congressional plan, it would be properly exercised only by strict compliance with its terms. This would include an affirmative determination of the public need for a section 214(c) restriction.

C. *Questioning the Principles*

The congressional plan perceived by the court in support of limited section 214(c) power is suspect. It is logically derived from two abiding congressional intentions. But these congressional intentions, as developed by the court, are each in turn questionable. The specific questions raised are: (1) did Congress intend, in section 214(a), that facilities be regulated to prevent duplication without consideration of the services offered; and (2) did Congress intend, in sections 203-205, that carriers have absolute freedom in initiating tariff revisions.

First, section 214(a) should not be understood as only a purposeless preoccupation by Congress with preventing duplicated facilities. The ultimate purpose of the provision is to prevent the higher cost of service that results from duplicated facilities.[56] At the threshold, then, the exclusion of service considerations in facilities regulation is contrary to congressional intent, rather than compliant with it. Further, in *Hawaiian Telephone Co. v. FCC*[57] the practical significance of service considerations in the facilities certification process was outlined:

> When the FCC considers an application for certification of a new line, it must start from the situation as it then exists, and must apply the statutory standard to determine whether indeed the public convenience and necessity requires more or better service. If it determines that more or additional competitive service would be in the public interest, then it can consider how much added service is necessary and finally to whom the opportunity for providing service should be awarded.[58]

The court, in *MCI Telecommunications Corp. v. FCC,* saw this as "merely a matter of fact observation."[59] If service considerations during a facilities certification would be a basis for regulating services not

55. MCI Telecommunications Corp. v. FCC, 561 F.2d at 377.

56. "This section is designed to prevent useless duplication of facilities with consequent higher charges upon the users of services." 78 CONG. REC. 10314 (1934).

57. 498 F.2d 771 (D.C. Cir. 1974).

58. *Id.* at 776.

59. MCI Telecommunications Corp. v. FCC, 561 F.2d at 376.

then considered, then the final provision of section 214(a) would be nullified by requiring a certification where the adequacy and quality of existing services were not impaired.[60] The court, instead, believed that a determination of the public necessity for a facility would not be altered if additional services were later provided over the same facility, because "the public need that justified construction of facilities will still be met and there is no sense in which those facilities would have become needlessly duplicative."[61]

The court's analysis is incomplete. MCI's facilities do not appear duplicative insofar as they are still necessary to provide MCI's private line services. However, either MCI's or AT&T's facilities are duplicative in the provision of public message telephone service. The users of MTS-type service, whose requirements were formerly served by AT&T, do not now need one of the two facilities. Hence, duplication of service does, in a sense, duplicate facilities and it can be anticipated that the allocated cost of the unneeded facilities will eventually be absorbed by public message telephone users.

Second, the congressional plan of tariff freedom as perceived by the Second Circuit, in *AT&T v. FCC*,[62] is unsound. Legislative history of the Communications Act reveals nothing to support, or contest, an "intended . . . specific scheme . . . achieved after a careful compromise."[63] Insofar as congressional intent in the Communications Act can be inferred from the Interstate Commerce Act, the principle of absolute carrier freedom in tariff revisions might be maintained in communications. But, in *General Telephone Co. v. United States*,[64] the Fifth Circuit determined that the clearest pervading purpose of Congress to be found in the Communications Act was to endow the new Commission with sufficiently flexible powers to deal with the dynamics of an evolving communications technology. It was therefore

60. The relevant wording is: "[N]othing in this section shall be construed to require a certificate or other authorization from the Commission for any . . . changes . . . other than new construction, which will not impair the adequacy or quality of service provided." 47 U.S.C. § 214(a) (1970).

The issue whether Execunet would impair MCI's existing private line services was never raised by the parties and only casually considered, and dismissed, by the court. MCI Telecommunications Corp. v. F.C.C., 561 F.2d at 375 n.51. The issue deserved more consideration. Because microwave transmission facilities do not have infinite circuit capacity, Execunet would necessarily displace MCI's private line services at capacity.

61. MCI Telecommunications Corp. v. FCC, 561 F.2d at 376.

62. 487 F.2d 865 (2d Cir. 1973).

63. *Id.* at 880. Based on the length of time of congressional consideration alone, this characterization of the Act appears inaccurate. *See* notes 46 & 47 *supra*.

64. 449 F.2d 846 (5th Cir. 1971) (involving similarity of the facilities certification provisions).

held that, in interpreting certain provisions of the Communications Act, although drawn from and nearly identical to provisions of the Interstate Commerce Act, the FCC would have broader authority than the ICC and would not be restricted to a course of action that had been dictated by national transportation policy.[65]

The broad authority attributed to the Commission in *General Telephone Co. v. United States* is not an isolated concession. Rather, it is representative of a tradition of judicial deference to the Commission's determinations, and the presumption of correctness that attaches to them.[66] Commission actions in patent violation of the Act, or actions which are not pursuant to its regulatory functions, are among the few recognizable exceptions to this broad construction of Commission authority.[67] The Commission has otherwise been allowed to reject tariffs with only a cursory economic analysis,[68] permit experimental services in the absence of a "compelling showing of legislative prohibition,"[69] and give retroactive effect to its rules despite detrimental carrier reliance.[70] It has generally been recognized that, in view of the congressional inability to identify new forms of communication and to continually modify statutory procedures for dealing with them, the FCC should be entitled to great latitude in coping with their development.[71]

The limiting congressional plan in the Communications Act, as perceived by the court in *MCI Telecommunications Corp. v. FCC,* is contrary to the consistent construction of broad Commission authority. Congress simply intended to delegate sufficient authority for effective administrative regulation of a technology which could not be regulated by legislative means. The reading of section 214(c) to require an affirmative determination of the public need for service restrictions must therefore fail with the misperceived congressional plan. Instead, based on the breadth of the congressionally delegated authority, the reasoned propriety of judicial deference to the Commission's actions, the impropriety of transferring congressional intent from transportation regulation to communications regulation, and the purpose behind facilities certification, it should be enough that "in [the Commission's]

65. *Id.* at 856.

66. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 948 (D.C. Cir. 1977).

67. *See, e.g.,* Daly v. United States, 286 F.2d 146, 149 (7th Cir. 1961) ("plainly erroneous" requirement).

68. North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1055 (4th Cir. 1977).

69. United Tel. Workers v. FCC, 436 F.2d 920, 924 (D.C. Cir. 1970).

70. General Tel. Co. v. United States, 449 F.2d 846, 864 (5th Cir. 1971).

71. Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966).

judgment the public convenience and necessity may require"[72] restriction of MCI's facilities to private line service.

CONCLUSION

The implicit limitation of MCI to private line service, through evolution of the microwave regulatory policy, was not based on a formal determination of the public interests involved. But the assumptions underlying the controlled opening of private line microwave to common carrier competition should be recognized as Commission judgments regarding the public interests involved in public message telephone service competition. The final explicit restriction of MCI's facilities to private line service, in the contested Commission orders, was nothing less than reiteration of those Commission judgments. Under the terms of section 214(c), the Commission orders were proper and the court's reversal was therefore unwarranted.

Finally, it should be noted that the Commission orders were essentially viewed by the court as protectionist actions, promotive of AT&T's private financial interests in its preexisting public message telephone service monopoly.[73] In maintaining this view, the court had to ignore the trend of Commission fostered competitive expansion in private line service, in which AT&T had also previously held a monopoly with vested financial interests. An enlightened approach to the trend would recognize that the Commission's controlled opening of private line service to competition is in compliance with the congressional mandate of regulating "so as to make available so far as possible, to all the people of the United States, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[74] There is no reason to believe that when, in the Commission's judgment, the controlled opening of public message telephone service to competition could be accomplished in compliance with the terms of the mandate, competition would not have been fostered.

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72. 47 U.S.C. § 214(c) (1970).

73. [T]he Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of de facto monopoly.

MCI Telecommunications Corp. v. FCC, 561 F.2d at 380.

74. 47 U.S.C. § 151 (1970).