

Note

AT&T and the Antitrust Laws: A Strict Test for Implied Immunity

In a major antitrust suit recently filed against American Telephone and Telegraph Co. (AT&T),¹ the United States alleges that AT&T has monopolized the markets for telecommunications equipment and services² in violation of § 2 of the Sherman Act.³ The Government is seeking to separate AT&T's operating companies, which provide principally intrastate telephone and other telecommunications services, from its Long Lines Department, which provides interstate services and interconnection between the operating companies.⁴

The Government is attempting to restructure an industry heavily regulated by the Federal Communications Commission (FCC). As a result of the suit, the court and the Commission will be engaged in overlapping factual inquiries under different statutes embodying different legal standards; the suit threatens to interfere with the Commission's efforts to formulate and implement regulatory policy in the communications industry. This threat of interference is clearest in the most important submarket of interstate telecommunications services—intercity voice and data transmission.⁵ This Note argues that in this submarket the conduct challenged by the Government is within the exclusive jurisdiction of the FCC and is therefore immune from the antitrust laws.

1. United States v. AT&T, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974).

2. Complaint at 11-15, United States v. AT&T, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974) [hereinafter cited as Complaint]. This Note does not discuss the claim of monopolization in the telecommunications equipment market.

3. 15 U.S.C.A. § 2 (Supp. Feb. 1975) provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony

4. Complaint, *supra* note 2, at 14-15. The Government also is seeking divestiture of AT&T's manufacturing subsidiary. *Id.* at 14. For a description of the Bell System, see M. IRWIN, *THE TELECOMMUNICATIONS INDUSTRY* 24-27 (1971).

5. For a definition of this submarket for antitrust purposes, see note 70 *infra*. This Note does not discuss the Government's allegations concerning AT&T's conduct in two secondary submarkets for telecommunications services—video program transmission and mobile telephone service.

I. The Doctrine of Implied Immunity

A. *Reconciling Antitrust and Regulation*

The accommodation of the antitrust laws and economic regulation has troubled courts since the earliest applications of the Sherman Act.⁶ Broadly speaking, the Act seeks to prevent “undue limitation on competitive conditions”;⁷ it is premised on the theory that “the unrestrained interaction of competitive forces will yield the best allocation of our economic resources.”⁸ The theory of regulation, on the other hand, is that the “unrestrained interaction of competitive forces” in a particular industry will not adequately serve the public interest.⁹ Congress therefore establishes a regulatory agency to supervise the conduct of firms in the industry according to a generalized concept of the “public interest”¹⁰ which embodies no necessary preference for competition.¹¹ Subjecting a regulated firm to antitrust liability raises the danger that conflicting standards of conduct may be imposed on the firm by the court enforcing the competitive mandate of the antitrust laws and by the federal agency enforcing its view of the public interest.

Any attempt to resolve this conflict must begin with the antitrust and regulatory statutes themselves. In some industries, Congress has perceived the potential for conflict and has granted immunity from the antitrust laws for certain conduct by regulated firms.¹² Where

6. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (rate agreement among railroads, approved by Interstate Commerce Commission, held subject to antitrust laws).

7. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

8. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). The Act was also intended to serve the noneconomic goal of providing “an environment conducive to the preservation of our democratic political and social institutions . . .” by preventing massive concentrations of industrial power. *Id.* See *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (Congress “not necessarily actuated by economic motives alone” and may have preferred a system of small producers for “indirect social or moral effect”).

9. See 2 A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 1, 4-5 (1971). For example, the relevant market may be one of natural monopoly which cannot efficiently support more than one firm; market imperfections may prevent the competitive process from producing goods of optimal quality, quantity, and price; or desired policy objectives other than those associated with competition may not be achieved. C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 189-90 (1959).

10. See, e.g., 47 U.S.C. § 201(a) (1970) (FCC may order a common carrier to interconnect with another if in “public interest”); *id.* § 201(b) (rates and practices must be “just and reasonable”); *id.* § 214 (no construction or extension of lines unless for “public convenience and necessity”); Loevinger, *Regulation and Competition as Alternatives*, 11 *ANTITRUST BULL.* 101, 128-34 (1966).

11. See, e.g., *FCC v. R.C.A. Communications, Inc.*, 346 U.S. 86, 92-95 (1953); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 775-77 (D.C. Cir. 1974); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 141 (1965).

12. See, e.g., 47 U.S.C. § 221(a) (1970) (merger of telephone companies, if approved by FCC, is exempt from antitrust and other conflicting federal laws).

Congress has failed to resolve explicitly the potential conflicts between antitrust and regulation, a court faced with an antitrust claim must attempt to infer congressional intent from statutory language and legislative history.¹³ Because these often provide little guidance, the courts have been forced to develop their own standards for making the accommodations between federal regulation and antitrust.¹⁴ The result of these efforts at accommodation has been a judicial doctrine under which an antitrust claim against a regulated firm will be dismissed if the conduct challenged has an "implied immunity" from the antitrust laws or, equivalently, is within the "exclusive jurisdiction" of the regulatory agency.¹⁵

B. *A Strict Test for Implied Immunity*

The reasoning by which a court decides a particular claim of implied immunity is often only implicit in its opinion. In *Gordon v.*

13. See Handler, *Regulation versus Competition*, 43 ANTITRUST L.J. 277, 282, 285 (1974). For example, in a number of cases involving the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, as amended, 7 U.S.C. §§ 601, 602, 608a-608d, 610, 612, 614, 624, 671-74 (Supp. III 1973), and the Capper-Volstead Act of 1922, 7 U.S.C. §§ 291, 292 (1970), the Court has found that the statutory language and legislative history clearly indicated that Congress intended the antitrust laws to be applicable to the conduct at issue. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 389-96 (1967); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 464-67 (1960); *United States v. Borden Co.*, 308 U.S. 188, 199-206 (1939).

14. Handler, *supra* note 13, at 281. The courts have made an accommodation of a different sort between state regulation and the federal antitrust laws. In *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), the Supreme Court held that the Sherman Act was not intended to apply to "state action." The *Parker* doctrine has established an implied antitrust exemption for conduct authorized or compelled by a state regulatory scheme. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975); commentary cited in Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164, 1166 n.18 (1975). The *Parker* doctrine is outside the scope of this Note, which is concerned only with interstate, and therefore federally regulated, telecommunications services.

15. The concept of "exclusive jurisdiction" should be distinguished from that of "primary jurisdiction." An agency has primary jurisdiction over a claim "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . ." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). Before deciding the case, the court refers it to the relevant regulatory agency for specific findings of fact or findings of law under the regulatory statute. McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 A.B.A. ANTITRUST SECTION 57, 62-63 (1958). In contrast, where the agency is found to have exclusive jurisdiction over the conduct at issue in the case, the court will dismiss the claim. See Pogue, *Exclusive Jurisdiction*, 43 ANTITRUST L.J. 313, 318 (1974); Handler, *supra* note 13, at 282. Nevertheless, some authors collapse the two doctrines and use the term "primary jurisdiction" to refer to both. See, e.g., Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037-38 (1964); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929, 932 (1954). For discussions of this terminological confusion, see Stokes, *A Few Irreverent Comments About Antitrust, Agency Regulation, and Primary Jurisdiction*, 33 GEO. WASH. L. REV. 529, 550-60 (1964); Comment, *New Twists on Old Wrinkles: Primary Jurisdiction and Regulatory Accommodation with the Antitrust Laws*, 15 B.C. IND. & COM. L. REV. 80, 92-94 (1973).

*New York Stock Exchange*¹⁶ and *United States v. National Association of Securities Dealers (NASD)*,¹⁷ the Supreme Court recently upheld immunity defenses to allegations of price fixing, concerted refusals to deal, and resale price maintenance in the securities industry, where the Securities and Exchange Commission (SEC) had specific authority to approve the conduct challenged in the suit. The Court apparently assumed that Congress must have recognized that it was allowing the SEC to approve per se violations of the antitrust laws.¹⁸ In cases such as the Government antitrust suit against AT&T, however, a broader range of conduct is at issue, and the alleged antitrust violation is more complex. In such circumstances the Court's willingness to find immunity has turned on whether the defendant is subject to regulation which is sufficiently "pervasive."¹⁹ The logic of this inquiry appears to be that if Congress has invested a regulatory agency with pervasive authority over an industry under a discretionary public interest standard, it must have determined that competition alone was inadequate to vindicate the public interest. Therefore, Congress must have intended to exempt the regulated firms from the competitive standard of the antitrust laws, at least when the matters at issue in the antitrust suit are within the agency's authority.²⁰

It is difficult, however, to give the doctrine of implied immunity any precise analytical content. The leading cases apply conclusory labels to discrete fact situations, stating on the one hand that immunity is implied only in cases of "plain repugnancy"²¹ between the

16. 422 U.S. 659, 682, 691 (1975) (upholding summary judgment for defendants in class action against major stock exchanges and their members alleging that the system of fixed commission rates for certain transactions was in violation of §§ 1 and 2 of the Sherman Act).

17. 422 U.S. 694, 729-30 (1975) (upholding dismissal of complaint alleging a combination by association of securities dealers and others to restrict the sale and fix the resale prices of mutual fund shares in secondary market transactions). For a discussion of *Gordon* and *NASD*, see Note, *SEC Regulation as a Pervasive Regulatory Scheme—Implied Repeal of the Antitrust Laws with Respect to National Securities Exchanges and the NASD*, 44 *FORDHAM L. REV.* 355 (1975).

18. See *Gordon v. NYSE*, 422 U.S. 659, 681-82 (1975) (Court notes that legislative permission for fixing of commission rates under SEC supervision occurred seven years after the Court's decision in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), declaring price fixing a per se violation of the Sherman Act.) This logic is more explicit in the lower court opinion in *Gordon*. *Gordon v. NYSE*, 498 F.2d 1303, 1307 (2d Cir. 1974).

19. *E.g.*, *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 730 (1975) (with respect to horizontal conspiracy count); *Silver v. NYSE*, 373 U.S. 341, 347 (1963); *California v. FPC*, 369 U.S. 482, 485 (1962); *United States v. RCA*, 358 U.S. 334, 350 (1959).

20. See *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 732-33 (1975); *Foremost Int'l Tours, Inc. v. Qantas Airways Ltd.*, 5 *TRADE REG. REP.* (1975 Trade Cas.) ¶ 60,578, at 67,535 (9th Cir., Oct. 22, 1975).

21. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963), *quoted with approval in, e.g.*, *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 217-18 (1966).

antitrust and regulatory statutes, and on the other that it is implied to keep federal agencies "free from the disruption"²² of conflicting antitrust judgments. Factors relied upon in one case are ignored altogether in others.²³ Commentators have despaired of formulating a coherent theory of the implied immunity doctrine,²⁴ and lower courts are left with little or no guidance in deciding an immunity claim on a particular set of facts.

But it is possible to distill from the Supreme Court's decisions all the criteria which it has found relevant in determining whether antitrust immunity should be implied. Any claim of immunity which can meet all of these criteria should certainly succeed. The case law suggests five criteria for this strict test: (1) the conduct challenged in the antitrust complaint, as well as rates, entry, and investment in the market, should be continually subject to the supervisory authority of the regulatory agency; (2) the agency should have the power to grant the relief requested by the antitrust plaintiff; (3) the benefits of competition should enter into the agency's public interest calculation; (4) agency expertise should be particularly useful in deciding issues in the antitrust suit; and (5) the antitrust suit should involve important regulatory policy questions.

1. *Supervisory Authority over Conduct*

In the leading implied immunity case, *Pan American World Airways, Inc. v. United States*,²⁵ the Supreme Court reversed a judgment against Pan American for violations of § 2 of the Sherman Act, ruling that the complaint was within the exclusive jurisdiction of the Civil Aeronautics Board (CAB). The Court stressed that the acts alleged in the suit as antitrust violations were "precise ingredients" of the CAB's regulatory authority.²⁶ To satisfy this criterion, the conduct

22. *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734 (1975).

23. *See, e.g.*, p. 262 *infra*.

24. *See Handler, supra* note 13, at 290-92 (suggesting a national committee to study the proper accommodation of regulation and the antitrust laws); Pogue, *supra* note 15, at 317.

25. 371 U.S. 296 (1963). The Court remanded the case with an order that the complaint be dismissed. *See Note, Antitrust and the Regulated Industries: The Panagra Decision and its Ramifications*, 38 N.Y.U.L. REV. 593 (1963). *Pan Am* was the first case in which the Court was clearly using the concept of exclusive agency jurisdiction. *Id.* at 604.

26. Specifically, the Court referred to the CAB's authority to grant certificates for operation on assigned routes and to allow or disallow affiliations between common carriers and air carriers. 371 U.S. at 305. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 402-03 (1973) (Burger, C.J., dissenting).

The district court in *Pan Am* had held that Pan American Airlines violated § 2 of the Sherman Act in using its 50 percent ownership of Panagra Airlines to prevent Panagra from securing authority from the CAB to extend its routes from the Canal Zone to

at issue in the suit must be subject to the supervisory authority of the relevant regulatory agency; in other words, the agency must have authority to monitor the activity and to order that it be modified or terminated.²⁷

Several cases suggest further that the agency's supervisory authority must extend to essentially the type of regulation imposed on public utilities,²⁸ which has traditionally involved control over the rates, entry, and investment of firms in the industry.²⁹ This stricter requirement of supervisory authority is in keeping with the concept of "pervasive regulation." An agency which controls these market variables can better shape the industry to meet the various policy objectives implicit in the regulatory act's public interest standard.

the United States in competition with Pan Am. 193 F. Supp. 18 (S.D.N.Y. 1961). The initial complaint also charged (1) that Pan Am and W.R. Grace & Co. formed Panagra under an agreement that Panagra would have the exclusive right to traffic along the west coast of South America while Pan Am, with no competition from Panagra, would operate in other parts of South America and between the Canal Zone and the U.S.; (2) that Grace conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the U.S. and the western coastal areas of South America and Buenos Aires. 371 U.S. at 298.

27. The "precise ingredients" criterion was first stated in *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), a case involving an alleged combination and conspiracy among certain shipping firms in violation of §§ 1 and 2 of the Sherman Act. The Court concluded that the matter was within the exclusive jurisdiction of the Shipping Board. 284 U.S. at 485. The Supreme Court has subsequently suggested that *Cunard* was a case of express, not implied, immunity under § 15 of the Shipping Act. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 220-21 (1966). However, the *Cunard* Court did not rely on an express immunity theory. See *United States Navigation Co. v. Cunard S.S. Co.*, *supra* at 486-87.

28. In *United States v. RCA*, 358 U.S. 334 (1959), the Supreme Court considered the question whether the FCC's approval of an agreement to exchange television stations barred a civil antitrust action by the Government. The Court ruled that it did not, noting that most of the cases dealing with implied immunity concerned common carriers rather than broadcasters. *Id.* at 348. The Court observed that broadcasters are not subject to the extensive controls, such as rate regulation, which typify common carrier regulation, *id.* at 348-49, and reasoned that the failure to subject broadcasters to the extensive regulation conventionally applied to common carriers necessarily implied that Congress intended that the field of broadcasting be one of free competition. *Id.* at 349. It held that the antitrust laws should therefore apply. *Id.* at 350.

In *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963), the Court rejected a claim of implied immunity, noting that "bank regulation is in most respects less complete than public utility regulation" and that federal agencies had no authority over investment and service and only indirect authority over rates.

It should be noted that the Court in *RCA* uses the term "primary jurisdiction" instead of "implied immunity" or "exclusive jurisdiction." For a discussion of the confusion involved in the use of these terms, see note 15 *supra*. It is obvious from the references in *RCA* to two implied immunity cases, *Keogh v. Chicago & N. Ry.*, 260 U.S. 156 (1922), and *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), that the Court was using the term "primary jurisdiction" in the sense of both primary and exclusive jurisdiction. 358 U.S. at 347-48. A similar confusion exists in *Philadelphia National Bank*. 374 U.S. at 353-54.

29. See I A. KAHN, *supra* note 9, at 20-21. Authority over investment should include authority to order capacity expansions and generally to maintain the quality of service.

If Congress failed to grant an agency authority over these variables, it may not have intended to supplant conventional market forces and displace the antitrust laws.

The supervisory authority criterion was emphasized in *Hughes Tool Co. v. Trans World Airlines, Inc.*³⁰ In holding that the CAB had exclusive jurisdiction over the alleged anticompetitive conduct, the Court relied on the fact that the conduct was continually subject to the supervisory authority of the agency.³¹ Mere agency authority to approve a firm's entry into the market, without the authority to monitor its conduct, is not sufficient for antitrust immunity. But the Court

30. 409 U.S. 363 (1973). As Chief Justice Burger points out in his dissent, the acts at issue in *Hughes Tool* were elements of an attempt to restrain trade in aircraft supply and manufacturing. The CAB has no authority over entry, rates, or investment in this market, and hence does not meet the more demanding requirement of supervisory authority discussed at p. 259 *supra*. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 403 (1973) (Burger, C. J., dissenting); Handler, *supra* note 13, at 286.

31. TWA instituted this suit for treble the alleged damages resulting from the Hughes Tool Company's exercise of its controlling interest in TWA from 1944 to 1960, in particular Hughes Tool's efforts to control the acquisition and financing of aircraft by TWA. Under § 408 of the Federal Aviation Act, 49 U.S.C. § 1378 (1970), the Civil Aeronautics Board must approve the acquisition of control of an air carrier by any person engaged in any phase of aeronautics. The Supreme Court held that this authority, in conjunction with the CAB's ongoing supervisory authority under § 415 of the Act, 49 U.S.C. § 1385 (1970), placed the conduct at issue beyond the reach of the antitrust laws. 409 U.S. at 389.

The fact that the Federal Aviation Act contains an express immunity provision, referred to in *Hughes Tool*, has created a great deal of confusion in the literature as to whether *Hughes Tool* is an express or an implied immunity case. Compare Shenfield, *Annual Survey of Antitrust Developments—The Year of the Regulated Industry*, 31 WASH. & LEE L. REV. 1, 45 (1974), and Comment, *Primary Jurisdiction in Antitrust Cases: Three Recent Decisions*, 42 U. CINN. L. REV. 725, 738-40 (1973), with Pogue, *supra* note 15, at 320, and Comment, *supra* note 15, at 107.

The confusion stems from the fact that the Court did pursue both arguments. Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (1970), provides that any person affected by an order under § 408, 49 U.S.C. § 1378 (1970) (consolidation, merger, purchase, lease, contracts to operate, or acquisition of control of air carriers), § 409, 49 U.S.C. § 1379 (1970) (interlocking relationships), or § 412, 49 U.S.C. § 1382 (1970) (pooling and other agreements), is relieved from the operation of the antitrust laws insofar as necessary to enable them to comply with the order. The Court made a determined effort to work the fact situation in *Hughes Tool* into the express immunity framework of § 414 by attempting to view all the transactions between Hughes Tool and TWA from 1944 to 1960 as part of the original 1944 order under § 408 permitting Hughes Tool to obtain de facto control of TWA. 409 U.S. at 375-76, 379.

However, as Chief Justice Burger noted in his dissent, many of the actions alleged to have damaged TWA were never reviewed by the CAB. *Id.* at 404 n.18. The Government itself made this observation, Memorandum for CAB as Amicus Curiae at 9-15, which seriously undermined the majority's contention that "[e]ach transaction was approved by the Board and each approval was an order under § 408 . . ." 409 U.S. at 379. In view of these difficulties, the Court's references to the CAB's supervisory authority over the control exercised by Hughes Tool years after the original CAB authorization appear to be an attempt to fit *Hughes Tool* into the implied immunity formula of *Pan Am*, a decision which is cited with approval throughout the opinion. See 409 U.S. at 388-89. The Supreme Court has recently given support to this interpretation by citing *Hughes Tool* as an implied immunity case. *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734-35 (1975).

indicated in *Hughes Tool* that the CAB need not actually have approved the conduct at issue or even have been aware of it, so long as the agency had the power to exercise control over the general class of conduct if it chose to do so.³² The Supreme Court has recently indicated that the degree to which an agency's supervisory authority is exercised may be relevant to, although not necessary for, a finding of implied immunity.³³ Read together, the leading implied immunity cases dealing with SEC and CAB regulation suggest that immunity requires either evidence of active supervision or existence of a complaint procedure by which an injured party may invoke the jurisdiction of the agency.³⁴

32. See 409 U.S. at 385-86, 389. The importance of this supervisory authority criterion was also emphasized in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). The Government brought an antitrust suit against Otter Tail Power, an electric power company, to enjoin alleged violations of the Sherman Act, including Otter Tail's refusal to sell power at wholesale to municipal systems in communities where it had previously been selling at retail and its refusal to transfer ("wheel") power from other companies over its transmission facilities to these systems. The Supreme Court upheld the lower court's finding that Otter Tail had violated § 2 of the Sherman Act.

The Court rightly dismissed the implied immunity defense as to "wheeling." The FPC has no authority to order wheeling, 410 U.S. at 375, and therefore no supervisory authority over refusals to wheel. The more interesting immunity question concerned the refusal to sell power at wholesale. Otter Tail maintained that its refusal to deal with the municipal companies should be immune from antitrust sanctions because the FPC has the power to compel involuntary interconnections of power systems pursuant to § 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b) (1970). The Court rejected this argument, noting that the essential thrust of § 202 is to encourage voluntary interconnections.

The *Otter Tail* Court's reading of the legislative history of the Federal Power Act was that Congress had considered and rejected pervasive regulation. 410 U.S. at 374. The FPC lacks authority over substantial elements of the commercial relationships between Otter Tail and the municipal cooperatives and between those cooperatives and their customers. The FPC has no control over the local distribution or generating plant of any power company, including companies that engage in interstate transmission, and has no control over the development of local cooperatives, their rates or, except insofar as they seek interconnection with interstate companies, the percentage of their power requirements to be produced by local generators. See 16 U.S.C. § 824(b) (1970); *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61, 72 (1943). The FPC did not have control over rates, entry, and investment in this retail power distribution market; therefore Otter Tail could not meet the stricter supervisory authority requirement for its implied immunity claim.

The FPC's lack of jurisdiction over wheeling may explain, in part, the Court's reluctance to find that the agency had exclusive jurisdiction over interconnection. A power company cannot wheel to a municipal cooperative with which it is not interconnected. Since the courts could not order wheeling without in fact also ordering interconnection, it would have been logically inconsistent for the Supreme Court to hold that the courts had jurisdiction over wheeling while the FPC had exclusive jurisdiction over interconnection.

33. *Gordon v. NYSE*, 422 U.S. 659, 685 (1975); *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734 (1975) (with respect to the count alleging a horizontal conspiracy between NASD and its members).

34. In *Pan Am* and *Hughes Tool* the CAB did not even believe that it had the authority to supervise the conduct at issue. See Memorandum for CAB as Amicus Curiae at 9-18, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); Brief for United States in Response in No. 23 at 42-43, *Pan American World Airways, Inc. v.*

2. Agency Authority to Grant Relief

Another criterion for implied immunity found in *Pan Am*³⁵ and other cases³⁶ is that the agency have the power to grant the type of relief requested in the antitrust suit. More recent cases have not subscribed to this requirement. *Hughes Tool*³⁷ and *Gordon v. New York Stock Exchange*,³⁸ for example, both involved private treble damage actions in which the Supreme Court found exclusive jurisdiction in a regulatory agency not empowered to grant damages.³⁹

United States, 371 U.S. 296 (1963). This approach suggests a desire to focus on the agency's statutory authority and to leave to Congress assessments of the efficacy of the regulators.

The discussion in *Gordon v. NYSE*, 422 U.S. 659, 685 (1975), and *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734 (1975), of the SEC's exercise of supervisory authority is not inconsistent with the lack of such a concern in *Pan Am* and *Hughes Tool*. In *Gordon* and *NASD*, the Court relied principally on its decision in *Silver v. NYSE*, 373 U.S. 341 (1963). *Silver* involved an antitrust action brought against the New York Stock Exchange by two nonmembers for alleged violations of § 1 of the Sherman Act, centering on the Stock Exchange's order to its members to terminate their direct wire telephone connections with the two nonmembers after the Exchange denied the nonmembers approval for such connections. The Supreme Court held that the New York Stock Exchange was not immune from the antitrust laws because the SEC did not have jurisdiction to review particular instances of enforcement of Exchange rules.

The *Silver* Court pointed out that it would be a different case "were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association," referring to 15 U.S.C. §§ 78o-3(g), 78o-3(h), 78y(a) (1970). 373 U.S. at 358 n.12. Review under these sections is triggered by the petition of any person aggrieved by the action. See *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir.), cert. denied, 344 U.S. 855 (1952). *Silver* may be read as holding that before a court infers antitrust immunity, it must find that a mechanism exists by which the aggrieved party may invoke the jurisdiction of the regulatory agency. Otherwise the agency might never review the conduct at issue. In *Pan Am* and *Hughes Tool* such a complaint procedure was available by virtue of §§ 408(e) and 411 of the Federal Aviation Act of 1958. 49 U.S.C. §§ 1378(e), 1381 (1970). In *Gordon* and *NASD* on the other hand, there appears to have been no such complaint procedure available. See, e.g., Brief of the United States as Amicus Curiae at 28, *Gordon v. NYSE*, 422 U.S. 659 (1975); cf. Jurisdictional Statement at 25-28, *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975). Therefore, the Court looked for evidence of some exercise of that authority with respect to the conduct at issue. Absent a complaint procedure this evidence afforded some assurance that the agency was aware of the problem and could take action if it thought necessary. See *Gordon v. NYSE*, *supra* at 683-85.

35. 371 U.S. 296, 311-12, 313 n.19 (1963).

36. *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734 (1975); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 460 (1945); *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500, 514 (1936); *Keogh v. Chicago & N. Ry.*, 260 U.S. 156, 162 (1922). For cases where the CAB's inability to grant a remedy resulted in retention of jurisdiction by the courts, see *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 (9th Cir. 1973), cert. denied, 417 U.S. 913 (1974); *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), cert. denied, 393 U.S. 846 (1968). See also *Foremost Int'l Tours, Inc. v. Qantas Airways Ltd.*, 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,578, at 67,535 (9th Cir., Oct. 22, 1975).

37. 409 U.S. 363 (1973).

38. 422 U.S. 659 (1975).

39. Neither the CAB nor the SEC has authority to grant damages. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 311 (1963); *Thill Sec. Corp. v. NYSE*, 433 F.2d 264, 278 (7th Cir. 1970).

The ability to grant most forms of injunctive relief is implicit in the requirement of supervisory authority over conduct.⁴⁰ Even if the agency has supervisory authority over regulated firms, however, it may not be able to order divestiture⁴¹ or to award damages. The inference that Congress intended to displace conventional antitrust remedies is certainly stronger if the agency is authorized to award both of these additional forms of antitrust relief.⁴² A strict test for implied immunity should therefore include the remedy requirement.

3. *Competition and the Public Interest*

In *Pan Am*⁴³ and recently in *Gordon and United States v. National Association of Securities Dealers*,⁴⁴ the Court suggested that an im-

40. See pp. 258-59 *supra*.

41. The Court has indicated that the inability to grant divestiture may defeat an implied immunity claim. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 311-13, 313 n.19 (1963).

42. See *Keogh v. Chicago & N. Ry.*, 260 U.S. 156, 162 (1922).

43. 371 U.S. 296, 304-09 (1963).

44. *Gordon v. NYSE*, 422 U.S. 659, 689-91 (1975); *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 732 (1975).

A strict version of this criterion is that an implied immunity argument can only succeed if a new competitive standard was explicitly written into the regulatory act. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 (1973) (suggesting that antitrust considerations must be "determinative" in the agency's "public interest" standard before that agency can be said to have exclusive jurisdiction over an antitrust controversy).

In his dissent in *NASD*, Justice White argued that immunity can be inferred only if Congress has displaced the unregulated market "with a differing competitive regime, defined by particularized competitive standards." 422 U.S. 694, 743 (1975). Justice White's test is heavily influenced by his reading of *Pan Am* and the very special language in the Federal Aviation Act of 1958 involved in that case. *Id.* at 740-41. Specifically, § 411 of the Federal Aviation Act, 49 U.S.C. § 1381 (1970), gives the CAB authority to investigate and remedy "unfair or deceptive practices or unfair methods of competition." But the Federal Aviation Act was principally a reenactment of the Civil Aeronautics Act of 1938, which was concerned with the problems of destructive competition on the one hand, and complete monopolization of a then oligopolistic industry on the other. See Jones, *Antitrust and Specific Regulation: An Introduction to Comparative Analysis*, 19 A.B.A. ANTITRUST SECTION 261, 305-09 (1961). Therefore it was quite natural that provisions addressing monopoly and unfair methods of competition were included in the Act. The Federal Aviation Act requires the CAB to foster competition. *Continental Air Lines, Inc. v. CAB*, 519 F.2d 944, 946-47 (D.C. Cir. 1975).

Consider, however, the application of the White test to the telephone industry, which was conceded by Congress in 1934 to be a monopoly. See, e.g., S. REP. NO. 781, 73d Cong. 2d Sess. 2 (1934). Any real competition in the industry had ended years before—with congressional approval. See Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 LAW & CONTEMP. PROB. 340, 355-58 (1969). It would have been odd for Congress in 1934 to have included in the Communications Act a provision concerning "unfair methods of competition" among the common carrier provisions of the Communications Act, given that it had conceded the principle of regional monopolies some 13 years before in the Willis-Graham Act of 1921, ch. 20, 42 Stat. 27. See generally S. REP. NO. 75, 67th Cong., 1st Sess. (1921); H.R. REP. NO. 109, 67th Cong., 1st Sess. (1921). And no such provisions exist. The White test would have the anomalous result of displacing the antitrust laws in industries where Congress felt the competitive ideal was still very important and retaining their applicability in industries where Congress felt competition should not play a significant role.

plied immunity claim is strengthened by a showing that the agency considers the benefits of competition in regulating the industry in the public interest. This emphasis on competition is difficult to justify. Although competition is undoubtedly relevant to an agency's determination of the public interest,⁴⁵ it is necessarily only one of many factors in that determination.⁴⁶ Indeed, the reason Congress imposes regulation on an industry is because unfettered competition does not adequately serve broader policy objectives.

4. *Agency Expertise*

A consideration articulated in earlier implied immunity cases,⁴⁷ and suggested in more recent ones,⁴⁸ is whether the issues in the suit involve questions requiring agency expertise concerning the regulated industry. The rationale for this criterion is not simply that the agency is a better factfinder than the court in a given controversy—the rationale for the doctrine of primary jurisdiction; indeed, reliance on agency expertise in the early implied immunity cases may be a result of the courts' tendency to confuse the concepts of primary and exclusive jurisdiction.⁴⁹ The principle behind judicial deference to agency expertise in a finding of exclusive jurisdiction is one of practical accommodation between regulation and antitrust: when an agency has the expertise to supervise an industry effectively, "continuing regulation is a better calibrated tool for . . . controlling anti-competitive behavior within an industry than the more blunt and generalized instrument of the antitrust laws."⁵⁰

5. *Presence of Important Regulatory Policy Issues*

The last and possibly most significant questions in weighing a case for implied immunity underlie the decision in *Pan Am*⁵¹ and are stated more explicitly in other cases:⁵² whether the issues in the suit

45. *Gulf State Util. Co. v. FPC*, 411 U.S. 747, 756-62 (1973).

46. *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91-92 (1953).

47. *Far East Conf. v. United States*, 342 U.S. 570, 574-75 (1952); *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 482-83, 485 (1932).

48. *See Gordon v. NYSE*, 422 U.S. 659, 689-90 (1975).

49. *See* notes 15, 28 *supra*.

50. *Foremost Int'l Tours, Inc. v. Qantas Airways Ltd.*, 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,578, at 67,535 (9th Cir., Oct. 22, 1975) (dicta).

51. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 307-10 (1963).

52. *See, e.g., United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734-35 (1975) (repeal of the antitrust laws implied where necessary to make the regulatory scheme work); *United States v. RCA*, 358 U.S. 334, 346-52 (1959). The importance of this criterion has received greatest emphasis in the "self-regulation" cases. *See Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973); *Silver v. NYSE*, 373 U.S. 341, 358 (1963) (Court defined central issue as "the extent to which the character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action.")

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necessarily involve important questions of regulatory policy and, if so, whether antitrust enforcement might seriously hamper, if not preclude, realization of the agency's policy objectives under the public interest standard.⁵³ Implicit in this inquiry is the assumption that Congress could not have intended to permit the antitrust laws to hamper or foreclose the achievement of legitimate regulatory policy objectives. The potential for collision with the regulatory scheme⁵⁴ is inherent in the court's power to impose new behavioral patterns on an industry in order to foster competition rather than to further the public interest as defined by the agency. Under this last criterion, the court asks whether the agency's exercise of its supervisory authority under a different legal standard might lead to conflicting judgments with significant ramifications for the industry and the public.

II. AT&T and Implied Immunity

A. *Competition in Intercity Voice and Data Services*

The origins of the Government suit as it relates to interstate telecommunications services lie in an FCC decision to experiment with competition in intercity private line services. In 1969 the FCC authorized Microwave Communications, Inc. (MCI) to establish a low-cost microwave transmission link between Chicago and St. Louis in direct competition with the Bell System's private line services.⁵⁵ In 1971 the Commission announced a "general policy in favor of the entry of new carriers in the specialized communications field."⁵⁶ The FCC's

53. *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734-35 (1975).

54. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309-11 (1963).

55. *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969). This was the first instance of FCC authorization of a common carrier in competition with the established telephone companies for private line voice and data traffic. (As opposed to conventional dialed long distance service, a private line is dedicated solely to communication between two or more locations specified by the customer. *See AT&T*, 34 F.C.C. 244, 250 (1961)). The trend toward expanding the options available to communications users had begun some years before. In 1959 the Commission for the first time permitted private users to provide their own point-to-point microwave communication links. *Allocation of Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359 (1959), *modified*, 29 F.C.C. 825 (1960). This privilege was enhanced by a later Commission order which allowed private users to pool their resources and share a microwave link. *Cooperative Sharing of Operational Fixed Stations*, 4 F.C.C.2d 406 (1966). *See also Irwin, The Communication Industry and the Policy of Competition*, 14 BUFFALO L. REV. 256 (1964). Although significant in principle, these authorizations were of little practical importance because of the relatively high cost and the coordination problems of private microwave systems.

56. *Specialized Common Carrier Serv.*, 29 F.C.C.2d 870, 920 (1971), *modified*, 33 F.C.C.2d 408 (1972), *aff'd sub nom. Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). For a general discussion of *Specialized Common Carrier Services*, see Note, *Recent Federal Actions Affecting Long Distance Telecommunications: A Survey of Issues Concerning the Microwave Specialized Common Carrier Industry*, 43 GEO. WASH. L. REV. 878 (1975).

decision to experiment with competition in service lines traditionally within the established common carriers' tariffs was prompted by complaints from the computer industry that existing service offerings were inadequate.⁵⁷ The entry of specialized carriers was authorized in order to develop new telecommunications services neglected by the established carriers.⁵⁸

The decision to promote competition in private line services was followed in June, 1972, by the FCC's announcement of the policies which would govern domestic satellite authorizations.⁵⁹ The FCC saw domestic satellites as a means of providing the specialized carriers with low cost transmission facilities, thereby enhancing their market viability.⁶⁰ Therefore the Commission restricted AT&T's use of satellites⁶¹ in order to prevent AT&T from preempting the technology or from using satellites to gain an unfair advantage in its competition with the specialized carriers.⁶² These and other FCC actions⁶³ have pre-

57. Computer service companies and user groups maintained that the telephone companies were being unresponsive to the computer user's needs for specially engineered data communications services. See *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 893-96 (1971). See also D. DUNN, *POLICY ISSUES PRESENTED BY THE INTERDEPENDENCE OF COMPUTER AND COMMUNICATIONS SERVICES* 52 (Stanford Research Institute Rep. No. 7379B-1, 1969). For a detailed compilation of computer industry complaints, see A. LIPINSKI, *DIGESTS OF THE RESPONSES TO THE FCC COMPUTER INQUIRY* (Stanford Research Institute Rep. No. 7379B-5, 1969).

58. *Specialized Common Carrier Serv.*, 29 F.C.C.2d 870, 906-07 (1971).

59. *Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities*, 35 F.C.C.2d 844, *modified*, 38 F.C.C.2d 665 (1972).

60. *Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities*, 22 F.C.C.2d 86, 95 (1970).

61. See *Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities*, 35 F.C.C.2d 844, *modified*, 38 F.C.C.2d 665 (1972).

62. The FCC decided to prohibit AT&T from providing specialized services over satellite facilities for the first three years in which it uses domestic satellites or until satellites serving the specialized carriers have enough business to operate at an efficient level of output. 35 F.C.C.2d at 851-52. And in order to prevent total satellite preemption by AT&T, the Commission ruled that it would permit concerns owning domestic satellites to lease capacity to AT&T only up to a given percentage of their total capacity. *Id.* at 853, *modified*, 38 F.C.C.2d at 687-88. Lastly, to prevent sham competition, satellite operators who decided to lease capacity to AT&T were prohibited from also offering end-to-end specialized carrier service. 35 F.C.C.2d at 848-49 (discussion of Comsat/AT&T proposal). This stricture was removed later in the year. 38 F.C.C.2d at 680-81, 688. See also *GTE Satellite Corp.*, 49 F.C.C.2d 42 (1974).

63. By December, 1973, there were applications for authorization to provide specialized carrier service to 200 cities. *Commission Policies Governing the Licensing & Regulation of Specialized Common Carriers*, 44 F.C.C.2d 467, 472 (1973). The FCC has also licensed miscellaneous and radio common carriers to compete with the Bell System in the provision of audio and video program transmission services and intracity mobile telephone services. See *General Mobile Radio Serv.*, 13 F.C.C. 1190, 1219 (1949) (allocation of frequencies for competitive mobile radio systems); *Allocation of Frequencies in 150.8-162 Mc/s Band*, 12 F.C.C.2d 841 (1968), *aff'd sub nom.* *Radio Relay Corp. v. FCC*, 409 F.2d 322 (2d Cir. 1969) (competition in providing paging services); *Affidavit of John C. Jones at 4-6, II Appendix Annexed to Defendants' Memorandum Submitted Pursuant to the Court's Order of February 27, 1975, United States v. AT&T, Civil No. 74-1698*

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sented AT&T with its strongest competitive challenge since the turn of the century.⁶⁴

AT&T has responded to the competition of the specialized carriers with three complementary strategies. First, it has cut rates, removed some restrictions on the manner in which a subscriber may use Bell lines,⁶⁵ and adopted the "Hi-Lo" Tariff in an attempt to jettison the constraints of nationwide cost-averaging.⁶⁶ Second, its operating companies have delayed or refused the specialized carriers access to their local distribution facilities.⁶⁷ Third, AT&T has introduced new facilities for data communications services to meet the objections of the

(D.D.C., filed Nov. 20, 1974) (competition in intercity program transmission services). A miscellaneous common carrier is a common carrier engaged in the intercity transmission of audio and video signals, principally by means of microwave. *Id.* at 4. A radio common carrier normally provides two-way mobile radio service and one-way radio signalling (paging) services within a locality. *Id.* at 2.

64. The FCC is currently considering an extension of its policy of encouraging competition which would permit firms to lease network services from Bell and other carriers at wholesale in order to resell those services to other users. American Trucking Ass'n, 47 F.C.C.2d 644 (1974); Note, *Resale and Sharing of Private Line Communications Services: A.T.&T. Restriction and FCC Regulation*, 61 VA. L. REV. 679 (1975). A number of authorizations of this character have already been made. See Telenet Communications Corp., 46 F.C.C.2d 680 (1974); Graphnet Sys., Inc., 44 F.C.C.2d 800 (1974); Packet Communications Inc., 43 F.C.C.2d 922 (1973).

65. In July, 1972, AT&T reduced the rates on its "Dataphone" data sets by approximately 24 percent and filed tariffs permitting more flexible use of channel-deriving equipment. AT&T—Long Lines Dept., 39 F.C.C.2d 637 (1973). See also AT&T, Long Lines Dept., 53 F.C.C.2d 470 (1975). "Dataphone" is an AT&T trademark. A data set is a device which performs the modulation/demodulation and control functions necessary to provide compatible interconnection between computer and communications facilities. See J. MARTIN, TELECOMMUNICATIONS AND THE COMPUTER 101-02 (1969).

66. Each established carrier has historically priced its interstate services on the basis of a nationwide averaging of its costs. For any given class of service, the rates are designed to be uniform throughout the contiguous 48 states, although costs vary significantly in serving different routes and different customers. AT&T, 44 F.C.C.2d 697 (1974). Because the pricing policies of the established carriers are so constrained by nationwide cost-averaging, these carriers charged that MCI and the other specialized carriers were "cream-skimming," *i.e.*, serving only high-density, low-cost routes and exploiting the lack of any obligation to serve unprofitable routes. See *Specialized Common Carrier Serv.*, 29 F.C.C.2d 870, 960-61 app. C (comments of AT&T).

In response to specialized carrier competition, AT&T introduced its controversial "Hi-Lo" Tariff. AT&T, 43 F.C.C.2d 821 (1973). The "Hi-Lo" Tariff was designed to end nationwide cost-averaging of private line services. Under the tariff, customers desiring private line services between high-density traffic points utilizing the most efficient technology pay a lower rate than the user desiring service on lower density, costlier routes. See AT&T, 55 F.C.C.2d 224, 227-30 (1975). In January, 1974, AT&T also filed tariffs which applied the Hi-Lo rate structure to WATS service. AT&T, 46 F.C.C.2d 81 (1974). WATS or "wide area telephone service" provides telephone service within a defined geographical area at a flat fee per month or at a fee based on time in use as opposed to time and distance. *Id.* at 81-82.

67. Since the specialized carriers do not presently have local distribution facilities, their systems depend on interconnection with the local distribution systems of the established carriers. The response of Bell Operating Companies has ranged from outright refusal to interconnect to the delaying tactic of insisting that local state regulatory approval was necessary for interconnection. See *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 44 F.C.C.2d 245, 246-50 (1973).

computer industry to the inadequate transmission capabilities of the old private lines.⁶⁸ In addition, its operating companies have allegedly harassed customers of the specialized carriers with threats of economic reprisals.⁶⁹

B. *Application of the Strict Test for Implied Immunity*

The Government has alleged that AT&T has monopolized the relevant telecommunications services submarket⁷⁰ by refusing to intercon-

68. In July, 1973, the FCC authorized AT&T to begin building its Digital Data System (DDS) network. AT&T, 41 F.C.C.2d 586 (1973). Since this network is engineered specifically for data transmission, it not only ensures fewer errors in transmission than conventional "voice-grade" private lines, but it also requires less expensive terminal equipment because it eliminates the need to convert from digital to analog signals for the purpose of transmission. See AT&T, 50 F.C.C.2d 501, 502-03 (1974). For a discussion of the distinction between digital and analog signalling, see Note, *supra* note 56, at 906-09.

In addition AT&T has accelerated its development of Dataphone sets by introducing in each of the three years following the FCC's *Specialized Common Carrier Services* decision a new Dataphone series characterized by higher bit speeds. (Bit speed refers to the rate at which the data can be transmitted along the line.) AT&T, Long Lines Dep't, 36 F.C.C.2d 498 (1972) (up to 2400 bits/second); 39 F.C.C.2d 637 (1973) (up to 4800 bits/second); 46 F.C.C.2d 90 (1974) (up to 9600 bits/second).

69. *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 5, at 3002 (1974) (Material Relating to the Testimony of C.M. Huntley, Exhibit 3); Plaintiff's Memorandum of Points & Authorities in Response to the Motion of the Court Regarding Certain Jurisdictional and Other Issues (Mar. 24, 1975) at 13, *United States v. AT&T*, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974).

70. Complaint, *supra* note 2, at 11. The relevant market—that for interstate, intercity voice and data communications—is a distinct submarket for antitrust purposes. Long-distance telecommunications service presents difficult problems of market definition because the volume of communication between any two points is insensitive to rate changes for communications service between other points. Therefore, the market delineation principle of cross-elasticity of demand is of limited usefulness. See *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 393 (1956). However, the Court has enunciated other principles to aid in market definition. See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Applying *Grinnell*, 384 U.S. at 575-76, the relevant geographic market would be the national market. AT&T's Long Lines Department operates the interstate network on a national level. Ratemaking and planning are done on a nationwide basis, and all rates and terms of service are filed with the FCC. Plaintiff's Memorandum, *supra* note 69, at 3-4. Applying *Brown Shoe*, different submarkets can be defined for interstate and intrastate service. The existence of different regulatory authorities creates disparities between interstate and intrastate service in rates, customer eligibility for different classes of service, and quality of service, which would justify different submarket definitions even if the services were otherwise interchangeable. See B. BOCK, *MERGERS AND MARKETS* 62-65 (1962); AT&T, 9 F.C.C.2d 30, 93-94 (1967).

The relevant product market must include both voice and data services. First, the same facilities may be used to provide both services. A data user can choose between a data set used in conjunction with a switched voice grade line, a data set used in conjunction with a private voice grade line, or among any of a range of specially engineered data lines of differing bandwidths. An individual interested in voice communication can use the switched network or utilize private lines. Second, whatever the original intention of the FCC, it is clear that the specialized carriers are not providing solely, or even primarily, data communications; a large percentage of their current traffic is private line voice communication. See *Commission Policies Governing the Li-*

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nect with specialized and domestic satellite common carriers,⁷¹ by making predatory price reductions with its TELPAK tariff,⁷² and by engaging in a general course of anticompetitive conduct including reciprocal buying agreements with its own customers, harassment of customers of competitors, preemptive use of others' market ideas, and abuse of the regulatory process.⁷³ A threshold question is whether this conduct is immune from antitrust attack because of the FCC's regulatory authority in the telecommunications services submarket. The Communications Act of 1934⁷⁴ does not expressly grant AT&T's Long Lines Department and the Bell Operating Companies immunity from the antitrust laws for the conduct challenged in the Government's suit.⁷⁵ Nor does the legislative history of the Federal Communications Act indicate how Congress intended the Act and the antitrust laws to be reconciled.⁷⁶ Therefore, if AT&T's alleged monopolization of inter-

censing & Regulation of Specialized Common Carriers, 44 F.C.C.2d 467 (1973). See also N.Y. Times, Sept. 18, 1975, at 56. For example, MCI's new Execunet service is very similar to traditional dialed long-distance (MTS) service. See Wall St. J., Oct. 28, 1975, at 4, col. 1. Third, there appears to be a significant cross-elasticity of demand between private line, traditional MTS and WATS (defined note 66 *supra*) services. See NARUC COMM. ON COMMUNICATIONS, AN INVESTIGATION INTO THE ECONOMIC AND QUALITY OF SERVICE IMPACT ON TELEPHONE SERVICE SUBSCRIBERS RESULTING FROM THE INTERCONNECTION OF SUBSCRIBER-PROVIDED EQUIPMENT TO THE PUBLIC SWITCHED NETWORK, AND FROM COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES 4535 (May 15, 1974), in *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 6, at 4460 (1974) [hereinafter cited as NARUC REPORT]. See also Note, *supra* note 64, at 694 n.59.

71. Complaint, *supra* note 2, at 12-13.

72. The Government refers to the tariff as "a startling reduction in price which virtually eliminated the incentive for construction and use of private microwave systems." Plaintiff's Memorandum, *supra* note 69, at 10. For a discussion of the TELPAK tariff, see Trebing, *Common Carrier Regulation—The Silent Crisis*, 34 LAW & CONTEMP. PROB. 299, 319-20 (1969).

73. Plaintiff's Memorandum, *supra* note 69, at 13.

74. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970).

75. However, a merger transaction among telephone and telegraph companies approved by the FCC is immune. 47 U.S.C. §§ 221(a), 222(c)(1) (Supp. III 1973).

76. Regulation of the telecommunications common carrier industry dates back to 1910 and passage of the Mann-Elkins Amendment to the Interstate Commerce Act, ch. 309, § 7, 36 Stat. 539, 544 (1910). This amendment extended the definition of common carrier in the Interstate Commerce Act to telephone, telegraph, and cable companies. The Bell System was not subject to effective regulation until 1934, S. REP. NO. 781, *supra* note 44, at 2; from 1910 to 1934 the ICC heard only four minor rate cases. Gabel, *supra* note 44, at 357-58. The Mann-Elkins Amendment did not address the question of conflict with the antitrust laws. See generally Plaintiff's Memorandum, *supra* note 69, at 38-41. As was the case initially with railroads, see *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314-15 (1897), courts must have assumed that the antitrust laws were fully applicable.

Congress first granted express immunity from the antitrust laws to telephone common carriers in the Willis-Graham Act of 1921, ch. 20, 42 Stat. 27, which exempted certain mergers and acquisitions. The legislative history of the Willis-Graham Act indicates a recognition that the economics of the telephone industry were such that competition could be detrimental to the public and to the industry in some instances. See S. REP. NO. 75, *supra* note 44; H.R. REP. NO. 109, *supra* note 44. But the Act specifically

state, intercity voice and data communication services is beyond the reach of the antitrust laws, the immunity must be implied.⁷⁷ In this critical submarket, AT&T's conduct would seem to qualify for anti-trust immunity even under the strict test put forth in Part I above.

I. *Supervisory Authority over Conduct*

The FCC has supervisory authority over the conduct challenged in the Government's claim of monopolization of the interstate telecommunications services submarket. The Commission has already acted to compel AT&T to interconnect with the competing carriers,⁷⁸ and has

shielded only approved property consolidations from the antitrust laws. No other express immunity provision for telephone companies was incorporated in the Communications Act of 1934. Nevertheless, the legislative history of that Act indicates congressional acquiescence to the existing telephone monopoly. See S. REP. NO. 781, *supra* at 2 (telephone business a monopoly and must therefore be effectively regulated). See also H.R. REP. NO. 59, 72d Cong., 1st Sess. (1932); *Preliminary Report on Communication Companies (Splawn Report)*, H.R. REP. NO. 1273, 73d Cong., 2d Sess., pt. 1, at xxx-xxxi (1934). Defendants' Memorandum Submitted Pursuant to the Court's Order of February 27, 1975, at 7-9, *United States v. AT&T*, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974).

Title II of the 1934 Act, dealing with common carriers, does not include a section like that in Title III, 47 U.S.C. § 313 (1970), which expressly makes the antitrust laws applicable to radio communication. Because a large percentage of voice and data communication in the domestic common carrier industry is by means of microwave radio, it might be argued that § 313 of the Federal Communications Act preserves the applicability of the antitrust laws in the instant case. This argument creates a distinction among regulated firms based not on the service provided in the market but on the mode of transmission, while the courts and the Commission have made distinctions in functional rather than technological terms, *i.e.*, common carriers vs. broadcasters as opposed to wire vs. radio. See, *e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940) ("[T]he Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition.") The legislative history of § 15 of the Radio Act of 1927, ch. 169, § 15, 44 Stat. 1168, the predecessor of § 313, does not evince congressional intent to make the antitrust laws applicable to common carrier services by radio. Compare 67 CONG. REC. 5557-59 (1926) (remarks of Rep. Johnson) and 67 CONG. REC. 5481-82 (1926) (remarks of Rep. Davis) with 67 CONG. REC. 12616 (1926) (remarks of Senator Dill).

The Supreme Court suggested in *United States v. RCA*, 358 U.S. 334, 346 (1959), that even evidence that Congress did not intend to prevent enforcement of the antitrust laws in the communications industry does not end the inquiry. If application of the antitrust laws would seriously undermine a comprehensive regulatory scheme, the courts may still defer to the Commission. *Cf. id.* at 346-52. In fact, the Court has inferred immunity in two cases despite an express savings clause in the relevant act (49 U.S.C. § 1506 (Supp. III 1973)). *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). Hence the existence of such a savings clause in the Communications Act, 47 U.S.C. § 414 (1970), is of little importance.

77. Recently the Ninth Circuit characterized the implied immunity doctrine as a safeguard against undue interference of the antitrust laws with the regulatory scheme of the Federal Communications Act. *ITT v. General Tel. & Electronics Corp.*, 518 F.2d 913, 918-19 (9th Cir. 1975). But since General Telephone did not raise the implied immunity defense on appeal, the court did not consider it. *Id.* at 919.

78. In April, 1974, the FCC ordered AT&T to cease and desist from any conduct which results in a denial of, or unreasonable delay in establishing, physical connections

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been actively concerned with Bell's TELPAK tariff.⁷⁹ The Commission has authority over the conduct challenged by the Government's subsidiary allegations of reciprocity, preemption of product innovations, and abuse of the regulatory process.⁸⁰ Indeed, it is currently investigating the interstate aspects of AT&T's major competitive responses to the specialized common carriers.⁸¹ Finally, the FCC has

with the specialized carriers, or from employing any policy which would deny the specialized carriers interconnection services similar to those provided to the Long Lines Department of AT&T. Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C.2d 413, *aff'd sub nom.* Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). The FCC has since dealt with a number of instances of alleged failures to comply with this order. *See, e.g.*, 48 F.C.C.2d 676 (1974); 48 F.C.C.2d 449 (1974). This order was followed by institution of an investigation into the substantive provisions of all the Bell System tariffs offering intercity and local distribution facilities for other carriers. AT&T, 47 F.C.C.2d 660, *modified*, 49 F.C.C.2d 729 (1974). The investigation was terminated with a formal settlement agreement by AT&T and the specialized carriers. AT&T, 52 F.C.C.2d 727 (1975), *appeal docketed sub nom.* Carpenter v. FCC, No. 75-1564 (D.C. Cir., filed June 6, 1975). The FCC has promised to "closely monitor" implementation of the agreement. *Id.* at 733.

79. *See* Trebing, *supra* note 72, at 319-20; Note, *supra* note 64, at 689-92.

80. Insofar as threats of economic reprisals or forced reciprocal buying arrangements affect the FCC's policy in promoting competition in intercity voice and data services, the FCC would have jurisdiction pursuant to 47 U.S.C. § 201 (1970) (unreasonable practice) and 47 U.S.C. § 202 (1970) (subjecting a person to any undue or unreasonable prejudice or disadvantage). *See generally* Telerent Leasing Corp., 45 F.C.C.2d 204 (1974), *appeal docketed sub nom.* North Carolina Util. Comm'n v. FCC, No. 74-1220 (4th Cir., filed Feb. 27, 1974); Bunker-Ramo Corp., 38 F.C.C.2d 860 (1972) (remanding to Administrative Law Judge an action by Bunker-Ramo against its competitor Western Union alleging among other conduct Western Union's refusal to maintain adequate transmission service to customers using Bunker-Ramo terminal equipment); Fidelity Television, Inc. v. FCC, 515 F.2d 684 (D.C. Cir. 1975) (discussion of FCC consideration of reciprocity allegations). The FCC also has authority to enforce § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), prohibiting reciprocal agreements which tend to substantially lessen competition. 15 U.S.C. § 21 (1970).

The FCC's authority over investment and quality of service, note 84 *infra*, enables it to control new market offerings. The agency's domestic satellite regulations illustrate how this authority can be used to prevent preemption of new technologies and services by the established carriers. *See* note 62 *supra*. *See also* Mobile Radio Communications, Inc., 29 F.C.C.2d 62 (1971) (illustration of FCC efforts to stem market preemption); FWS Radio, Inc., 40 F.C.C.2d 680 (1973) (modifying ruling in *Mobile Radio*).

The FCC frequently deals with allegations of abuse of its own processes. *See, e.g.*, Jacksonville Broadcasting Co., 34 F.C.C.2d 881 (1972); Sencland Broadcasting Sys., Inc., 28 F.C.C.2d 74 (1971). 47 U.S.C. §§ 202, 203, 205 (1970), contain penalties for failure to comply fully with orders promulgated under these sections. *See also* 47 U.S.C. §§ 214, 219, 220, 312, 510 (Supp III 1973). This conclusion in no way conflicts with the Supreme Court's holding in *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972), that abuse of administrative process might constitute an antitrust violation. The question whether that violation could be immunized by the agency's control over abuse of its processes was not before the Court.

The FCC has recently indicated in its memorandum as *amicus curiae* in the AT&T suit that it regards virtually all the conduct put in issue by the Government's complaint and opening memorandum as within its jurisdiction. Memorandum of FCC as *Amicus Curiae* at 28-29, *United States v. AT&T*, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974).

81. This has been virtually conceded by the Government. Transcript of Proceedings (Hearing on Jurisdictional Issues, July 23, 1975) at 60-62, *United States v. AT&T*, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974). In its opening memorandum, AT&T suggested that aspects of the abuse of process and reciprocity allegations might be outside the

pervasive regulatory authority over the submarket through its control of rates,⁸² entry,⁸³ and investment.⁸⁴

The Government has argued that even if the FCC has authority to supervise the conduct of the defendants, it does not have authority over a conspiracy to engage in that conduct.⁸⁵ This argument is predicated⁸⁶ on the Supreme Court's 1945 decision in *Georgia v. Pennsylvania Railroad Co.*, which is, however, easily distinguished.⁸⁷ Moreover, both *Pan Am*⁸⁸ and *NASD*⁸⁹ dismissed conspiracy counts even though the agency had no express authority to supervise agreements among the alleged conspirators.⁹⁰ In both cases the Court did not distinguish

authority of the FCC, but emphatically withdrew the suggestion at oral argument. *Id.* at 145. In Docket No. 19419 the FCC is examining allegations that AT&T's rates for data sets are noncompensatory and predatory. AT&T, Long Lines Dep't, 46 F.C.C.2d 90, 91 (1974); 53 F.C.C.2d 470 (1975). The rates for AT&T's Dataphone Digital Service are under investigation in Docket No. 20288. AT&T, 50 F.C.C.2d 501 (1974). (Dataphone Digital Service is the tariff name given to private line service on AT&T's new Digital Data System, see note 68 *supra*.) The Hi-Lo Tariff, *supra* note 66, is being investigated in Docket No. 19919. AT&T, 44 F.C.C.2d 697 (1974). See also AT&T, 55 F.C.C.2d 224 (1975) (interim decision).

82. The charges, practices, classifications, and regulations for a communications service must be specified in the tariff. 47 U.S.C. § 203(a) (1970). They must be just and reasonable, *id.* § 201(b) and may not be unjustly or unreasonably discriminatory. *Id.* § 202. The FCC has the authority to prescribe just and reasonable rates, classifications, practices, or regulations when it finds those existing to be in violation of the Act. *Id.* § 205.

83. The FCC supervises entry into the telecommunications common carrier industry pursuant to *id.* § 214. This section requires any interstate carrier to obtain a certificate of public convenience and necessity before constructing a line which is not wholly intrastate.

84. A certificate of public convenience and necessity is required before the carrier can undertake any reduction in service. *Id.* § 214(a). On its own initiative or that of a complaining party, the FCC may order a carrier to expand its facilities. *Id.* § 214(d). The FCC's authority to dictate the terms and classifications of service, see note 82 *supra*, allows it to control the quality of service and indirectly the investment necessary to maintain that service.

The FCC has jurisdiction over every interstate call from terminal to terminal, including the telephone set or other station equipment. See *United States v. AT&T*, 57 F. Supp. 451 (S.D.N.Y. 1944), *aff'd per curiam sub nom. Hotel Astor, Inc. v. United States*, 325 U.S. 837 (1945); *United States Dep't of Defense v. General Tel. Co.*, 38 F.C.C.2d 803, 809 (1973). The only interstate service subject to state regulation is local exchange service at border areas. 47 U.S.C. § 221(b) (1970).

85. See Plaintiff's Memorandum, *supra* note 69, at 37.

86. *Id.*

87. 324 U.S. 439 (1945). The basis for the decision in *Georgia* was not that the agency lacked supervisory authority over the defendants' conduct but that it lacked the authority to grant the injunctive relief requested in the antitrust suit. *Id.* at 453, 455. Following *Keogh v. Chicago & N. Ry.*, 260 U.S. 156 (1922), the Court held that the district court had jurisdiction of an antitrust claim by the State of Georgia for injunctive relief against a conspiracy to fix railroad freight rates, because the Interstate Commerce Commission had no authority to enjoin the carriers from fixing rates. 324 U.S. at 457-58.

88. 371 U.S. 296 (1963).

89. 95 S. Ct. 2427 (1975).

90. See Brief for the United States in Response in No. 23 at 37, 43, *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); Brief for United States at 62-63, *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975). In each case the Government argued that *Georgia v. Pennsylvania Railroad Co.* defeated the implied immunity claim.

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between supervisory authority over overt acts in a conspiracy and the conspiracy itself.⁹¹ *Pan Am* and *NASD* indicate that so long as the agency has authority over the overt acts at issue in the antitrust suit, its lack of authority over agreements to do those acts will not defeat a claim of implied immunity.⁹² Even if authority over agreements among regulated firms and their subsidiaries were necessary, the FCC would seem to possess that authority with respect to a conspiracy among AT&T and its subsidiaries—Western Electric, Bell Laboratories, and the Bell Operating Companies.⁹³

Another argument is that the implied immunity doctrine does not extend to activity found unlawful by the agency—a position the Government contends⁹⁴ is supported by *Ricci v. Chicago Mercantile Exchange*.⁹⁵ But the Court in *Ricci* did not reach the defendant's implied immunity contention,⁹⁶ and in none of the implied immunity

91. See *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 730-35 (1975); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 325-26, 326 n.2 (Brennan, J., dissenting, expressing dissatisfaction with Court's handling of *Georgia v. Pennsylvania Railroad Co.*).

92. See also *Carter v. AT&T*, 365 F.2d 486, 492-94 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) (allegation of industry conspiracy to adopt telephone tariff does not undermine defense that FCC approved tariff); von Mehren, *supra* note 15, at 937 (reading *Keogh v. Chicago & N. Ry.*, 260 U.S. 156 (1922), as rejecting, for acts within the purview of regulatory statutes, the doctrine that conspiracy will make illegal under the antitrust laws acts which are otherwise legal).

Related to the Government's conspiracy argument is its contention that if AT&T's individual acts, although legal in isolation, were part of an overall plan which showed an "intent to monopolize," there is no implied immunity defense. Transcript, *supra* note 81, at 64-67. But in implied immunity cases, the Supreme Court has never concerned itself with questions of intent. The argument that an illegal intent can defeat an immunity claim confuses the standards for an exemption from the antitrust laws with the standards for a violation of those laws assuming an exemption does not exist. Cf. *Gordon v. NYSE*, 422 U.S. 659, 687-88 (1975); *Silver v. NYSE*, 373 U.S. 341, 360 (1963). To disallow the immunity defense where intent to monopolize or to restrain trade is alleged would virtually destroy the implied immunity doctrine, since Sherman Act suits almost always involve allegations of specific intent.

93. The FCC has extensive authority to alter the market relationships of regulated firms with their subsidiaries and each other. See *GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); *General Tel. Co. v. United States*, 449 F.2d 846 (5th Cir. 1971). The FCC also has express authority over vertical and horizontal agreements. See 47 U.S.C. § 211 (1970) (carrier must file copies of all contracts, agreements, or arrangements with other carriers unless expressly exempted); *id.* § 218 (gives Commission broad authority to inquire into management of a carrier); *id.* § 215 (agency has broad authority to inquire into transactions of regulated common carriers). The FCC is presently engaged in an extensive investigation of the vertical relationship between the Bell System Operating Companies and Western Electric. See *AT&T*, 27 F.C.C.2d 151 (1971). See also Affidavit of Frederick J. Coper, I Appendix, *supra* note 63.

94. See, e.g., Transcript, *supra* note 81, at 124.

95. 409 U.S. 289 (1973).

96. In *Ricci*, the plaintiff alleged that the Chicago Mercantile Exchange and others had conspired to restrain the plaintiff's business by transferring his membership to another in violation of Exchange rules and the Commodity Exchange Act. The Supreme Court upheld the district court's stay of the antitrust action until the Commodity Ex-

cases has it prejudged the question of the lawfulness under the regulatory act of the conduct at issue in the antitrust suit.⁹⁷

2. FCC Authority to Grant Requested Relief

The Government's suit seeks both injunctive relief and the separation of all or part of the Long Lines Department of AT&T from some or all of the Bell Operating Companies.⁹⁸ Since the FCC has statutory authority to grant injunctive relief,⁹⁹ the only difficult inquiry under this criterion is whether the FCC has the power to order divestiture.

The existence of the Commission's divestiture authority is supported by *General Telephone Co. v. United States*,¹⁰⁰ in which the Fifth Circuit upheld the FCC's authority to prohibit telephone companies from furnishing cable television service in their telephone service areas. The court relied on §§ 214¹⁰¹ and 4(i)¹⁰² of the Federal Communications Act, which give the FCC general authority to authorize the establishment of interstate telecommunication lines and to issue necessary rules and orders.¹⁰³ The court recognized that the FCC was applying its orders retroactively and, therefore, essentially ordering divestiture.¹⁰⁴

change Commission passed on the legality of the defendants' conduct under the Act. The Government seeks to rely on dicta that if the Commission found that the conduct violated the Commodity Exchange Act, then the antitrust action should probably proceed, absent more compelling evidence of the exclusive jurisdiction of the agency. *Id.* at 304.

The Government's interpretation of the *Ricci* dicta would eliminate the implied immunity criterion that the agency be able to afford the remedy sought. If the conduct challenged in the antitrust suit is lawful under the regulatory statute, the agency of course cannot apply a remedy; if the conduct is illegal, the immunity defense would be unavailable. There is, however, an interpretation of the *Ricci* dicta more consistent with cases where the Court has inquired into the agency's authority to grant a remedy, pp. 262-63 & note 36 *supra*. The Court's reluctance to find exclusive jurisdiction might be explained by the fact that *Ricci* sought treble damages as well as injunctive relief and that the Commodity Exchange Commission cannot award damages. *See Ricci v. Chicago Mercantile Exch.*, 447 F.2d 713, 717-18, 720 (7th Cir. 1971).

97. To the extent that the existence of a complaint procedure is important for the satisfaction of the supervisory authority criterion, *see* note 34 *supra*, such a procedure is available. The Government could have invoked the jurisdiction of the FCC under § 208 of the Communications Act of 1934. 47 U.S.C. § 208 (1970). The essence of the Government's claims with respect to the telecommunications services submarket could be expressed as allegations of violations of §§ 201, 202 and 214 of that Act. 47 U.S.C. §§ 201, 202, 214 (1970).

98. Complaint, *supra* note 2, at 14-15.

99. The FCC has express authority to issue cease and desist orders. 47 U.S.C. § 312(b) (1970). *See* pp. 263, 270-72 *supra*.

100. 449 F.2d 846 (5th Cir. 1971).

101. 47 U.S.C. § 214 (1970).

102. *Id.* § 154(i).

103. 449 F.2d at 854.

104. *Id.* at 863-64 ("new rules may abolish or modify pre-existing interests"), *quoted with approval*, *United States v. Midwest Video Corp.*, 466 U.S. 649, 674 n.31 (1972). *See* Petitions from Tel. Common Carriers & Cable Television Sys. Operators, 50 F.C.C.2d

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In the instant case, the logic of *General Telephone* would support a divestiture order by the FCC under the line authorization power of § 214. Moreover, approximately 69 percent of the circuit miles of long distance carrier facilities in the Bell System are microwave links.¹⁰⁵ The FCC could use its radio licensing authority over these links to reallocate market shares in interstate communication service by refusing to renew AT&T's licenses and by accepting applications from others to operate the routes.¹⁰⁶ The FCC is in fact now considering whether it should order the divestiture of AT&T's Long Lines Department.¹⁰⁷

3. *Competition and the Public Interest*

The courts have consistently stressed the importance of competition in the FCC's determination of the public interest under the Federal Communications Act.¹⁰⁸ Indeed, the actions by AT&T which gave rise to the Government's claim of monopolization in the telecommunications services submarket were a response to the FCC's policy of encouraging competition from specialized carriers.¹⁰⁹ The FCC has even been reversed by the Court of Appeals for giving *too much* weight to the policy of competition in regulating common carriers.¹¹⁰

156 (1974). In some cases the FCC has insisted on a rigid separation between common carriers and their subsidiaries. *GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) (upholding FCC authority to order common carriers to deal at arms length with data processing affiliates); *Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz*, 46 F.C.C.2d 752 (1974), *modified*, 51 F.C.C.2d 945 (1975) (arms length approach applied in radio common carrier area). Moreover, § 11 of the Clayton Act, 15 U.S.C. § 21 (1970), expressly empowers the FCC to order divestiture in enforcing §§ 2, 3, 7 and 8 of the Clayton Act against regulated carriers. See *CML Satellite Corp.*, 51 F.C.C.2d 14, 39-40 (1975), *appeal docketed sub nom. RCA Global Communications Corp. v. FCC*, No. 75-1236 (D.C. Cir., filed Mar. 10, 1975) (Commission will enforce § 7 under its broad public interest standard).

On the authority of a federal agency generally to order divestiture, see *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 311-12 (1963) (CAB has power to order divestiture despite lack of explicit grant of such authority in Federal Aviation Act); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962); Note, *Implied Power of Federal Agencies to Order Divestiture*, 39 NOTRE DAME LAW. 581 (1964).

105. NARUC REPORT, *supra* note 70, at 4529.

106. Pursuant to 47 U.S.C. §§ 303, 307 (Supp. III 1973). Currently licenses for common carrier point-to-point microwave services must be reviewed every five years. 47 C.F.R. § 21.35 (1974).

107. Economic Implications & Interrelationships Arising from Policies & Practices Relating to Customer Interconnection, Jurisdictional Separations & Rate Structures, 46 F.C.C.2d 214 (1974); 50 F.C.C.2d 574, 578-79 (1974).

108. See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *General Tel. Co. v. United States*, 449 F.2d 846, 857 (5th Cir. 1971).

109. See Panel, *The Role of Competition in Transportation and Communications*, 39 ANTITRUST L.J. 465, 476-77 (1970); Note, *supra* note 56, at 692-94; pp. 265-68 *supra*.

110. *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974) (Commission did not meet its statutory obligation to consider the "public convenience and necessity" when it did no more than equate the public interest with more competition).

4. *FCC Expertise in the Communications Industry*

The legality of AT&T's conduct, whether judged under the Sherman Act or the Federal Communications Act, depends on several basic factual issues which require the FCC's expertise in the communications industry for proper resolution. The reasonableness of AT&T's price reductions depends on difficult marginal and average cost calculations.¹¹¹ The FCC's familiarity with the technology and its experience in rate-making render it better equipped than a court to determine whether given rates are in some sense "compensatory."¹¹² The reasonableness of AT&T's refusals to interconnect with competing carriers depends in large part on technical engineering questions which the courts are also ill-equipped to decide.¹¹³ In the last 10 years the courts have frequently deferred to the FCC's technical expertise on the question of the reasonableness of refusals to interconnect with specialized carriers or with customers who provide their own terminal equipment.¹¹⁴

Finally, AT&T will probably resist divestiture of its Long Lines Department by arguing that its entire complex of telecommunications services is a natural monopoly which cannot be broken up without great losses in efficiency. This issue involves even more difficult cost computations than the predatory pricing issue. A predatory pricing inquiry focuses on the costs for a given firm of the incremental unit of output at its current output level. The critical characteristic of natural monopoly, however, is the existence of decreasing average costs over the entire range of output demanded by consumers; hence the inquiry requires a determination of the average cost for the most efficient firm at each possible rate of output up to the total demand of the market.¹¹⁵ In Docket No. 20003 the FCC is attempting to

111. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (test for predatory pricing should be price less than short run marginal cost); Note, *Telex v. IBM: Monopoly Pricing Under Section 2 of the Sherman Act*, 84 YALE L.J. 558 (1975). The determination of the marginal cost of production for a firm is difficult in any context, but the difficulty is exacerbated in the case of AT&T by pervasive common costs, variation in costs of service with time of day, complex technology, and conceptual difficulties in defining the unit of output. And the existence of common and joint capital costs makes average cost even more difficult to calculate. See 1 A. KAHN, *supra* note 9, at 63-86; Vickrey, *Responsive Pricing of Public Utility Services*, 2 BELL J. ECON. & M. SCI. 337 (1971).

112. A statement of principles to be used in pricing specific telecommunication services under competitive conditions is under consideration in Phase II of Docket No. 18129, now pending before the FCC. AT&T, 38 F.C.C.2d 213, 216-17 (1972).

113. See, e.g., *MCI Communication Corp. v. AT&T*, 496 F.2d 214, 222 (5th Cir. 1974). For a discussion of some of the technical issues involved in interconnection of customer-owned equipment, see National Academy of Sciences, *A Technical Analysis of the Common Carrier/User Interconnection Area*, June 1970, reprinted in Affidavit of Scott Sheperd, II Appendix, *supra* note 63, Attachment K.

114. See, e.g., *MCI Communication Corp. v. AT&T*, 496 F.2d 214 (5th Cir. 1974).

115. 2 A. KAHN, *supra* note 9, at 119; 1 A. KAHN, *supra* at 124 n.3.

define the extent of any natural monopoly in telecommunications services;¹¹⁶ the courts should leave this determination to the Commission.

5. *Issues of Regulatory Policy in the Communications Industry*

The Government's suit involves basic questions of regulatory policy in the communications industry.¹¹⁷ Established carriers have argued that competition from specialized common carriers has forced them to abandon nationwide cost-averaging for interstate services.¹¹⁸ The state regulatory authorities have argued that competition will destroy the revenue contribution to local telephone service and intrastate toll services made by interstate toll telecommunications services.¹¹⁹ Increased competition in interstate services forces Bell to lower its interstate rates, which in turn forces it to increase intrastate rates—in particular, local telephone rates and connection fees.¹²⁰ State regulators argue that this

116. Economic Implications & Interrelationships Arising from Policies & Practices Relating to Customer Interconnection, Jurisdictional Separations & Rate Structures, 50 F.C.C.2d 574, 577-78 (1974).

117. See FCC Memorandum, *supra* note 80, at 15, 25. In antitrust actions involving customer-provided terminal equipment and radio common carriers, courts have used a primary jurisdiction referral, *see* note 15 *supra*, to the FCC for guidance on the character and significance of the regulatory policy questions involved in the suit. *Carter v. AT&T*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *Macom Products Corp. v. AT&T*, 359 F. Supp. 973 (C.D. Cal. 1973) (immunity defense disfavored); *Chastain v. AT&T*, 351 F. Supp. 1320 (D.D.C. 1972). See also *Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co.*, 505 F.2d 152 (9th Cir. 1974) (primary jurisdiction referral to California Public Utilities Commission).

118. See note 66 *supra*. Some of the policy objectives behind cost-averaging were articulated by Hearing Examiner Herbert Sharfman. Among them are simplicity in administration of the tariff, easier customer understanding of the rate structure, and spreading of benefits of efficiencies and economies to all subscribers of a service rather than simply to those who are in a less costly location to serve. *Microwave Communications, Inc.*, 18 F.C.C.2d 979, 987 (1967) (Initial Decision of Hearing Examiner Herbert Sharfman). See Note, *supra* note 64, at 687.

119. See NARUC REPORT, *supra* note 70, at 4534-47. The FCC generally allows a higher rate of return on the Bell System's interstate operations than state regulatory authorities allow on intrastate operations. Compare, e.g., *AT&T*, 9 F.C.C.2d 30, 88 (1967) (fair rate of return on AT&T's interstate operations is in the range of seven to 7½ percent), with 66-70 P.U.R.3d Index-Digest, *Return* § 111 (1967) (rates of return allowed for particular telephone utilities). The principal, and subtler, mechanism by which the FCC creates these subsidies is its authority pursuant to 47 U.S.C. § 221(c)-(d) (1970) to value the property used by carriers for interstate services. The value of this property is the "rate base" to which a rate of return approved by the Commission is applied to determine the rates for interstate telecommunications services. See Cunningham, *The Anatomy of a Utility Rate Case*, in *THE NEW ECONOMICS OF REGULATED INDUSTRIES: RATE-MAKING IN A DYNAMIC ECONOMY* 21 (J. Haring ed. 1968). Since state regulatory agencies use a similar ratemaking procedure and since much of the Bell System telephone plant is used to provide both interstate and intrastate services, the relative rates for interstate and intrastate services can be altered by changing the interstate rate base. The more of the Bell System's capital in the interstate rate base, the lower intrastate rates. See Boritzki, *Settlements and Separations*, PUBLIC UTIL. FORT., Oct. 10, 1974, at 27.

120. See SYSTEMS APPLICATION, INC., REGULATORY POLICY CHANGES AND THE FUTURE OF THE INDEPENDENT TELEPHONE INDUSTRY 6-8 (1975); Baer & Mitchell, *Impact of Competition on an Independent Telephone Company*, PUBLIC UTIL. FORT., Oct. 23, 1975, at 23, 27-28.

result shifts the costs of telephone service from higher income to lower income consumers and undermines the national goal of a nationwide network with which any user can interconnect at modest cost.¹²¹

The FCC is currently reassessing its pro-competitive policy in private line communications services.¹²² The Commission has noted that its assessment of this policy depends upon whether it finds that the public interest is served by subsidizing some consumers at the expense of others.¹²³ These cross-subsidies are necessarily internal (intracorporate) subsidies because the regulatory agency has a ratemaking, not a taxing power.¹²⁴

The divestiture of AT&T's Long Lines Department would enhance competitive pressure on nationwide cost-averaging, and would make difficult, if not impossible,¹²⁵ the subsidization of intrastate consumers by interstate consumers. These developments are likely to benefit business users at the expense of residential users, urban users at the expense of rural, and those who frequently call long-distance at the expense of those who do not. Perhaps this is a proper state of affairs.¹²⁶ But it should result from an informed balancing of policy alternatives by the regulatory agency, not from an antitrust decree.

Divestiture of Long Lines may also disrupt the FCC's long range planning for the structure of the national communications network. In its current inquiry into the limits of natural monopoly in telecommunications, the Commission intends to examine the probable impact of new technologies and the potential benefits of restructuring AT&T.¹²⁷ New technologies such as the laser may allow a single carrier to realize enormous economies of scale through increased use of

121. NARUC REPORT, *supra* note 70, at 4480-81.

122. Economic Implications & Interrelationships Arising from Policies & Practices Relating to Customer Interconnection, Jurisdictional Separations & Rate-Structures, 46 F.C.C.2d 214 (1974).

123. *See id.* at 214-16. For a discussion of cross-subsidies as one function of a regulatory agency, see Posner, *Taxation by Regulation*, 2 BELL J. ECON. & M. SCI. 22 (1971). *See also* Waverman, *The Regulation of Intercity Telecommunication*, in PROMOTING COMPETITION IN REGULATED MARKETS 201, 233-37 (A. Phillips ed. 1975).

124. The Commission can set rates which yield different profit margins on two services offered by the same regulated firm. But it cannot order one regulated firm to price its service well in excess of cost and appropriate these supernormal profits to subsidize another firm whose rates are held below cost.

125. The difficulty arises because the Long Lines Department and the Operating Companies will no longer be under common ownership and hence their investment will no longer be pooled to determine interstate rates. *See* note 119 *supra*. *See also* Hallingby, *The Case for Keeping American Telephone Intact*, PUBLIC UTIL. FORG., Jan. 16, 1975, at 15, 18 (divestiture of Long Lines would make the planning and engineering of the national network more expensive).

126. *See* I A. KAHN, *supra* note 9, at 54-57.

127. Economic Implications & Interrelationships Arising from Policies & Practices Relating to Customer Interconnection, Jurisdictional Separations & Rate Structures, 50 F.C.C.2d 574, 577-79 (1974).

intermediate switching and toll route concentration.¹²⁸ The economies of scale made possible by new technologies may in the future broaden the scope of the existing natural monopoly in communications and render inappropriate the Commission's current emphasis on competition.

The injunctive relief sought by the Government against AT&T's product innovations, rate reductions, and refusals to interconnect would also interfere with the FCC's attempts to monitor competition among carriers. For example, both the court and the agency may prescribe the terms and conditions on which interconnection will occur.¹²⁹

The communications industry is undergoing a period of extraordinary technological progress. Most observers have stressed that the potential of the new information technology will not be realized if its development is left to the market, and have emphasized the need for a coherent and innovative approach to regulation in the industry.¹³⁰ AT&T bulks largest in the industry, and a decision to dismantle its telephone monopoly should be made by that body best equipped to shape the industry in the public interest—the FCC.

128. See J. MARTIN, *supra* note 65, at 156-61; Waverman, *supra* note 123, at 221-24. The complexities of providing integrated service through intermediate switching and toll route concentration are probably best handled by a single supplier. See Establishment of Domestic Communications-Satellite Facilities by Nongovernmental Entities, 35 F.C.C.2d 844, 853-54 (1972). See generally Barrow & Manelli, *Communications Technology—A Forecast of Change (Part I)*, 34 LAW & CONTEMP. PROB. 205 (1969).

129. See *MCI Communications Corp. v. AT&T*, 496 F.2d 214, 222 (3d Cir. 1974) ("Such a determination [of the reasonableness of a refusal to interconnect], involving, as it must, the comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest, should be made, in the first instance, by the administrative agency which has been entrusted with the primary responsibility for making such a determination and which has the expertise necessary for the development of sound regulatory policy."); FCC Memorandum, *supra* note 80, at 15.

130. See generally R. SMITH, *THE WIRED NATION* (1972); Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U.L.Q. 1 (1968); Parker & Dunn, *Information Technology: Its Social Potential*, 176 SCIENCE 1392 (1972).