pand internally and has probably weakened the competitive position of the smaller brewers. Nonetheless, even modest relaxation in the rigidities of past horizontal merger policies is welcome and worth praise.

More impressive was the Antitrust Division's steadfastness in overseeing the Conoco takeover war between DuPont and Mobil. Not only did the division handle a tense case with care and dispatch, but it also held firm against intense political pressures growing out of the supposed danger of conglomeration. Despite fears of "merger mania" for which Mr. Baxter is unfairly taxed, overall business concentration in fact has remained unchanged for decades. In fact, the number of mergers today is still far below the level reached in the late 1960s, and the mergers of that time have had no traceable adverse effects on the economy. It is useful to remind ourselves that large mergers as well as small ones can be beneficial, sometimes spectacularly so: recall, for example, that after Shell purchased Belridge Oil, the latter's production rose 70 percent. Not all mergers are so desirable or successful, to be sure. But sound policy should attack only those that seriously threaten competition.

Finally, I have just a few comments on horizontal and vertical arrangements, not because they are relatively unimportant, but because there isn't much to say other than that the Justice Department and FTC generally have followed the Bork prescription. In particular, the Antitrust Division continued the Carter administration's vigorous pursuit of highway bid-rigging and said it will press for criminal penalties. I hope, however, that it will also pay attention to one of the probable causes of the exceptional number of hard-core antitrust violations in government bidding—the sealed bid process, which almost invites price fixing. This deserves priority now that government purchases loom so large in the economy.

On vertical arrangements, both Baxter and Miller have stated that they will apply the reasoning of the Supreme Court's 1977 decision in *Sylvania*, and that they will not repeat the contrary actions taken by their agencies in 1980 (the indictment of Cuisinart for vertical price fixing and the FTC challenge to Russell Stover for announcing suggested resale prices). Small businesses that for years have used the FTC to protect themselves from aggressive competition may be disappointed, but consumer welfare should be improved.

ALL IN ALL, THEN, the Reagan administration did fairly well its first year. Antitrust enforcers increasingly adopted a more rational course. Probably more actions helped than hurt. And, as they say, "That's close enough for government work." ■

Telecommunications

Henry Geller

FROM THE VIEWPOINT of a regulatory reformer, the Reagan administration's record in telecommunications ranges all the way from excellent to poor.

The AT&T Case Settled at Last. The blockbuster event in the first year was, of course, the welcome and historic settlement of the AT&T antitrust suit. When Theodore Vail put together the AT&T combine at the turn of the century, he made a pact with government: AT&T got a monopoly position in exchange for providing regulated, universal end-to-end service. But after World War II, what Vail wrought became obsolete as dynamic technology blurred the lines between industrial sectors and made competition inevitable. AT&T then tried for years to gain from Congress the right to enter the new information markets on an unregulated basis. And for years Congress sputtered and came forth with increasingly complex bills heavy with regulation. Finally AT&T elected to cut the Gordian knot.

Under the settlement reached with the Justice Department, the Bell System is split in two: One part, AT&T, retains Bell's competitive communications businesses—long-distance services, terminal (or customer premises) equipment, Western Electric, and Bell Laboratories—and will be free to expand into data processing, enhanced communications services, or anything else. The other part will consist of Bell's twenty-two telephone companies, organized into one company or many and restricted to monopoly local distribution services.

The settlement is a good one. It recognizes the need to allow AT&T to respond quickly to changing technology and markets by offering new services and equipment. It wipes out the 1956 consent decree, which had largely kept AT&T out of unregulated businesses and had resulted in long, stultifying proceedings that sought to determine whether a proposed AT&T offering was more a telephone, and thus subject to regulation, or a computer.

But the settlement presents difficulties too. First, implementation will not be easy. There will be serious problems in properly valuing the assets to be split up and in arranging the timetable for shifting all consumer premises equipment to AT&T. And there may be clashes between the communications policy enunciated by the FCC and that embodied in the settlement. Transitions are always messy, of course, and one this huge will be grossly messy. But problems of this sort, however difficult, will be worked out.

A more fundamental issue involves the future status of the twenty-two operating companies. Unlike the new AT&T—or, for that matter, GTE, Continental, United, and the smaller independent telephone companies—the twenty-two Bell companies will be barred from entering the new information services, even through a fully separated subsidi-

ary. The purpose of this is, of course, to ensure that their essential local distribution facilities are fairly available to all information entrepreneurs. But there is a danger that, in restricting these companies to just the "pipeline" aspect of communications, we may be turning them into the railroads of the future—unable to compete against the new information services that spring up around them. We may be, in other words, recreating the situation AT&T faced under the consent decree. At the least, it should be required that the restriction be reexamined after an appropriate period—say, three to five years.

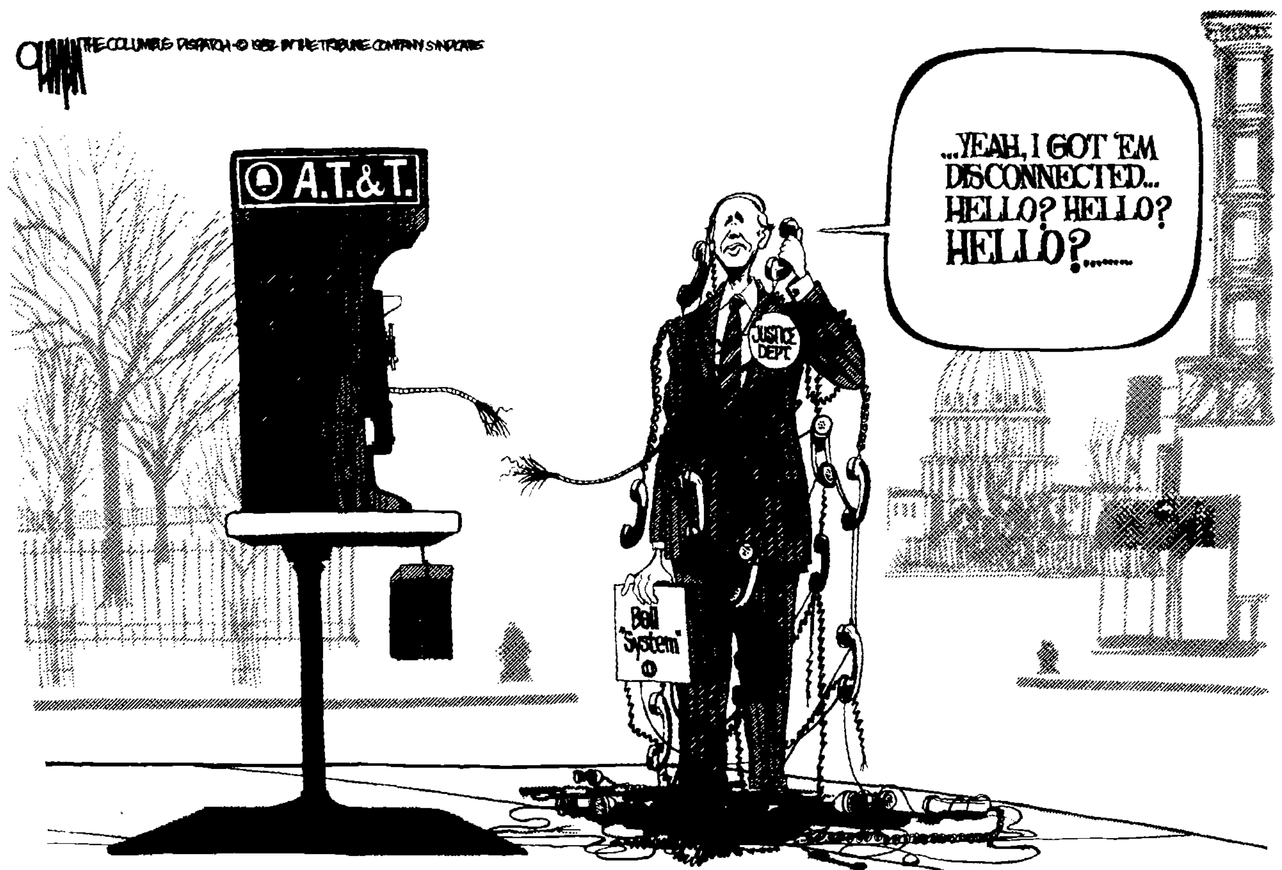
Finally, congressional action will be needed to ensure that rural telephone rates do not go up precipitously in the new competitive environment and to extend the FCC's jurisdiction over long-distance rates to cover intrastate toll calls. Congress should also make clear what the courts have put in doubt—that the FCC need not regulate where it finds effective competition. In view of the strong and conflicting pressures on Congress, however, it is by no means sure that any legislation will be passed quickly.

Nevertheless, the settlement will go forward. And the largest and most vital component of the U.S. telecommunications industry will soon be engaging fully in the contest against growing foreign competition and making its maximum contribution to a more productive U.S. economy.

A Mixed Record at the FCC. Mark Fowler, the new chairman of the Federal Communications Commission (FCC), has coined the term "unregulation" to emphasize his commitment to complete deregulation. By this he means removing constraints in the broadcast and related fields that may have First Amendment implications, and in general working from the premise that the market does not have to function well to do better than regulation.

What Fowler is talking about includes both "letting go" and "letting in"—and the latter, letting in more competition, is the more important in my view. Unfortunately, in the very first test of this process—an action involving AM radio broadcasting—the Fowler FCC flunked.

The present spacing in the AM band is a ten kilohertz separation between stations. Regions I and III of the world have already adopted nine kilohertz spacing, and our engineering experts at the FCC and the National Telecommunications and Information Agency strongly recommend that we in Region II follow suit. The Carter FCC urged that we do so, both to get more stations—400 to 700 more—and to avoid interference from Regions I and III. Late last year, however, the Fowler commission, in a four-to-two vote, returned to a ten kilohertz rule. While the commission purported to act on cost-benefit grounds, I think the straight answer is that it caved in to heavy lobbying by the National Association of Broadcasters.



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The same basic issue will come up again in FM, where it is also possible to get many more stations by changing the technical rules, and in television as well. So if the decision not to adopt nine kilohertz AM spacing is a harbinger of what is to come, the new commission is off to a very bad start.

Happily, decisions on other telecommunications matters have been more encouraging. One excellent step now being considered would increase competition among communications common carriers by increasing the number of orbital slots above the earth's equator available for the stationing of communications satellites. Such slots are now in short supply. The FCC's proposal would double the number by reducing the separation between them from four degrees to two.

In the field of television, the FCC proposes to eliminate all present restrictions on subscription TV, an over-the-air pay service, so that it can compete more effectively with pay cable. The commission also wants to promote competition by allowing U.S. domestic satellites to serve neighboring countries like Canada and Mexico, instead of being confined just to the U.S. market.

One final point about "letting in." The Fowler commission has been moving soundly to develop teletext, a computer-generated information service for TV screens. But it has been unable to make the needed final decisions on such services as AM stereo, low-power TV, subscription TV, and multipoint distribution systems—a low-power, omni-directional radio service for distributing films or data. Of course, its predecessor had the same problem. But, with a year having passed, the current commission has no excuse for the lack of policy that is still blocking or holding back these potentially valuable services.

The other half of deregulation, "letting go," means removing harmful or useless rules. Thus, the FCC has been urging Congress to repeal the Fairness Doctrine and the statutory provisions requiring radio and TV broadcasters to give equal time and reasonable access to candidates for federal office. I think it is important to keep on calling attention to these restrictions, if only as part of an educational process, because they do have serious First Amendment consequences. But let's not fool ourselves about the chances of getting members of Congress to act any time soon: as incumbents, they have ample reason to like the restrictions.

And that raises a question. Petitions have long been pending before the FCC which would, if granted, greatly relieve broadcasters' burdens in this area. The FCC can't repeal statutes. But in areas like fairness and reasonable access for federal candidates, it is free to reduce its interference with daily broadcast editorial decisions by adopting a more general approach that gives more breathing space to the broadcaster. And it can rescind its rules on personal attack and political editorializing—crazy-quilt rules that smother robust, wide-open debate. Its failure to do any of this makes me wonder whether what's been going on is just grandstanding. The commission ought to get moving immediately and take what action it can.

One final application of "letting go" concerns who is allowed to own what. The FCC limits the number of TV stations or radio stations one group may own and bans some cross-ownership arrangements—for example, common ownership of local newspaper-TV or local TV-cable combinations. The Fowler commission has decided, wisely I think, to reexamine these rules. With roughly 9,000 radio stations operating in this country, there may well be no need to restrict an owner to only seven. At this point it might also be desirable, in the interests of greater competition in the franchising process, to rescind the rule that bars TV *networks* from owning cable systems.

Chairman Fowler, however, has indicated that he wants to end the ban on common ownership of *local* cable and TV stations. And this, I think, conflicts with the bedrock First Amendment principle on the importance of diversifying the sources of information available to the American people. For instance, there's no reason at all why Cox Broadcasting shouldn't be in cable TV in various cities around the country, as it in fact is (like the other broadcasters who, taken together, own a third of all cable systems). But there's ample reason why Cox, which already owns (under a "grandfather" arrangement) a newspaper and a TV station in Atlanta, should not also own the cable system there. The new cable systems in large cities have an enormous channel capacity—up to 100 channels—and the cable entrepreneur controls all 100 channels. Elimination of the ban on cross-ownership would permit a powerful TV station to combine with the one powerful new medium that could give it real competition. It's regrettable that the FCC seems to be moving in that direction.

Finally, let me briefly note two congressional matters involving cable. First, as a result of a poor FCC decision in 1980, a broadcaster can no longer bid for a film and obtain exclusive rights: cable can always pick up and retransmit the film. Congress is trying to remedy this. Unfortunately, the main bill, that of Representative Kastenmeier (Democrat, Wisconsin), proposes not a market solution, but rather a modified form of government regulation. Congress should make cable, which is now a multi-billion dollar industry, bid in the marketplace for its programming just like everyone else. (See "Making Cable TV Pay," Henry Geller, *Regulation*, May/June 1981.)

Second, the communications bill (S. 898) that passed the Senate in October 1981 contains a provision that cable generally shall not be considered a common carrier. This would mean that the cable operator would always control the content of its 100 channels, and would never have to provide any leased channel access. In my opinion, this would be very poor policy also.

IN SUM, as I've said, in telecommunications there's been one excellent development—the AT&T settlement—and, for the rest, a mixture of some good and some bad at the FCC. The most important area, telephone, is headed in the right direction. ■