A NEW TELECOMMUNICATIONS PARADIGM: A REVIEW OF *FEDERAL TELECOMMUNICATIONS LAW* BY MICHAEL W. KELLOGG, JOHN THORNE AND PETER W. HUBER

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Publication of *Federal Telecommunications Law*[1] promises to fill a gap in the materials available to practitioners and students of communications law—a single, comprehensive volume bringing together information concerning disputes that have raged throughout the industry in recent years. This collaborative effort by three attorneys deeply involved in representing Bell Operating Companies in the proceedings on the Modified Final Judgment in the Government antitrust proceeding against the Bell System is scholarly, well-written, and well-edited.

The fact that the book is not as comprehensive as its title might suggest should scarcely be surprising in view of the obvious difficulties of being truly comprehensive. The book focuses upon antitrust matters and those aspects of FCC regulation that interact with antitrust. There is virtually no discussion of Title III of the Communications Act of 1934 ("Communications Act")[2] and a great deal of common carrier law is simply ignored.

The authors express very definite points of view on many widely controverted questions. While much of their treatment of such issues will doubtless provoke disagreement by others, the book is enhanced by abundant footnote references that the professional audience to whom the volume is directed can be expected to review before reaching their own conclusions. What the book does more fundamentally, however, is to articulate and apply a "new paradigm of unfettered competition" with reference to which specific disputes are judged.[3] A paradigm is a fundamental model or pattern, ultimately not provable but nevertheless intellectually attractive, with reference to which concrete conclusions are drawn in a wide range of contexts. The process by which paradigms last for a relatively long period of time and are then supplanted in a relatively short period is described in the classic work by Thomas Kuhn, *The Structure of Scientific Revolutions.*[4]

Federal Telecommunications Law begins by paraphrasing what it identifies as the "old regulatory paradigm." It characterizes the old paradigm as founded on the three pillars of a protected franchise, quarantine of the monopolist, and cradle-to-grave regulation. The old paradigm of a highly integrated and tightly controlled national telephone system was a powerful force created by Theodore Vail, the true father of the Bell System. Vail conceived and frequently wrote about a unified system with all the parts controlled by a single entity that would provide universal service free of competition and would assume a paternalistic approach toward the public. In return for its monopoly status, it would be subject to detailed regulation. While Vail's thirst for power paralleled that of the robber barons of the late nineteenth century, the public service ethic he also espoused distinguished his paradigm, making it more attractive and durable.

The authors make the fundamental mistake of equating the old paradigm with the basic requirements of the law that existed prior to the introduction of competition in the 1970s. The Communications Act did not embrace monopoly.[5] The book's authors extrapolate from a handful of precedents in-

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[1] MICHAEL W. KELLOGG, JOHN THORNE & PETER W. HUBER, FEDERAL TELECOMMUNICATIONS LAW (1992).

[2] The book has virtually nothing to say, for example, with respect to broadcasting, other than to credit Bell with developing much of the technology upon which broadcasting is based and recapitulating the successful Bell defense to the antitrust claim made against it by Delta Communications Corp. with respect to program transmission rates.

[3] KELLOGG, THORNE & HUBER, *supra* note 1, at 3.

[4] THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

[5] Its common carrier provisions were developed initially under the Interstate Commerce Act of 1887 and applied origi-

hospitable to competitive entry to the erroneous conclusion that pre-1970 law mandated monopoly. In fact, it did not. These precedents were distinguished or otherwise overcome in the intense regulatory litigation that took place through the 1970s and resulted in the introduction of competition into the world previously controlled by the Bell System. The fundamental decisions allowing competition were made under the Communications Act rather than under the antitrust laws. The major antitrust decisions followed in the wake of the pro-competitive regulatory decisions and addressed, not the questions of whether competition was appropriate, but rather whether Bell's efforts to stop competitive inroads required further remedy. The insistence by the authors that these earlier precedents were the definitive expression of the Communications Act long after the courts rejected such claims reflects a residue of old Bell positions which were used first unsuccessfully to stop competition and then later to avoid antitrust liability on the ground that—like Flip Wilson's "devil"—the Communications Act "made" AT&T engage in anticompetitive actions.

The book is weaker in interpreting the events of the 1970s than those of the 1980s. The authors have great difficulty facing the fact that the Bell System was guilty of serious violations of law during that period. After failing to explain the numerous and specific allegations of antitrust misconduct so painstakingly documented on the record, the authors disingenuously try to obscure the fundamental fact that Bell entered into the 1982 consent decree because it recognized the overwhelming probability that it was about to lose, and lose big. The authors instead insist limply that Judge Greene's decision denying Bell's motion to dismiss the suit did not reach the ultimate merits and failed to come to grips with the implications of the prior verdicts against Bell in the MCI and Litton private antitrust suits.

The authors speculate that dramatically different developments might have taken place had Judge Ritchie, rather than Judge Greene, been assigned the Government case. A far more interesting speculation is how differently the industry might have developed if John deButts had not replaced AT&T Chairman H. I. Romnes in February 1972 and proceeded, in effect, to declare war on competition. His efforts ultimately resulted in bringing about that which he most despised. When, for instance, he nearly drove the "specialized" carriers from the private line business by such steps as cross-subsidizing rates for AT&T's private line services out of monopoly telephone service, and withholding and obstructing interconnections, he unwittingly caused them to redirect their efforts to a higher risk assault upon AT&T's basic long-distance switched telephone monopoly. In a highly ironic, but quite real sense, deButts can be viewed as the unwilling godfather of the competitive telephone industry.

There was nothing inevitable about Bell's anticompetitive conduct. Most corporations adjust to adverse governmental decisions without resorting to such conduct. Romnes was apparently adjusting to the 1971 *Specialized Carrier* decision. His policy of benign neglect toward the new competitors might ultimately have proven more effective than the all out aggression of his successor. Entry into long distance communications, despite AT&T's overwhelming market share, was made possible during the period when microwave relay was the most efficient long distance technology. This is when the barriers to entry were the most vulnerable. When much higher capacity optical fiber became the most efficient medium, the barriers to new entry rose once again. By repeatedly raising the ante for survival of the new competitors and cutting off their lines of retreat, deButts forced them to attack the larger market and grow to a size at which they could thrive even after optical fiber would require greater amounts of traffic for efficient operation.

DeButts was moved, in large measure, by the old Vail paradigm. And despite the limited support found in the actual legal requirements of the Communications Act, the popularization of that paradigm was a powerful weapon in fighting competition. Although younger readers today may find it hard to believe, most people twenty years ago had really been led to believe that terrible things might happen to telephone service if entities other than the telephone company were allowed to insert themselves into "the system." Defeating this popularly accepted paradigm was, in many respects, more difficult than disposing of the legal precedents it relied upon.

Since a paradigm is basically a subjective thing, it is not possible to pinpoint where one becomes broken. There are, however, several points that stand out in retrospect. Perhaps the first noteworthy break in the paradigm occurred in Philadelphia during

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nally only to railroads, many of which were subject to considerable competition. When its provisions were applied to telecommunications beginning in 1910 and culminating in the 1934 incorporation into a separate Communications Act, they were applied not only to the powerful AT&T monopoly but also to competitive international and domestic telegraph industries.

cross-examination in MCI's suit demanding local interconnections from the Bell System. Bell had made the claim that such interconnection would damage the technical integrity of the telephone system. Questions regarding the ability to cope with alleged technical problems led to inquiry as to whether the hiring by MCI of former Bell System employees could enable it to avoid damage. Finally, the witness was asked whether interconnection could be safely made if MCI were to hire him to supervise the operation of its system. There was a highly pregnant pause as the witness underwent considerable personal tension before adhering to the company line and declaring that it would be impossible within the organizational structure.[6] During that pause, it was clear to most observers that Judge Clarence C. Newcomer and others in the court room recognized that the alleged technical difficulties were the sort of things that could be worked out by parties at all inclined to do so.

The most critical event in the demise of the *ancien regime*, as the authors recognize, was the *Execunet* litigation[7] in which the courts upheld MCI's right to furnish basic long distance telephone service and obtain the connections to the local exchanges needed to make it work. Most of the record in the case dealt with such issues as the taxonomic inquiry as to whether the Execunet service, as then configured, was more akin to AT&T switched private line or to its basic telephone service—all of which would become irrelevant in the future. MCI's fundamental claim was that it was entitled to provide any type of service its facilities were capable of providing. To Bell's claim that it alone was entitled to provide basic telephone service, MCI responded that no public body had ever given Bell a monopoly over telephone service. Bell was unable to respond to MCI's challenge by citing any authority for its claim of a *de jure* interstate monopoly. The result of the case was at first a very big surprise to people in the industry, who had been so thoroughly brainwashed in the Bell paradigm that they had failed to examine its basic assumptions.[8] In effect, someone had gotten the nerve to cry out that the Emperor's new clothes simply did not exist. And just as in the old story, when this was finally pointed out, there followed a general recognition of the fact that should have been apparent all along.

Even before the Supreme Court had denied the second set of petitions for certiorari in the *Execunet* litigation, another event occurred, which although relatively unimportant in its own right, shed light on shifting subjective attitudes toward the old paradigm. It occurred in an oral argument in July 1978 before the Commission on whether the costs of Bell's institutional advertising should be recovered in charges imposed upon customers. Counsel for MCI held up a two-block plastic puzzle that was capable of being fitted together as a pyramid and had been distributed at shopping malls in the Washington area as one step in the major advertising campaign Bell was then conducting. The puzzle claimed to illustrate the point of the campaign that "The System is the Solution." In demonstrating how the plastic puzzle was being used to sell the proposition that the Bell System should not be tampered with,[9] counsel for MCI introduced into the otherwise solemn event a degree of gentle mockery at the advertising claim that went far beyond the technical question of rate regulation nominally at issue. While AT&T's very able counsel[10] was shrewd enough to ignore the undertone and explained instead that the puzzles had been distrib-

[6] MCI Communications Corporation v. AT&T, (U.S.D.C. E.D. Pa.) Civil Action No. 73-2499, Transcript of Hearing on Request for Preliminary Injunction, November 16, 1973, Testimony of Richard Hough, pp. 328-41; Decision at 369 F. Supp. 1004 (1974), *vacated on primary jurisdiction grounds*, 496 F.2d 214 (3d Cir. 1974).

[7] MCI Telecommunications Corporation v. FCC, 561 F.2d 365 (D.C. Cir.), *cert. denied*, 434 U.S. 1040 (1978), *mandate enforced*, 580 F.2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980 (1978).

[8] Curiously, while the authors recognize the "profound implications" of the *Execunet* decisions, they nevertheless reflect the shock with which their clients initially greeted the decisions by referring to them as "dubious as a matter of law" and "poorly reasoned." KELLOGG, THORNE & HUBER, *supra* note 1, at 608-09. While such epithets are no doubt pleasing to the elders among their clients, they are not supported by reasoned analysis and may suggest that the conversion to new principles is somewhat less than complete.

[9] A small card distributed with the puzzle explained:

> The parallel to the Bell System is obvious. Western Electric, Bell Labs, Long Lines, AT&T, and the operating companies form a unified structure that has demonstrated its strength and function. It has provided an extraordinary record of planned innovation, and genuine reliability in an age of unreliability. Like the pyramid in this envelope it is deceptively simple and the temptation to alter its simplicity is undeniable.
>
> As you struggle with this puzzle think of the difficult road back should the Bell System ever be broken up. Time, energy, and resources would be wasted in a fruitless effort to improve that pyramid of telecommunications — the Bell System. It Works.

Comments of MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C Inc. of July 7, 1978 in FCC Docket No. 19129.

[10] Several years later, as AT&T's General Counsel, he was to approve the compromise embodied in the Modified Final

uted by employees on their own time as a reflection of their enthusiasm for the Bell System, many in the audience had reached the point where it was possible to laugh at the paradigm in public.

The old paradigm is now interred. But there is a deep-seated psychological need for a new paradigm when an old one passes away. *Federal Telecommunications Law* seeks to satisfy that need. It builds on the vividly demonstrated success resulting from the introduction of competition into the communications industry. It reverses the Vail paradigm a complete 180 degrees and says, in effect, competition is so perfect a solution to all problems that no other public values should be allowed to intrude.[11] The authors of the book apparently came to the communications world after the Modified Final Judgment and don't carry the baggage that is borne by the more senior people in their Bell clients who once subscribed to the old Vail paradigm. The authors therefore do not feel any need to apologize for changing so profoundly their fundamental views. This may also illustrate Kuhn's observation that the developers of new paradigms are generally either very young or very new to the field.[12]

The interest of the Bell Operating Companies in promoting the new paradigm lies in their desire to have a conceptual platform for ridding themselves of the restrictions that were agreed upon in the 1982 antitrust consent decree, as well as various structural requirements imposed by the FCC. It may be easier to rely on a simple paradigm to make such a case rather than address the much more complex details required for decisions that take adequate account of a variety of public interest values.

The Communications Act is, at its core, a statute rooted in the concept of equity rather than merely economic efficiency. The common carrier scheme of regulation was based quite explicitly on the conclusion that competition "is no safeguard against discrimination."[13] Regulation was not merely a *quid pro quo* for freedom from competition. The new paradigm, and the book that reflects it, are creatures of the 1980s rather than of the periods over which the statute was crafted. In the 1990s, amidst the debris of a shattered savings and loan industry and a seriously weakened airline industry, it is far less palatable to assume that competition is a panacea justifying the complete jettisoning of every regulatory protection for consumers.

There is no doubt that the emergence of competition is the dominant theme to describe what has transpired in the telecommunications industry over the last twenty-five years. That, however, does not justify the use of the prescriptive paradigm developed in this book as the touchstone for policy decisions on questions that take center stage in the 1990s. Excessive reliance on a simple-minded paradigm did the industry a great deal of damage in the past. That process should not be allowed to repeat itself now.

Judgment that marked the end of the old paradigm.

[11] The authors concede only that: "The regulation that remains will be imposed, if at all, at the interfaces of competition, at any remaining bottlenecks such as they are, where competition alone cannot provide appropriate discipline." KELLOGG, THORNE & HUBER, *supra* note 1, at 75.

[12] KUHN, *supra* note 4, at 90.

[13] This was first stated in the 1886 Cullom Report, which sets forth the fundamental basis for the initiation of common carrier regulation. S. REP. NO. 46, 49th Cong., 1st Sess, reprinted in B. Schwartz, *The Economic Regulation of Business and Industry* 72 (1973).