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DIALING FOR DOLLARS: COMMUNICATIONS REGULATION AND ELECTRONIC FUND TRANSFER SYSTEMS

THE HONORABLE ROBERT E. LEE*

INTRODUCTION

That this is an appropriate time for discussing the policy options for EFT development is indicated by the creation last fall of the National Commission on Electronic Fund Transfer (NCEFT).¹ The NCEFT has a two year mandate from Congress to conduct a study and to recommend appropriate legislative and administrative action in connection with the development of public and private EFT systems. The membership of the NCEFT reflects the broad range of interests affected by EFT systems; beside representatives of the financial industry and its regulators, the NCEFT will include representatives of the Postmaster General, the Federal Trade Commission, the Congressional Office of Technology Assessment, and the Federal Communications Commission.²

Several federal agencies charged with regulating various sectors of the banking industry have likewise expressed an interest in EFT policy, either by official inquiry or initiation of experimental rules. In November, 1973, the Board of Governors of the Federal Reserve System proposed a set of EFT-related regulations as an amendment to its Regulation J, which governs the transfer of funds through Federal Reserve facilities. The same announcement invited comment on broad issues of EFT policy.³

The Federal Reserve System counts as members all national banks, and the state chartered banks and trust companies that choose to join by purchasing stock and maintaining a reserve balance in the local Federal Reserve Bank. The Fed holds an important place in fund transfer both because its members are in general the larger commercial banks⁴ and because the Federal Reserve Act authorizes the Board of

* Commissioner, Federal Communications Commission. Research for this paper was done by Daniel Prives, Harvard Law School '77, under the supervision of Mr. Sidney Goldman and with the assistance of the Harvard Program on Information Technologies and Public Policy. The views expressed in this article are those of the author and do not necessarily reflect the views of the Federal Communications Commission.

1. Pub. L. No. 93-495, § 201 (1974 U.S. CODE CONG. & AD. NEWS 1733).

2. *Id.* § 202(a) (1974 U.S. CODE CONG. & AD. NEWS 1733-34).

3. Federal Reserve Board, Federal Reserve Banks, Proposed Transfer of Funds, 38 Fed. Reg. 32952 (1973).

4. As of December 31, 1973, member banks accounted for forty percent of all commercial banks in the United States and for sixty-one percent of all commercial banking offices, and they held about seventy-seven percent of the total deposits in

Governors to regulate the transfer of funds through Federal Reserve Banks, to act as a clearinghouse for fund transfers, and to charge for the service of clearing funds.⁵ The Federal Reserve's EFT proposals and inquiry prompted comments from all sectors of the banking community — member and non-member commercial banks, savings and loan associations, mutual savings banks, and credit unions — as well as the Justice Department, the Postal Service, AT&T, and many other parties. The Fed has yet to announce the policies it will pursue as a result of the inquiry, but in the meantime has turned down requests to operate EFT systems for a group of banks in Atlanta pending the outcome of its EFT inquiry and proposed legislation regarding the NCEFT.⁶

At the same time, the Federal Home Loan Bank Board, which supervises federally chartered savings and loan associations,⁷ proposed in May, 1974, to extend, consolidate, and expand its "pilot regulation" of EFT systems to permit further experimentation until July, 1975.⁸ Under this regulation, federally chartered savings and loan associations may maintain electronic "remote service units" to handle deposits, withdrawals, payments, and transfers among accounts anywhere within the state in which the home office of the institution lies.⁹

The National Credit Union Association, whose authority extends to federally chartered credit unions,¹⁰ also amended its regulations in August, 1974, to set up a procedure for establishing EFT pilot programs.¹¹ Under this broad new rule, any pilot program will be approved if the NCUA determines that its implementation will provide it with information helpful in formulating permanent programs beneficial to federally chartered credit unions.

In December, 1974, the Comptroller of the Currency, responsible for the administration of national banks, announced an interpretation

commercial banks. State member banks account for eleven percent of the total number of state-chartered commercial banks, twenty-four percent of the banking offices, forty-eight percent of the total deposits. ANNUAL REPORT OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 1973, at 254-55 (1974).

5. 12 U.S.C. § 248(o) (1970).

6. American Banker, Sept. 12, 1974, at 1, col. 1.

7. The Federal Home Loan Bank Board has the authority to charter and supervise federal savings and loan associations under the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(a) (1970).

8. 39 Fed. Reg. 16484, *rules adopted as modified*, 39 Fed. Reg. 23991 (1974) (*codified at* 12 C.F.R. §§ 545.4-2, 545.14-5 (1975)).

9. 12 C.F.R. § 545.4-2(a), (b) (1975).

10. The National Credit Union Administration charters and governs federal credit unions under 12 U.S.C. § 1754 (1970).

11. *See* 12 C.F.R. § 721.3 (1975).

of section 36 of the National Bank Act, which limits the authority of the national banks to establish branches, permitting national banks to establish "Customer-Bank Communication Terminals" (CBCTs)¹² without regard to geographic restrictions.¹³ The Comptroller's action was almost immediately challenged by the State of Missouri when the First National Bank of St. Louis took advantage of the regulation and installed an automated teller in suburban St. Louis.¹⁴

A number of states have also taken steps toward formulating policies with regard to EFT systems, sometimes by legislative mandate, sometimes by executive action and judicial decision. At least three states, Washington, Massachusetts, and Oregon, have already adopted legislation permitting banks to install remote electronic banking facilities.¹⁵

The Massachusetts statute authorizes banks, saving banks, and savings and loan associations to install and operate remote, unmanned facilities. The facilities can be shared by any financial institutions, but

12. There is no standard nomenclature in the EFT field at this time. What the Comptroller of the Currency calls CBCTs are described by the Federal Home Loan Bank Board as "Remote Service Units" or RSUs. CBCTs or RSUs may generally be classified as "manned" or "unmanned." Unmanned CBCTs are also known as Automatic Teller Machines (ATM), and should be familiar to most readers as "Total-Tellers," "24-Hour Tellers," or some similar promotional name.

Manned CBCTs now in use involve a party in addition to the financial institution and its customer. Typically, such a CBCT is located in a supermarket and is manned by an employee of the store, the supermarket serving as a financial and operational intermediary between the customer and the financial institution. Future manned CBCTs may include devices, known as point-of-sale (POS) terminals, for direct transfer of funds from a customer's account to a merchant's account. Electronic cash registers and devices which only perform credit authorization are also described as POS terminals, but they do not fall into the CBCT category.

"On-line" and "off-line" is another useful distinction among CBCTs, particularly when the impact of communication regulation is involved. An on-line CBCT is connected by wire to a central computer or computer network, and is continually polled and updated as transactions occur. An off-line CBCT is either completely self-contained and records its transactions on tape for periodic removal, or communicates with a central computer in a "batch" mode.

13. 39 Fed. Reg. 44416 (1974). The Comptroller's ruling is codified at 12 C.F.R. § 7.7491 (1975). [A recent interpretative ruling by the Comptroller places some geographic restrictions on the establishment of CBCTs. See 40 Fed. Reg. 21700 (1975), amending 12 C.F.R. § 7.7491 (1975).—Eds.]

14. American Banker, Jan. 7, 1975, at 1, col. 3. The State brought the action because its branching laws prohibit the establishment of facilities outside of the city in which the principal office is located.

[On May 28, 1975, a challenge to the installation by a national bank, pursuant to the Comptroller's ruling, of an unmanned automated teller machine was upheld by the United States District Court for the District of Colorado. State of Colorado *ex rel.* State Banking Board v. First Nat'l Bank, Civil No. 75-M-397 (D. Colo., May 28, 1975).—Eds.]

15. American Banker, Oct. 4, 1974, at 1, col. 3.

the number of facilities an institution may own or participate in is limited. Moreover, no institution may own or participate in a remote unit outside the county in which its main branch lies, a provision parallel to the state's branching laws.¹⁶

The Washington state statute puts no territorial restrictions on installing remote units, and it makes more extensive provision for sharing remote facilities. A commercial bank that wishes to install a remote automated facility must share the facility with other commercial banks that will bear a reasonable share of the costs. The statute permits other financial institutions to share facilities with each other or with commercial banks, but sharing is not mandatory for them.¹⁷

Other states have taken a more restrictive stance toward EFT systems. For example, in *State ex rel. Meyer v. American Community Stores*,¹⁸ the Nebraska Attorney General recently argued that an EFT system using terminals in a Hinky Dinky supermarket operated by the store's employees violated that state's banking laws, an argument rejected by the Supreme Court of Nebraska.

The EFT options advanced by the private sector are too numerous to list; however, one of the major conflicts at this point revolves around the desirability of co-operative development of EFT systems. Four New York banks, Chase Manhattan, Bankers Trust Co., Manufacturers Hanover Trust Co., and Chemical Bank, have already agreed to operate an experimental EFT system using a jointly operated facility to authorize Master Charge and Bank Americard purchases through the participating banks.¹⁹ New York's First National City Bank (Citibank) opposes the joint facility concept. Citibank has developed its own credit card system and advocates absolutely competitive development of EFT systems.²⁰

Finally on this list of options on the EFT agenda is an option closer to the traditional concerns of the FCC. In March, 1974, the Federal Home Loan Bank Board (FHLBB) requested that savings and loan associations under its jurisdiction, as well as other financial institutions, be exempted from a regulation dealing with attachment of non-telephone company equipment to telephone company lines.²¹ A rule of the Oklahoma Corporation Commission requires certification

16. MASS. ANN. LAWS ch. 167, § 65 (Supp. 1974).

17. WASH. REV. CODE ANN. §§ 30.43.010-30.43.040 (Supp. 1974).

18. 193 Neb. 634, 228 N.W.2d 299 (1975).

19. American Banker, Sept. 25, 1974, at 1, col. 2.

20. American Banker, Sept. 27, 1974, at 1, col. 3.

21. Letter from the Federal Home Loan Bank Board to the Corporation Commission of Oklahoma, Mar. 28, 1974.

for all telephone company customers who wish to connect their facilities to the telephone network, unless they comply with all telephone company rules regarding connection of equipment.²² The FHLBB requested the exemption on the grounds that the various banking regulatory agencies have overriding authority over bank-related systems under the laws that created these agencies, and secondly, that the use of communication facilities is merely ancillary to the banks' primary business, and thus beyond the purview of communications regulation.²³

The Oklahoma Corporation Commission's rule is but one instance of a much broader policy debate over the question whether customers can connect their own equipment to telephone company lines. This debate has been complicated by a jurisdictional clash between the FCC and state agencies which regulate the telephone system, as exemplified by the conflicting rules between the North Carolina Utilities Commission and the FCC which led to the *Telerent* case.²⁴ The FHLBB was properly concerned that this so-called interconnection issue could have serious consequences for the spread of EFT systems.

The list of EFT proposals and regulations from the banking agencies, from the states, and from the banking industry amply demonstrates that there are many options and models for developing the social and legal support system for future fund transfer mechanisms. Consideration of EFT systems as communication systems is an option and a model which has received little attention. This article describes the direct and the indirect influence of communication regulation on EFT systems. The first consideration is whether the FCC can and should exert direct authority over EFT systems. While it appears that the FCC would describe many EFT services as "hybrid communication systems" under the principles established by the FCC in its *Computer Inquiry*,²⁵ the drawbacks involved in FCC regulation are substantial, and, it will be argued, the FCC should thus forbear from exercising authority over EFT systems. It is suggested that for the present, the substance of communication regulation might by analogy be adopted by regulatory bodies other than the FCC as a means for regulating access to EFT systems. The final section of this article concerns the indirect influence of communication regulation of EFT systems which

22. See *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 225 (1974).

23. Letter from the Federal Home Loan Bank Board to the Corporation Commission of Oklahoma, Mar. 28, 1974.

24. *Telerent Leasing Corp.*, 45 F.C.C.2d 104 (1974).

25. *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (Final Decision and Order, 1971), 28 F.C.C.2d 291 (Tentative Decision, 1970) [hereinafter cited as *Computer Inquiry*].

arises because EFT systems may involve interconnection of non-telephone company communication systems to the telephone network. The status of the interconnection issue before the FCC has an impact on the kind of EFT systems that can eventually be adopted.

A COMMUNICATION VIEW OF EFT SERVICES

Is an EFT system a communication system of the sort ordinarily within FCC common carrier jurisdiction? The answer to this question depends on the technology of the system and its function. First, the FCC has jurisdiction only over communication systems that employ wire or broadcast electronic communication.²⁶ Secondly, in addition to the technology requirement, a system must possess the functional characteristics of a communications common carrier.²⁷ Whether or not a function of a system is communication common carriage is hardly a simple determination. The authors of the Communications Act forced the concept of common carriage from the transportation field into a communications mold.²⁸ At common law, the transportation common carrier holds himself out for hire by anyone, accepts control over the goods he carries, and thus assumes the responsibility of an insurer. In contrast, a communication common carrier does not insure the accuracy of its messages; instead, because communications is such an essential function with characteristics of a natural monopoly, common carrier regulation of a communication service is supposed to insure that all have access to the service on a nondiscriminatory basis at fair rates.

The Communications Act sheds no light on the nature of communication common carriage. Its definition is framed in terms of the

26. 47 U.S.C. § 152 (1970). For some purposes, the technology of the communication system is enough to establish FCC jurisdiction. For example, a microwave facility must be licensed as a radio facility no matter what messages it carries. 47 U.S.C. § 301 (1970).

27. 47 U.S.C. § 201 (1970).

28. The telephone and telegraph companies were first included as federally regulated common carriers in 1910 through an amendment to the Mann-Elkins Act, which itself amended the Interstate Commerce Act. Both sponsors of the bill spoke against the amendment, which would regulate communications as common carriers. Nevertheless, the concept stuck, and no changes were made when authority over communications common carriers was vested in the FCC by the Communications Act of 1934. See Berman, *Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission*, 27 FED. COM. B.J. 161, 204-06 (1974).

The legislative history of the 1934 act provides little insight: "It is to be noted that the definition [of common carrier] does not include any person not a common carrier in the ordinary sense of the term" *Id.* at 206, quoting H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 46 (1933).

common law concept, which, as noted above, was not applied to communication. Consequently, the FCC has had to define the functions that fall within the term "communication common carriage." As an expert agency, the FCC has been accorded considerable latitude in establishing the base of its jurisdiction.²⁹ The term "communications common carrier" ordinarily applies when there is a public offering to provide facilities for transmission of communication.³⁰

The most recent consideration of the line between what is and what is not within the ambit of FCC authority lies in the *Computer Inquiry*, wherein the FCC sought to delineate the areas of the computer services market which constitute communication common carriage. In the *Computer Inquiry*, the FCC first determined that it should not regulate the function of data processing. It found that the data processing services industry was sufficiently competitive to eliminate the need for regulation and that regulatory constraints would inhibit flexibility in development and thus would be contrary to the public interest.³¹ On the other hand, regulatory jurisdiction was extended to computer services which are "essentially communications."³²

Defining the computer services that constitute "data processing" proved difficult, however, since the present state of computer technology makes possible such communication functions as routing messages from one computer terminal connected with a central computer to another, the so-called "message switching" function, in addition to data processing.³³ Thus, the FCC had to sort out the communication

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

30. Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who chose to employ such facilities and to compensate the carriers therefore may communicate or transmit intelligence of their own design and choosing

Frontier Broadcasting Co., 24 F.C.C. 251, 254 (1958) (footnote omitted). See also Berman, *Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission*, 27 FED. COM. B.J. 161, 204-08 (1974).

31. 28 F.C.C.2d at 278 (Final Decision and Order), 297-98 (Tentative Decision). The FCC declined to decide whether its jurisdiction in fact extends to data processing services as such. 28 F.C.C.2d at 268 (Final Decision and Order).

32. 28 F.C.C.2d at 278 (Final Decision and Order).

33. "Message switching" is to be distinguished from "circuit switching" which involves the creation of a physical link between the communicating parties. In message switching, the transmission of data involves a very brief period of storage of data within the computer while it searches for an available line to send the message to its destination, and there is never a physical link between the lines from the sender and the lines of the receiver. For purposes of regulation, message switching is defined as "the computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the messages remains unaltered." 47 C.F.R. § 64.702(a)(2) (1974).

function, which it continued to regulate, from the data processing function, which it decided not to regulate. The Commission employed a principle that is easier to state than to apply: If a service includes communications functions incidental to its data processing service, it is a "hybrid data processor" and is not subject to regulation as a communication entity; if, however, the service employs data processing as incidental to what appears to be a communication service, then it is a "hybrid communication service" subject to FCC jurisdiction. In the words of the *Computer Inquiry*:

[W]here message-switching is offered as an integral part of and as an incidental feature of a package offering that is primarily data processing, there will be total regulatory forbearance with respect to the entire service³⁴

EFT Systems as Communication Common Carriers

An EFT service, to constitute a "hybrid communication service," must use a regulated technology and must serve more of a communication function than a data processing function. First, the system must employ electronic transmission of data. Perhaps from a logical standpoint the function that a system performs should be more relevant to its regulatory status than the technology by which the function is accomplished, but the technology of the system, under the Communications Act, is a controlling factor. Thus, if two EFT systems having identical functions differ in that one system sends its message by wire and the other by hand-delivering magnetic tapes, the FCC could only regulate the former, no matter how reasonable it would be for the FCC to regulate also the latter.³⁵

Second, laying aside the question of technology, an EFT system must perform primarily a communication function as opposed to a data processing function, to be subject to FCC regulation, a determination which can only be made by evaluating the functions of a particular EFT system. An example of an EFT system which would constitute a hybrid communication service involves a communication system among Automated Clearing Houses (ACHs).³⁶ An ACH makes it possible for a large business to distribute its payroll merely

34. 28 F.C.C.2d at 305 (Tentative Decision).

35. The dependence of FCC jurisdiction on an accident of technology represents a fatal weakness of the Communications Act in dealing with EFT systems. This weakness could be avoided in the future by focusing on the functions of fund transfer systems rather than on the technology they employ.

36. ACHs have already been established in a number of areas, including California, Atlanta, Boston, and Minneapolis. None, to my knowledge, uses the particular type of wire transfer described.

by sending its bank a magnetic tape containing the names of its employees, their banks, and the amounts of their paychecks. The employer's bank culls the information on the tape regarding the employees who happen to have accounts at that bank and sends the rest of the information to the local ACH. The ACH collates this information with information from its other member banks and sends it to its destination, which may be another local member of the ACH or another ACH in a different locality.

Data processing is involved in the ACH system described above. First, data is rearranged to allow it to be sent to a member bank or another ACH. Secondly, the ACH system would presumably debit and credit its members' clearing house accounts. Finally, the ACH might perform any of a number of housekeeping functions, such as checking the format of items, tabulating statistics on amounts flowing through the system, and so on. However, despite the data processing that goes on, it appears that the system as a whole is geared to a single end, transferring paycheck information from the employer's bank to the employee's bank. The primary purpose of the system thus seems to be message switching, and as the *Computer Inquiry* indicates, such an ACH system could be subject to regulation under the Communications Act. In fact, if one accepts the proposition that the check-clearing function of banks is not primarily an adjustment of clearing-house balances among banks, but is rather a type of communication among a payee, his bank, the payor's bank, and the payor, then any system that uses a regulated technology to replace the check-clearing function will likely constitute a "hybrid communication system" by the terms of the *Computer Inquiry*.

On the other hand, there are reasons for FCC abstention in the regulation of EFT systems, even when those systems involve communication functions. The principle upon which such abstention might be based is contained in the *Computer Inquiry*. In determining the exercise of its common carrier jurisdiction, the FCC has indicated an intention to restrict regulation to those areas where such "factors are present to require governmental intervention to protect the public interest because a potential for unfair practices exists."³⁷ In the area of data processing, as indicated above, the Commission decided to abstain because it found that the provision of services was essentially competitive and that, therefore, the public interest did not require regulation.³⁸

37. 28 F.C.C.2d at 297 (Tentative Decision).

38. *Id.* at 297-98.

In the area of electronic transfer of funds, the FCC might likewise deem that it not be in the public interest to assert regulatory jurisdiction on systems intimately related to banking. Such a decision could be based on several grounds.

First, because the FCC's authority is limited to EFT systems that employ communication by wire, the impact of EFT regulation would be reduced and could produce distortions in the kinds of EFT systems that are designed. A cost of exercising authority would be the possibility that new EFT systems would be designed to take advantage of FCC authority or to avoid it, possibly resulting in less efficient systems. On the other hand, the benefit of FCC regulation would not be great if a large number of systems are exempt from it. Thus, the FCC might better refrain entirely from regulating.

Secondly, because EFT systems are already regulated by banking agencies, FCC regulation in the area would be redundant and confusing. The Commission decided that data processing should not be regulated because the market provided adequate regulation; similarly, it might determine that banking agencies provide adequate regulation. The check-clearing function is under the authority of the Federal Reserve System,³⁹ and it has used this authority to regulate transfers by wire since the inception of the Fedwire in the 1920's. The FCC might continue to rely on the Federal Reserve to regulate EFT systems. In addition, Congress has given the NCEFT authority to investigate future developments in EFT systems and to recommend legislation and administrative action.⁴⁰ In light of Congress' evident intent that the EFT situation be studied as a whole, an independent EFT study by the FCC would be repetitive. Thus, between existing regulation of the clearing house function of commercial banks and Congressionally authorized study of EFT systems, the FCC might decide to take a hands-off attitude toward EFT.

Thirdly, because a few EFT systems might not be found to offer a service to the public, regulation may not be necessary. Some EFT systems, for example, are concerned only with the internal operations of banks. The present Bankwire system, which is used in the transfer of large amounts among the banks belonging to the system, is such a system. When it is unlikely that the public interest will be affected by the operation of an EFT system, such as in the case of Bankwire, the FCC might eschew regulation. In the case of the ACH system described earlier, and with other systems that propose funds transfer

39. 12 U.S.C. § 248(o) (1970). *See also* Federal Reserve Board, Federal Reserve Banks, Proposed Transfer of Funds, 38 Fed. Reg. 32952 (1973).

40. Pub. L. No. 93-495, § 203(a) (1974 U.S. CODE CONG. & AD. NEWS 1734-35).

from the point of sale, it would be more difficult to make a convincing argument that the systems do not involve a public offering of service such as to eliminate the need for FCC regulation. Thus, in only a few cases could the FCC decide to exercise its discretion not to regulate on grounds that the systems do not involve the public interest.

The status of EFT systems as communication common carriers under FCC jurisdiction thus falls into two issues: whether EFT systems are communication or data processing systems and whether the FCC should regulate banking systems in the EFT area. The first issue can be resolved in favor of communication regulation for most EFT systems. On the other hand, the FCC might make several arguments for exercising its discretion not to regulate: that its jurisdiction over EFT would be incomplete because of its technological limitations, that EFT systems are under sufficient administrative scrutiny already, and that some EFT systems have an insignificant effect on the public interest. This is not to say that the FCC would never decide to regulate an EFT system. At this point, however, communication regulation of EFT systems by the FCC is a remote possibility.

Common Carrier Regulation as a Model for EFT Regulation

Although the FCC probably will not attempt to regulate EFT systems, it is reasonable to ask whether the policies that lie behind communication regulation are relevant to issues that EFT systems have raised. One area in which EFT regulation might benefit from experience with communication regulation is in the area of access to EFT systems. In the Federal Reserve's inquiry into EFT systems, one of the major questions asked was whether non-members of the Federal Reserve should be allowed access to any EFT system operated by the Federal Reserve, and if so, at what cost.⁴¹

Access is also an issue in the development of ACHs. The original rules of the California ACH would have permitted access only to commercial banks, but current rules in most, if not all, ACHs permit thrift institutions to participate indirectly in the system through a relationship with a commercial bank member.⁴² And access is a prominent issue in the development of remote service units and point-of-sale systems. For instance, the Washington state EFT statute requires

41. See 38 Fed. Reg. 32952 (1973).

42. *E.g.*, New England Automated Clearing House Association Operating Rules. It has been announced that the New York Automated Clearing House will permit direct access by thrift institutions when it opens this summer. *American Banker*, Jan. 27, 1975, at 1, col. 1.

that commercial banks share their facilities with other commercial banks when requested to do so.⁴³

Access is an important issue in EFT systems because small banks and financial institutions may not have the resources to create such systems even on a shared basis, and because, in some cases, more than one customer facility (*e.g.*, an automated teller machine) in a location may be impractical. The marketing potential of EFT services makes it imperative that small institutions be permitted to participate if they are to survive. The analogy to communication common carriers is strong: communication common carrier regulation is intended to insure that all parties have equal access to the resources of communication channels which are limited by physical characteristics (*e.g.*, to be able to call anyone else, all telephones have to be connected with each other). Similarly, EFT systems represent a potentially important resource limited by such characteristics as economies of scale, which may create natural monopolies, and the fact that only so many remote service units can fit in a given amount of space.

The concept of common carriage is one model for implementing a policy that all financial institutions or all institutions of a certain type (commercial banks, savings and loan associations, etc.) should participate in EFT systems on an equal basis. The elements of common carrier regulation relevant to EFT systems are a public filing of the terms under which parties may participate in an EFT system and a procedure for reviewing the terms and modifying them if they are unfair or discriminatory. Under the Communications Act, communication carriers must file the charges for using their facilities, and the rules governing such use, with the FCC. The Commission may suspend a new charge for up to three months while it investigates, and may declare any charge or regulation of the carrier to be in violation of the Communications Act.⁴⁴ The rate filing and review system provided by the Communications Act does not depend on the rate-of-return method of rate-setting that has been adopted for those common carriers that happen to be regulated monopolies; while all carriers must file rates with the FCC, not all are subject to rate-of-return regulation. Thus, in regulating access to EFT systems, an agency interested in EFT systems might establish among its experimental policies a procedure to systematize access to EFT projects, using as a model the tariff-filing procedure of communications regulatory agencies, an option not inconsistent with free competition in EFT experiments.

43. WASH. REV. CODE ANN. § 30.43.030 (Supp. 1974).

44. 47 U.S.C. §§ 203(a), 204 (1970).

Of course, the common carrier model is not the only possibility for enforcing access to EFT systems. A principle of access can also be found in the interpretation of the antitrust laws, as in the case of *Associated Press v. United States*.⁴⁵ In the *Associated Press* case, the Supreme Court upheld an injunction against AP that had the effect of opening up the news service's facilities to all newspapers on an equal basis, regardless of whether another competing newspaper subscribed to the service in the particular region. The antitrust model seems, however, to be a cumbersome way to enforce a policy of access to EFT systems. The number of local and regional EFT projects that have already been established and the number of parties who might bring suit for access to the systems suggest that a more comprehensive method of enforcing access might be necessary.

The best way to summarize the relationship between communication common carrier regulation and EFT systems is to point out that the regulation of communication common carriers is a model for the enforcement of access to EFT systems that seems less cumbersome and more automatic than a system that relies on the courts or the state commissioner of finance for enforcement. It is unlikely, however, that the FCC will be the agent for imposing such a model on EFT systems. Its ability to regulate only communication by wire and the ample regulation already present in the banking industry make it a relatively less effective agent for change in the EFT area.

INTERCONNECTION AND EFT SERVICES

The problem of interconnection affects EFT systems today, as it affects many industries with specialized communication needs. As far as the banking industry is concerned, the interconnection and foreign attachment problem has two faces. At the federal level, there are remaining interconnection and foreign attachment restrictions. At the state level, the division of communication authority between the federal government and the states may stand in the way of electronic banking services if banking retains a state-oriented marketing system.

Ten years ago, many EFT systems were inconceivable except as an extension of telephone service owned and controlled by the telephone companies, because the telephone tariffs prohibited customers from attaching foreign equipment to standard lines and prohibited private branch exchanges on leased lines. The *Carterfone* decision and its aftermath have changed the outlook on services within the tele-

45. 326 U.S. 1 (1945).

phone companies' sole prerogative.⁴⁶ The relevant tariffs fall into two categories. Interconnection deals with the attaching of full customer communication systems, such as private branch exchanges or microwave systems, to the telephone networks. Foreign attachment refers to the use of non-company equipment, such as answering devices, in connection with the regular telephone networks.

The *Carterfone* case in 1969 held that the telephone company's blanket prohibition of all customer-provided equipment was unreasonable and discriminatory without evidence that the telephone network had actually been harmed or would be harmed by the equipment. The tariff by which AT&T replaced its pre-*Carterfone* practices set up technical criteria for interconnection and foreign attachment, required a telephone company-provided interface of the network, and required telephone company equipment for "network control signaling," that is, dialing.⁴⁷ A recent modification in the tariff has indicated that the network interface requirement may be eased.⁴⁸

The arguments to justify the present allocation of functions between the telephone company and its customers fall into two categories, technological and economic. On the technological side, the issues in *Carterfone* include the alleged increase in network maintenance costs due to foreign equipment on the lines, degradation of the switching operations caused by "foreign" dialers, and increased demand on the network beyond its design capabilities. The economic issues primarily involve the effect of creating competitive markets in telephone equipment on the policy of price discrimination and cross-subsidization practiced by the phone company and sanctioned by the FCC. The policy question that arises is whether these general issues apply with equal force to an EFT system.

The technical issue of maintenance costs and degraded switching capability does not apply with any special force to the CBCT systems. Reputable manufacturers of terminals — IBM, NCR, Bunker-Ramo, Burroughs, Singer and TRW — would dispute the telephone company's expressed fear that they would not build equipment adequate to meet reasonable standards of reliability and maintainability.

The other technical issue is whether increased demand created by interconnected equipment will overburden the telephone network.

46. Use of Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420, *petition for reconsideration denied*, 14 F.C.C.2d 571 (1968).

47. See American Tel. & Tel. Tariff FCC No. 260 sec. 2.6.

48. See Hirsch, *Interconnect Bar Lowered Slightly*, DATAMATION, Sept., 1974, at 117.

Previous developments in computer-communication technology have caught the telephone companies short on capacity. The explosive growth of timesharing and remote computer services in the mid-1960s led to serious disruptions of telephone service in some areas.⁴⁹ In major urban areas, the growth of point-of-sale systems could come in the areas of high computer use, the central business districts. The FCC might keep close watch on the traffic EFT development may create.

The economic argument against interconnection is based on a long-standing policy of cross-subsidization practiced by the phone company. As a regulated monopoly, the telephone company can set proportionately higher rates for its customers who can pay more, for example business customers, and use the higher rates to subsidize residential service. The company alleges that interconnection equipment manufacturers take advantage of the artificially high prices for business equipment, and that the widespread use of interconnected machines and systems will ultimately produce higher residential telephone rates.⁵⁰ The economic issue does not apply to point-of-sale EFT systems with the same force as it might affect, say, private switchboard systems. The telephone companies do not yet have a capital base of point-of-sale terminals with which to cope. Thus, point-of-sale EFT systems represent new growth, not a siphoning from the current sources of company revenues.

In short, the ordinary arguments against interconnection and foreign attachment in general have little connection with a point-of-sale EFT system, although it will be necessary to see that CBCT growth does not overwhelm telephone company capacity. The interconnection issue, however, is confused by the fact that communication regulation in the United States is shared by state and federal agencies. Under the Communications Act, the authority of the FCC is limited to regulating interstate and foreign communications by wire. Interstate telephone regulation is within the province of a state regulatory body in 48 states; only two states, Texas and New Mexico, do not regulate at the state government level.⁵¹ Ordinarily, this authority is divided according to whether the service involves interstate transmission by wire. This distinction, however, ill-fits the telephone network, which carries interstate and intrastate messages indiscriminately. The mismatch has led to a conflict between the FCC and state authorities

49. M. IRWIN, *THE TELECOMMUNICATIONS INDUSTRY* 41 (1971).

50. The role of cross-subsidization in the telephone rate structure and arguments for and against it are summarized in S. MATHISON AND P. WALKER, *COMPUTERS AND TELECOMMUNICATIONS: ISSUES IN PUBLIC POLICY* 142-45 (1970).

51. FEDERAL POWER COMMISSION, *FEDERAL AND STATE COMMISSION JURISDICTION AND REGULATION OF ELECTRIC, GAS, AND TELEPHONE UTILITIES* 5 (1973).

on the interconnection and foreign attachment issue, with some states adopting a more restrictive policy. The banking industry has often respected state lines, but this conflict of communications jurisdiction adds to the incentives of the industry to shed the state-boundary restrictions when considering the status of EFT systems.

The leading case in the federal-state jurisdictional conflict over interconnection is the *Telerent* decision,⁵² adopted by the FCC in January, 1974, and currently on appeal. The case arose when several states adopted policies toward interconnection and foreign attachments inconsistent with the FCC's *Carterfone* decision. The most restrictive was North Carolina's ruling, which prohibited all connection of customer equipment on telephone lines used for intrastate service. Of course, very few facilities of the telephone company are employed exclusively for interstate use, so the North Carolina Utilities Commission decision all but abrogated *Carterfone* in North Carolina.

In *Telerent*, the FCC made a declaratory ruling that *Carterfone* preempted the state's authority in the interconnection area. The decision rests on two grounds. First, the Commission emphasized that different federal and state interconnection rules cannot be reconciled with the fact that the telephone plant is used in common for all local and long distance telephone calls. Thus, Congress' grant of plenary regulatory power to the Commission must allow it to override an inconsistent state rule. Secondly, the Commission concluded that the legislative history of the Communications Act indicates that state power in the communication field was limited to regulation of rates and services, not regulation of hardware. The Commission decided that states can only adopt interconnection rules not inconsistent with the policies set forth in *Carterfone*.

Because almost all telephone machinery is employed for interstate and intrastate service, *Telerent* does not answer the question whether the state has authority over interconnection and foreign attachment if the device can only be used for intrastate messages. Yet the traditional structure of banking might put a local EFT system into this curious classification. For instance, if ATMs were deemed bank branches, their use across state lines would be prohibited. Then an ATM network would fall into the limbo left by *Telerent* of a communication system used for only intrastate messages. Banking regulators might avoid this eventuality by allowing local EFT systems to cross state lines. Thus, this aspect of communications regulation might be an added incentive to proceed in that direction.

52. *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974).

CONCLUSION

Practical difficulties stand in the way of direct FCC regulation of EFT systems, and a move in that direction is highly unlikely. EFT systems may benefit from the experience of communication regulation, though, regardless of the authority of the FCC. Certain aspects of common carrier regulation as it has evolved in this country provide a model for enforcing access to EFT systems by various members of the financial industry, first, by providing a way in which information about available projects can be publicized, and secondly, by creating a uniform system of accounting by which discrimination in the cost of participation can be reduced.

The financial industry should also be interested and involved in the outcome of the interconnection issue, for it will indirectly influence the development of EFT systems. In particular, as the NCEFT and various state legislatures weigh the merits of adopting or rejecting the Comptroller of the Currency's interpretation of "branch bank," they might consider the communications implications, as well as the banking implications, of a system of intrastate EFT systems.