Coordinating Domestic Telecommunications Facilities and Services in a Changing Environment: An Overview and Some Suggestions About Negotiating Processes

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Program on Information Resources Policy

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Executive Summary

• The negotiating processes for achieving coordinating action for telecommunications facilities and services are likely to become more visible. This will result from increased competition and a greater variety of offerings. If negotiations fail to achieve needed coordination, greater government involvement may result than existed prior to the deregulation of the telecommunications industry.

• Up to now, the single integrated switched telephone network, which makes possible the connection of any customer's station with any among millions of other stations, was operated by AT&T in partnership with the Independent Telephone Companies. Management and administration techniques coupled with some negotiating processes were employed to coordinate--fit together--technical, administrative and operational aspects of, for example, local exchanges, long lines, hardware supplies, and network planning. The resulting telephone facilities and services were convenient, effective, reliable and survivable in the face of natural or man-made disasters. The coordinating processes which required minimal government participation were largely invisible to the users and, therefore, have been taken for granted for accomplishing what needed to be done.

• Examples of proposed legislation and regulation indicate that the principal objectives of policymakers (other than those involved with national security and emergency preparedness) are to further competition and to achieve antitrust accountability by participants in coordinating negotiations. Achieving negotiating processes which result in coordinating agreements, thus avoiding increased government involvement, is not included among the principal objectives.

• This conclusion raises a question of national telecommunications policy: Should effective coordination resulting from concerted action be sought as an objective to complement separate action demanded by competition?

• Consideration of the following questions may facilitate effective negotiating for coordination purposes and may lead to the development of due process in this area--which differs from due process for adversary processes:

(1) Might the principles underlying the Tunney Act dealing with antitrust consent decrees, if applied to telecommunications coordinating processes, achieve a better balance between the needs for effective negotiating and adequate public accountability than would detailed procedural regulations of such processes?

(2) Are coordinating aspects for national security and emergency preparedness of the telecommunications infrastructure separable from commercial civilian aspects so that separately conducted coordinating processes would be effective?

(3) What might be learned from coordinating processes employed within energy and transportation infrastructures that might be applied to telecommunications coordinating processes?

I. INTRODUCTION: PURPOSES OF THE STUDY

The purpose of this paper is to alert users of point-to-point switched two-way telephone, data and other telecommunications facilities and services and regulators of the emerging competitive telecommunications industry to a possible threat: Those involved may underestimate the difficulties of achieving coordination by competing entities of different parts of the facilities and services. However, if fitted together properly through concerted action, these entities will furnish the wanted end-to-end telecommunications facilities and services and thus avoid increased government involvement.

Point-to-point switched two-way telecommunications--the kind of telecommunications with which this paper is concerned--involves the connectability of one customer's station (telephone or other terminal equipment) with any one among millions of other stations. Up to now, the single integrated telephone network was operated by AT&T in partnership with the Independent Telephone Companies. Management and administration techniques coupled with some negotiating processes were employed to coordinate--fit together--technical, administrative, and operational aspects of, for example, local exchanges, long lines, hardware supplies, and network planning. The resulting telephone facilities and services were convenient, effective, reliable and survivable in the face of natural or man-made disasters. The coordinating processes which required minimal government participation were largely invisible to the users and, therefore, have been taken for granted for accomplishing what needed to be done.

With the advent of competition and a greater variety of facilities and services, the negotiating processes leading to concerted action are likely to be more visible and may entail greater government involvement, especially if negotiations fail to achieve agreement on needed coordination.

In dealing with the roles of negotiating processes for coordinating purposes, this paper addresses the following questions:

- What is involved in coordinating domestic telecommunications facilities and services?
- What changes are occurring in the environment in which coordination is sought?
- What processes and organizational mechanisms are employed to identify where coordination is needed and how it may be achieved?
- When are negotiating processes appropriate to identify where coordination is needed and to determine how it may be achieved?
- How can negotiating processes be made effective to achieve coordinating objectives and how at the same time can participants in such processes be held accountable without affecting unduly the effectiveness of negotiating processes?
- What can be learned from other industries in which coordination is sought (such as the energy and transportation industries) regarding the processes and organizational mechanisms employed for coordinating purposes?

II. COORDINATION AND ENVIRONMENT

The subject of this paper requires a basic understanding of (A) what is involved in coordinating domestic telecommunications facilities and

services, and (B) how the environment which needs such coordination is changing.

A. What is Coordination?

Point-to-point switched two-way telecommunications--the kind of telecommunications with which this paper is concerned--involves the connectability of any customer's station (telephone or other terminal equipment) with any one among millions of other stations.

The stations may be in customers' homes, offices, automobiles, planes, boats, or field commanders' command posts in trenches. The connections may be achieved through wires, cables, optic fibers, satellites, electromagnetic (radio) waves, analog or digital signals, or some new technology that may replace or complement existing ones.

The establishment of such connections in a convenient, effective, reliable and survivable (in the face of natural or man-made disaster) manner requires coordination--the fitting together--of different technical, administrative and operational aspects. This may involve planning and operation of a single integrated network or coordination of several independent or semi-independent networks. In either case, the networks must be adequate to meet expected demands. It may involve selecting suitable hardware compatible with hardware already in place; restoring networks that have been destroyed in varying degrees by natural forces, sabotage or enemy action; the pre-planning on a contingency basis of restoration activities, and the like.

The processes for coordinating parts of particular facilities or services depend on the structure of the industry. If a single provider

organization operating a single integrated network would be involved--which actually never was the case--in establishing and maintaining such connections for a single service (for example, telephone service), management and administration techniques would coordinate among the organization's various departments or subsidiaries responsible for local exchanges, long lines, hardware supplies, network planning, etc. When such single integrated network was operated in partnership by several complementary organizations--as it was until now by AT&T and the so-called Independent Telephone Companies--negotiating processes in addition to management and administration techniques were employed. In such cases, government was involved only minimally.

If, on the other hand, an increasing number of autonomous organizations operate several independent or semi-independent networks which complement or compete with one another, then concerted actions resulting from negotiations and agreements or from government regulations or from combinations of such processes may be required to achieve desired degrees of coordination. The negotiations may involve, in addition to the autonomous provider organizations, third parties (such as trade or professional associations) to assist the provider organizations in reaching coordination agreements, or they may involve varying degrees of initiatives, supervision, monitoring or reviews by government agencies.

Alternatively, coordination of multiple independent networks may be established by governmental directives embodied in legislation, regulations or judicial decrees ordering the taking of whatever steps may be considered necessary to achieve specified coordination objectives. Industry advisory committees may be established to assist government agencies to determine what the coordination objectives should be and what steps should be taken

to reach them. The members of such committees also engage in a form of negotiations. These are aimed at exchanging information, consensus building regarding the tasks assigned to such committees, assigning priorities to such tasks and determining ways of implementing such tasks, for example.

When AT&T and the so-called Independents operated a single integrated network and when they were the exclusive providers of terminal equipment to customers, the customers expected, and AT&T and the Independents undertook, to assume all of the necessary coordinating responsibilities, including maintenance of terminal equipment. But where several providers are involved, customers may have to assume some of the coordinating responsibilities such as keeping customer-owned terminal equipment in good working order.

Providers' or consumers' individual actions may have coordinating effects, such as suppliers offering hardware which is compatible with hardware offered by other suppliers or consumers purchasing particular consumer items while declining to purchase other similar items.

With the breakup of AT&T, the development of competing long-line networks and customer-owned private networks, the possibility of new local exchange facilities and new customer-owned terminal equipment for new services, the subject of coordination of telecommunications facilities and services assumes new importance. For this reason this paper will focus principally on coordination sought through concerted actions. The concert is achieved by means of negotiations which result in agreements or in consensus building without formal agreements aimed at limiting or eliminating separateness, isolation and autonomy on the part of provider and user organizations involved. The coordination achieved may be loose or

stringent, optional or compulsory. Thus we recognize varying degrees of coordination.

The paper recognizes but does not discuss in detail coordinating processes involving providers' or users' individual actions which collectively have coordinating effects as well as governmental directives aimed at achieving needed coordination.

B. The Changing Telecommunications Environment

Significant changes in the telecommunications environment render coordination both necessary and difficult. The confluence of advanced communications and information technologies is making available increasingly diverse compunications facilities and services. The organizations furnishing such facilities and services are becoming correspondingly more and more differentiated. For example, organizations such as MCI and Southern Pacific Communications (SPC) offer long distance telephone service in competition with traditional telephone companies; traditional telephone companies which offer both long distance and local services offer regulated common carrier telephone services as well as unregulated enhanced compunications services; satellite companies offer transponder facilities on a rental basis; organizations such as Satellite Business Systems (SBS) offer telecommunications services to large users; and hardware suppliers offer terminal equipment to telephone subscribers in competition with telephone companies.

Large scale users of compunications facilities and services either establish their own private systems or contract for bulk facilities and services furnished by telecommunications carriers or other suppliers.

Governmental policies seek to place increased reliance on competition relative to monopoly and on marketplace forces relative to regulation.

In the earlier telecommunications environment, a single dominant monopolistic organization furnished telephone facilities and services in partnership with other monopolistic organizations. In such an environment, coordination was achieved primarily by means of managerial processes within the dominant organization and to a limited degree by means of negotiating processes between the dominant organization and its partners. In this earlier environment, the user organizations' telecommunications needs were not too diverse, and private telecommunications systems or bulk procurement of telecommunications facilities and services were limited largely to governmental organizations.

In this earlier environment, coordination was achieved primarily by managerial methods and only incidentally by means of negotiations and agreements. Government directives embodied in legislation, regulations or judicial decrees were largely unneeded.

A coordinating situation which occurred during the period of transition from yesterday's to tomorrow's environment will serve to elucidate the factual circumstances that may be involved in coordinating situations and the questions that may be raised concerning the coordinating methods employed.

III. AN EXAMPLE OF A COORDINATING SITUATION AND QUESTIONS RAISED CONCERNING COORDINATING METHOD EMPLOYED

The following example describes the factual circumstances in a particular coordinating situation, the parties involved and their respective concerns, the coordinating mechanism employed in achieving the desired

objectives, and the questions raised concerning the particular coordinating device selected by the parties.

A. The Coordinating Situation and the Coordinating Method Employed

In the late 1970s, AT&T Long Lines, the Bell Operating Companies, and the Independent Telephone Companies (the latter assisted by the staff of the United States Independent Telephone Association [USITA]) organized a coordinating mechanism--the Bell-Independent Planning and Operations Group (BINPOG).

The participants in BINPOG considered themselves partners. The objectives of this mechanism involved the planning of the optimal configuration of the integrated public switched network. The objectives included, among others, guiding the expansion of the network to meet forecasted customer needs in an optimal manner; guiding the introduction of new technologies in planning the evolution of the network; coordinating the introduction of new network service capabilities; and providing uniform network performance and interface standards.

The incentive for the Independents to participate in this joint planning mechanism was to eliminate losses of toll revenue resulting from the introduction of new technologies such as large-scale electronic switching centers which would take the place of smaller switching centers owned by individual Independents. Joint ownership by AT&T and an individual Independent of the new switching centers was considered the appropriate device by which such losses would be eliminated, thus removing a hurdle in the path of joint planning of an efficient integrated public switched network.

Technological innovation of new large-scale electronic toll switching centers was intended by Bell and the Independents to effect significant economies by making possible favorable trade-offs between economies of scale of large toll switching centers and lesser added transmission costs. In addition, the centers were expected to make possible the offering of a wide variety of new service features.

As joint planning progressed, some of the approximately 1,000 Bell-owned and 500 Independent-owned toll switching centers would be phased out by new large-capacity electronic toll switching centers serving very large geographical areas which frequently would include several telephone companies' operating areas. (How many centers would be involved would depend on the outcome of such planning.) If all new centers were owned by the Bell System, the revenues earned by many Independents in providing long distance message telecommunications services would be reduced. (Revenues of regulated utilities depend on who has invested how much in the switching centers or other facilities needed to render regulated toll services.) Thus without the introduction of the joint ownership device, the Independents might be inclined to resist the introduction of technological innovations such as large-capacity electronic toll switching centers.

B. Questions Raised Regarding Joint Ownership Device

The joint ownership device raised a number of questions regarding the possible impacts of that device on the structure of the industry.

As seen by the former Chairman of the House Subcommittee on Communications, Lionel Van Deerlin, the joint ownership device "...might inhibit the development and the application of innovative technology...."[1] The

former Chairman of the FCC, Charles D. Ferris, observed that it "...might well result in a further erosion of the 'independence' of non-Bell companies; further consolidation of what is already a highly concentrated multiservice industry; and increased resistance by that industry to both technological and market changes, including the expanding role of competition in these markets...."[2] A former Assistant Attorney General, John H. Shenefield, in charge of the Antitrust Division of the Department of Justice stated that it "...may tend to eliminate any incentive for independent telephone companies to develop their own such facilities or make use of companies other than AT&T for such services...."[3]

The National Telecommunications and Information Administration (NTIA) formally petitioned the FCC on October 10, 1980:

> ...to issue a Notice of Inquiry and Proposed Rulemaking to review the competitive and public policy implications of currently pending plans of AT&T and the Independent telephone industry to consolidate certain toll facilities and to make related adjustments in the ownership of existing or planned communications facilities....[4]

In its statement containing a detailed discussion of related Commission proceedings, AT&T asked the Commission to dismiss the petition on the grounds that "...concerns raised by NTIA are essentially the same as those which have been and are being considered by the Commission in other proceedings."[5]

USITA commented that:

> ...formal inquiry at this time might well result in expending the Commission's limited resources in a proceeding on abstract and possibly academic matters. USITA respectfully suggests, therefore, that no action be taken on the Petition's request for a notice of inquiry and rulemaking. USITA would welcome the opportunity, however, to meet informally, under the Commission's auspices, if further explanation of the Report appears necessary or desirable.[6]

MCI commented:

> NTIA has raised some very important questions in its Petition for Notice of Inquiry and Proposed Rulemaking. As more becomes known about what AT&T and USITA have been doing behind closed doors, it is quite likely that further serious questions will be raised. The Commission should undertake to find out what has been going on and should seek comments on the public interest implications of the planning process, both as it is now conducted and as it may be restructured.[7]

Satellite Business Systems (SBS) commented that the FCC:

> ...has the legal rights to make such an inquiry to require appropriate changes... [and that] ...such information may be vital to effect the Commission's policies being formulated in Document No. 78-72. For the reasons stated above, SBS encourages the Commission to institute an appropriate Notice of Inquiry and Rulemaking.[8]

Southern Pacific Communications Company (SPC) filed comments in support of the petition "...urging the Commission to promptly commence a proceeding to explore the implications of the Industry Report."[9]

United States Transmission Systems, Inc. (USTS) commented:

> It is necessary that the Commission investigate this matter before the project is actually implemented in order to determine, if nothing else, the anti-competitive effects of the project. Indeed, the Commission is required to conduct such an investigation. 47 U.S.C. Section 314. Accordingly, USTS strongly urges the Commission to grant the petition of NTIA.[10]

At this writing, the FCC has not issued the requested Notice of Inquiry and Proposed Rulemaking, and no final judicial determination has been made regarding any of the questions raised above. Furthermore, while the divestiture by AT&T of the Bell Operating Companies (BOCs) is taking place, which results in changes in the relationships between the Bell system companies (i.e., AT&T and the BOCs) and the Independent Companies, the joint ownership device is relegated to a state of suspended animation. It may or may not be activated in the form originally contemplated or in a somewhat modified form.

IV. COORDINATING ORGANIZATIONS AND NEGOTIATING PROCESSES: AN OVERVIEW

A. Coordinating Organizations

Coordinating organizations and processes come in an infinite variety depending on the parties and the scope of the objectives involved. The parties may be exclusively providers of telecommunications services and facilities. They may have an on-going, partnership-like relationship (as in the case of Bell and the Independents), or they may have relationships of competitors, of wholesalers and retailers, suppliers and customers, or mixtures of those relationships. The parties may include so-called third parties, such as trade or professional associations, supplier or consumer organizations or labor unions. The parties may be governmental policymakers in such fields as national security, international relations, foreign trade, regulatory or antitrust activities. They may be large-scale governmental consumers such as the Department of Defense or the General Services Administration.

The coordinating objectives and the corresponding coordinating organizations which are concerned with the objectives may be broad, general and large or narrow, specific, and small. The scope and size of objectives and organizations can be measured only approximately and not with any degree of precision.

At one end of the spectrum might be placed the objective of establishing compatibility criteria for equipment used by Bell and the Independents in operating the basic telephone network. For this coordinating purpose, Bell and USITA established Engineering and Equipment Compatibility Committees.

Compatibility criteria are governed by engineering considerations, but they may have economic and competitive as well as regulatory impacts. For example, the cost of equipment may be increased or decreased; market competition may be affected since product differentiation might be more limited; and regulators might become involved with the appropriateness of the criteria.

After January 1, 1984, AT&T's divestiture will become effective and AT&T will discontinue developing industry-wide technical standards, administrative and maintenance procedures, and operating principles for the telephone network. To assume some of these coordination responsibilities after that date, the exchange carriers created an Exchange Carriers Standards Association, Inc. (ESCA). One of the functions of ESCA will be to represent exchange carrier interests in forums concerning technical standards that may affect these carriers. The other purpose will be to sponsor and fund the staff for a public standards committee to formulate voluntary standards for interfaces with exchange networks. The industry standards committee--designated the "T-1 Committee"--will formulate these standards pursuant to procedures established by the American National Standards Institute (ANSI).

The T-1 Committee will consist of exchange carriers, interexchange carriers, enhanced service providers, hardware manufacturers, user groups, government agencies, and any other parties with a direct and material interest in telecommunications standards.

A somewhat broader objective than equipment compatibility for the basic telephone network is the objective of establishing technical standards for equipment used by all providers and users of telecommunications services and facilities. Two organizations which might

be characterized as private third party organizations are involved in connection with the achievement of this objective: the Institute of Electrical and Electronic Engineers (IEEE)--a professional association--and the Computer Business Equipment Manufacturers Association (CBEMA)--a trade association. The latter works in this arena under guidelines developed by the American National Standards Institute (ANSI), a third party association concerned with the establishment of national and international technical standards generally.

At the other end of the spectrum, the scope of coordination objectives may be broad and general, as in the case of achieving national security and emergency preparedness (NSEP) objectives aimed at meeting emergency conditions and assuring survival of the communications infrastructure as a whole.

A fairly large coordinating organization designed to achieve those objectives--the President's National Security Telecommunications Advisory Committee (NSTAC)--was established by Executive Order.[11] Under the provisions of the Executive Order, the Committee consisting of not more than 30 members is appointed by the President who also designates a chairman and a vice chairman. The functions of the Committee include providing "information and advice to the President regarding the feasibility of implementing specific measures to improve the telecommunications aspects of our national security posture" and "technical information and advice in the identification and solution of problems which the Committee considers will affect national security telecommunications capability."[12]

A coordinating organization designed to implement NSEP planning has been established within the FCC--the National Industry Advisory Committee

(NIAC). NIAC was established originally in 1958 but was reorganized in 1982 to advise the Commission on matters related to NSEP, the National Communications System (NCS) and NSTAC. The activities of NIAC in conjunction with NSTAC are being carried out according to a Memorandum of Understanding between the FCC and NSTAC.

Two organizations which have very broad charters in the fields of science and technology--the National Research Council (NRC) and the National Science Foundation (NSF)--have participated sporadically in an advisory capacity in connection with NSEP coordinating efforts. The NRC, for example, recently published a report entitled "National Joint Planning for Reliable Emergency Communications."[13] The report contains an overview of the changes which are taking place in the environment in which NSEP coordination has to be achieved and how appropriate industry-wide machinery might be developed to achieve the desired objectives.

B. Negotiating Processes

A wide range of negotiating processes are conducted for coordinating purposes depending on goals and participants. On the one hand, negotiating processes involve specific issues and are aimed at written agreements or proposed government regulations. On the other hand, exploratory negotiations aim at sharing relevant information and, insofar as possible, consensus building regarding problems, objectives, means for reaching objectives, priorities among objectives, etc.

The negotiating processes also differ depending on the interests represented by the negotiators and their relationship to one another. The participants may be engaged either in competitive or complementary

activities. Some of the participants may represent regulators or they may be "third parties" such as facilitators, mediators, or resource persons.

To be effective, written agreement-directed negotiating processes usually have to be limited to a number of participants who can conveniently be seated facing one another around a table. Exploratory negotiating processes involving information sharing and consensus building can accommodate more participants and the participants may be divided among panels or committees assigned different tasks.

Participants in written agreement-directed negotiations must have incentives to negotiate actively and in good faith. They participate because they expect to improve their status by reason of any agreements that may be reached.[14] Participants in exploratory negotiations may lack such incentives and, therefore, have low expectations regarding the outcome of consensus-building efforts. Consequently, they may limit themselves to going through motions of participating, rather than being active contributors or even playing leadership roles.

Recent regulatory efforts regarding coordinating processes on the part of Congress, the Executive Branch, the Federal Communications Commission and the courts (Judge Greene in the case of the MFJ in particular) have sought to establish categories of coordinating processes (1) depending on the subjects involved--commercial purposes as distinguished from NSEP purposes--and (2) depending on the participants involved, that is, coordinating processes involving exclusively carriers which are not in competition with one another, such as exchange carriers, and coordinating processes involving carriers and other organizations which are in competition with one another, such as inter-exchange carriers, hardware suppliers, etc.

Examples of such efforts are presented in the following two sections.

V. REGULATING COORDINATING PROCESSES INVOLVING COMMERCIAL SERVICES

A. Record Carriers

The Record Carrier Competition Act of 1981[15] provides that the Federal Communications Commission shall require each record carrier (i.e., telegraph or cable company) to make available to any other record carrier, upon reasonable request, full interconnection with any facility operated by such record carrier. Under the provisions of the statute, such facility is to be made available through written agreement, upon terms and conditions which are just, fair, and reasonable, and which are otherwise consistent with the purposes of promoting the development of fully competitive domestic and international markets in the provision of record communication service.

The Act requires the Commission to convene a meeting among all record carriers (required by the Commission to be parties to any such interconnection agreement) for the purpose of negotiating any such agreement. Representatives of the Commission are required to attend such a meeting for purposes of monitoring and presiding over such negotiations. If the parties fail to enter into an agreement before the end of the 45-day period following the beginning of such a meeting -- and that period has expired -- "then the Commission shall issue an interim or final order which establishes a just, fair, reasonable and non-discriminatory agreement which is consistent with the purposes of this section" [i.e., "...promote the

development of fully competitive domestic and international markets in the provision of record communications service..."].[16]

B. Bell Operating Companies

The Modification of Final Judgment (MFJ) entered on August 24, 1982[17] provides that the Bell Operating Companies (BOCs) "shall provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness" (AT&T Reorganization, [B]).[18] This provision is discussed in detail below in Section VI.

C. Telephone Exchange Carriers

In a Notice of Proposed Rulemaking,[19] the Commission proposed that

> ...the carrier association established by the Third Report[20] affords an appropriate structure for limited joint planning [for interconnections]....and that there is no need to establish some form of parallel organization the membership of which would overlap extensively with the membership of the established organization.[21]

The Third Report contains the following provisions regarding the organizational structure of the association: The membership of the carrier organization mandated by the Commission is limited to exchange carriers that participate in access charge[22] revenue pools administered by the association. Its governing board consists exclusively of exchange carrier representatives. Neither the Commission nor state commissions, interexchange carriers nor consumers are represented on the board. Staffing arrangements are to be determined by the association.

The Notice of Proposed Rulemaking contains the following provisions regarding the association's limited joint planning activities:

> The Commission recognizes the following joint planning objectives:
>
> ...development of industrywide technical standards, operating principles, administrative procedures and maintenance procedures; informal resolution of service and maintenance disputes which may arise where there is divided responsibility for elements of a joint through service; development of standby procedures and facilities to support extraordinary communications requirements (e.g., NSEP communications); and development of appropriate forecasting and circuit requirements amalgamation procedures to facilitate planning for construction of new facilities with relatively long "lead" times....[23]

With regard to the desirability and risks of concerted action, the Commission comments as follows:

> ...Concerted action by competitors may, if carried too far, be anticompetitive and inimical to the pro-competitive policies of this Commission. However, many forms of planning are not necessarily anticompetitive, and indeed may be desirable. Moreover, the fact is that such planning has proceeded for over a century, and immediate discontinuance of all such planning could disrupt the provision of service to the public.[24]

The provisions dealing with the association's joint planning procedures are designed to

> ...serve three primary objectives. First, the public should be given ample opportunity to observe the processes of the association and to examine the decisions and other actions of the association. Second, this Commission should reserve sufficient authority to oversee the operations of the association in order to ensure that actions taken by the association are consistent with the policies of the Act and any rules we may adopt herein. And third, sufficient flexibility should be incorporated in the procedures of the association to enable it to carry out its planning functions efficiently and effectively.[25]

The Commission proposes that the association be governed by bylaws submitted to, and approved by, the Commission; the Commission will have authority to monitor the activities of the association by sending an official representative to the association's meetings who will have

authority to require the association to terminate any particular proceeding if he concludes that actions taken in the proceeding, or the manner in which the proceeding is being conducted, violate the Act or the rules established by the Commission; the meetings be open to the public, unless the association determines that matters to be discussed involve classified information or trade secrets and commercial or financial information which is privileged or confidential; the association be required to keep minutes of its meetings which must be filed with the Commission and made available for public inspection;[26] the association be required to permit interexchange carriers (including voice and data communications carriers) and other users of exchange access facilities as well as equipment manufacturers to make written and oral presentations to the association regarding interconnection planning matters under consideration but they are barred from playing an active role in the association's decision making.[27]

The Notice of Proposed Rulemaking failed to mention the organization by the exchange carriers of the Exchange Carriers Standards Association (ECSA) described above in Section IV. The functions of ECSA would parallel to a considerable degree the limited planning functions which the Commission would assign to the Exchange Carrier Association (ECA). The Commission mandated the ECA to develop tariffs regarding access charges and to perform financial functions in connection with access charge revenue pools.

The Commission has invited comments regarding these proposed procedures, including whether the proposed rules should address informal planning contacts and other arrangements among exchange carrers which, as the Commission notes, may make important contributions to the efficiency of interconnection planning.[28] The Commission points out that

> ... although it is true that competition is an important factor which should be given weight in the administration of the Act, this Commission also is required by the public interest standards of the Act to consider factors other than competition, such as the efficiency of the communications network, the provision of reliable service to the public, and the future needs of carriers and users. In sum, we believe that we have sufficient authority under the Act to sponsor procedures as outlined, and that use of such procedures would not raise antitrust issues. Of course, in formulating final rules and requirements herein, we will give weight to the views of the Attorney General of the United States regarding any aspects of the association's activities which may have anticompetitive effects.[29]

D. Telephone Exchange and Interexchange Carriers

While the following legislation is no longer under active consideration, the provisions dealing with coordinating negotiations are examples of the thinking that underlies such provisions. Therefore, the provisions are still relevant and worth considering.

S.898,[30] the Senate-passed Telecommunications Competition and Deregulation Act of 1981, contained procedural provisions to govern coordination negotiations initiated by carriers (including carriers which are in competition with each other) where the objectives of the negotiations are the planning and agreeing to:

> (1) the design, development, construction, management, maintenance, or coordination of any network of telecommunications services or facilities (including the establishment of joint or through routes or services);
> (2) the development of technical standards applicable to such services and facilities; and
> (3) the development of technical standards for customer-premises services for handicapped people;[31]

To such negotiations, the following procedural requirements would apply:

> ...any meeting...shall take place after notice is given by the carriers involved to the [Federal Communications] Commission, and a representative of the Commission shall be given an opportunity to attend, or otherwise monitor,

> any such meeting at the time it is conducted. The Commission shall make any such notice available at the offices of the Commission for public inspection immediately upon receipt of such notice by the Commission. The failure of the Commission to exercise such authority to attend or otherwise monitor a meeting shall not impair the authority of such carriers to conduct such meetings under this section.
>
> ...a transcript of each meeting shall be filed immediately with the Commission and shall be available at the offices of the Commission for public inspection not later than 30 days after the meeting involved is conducted except that no transcript may contain any material the disclosure of which...could adversely affect the national defense and security or emergency preparedness of the Nation...[32]

The above procedural requirements would not have applied to:

> (1) any meetings where the carriers involved...are not in competition with each other with respect to the offering of such service or facility;
> (2) the routine nondiscriminatory contacts among carriers necessary to reach or execute the joint decisions made at any meeting for network planning, etc. purposes; and
> (3) any meeting initiated by the Commission (upon its own initiative or upon the request of any person or interested telecommunications carriers) for the purposes of:
>
> (1) assuring the establishment and maintenance of networks of telecommunications services and facilities adequate to maintain the national defense and security and the emergency preparedness of the Nation; and
> (2) assuring that all telecommunications carriers have developed and established such plans and arrangements as may be necessary to comply with the provisions of section 233 of the Act (President's authority regarding protection and restoration of essential telecommunications).[33]

Similar network planning provisions are contained in H.R. 5158,[34] the Telecommunications Act of 1981, which was introduced by Rep. Timothy E. Wirth, the Chairman of the telecommunications subcommittee of the House Committee on Energy and Commerce. The bill was reported on March 25, 1982 by the Subcommittee with amendments to the full committee but was withdrawn by Rep. Wirth shortly before the end of the 97th Congress after several

days of mark-up sessions conducted by the full committee. Again, although this legislation is inactive, the thinking underlying its provisions dealing with coordinating negotiations is still worthy of consideration.

Section 261 of that bill declares that:

> (a) It shall be lawful for carriers under the auspices of the Commission, jointly to meet, plan, and enter into agreements and execute any such agreements on matters relating directly to the design, maintenance, management, development, and coordination of any network of transmission services or facilities (including the establishment of through routes), or the development of proposed technical standards applicable to such services or facilities. Nothing in this section shall be construed to authorize any meeting or other conduct among carriers the purpose or effect of which is to engage in any activity which is prohibited by Federal or State antitrust laws, otherwise to limit the application of Federal or State antitrust laws, or to authorize the disclosure of any classified information.... (b) The Commission shall establish a network planning committee, membership in which shall be open to all carriers, which shall recommend technical standards and advise on matters of network planning and management.[35]

VI. REGULATING COORDINATING PROCESSES INVOLVING NATIONAL SECURITY AND EMERGENCY PREPAREDNESS (NSEP) PURPOSES

National security and emergency preparedness (NSEP) coordination constitutes a special aspect of coordination of telecommunications facilities and services.

A. Governmental Parties

The principal governmental parties involved are the President as Commander-in-Chief, the Department of Defense (DoD), the Defense Communications Agency (DCA), and the National Communications System (NCS). By means of the Defense Communications System (DCS), the DCA furnishes

long-haul, point-to-point telecommunication services to the National Command Authority, the Department of Defense and some other designated governmental agencies. More than 85% of the required telecommunication facilities are leased from commercial carriers.

NCS was organized in 1963 as a confederation of the telecommunications assets of 11 Federal agencies, including the Departments of State and Defense, the Federal Aviation Administration, the Federal Emergency Management Agency, the General Services Administration, the Central Intelligence Agency, and the National Aeronautics and Space Administration (NASA). NCS's primary mission is to ensure that Federal telecommunica- tions resources can be operated effectively to satisfy Federal telecommunications needs in any possible emergency situation ranging from localized natural or man-made disasters to national emergencies, including a nuclear attack.

The director of the DCA has been designated by the Secretary of Defense to act as manager of the NCS.

The Federal Communications Commission is involved collaterally as a result of its regulatory authority and may implement NSEP plans.

As has been discussed above in section IV, coordinating machinery which is designed to deal with NSEP objectives has been established by the President and the FCC -- NSTAC and NIAC.[36]

Both of these coordinating organizations are to function as interfaces between the diverse suppliers of telecommunications services and facilities on the one hand and between parties in public sector on the other hand.

B. Objectives

According to the Director of the Defense Communications Agency, Lieutenant General William J. Hilsman, DCA and NCS attempt to perform their respective missions by seeking to attain the following specific objectives:

> Connectivity between the National Command Authority and our national forces before, during, and after nuclear attack.
>
> Support for the mobilization of forces.
>
> Operational control of forces during a protracted nuclear conflict.
>
> Support for the continuity of government during and after nuclear war and natural or man-made disaster.
>
> Protection at all times of sensitive information transmitted over the telecommunications system.[37]

Thus, in addition to reliable, responsive, and flexible commercial telecommunications (i.e., adequate quality, readily available, nationwide service) necessary to meet all users' service needs, DCA and NCS also require:

> Survivability--a system able to effectively perform during and after a disaster or period of military conflict.
>
> Restorability--alternate routing, facilities redundancy, and interconnection and interoperation capability sufficient to provide rapid restoration of service to damaged areas of the Nation.
>
> Credibility--a system of sufficient robustness to contribute to the Nation's deterrence posture by creating the perception in any potential aggressor that it can and will provide service during and after any attack or other crisis situation."[38]

Additionally, DCA and NCS are seeking a pre-established mechanism to assure that the "the paperwork" will eventually catch up with the orders placed, and that the necessary funding will be provided. As an example, DoD cited the relocation of 120,000 Cuban refugees whom DoD placed in

military installations in several states. This resulted in sizable new communications requirements. At the request of DoD, AT&T Long Lines worked with the Bell Operating Companies to provide the necessary facilities without prior federal government payment. In this instance Long Lines handled centrally all paperwork affecting the BOCs.

These objectives have taken on increasing importance: New technologies, such as satellites and nuclear weapons, have changed dramatically the nature of the threat to the nation's telecommunications resources; those responsible for the nation's security would like to ensure the survivability of these vulnerable resources.

Presidential Directive 53 identifies some of the objectives which have to be achieved to assure enduring command and control communications for national defense purposes during and after any national emergency:

> To the maximum feasible extent, interstate communications carrier networks, including those of specialized and domestic satellite carriers, should be interconnected and capable of interoperation in emergencies at breakout points outside of likely target areas.
>
> There must be a capability to manage the restoration and reconstitution of the national telecommunications system following an emergency.
>
> National security and continuity of government telecommunications requirements must have priority in restoration of services and facilities in national emergencies.
>
> Information must be made available to allow commercial carriers to locate backbone facilities, where possible, outside of likely target areas.
>
> Functionally similar government telecommunications networks must be capable of interchange of traffic in emergencies.[39]

Those in government who are responsible for national security and emergency preparedness are seeking statutory recognition in legislation that the achievement of their objectives is at least as important as the

achievement of economic, social and other objectives. Thus, they seek, for example, elimination of any restrictions on any carriers in providing telecommunications facilities or services (including, for example, customer premises equipment) during times of emergency, regardless of how those restrictions are imposed (by other statutes, by judicial decrees or through administrative rules, regulations or orders).

C. Processes

DoD, DCA and NCS consider prior joint network planning and preparation for centralized network management operations during an emergency or disaster essential to achieve their objectives. At present, DCA and NCS state, they are able to turn to Bell and the Independents who possess a central management organization able to draw manpower and equipment from anywhere in the United States. They point to the existence of standardized equipment, training, and installation methods and maintenance practices which ensure the expedited utilization of available resources, thereby permitting rapid restoration and provision of service in any location. According to Lieutenant General Hilsman:

> Today, the telecommunications industry, with the leadership of the Bell System, performs these activities. We are convinced that continuation of this capability and its extension to involve all telecommunications carriers, is a matter of extreme importance, both now and in the future, less regulated, more competitive telecommunications marketplace. We at DoD, and the NCS, submit, therefore, that S.898 must contain a provision authorizing and ensuring that all telecommunications carriers develop and participate in joint carrier planning and centralized network management.[40]

Subsequently, in a letter to Congress, DoD insisted that prior joint network planning for achieving national security and emergency preparedness objectives be not only authorized but also required by statute.

> ...Without a provision both authorizing and requiring prior joint carrier planning, the Nation's telecommunications resources will become less and less prepared to collectively respond to reconstitute telecommunications impaired or destroyed by natural disasters or national emergencies (e.g., nuclear attack). The FCC's role in the planning process should also be specified. The carriers should be required to give notice of any such meetings to the FCC and afford the FCC an opportunity to attend, or otherwise monitor, the meetings. The failure of the FCC to attend such a meeting should not, however, impair the ability of the carriers to meet. The Commission, moreover, should be given the enforcement authority to ensure such planning occurs....A mechanism to prevent disclosure of national defense and security information developed in the planning meetings must also be established....[41]

In its analysis of the impact of the proposed antitrust consent decree (subsequently approved by Federal District Judge Harold Greene) upon the provision of telecommunications services to DoD,[42] the Department stressed the importance of the so-called "single point of contact provision."

DoD notes that the Department of Justice (DoJ), in its Competitive Impact Statement (CIS) filed with the U.S. District Court and published in the Federal register[43] had stated that the centralized administrative entity "...would be separate from AT&T and AT&T could not participate in or contribute to its functioning"; and, because any such entity "...would be a venture among independent corporations, antitrust limitations on joint activities would apply."[44] Additionally, DoJ stated BOCs' participation in a government- or industry-established "centralized coordinating body" through which all carriers meet NSEP needs, "could constitute compliance" with the "single point of contact provision" of the proposed decree.[45]

D. Proposed NSEP Legislation

In mid-1983, the Senate was again considering NSEP coordinating provisions which are contained in S.999, the "International

Telecommunications Act of 1983."[46] In testimony on this legislation before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, FCC Commissioner Dawson, who has been designated Defense Commissioner, and LTG Hilsman submitted the following draft provisions which they urged to be substituted for the provisions contained in S.999 as originally introduced:[47]

> (1) Authorize the President to establish a program to ensure the availability, continuity and prompt initiation or restoration of communications services and to provide for the continuity and prompt initiation or restoration of communications essential to NSEP. Such language should delineate between the role of the executive agencies as NSEP planners and the regulatory role--not an NSEP planning role--of the FCC. Quite simply, the FCC should be out and stay out of NSEP planning.
>
> (2) In accordance with this plan, authorize the President to require any federal agency--other than the FCC in the exercise of its regulatory responsibilities--and request any carrier or other person, to establish and maintain facilities and plans or arrangements for the mutual backup, restoration and interconnection of their communications services, facilities and equipment, including customer-premises equipment, inside wiring and enhanced services.
>
> (3) Authorize the President to request carriers and other persons to engage in joint planning meetings. These planning meetings would be conducted pursuant to procedures adopted with the concurrence of the FCC and the Attorney General.
>
> (4) Authorize the President to appoint an advisory committee to look at the structure, policy and needs of NSEP communications as well as to provide technical advice and advice regarding the implementation of improvements in NSEP communications.
>
> (5) With specific regard to the FCC, the legislation should make it very clear that the FCC "may"--upon a public interest determination:
>
> (a) Require carriers or others to engage in the joint planning meetings requested by the President and mentioned above;

(b) Adopt regulations to provide for priorities in the initiation or restoration of communications services, including enhanced services;

(c) Adopt regulations or orders to set out procedures, technical standards or other requirements, including interim compensation, in order to provide for the mutual backup, restoration, or interconnection of communications services. This would take place essentially after the President or the Commission certified that voluntary arrangements were unlikely and that involuntary arrangements would not unreasonably confer a competitive advantage on any carrier or retard the introduction of new or lower cost technologies or services;

(d) Establish and enforce such minimum uniform technical standards as are necessary to support NSEP for customer-premises equipment and inside-wiring and their interconnection;

(e) Meet the communications requirements from any telecommunications emergency, authorize or require any carrier, its subsidiary or affiliate or any other person, to cooperate with any person or other entity to provide facilities, services, customer-premises equipment or inside-wiring, on an individual or joint basis;

(f) Perform an arbitrational role by establishing appropriate financial terms, conditions and charges for any NSEP plans, facilities, services, equipment, wiring or modifications thereto, provided by any carrier or any person in those instances where such carrier or person and the President or his designee cannot agree on those terms, conditions or charges;

(g) Review and reallocate any revenue received by such carrier, its subsidiary or affiliate, for NSEP services. And this should take place notwitstanding any agreement between the President or his designee and any carrier, its subsidiary or affiliate, regarding financial terms, conditions and charges.

VII. FURTHERING NEGOTIATING PROCESSES

In recent years, increased emphasis has been placed on private and public negotiating processes as a means of conflict resolution, consensus building and policy formulation. (Private negotiating processes involve

private concerns exclusively while public negotiating processes involve public concerns which in turn affect private ones.)

With regard to the growing importance of negotiating processes generally in our society, Derek C. Bok, President, Harvard University believes that:

> ...Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of the most creative social experiment of our time....[48]

Scholars at universities have researched and taught increasingly the subject of negotiating processes and have published the fruits of their labors. Two prominent examples are The Art & Science of Negotiations by Howard Raiffa[49] and Getting to Yes by Roger Fisher and William Ury.[50]

With regard to the use of negotiations in connection with public (regulatory) concerns, the Administrative Conference of the United States has adopted Procedures for Negotiating Proposed Regulations.[51] The recommended procedures are designed to serve as supplements or substitutes for adversary procedures in suitable situations. The recommended procedures are based to a considerable extent on a scholarly report prepared for the Committee on Interagency Coordination of the Administrative Conference by Philip J. Harter.[52]

Within the Federal Communications Commission, attention has been focused on negotiating processes to facilitate the achievement of the Commission's regulatory objectives. A paper prepared by Roy L. Morris and Robert S. Preece of the Commission staff entitled Negotiating for Improved Interconnection: The Incentives to Bargain, is an example of such attention.[53]

In connection with the use of negotiating processes for purposes of coordinating domestic telecommunication facilities and services, the Harter report and the procedures for negotiating proposed regulations recommended by the Administrative Conference, are particularly relevant.

Harter has identified a number of propositions which he considers particularly important in connection with public negotiations:

(1) Parties must have incentives to negotiate; they must believe that they will be better off by negotiating than by stalling or taking adversary actions;

(2) The parties have to be willing to focus their thinking on their true interests -- immediate, intermediate and long range -- rather than any positions that they may have advanced and are inclined to defend;

(3) They have to be willing to rank their concerns and trade them with other parties;

(4) They have to engage in exchanges of views for purposes of developing shared objectives;

(5) Procedural prohibitions or requirements designed to protect the integrity of adversary processes have to be examined to determine whether they constitute hurdles in the path of negotiating processes (among such provisions are judicially imposed ex parte rules, the Federal Advisory Committee Act, the Sunshine Act, and the Freedom of Information Act);

(6) If the objective of the negotiations is either a written agreement or a proposed government regulation, the issues must be sufficiently concrete, the number of parties sufficiently limited (probably fewer than fifteen), and some resolution of issues by court action or regulatory action inevitable;

(7) The power distribution among parties must be sufficiently equal so that none of the participants have either overwhelming or negligible power;

(8) The integrity of the negotiators in terms of their competence and candor is essential as is their status vis-a-vis their principals. (While they may not be able to commit their principals, they must be able to make a reasonably good guess as to what their principals will accept.)

The procedures recommended by the Administrative Conference for negotiating proposed regulations include provisions--

(a) ...explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this recommendation....The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings...free of the restrictions of the Federal Advisory Committee Act and any ex parte limitations. Legislation should provide that information tendered to such groups, operating in the manner proposed, should not be considered an agency record under the Freedom of Information Act;

(b) ...authorize agencies to designate a "convenor" to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency regulatory program, and (ii) determining, in consultation with the agency, who should participate in the negotiations;

(c) ...the convenor should conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empanelled to develop a proposed rule relating to the particular topic. The convenor should consider the risks that negotiating procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition;

(d) ...issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances;...

(e) ...interests significantly affected should be such that individuals can be selected who will adequately represent those interests. ...negotiations should ordinarily involve no more than 15 participants;

(f) ...no single interest should be able to dominate the negotiations;

(g) ...the agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency;

(h) ...the convenor should be responsible for determining preliminarily the interests that will likely be substantially affected by a proposed rule, the individuals that will represent those interests in negotiations, the scope of issues to be addressed, and a schedule for completing the work. ...reasonable efforts should be made to secure a balanced group in which no interest has more than a third of the members and each representative is technically qualified to address the issues presented, or has access to qualified individuals;

(i) ...[if] an existing committee of a non-governmental standards writing organization...appears to enjoy the support and confidence of the affected interests ...the convenor should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations;

(j) ...the agency should publish in the Federal Register a notice that it is contemplating developing a rule by negotiation and indicate the issues involved and the participants and interests already identified... if an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency should determine...whether the petitioner should be added to the negotiating group...;

(k) ...the agency should designate a senior official to represent it in the negotiations and should identify that official in the Federal Register notice...;

(l) ...the agency should consider reimbursing the direct expenses of such participants and should also provide financial or other support of the convenor and the negotiating group. Congress should clarify the authority of agencies to provide such financial resources;...

(m) ...the convenor and the agency might consider whether the selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses;

(n) ...the goal of the negotiating group should be to arrive at a consensus on a proposed rule...the negotiating group should prepare a report to the agency containing its proposed rule and a concise general statement of its basis and purpose. The participants may, of course, be unable to reach a consensus on a proposed rule, and, in that event they should identify in the report both the areas in which they agreed and the areas in which consensus could not be achieved. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities, and identify potentially acceptable solutions...;

(o) ...the negotiating group should be authorized to close its meetings to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving a consensus would be significantly enhanced...;

(p) ...the negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency.

V. CONCLUSION AND SUGGESTIONS

The materials presented in this paper suggest a general conclusion: Many government policymakers other than those concerned with NSEP

objectives appear to be concerned with furthering competition (i.e., individual initiatives) and, therefore, seek to achieve strict antitrust accountability by parties engaged in negotiations aimed at concerted actions. They are concerned less with furthering effective negotiating processes aimed at agreeing on the identity and attainment of desired coordinating objectives.

Perhaps paying insufficient attention to these issues is understandable. Prior to AT&T's dissolution, coordinating processes involved AT&T and the Independent Telephone Companies and were largely invisible; government participated only minimally. Therefore, the results of these processes have been taken for granted.

Furthermore, there is insufficient appreciation that negotiating processes differ from adversary processes when it comes to ensuring their effectiveness: due process for negotiating processes differs significantly from due process for adversary ones. A careful reading of the recommendations of the Administrative Conference should remind policymakers of this significant circumstance.

Finally, awareness of the need for coordination and effective negotiating processes to achieve agreement on coordination objectives and methods is all the more important in view of the increasing complexity of the telecommunications infrastructure: a growing number of competing provider-organizations offer diverse facilities and services for multiple uses by distinct classes of users. These factors will render coordination within the evolving infrastructure increasingly difficult unless these same factors can be shown to make coordination less needed. And who has the burden of proof that less rather than more coordination will be needed for

the satisfactory functioning of the evolving telecommunications infrastructure?

The conclusion in turn suggests a number of questions which should be addressed by telecommunications policymakers in the private and public sectors:

1. In its efforts to formulate a national telecommunications policy, Congress has stressed competition and marketplace forces in relation to monopoly and regulation. Should an effort be made to persuade Congress to place complementary stress on the need for identifying situations in which coordination is necessary or desirable? Should Congress be persuaded to encourage government agencies, private interest groups and telecommunications professionals to engage in exploratory negotiations with a view to reaching a consensus or at least a prevailing view concerning such situations and preferred ways of dealing with them?

Congress and the FCC have sought to achieve coordination with respect to particular aspects already identified as requiring coordination. For example, the Commission has proposed specific coordination processes for interconnection-planning by an exchange carriers association. It proposes to exclude from active membership in such association parties such as interexchange carriers, users, equipment suppliers, etc. who would be limited to submitting written or oral presentations. Are such exclusions justified on the grounds of protecting competition among the excluded parties, or are such exclusions likely to affect adversely effective coordination processes and the adoption of effective coordination methods?

2. In order to achieve adequate accountability, to what extent should coordination processes be subject to procedural requirements such as government participation, opening such processes to the public, requiring

transcripts, giving the public access to transcripts, screening membership in coordinating organizations, etc.? Or might effective coordination and adequate accountability be achieved more effectively by focusing on the outcomes of any coordinating efforts while giving the parties the greatest possible freedom to determine who should be participating in such processes, what should be their scope and how should they be conducted?

Instead of imposing procedural requirements largely borrowed from adversary process controls, would it perhaps be preferable to follow the pattern of the Tunney Act[54] which applies to a somewhat related arena, namely proposed antitrust consent decrees?

The Tunney Act focuses primarily on the substantive results of the negotiations -- the proposed decrees -- rather than negotiating procedures. A single requirement involving negotiating procedures consists of a disclosure requirement concerning so-called "lobbying contacts." Each antitrust party is required to:

> ...file with the district court a description of any and all written or oral communications by or on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgement pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.[55]

With regard to the proposed decree, the act requires a determination by the court "that the entry of such judgement is in the public interest."[56]

> For the purpose of such determination, the court may consider:
> (1) the competitive impact of such judgement...

> (2) the impact of entry of such judgement upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at the trial.[57]

The question might be explored whether it would be desirable to require in each instance of a coordination agreement or other concerted action that such agreement or concerted action be reduced to writing, that the parties who participated in the negotiations be identified, and that the reasons for such agreement or concerted action be set forth in an accompanying report. Such requirement would give the Federal Communications Commission, the Department of Justice and interested parties in the private sector an opportunity to inform themselves how such agreement or concerted action might affect the public interest (including competition) or the interests of private parties. The Commission, the Department and affected parties would then be in a position to determine what action, if any, they deem appropriate regarding any such agreement or concerted action.

Thus, negotiating processes involving coordination of telecommunications facilities and services would remain unencumbered by procedural strictures, but the results would be readily accessible to be scrutinized from a substantive point of view by the Commission, the Department of Justice and others in and out of government who may have an interest.

The objection might be raised that the requirement of reducing the negotiating results to writing, identifying the parties who participated in negotiations and stating the reasons for any agreement or understanding, might have chilling effects on negotiations not unlike the requirements of keeping transcripts, making them public and having the FCC monitor the

negotiations. While possible chilling effects cannot be denied, the question is whether the suggested procedure achieves an adequate balance between freedom to negotiate effectively and protection of the public by achieving adequate accountability. In the case of coordinating negotiations and agreements, both objectives are of importance, and a proper balance has to be struck.

3. Are NSEP coordinating objectives and processes separable from commercial civilian coordinating objectives and processes? Both the MFJ and proposed telecommunications legislation perceive coordination as mandatory for purposes of achieving NSEP objectives. As interpreted by the Department of Justice in its competitive impact statement,[58] the decree considers participation or even leadership by interface organzations in national security coordinating processes as on appropriate way of conducting such processes. The interface organization -- the single point of contact sought by the DoD -- may either be organized by the BOCs or it may be organized by all of the telecommunications facilities and services providers or it may be organized by the government or jointly by providers and government.[59]

This seems to suggest that national security coordination situations may involve coordinating processes which differ from coordinating processes involving commercial civilian objectives. The question might well be asked, however, whether NSEP objectives and commercial civilian objectives are clearly separable. In the first place, national security telecommunications utilize predominantly leased commercial civilian facilities. Furthermore, DoD presents some situations involving coordination which suggest that some of those objectives overlap.

The equal exchange access provision of the decree requires that all BOCs provide to all interexchange carriers and information service providers exchange access that is equal in type, quality, and price to that provided to AT&T and its affiliates. DoD maintains that this provision:

> ...would appear to encourage the BOCs to make such access available through nodal points where large volumes of traffic could be concentrated. This would be more cost-effective and would facilitate the provision of equal access, but could also reduce the survivability of the nationwide telecommunications network because damage to or service outages at the points of exchange access would prevent all interexchange users from accessing the local exchange portion of the nationwide network....[60]

Another example involves the location of key Bell and independent communications facilities in California at or near the San Andreas fault where severe damage might be expected in case of a major earthquake. A NCS analysis made in 1980 shows that:

> ...a high concentration of critical circuitry carrying high restoration priority assignments existed in the State of California (e.g. national warning system circuitry, command and control circuitry)....[61]

Restoration of these facilities which provide both civilian and military services "...would clearly be beyond the financial, logistic and personnel capability of any other...single entity (i.e., other than the integrated Bell system)...."[62] and, therefore, requires contingency planning involving all or most providers of telecommunications services.

These examples suggest that in the case of facilities (and perhaps in the case of other coordination situations) coordination involves taking into account both civilian commercial and NSEP aspects. Should these aspects be dealt with in two separate coordinating processes: one considering national security aspects under the leadership of an interface organization and one considering commercial civilian aspects under the

leadership of a party chosen by all participating facilities providers? Or are such separate coordinating processes impractical and will a single coordinating process dealing with NSEP as well as commercial civilian objectives evolve? Plausible theoretical arguments can be advanced both for and against either proposition. However, experience may teach that NSEP and commercial civilian aspects are inseparable to such a degree that separate coordinating processes are impractical.

4. How might coordinating processes be furthered? This is a double-barrelled question: What situations in the telecommunications infrastructure make coordination necessary or desirable if the infrastructure is to be adequate in providing diverse facilities and services to diverse users for diverse purposes? And once such situations have been identified, what processes are adequate to achieve effective coordination? Is it likely that in the absence of effective negotiating processes, resort will be had to regulatory processes to such an extent that the sought-after deregulation may result in more regulation, though of a different kind?

Some situations making coordination necessary or desirable have already been identified and coordinating processes have been or are being instituted. NSEP, affordable universal telephone service, setting equipment standards and planning for interconnection by exchange carriers are some examples.

How might additional coordinating objectives be identified? Does identifying them involve monitoring the working of the telecommunications infrastructure? And how would such monitoring be undertaken? Can objective standards and procedures be developed for this purpose or will

such monitoring be limited to checking on customer complaints or exercising regulatory or Congressional pressures?

What processes might be appropriate for agreeing on and achieving needed improvements? Do perhaps the Harter report and the Recommendations of the Administrative Conference relating to procedures for negotiated regulations suggest the directions in which we may have to move in devising effective coordination processes?

5. What might be learned from coordinating processes that have been employed with regard to the energy and transportation infrastructure? In what respects are coordinating objectives of those infrastructures comparable, particularly regarding reliability, survivability and restorability in NSEP planning? What forms of coordinating organizations have they utilized? What are the relations between those organizations and government regulators? How extensive have been concerns with avoiding unreasonable restraints of competition and assuring adequate public accountability?

Those are a few of the questions relevant to the roles that negotiating processes may play in the evolving telecommunications infrastructure to identify situations in which coordination objectives should be achieved and to determine acceptable ways of achieving them.

Notes

1 Remarks of Chairman Lionel Van Deerlin before the NTCA Convention in San Diego, February 17, 1978.

2 Letter from Charles D. Ferris, Chairman, FCC to Chairman Van Deerlin, March 15, 1978.

3 Letter from John H. Shenefield, Assistant Attorney General, Antitrust Division to Chairman Van Deerlin, March 17, 1978. In a closing paragraph, Shenefield states: "The antitrust laws, and the fundamental national commitment to competition they reflect, are premised on the assumption the public interest will best be served by firms acting individually, not in concert. We are unaware of any showing to date by AT&T and the independent telephone companies involved that the joint ownership of interstate communications facilities is essential or appropriate."

4 National Telecommunications and Information Administration, Petition for Notice of Inquiry and Proposed Rulemaking, In the Matter of AT&T and Independent Telephone Companies Joint Planning and Joint Ownership Feasibility Project, October 10, 1980.

5 Statement filed by AT&T (FCC-RM 3781), December 3, 1980.

6 Comments filed by USITA (FCC-RM 3781), December 3, 1980.

7 Comments filed by MCI (FCC-RM 3781), undated.

8 Comments filed by SBS (FCC-RM 3781), December 3, 1980.

9 Comments filed by SPC (FCC-RM 3781), December 3, 1980.

10 Comments filed by USTS (FCC-RM 3781), December 3, 1980.

11 Executive Order 12382 of September 13, 1982, Fed. Reg. Vol. 47, No. 179, September 15, 1982, Presidential Documents.

12 Sec. 2 (b) and (c).

13 NATIONAL JOINT PLANNING FOR RELIABLE EMERGENCY COMMUNICATIONS, A Report to the National Communications System by the Committee on Review of National Communications System Initiatives in Support of National Security Telecommunications Policy, Board of Telecommunications - Computer Applications, Commission of Engineering and Technical Systems, National Research Council, February 1983. (NRC is the principal operating agency of the National Academy of Sciences, the National Academy of Engineering and the Institute of Medicine.)

[14] Philip J. Harter, Negotiating Regulations: A Cure for the Malaise? (January 1982). Report prepared for the Committee on Interagency Coordination of the Administrative Conference of the United States. At p. 45, Harter states: "...a party needs an incentive to negotiate by believing it will be better off for having done so...." The following works are cited in Note 208 of Harter's paper in connection with this statement: Bacharach and Lawler, Bargaining (1981), Luce and Raiffa, Games and Decisions (1957); Sandler, Varieties of Dispute Processing, 70 F.R.D. 79 (1976); Fuller, Forms and Limits of Adjudication, 92 Har. L. Rev. 353 (1978); Fuller, Mediation--Its Forms and Functions, 44 So. Cal. L. Rev. 305 (1971).

[15] P.L. 97-130, December 29, 1981, 95 Stat. 1687.

[16] Ibid.

[17] Approved by Judge Harold H. Greene in United States v. American Telephone and Telegraph Company et al, United States District Court for the District of Columbia, Civil Action No. 74-1698, August 24, 1982.

[18] Ibid.

[19] Adopted April 27, 1983, released May 31, 1983, In the Matter of MTS and WATS Structure, CC Docket No. 78-72, Phase III.

[20] Third Report and Order, adopted December 22, 1982, released February 28, 1983, In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I.

[21] Notice of Proposed Rulemaking, supra, at para 52, 53.

[22] "Access charges" involve the compensation that exchange carriers receive for the origination and termination of interstate or international telecommunications or enhanced services.

[23] Notice of Proposed Rulemaking, supra, para 41.

[24] Supra, para 42.

[25] Supra, para 61.

[26] Supra, para 62. The Commission states that the proposed procedures have been drawn in large measure from provisions contained in Section 708 of the Defense Production Act of 1950, 50 USC App. § 2158.

[27] Supra, para 63.

[28] Supra, para 66.

[29] Supra, para 67

[30] S.898, 97th Congress, 1st Session, "An Act to amend the Communications Act of 1934 to provide for improved domestic telecommunications and for other purposes," in the House of Representatives, referred to the Committee on Energy and Commerce.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] H.R. 5158, 97th Congress, 1st Session, "A Bill to Amend the Communications Act of 1934 to revise provisions of the Act, relating to telecommunications, and for other purposes," December 10, 1981.

[35] Ibid.

[36] Supra, note 11.

[37] Statement of LTG William J. Hilsman, Director, DCA, before the Committee on Commerce, Science, and Transportation, United States Senate, on S.898, The Telecommunications Competition and Deregulation Act of 1981, June 11, 1981.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Letter to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, House of Representatives, from William H. Taft IV, General Counsel, DoD, March 8, 1982, p. 5.

[42] Department of Defense Analysis of the Impact of the Department of Justice-American Telephone and Telegraph Company Antitrust Suit Settlement Agreement upon the Provision of Telecommunications Services to the Department of Defense.

[43] 47 Fed. Reg. 7170 (February 17, 1982).

[44] Ibid.

[45] Ibid.

[46] S.999, a bill to amend the Communications Act of 1934 to provide for improved international telecommunications, and for other purposes, April 7, 1983 introduced by Mr. Baker (for Mr. Goldwater) (for himself, Mr. Pressler and Mr. Hollings).

[47] Statement of Mimi Weyforth Dawson, Defense Commissioner, Federal Communications Commission, before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, Hearings on the International Telecommunications Act of 1983 [S.999], May 11, 1983.

[48] Derek C. Bok, The President's Report 1982-82, Harvard University.

[49] Howard Raiffa, The Art & Science of Negotiation, The Belknap Press of Harvard University Press, Cambridge, Massachusetts and London, England, 1982.

[50] Roger Fisher and William Ury, Getting to Yes, Negotiating Agreement Without Giving In, Houghton Mifflin Company, Boston, 1981.

[51] Administrative Conference of the United States, Recommendation 82-4, adopted June 18, 1982.

[52] Philip J. Harter, Negotiating Regulations: A Cure for the Malaise? (January 1982).

[53] Federal Communications Commission, Office of Plans and Policy, OPP Working Paper Series, Negotiating for Improved Interconnection: The Incentives to Bargain, January 1982 (revised April 1982).

[54] The Antitrust Procedures and Penalties Act (better known by its popular title as the Tunney Act) (15 U.S.C. 16(b) et seq).

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Supra, note 42, at p. 34.

[59] Supra, note 44, at p. 34.

[60] Supra, note 41, at p. 34.

[61] Ibid.

[62] Ibid.