

January 24, 1980

DISSENTING STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY
IN WHICH
COMMISSIONERS ANNE P. JONES AND JAMES H. QUELLO JOIN

In Re: Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services.

The concept of this order--the investigation of the lawfulness of existing tariff constraints with respect to the resale and sharing of MTS and WATS--would have been fine if there were no Docket No. 78-72--
the MTS/WATS Market Structure Inquiry. ^{1/}

An examination of these issues, and their ramifications in the marketplace and in the telecommunications industry institutional structure, is certainly appropriate at this time. However, the resale and shared use of MTS and WATS is already addressed within the much broader context of Docket No. 78-72. As a matter of fact, comments in this proceeding are due on March 3, 1980, approximately two weeks from now.

I believe that the resolution of these resale and sharing issues in a separate proceeding of the scope indicated in this Order would be:

- (1) duplicative of the work being done by both the parties and the Commission staff in Docket No. 78-72;
- (2) prejudicial to essential aspects of Docket No. 78-72; and
- (3) inhibitive of the effective and timely resolution of that Docket.

^{1/} Notice of Inquiry and Proposed Rulemaking, 67 FCC 2d 757 (1978); and Supplemental Notice of Inquiry and Proposed Rulemaking, 72 FCC 2d 222 (1979).

Docket No. 78-72 was instituted by the Commission in response to the Execunet decisions ^{2/} and raises the paramount issue of whether or not the monopolistic supply of MTS and WATS services is in the public interest.

The majority evidently believes that there are aspects of resale and sharing which should be separated from Docket No. 78-72, and that these aspects can be resolved without affecting the decision-making process in the existing proceeding. The majority takes the position that this proposed new proceeding is addressing resale and sharing in a different context:

"We emphasize that in this proceeding, our primary objective is to evaluate the desirability of resale and sharing of services which are already offered but whose use is restricted under present tariffs....We are not directly considering entry by new underlying carriers."

I think that these arguments are naive and short-sighted. Docket No. 78-72 is not restricted to the provision of switched telephone-grade channels by underlying carriers only. Although Docket No. 78-72 was triggered by the Execunet decisions, its concern is with the competitive provision of interstate MTS-like service by any entity. Parties advocating competition are asked to comment, inter alia, upon the associated telecommunications industry structure (e.g., the role and organization of the Bell System) and upon the appropriate

2/ MCI Telecommunications Corp. v. FCC (Execunet I), 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978); MCI Telecommunications Corp. v. FCC (Execunet II), 580 F.2d 590 (D.C. Cir. 1978) cert. denied, 439 U.S. 980 (1978).

institutional structure (e.g., jurisdictional separations procedures and access charges). The participants are asked to develop industry structure models which must necessarily include certain assumptions about, and recommendations concerning, resale and sharing policy. The Supplemental Notice in Docket No. 78-72 states:

"Participants who advocate more than one source of supply should specify the terms and conditions under which entrants would be allowed to provide services. Examples of such terms and conditions might be unlimited resale of all common carrier services...." 3/

Clearly, the scope of Docket No. 78-72 necessarily includes the question of the role of resale carriers in the competitive environment.

The attempt to consider the resale and sharing matter in a separate proceeding will result in both parties and Commission staff addressing themselves to the following, identical issues in separate proceedings:

- (1) the competitive supply of switched telephone channels;
- (2) effects upon entry and exit into this market;
- (3) the compatibility of existing jurisdictional separations procedures, and the necessity for, and the nature of, any changes;
- (4) the effects of competitive activity upon industry structure and upon AT&T in particular; and
- (5) effects upon the public.

3/ Supplemental Notice, 73 FCC 2d at 239.

Given the extensive duplication of issues in these Dockets, I cannot condone the repetition of effort involved, nor can I see how either proceeding can be intelligently resolved separate and apart from the other. If, as implied by the majority, Docket No. 78-72 is too courageous an effort by this Commission to resolve key questions of competition in MTS and WATS and will take fifteen years to implement, then the Commission in all honesty should recall and terminate that Docket. As it now stands, the issuance of this Order prejudices the outcome of the parent Docket No. 78-72.

I dissent.