

party to the proceedings before the FCC¹¹⁵ or now before the court shall file with the court any comments on the FCC's proposed schedule within fifteen days after that schedule is filed with the court by the FCC. Within fifteen additional days, the FCC may reply to any of the comments. The court will then either approve, reject, or appropriately modify the schedule, or make such further orders as necessary.

After a schedule has been approved, the parties will be expected to adhere to it. Deviations from the schedule will require the court's prior approval.¹¹⁶ This division of the court shall retain jurisdiction "to ensure compliance"¹¹⁷ with our decision.

IT IS SO ORDERED.



**CENTER FOR AUTO SAFETY and John
Hubbard, Petitioners,**

v.

**Joan CLAYBROOK, Administrator
National Highway Traffic Safety
Administration, Respondent,**

**Officine Alfieri Maserati, S.P.A.,
Intervenor.**

No. 79-1292.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 20, 1980.

Decided April 7, 1980.

Petition was filed for review of an order of the National Highway Traffic Safety

115. There apparently are parties which appeared in these proceedings before the FCC but are not before the court. The FCC is ordered to give them notice, within ten days of today, of this court's opinion and their right to file comments on the schedule the FCC proposes.

116. The State of Hawaii as intervenor asks the court not to invalidate those parts of AT&T's tariff revisions which extend WATS to Hawaii

Administration exempting certain low volume luxury car manufacturers from federal fuel economy standards. The Court of Appeals, Bazelon, Senior Circuit Judge, held that NHTSA did not abuse its discretion in exempting from federal fuel economy standards luxury car manufacturers, which produced less than 10,000 passenger cars annually, world wide.

Petition denied.

J. Skelly Wright, Chief Judge, filed concurring opinion.

War and National Emergency ⇐39

National Highway Traffic Safety Administration did not abuse its discretion in exempting from federal fuel economy standards luxury car manufacturers, which produced less than 10,000 passenger cars annually, world wide. Motor Vehicle Information and Cost Savings Act, § 502(e) as amended 15 U.S.C.A. § 2002(e).

Petition for Review of an Order of the National Highway Traffic Safety Administration.

Barbara L. Bezdek with whom Clarence M. Ditlow, III, Washington, D.C., was on brief, for petitioners. Katherine A. Meyer, Washington, D.C., also entered an appearance, for petitioners.

David W. Allen, Asst. Chief Counsel, National Highway Traffic Safety Administration, Washington, D.C., with whom Enid Rubenstein and Stephen R. Kratzke, Attys., National Highway Traffic Safety Administration, Washington, D.C., were on brief, for respondent.

(WATS was also extended to Alaska at the same time). Hawaii notes that no one has challenged those revisions. Our opinion today has no effect on the FCC's determination to allow the extension of WATS to Hawaii or Alaska.

117. *Nader v. FCC*, *supra*, note 15, 520 F.2d at 207.

NATIONAL ASS'N OF REG. UTIL. COM'RS v. F.C.C.

Cite as 737 F.2d 1095 (1984)

1095
RECEIVED

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Ad Hoc Telecommunications Users Committee, et al., Intervenors.

PUBLIC SERVICE COMMISSION OF the DISTRICT OF COLUMBIA, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

United Telephone System, Inc., et al., Intervenors.

PEOPLE OF the STATE OF CALIFORNIA and the Public Utilities Commission of the State of California, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Southern Pacific Communications Company, et al., Intervenors.

MCI TELECOMMUNICATIONS CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Aeronautical Radio, Inc., et al., Intervenors.

LEXITEL CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

United Telephone Systems, Inc., et al., Intervenors.

WESTERN UNION TELEGRAPH COMPANY, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

MCI Telecommunications Corporation, et al., Intervenors.

NORTH AMERICAN TELEPHONE ASSOCIATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

GTE Sprint Communications Corporation, et al., Intervenors.

MCI TELECOMMUNICATIONS CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

GTE Service Corporation, et al., Intervenors.

PUBLIC SERVICE COMMISSION OF the DISTRICT OF COLUMBIA, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

GTE Sprint Communications Corporation, et al., Intervenors.

AERONAUTICAL RADIO, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Western Union Telegraph Company, et al., Intervenors.

UNITED STATES TRANSMISSION SYSTEMS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

JUL 25 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

GTE Sprint Communications Corporation, et al., Intervenors.

TELESPHERE NETWORK, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

American Broadcasting Companies, et al., Intervenors.

ASSOCIATION OF LONG DISTANCE TELEPHONE COMPANIES, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Western Union Telegraph Company, et al., Intervenors.

Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-1954, 83-1984, 83-1995, 83-2016, 83-2108, 83-2168 and 83-2218.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 18, 1984, April 19, 1984.

Decided June 12, 1984.

Review was sought of orders of the Federal Communications Commission dealing with allocation of that portion of local plant cost attributable to interstate service. The Court of Appeals held that: (1) FCC had authority to impose flat-rate end user access charges; (2) FCC decisions with respect to economic bypass and universal service were supported; (3) there was no unlawful discrimination against carriers subject to the carrier common line charge in favor of interstate users of exchange facilities; but (4) FCC did not adequately explain certain decisions relating to party line

access charges and average schedule companies.

Affirmed in part and remanded in part.

1. Telecommunications ⇐6

Insuring the provision of universal service is properly primary goal of the Federal Communications Commission.

2. Telecommunications ⇐313, 334

A portion of the cost of local subscriber plant may be recovered only under the authority of a body with interstate regulatory powers with respect to telephone service but the recovery of costs allocated to such a body is not required to be through usage-based charges.

3. Telecommunications ⇐323

Provision of the Communications Act establishing the Federal-State Joint Board to make recommendations to the Federal Communications Commission with regard to the separations process did not mandate usage-based charges to recover that portion of local plant cost allocated to interstate service. Communications Act of 1934, § 410(c), as amended, 47 U.S.C.A. § 410(c).

4. Telecommunications ⇐317

Communications Act provision denying FCC jurisdiction over purely intrastate communications does not preclude the FCC from imposing flat-rate end user charges. Communications Act of 1934, § 2(b), as amended, 47 U.S.C.A. § 152(b).

5. Telecommunications ⇐323

Federal Communications Commission may properly order recovery, through charges imposed on telephone subscribers, of the portion of local plant cost which is in interstate jurisdiction.

6. Telecommunications ⇐334

Scheme advanced by Federal Communications Commission requiring all telephone subscribers to pay, on a per-line basis, for that portion of their necessarily incurred local telephone plant cost which is under interstate jurisdiction did not overstep the jurisdiction of the FCC.

7. Te
P
Comm
able t
sion
comm
public
state
for co
ers ar
er to
munic
amenc
8. Tel
Fu
treatr
ing pr
plant
nicatio
9. Tel
In
spect
plant
it was
Comm
approa
stifle,
technol
10. Tel
Fe
determ
can be
change
teleph
and sin
ord t
comm
were
11. Te
Fu
was ne
with r
in cer
that p
to inte
12. A
A
comm
taint

7. Telecommunications ⇄334

Power of the Federal Communications Commission to prescribe just and reasonable telephone rates is not limited by provision of the Communications Act that all communication common carriers must file public schedules of their charges for interstate wire or radio communications except for connecting carriers; connecting carriers are not immune from Commission power to set just and reasonable rates. Communications Act of 1934, §§ 203, 205, as amended, 47 U.S.C.A. §§ 203, 205.

8. Telecommunications ⇄323

Federal Communication Commission's treatment of the bypass issue in determining proper allocation of that portion of local plant cost attributable to interstate communication was adequately reasoned.

9. Telecommunications ⇄323

In treating the bypass issue with respect to allocation of that portion of local plant cost attributable to interstate service, it was not unreasonable for the Federal Communications Commission to resist an approach which would curtail, and perhaps stifle, development and construction of new technology.

10. Telecommunications ⇄317

Federal Communications Commission determinations that some end user charge can be levied without driving many exchange service subscribers away from the telephone system and that most residential and single-line business customers can afford to pay at least a portion of their common line costs through fixed charges were adequately reasoned and supported.

11. Telecommunications ⇄335

Federal Communications Commission was not required to hold trial-type hearings with respect to proceedings which resulted in certain orders relating to allocation of that portion of local plant cost attributable to interstate service.

12. Administrative Law and Procedure ⇄394

Agency's denial of fair opportunity to comment on a key staff study may fatally taint the agency's decisional process.

13. Telecommunications ⇄333

Where Federal Communications Commission gave the case reconsideration and further reconsideration, so that interested entities eventually had ample opportunity to address staff study, failure of the Commission to release the study in time for comments before its initial determination was harmless.

14. Telecommunications ⇄325

Determination of Federal Communications Commission, made in proceedings involving allocation among subscribers of that portion of local plant cost attributable to interstate service, that a full multiline business access rate should be applied only prospectively to newly laid Centrex-CO lines and that existing Centrex-CO plant should be subject to transitional access charges was supported by FCC finding that not all local Centrex-CO exchange rates are subsidized.

15. Administrative Law and Procedure ⇄392

Agency decision arrived at through informal rule making must have a rational basis in the record and be based on a consideration of the relevant factors under its statutory mandate; when agency undertakes a thorough, primary, evaluation of all relevant facts, it is highly desirable that agency independently amass the raw data, verify the accuracy of data, apply that data to consider several alternative courses of action, and reach a result confirmed by the comments and submissions of interested parties.

16. Administrative Law and Procedure ⇄394

Although agency must consider and analyze factual materials gathered during the informal rule-making process, agency need not conduct its analysis without relying on the comment submitted during the rule making.

17. Telecommunications ⇄313

It was not unreasonable for Federal Communications Commission to rely on

comments of various state commissions to the effect that certain telephone services were priced above cost.

18. Telecommunications ⇄325

Decision of the Federal Communications Commission to accommodate period of reevaluation of Centrex-CO pricing in conjunction with the establishment of a Joint Board was reasonably and rationally supported by the record.

19. Telecommunications ⇄324, 343

Federal Communications Commission did not respond adequately to charges that its method for computing the charge to be imposed on party line subscribers to recover local plant cost attributable to interstate service inaccurately reflected the cost of providing party-line service and would create an artificial economic incentive for customers to switch from single-line to party-line service; remand was required to permit further consideration of claims that party-line access charges were uneconomically subsidized by single-line access rates.

20. Telecommunications ⇄336

Federal Communications Commission did not adequately explain certain determinations it made with respect to "average schedule companies" which use the average schedule to compute access costs.

21. Telecommunications ⇄310

Communications Act prohibits unjustifiably different rates for the same service. Communications Act of 1934, § 202(a), as amended, 47 U.S.C.A. § 202(a).

22. Telecommunications ⇄317

Although, under FCC order, other communication carriers would pay more dollars per line for access charges than private line users, the order did not permit unjustifiably different rates as the OCC's require and use a correspondingly greater volume of exchange access on each line. Communications Act of 1934, § 202(a), as amended, 47 U.S.C.A. § 202(a).

23. Telecommunications ⇄317

Decision of the Federal Communications Commission to recover nontraffic sen-

sitive access costs from carriers on a usage sensitive basis was not inherently discriminatory. Communications Act of 1934, § 202(a), as amended, 47 U.S.C.A. § 202(a).

24. Telecommunications ⇄317

Evidence that Federal Communications Commission could reasonably have elected to implement a nonusage-based scheme for recovering exchange access costs from carriers and other private line users did not show that Commission erred in choosing a usage-based recovery plan.

25. Telecommunications ⇄317

Decision of the Federal Communications Commission to recover nontraffic sensitive costs from end users on a flat-rate basis did not require the Commission to also assess the subsidized balance of those costs on a flat-rate basis from the interexchange carriers.

26. Telecommunications ⇄317

Federal Communications Commission may lawfully impose flat-rate end user access charges on a gradual basis in order to preserve universal service, as rates may be structured to avoid disruptive service impacts.

27. Telecommunications ⇄310

Communications Act does not prevent all discrimination or disparities in prices for similar service; it prohibits only unreasonable discrimination; reasonableness of price disparity must be judged by the circumstances in which it is assessed. Communications Act of 1934, § 202(a), as amended, 47 U.S.C.A. § 202(a).

28. Telecommunications ⇄317

Decision of the Federal Communications Commission to avoid unnecessary customer impact or market displacement reasonably justified any slight disparities implemented under new plan for carrier access charges. Communications Act of 1934, § 202(a), as amended, 47 U.S.C.A. § 202(a).

29. Telecommunications ⇄323

Federal Communications Commission rationally held that carriers reselling pri-

vi
se
cc
je
30
tic
ma
sp
tio
ex
ye
the
bili
wh
anc
31.
priv
por
to
imp
cise
the
32.
ma
clo
ext
mi
cou
is
ag
the
fac
wh
pia
33.
mu
vie
be
it
cir
34
to
su

Cite as 737 F.2d 1095 (1984)

vate line service to provide long distance service were situated similarly to other common carriers and thus should be subject to the common carrier line charge.

30. Telecommunications ⇄317

Decision of the Federal Communications Commission not to make tariff filing mandatory for exchange carriers with respect to privately owned telecommunications systems capable of accessing a local exchange was reasonable where it was not yet clear whether exchange carriers had the measurement and other technical capabilities to develop a surrogate surcharge which could sufficiently approximate usage and satisfy the statutory limits on tariffs.

31. Telecommunications ⇄327

Both the concept of a surcharge on private line and PBX service to recover a portion of the local plant costs attributable to interstate service and the decision to impose a \$25 surcharge were lawful exercises of the statutory discretion vested in the Federal Communications Commission.

32. Administrative Law and Procedure ⇄797

If an agency in the course of an informal rule making does not attempt either to close itself off from informed opinion or to extend its reach beyond the scope of permissible authority, it is the duty of the court to accept the agency's judgment if it is rational and not unreasonable; fact that agency decision is a difficult one or that the decision rests on set of evidentiary facts less desirable or complete than one which would exist in some regulatory utopia does not alter the court's role.

33. Telecommunications ⇄341

It is not the duty of the Federal Communications Commission to convince reviewing court that what it has done is the best that could be done but only that what it has done is reasonable under difficult circumstances.

34. Telecommunications ⇄337

FCC order allowing exchange carriers to develop reasonable, nondiscriminatory surcharges on interconnected use of ex-

change services by carriers' publicly offered interstate services using radio and other facilities and privately-owned microwave relay systems and satellite transmission systems, announcing that it was prepared to consider the carriers' proposals for a surcharge to the individual exchange telephone lines, and requiring that any surcharge be filed in tariffs with the Commission merely served notice that FCC considered the hidden access enjoyed by private communications systems to be a subject worth studying; challenge to imposition of any such surcharge was not ripe for review.

35. Telecommunications ⇄337

Where Federal Communications Commission had retained its final authority over possible surcharges, which could not go into effect unless and until Commission approved them, and where Commission has not prescribed any formula for their composition, it was premature to accuse the FCC of an unlawful delegation to local exchanges of the power to impose certain surcharges.

36. Telecommunications ⇄321

Impact upon a single industry of FCC's vast and ambitious reworking of communication industry's rate structure could not affect outcome of review of the structure and fact that imposition of a cost-based footing for FX access would have an adverse impact on the airline industry did not render the FCC determination unreasonable.

37. Telecommunications ⇄313

Determination of the Federal Communications Commission that, to the extent practical, telephone prices should be based upon the true cost characteristics of telephone company plant was not unreasoned.

Petitions for Review of Orders of the Federal Communications Commission.

Genevieve Morelli, Deputy Asst. Gen. Counsel, National Association of Regulatory Utility Commissioners, Washington,

D.C., with whom Paul Rodgers, Gen. Counsel, and Charles D. Gray, Asst. Gen. Counsel, National Association of Regulatory Utility Commissioners, Washington, D.C., were on the brief, for National Association of Regulatory Utility Commissioners, petitioner in No. 83-1225. Deborah A. Dupont, Attorney, National Association of Regulatory Utility Commissioners, Washington, D.C., also entered an appearance for National Association of Regulatory Utility Commissioners.

William J. Byrnes, Washington, D.C., with whom Michael H. Bader, Kenneth A. Cox, Joel Rothstein Wolfson, Theodore D. Kramer, Robert Michelson, and Robert E. Conn, Washington, D.C., were on the brief, for MCI Telecommunications Corp., petitioner in Nos. 83-1463 and 83-1984, and intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1464, 83-1493, 83-1954, 83-2016, 83-2108, 83-2168, and 83-2218.

John L. Bartlett, Washington, D.C., with whom Robert J. Butler, Carl R. Frank, Richard E. Wiley, Philip V. Permut, Howard D. Polsky, and James M. Tobin, Washington, D.C., were on the brief, for Aeronautical Radio, Inc. and Lexitel Corp., petitioners in Nos. 83-1464 and 83-2016, and intervenors in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-2108, 83-2168, and 83-2218.

Lloyd N. Moore, Jr., Washington, D.C., with whom Howard C. Davenport and Michael E. Geltner, Washington, D.C., were on the brief, for Public Service Commission of the District of Columbia, petitioner in Nos. 83-1329 and 83-1995, and intervenor in Nos. 83-1225, 83-1439, 83-1463, 83-1464, and 83-1493.

Denise Bonn, Washington, D.C., with whom Albert H. Kramer, Washington, D.C., was on the brief, for North American Telecommunications Association, petitioner in No. 83-1954 and intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-2168, and 83-2218.

J. Calvin Simpson, San Francisco, Cal., and Peter G. Fairchild, Sacramento, Cal., were on the brief for People of the State of

California, et al., petitioners in No. 83-1439.

Arthur H. Simms, Lawrence P. Keller, Joel Yohalem, H. Richard Juhnke, Edward Berlin, Carmen D. Legato, and Francis S. Blake, Washington, D.C., were on the brief for Western Union Telegraph Co., petitioner in No. 83-1493 and intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1954, 83-1984, 83-2016, 83-2035, 83-2108, and 83-2218.

Jeffrey H. Matsuura, F. Thomas Tuttle, William D. English, Kevin H. Cassidy, William E. Willis, Margaret K. Pfeiffer, Robert B. Bell, J. Laurent Scharff, and Richard Singer, Washington, D.C., were on the brief for Satellite Business Systems, intervenor in Nos. 83-1439 and 83-1464.

John A. Ligon, Grant S. Lewis, and John S. Kinzey, New York City, were on the brief for United States Transmission Systems, Inc., petitioner in No. 83-2108 and intervenor in No. 83-1225.

Leo I. George, Washington, D.C., was on the statement in lieu of brief for Telephone Network, Inc., petitioner in No. 83-2168.

Victor J. Toth, Reston, Va., was on the statement in lieu of brief for Association of Long Distance Telephone Companies, petitioner in No. 83-2218.

John E. Ingle, Counsel, Federal Communications Commission, Washington, D.C., with whom Bruce E. Fein, General Counsel, Daniel M. Armstrong, Associate General Counsel, Nancy E. Stanley, Jane E. Mago, and Linda L. Oliver, Counsel, Federal Communications Commission, Washington, D.C., were on the brief, for Federal Communications Commission, respondent in all cases.

Robert B. Nicholson, Frederic Freilicher, Barry Grossman, and Nancy Garrison, Washington, D.C., were on the statement in lieu of brief for United States of America, respondent in all cases.

Bruce Renard, Gainesville, Fla., for Florida Public Service Commission, intervenor in Nos. 83-1225 and 83-1329.

Fl.
Fl.
ty
ma
Co
jo
St.
int
Ra
Co
fo
ca
.
wi
Pa
Co
83-
149
83-
1
wh
Ho
Yo
Cit
Co
int
14
83-
21
Yo
N.
D.
ap
R(
12
wi
in
tic
in
D
ti
R
P
b
al
a
w

Cite as 737 F.2d 1095 (1984)

Benjamin H. Dickens, Jr., Tallahassee, Fla., with whom Jack Shreve, Tallahassee, Fla., for National Association of State Utility Consumer Advocates and Joel B. Shifman, Charleston, W.Va., for Public Service Commission of West Virginia, were on the joint brief, for National Association of State Utility Consumer Advocates, et al., intervenors in Nos. 83-1225 and 83-1493. Raymond E. Lark, Jr., and Lee Jedziniak, Columbia, S.C., also entered appearances for Steven W. Hamm, as Consumer Advocate for the State of South Carolina.

Raymond F. Scully, Washington, D.C., with whom Robert P. Casey, Harrisburg, Pa., was on the brief, for Bell Operating Companies, intervenors in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-1954, 83-1984, 83-1995, 83-2016, 83-2108, 83-2168, and 83-2218.

Michael Boudin, Washington, D.C., with whom David H. Remes, Washington, D.C., Howard J. Trienens, Daniel Stark, New York City, Alfred A. Green, New York City, and Judith A. Maynes, New Haven, Conn., were on the brief, for AT & T Co., intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-1954, 83-1984, 83-1995, 83-2016, 83-2108, 83-2168, and 83-2218. M. Jean Dabney, New York City, James D. Ellis, Bedminster, N.J., Alfred Winchell Whitaker, and Hiram D. Gordon, New York City, also entered appearances for AT & T Co.

Mary Jo Manning, Washington, D.C., for ROLM Corporation, intervenor in Nos. 83-1225 and 83-2218.

Charles M. Meehan, Washington, D.C., with whom Shirley S. Fujimoto, Washington, D.C., for Utilities Telecommunications Council, Deborah Shur Trinker, Washington, D.C., Lee M. Weiner, Washington, D.C., for Association of Data Communications Users, Wayne V. Black, and Stark Ritchie, Washington, D.C., for American Petroleum Institute, were on the joint brief, for American Petroleum Institute, et al., intervenors in Nos. 83-1225, 83-1329, and 83-1984.

David Cosson, Washington, D.C., with whom Amy S. Gross, Margot Smiley Hum-

phrey, and Ellen S. Deutsche, Washington, D.C., were on the brief, for Rural Telephone Coalition, intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, and 83-1493.

J. Roger Wollenberg, William T. Lake, and Roger M. Witten, Washington, D.C., were on the brief for International Business Machines Corp., intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-1954, 83-1984, 83-1995, 83-2016, 83-2108, 83-2168, and 83-2218.

Joseph M. Kittner, Randolph J. May, and Timothy J. Cooney, Washington, D.C., were on the brief for Ad Hoc Telecommunications Users Committee, intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-2168, and 83-2218.

Herbert E. Marks, Joseph P. Markoski, Judith Jurin Semo, Washington, D.C., and David A. Wormser, Arlington, Va., were on the brief for Association of Data Processing Service Organizations, Inc., intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1954, 83-1984, 83-2016, 83-2168, and 83-2218.

Richard E. Wiley, Philip V. Permut, Danny E. Adams, Howard D. Polsky, Philip M. Walker, and Donald E. Ward, Washington, D.C., for GTE Corp., and Bernard C. Topper, Jr., Burlingame, Cal., and Mitchell F. Brecher, Washington, D.C., for GTE Sprint Communications Corp., were on the joint brief for GTE Corp., et al., intervenors in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-1954, 83-1984, 83-1995, 83-2016, 83-2108, 83-2168, and 83-2218. Richard McKenna, James R. Hobson, Gail L. Polivy, and Mark P. Bresnahan, Washington, D.C., also entered appearances for GTE Corp., et al.

Charles A. Zielinski and A. Richard Metzger, Jr., Washington, D.C., were on the brief for Rochester Telephone Corp., intervenor in Nos. 83-1225, 83-1463, 83-1464, and 83-1493. Daniel L. Koffsky, Washington, D.C., also entered an appearance for Rochester Telephone Corp.

David E. Blabey, Lawrence G. Malone, and Timothy P. Sheehan, Albany, N.Y., were on the brief for New York State

Department of Public Service, intervenor in Nos. 83-1225 and 83-1329.

Ronald D. Eastman, Lynda S. Mounts, Washington, D.C., Louis J. Caruso, and R. Philip Brown, Lansing, Mich., were on the brief for the State of Michigan, et al., intervenors in No. 83-1329.

Gary C. Tucker, Michael L. Glaser, and Francis E. Fletcher, Washington, D.C., were on the brief for Roseville Telephone Company, et al., intervenors in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, and 83-1493.

Leo I. George and Thomas J. McCabe, Washington, D.C., were on the statement in lieu of brief for U.S. Telephone, Inc., intervenor in No. 83-1225. Daniel Huber also entered an appearance for U.S. Telephone, Inc.

Peter Tannenwald and Vonya B. McCann, Washington, D.C., were on the brief for Sateco Inc., et al., intervenors in Nos. 83-1225 and 83-2218. Mania K. Baghdadi, Washington, D.C., also entered an appearance for Sateco Inc., et al.

Thomas J. O'Reilly, Washington, D.C., was on the brief for United States Independent Telephone Association, intervenor in No. 83-1225.

Edward J. Perez, Los Angeles, Cal., was on the brief for City of Los Angeles, amicus curiae urging reversal and remand.

Diane L. McIntire, Washington, D.C., entered an appearance for Iowa State Commerce Commission, intervenor in No. 83-1225.

Eric A. Eisen and Elisabeth H. Ross, Washington, D.C., were on the brief for Missouri Public Service Commission, intervenor in No. 83-1329.

Douglas N. Owens, Olympia, Wash., also entered an appearance for Washington Utilities & Transportation Commission, intervenor in No. 83-1225.

Theodore D. Frank, Washington, D.C., entered an appearance for Centel Corp., intervenor in Nos. 83-1225, 83-1463, 83-1464, 83-1995, 83-2168, and 83-2218.

Carolyn C. Hill, Washington, D.C., entered an appearance for United Telephone Systems, Inc., intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, and 83-1493.

James H. DeGraffenreidt, Baltimore, Md., entered an appearance for Maryland Office of People's Counsel, intervenor in No. 83-1225.

Joseph M. Kittner and Randolph J. May, Washington, D.C., also entered appearances for American Broadcasting Companies, Inc., intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, 83-1493, 83-2168, and 83-2218.

Steven M. Schur, Madison, Wis., and Philip J. Mause, Washington, D.C., entered appearances for Public Service Commission of Wisconsin intervenor in No. 83-1225.

Thomas N. Wies, Burlington, Vt., entered an appearance for Vermont Public Service Board, intervenor in Nos. 83-1225 and 83-1464.

Elizabeth A. Celis entered an appearance for Arizona Corporation Commission, Phoenix, Ariz., intervenor in No. 83-1225.

James E. Weging, Chicago, Ill., entered an appearance for Illinois Commerce Commission, intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, and 83-1464.

Randall B. Lowe, Washington, D.C., entered an appearance for Combined Network, Inc., intervenor in No. 83-1225.

Nicholas P. Miller, Seattle, Wash., entered an appearance for State of Alaska, et al., intervenor in Nos. 83-1225, 83-1329, 83-1439, 83-1463, 83-1464, and 83-1493.

Robert M. Hill, Jr., Florence, Ala., entered an appearance for Public Service Commission of Alabama, intervenor in No. 83-1225.

William B. Gundling, Hartford, Conn., entered an appearance for Department of Public Utility Control of the State of Connecticut, intervenor in Nos. 83-1225 and 83-1984.

Walter Washington, Pierre, S.D., entered an appearance for South Dakota Public

Utilities Commission, intervenor in Nos. 83-1225 and 83-1329.

David A. Irwin, Washington, D.C., entered an appearance for Enhanced Communication Services Association, intervenor in No. 83-1225.

Stephen R. Bell and Paul J. Sinderbrand entered appearances for Tymnet, Inc., Washington, D.C., intervenor in No. 83-1329.

Gerald R. Tarrant entered an appearance for Public Service of the State of Vermont, Washington, D.C., intervenor in No. 83-1464.

Randall B. Lowe and Thomas J. Beers, Washington, D.C., also entered appearances for Allnet Communication Services, Inc., intervenor in Nos. 83-2168, and 83-2218.

Albert H. Kramer, Washington, D.C., also entered an appearance for American Telephone Association, intervenor in No. 83-2108.

TABLE OF CONTENTS

	Page
I. BACKGROUND	1103
A. AT&T and the Separations Process ..	1103
B. The Growth of Alternatives to Ordinary Long Distance Service	1105
C. Proceedings in Docket No. 78-72	1107
D. Review of the FCC's Orders	1110
II. ANALYSIS	1111
A. Flat-Rate End User Access Charges	1111
1. FCC Authority to Impose the Charges	1111
2. The FCC's Decisional Process	1115
a. Uneconomic Bypass	1115
b. Universal Service	1119
c. Alleged Procedural Deficiencies	1120
3. Centrex-CO Service	1122
4. Party Lines	1125
5. Average Schedule Company Status	1127
B. Access Charges to Carriers and Private Line Users	1129
1. Unlawful Discrimination Against Carriers Subject to the Carrier Common Line Charge in Favor of Other Interstate Users of Exchange Facilities	1130
a. The Previous System of Exchange Access Compensation and the Commission's Response	1130
b. Failure to Cure Pre-Existing Discrimination	1132
c. The Reasonableness of Adopting Usage-Based Charges for Carriers and Private Line Users Requiring Exchange Access	1134

d. Discrimination in the Uniform Access Compensation Plan ...	1136
2. Private Line Service	1138
3. Private Communications Systems	1142
4. Foreign Exchange ("FX") Service	1144

III. CONCLUSION	1147
-----------------------	------

Before WILKEY and GINSBURG, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion PER CURIAM.

PER CURIAM:

We review in this proceeding Federal Communications Commission (FCC or Commission) decisions focused on the future of United States interstate telephone services. In the Commission's view, this case presents perhaps "the most difficult" and probably "the most important" problem ever to come before the agency. *MTS & WATS Market Structure: Third Report and Order* ¶ 368, 93 F.C.C.2d 241, 340-41 (1983). The decisions at issue, we conclude, are within the Commission's authority and, for the most part, are rationally grounded and sufficiently supported by evidence. We therefore affirm the FCC's orders in all major respects. We remand to the agency for further, more careful, analysis only two portions of its orders: the segments dealing with party line service and small telephone companies' election of "average schedule company" status.

I. BACKGROUND

A. *AT & T and the Separations Process*

The multiple petitions consolidated for our review address facets of a controversial, compound question: Among telephone users, how should the costs of local telephone company equipment be divided. That equipment starts at every subscriber's wall plug; it includes the line, or "loop," between each subscriber's premises and the local telephone company central office. Switching equipment at the office routes each incoming call out onto the local loop of the subscriber receiving the call, or out to another local office where the call may be switched onto the long-distance

lines of AT & T or another long-distance carrier.

A large part of the cost of this local plant is nontraffic sensitive (NTS). Plant costs are nontraffic sensitive when they do not vary with the extent to which the facilities are used. The basic cost of installing and maintaining a local loop, for example, remains the same whether the subscriber, or "end user," uses the loop to make one call or a hundred, and whether those calls are local or long-distance. Some switching costs, on the other hand, are traffic-sensitive. They in fact increase with usage; for example, as more calls pass through the equipment, heavier, more costly switches must be employed.

In the days when AT & T was the only interstate long-distance carrier, the recovery of telephone equipment costs was not the controversial matter it is today. At first, local telephone companies¹ recovered all local exchange plant costs, for the most part through flat per-month charges paid by local subscribers.² The long-distance carrier (AT & T for interstate calls, perhaps another company for intrastate long-distance calls) recovered the costs of long-distance or "toll" lines and long-distance switching equipment through usage-sensitive charges imposed on the makers of long-distance calls—the more and farther one called, the more one paid. Where the local carrier owned long-distance property—for example, toll lines out to the city limits—the long-distance carrier reim-

bursed the local company for the use of that property through a share of long-distance revenues.³ See, e.g., *Illinois Bell Telephone Co. v. Moynihan*, 38 F.2d 77, 82-83 (N.D.Ill.), *rev'd sub nom. Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930); *Re Indiana Bell Telephone Co.*, 1922C Pub.Util. Rep. 348, 368.

All long-distance calls, however, require the use of both local property and long-distance facilities. The calls begin on some subscriber's local loop; they then travel through local switches on their way out to long-distance lines; from the long-distance lines, they drop back into a local system at the receiving end and pass through local switches; finally, they pass onto the call recipient's local loop. In *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930), the Supreme Court decided that, because local plant is used for interstate calls, an appropriate percentage of local plant costs should be placed within the jurisdiction of federal⁴ rather than state regulators. AT & T and the local companies then adjusted their cost-allocation system to accommodate *Smith*.

State regulators, after *Smith*, could authorize local companies to recover only the portion of local telephone plant costs allocated to the intrastate jurisdiction. AT & T recovered local telephone plant costs allocated to the interstate jurisdiction and passed those revenues back to the local companies.⁵ AT & T chose to recover local

1. Until recently, 22 larger local telephone companies—the Bell Operating companies (BOCs)—were subsidiaries of AT & T. In 1982, the Justice Department and AT & T entered into a consent decree providing that AT & T would divest itself of the BOCs as of early 1984. See *United States v. AT & T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). In addition to the BOCs, almost 1500 independent local companies provide local service.

2. In the early days of telephone service, pay telephone (coin box) revenues, in addition, were vitally important to local telephone companies. Cf. *Illinois Bell Tel. Co. v. Moynihan*, 38 F.2d 77 (N.D.Ill.) (striking down coinbox rates prescribed by Illinois Commerce Commission as confiscatory), *rev'd*, *Smith v. Illinois Bell Tel.*

Co., 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930).

3. When the local company was a subsidiary of AT & T, the reimbursement took place through a division of revenues within the AT & T corporate family.

4. Prior to the creation of the FCC, see Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976 & Supp. V 1981), the Interstate Commerce Commission exercised regulatory authority over interstate wire communication.

5. All interstate revenues were paid into an interstate "pool." AT & T allocated a share of revenues out of the pool to each local telephone company in proportion to its share of the total

Cite as 737 F.2d 1095 (1984)

telephone costs assigned to the interstate jurisdiction in the same way it had all along recovered costs associated with interstate service—through usage-based charges imposed on the makers of long-distance calls. Thus long-distance callers, charged on the basis of the frequency and distance of their calls, covered through their payments a significant portion of the costs of local subscriber plant. Revenues paid in by long-distance callers were shared by AT & T with the local companies through a process called settlements and division of revenues.

That basic system remains in effect today. The FCC, working with a Federal-State Joint Board established pursuant to 47 U.S.C. § 410(c) (1976), allocates local plant costs between the interstate jurisdiction (FCC controls recovery of costs) and the intrastate jurisdiction (state commissions control recovery of costs). This mode of allocation—the “separations process”—currently assigns roughly 26% of the costs of local exchange plant to the interstate jurisdiction. *See Amendment of Part 67, 89 F.C.C.2d 1, 5, modified, 90 F.C.C.2d 522, recon. denied, 91 F.C.C.2d 558 (1982), petition for review pending sub nom. MCI Telecommunications Corp. v. FCC, No. 82-1237 (D.C.Cir. filed Mar. 4, 1982); see also MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 523 & n. 4 (D.C.Cir. 1983).*

Two key characteristics of the system bear emphasis. First, local charges do not cover the full costs of local telephone facilities. Today, local charges cover only 74% of the costs of the basic local network. The rest of the local plant costs are recovered from long-distance fees paid by long-distance callers on a traffic-sensitive basis. Second, subscribers who are heavy long-distance users, under the current, usage-based charges, pay a percentage of the costs of the local network wholly out of proportion to the costs of supplying them with service. These subscribers are heavy users of their local loops, but the basic cost of a local loop is nontraffic sensitive—that cost remains the same regardless of how

many, or how few, calls a subscriber makes.

B. *The Growth of Alternatives to Ordinary Long-Distance Service*

Ordinary long-distance service is not the only way to arrange calls from one state to another. AT & T and other carriers offer a variety of “private line” arrangements. Private line services furnish to the large-scale user, for a flat rate, full-time private interstate circuits between specific points. Foreign Exchange (FX), for example, is one form of specialized private line service. Essentially, FX users have a private line connected to the local exchange at one end. A Washington business buying Washington-New York FX service with the “closed end” in Washington, under the current scheme, can call any telephone subscriber in New York, without paying an additional per-call charge, and any New York telephone subscriber can call the business in Washington for the price of a local call. Common Control Switching Arrangement (CCSA) is another specialized private line service. CCSA involves a network of private lines linked through switches at a local telephone company's premises. *See Bell System Tariff Offerings, 46 F.C.C.2d 413, 418 n. 5, aff'd sub nom. Bell Telephone Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975).*

The FCC, prior to the set of decisions before us for review, did not require users of private line services to contribute, as ordinary long-distance callers do, to local plant costs allocated to the interstate jurisdiction. Users of these services, however, may in fact place long-distance calls originating and/or terminating in the local exchange. For example, every FX call is an interexchange call originating or terminating in a local exchange. FX users now pay ordinary business line rates (as well as a flat fee for the private line) and thus contribute to local plant costs allocated to the intrastate jurisdiction; currently, however, they make no contribution to the local plant

investment allocated to the interstate jurisdic-

tion. *See* Brief for FCC at 10.

costs allocated to the interstate jurisdiction. A further illustration is the "leaky PBX." The "leaking" becomes possible when a private line user hooks up its private line to an ordinary local loop through a switchboard, or "PBX," at one or both ends. A business with a New York-Washington private line can thus dial up from any Washington exchange telephone to the Washington switchboard, dispatch the call to New York via the private line, and drop it back out into the New York local exchange through the switchboard on the other end. Here too, the caller currently makes no contribution to local plant costs allocated to the interstate jurisdiction.

Choice increased when other common carriers (OCCs) entered the market once served only by AT & T. The Commission's decision in *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975), paved the way for private line market entry by carriers offering services in competition with AT & T. Subsequent FCC and appellate court decisions clarified that AT & T could not, through its subsidiaries, the Bell Operating Companies (BOCs), block competition in private line offerings, such as FX and CCSA, by denying OCCs loop service through which they could interconnect their private line circuits into the local exchange. *See Bell System Tariff Offerings*, 46 F.C.C.2d 413, *aff'd sub nom. Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975).

In 1974 MCI filed tariffs for a new service it called Execunet. With Execunet, MCI linked together a nationwide network of intercity private lines and local interconnections to offer a service that could compete with AT & T's ordinary long-distance service. An Execunet customer could enter the MCI network from any local phone in an area served by the network and, after entering a subscriber authorization code, dial an ordinary long-distance number. The call would travel over MCI private

facilities to the appropriate local exchange, drop back into the local exchange, and be routed along local lines to its recipient. This court, in its *Execunet I* and *II* decisions, held that Execunet service was not beyond the scope of MCI's private line authorizations; that the Commission had not made the explicit public interest findings necessary to bar OCCs from offering such service; and that, unless and until the Commission made such findings, local telephone companies were required to give the OCCs appropriate interconnections for the service. *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C.Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 780, 54 L.Ed.2d 790 (1978) (*Execunet I*); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590 (D.C.Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 566, 58 L.Ed.2d 651 (1978) (*Execunet II*).

After the *Execunet* decisions, the FCC opened Common Carrier Docket No. 78-72 to determine "whether the public interest requires that interstate message toll telephone service (MTS) [i.e., ordinary long-distance service] and/or wide area toll telephone service (WATS), or their functional equivalents, should be provided ... free from direct competition[.]" *MTS & WATS Market Structure: Notice of Inquiry and Proposed Rulemaking*, 67 F.C.C.2d 757, 757 (1978) (footnotes omitted). The Commission announced that it would consider, as part of its analysis,

what reimbursement interstate services should make to local operating companies for the use of local plant, on a cost causal basis; what additional charges, if any, should be levied on interstate services to support local exchange services; and whether and how these charges can be equitably imposed on all interstate services.

Id. at 759.

During the pendency of the *Execunet* litigation, the OCCs and their subscribers made no contribution to local plant costs allocated to the interstate jurisdiction. In 1978, however, the BOCs filed a new tariff

Cite as 737 F.2d 1095 (1984)

with the FCC under which OCCs would pay for Exchange Network Facilities for Interstate Access (ENFIA) at rates designed to parallel the contribution AT & T made to the costs of local plant through the settlements and division of revenues process. The OCCs, the BOCs claimed, were using local exchange plant to make interstate calls in the same manner as AT & T—yet the OCCs made no special contribution to the costs of that plant, as AT & T did. The ENFIA tariff was the remedy the BOCs proffered for this disparity.

The OCCs protested vigorously. Their interconnections into the local exchange, they argued, were simple FX interconnections to the "line side" of a local central office switch. FX users had never contributed to the interstate portion of local plant costs. AT & T's interconnection to the "trunk side" of a toll office switch, the OCCs pointed out, was different and, at the time of the ENFIA tariff filing, technologically available only to AT & T. "Trunk side" connection, the OCCs maintained, was far superior to "line side" linkage. Because of the unique quality of AT & T's interconnection, the OCCs argued, AT & T was the only true provider of ordinary long-distance services. Thus, in the OCCs' view, AT & T should shoulder alone the costs of local exchange plant allocated to the interstate jurisdiction.

To cope with this dispute pending eventual action in Docket No. 78-72, the FCC in 1978 supervised several months of negotiations. The Commission's objective was to achieve "some form of a 'rough justice' interim" solution. *AT & T*, 91 F.C.C.2d 1079, 1081 (1982). The negotiations culminated in December 1978 with the signing of the ENFIA agreement, a settlement due to expire, by its terms, upon the effective date of a superseding Commission order in Docket No. 78-72, or after five years, whichever came first. Under the ENFIA agreement OCCs providing Execunet-type services made "payment[s] to the local telephone company for use of jointly used subscriber plant ... in the provision of their interstate services." ENFIA Agreement ¶ 9, reprinted in 43 Fed.Reg. 59,129, 59-

131 (1978). These payments, however, were far below those AT & T made through the settlements and division of revenues process.

Parties to the ENFIA agreement remained mindful of the disparate treatment of Execunet-type services in comparison to other interstate services, whose providers paid only local business rates for connections to local exchange facilities. They were mindful also that an attempt to arrive at a more encompassing settlement might have impeded negotiations. See *MCI Telecommunications Corp. v. FCC*, 712 F.2d 517, 524 (D.C.Cir.1983). The ENFIA settlement therefore stated that the parties reached their interim agreement on compensation of local telephone companies for use of local exchange facilities "as if" the charges they established "could, after appropriate consideration by the Commission, be ultimately applied to other services which also utilize the local telephone company exchange facilities." ENFIA Agreement ¶ 5, reprinted in 43 Fed.Reg. at 59-131.

C. Proceedings in Docket No. 78-72

The Commission did not linger over the basic market structure issue in Docket No. 78-72; it concluded that an open market and free competition were "in the public interest and will further the goals of the Communications Act." *MTS & WATS Market Structure: Report and Third Supplemental Notice of Inquiry*, 81 F.C.C.2d 177, 183 (1980) (*Third Supplemental Notice*). Turning to the further issues posed in the docket, the Commission, after four supplemental notices of inquiry, ultimately released *MTS & WATS Market Structure: Third Report & Order*, 93 F.C.C.2d 241 (1983) (*Access Order*), the first of the series of FCC orders presented for our review. The Commission twice modified the *Access Order* plan initially and most substantially on reconsideration, *MTS & WATS Market Structure: Memorandum Opinion & Order*, 48 Fed.Reg. 42,984 (1983) (*Reconsideration Order*), and again on further reconsideration, *MTS & WATS*

Market Structure: Memorandum Opinion & Order, 49 Fed.Reg. 7,810 (1984) (*Further Reconsideration Order*). All three orders are before us in this appellate proceeding.

[1] In its Docket No. 78-72 dispositions, the Commission sought to accommodate four goals that tugged in different directions. "[T]he continued assurance of universal service" appeared first on the FCC's list. *Access Order* ¶ 122, 93 F.C.C.2d at 278. Section 1 of the Communications Act requires the FCC to "regulat[e] interstate ... commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Our case law recognizes the prominence of this universal service objective. See, e.g., *United States v. Western Electric Co.*, 569 F.Supp. 1057, 1120 (D.D.C.1983); see also *Access Order* ¶¶ 74-84, 93 F.C.C.2d at 265-67.⁶ The other three objectives identified by the Commission were "the elimination of unjust discrimination or unlawful preferential rates," as mandated by section 202 of the Communications Act; "the encouragement of network efficiency"; and "the prevention of uneconomic bypass." *Access Order* ¶ 122, 93 F.C.C.2d at 278.

"Bypass" occurs when end users develop and employ alternative local distribution technologies in place of the local exchange system. The Commission considered certain forms of bypass a grave risk. It feared, particularly, that the current system for recovery of subscriber plant costs might lead to "uneconomic bypass"—that heavy users might turn to bypass technologies priced lower than local exchange facilities, but in fact costing more to provide. The Commission explained that "uneconomic" technologies posed a threat to the local

telephone network when, as under the current system of charges, access to the local telephone network, for heavy interstate users, is priced above cost. This ultimate concern influenced the FCC's course: if large users left the network and turned to bypass technologies, the local companies would have to raise the rates paid by their remaining subscribers, thus jeopardizing universal service.

The Commission determined that its various objectives could be balanced most effectively if it moved toward a system in which a substantial portion of the NTS costs of local telephone plant within the FCC's jurisdiction would be recovered through flat per line charges billed to end users. The FCC targeted for elimination heavy long-distance users' payment of a share of local telephone plant costs in excess of the actual cost of supplying those users with service. A critical factor, sometimes overlooked in discussions of the cost-allocation problem the FCC faced, was spotlighted by the Commission: "A subscriber who does not use the subscriber line to place or receive calls imposes the same NTS costs as a subscriber who does use the line." *Access Order* ¶ 121, 93 F.C.C.2d at 278. It should be the main rule, the FCC decided, that subscribers bear responsibility for the local telephone network costs they actually cause. Explaining its position, the Commission stated:

Economics teaches us that, except in certain circumstances involving market failure, prices equal to the cost of producing another increment of a good, i.e., equal to the marginal cost of production, are optimal. Provision of telephone services involves two marginal costs. One varies with the traffic level. The other varies with the number of access lines demanded. For this reason, efficient pricing requires both usage sensitive and

6. MCI contends that the FCC has no responsibility to promote universal service because "the Commission has no statutory responsibility for local communications," and therefore "it would be unlawful for it to promulgate a policy designed to ... benefit local communications."

Brief for Intervenor MCI Telecommunications Corp. at 19 n. 20. We reject MCI's argument. Congress directed that, "so far as possible, ... all people of the United States" are to have adequate telephone facilities at reasonable prices.

no
of
tel
ma
pre
eri
tia
ou
tec
old
nat
wo
ble
ser
bas
of
sar
use
pro
wh
tion
/
anc
dus
app
tec
gro
has
con
doe
tec
enl
U.S
tha
cat
cos
Inv
sul
Id. ¶
notes
Th
ty su
of un
pass
¶ 31,
wise
impl
tem
more
"the
ed t

Cite as 737 F.2d 1095 (1984)

non-usage sensitive charges for recovery of access costs.

The cost imposed upon the nation's telecommunications system, and ultimately upon the general public, by our present usage sensitive method of recovering these NTS costs pose[s] a substantial danger to the long term viability of our nation's telephone systems. New technologies and radical improvements in older technologies make available alternatives to the traditional telephone network. Telecommunications is substitutable for a wide variety of other goods and services produced by our society. Prices based upon the true cost characteristics of telephone company plant are necessary both to make a decision on whether use of the alternative technologies is appropriate and to make a decision on whether to substitute telecommunications for other activities.

As telecommunications plays a larger and larger role in fundamental U.S. industries, the problems resulting from inappropriate pricing grow. Computer technology and communications have grown so similar that the Commission has redrawn its traditional definition of communications. Access pricing that does not reflect cost can turn computer technologies from directions that would enhance the productivity of this essential U.S. industry and all of the industries that depend on computers and communications toward simple avoidance of non-cost based telecommunications prices. Investment may be misdirected as a result.

Id. ¶¶ 27-29, 93 F.C.C.2d at 251-52 (footnotes and paragraph numbers omitted).

The FCC acknowledged that "uncertainty surround[ed] the precise size and threat of uneconomic bypass," but found the bypass phenomenon real and growing. *Id.* ¶ 31, 93 F.C.C.2d at 252. It would be unwise, the Commission concluded, to delay implementation of a cost-based pricing system until the effects of bypass became more pronounced. Delay risked losing "the luxury of the gradual transition needed to satisfy our objective of maintaining

affordable service"; any further bypass "might mean higher long run costs for those who were required to remain on the network." *Id.* Of prime importance in its decisionmaking, the Commission observed:

[W]ere we to delay instituting the smooth movement towards a rational pricing system until a significant number of large users had initiated constructing alternative bypass systems, it could well be too late for any remedial action. Usually uneconomic bypass is uneconomic only before the construction of bypass facilities starts. Once a large telecommunications user has committed significant capital to building a private bypass system, the maintenance of that system is no longer uneconomic. Consequently, we believe that prompt action is essential to preserve the public interest.

Id. ¶ 32, 93 F.C.C.2d at 252-53.

Under the FCC's plan to shift most subscriber plant costs in the interstate jurisdiction onto end users, a \$6 end user charge will be imposed on multi-line business customers starting in June 1984. The Commission now anticipates imposing some end user charges on residential and single-line business users, on a transitional basis, starting in June 1985. The initial *Access Order* contemplated recovery through flat-rate end user access charges of all NTS subscriber plant costs except those allocated to a carrier-supported Universal Service Fund, designed to keep down local rates in areas where exchange plant costs are especially high. *Access Order* ¶ 134, 93 F.C.C.2d at 281-82. On reconsideration, the Commission chose to institute further decisionmaking on several matters: the magnitude of the end user charge after the transition; categories of low-income subscribers who should be exempted from end user charges; the shape of the transition; and mechanisms sensitive to the particular needs of small telephone companies in high cost areas. The residential and single-line business end user charge will not exceed \$4 per line per month through 1990, and the FCC has announced its intention to monitor closely the impact of residential end user

charges on universal service as those charges are imposed. *Further Reconsideration Order* ¶¶ 15-26, 49 Fed.Reg. 7,810, 7,812-13 (1984).

The FCC has allocated the jurisdictionally interstate NTS costs of local telephone plant that it is not shifting to end users—or, for the transitional period, that it is not yet shifting to end users—to interexchange carriers and to users of interstate private line services. Interexchange carriers are to pay a “carrier’s carrier” charge; a surcharge has been established for private line users. The interexchange carriers (most prominently, AT & T and the OCCs) will in turn pass their carrier’s carrier charge on to their customers through the long-distance rates they set. The modified final judgment settling the government’s anti-trust suit against AT & T, *see supra* note 1, requires the BOCs to move, over the next few years, to provision of equal interconnection to the OCCs; to the extent that the same quality interconnection is unavailable in the transitional years, AT & T’s carrier’s carrier charge will be maintained at a “premium” above the charge paid by the OCCs. The interim surcharge set by the Commission is to be paid by the following category of users: private line and other users who may engage local exchanges for interstate calling without otherwise contributing to the portion of local

telephone plant costs assigned to the interstate jurisdiction.

D. Review of the FCC’s Orders

Our review of the FCC’s multifaceted decision first considers arguments relating to the Commission’s imposition of flat-rate end user access charges. Under this main heading, we deal with (1) contentions that the imposition of end user charges exceeds jurisdictional limitations on the Commission’s authority implicit in the Communications Act and/or the Supreme Court’s decision in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930);⁷ (2) assertions that the FCC’s decision is irrational, unsupported, or procedurally defective;⁸ and (3) attacks on the end user charges the Commission ordered for Centrex-CO subscribers⁹ and party-line users.¹⁰ We also place in this portion of the opinion review of the Commission’s changes in the prerequisites for small telephone companies’ election of “average schedule company” status.¹¹

In the second main segment of the opinion, we address objections various petitioners raise to the carrier’s carrier charge and private line surcharge. These objections include claims that (1) the FCC’s plan perpetuates unlawful discrimination between OCCs and other entities using the local exchange for interstate calling;¹² (2) the FCC’s prescription of a surcharge payable

7. This position is advanced by petitioners National Association of Regulatory Utility Commissioners and California, and by intervenors National Association of State Utility Consumer Advocates, *et al.*, Florida Public Service Commission, New York State Department of Public Service, Independent Alliance, and Missouri Public Service Commission. It is addressed by the FCC and intervenors MCI Telecommunications Corp., AT & T, BOCs, United States Independent Telephone Association, IBM Corp., and Rochester Telephone Company.

8. These arguments are made by petitioners National Association of Regulatory Utilities Commissioners and California, and by intervenors National Association of State Utility Consumer Advocates, Michigan, Rural Telephone Coalition, Florida Public Service Commission, and Independent Alliance. They are addressed by the FCC and intervenors AT & T, BOCs, United

States Independent Telephone Association, and Rochester Telephone Company.

9. Parties mounting these attacks are petitioners Public Service Commission of the District of Columbia and North American Telecommunications Association. The FCC, supported by intervenors BOCs and ROLM Corp., defends its actions.

10. This attack is made by petitioner Rural Telephone Coalition.

11. *See supra* note 10.

12. Petitioner MCI Telecommunications Corp. and intervenor Sateco, *et al.* make this claim; the FCC’s position is supported by intervenors AT & T, BOCs, GTE Corp., Ad Hoc Telecommunications Users Committee, and Association of Data Processing Service Organizations.

by private line and other users lacks evidentiary support or rational basis;¹³ (3) the FCC's action regarding private communications systems is unjustified;¹⁴ and (4) errors warranting reversal infect the FCC's treatment of FX users.¹⁵

II. ANALYSIS

A. Flat-Rate End User Access Charges

1. FCC Authority to Impose the Charges

Petitioners¹⁶ present, elaborate, and recapitulate their core argument that the Commission lacks authority to impose flat-rate end user access charges. They derive their contentions from precedent and statutory provisions. We turn first to their insistent claim that the Supreme Court's decision in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930), *see supra* p. 1104, confirms the powerlessness of the federal agency to take the action they challenge. Petitioners misapprehend the Court's holding in *Smith*. We here describe that case in sufficient detail to clarify the precise thrust of the High Court's opinion.

Smith presented for Supreme Court review a district court decision striking down as confiscatory Chicago coinbox rates set by the Illinois Commerce Commission. The district court, like the state commission before it, had taken as a rate base all of Illinois Bell's Chicago property, including both exchange plant and toll (long-distance) lines out to the city limits. In computing the revenue generated by that investment, the district court counted both the sums Illinois Bell received directly from local users and the share of interstate tolls AT &

T paid over for the use of Illinois Bell's long-distance lines in interstate calling.

The Supreme Court reversed. It held first that the state commission and district court erred in not separating out Illinois Bell's intrastate and interstate property, revenue, and expenses. Chief Justice Hughes wrote:

The separation of the intrastate and interstate property, revenue and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. *It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.* In disregarding the distinction between the interstate and intrastate business of the Company, the court found it necessary to pass upon the fairness of the division of interstate tolls between the American and Illinois companies. The court held that the division was reasonable and the appellants contest this ruling. But the interstate tolls are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates was a matter for the determination either of the Illinois Commission or of the court in dealing with the order of that Commission. 282 U.S. at 148, 51 S.Ct. at 68 (emphasis supplied). The Court stated that it was the ICC, then charged with regulating interstate communication, *see supra* note 4, that had "authority to estimate the value of the property used in the interstate service and to determine the amount of the revenues and the expenses properly attributable thereto"; "[t]he proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction." *Id.* at

The validity of the premium carrier's charge levied against AT & T above that assessed against the OCCs is under consideration in a separate review proceeding. *AT & T v. FCC*, No. 84-1087 (D.C.Cir. filed March 9, 1984).

16. "Petitioners," as used in our analysis, describes both petitioners and intervenors appearing in opposition to the Commission's decision.

13. Petitioner Aeronautical Radio, Inc. and intervenor American Petroleum Institute, *et al.* make this claim; the FCC is supported by intervenors AT & T and BOCs.

14. Intervenor American Petroleum Institute levels this attack.

15. Petitioner Aeronautical Radio, Inc. here contests the FCC's decision; intervenors AT & T and BOCs defend the FCC.

149, 51 S.Ct. at 69. Any review of the state commission's order, the Court continued, must therefore rest on an appropriate determination of "the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service." *Id.* The Court cited the *Minnesota Rate Cases*, 230 U.S. 352, 435, 33 S.Ct. 729, 755, 57 L.Ed. 1511 (1913), in which it had imposed a similar constraint on the states' determination of intrastate rail rates.¹⁷

The requisite allocation of property between the interstate and intrastate services, the Court then stated, must be made with an eye to "the actual uses to which the property is put." 282 U.S. at 151, 51 S.Ct. at 69. Figures Illinois Bell had submitted to the district court reflected treatment of the costs of exchange plant as wholly local. *Id.* at 150, 51 S.Ct. at 69. That allocation was impermissible, the Court declared, "for unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden." *Id.* at 151, 51 S.Ct. at 69.¹⁸

One petitioner argues that *Smith* precludes FCC-imposed flat-rate end user charges because the imposition means "costs attributable to interstate usage [are not] allocated to and recovered from the interstate network." Brief of Petitioner National Association of Regulatory Utility Commissioners at 28 (hereafter, NARUC

17. In a later opinion, Chief Justice Hughes characterized *Smith* as "a case where the segregation of properties and business was essential in order to confine the exercise of state power to its own proper province." *Lone Star Gas Co. v. Texas*, 304 U.S. 224, 241, 58 S.Ct. 883, 891, 82 L.Ed. 1304 (1938).

18. Petitioners emphasize this statement. *See, e.g.*, Brief of Petitioner National Association of Regulatory Utility Commissioners at 26; Brief of Intervenor National Association of State Utility Consumer Advocates, *et al.* at 14 (hereafter, NASUCA Brief); Brief of Intervenor New York State Department of Public Service at 21. They argue that the FCC's plan is inconsistent with *Smith* because under the FCC's plan "local exchange customers . . . bear all the burden." NASUCA Brief at 20.

Brief). Another asserts that the FCC's plan "essentially repeals" *Smith*'s command to allocate exchange plant between the interstate and intrastate jurisdictions. Brief of Intervenor National Association of State Utility Consumer Advocates, *et al.* at 13 (hereafter, NASUCA Brief). *See also* Brief of the People of the State of California and the Public Utilities Commission of the State of California at 11 (hereafter, California Brief); Brief of Intervenor Florida Public Service Commission at 16 (hereafter, Florida Brief).

[2,3] Petitioners confuse or blend two questions: (1) jurisdiction or authority to recover costs; (2) the manner in which costs are to be recovered. *Smith* dealt with jurisdiction; it held that a portion of the costs of local subscriber plant may be recovered only under the authority of a body with interstate regulatory powers. The *Smith* Court did not address the manner in which the federal agency was to perform its task. It did not hold that the FCC must order recovery of costs allocated to its jurisdiction through usage-based charges. The practical effect of the *Smith* decision in 1930, it is true, was a system under which subscriber plant costs in the interstate jurisdiction would be recovered on a usage basis. But nothing in *Smith* mandated that result; other plans under which those costs were subject to federal, rather than local, regulatory authority might have served as well.¹⁹

We read less into the Court's words. The state commission, the Court explained, must count some exchange plant as interstate to avoid retaining interstate property, but not interstate revenues, in its calculations. By including interstate property in its jurisdictional domain, the state commission would artificially inflate the intrastate rate base, and hence intrastate charges.

19. Some petitioners argue that their view of *Smith* became statutory law when Congress enacted 47 U.S.C. § 410(c) (1976). *See* NASUCA Brief at 16-23. Section 410(c) provides for the establishment of a Federal-State Joint Board to make recommendations to the FCC with regard to the separations process. The provision was introduced in 1971 at the urging of the National Association of Regulatory Utilities Commissioners (NARUC). NARUC complained that the FCC

Cite as 737 F.2d 1095 (1984)

[4] Coupled with their exorbitant reading of *Smith v. Illinois Bell Telephone Co.*, petitioners assert that section 2(b) of the Communications Act,²⁰ which denies Commission jurisdiction over purely intrastate communications, precludes the FCC's imposition of flat-rate end user charges.²¹ Those charges, petitioners say, are in fact for intrastate, not interstate, service. They must be paid to receive *any* telephone service; even subscribers who neither make nor receive interstate calls in the billing period must pay. Thus, petitioners conclude, the charges should be regarded as a "local access" toll, an intrastate rate, a directive the FCC lacks jurisdiction to impose. See Brief of Intervenor New York State Department of Public Service at 9-10,

was allocating too many costs to the intrastate jurisdiction, to be recovered through local charges, and not enough to the interstate jurisdiction, to be recovered through AT & T long distance charges. See 117 CONG.REC. 15,979-81 (1971).

NASUCA contends that the FCC's plan "reduces the Joint Board proceedings under § 410(c) to a mere sham." NASUCA Brief at 19. We cannot agree; Joint Board proceedings, now as before, determine which costs shall be allocated to the jurisdiction of the state commissions and which to the jurisdiction of the FCC. As support for the position that *Smith* and the § 410(c)—endorsed separations process go beyond jurisdiction and indeed dictate how costs must be recovered, NASUCA cites material printed in the Congressional Record by Senator Magnuson when he introduced the Senate version of § 410(c). The material states that the separations process should avoid placing any "unreasonable burden . . . on either the interstate or intrastate users of the telephone service." It emphasizes the importance of local service, and of "allocat[ing] a fair amount of the cost of providing local telephone service to the users of the interstate service." 117 CONG.REC. 15,980 (1971). NASUCA leans too heavily on these words. When § 410(c) was enacted, local telephone plant costs in the interstate jurisdiction were in fact recovered through usage-based charges. Senator Magnuson may have been concerned with protecting the legitimate interests of the state commissions under that system. Nothing in the legislative history of § 410(c), however, convinces us that the section was meant to freeze in place for all time the 1971 system for recovery of costs.

20. Section 2(b) reads in part:

[S]ubject to the provisions of section 301 of this title, nothing in this chapter shall be con-

19 (hereafter, New York Brief); California Brief at 11; Florida Brief at 18.

[5] Petitioners here lose sight of the Commission's main theme. The end user charge reflects costs caused not by a subscriber's actually making interstate calls, but by the subscriber's connection into the interstate network, which enables the subscriber to make interstate calls. The same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well. Under *Smith*, a portion of the costs of that loop are assigned to the interstate jurisdiction, for recovery under the regulatory authority of the FCC, on the basis of a complex division taking into ac-

strued to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clause [] (2)

47 U.S.C. § 152(b) (Supp. V 1981).

21. Petitioners also cite § 221(b) of the Act, which reads:

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. § 221(b) (1976).

Section 221(b) is irrelevant to the problem before us; its limitation on Commission regulation of telephone exchange service "was merely intended to preserve state regulation of local exchanges that happen to overlap state lines." *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 216 (D.C.Cir.1982), cert. denied, — U.S. —, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983).

FCC's
s com-
etween
ictions.
tion of
t al. at
ee also
Califor-
sion of
reafter,
r Flori-
hereaf-

nd two
rity to
which
h dealt
tion of
may be
y of a
powers.
ne man-
was to
hat the
located
e-based
Smith
system
in the
covered
Smith
under
federal,
authority

ds. The
ed, must
estate to
t not in-
y includ-
ional do-
rtificially
nce intra-

view of
gress en-
NASUCA
s for the
Board to
th regard
sion was
National
mission-
t the FCC

count statistical calling patterns. That separations decision, however, does not affect the cost of the loop. Local telephone plant costs are real; they are necessarily incurred for each subscriber by virtue of that subscriber's interconnection into the local network, and they must be recovered regardless of how many or how few interstate calls (or local calls for that matter) a subscriber makes. The FCC may properly order recovery, through charges imposed on telephone subscribers, of the portion of those costs that, in accordance with *Smith*, have been placed in the interstate jurisdiction.

In *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874, 98 S.Ct. 222, 54 L.Ed.2d 154 (1977) (*NCUC II*), the Fourth Circuit reviewed a Commission order setting conditions under which terminal equipment (including home telephones, answering devices, and switchboards) could be connected to local telephone company lines. The order covered, inter alia, subscribers who neither made nor received interstate calls. Petitioners in *NCUC II* argued that the Commission had impermissibly invaded the intrastate jurisdiction; the FCC, they objected, had set rules for use of equipment needed, and used dominantly—sometimes exclusively—for local calls. The Fourth Circuit rejected the argument that the FCC had trespassed on state territory. The terminal equipment in question, it noted, was used for both interstate and intrastate communication. "The withdrawal of [FCC] jurisdiction over one," the court stated, "cannot be read to mean the withdrawal as to the other," 552 F.2d at 1046, nor could the fact that the phones were necessary for local calling divest the FCC of its "paramount" interstate regulatory authority. *Id.* at 1043 (describing holding of *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027, 97 S.Ct. 651, 50 L.Ed.2d 631 (1976) (*NCUC I*)). The court concluded:

Petitioners confuse the fact that almost all terminal equipment is and has been used predominantly for local communication, with the statutory division of

decisionmaking power. We find it difficult to credit an argument which amounts to an assertion that Congress created a regulatory scheme that depends on the calling habits of telephone subscribers to determine the jurisdictional competence of the FCC versus state utility commissions.

552 F.2d at 1046.

We endorsed the Fourth Circuit's *NCUC I* and *II* reasoning in *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir.1982), cert. denied, — U.S. —, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983) (*Computer II*). That case presented for review a Commission order detariffing terminal equipment (there described as customer premises equipment, or CPE), including home telephones, and preempting all state rate regulatory authority in the area. Petitioners in *Computer II* asserted that "the Commission's decision to order the states to remove CPE charges from their tariffs is an unjustifiable invasion of the authority to regulate intrastate communications services reserved to the states by the Act." 693 F.2d at 214. The *NCUC II* court had noted that it did not have before it an FCC attempt "to control the rates for exclusively local service." 552 F.2d at 1047 (emphasis in original). We rejected an attempt to distance *NCUC II* from *Computer II* on that ground, and said we saw no reason to distinguish between "preemption principles applicable to state ratemaking authority and those applicable to other state powers." 693 F.2d at 215, 216.

In *Computer II* the FCC asserted exclusive rate regulatory authority over CPE; we upheld its order, although the equipment in question is necessary to make local calls, and although some subscribers might use their CPE only to make local calls. Similarly here, the FCC asserts authority to condition end user access to the local telephone plant on the end user's payment of plant costs in the FCC's interstate domain, although the plant in question is necessary to make local calls, and although some subscriber's might use it only to

make local calls. In each case, the very same equipment is by its nature a key element of both interstate and intrastate calling. Every telephone subscriber is automatically connected through the same subscriber plant into both the local exchange and the interstate network. No subscriber can avoid "causing" those costs of its telephone line allocated to the interstate jurisdiction.

Counsel for petitioner NARUC indicated at oral argument that NARUC's jurisdictional objection would evaporate if a mechanism could be utilized to allow end users who elected not to make or receive interstate calls to escape payment of local telephone plant costs allocated to the interstate jurisdiction. Oral Argument Transcript at 28. This argument would make some sense if a subscriber's choice not to make interstate calls meant that certain fixed "interstate" costs would not be incurred; if that were in fact the case, it might well be unfair to ask a subscriber who neither made nor received interstate calls to pay those costs. A subscriber's choice not to make or receive interstate calls, however, would not reduce the costs of that subscriber's loop; the local telephone plant costs would remain unchanged, as would the need to recover those costs. If we indulged NARUC's claim—that jurisdictional significance attends an individual subscriber's decision to use its line entirely for intrastate calls—then, as NARUC's counsel

22. In practice, such an adjustment would be unworkable. It would be prohibitively complex and inefficient to have the separations formula vary from subscriber to subscriber. Any equivalent adjustment would have to be based on the totality of subscriber plant investment and expenses.

23. California additionally argues that the Commission's power under § 205 of the Communications Act should be limited by § 203, which provides that all communications common carriers except "connecting carriers"—including those engaged in interstate communications "solely through physical connection with the facilities of another [unrelated] carrier," 47 U.S.C. §§ 153(u), 152(b) (1976 & Supp. V 1981)—must file public schedules of their charges for interstate wire or radio communication. California reasons that just as connecting carriers are exempt from the tariff-filing requirement of

conceded, NARUC could hardly contest an allocation of all of such a subscriber's line costs (previously divided between the interstate and intrastate domains) to the intrastate jurisdiction alone. *See id.* at 22-23. It is hard to see what significant benefit NARUC would gain under such an arrangement.²²

[6, 7] The scheme advanced by the FCC simply requires all telephone subscribers to pay, on a per-line basis, for that portion of *their necessarily-incurred local telephone plant costs* assigned under *Smith* to the interstate jurisdiction. We cannot sensibly say that the FCC has overstepped the limits of its jurisdiction in embarking upon such an arrangement.²³

2. The FCC's Decisional Process

Petitioners unleash a volley of argument attacking the FCC's decisionmaking process as unreasoned or unreasonable. They claim that the FCC misjudged the threat of economic bypass, inadequately considered the potential harm to universal service, and failed to observe necessary or proper procedural requirements during the rulemaking.

a. Uneconomic Bypass

Most prominently, petitioners say the evidence before the Commission did not warrant an immediate response of the kind the FCC gave to the prospect of uneconomic bypass. If heavy users of interexchange

§ 203, they should be immune from Commission power under § 205. California Brief at 12. Sections 203 and 205, however, serve different goals. The § 203 filings of a non-connecting carrier in any case show "all charges for itself and its connecting carriers," 47 U.S.C. § 203, and nothing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205. Further, California's argument that connecting carriers are wholly safe from the Commission's § 205 power seems hard to reconcile with 47 U.S.C., § 152(b), which provides that "sections 201 to 205 of this title shall, except as otherwise provided therein, apply to [connecting carriers]." *But see* New York Brief at 11-12, 23-24 (quoting § 152(b) but omitting crucial language).

services can cut costs through bypass technologies, petitioners concede, the risk of bypass is present. But the Commission should have held back, they contend. Technologically, petitioners maintain, bypass potential has not matured as a market-place force to be reckoned with. "[R]egulation perfectly reasonable and appropriate in the face of a given problem," petitioners remind us, "may be highly capricious if that problem does not exist." NARUC Brief at 39 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C.Cir.), cert. denied, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977)).²⁴

[8] We hold that the FCC's treatment of the bypass issue is adequately reasoned and indicate here why we have so concluded. We turn first to the staff effort preceding the Commission's determination.

During the past few years, members of the communications industry have been bombarded with press and trade writings promoting the use and virtues of bypass technology. Status Report on Near-Term Local Bypass Developments 6 (attached to *Access Order* as Appendix F), reprinted in J.A. 3101, 3106 (hereafter, Appendix F). Many of these materials came to the Commission's attention in the commenting process. The Commission staff did not swallow the materials whole. It prepared and submitted to the Commission a preliminary report based on its own survey of the industry and the current literature. *Id.* at 1, reprinted in J.A. 3101, 3101. The report documents the reality of both local and long-haul by-pass. We cite several examples.

Martin Marietta connects its Data Systems Center to its Orlando plant via fiber optic cable; it is currently installing an earth station to bypass the local exchange and make interstate calls directly via satellite. Southern Bell estimates its current gross revenue loss from Martin Marietta's self-help at an annual \$500,000, and its

24. *But cf.* California Brief at 16, 18 ("Today, ... as a result of the historical development of alternative means of communications, most large users have already bypassed the local ex-

projected annual revenue loss at up to \$3 million. *Id.* at A-3, reprinted in J.A. 3101, 3128. Southern Railway System uses a private microwave system in three states (Alabama, Georgia, Kentucky); South Central Bell estimates its resulting yearly revenue loss at \$300,000. *Id.* Combustion Engineering completely bypasses the local network for long-distance calling; Southern New England Telephone estimates the revenue loss to it at \$1.7 million per year. *Id.* at A-4, reprinted in J.A. 3101, 3129. Textronics operates a digital microwave system linking various of its facilities in Oregon and Washington; Pacific Northwest Bell estimates its revenue losses at \$800,000 per year. *Id.* at A-5, reprinted in J.A. 3101, 3130. The federal government utilizes digital satellite links to connect its Seattle switching network with a California switching node; Pacific Northwest Bell estimates its revenue losses at \$1.5 million per year. *Id.* Boeing uses a digital microwave system linking several of its facilities in the Puget Sound basin, causing Pacific Northwest Bell revenue losses estimated at \$2 million per year; Boeing has interconnected that network via satellite to locations in Kansas, Virginia, Pennsylvania, and elsewhere, generating Pacific Northwest Bell revenue losses estimated at \$400,000 per year. *Id.* at A-5, 6, reprinted in J.A. 3101, 3130, 3131.

From its investigation, the Commission staff concluded:

[W]hether or not local bypass is successful, operationally and economically, will be determined in the next three to five years. If the carriers are slow in responding to business users' needs and bypass proves viable during this period, there could be an irreversible swing to local bypass by a large sector of the Fortune 500—and by various government agencies as well.

Id. at 4, reprinted in J.A. 3101, 3104.

The FCC's view was informed by its staff's "effort[] to identify and understand

change"; nonetheless, "the limited threat posed by 'uneconomic' bypass does not justify the extreme measures proposed by the FCC."

bypass activities, technology and trends," *id.* at 1, reprinted in J.A. 3101, 3101, and by comments "numerous participants" made. *Access Order* ¶ 107, 93 F.C.C.2d at 274. These included Comments of Southern Pacific Communications Co. at 17-19, reprinted in J.A. 1729, 1743-45 (OCC describes its use of microwave radio facilities to bypass local telephone network for local portion of interstate calling); Comments of the Association of Data Communications Users at 18, reprinted in J.A. 1416, 1433 ("ADCU members are currently availing themselves of bypass technologies and will continue to do so as such technologies are further refined"); and Comments of the Western Union Telegraph Co. in Response to Fourth Supplemental Notice of Inquiry and Proposed Rulemaking at 23, reprinted in J.A. 1827, 1848 ("Western Union already has a growing investment of over \$100 million in local distribution facilities as part of a specific program to reduce its dependency on the Bell System") (hereafter, Western Union Comments). AT & T and the BOCs, we note, submitted an extensive study of bypass economics and technologies. Comments of BOCs and AT & T in Response to the Fourth Supplemental Notice of Inquiry and Proposed Rulemaking at 90-105, reprinted in J.A. 1436, 1525-40.

Petitioners characterize much of the bypass data the Commission gathered as anecdotal, and much of the discussion as merely theoretical. The FCC, it is true, had nothing in hand approaching a "definitive analysis." See Appendix F at 1, reprinted in J.A. 3101, 3101. But Congress has charged the Commission with responsibility to regulate in "a field of enterprise the dominant characteristic of which [is] the rapid pace of its unfolding." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219, 63 S.Ct. 997, 1011, 87 L.Ed. 1344 (1943). "[P]ure factual determinations" were not, and could not have been, made; the FCC's decision inevitably rested on "judgment and prediction." *FCC v.*

25. NARUC and RTC invoked § 214 of the Act as empowering the Commission to act as these petitioners proposed. It appears, however, that the Commission's § 214 powers do not extend

WNCN Listeners Guild, 450 U.S. 582, 594, 101 S.Ct. 1266, 1274, 67 L.Ed.2d 521 (1981). In light of the material available to the Commission, and the leeway the FCC has to make "deductions based on [its] expert knowledge," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814, 98 S.Ct. 2096, 2121, 56 L.Ed.2d 697 (1978) (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29, 81 S.Ct. 435, 450, 5 L.Ed.2d 377 (1961)), we cannot indict the agency's assessment of the bypass risk as arbitrary or unsupported.

[9] Petitioner NARUC and intervenor Rural Telephone Coalition (RTC) wanted the Commission to deal with uneconomic bypass by denying potential bypassers permission to construct facilities posing the problem. *Access Order* ¶ 110, 93 F.C.C.2d at 274 & n. 38. The FCC rejected this proposal as unsound and unworkable. It stated:

We are simply not in a position to determine what constitutes an uneconomic "bypass" service and what is a wholly new service that will attract a new set of users and enhance the ability of all users to make full use of telecommunications service-potential. For example, some comments assert that cellular services constitute a bypass technology. We have concluded, however, that cellular radio is a distinct service that serves distinct needs and that cellular service could be complementary to existing wire-line service. Indeed, a given technology may be the efficient means of providing service to certain groups yet constitute uneconomic bypass for other services or groups.

Id. ¶ 111, 93 F.C.C.2d at 275. It was not unreasonable for the FCC to resist an approach that would curtail, and perhaps stifle, development and construction of new technology.²⁵

to entities other than common carriers. See 47 U.S.C. § 214 (1976).

California suggests that "the practical alternative to bypass lies not in prohibiting new servic-

up to \$3
J.A. 3101,
n uses a
ee states
outh Cen-
arly reve-
stion En-
the local
g; South-
mates the
per year.
101, 3129.
microwave
ilities in
ic North-
losses at
reprinted
d govern-
cs to con-
rk with a
ic North-
losses at
ng uses a
several of
sin, caus-
ue losses
; Boeing
via satel-
nia, Penn-
ng Pacific
timated at
reprinted

ommission

ss is suc-
onomically,
t three to
e slow in
needs and
is period,
swing to
or of the
s govern-

3104.

ed by its
understand

hreat posed
stify the ex-
C").

According to intervenor Michigan, the Commission is disarmed by its own self-confessed inability to identify uneconomic bypass. Without any evidence of the existence of the phenomenon the FCC seeks to check, Michigan argues, the agency's position rests on quicksand. See Reply Brief of Intervenors the State of Michigan and the Michigan Public Service Commission at 2.

We have already underscored the permissibly predictive, judgmental character of the Commission's stance. See *supra* p. 1117. The FCC sufficiently established the existence of bypass as a real market force. It sufficiently established both 1) the inability of regulators, under a noncost-based pricing system, to determine accurately the economic efficiency or inefficiency of a given technology, and 2) the likelihood that market participants under such a system will exploit available bypass technology when they can reduce their costs by doing so. Cf. Western Union Comments at 23, reprinted in J.A. 1827, 1848 ("To the extent that access charges are set at excessive levels, there can be little doubt that interstate users will be encouraged to invest in unnecessary and duplicative facilities. This is particularly true in the case of private line users, and Western Union is a case in point."). As a reviewing court, we would reach beyond our limited range of surveillance if we demanded more.²⁶

es nationwide, but in [the states'] addressing the phenomenon as it actually arises in actual situations." California Brief at 17. To the extent California means the FCC should have remitted to the states the task of prohibiting construction of specific bypass facilities, the Commission appropriately refused to rely on local agencies to make technological judgments the Commission considered itself incompetent to undertake successfully. To the extent California means the state commissions should be left to address the bypass threat through "rate-making structures [that] provide for a reduced NTS payment by high-volume users" on a case-by-case basis, see Oral Argument Transcript at 65-68 (statement of Bruce Renard, counsel for Florida Public Service Commission), we again find the Commission's decision reasonable. The FCC could well conclude that it was unsound to address distortions in the interstate rate structure by introducing complementary distortions in the intrastate rate structure.

Intervenor Florida Public Service Commission faults the FCC for failing to determine the *degree* to which the price of access to the local network can be set above cost before it will be in the interest of large-scale users to turn to uneconomic bypass. Florida Brief at 5-6. The Commission, however, is engaged in a continuing venture. It is now undertaking the investigation Florida presses. See *Further Reconsideration Order* ¶ 20, 49 Fed.Reg. at 7,812:

We will also develop and analyze additional information with respect to the extent and dangers of bypass.... [W]e intend to use this additional information to design the transition plan. The end user charges at particular points in the transition should be low enough to avoid any adverse effect upon the universality of service and high enough to produce toll rate reductions that are sufficient to deter uneconomic bypass.

We note finally that the threat of uneconomic bypass entered the Commission's calculus not as a self-standing justification for the agency's decision but as a particular—albeit important—feature of the FCC's general concern that proper allocation of resources requires a pricing system consistent with the lessons "[e]conomics teaches

26. Michigan argues similarly that no evidence supports the Commission's concern that pricing long-distance service above cost artificially represses usage. Brief of Intervenors the State of Michigan and the Michigan Public Service Commission at 7. Michigan notes the Commission's statement that it "ha[d] some questions concerning the methodology used in [one] study" of long-distance calling, and that it found "[c]ertain assumptions underlying the results of [another] study ... questionable or unclear." See *Access Order* ¶ 112, 93 F.C.C.2d at 275 & n. 39.

We do not see the Commission's recognition of flaws in studies it considered as tantamount to a rejection of those studies as worthless. The Commission's reference to "artificial[] restrict[ion of] calling patterns," *id.*, we further note, did not figure as a major item in its analysis.