

1 are lots of cases daily applying this in both state and
2 federal court.

3 Indeed, the Commission has done much the same
4 thing in its two Fox Television decisions. And, indeed, in
5 deciding there that amounts contributed as debt were really
6 equity, the commissioners looked at the fact that the
7 security was convertible into equity, implying that,
8 therefore, it was the equivalent of equity.

9 I suspect the Fox Television cases might have even
10 affected the transaction planners here and made them realize
11 it would be dangerous to contribute this capital as a
12 convertible debenture, because then it might run afoul of
13 the Fox Television precedent. But I don't know that.

14 Fifth point -- fifth distinction: Real-world
15 options do not come accompanied with any control rights.
16 Here, the euphemistically titled "investor safeguards"
17 protect Bell Atlantic's hidden equity of 70 percent in a way
18 that no ordinary option holder is ever protected in the
19 securities markets. While option holders may receive anti-
20 dilution rights that protect them against the issuance of
21 additional shares -- but, indeed, Bell Atlantic also gets
22 these dilution rights -- the ordinary option holder in the
23 real world is never empowered to block transactions or to
24 bar dividends -- at least those above a modest amount during
25 the interval that it holds the option. It's always exposed

1 to the possibility of payouts to current shareholders while
2 it's a mere option holder.

3 But Bell Atlantic receives more than the ample
4 protections here. In effect, Bell Atlantic has protected
5 what I call its hidden equity -- the 70 percent -- by
6 ensuring that Data Co's earnings will be locked into the
7 firm and not distributed to its current shareholders, the
8 Class A shareholders. Thus, it knows that Data Co's
9 earnings over the interval that it holds this option will
10 remain undistributed and, hence, subject to its eventual 80
11 percent claim. Putting this in the simplest terms, by
12 ensuring that the money cannot be -- the current earnings
13 cannot really be taken out of Data Co's piggy bank, Bell
14 Atlantic is assured that eventually its 80 percent share in
15 Data Co will apply not just to future earnings, but to
16 current earnings and profits, as well.

17 Okay, sixth point: Generally, options are
18 contingent at the time they are acquired. We do not know
19 with any certainty that they will be exercised. This is
20 different. This is really what I call a non-optional option
21 or, to simplify it further, a non-option; because someone --
22 Bell or its assignee -- is rationally certain to exercise
23 this option. If Bell is unable, someone else will purchase
24 it and exercise that option, because no one's going to turn
25 down the opportunity to turn 10 percent into 80 percent. No

1 option in the markets has that kind of assurance, that kind
2 of certainty; because the market price can fall. In any
3 situation, it's possible it can fall below the option price.

4 Now, finally, on this topic of the unique
5 character of Bell Atlantic's alleged option, I want to
6 direct your attention to Bell Atlantic's most recent claim
7 in its last filing that under SEC Rule 13(d)(3), it would
8 not be deemed to be the beneficial owners of the additional
9 70 percent of Data Co's shares because its option is somehow
10 not, quote, "currently convertible." Consistent with some
11 of the earlier statements about the federal securities law,
12 this is breathtakingly wrong -- for several, independent
13 reasons. I don't have time to take you through all the
14 reasons, but I want to give you the one that you can see off
15 the face of the rule.

16 They rely on a clause, clause D(1)(i) of Rule
17 13(d)(3) which, under some conditions sometimes partially
18 exempts options and convertible securities if the holder
19 cannot exercise the option within 60 days. But they simply
20 do not quote the rest of the language in that rule, which
21 has a "provided, however" clause that says -- and I'm
22 quoting -- that if you acquire a conversion right or an
23 option, quote, "with the purpose or effect of changing or
24 influencing" -- "influencing" -- "control of the issue, then
25 immediately upon such acquisition of the conversion right or

1 the option you shall be deemed to be the beneficial owner of
2 the securities, which may be acquired through the exercise
3 or conversion of such security for power."

4 I think that's a pretty material omission. It
5 means that you'd have to say, in order for this particular
6 provision not to guarantee that you were the beneficial
7 owner under Rule 13(d)(3) of the underlying 70 percent, that
8 you could say that the granting of a 70 percent additional
9 conversion right could not have either the purpose or the
10 effect of, quote, "influencing control."

11 And yet, a 70 percent grant is certain to
12 influence control, because it tells others that control is
13 locked up and it's preclusive, and no one else can challenge
14 it.

15 There are other equally important arguments about
16 13(d)(3), but I don't want to descend down into the federal
17 securities laws.

18 To this point, I've argued that the Class B shares
19 are not real options. They are beyond any other kind of
20 options that have been used in similar transactions. They
21 are, rather, an attempt to park and defer current ownership
22 rights in order to avoid the attribution of ownership and
23 control.

24 Ultimately, however, I have to take the bull by
25 the horns and disagree with my esteemed colleague on this

1 question of whether options in general are not equity,
2 because in his words they do not convey "appropriate
3 participation rights." I think that analysis is flawed on
4 two levels, what I'll the theoretical and the practical.

5 On the theoretical level, I think Professor Gilson
6 is giving us a model of all capital in which there were
7 three categories -- debt, equity and options. And I don't
8 think there is any general literature that sees capital as
9 split three ways. It tends to see capital as debt or
10 equity.

11 Modern financial theory tells us that all the
12 equity in a firm -- at least a firm that has limited
13 liability -- should be viewed as an option. That is, the
14 equity holders have an option on the firm's assets, because
15 they have limited liability. And if the value of the assets
16 declined below the value of the liabilities, they can simply
17 abandon the firm, turn it over to the credit holders; and
18 that's the equivalent of the nonexercise of an option. You
19 have no obligation to continue the firm. It's like giving
20 up on the option. That's the core of what I'll call the
21 Black/Scholes option model.

22 Now, if you see the equity of a firm with limited
23 liability as equivalent to an option, there's no great,
24 bright-line distinction between equity and option. Equity
25 is an option, and an option is an option on an option, and

1 that line becomes relatively less significant. Thus, I
2 don't think there's an important theoretical point that says
3 options are qualitatively distinct and generically removed
4 from other forms of equity.

5 On the practical level, I'm going to have to
6 suggest that Professor Gilson's analysis tends to overlook
7 what I think is the simply outstanding and critical fact --
8 that an option conveys the key right to share in equity
9 appreciation alongside the other shareholders --
10 particularly an option issued by the corporation,
11 particularly for start-up companies, particularly for high-
12 tech, Internet, start-up companies like this one.
13 This is probably the most important means by which equity
14 holders actually realize the benefits of ownership.

15 Professor Gilson, I think, is implicitly arguing
16 that the benefits of ownership can only be realized through
17 dividends. He keeps talking about the right to realize
18 earnings through dividends. I'd have to say if you went out
19 on the street and talked to the holders of Amazon.com or any
20 other young companies, you'd get a chuckle about this belief
21 that they're waiting for earnings through dividends. Here,
22 particularly when there are constraints -- constraints in
23 the investor-protection safeguards and constraints through
24 the control of the board and the appointment of managers.

25 On the payment of dividends, over the period that

1 Bell Atlantic holds the Class B shares, I don't think
2 dividends are a realistic possibility in the eyes of even
3 the persons who buy the Class A shares. Rather, they will
4 be looking to equity appreciation, and the benefits of
5 ownership are -- both in this case and in other cases, more
6 likely to be realized through means other than dividends --
7 There are multiple such means, and I don't have to go
8 through the laundry list right now.

9 In conclusion, let me return, really, to my first
10 point. I want to stress that today you're considering not
11 simply whether a small loophole might be justified in order
12 to realize some possibly important competitive gains. But
13 rather, you are being asked to consider whether to accept an
14 exemption that could pretty quickly swallow up the
15 meaningfulness of the definition of "affiliate" in your
16 statute, because it allows clever transaction planners to
17 park equity in a manner that leaves the subject corporation
18 legally and theoretically outside the control of the
19 founder, but definitely within their planning, and exempt
20 from, and invulnerable to, attack from others in the
21 corporate control marketplace.

22 In this case, the stock is being parked with
23 public shareholders, and that may seem somewhat more
24 innocuous. In the next case, tomorrow, the stock could be
25 parked with an insurance company, it could be parked with

1 several mutual funds, or it could be parked with any number
2 of other institutional investors or investment banks.
3 There's no real conceptual difference between them.

4 Any one of these parties -- investment banks or
5 institutional investors -- can be promised some kind of
6 special accommodation payment for their services, such as,
7 for example, a special interim dividend during period
8 they're holding the stock. There's really no way for this
9 agency or most other agencies to monitor this, because the
10 relationships between investment banks or institutional
11 investors and large corporations are multilateral. There
12 are all kinds of things going on, and there are ways to make
13 accommodation payments by all kinds of techniques.

14 MS. DOROTHY ATTWOOD: Can I ask a question?

15 MR. COFFEE: I'm sorry?

16 MS. ATTWOOD: My question is: Why do you have to
17 be -- why are we concerned about the sale to an insurance
18 agent or to others?

19 MR. COFFEE: Well --

20 MS. ATTWOOD: Because --

21 MR. COFFEE: -- because it wouldn't be a true
22 owner. You'd be looking at someone who knows that, I am
23 being paid a fee -- an accommodation fee -- just to serve as
24 the agent in a stock parking arrangement, so that I can be
25 assured I can buy any company out there that might be

1 legally impossible to buy today; put it in the nominal
2 control of an investment bank, an insurance company; keep it
3 there for a number of years, as long as I keep making these
4 accommodation payments, until either the Commission approves
5 the transaction, 2, changes its rules, or 3, administrations
6 change, and you hope you can get an existing rule -- even
7 though well-established -- reversed. During all that time,
8 someone who is not supposed to have control would be in *de*
9 *facto* control through the guise of this somewhat transparent
10 agent who's being paid an accommodation payment.

11 I think that's a very dangerous loophole that you
12 don't need to easily rationalize. You don't have to reach
13 this kind of question in order to say that sometimes
14 transactions do look like subterfuges. It may be that the
15 broader question of how we should treat options under all
16 circumstances is a big question. You don't need to reach it
17 on a set of facts that don't present all of the problems of
18 a cleaner, more theoretical case.

19 Am I answering your question?

20 MS. ATTWOOD: Well, I guess my question went to --
21 you said this was a huge loophole in the telecom law. And I
22 can see how, if we were talking about evaluating those
23 transactions, if we were concerned about securities law
24 outside the context of the communications law, we may worry
25 about what entity ultimately had control for that 'parking

1 period of time'.

2 But when we're talking now about -- our vantage
3 starts from the proposition that it's the relationship
4 between the -- it's the relationship between the company
5 that is getting rid of those assets, or divesting those
6 assets, and the new company. Why are we looking more toward
7 -- why would it matter ultimately -- I mean other than it's
8 now -- in this transaction, it's public shareholders -- why
9 would it matter that it would be the insurance agent if the
10 point of where we're looking -- the source of -- from the
11 perspective, at least, of 271 is to look between the
12 relationship between original company, the BOC -- and it's
13 always the BOC in 271 -- and the divested company?

14 MR. COFFEE: But I mean --

15 MS. ATTWOOD: Why does it matter?

16 MR. COFFEE: The BOC can also sell to a kind of
17 transparent agent. There are all kinds of subterfuges that
18 are possible, once you say that options don't count. We've
19 been looking at a case that would be acquisition, but there
20 could be other kinds of transactions under which you park
21 the assets in a controlled company, with a nominal
22 institutional investor in charge in return for accommodation
23 payments.

24 And your hope is that at some point in time you'll
25 get the law changed so you'll keep it in that position.

1 That's the kind of legal limbo that I think you create if
2 you are allowed to use options in a manner that I think
3 effectively does lock up control, because options -- like an
4 80 percent option -- are clearly preclusive to the rest of
5 the market. No one's going to come in and take control, and
6 the managers and the directors initially appointed by you
7 are not likely to be subject to any kind of control threat
8 so long as there is this background option.

9 Now, the full purposes of 271 are not my area of
10 expertise. I would assume there is some concern about price
11 discrimination and other kinds of treatment, but I'll leave
12 that to Peter.

13 I think I'll conclude. I have a couple of
14 responses to something I think Ron said, but I don't want to
15 take too much more time. I just want to say that I don't
16 think in this case that it is necessary for you to reach the
17 full breadth of this issue of whether options are going to
18 be always or never equivalent to ownership of the underlying
19 shares. There are broad problems. If you decide in this
20 case that this option is not a equity, that means that all
21 options and all kinds of other exotic securities that can be
22 imagined are going to be discerned by transaction planners
23 as beyond your control. And I think that's going to invite
24 an avalanche of proposals by which people will seek to test
25 the outer limits.

1 You don't need, though, in this case to say that
2 options are always equity. I would make that argument. I
3 think there are strong reasons that the -- both the tax law,
4 accounting law and the SEC, who has more experience than
5 anyone else in this area, generally does see these kind of
6 options as always equity. But we don't have to get to that
7 ultimate case.

8 This is a simpler case, I believe, because this is
9 a unique animal. It's what I earlier called a non-option,
10 because it's something that's riskless, costless and
11 virtually certain that someone is going to exercise.

12 At that point, I'm going to turn it over to Peter.

13 MR. STRICKLING: I just want to follow up on your
14 last idea, which is -- and for I realize you're working for
15 AT&T, not Bell Atlantic-GTE -- but do you see an option that
16 could be constructed here by which you wouldn't attribute
17 the ownership back to the -- ?

18 MR. COFFEE: I can imagine that there would be
19 such an option. I think the critical right that makes this
20 option -- confers ownership, at least, is the fact that you
21 share in the equity appreciation over the interim period.
22 But, again, I don't want to design a transaction for Bell
23 Atlantic. I'm just saying that --

24 MR. STRICKLING: I don't see how without --

25 MR. COFFEE: -- I think it's critical.

1 MR. STRICKLING: -- cutting them a bill.

2 MR. GILSON: Before we go into what I understand
3 will be the Communications Act issue, it may be useful to
4 join the set of issues that Jack and I have raised, because
5 there's some real disagreement about both the way it's
6 framed and the context.

7 It may be helpful to join those issues now --

8 MR. COFFEE: Well, whatever you want to do.

9 MR. GILSON: I think that would be helpful,
10 because I understand your point that what's been presented
11 here doesn't work from your point of view. But I am trying
12 to test the limits of this to understand what would work.
13 Obviously, I don't share your view of a complete
14 divestiture, no problem, but I'm trying to understand what
15 little -- where the -- you know, where the point comes in
16 which it goes beyond the pale and what those distinguishing
17 characteristics are. But, Professor, if you want to respond
18 briefly, go ahead.

19 MR. GILSON: Yeah, I want to -- raise a -- I'll
20 keep it quick, but to make a couple of points. First, Jack
21 keeps stressing, well, this isn't a traditional option.
22 This is not an option of the sort that you see traded on an
23 exchange.

24 No separately -- no option that would key to a
25 transaction takes the form of a tradable option. The

1 options are done in a venture capital setting, have a
2 specific negotiated character. Put aside for a moment
3 whether the character raises issues of control under the
4 third element of 3-1.

5 But the fact that this is characterized as a
6 nontraditional option -- though I will disagree along the
7 set of lines with Jack -- doesn't turn it into an equity
8 interest. It may raise issues of control, which was the
9 thrust of my presentation, which the Commission has to
10 consider in the context of the transaction under the
11 statute. Characterizing this as nontraditional -- one
12 character or -- one set or another -- way or another doesn't
13 make it an equity interest.

14 MR. COFFEE: Well, I can respond in a sentence? I
15 think I'm characterizing this as an equity parking
16 arrangement. If I took equity and gave it to an agent -- a
17 somewhat hidden agent -- and said, "Hold this for me subject
18 to my control. Keep the assets intact. Pay out no
19 earnings, and give it back to me when I recall it with all
20 of its earnings intact," then I think I have parked the
21 equity. And I think you should regard that as an equity
22 equivalent.

23 And I think that we are very close to that point,
24 and I think all of the evidence I've pointed to says this is
25 well beyond anything that any other case in any other

1 setting has said is not equity.

2 MR. GILSON: Jack --

3 MR. COFFEE: I can deal with --

4 MR. GILSON: Jack, you're --

5 MR. COFFEE: -- some of Ron's examples.

6 MR. GILSON: -- now making -- you've now made the
7 same point twice, and I'm going to respond to it. Jack's
8 point with respect to what he calls "parking" or delaying
9 equity rights until a future date is precisely what an
10 option does. It defers equity rights until a future date.
11 Jack makes -- the only reference that Jack makes to equity
12 rights is to value appreciation. There's no reference to
13 the notion that somehow Bell Atlantic has the right to vote
14 80 percent of the stock in this period, has any distribution
15 rights, has any dissolution rights --

16 The value -- the "parking" that Jack -- the
17 evocative phrase Jack chooses to use takes place only with
18 respect to value, and value in turn is subject to
19 substantial risk under this arrangement.

20 MR. STRICKLING: Well, what about his point that
21 the exercise is costless, that the time is a true exercise?

22 MR. GILSON: The -- that's the -- let me frame it
23 in terms of whether Bell Atlantic has a good deal at risk in
24 this transaction. They do have a good deal at risk. The
25 risk is the inability to get section 271 approval. That is,

1 they take precisely the risk the statute is concerned about
2 in this setting.

3 If Bell Atlantic is unsuccessful in securing 271
4 approval and opening up markets, the result of having to
5 otherwise dispose of the conversion right -- either because
6 of the limitations that Bell Atlantic has imposed on its
7 right to sell the rights, or on any other technique is going
8 to impose a substantial penalty. That is, there is a
9 substantial risk associated with this transaction to Bell
10 Atlantic. It is not a, "Well, we'll hold it and see. And
11 if it doesn't work out, we will take this right and place
12 with someone else."

13 MR. STRICKLING: But I understood Prof. Coffee to
14 be making two points. One, that this option isn't really an
15 option because when it comes time to exercise it, it's a
16 costless transaction at that point in the sense that there's
17 no additional consideration paid, there's no surrender of a
18 senior security. Then I understood him to be making a
19 second point, which is also there's no down side risk that
20 attaches to this. But I understood them to be two separate
21 points. I --

22 MR. GILSON: Let's take the --

23 MR. STRICKLING: -- hear you think --

24 MR. GILSON: -- but let's take the --

25 MR. STRICKLING: -- it's a risk.

1 MR. GILSON: -- but let's take those as separate
2 points.

3 MR. STRICKLING: Okay.

4 MR. GILSON: And here what I want to separate out
5 is the thrust of Jack's analysis about wanting to
6 characterize this as a security is essentially to place the
7 issue in a setting in which the Commission has no discretion
8 to take into account the statute, to take into account the
9 crafting of the transaction and whether whatever elements of
10 control may exist are consistent or not consistent with the
11 policies of the statute.

12 If you take Jack's point that this is not a
13 traditional option -- and in a moment, I'll indicate
14 there're a whole range of circumstances in which familiar
15 options don't take the form of options that are traded on
16 the Exchanges -- the effect of that is not to create a
17 loophole. It doesn't mean these transactions are suddenly
18 free, that insurance companies and Jack's "triumphant arch"
19 beckons all sorts of people.

20 What it simply means is, in every transaction the
21 Commission in the end has the discretion in light of the
22 statute to identify who's in control. There's a big ticket
23 booth before his arch. It requires Commission approval to
24 walk through, and a Commission determination that there is
25 no control.

1 So, the notion that this transaction to deal with
2 the peculiar circumstance that Bell Atlantic is confronted
3 with creates some broad loophole is interesting rhetoric.
4 But with respect to the statute, 3-1's requirement that
5 there not be control independent of equity interest or
6 equity equivalents never disappears.

7 MR. COFFEE: Can I respond to some of this at some
8 point?

9 MR. STRICKLING: Well, let me ask a question,
10 which is that 3-1 talks about ownership has control --

11 MR. STRICKLING: -- so that I think -- don't we
12 need to, as a result, give some meaning to each of those
13 terms? I get the sense you're kind of combining --

14 MR. GILSON: That's exactly -- no not at all.
15 What I'm saying is that an equity interest is traditionally
16 something more than a simple -- than a right only to the
17 appreciation in the value of the asset.

18 MR. BARR: I -- can I interject?

19 MR. GILSON: Sure.

20 MR. BARR: You know, I've heard a lot of loaded
21 terms. You said "subterfuge." There's nothing been --
22 there's no parking, no subterfuge. We start out as the
23 owner of this asset. There's no ifs ands or buts about it.
24 We're not trying to hide that fact. But we are structuring
25 this just like Company A with an option to buy Company B.

1 To get to that point, we have to transfer out this
2 asset that we start owning. That's not parking, because
3 what we're taking back and what we're paying full value for
4 is this optional right. It's not costless. We're giving
5 full market value for it, by definition, when we contribute
6 this company. And that's a prepaid option. It's not
7 costless.

8 And there's nothing about option law that says
9 that an option has to have an exercise price and, if it has
10 an exercise price, it has to be paid at the time of
11 exercise. There are prepaid options. And there is risk
12 associated with a prepaid option, because we don't know what
13 that value is going to be. It might go up, might go down.

14 And the -- I want to get two other sort of canards
15 off the table, here. One is --

16 MS. ATTWOOD: Canard?

17 MR. BARR: Isn't that the right pronunciation?

18 MS. ATTWOOD: I don't think you want to get
19 into --

20 (Laughter.)

21 MR. BARR: He says it's riskless. Well, there's
22 the risk of what's going to happen to this asset. He says
23 that there's no risk that we're not going to get 271.

24 And there's a little game being played here, which
25 is he sort of says, Well, you might transfer this to

1 somebody. In fact, you can easily transfer it to somebody
2 and realize value. That makes it not an equity. And then
3 on the other side he says, the immediate ability to exercise
4 this in that context somehow means control, and there's no
5 risk.

6 Well, of course there's risk. If we have to sell
7 it, we don't end up in control -- ownership and control,
8 which is what the statute is ultimately concerned about.
9 That's a big risk for us.

10 Two things. This idea that we're going to take 80
11 percent of the earnings is simply wrong, and we're going to
12 submit a written declaration, as requested, on that. We
13 said from day one we had 10 percent of the earnings. Public
14 gets the rest of the earnings. We're not saying --

15 MR. STEVEN G. BRADSHAW: Only payouts. Only
16 dividend earnings.

17 MR. BARR: Yeah, only the -- only dividends. And
18 he says that we can keep the dividends in the company and
19 have veto power over the dividends. That's not true. What
20 we have is what typically granted in these situations, which
21 is the ability to approve extraordinary dividends -- not
22 normal dividends.

23 MR. COFFEE: Can I make one response to something
24 that's gone back and forth twice now? Ron keeps replying to
25 me by saying that I'm only talking about value equivalents

1 and you have to show instead something called "control
2 equivalents." And he makes that point several times in his
3 last filing.

4 I think that's vulnerable to exactly the point
5 that Mr. Strickling just made that the statute talks about
6 ownership -- "owns or controls." You have to assume that
7 Congress has a disjunctive meaning and words have
8 independent legal significance; otherwise, Congress was
9 being redundant.

10 But the other point I want to make on exactly this
11 theme is that I think value equivalents in this setting
12 tends to show control equivalents. We have a world here in
13 which Bell Atlantic has, I think, conceded in earlier filing
14 that the Class B shares -- although they represent really
15 only 10 percent of the dividend rights -- are likely to
16 amount to 80 percent of the market value of the entity,
17 because they expect the Class A shares to trade at only
18 about 20 percent of the total firm value.

19 If 10 percent of the outstanding shares represent
20 80 percent of the firm value, that's a control premium.
21 That's the classic phenomenon of a control premium, and it
22 shows the market understands that there is a control premium
23 associated with the Class B shares.

24 That means that this kind of control premium is
25 here, and we don't have a situation in which there is only

1 some equity rights and no control rights. I would argue --
2 I think AT&T would argue -- that this statute is interested
3 in either ownership or control, but I think this is a case
4 where value equivalents really is very strong evidence of
5 control possession. Okay.

6 There's also this point about how we look at risk.
7 They keep coming back and saying generically there's some
8 risk in this entire transaction. That's a little
9 inconsistent, because their starting point is, we can
10 disaggregate. We can take the securities and break them
11 down into the shares and the option. And then, when they
12 want to justify the option as having risk, they go back to
13 the entire aggregation -- entire transaction. They
14 integrate.

15 I don't think you can have it both ways. If
16 you're going to focus on just the option separately -- which
17 is by itself questionable -- but if you're going to do that,
18 you're going to have to show risk in just the option. The
19 risk here that exists for Bell is in the transaction, not in
20 the option. This option can be sold to someone, and there
21 will be gain. That is a certainty. You may have agreed on
22 your own to give some of this gain back to a treasury, but
23 there is not a downside. There is still some upside gain in
24 all circumstances surrounding the option.

25 MS. ATTWOOD: Can I ask a question --

1 MR. COFFEE: If you're going to --

2 MS. ATTWOOD: -- because you said before that they
3 can't have a share in -- because there's a share in the
4 equity appreciation pair. I have a question about under the
5 -- as I understand the modified proposal -- and I may not
6 understand it fully, so I state that -- but as I understand
7 it -- if, in fact, there's not a certain percentage of lines
8 that have been reached, then it is structured in a way that
9 says that in fact, upon that conversion, upon that sale of
10 those securities there will not be a share in -- there will
11 not be equity appreciation, because it would be as if you
12 sold those assets today.

13 So, to the extent that in fact there is some
14 appreciation that would occur, like you describing in the
15 Internet companies -- the -- you know, Amazon.com -- people
16 keep investing, even though there is no dividend -- in fact,
17 in this instance, absent getting some level of approval,
18 argue then, isn't this deal structured in a way that, in
19 fact, is precisely what you would be okay in an option,
20 that is, there would be no share in the equity appreciation.

21 MR. COFFEE: I believe it's a sliding scale,
22 depending on how much approval they get. You have a
23 possibility of getting all the gain if you get approval, and
24 you'd get various levels of -- I don't know the exact phrase
25 -- interlata approval, and you allocate the gain along that.

1 But at minimum, you get the gain based on the S&P index,
2 which is if there's no down side and there's the S&P index
3 appreciation, that's a very large appreciation to begin with
4 -- meaning that this option has some built-in gain.

5 Now on the exact terms of the give-back proposals,
6 I think it'd be better if I turned it over to Peter here,
7 who's been uniquely quiet for the last 50 minutes. Is that
8 okay, Larry?

9 MR. PETER KEISLER: I'll talk some about the
10 Communications Act. Bell Atlantic's most recent --

11 MS. ATTWOOD: Did you want me to try to --

12 MR. KEISLER: I'll work in -- I will actually work
13 in -- the answer really is a Communications Act answer, I
14 think, Dorothy. I'll work it into what I'm going to say.

15 MS. ATTWOOD: No, go on to the equity questions.

16 MR. KEISLER: Bell Atlantic's Monday evening
17 filings, the last brief that was filed so far in this
18 proceeding -- we didn't file a written response. We were
19 trying to get the sense of the constant ping-ponging between
20 the parties was exhausting you as well as us. And there had
21 to be some --

22 MS. ATTWOOD: Why, thank you!

23 (Laughter.)

24 MR. KEISLER: Well, maybe the emphasis is on us.
25 It was exhausting us. And there had to be some stopping

1 point, some decent interval before this debate, so we let
2 them have the last word for now.

3 But that was an extraordinary filing, and I'd like
4 to give you our take on it from the Communications Act side.
5 Their argument now -- and it was echoed by Bill in his
6 opening statement -- is as follows: There is, they say, no
7 *per se* that requires you as a matter of law to hold this
8 transaction unlawful. And they say, therefore it is really
9 all a matter of policy discretion by the Commission. And
10 they go on to say principally in this filing that, because
11 this is a transaction that's going to serve the public
12 interest -- both the larger transaction, merger, and the
13 interlata aspect of it -- both -- you should approve it; and
14 you can approve it without setting any legal precedent,
15 because you can do it on the facts specific to this
16 transaction, establishing no incorrect holding of law, and
17 doing nothing that's going to trouble you in future matters
18 in future proceedings that come down the line.

19 Now, Prof. Coffee has identified a whole bunch of
20 ways in which this is going to trouble you and multiply the
21 number of proceedings in which my corporate partners and
22 other people like me, who specialize in looking at rules and
23 developing and reclassifying instruments so as to take
24 advantage of those rules, will come before you.

25 But I'd like to talk about three respects that