

# ARTICLE

## INFORMATION SERVICES IN THE 1990S: A CASE STUDY IN RETHINKING THE BENEFICIAL USES OF INDUSTRIAL POLICY

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### Table of Contents

I.	INTRODUCTION.....	1
II.	A NEW FORMULATION OF INDUSTRIAL POLICY .....	3
III.	THE INFORMATION SERVICES MARKET AS A PRIME CANDIDATE TO BENEFIT FROM THE APPLICATION OF A NEW INDUSTRIAL POLICY .....	4
	A. Definition of Enhanced Services For Regulatory Purposes.....	4
	B. Importance of Information Services to the Nation's Economy.....	7
IV.	APPLICATION OF THE NEW INDUSTRIAL POLICY FRAMEWORK TO THE FCC'S ACCESS CHARGES REGIME .....	8
	A. An Overview of the ESP Access Charges Issue.....	9
	B. The Commission's Legal Authority To Apply A New Industrial Policy Paradigm To The Access Charge Issue .....	14
V.	RECONSIDERING THE ESP ACCESS CHARGE ISSUE UNDER THE NEW INDUSTRIAL POLICY PARADIGM.....	20
VI.	CONCLUSION.....	24

### I. INTRODUCTION

On September 23, 1992, FCC Commissioner Ervin S. Duggan delivered an address to the Federal Communications Bar Association

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entitled *It's Time to Re-Think Industrial Policy*.<sup>1</sup> In his address, Commissioner Duggan defined industrial policy as putting "the power of public policy behind private economic activity,"<sup>2</sup> as well as "government's involving itself in the work of setting industrial goals and promoting industrial progress."<sup>3</sup> He bemoaned what he called the current bias against "industrial policy," and he claimed that "[t]he next Administration . . . cannot succeed in its role of economic leadership unless it accepts, unblinkingly, the necessity of rethinking industrial policy -- and accepts the challenge of doing it well."<sup>4</sup>

Disclaiming any attempt to be exhaustive, Commissioner Duggan offered what he called three guiding principles that might lead toward sound industrial policy:

1. Any worthwhile industrial policy should promise a significant multiplier effect: a gigantic boom for a relatively small investment.

2. Any successful American industrial policy should revere private initiative and private market forces.

3. Because a successful American industrial policy must revere private initiative, it should create "arenas for competition."<sup>5</sup>

Commissioner Duggan indicated a belief that the information services industry would be an attractive and deserving target of attention for a properly formulated and applied industrial policy. He observed that "communications and information processing are near the forefront among America's strongest and most competitive industries," and that these industries "are worth pinning our global hopes upon."<sup>6</sup> Indeed, he stated that "[i]n the coming century, tele-transportation -- the movement of information and ideas -- will be the new source of economic growth and of personal fortunes . . . ."<sup>7</sup>

Drawing upon the pragmatic approach outlined by Commissioner Duggan, this article describes a framework for determining the proper employment of industrial policy by the United States government. The article argues that public policymakers should be receptive to a fresh understanding of the appropriate uses of a new industrial policy paradigm, especially in those situations where the employment of that paradigm will involve no expenditure of public monies or resources and will yield considerable benefits to the American people. This article then

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1. FCC Commissioner Ervin Duggan, *It's Time to Re-Think Industrial Policy*, Remarks Before the Federal Communications Bar Association (September 23, 1992) (on file with FCC).

2. *Id.* at 2.

3. *Id.* at 1.

4. *Id.* at 3.

5. *Id.* at 5-6.

6. *Id.* at 7.

7. *Id.*

applies the new industrial policy framework to a specific case study: the long-standing controversy concerning the FCC's access charge treatment of enhanced service providers. The article concludes that, based on the application of the new paradigm, the FCC should reconsider the recent changes in its access charge policy toward ESPs so as to preserve and extend the growth and success of the domestic information services marketplace, and thereby, the U.S. economy as a whole.

## II. A NEW FORMULATION OF INDUSTRIAL POLICY

Commissioner Duggan noted that the practice of industrial policy can lead, on one hand, to "too much central planning, too much government intrusion," while on the other hand one can end up "neglecting what national leaders can and should do" and thereby "render government feckless and irrelevant."<sup>8</sup> To steer the middle ground, Commissioner Duggan suggested the three principles outlined above, which he admits are merely guideposts for an intelligent industrial policy: the promise of a significant economic "multiplier" effect; a predisposition towards private initiative and market forces; and the creation of "arenas for competition."<sup>9</sup>

Commissioner Duggan stated that the FCC now should confront the question of industrial policy squarely to "decide how we can best spur our communications industries to health at home and success abroad—without jeopardizing the interests of consumers or preempting market forces."<sup>10</sup> Thus, he urged the FCC to look carefully at what it does in the telecommunications marketplace, including "[t]he public-policy goals we set, the industries and services we choose to encourage, and the specific policies we make . . ."<sup>11</sup>

Commissioner Duggan undoubtedly is correct that a properly formulated "industrial policy" can be beneficial in certain instances. In fact, given Commissioner Duggan's definition,<sup>12</sup> any exercise of

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8. *Id.* at 5.

9. *Id.* at 5-6. Commissioner Duggan stated that the first principle, the economic multiplier effect, is exemplified by the interstate highway system, land-grant colleges, the G.I. bill, and in the communications area, by the FCC's policies relating to the establishment of the cellular telephone industry. He suggested that the second principle, revering private initiative, was ignored, for example, when the federal government created the Synfuels Corporation. The third principle, fostering the creation of "arenas" of private competition, is exemplified by the FCC's "open skies" policy for domestic communications satellites. See Establishment Of Domestic Communications-Satellite Facilities By Nongovernmental Entities: Report and Order, 22 F.C.C.2d 86 (1970), Second Report and Order, 35 F.C.C.2d 844 (1972), *recon. granted in part*, Mem. Op. and Order, 38 F.C.C.2d 665 (1972).

10. Duggan, *supra* note 1, at 7.

11. *Id.*

12. *Id.* at 1-2.

government power which has an impact on the marketplace, as well as any deliberate refusal to exercise such power, can be characterized to some degree as the use of "industrial policy." Title I of the Communications Act of 1934 directs the FCC to regulate interstate and foreign communications "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ."<sup>13</sup> And, Section 7 of the Act states that the federal government's policy is "to encourage the provision of new technologies and services to the public."<sup>14</sup> The FCC must engage in some form of industrial policy in order to fulfill those statutory goals.

### III. THE INFORMATION SERVICES MARKET AS A PRIME CANDIDATE TO BENEFIT FROM THE APPLICATION OF A NEW INDUSTRIAL POLICY

The government should be less hesitant to use its power in a specific market where that market is considered by most impartial observers to be a growing and vital part of the country's economy. While some might argue more abstractly that all or many industry segments in this country are deserving of special attention by the government, as a practical matter such a position is not realistic. Certain industry segments are more important to the existing and future national economic base than others. This observation relates to the first principle articulated by Commissioner Duggan, namely that industrial policy is employed more suitably where a minimal but definite investment of effort and resources will result in the maximum yield. As Commissioner Duggan himself recognizes, in today's economy one such key industry is undoubtedly telecommunications-based information services<sup>15</sup>, or what the FCC calls "enhanced" services.<sup>16</sup>

#### A. Definition of Enhanced Services For Regulatory Purposes

Beginning in 1966, and continuing into the early 1980s, the FCC wrestled with the regulatory and policy questions that emerged as the result of the growing interdependence of computers and communications services and facilities. In its *Computer I* decisions,<sup>17</sup> the FCC recognized

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13. 47 U.S.C. § 151 (1988).

14. 47 U.S.C. § 157 (1988).

15. Duggan, *supra* note 1, at 7.

16. See *infra* note 23 and accompanying text for the definition and scope of "enhanced services".

17. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service Facilities: Notice of Proposed Rulemaking and Tentative Decision, 28 F.C.C.2d 291 (1970) [hereinafter *Computer I* Tentative Decision], Final

that "there is a close and intimate relationship between data processing and communications services and that this interdependence will continue to increase."<sup>18</sup> Even at that early stage, the Commission recognized that "the data processing industry has become a major force in the American economy, and that its importance to the economy will increase in both absolute and relative terms in the years ahead."<sup>19</sup> While temporarily sidestepping the question of whether it possessed the statutory authority to regulate all data processing services, the FCC concluded that it should forbear from regulating these services.

One of the major issues facing the FCC in the *Computer I* decisions was the creation of a workable definition of data processing services in contrast to the underlying regulated telephone services on which remote access data processing services rely for transport. Such a distinction was critical because the Commission had concluded that "the offering of data processing services is essentially competitive and . . . there is no public interest requirement for regulation by government of such activities."<sup>20</sup> Obviously, the definitional scheme employed would have a major impact not only on the specific services which are or are not subject to public utility-type regulation under the Communications Act, but also on the ability of providers of data processing services, in their business decisions and dealings, to rely on a sharply delineated line between regulated and unregulated services.

After several definitional attempts that proved unworkable, the FCC in the early 1980s issued its *Computer II* orders<sup>21</sup> establishing what it called a "clear-cut" regulatory dichotomy between regulated "basic" and unregulated "enhanced" services.<sup>22</sup> Under Section 64.702 of the FCC's rules, adopted in the *Computer II* decisions, a service is considered "enhanced" if it does at least one of the following:

1. employs computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; *or*

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Decision and Order, 28 F.C.C.2d 267 (1971) [hereinafter *Computer I* Final Decision], *aff'd in part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2nd Cir. 1973), *decision on remand*, Order, 40 F.C.C.2d 293 (1973).

18. *Computer I* Final Decision, *supra* note 17, 28 F.C.C.2d at 269.

19. *Id.* at 268-69 (citations omitted).

20. *Computer I* Tentative Decision, *supra* note 17, 28 F.C.C.2d at 297, para. 20.

21. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second *Computer Inquiry*): Tentative Decision, 72 F.C.C.2d 358 (1979), Final Decision, 77 F.C.C.2d 384 (1980) [hereinafter *Computer II* Final Decision], *recon.*, Mem. Op. and Order 84 F.C.C.2d 50 (1981), *further recon.*, Order on Further Reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, Mem. Op. and Order, 56 Rad. Reg. 2d (P&F) 301 (1984).

22. *Computer II* Final Decision, *supra* note 21, 77 F.C.C.2d at 420.

2. provides the subscriber additional, different, or restructured information; *or*

3. involves subscriber interaction with stored information.<sup>23</sup>

Under the FCC's three-pronged definition, virtually any telephone-based information service that involves a computer's manipulation of customer data is classified an "enhanced service." On the other hand, a basic service is the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."<sup>24</sup> In contrast to enhanced services, which are unregulated, basic services are considered regulated common carriage subject to Title II of the Communications Act of 1934, as amended.<sup>25</sup>

There are a wide range of information services which are classified as unregulated "enhanced services."<sup>26</sup> The term is often used to refer more specifically to on-line interactive data services, which send information from computer databases over telephone lines to subscribers' terminals, personal computers, or teleprinters. The term videotext services, often used synonymously with on-line services, denotes computer-to-computer communications, information, entertainment, or transactional services. Videotext services typically include instructional and reference services, such as foreign language instruction, medical databases, news and weather services, and subscriber bulletin boards; entertainment services, such as book, music, and concert reviews, and recreational forums; and business services, such as stock market quotations and portfolio management services. Well-known enhanced service providers (ESPs) that supply videotext services utilizing telephone lines include CompuServe, Prodigy, GENIE, America On-line, Lexis, Dow Jones, and a host of others. One specific example of a videotext system is a computerized reservation service, which is an on-line system operated by airlines and others that offers flight schedule and fare information and allows subscribers to book travel arrangements for hotels, car rentals, and entertainment. In contrast to videotext, audiotext services are information services delivered by spoken or recorded voice over telephone lines.

Other types of telecommunications-based services, many of which overlap with each other, also are classified as "enhanced" under the FCC's definition. Protocol processing services allow two different computers to "speak the same language." Electronic data interexchange

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23. 47 C.F.R. § 64.702 (1992).

24. Computer II Final Decision, *supra* note 21, 77 F.C.C.2d at 420.

25. 47 U.S.C. §§ 201-27 (1988 & Supp. III 1991).

26. For descriptions and definitions of many of the terms in this section see DIGITAL INFORMATION GROUP, 1990-91 INFORMATION INDUSTRY FACTBOOK (1991).

(EDI) is the exchange of trade-related documents electronically and has been used extensively in the transportation, retail, and grocery industries. Point-of-sale (POS) transaction processing uses the telecommunications network to validate credit cards purchases by linking "swipe" machines resident at the retailer's premises to large databases. Other information services include batch processing, value-added service networks, and electronic mail.

All these different information services, with their differing applications and uses, use the same telecommunications network to reach the customer, and the Commission classifies them universally for regulatory purposes as enhanced services without further distinctions. The FCC reaffirmed the basic/enhanced services dichotomy in its *Computer III* decisions,<sup>27</sup> and that definitional scheme for regulatory purposes remains in place today.

## B. Importance of Information Services to the Nation's Economy

It is beyond dispute that the information services industry is of vital importance to our nation's economy. According to the 1992 Department of Commerce *Industrial Outlook* report, there are over 24,000 individual information providers competing in the domestic market, employing nearly one million people.<sup>28</sup> Revenues of the electronic information services industry grew by 18.5 percent in 1991, amounting to \$10.2 billion; on-line information services accounted for 78 percent of these revenues.<sup>29</sup> The electronic information services industry is expected to grow by about 20 percent in 1992, reaching \$12 billion in revenues, and is projected to grow by 20 percent annually through the next five years.<sup>30</sup>

The Department of Commerce concludes that information services "are a growing share of the U.S. economy" and "a strategic input" to making the domestic business sector more competitive internationally.<sup>31</sup> In most respects, the United States has "the most advanced and diversified electronic information services industry in the world."<sup>32</sup> The

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27. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry): Report & Order, 104 F.C.C.2d 958 (1986), *recon.*, Phase I Reconsideration Order, 2 F.C.C.R. 3035 (1987), *further recon.*, Order on Further Reconsideration, 3 F.C.C.R. 1135 (1988), *second further recon.*, Order on Second Further Reconsideration, 4 F.C.C.R. 5927 (1989), *Report & Order* and *Phase I Reconsideration Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *decision on remand*, Computer III Remand Proceedings: Report and Order, 5 F.C.C.R. 7719 (1990) [hereinafter Computer III Remand Order].

28. U.S. DEPARTMENT OF COMMERCE/INTERNATIONAL TRADE ADMINISTRATION, U.S. INDUSTRIAL OUTLOOK '92 26-1 (Jan. 1992).

29. *Id.*

30. *Id.* at 26-2.

31. *Id.* at 26-1.

32. *Id.* at 26-2.

Department of Commerce states that U.S. information services "will be in great demand in the evolving global economy," in part because information service companies "are finding innovative and cost-effective ways to create, store, manipulate, and cross-correlate information."<sup>33</sup> As these facts indicate, the continued growth and success of the domestic information services industry is vital to the advancement of this country's economy. In its *Computer II* decisions, the FCC stressed that the ultimate success of the "fast-moving, competitive market" for enhanced services was of great importance to the country's consumers,<sup>34</sup> and this consideration undoubtedly has informed many of its regulatory policies with regard to enhanced services.

In light of the importance of the domestic information services industry to the national economy, and to the leadership of the United States in this sector of the global economy, it is appropriate for government policymakers to be sensitive to the need to adopt regulatory policies which will not stifle or impede its continued growth. Conversely, the government should, where feasible, affirmatively adopt policies which encourage the growth and competitive success of the information services industry. This is particularly true where these policies will enhance competition and do not involve the outlay of public funds.

#### IV. APPLICATION OF THE NEW INDUSTRIAL POLICY FRAMEWORK TO THE FCC'S ACCESS CHARGE REGIME

Commissioner Duggan's outline of a new, "intelligent" industrial policy paradigm offers a foundation for a reappraisal of the FCC's regulatory policies as they relate to the enhanced services industry. One such policy is embodied in the FCC's access charge regime. Governed by Part 69 of the FCC's Rules,<sup>35</sup> access charges essentially are the fees paid to local exchange carriers (LECs) by end users and interexchange carriers (IXCs) in order to originate and terminate interstate calls over the LECs' local exchange facilities. IXCs are primarily long distance voice carriers such as AT&T and MCI. Although IXCs and end users both pay federal access charges, IXCs must pay usage-sensitive charges while end users pay flat-rated Subscriber Line Charges and a Private Line surcharge. The FCC's recent proposals to impose usage-sensitive common carrier-type access charges on enhanced service providers, most recently as a condition precedent to using any of the advanced features made available under the FCC's Open Network Architecture program, offer a good case

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33. *Id.* at 26-1.

34. *Computer II* Final Decision, *supra* note 21, 77 F.C.C.2d at 434.

35. 47 C.F.R. §§ 69.1- .612 (1992).

study for the application of Commissioner Duggan's industrial policy framework.

### A. An Overview of the ESP Access Charges Issue

The ability of enhanced service providers to offer advanced information services to their subscribers at a reasonable price is directly dependent upon their ability to obtain cost-based access to local telephone facilities. ESPs subscribe to local telephone lines to allow their subscribers to access their information services with a local telephone call. The large nationwide ESPs, such as CompuServe and Prodigy, subscribe to thousands of these lines. To date, ESPs have been able to use non-usage-sensitive local business lines, obtained from the local telephone companies at rates based on tariffs filed with the state public utility commissions, to make available their on-line information services to customers. These state-tariffed local lines typically cost between \$25.00 and \$35.00 per month on a flat-rate basis.<sup>36</sup> By using flat-rate, state-tariffed business lines, ESPs are not required to pay the usage-sensitive access charges which are part of the federal access charge regime originally created primarily for long distance voice common carriers such as AT&T and MCI. Based on an assumed usage of 100 hours per month per line, which is typical of the usage of local telephone lines by ESPs, voice common carriers would pay at least \$160.00 per month in usage-sensitive charges in order to use these same lines.<sup>37</sup>

For the past 15 years, the FCC has wrestled with the problem of creating a rational access charge system to compensate local exchange carriers for the use of their facilities to originate and terminate interstate traffic. In 1978, the Commission initiated a *Notice of Inquiry and Proposed Rulemaking* "to determine what reimbursement interstate services should make to local operating companies for the use of local plant, on a cost causation basis."<sup>38</sup> After four supplemental notices of proposed rulemaking,<sup>39</sup> and in anticipation of the imminent break-up of the Bell

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36. See, e.g., Additional Comments of CompuServe Incorporated at 9, Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 F.C.C.R. 4524, (CC Docket No 89-79, filed Sept. 30, 1992) [hereinafter Additional CompuServe Comments].

37. *Id.* at 9. The \$160 per month figure is derived by multiplying 6000 minutes of use per month by 2.67¢ per minute, which is the minimum usage-sensitive charge that would apply.

38. MTS and WATS Market Structure: Notice of Inquiry and Proposed Rulemaking, 67 F.C.C.2d 757, 759 (1978).

39. MTS and WATS Market Structure: Supplemental Notice, 73 F.C.C.2d 222 (1979); Second Supplemental Notice, 77 F.C.C.2d 224 (1980); Third Supplemental Notice, 81 F.C.C.2d 177 (1980); Fourth Supplemental Notice, 90 F.C.C.2d 135 (1982).

System,<sup>40</sup> the Commission finally adopted its *Third Report and Order* in 1983.<sup>41</sup> In this decision, the FCC established four goals for pricing access to local facilities which it said were derived from several provisions of the Communications Act: "the continued assurance of universal service; the elimination of unjust discrimination or unlawful preferential rates; the encouragement of network efficiency; and prevention of uneconomic bypass."<sup>42</sup> The Commission also noted the additional non-statutory objective of full and fair competition in the interexchange market.<sup>43</sup> The FCC recognized that these principles "are to some extent conflicting and there is no possibility of devising a 'perfect' plan that would fully and immediately effectuate all of our goals." Rather, the Commission believed that "any acceptable plan must balance these goals in a satisfactory manner."<sup>44</sup>

Use of the local exchange facilities by interexchange carriers and end users imposes both non-traffic sensitive (NTS) and traffic sensitive (TS) costs. While recovering all traffic-sensitive costs on a usage-sensitive basis, the Commission adopted a bifurcated approach to recover the non-traffic sensitive costs. A monthly flat rate subscriber line charge (SLC) was assessed on residential and business subscriber lines to recover a portion of the NTS costs, while the remainder of NTS costs were to be collected from interexchange carriers on a usage-sensitive basis through a rate element called the Carrier Common Line Charge (CCLC). The CCLC is intended to recover the explicit subsidy amounts that historically were incorporated into the rates paid by long distance voice services to defray the costs of local telephone service, especially the costs of residential service.

The *Third Report and Order* did not specifically mention the access charge treatment applicable to the use of local exchange facilities by ESPs to originate or terminate their services. On reconsideration<sup>45</sup> however, the Commission stated that "there is some uncertainty as to whether the [FCC's carrier access charge] rules would apply to entities which may not be considered carriers, such as enhanced service providers . . . but which also use access service."<sup>46</sup> The *First Reconsideration Order* expressly declined to apply usage-sensitive carrier access charges to ESPs, due in

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40. See *United States v. AT&T (Modified Final Judgment)*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

41. *MTS and WATS Market Structure: Third Report and Order*, 93 F.C.C.2d 241 (1983) [hereinafter *Third Report and Order*].

42. *Id.* at 278.

43. *Id.* at 267-68.

44. *Id.* at 278.

45. *MTS and WATS Market Structure: Mem. Op. & Order*, 97 F.C.C.2d 682 (1983) [hereinafter *First Reconsideration Order*].

46. *Id.* at 711.

part to the Commission's concern that such an action would result in "huge increases in their costs of operation which could affect their viability."<sup>47</sup> In addition to concern about the impact of "rate shock," the Commission recognized the practical implementation problems that local exchange carriers would face in attempting to measure ESP usage for jurisdictional purposes, and in assessing switched access charges on ESPs and other end users employing what is known as a "leaky PBX" configuration.<sup>48</sup>

Thus, at the inception of the federal access charge regime, the FCC treated ESPs as end users which were not subject to the same high level of access charges as voice common carriers. Indeed, the Commission's access charge decisions never discussed in any substance whether ESPs should, as a matter of law or policy, pay access charges at the same rates as interexchange carriers. Instead, the FCC established two categories of users of the local exchange facilities: interexchange carriers, which are subject to usage-sensitive charges, and end users, which are not.<sup>49</sup>

Upon review, the D.C. Circuit upheld the *Third Report and Order in National Association of Regulatory Utility Commissions v. Federal Communications Commission*.<sup>50</sup> The Court stated that the FCC's access charge policies "are within the Commission's authority and, for the most part, are rationally grounded and sufficiently supported by evidence."<sup>51</sup> The D.C. Circuit observed that the FCC had considerable statutory discretion to "balance the multiple goals embodied in the Communications Act,"<sup>52</sup> and that the adopted access charge rules are well within the FCC's "broad zone of expertise and discretion . . ."<sup>53</sup>

In July 1987, the Commission released a *Notice of Proposed Rulemaking* proposing amendment of Part 69 of the Commission's rules

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47. *Id.* at 715.

48. *Id.* at 713-14. A flat-rate special access surcharge was applied to ESPs with "leaky PBX" traffic.

49. The rules state that carrier's carrier charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunication services," while end user charges "shall be computed and assessed upon end users." 47 C.F.R. § 69.5 (1992). An end user is defined as "any customer of an interstate or foreign telecommunications services that is not a carrier . . ." 47 C.F.R. § 69.2(m) (1992). The FCC's rules do not define the term "enhanced service provider," but the end user definition plainly includes ESPs. *See, e.g.,* Northwestern Bell Telephone Company, 2 F.C.C.R. 5986, 5988 (1987) ("enhanced service providers are treated as end users for purposes of our access charge rules.").

50. *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

51. *Id.* at 1103. In an order effective January 1, 1987, the Commission applied carrier access charges to data and telex resale carriers. However, the rule change adopted was not intended "to apply [carrier] access charges to enhanced service providers." Common Carrier Services: WATS-Related and Other Amendments of Part 69 of the Commission's Rules, 51 Fed. Reg. 33,751, 33,752 (1986).

52. *NARUC*, 737 F.2d at 1134.

53. *Id.* at 1138.

relating to ESPs.<sup>54</sup> The FCC tentatively concluded that enhanced service providers should be accorded the same access charge treatment as voice common carriers, thereby eliminating ESP's use of flat-rated, state-tariffed access arrangements for the origination and termination of their services. Rather than making an explicit determination, as a matter of law or policy, that usage-sensitive carrier access charges should in fact apply to ESPs, the *Part 69 NPRM* instead referred to an "interim" ESP "exemption" from common carrier access charges, thereby implying that ESPs all along would have been subject to such charges absent this "exemption." The FCC stated that federal carrier access charges now should be applied to ESPs because "a rate shock rationale no longer justifies an access charge exemption for enhanced service providers."<sup>55</sup> The Commission noted that previously "[w]e feared that if we imposed full interstate access charges on enhanced service providers, which were then paying local business rates for their interstate access they would face large increases in their operating costs and might no longer be viable."<sup>56</sup> The *Part 69 NPRM* sought comments addressing the FCC's tentative conclusions about rate shock and various issues relating to implementation of its proposal to impose carrier access charges on ESPs.

On April 27, 1988, the FCC released its *Part 69 Order* which concluded that the so-called ESP "exemption" from carrier access charges should be retained.<sup>57</sup> Although the FCC seemed to focus exclusively on the access charge principle of nondiscrimination to the exclusion of the other principles adopted in its 1983 *Third Report and Order*,<sup>58</sup> nonetheless it stated that the imposition of access charges on ESPs "could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired."<sup>59</sup> Thus, although the Commission did not make an explicit finding on the point, it apparently believed that, absent concerns about "rate shock," carrier access charges should be applied to ESPs.

In 1989, the FCC once again invited comments concerning the "special treatment" being given to ESPs vis-a-vis other access customers.<sup>60</sup>

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54. Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers: Notice of Proposed Rule Making, 2 F.C.C.R. 4305 (1987) [hereinafter Part 69 NPRM].

55. *Id.* at 4306.

56. *Id.*

57. Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers: Order, 3 F.C.C.R. 2631 (1988) [hereinafter Part 69 Order].

58. Third Report and Order, *supra* note 41, 93 F.C.C.2d at 2631. See *supra* notes 41-44 and accompanying text.

59. *Id.* at 2633 (footnote omitted).

60. Amendment Of Part 69 of the Commission's Rules Relating To The Creation Of Access Charge Subelements For Open Network Architecture: Notice of Proposed Rulemaking, 4 F.C.C.R. 3983 (1989).

This time the issue concerning the appropriate access charge treatment of ESPs arose in the context of a proceeding specifically intended to decide how ESPs will be able to access new telephone network services and functions which are part of the FCC's Open Network Architecture (ONA) program. In its ONA proceedings,<sup>61</sup> the Commission had stated that ONA was intended as a means to make new and unbundled features of the local exchange network available on a uniform basis to enhanced service providers. This new program, which became a condition precedent to removal of structural separation requirements which previously had governed the Regional Bell Operating Companies' (RBOCs) participation in the enhanced service marketplace, was intended to "open up network capabilities to competing providers of enhanced services."<sup>62</sup> The Commission stated that a "major goal of ONA is to increase opportunities for ESPs to use the RBOCs' regulated networks in highly efficient ways, enabling them to expand their markets for their present services, and develop new offerings as well, all to the benefit of consumers."<sup>63</sup> In its original *ONA Phase I Order*, the FCC indicated that its planned pricing of ONA services used by ESPs "should ensure that these services are cost-based and bring related benefits to the enhanced service industry."<sup>64</sup>

In July 1991, the FCC, citing concerns about possible disruption of the enhanced services industry, retained the so-called ESP "exemption" from usage-sensitive carrier access charges, but in a way sure to constrain its applicability in the future. In the *Part 69 ONA Order*,<sup>65</sup> the Commission adopted rules which impose common carrier-type access charges on enhanced service providers as a condition for ESPs' use of the new network features and functionalities to be made available as part of the FCC's Open Network Architecture program. The FCC ruled in the *Part 69 ONA Order* that all enhanced service providers that wish to use new ONA features, generally referred to as "Basic Service Elements" or BSEs, must acquire a new access arrangement called a "Basic Serving Arrangement" or BSA.<sup>66</sup> The use of BSEs which are made available as part of the ONA program should enable enhanced service providers,

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61. Filing and Review of Open Network Architecture Plans: Phase I Order, 4 F.C.C.R. 1 (1988) [hereinafter *ONA Phase I Order*], *modified on recon.*, Order on Reconsideration, 5 F.C.C.R. 3084 (1990) [hereinafter *ONA Reconsideration Order*], *further recon.*, Order on Further Reconsideration, 5 F.C.C.R. 3103 (1990).

62. *ONA Reconsideration Order*, *supra* note 61, 5 F.C.C.R. at 3084.

63. *Computer III Remand Order*, *supra* note 27, 5 F.C.C.R. at 7719-20.

64. *ONA Phase I Order*, *supra* note 61, 4 F.C.C.R. at 85 n.326.

65. Amendment Of Part 69 Of The Commission's Rules Relating To The Creation Of Access Charge Subelements For Open Network Architecture: Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 F.C.C.R. 4524 (1991) [hereinafter *Part 69 ONA Order*].

66. *Id.* at 4535.

particularly in the future, to provide their information services to the public on a more efficient, low-cost, and user-friendly basis than is possible with today's technology. However, the BSA outlined in the *Part 69 ONA Order* is modeled on the carrier access charge regime, and, therefore, it contains the explicit subsidy elements of the CCLC to defray the costs of local telephone service.<sup>67</sup>

In the *Part 69 ONA Order*, the FCC refused requests by ESPs to require the local exchange carriers to create a federally-tariffed BSA that, rather than being designed for voice common carriers, specifically would be designed to meet the needs of ESPs and which would not be priced to recover the explicit cost subsidy contained in the new Basic Serving Arrangement. The Commission explained that such an ESP-specific access arrangement "is inconsistent with our current rate structure," and there is "no reason" to deviate from present access charge rate structures "for one group of access users."<sup>68</sup> In addition, the Commission refused, even on an interim basis pending the development of a new cost-based BSA designed for ESPs, to allow enhanced service providers to continue their access to the local exchange network through local business lines in conjunction with using the advanced functionality of new federally-tariffed BSEs. The FCC stated that this so-called "mix and match" option "could result in a mismatch of BSE costs and revenues, seriously undermine state policies, and create jurisdictional boundary problems."<sup>69</sup>

Accordingly, rather than imposing common carrier access charges on ESPs directly, as earlier proposed in 1987, the FCC's new rules expressly condition the availability of new federally-tariffed ONA services upon the purchase of an access arrangement which is priced virtually the same as the pre-existing common carrier access charge model. The result is that ESPs, in order to use new network features and functionalities, will be compelled to pay *at least* three to four times as much as they pay currently for local network access, even though the actual costs to the telephone company of providing the local access arrangement would be virtually the same.<sup>70</sup>

## **B. The Commission's Legal Authority To Apply A New Industrial Policy Paradigm To The Access Charge Issue**

In relating the issue of the appropriate access charge treatment for ESPs to a new industrial policy paradigm for information services, it is important to understand that the FCC is not compelled as a matter of law to impose common carrier-type access charges on enhanced service

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67. *Id.* at 4525.

68. *Id.* at 4535.

69. *Id.*

70. See *supra* notes 36-37 and accompanying text.

providers, either on a stand-alone mandatory basis (that is, apart from the use of ONA features) or as a precondition to the use of federal ONA features and functionalities. In fact, the FCC possesses the legal flexibility and discretion to adopt a new industrial policy that fosters the important public policy of promoting the continued development and growth of the information services market.

In *NARUC v. FCC*,<sup>71</sup> which upheld the *Third Report and Order* in the access charge proceeding, the D.C. Circuit also upheld the FCC's broad statutory discretion. The Court observed that those parties challenging the FCC's newly-adopted access charge regime ignored "the breadth of the Commission's statutory discretion to balance the multiple goals embodied in the Communications Act."<sup>72</sup> The Court stated that the access charge plan fell within "the broad zone of expertise and discretion which must be granted to the Commission in a proceeding which touches the very core of the rapidly developing telecommunications industry."<sup>73</sup> The D.C. Circuit approved the FCC's access charge orders because they "reconciled widely diverse policy goals and numerous competing interests."<sup>74</sup> It found that although the FCC had not achieved "a plan of pristine quality," the Court's review of that plan did not and could not "require perfection."<sup>75</sup>

In particular, the D.C. Circuit indicated that the FCC was permitted to resolve policy questions by using a differential access charge treatment for various types of users of local access. For example, the FCC could impose flat-rate charges on end users as a means to preserve universal service because "rates may be structured to avoid disruptive service impacts."<sup>76</sup> The Court stated that:

The Communications Act authorizes the Commission to impose reasonable charges to promote a rapid, efficient, and modern telecommunications network in which technological innovations are encouraged in order to permit the development of facilities adequate to provide this service.<sup>77</sup>

The Court also cited the Commission's decision on the appropriate treatment of foreign exchange (FX) service users for access charge purposes as an example of a question which was within "the FCC's ambit of discretionary authority."<sup>78</sup>

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71. *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

72. *Id.* at 1134.

73. *Id.* at 1138.

74. *Id.* at 1147.

75. *Id.*

76. *Id.* at 1135.

77. *Id.*

78. *Id.* at 1147.

The FCC's broad discretion to adopt statutory-based regulatory policy also is reinforced by the Supreme Court's landmark decision in *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>79</sup> There, the Supreme Court upheld the Environmental Protection Agency's (EPA's) construction of the Clean Air Act Amendment of 1977 in defining a "source" of air pollution.<sup>80</sup> The EPA adopted a broad reading of the term "source" to include all plantwide emissions, allowing air-polluting facility operators to offset increases in pollution from one part of a plant with decreases in another part.<sup>81</sup> The Court stated that, where Congress has not indicated its definitional intent in an area, the federal courts must determine only whether the agency's view of the statute in the context of a particular proceeding is "a reasonable one."<sup>82</sup> The Court went on to state that the EPA's interpretation of the statutory term represented "a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and measured fashion, and the decision involves reconciling conflicting policies."<sup>83</sup> The Court continued: "[w]hen a challenge to any agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."<sup>84</sup>

The *Chevron* decision precedes other recent Supreme Court decisions which afford agencies considerable discretion to formulate regulatory policies in accordance with "reasonable" interpretations of their governing statute.<sup>85</sup> Most recently, the Supreme Court stated that it has reaffirmed *Chevron* "often" and that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law."<sup>86</sup> Recent D.C. Circuit decisions also have applied the Supreme Court's *Chevron* rationale to

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79. 467 U.S. 837 (1984).

80. *Id.* at 866.

81. *Id.* at 840, 858.

82. *Id.* at 845.

83. *Id.* at 865 (citations omitted).

84. *Id.* at 866.

85. *See, e.g., National Labor Relations Board v. United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987) (Court upholds NLRB's construction of statute, citing *Chevron* and the traditional deference accorded the Board's "rational" interpretations of the statute); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1985) (Court upholds CFTC's construction of statute, stating that "considerable weight must be accorded the CFTC's position" and citing the agency's "superior" expertise in determining whether a regulation is "reasonably necessary" to accomplish the purpose of the agency's governing statute).

86. *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S.Ct. 1394, 1401 (1992).

various FCC actions,<sup>87</sup> and in particular have upheld the FCC's broad discretion to determine the reasonableness of telephone rates and charges.<sup>88</sup> Thus, the federal courts have recognized that the FCC possesses considerable discretion, of course, within the bounds of rational decisionmaking, to adopt policies which promote the public interest.

Given the discretion possessed by the FCC, and the importance to the development of an advanced information services infrastructure of creating and preserving reasonable, cost-based access for ESPs, it is perhaps surprising that the Commission in recent years has sought repeatedly to impose higher carrier access charges on ESPs, either directly initially, or subsequently as a precondition to utilizing ONA services. Even if "rate shock" arguments<sup>89</sup> may have diminished somewhat due to the growth of the industry, substantial increases in access costs will certainly have a materially adverse effect on the continued development of the information services marketplace and infrastructure.

It is apparent that the FCC's focus has been primarily on the aspect of nondiscrimination among users of local exchange facilities, to the detriment of the other three equally-important statutorily-derived principles.<sup>90</sup> The FCC derived its nondiscrimination principle from Section 202(a) of the Communications Act.<sup>91</sup> This provision states that it is

unlawful . . . to make any unjust or unreasonable discrimination in charges . . . for or in connection with like communications service . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.<sup>92</sup>

The key word in this provision, of course, is "unreasonable." The Act plainly contemplates that the FCC could adopt and implement a rate scheme which discriminates against or in favor of certain classes of telecommunications providers and users, as long as such discrimination is reasonable. As the D.C. Circuit indicated in the *NARUC* decision, "when there is a neutral, rational basis underlying apparently disparate

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87. *e.g.*, *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C. Cir. 1989) (*Chevron* test used to uphold FCC's "reasonable" interpretation of Communications Act); *King Broadcasting Co. v. FCC*, 860 F.2d 465, 469 (D.C. Cir. 1988) (*Chevron* test applied to FCC broadcasting decision); *Pappas v. FCC*, 807 F.2d 1019, 1024 (D.C. Cir. 1986) (FCC decision is upheld as permissible construction of Communications Act under *Chevron*).

88. *e.g.*, *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 781 (D.C. Cir. 1990) (FCC has "considerable discretion" to determine appropriate telephone company rate base items); *Alltel Corp. v. FCC*, 838 F.2d 551, 557 (D.C. Cir. 1987) (FCC has broad discretion "in its choice of methods for the determination of [telephone company] rates.").

89. *See supra* notes 46-59 and accompanying text.

90. *See supra* notes 41-44 and accompanying text.

91. Third Report and Order, *supra* note 41, 93 F.C.C.2d at 265.

92. 47 U.S.C. § 202(a) (1988).

charges, the [access charge] rates need not be unlawful."<sup>93</sup> The Commission itself concluded in the *Part 69 Order* that "to the extent the exemption for enhanced service providers may be discriminatory, it remains, for the present, not an unreasonable discrimination within the meaning of Section 202(a) of the Communications Act of 1934."<sup>94</sup>

In addition, Section 202(a) allows the FCC to adopt different rates for two or more types of services or service providers that are not "like" one another.<sup>95</sup> Initially, it is not at all clear that the present access charges system *does* discriminate in favor of ESPs versus carriers -- in fact, the reverse may be true. Many ESPs long have held that their use of local facilities is not "like" the use of local facilities that interexchange carriers exhibit, as is required to trigger the nondiscrimination standard of Section 202(a). Under this view, the local exchange access currently used by ESPs actually is "like" the local exchange access used by all other end users. These ESPs point to many differences between voice telephony and data services, and the similarity between ESPs and other end users (such as ordinary business users) in terms of the way in which they utilize the local exchange network.<sup>96</sup> Thus, these ESPs argue, imposing carrier access charges on enhanced service providers would violate the Communications Act by subjecting them to "undue or unreasonable prejudice or disadvantage."<sup>97</sup>

Putting aside the not unimportant issue whether imposing access charges would unreasonably discriminate against ESPs,<sup>98</sup> the question remains whether the "discrimination" supposedly created by the current access charge treatment of ESPs, or the extension of that treatment as part of the ONA regime, can be viewed as reasonable. It is here that the FCC's

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93. 737 F.2d at 1133.

94. *Part 69 Order*, *supra* note 57, 3 F.C.C.R. at 2633.

95. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990) (application of Section 202(a) "likeness" analysis to FCC's policies regarding AT&T's Tariff 12 arrangements); *Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982) (explication of customer-oriented "functional equivalency" test for determining "like" services).

96. For example, while IXC's furnish the essentially homogenous service of transmitting voice messages from one location to another, ESPs provide a diverse and ever-changing array of data-based services, such as packet switching, point-of-sale credit verification, on-line database information retrieval, remote computing bulletin board and electronic conferencing services, and electronic mail. *See supra* note 26 and accompanying text. The many differences that exist between ESPs and interexchange carriers are reflected in a host of access features provided to IXC's as part of the FCC's Basic Serving Arrangement which are not needed or used by ESPs, such as presubscription, extensive tandem switching, NANP transmission, call denial, service code denial, service class routing, trunk-side signaling, one-plus dialing capability, and equal access features.

97. 47 U.S.C. § 202(a) (1988).

98. The FCC avoided deciding this specific question in the *Part 69 Order*, stating that it "need not . . . resolve that issue in this order." *Part 69 Order*, *supra* note 57, 3 F.C.C.R. at 2633.

broad discretion in balancing its statutory goals comes into play in conjunction with the formulation of a new industrial policy paradigm relating to information services. In particular, the agency possesses discretion to balance the various goals of its access charge policy without continuing to focus predominately on the nondiscrimination principle to the exclusion of other worthwhile public policy objectives.

Recall that in the *NARUC* decision the D.C. Circuit concluded that "rational" distinctions in rate treatment can serve other important public policy goals. Indeed, as pointed out previously, in discussing the access charge treatment of ESPs the Court indicated that the Act "does not prevent all discrimination—disparities in prices for similar services—but only *unreasonable* discrimination. The reasonableness of the price disparity must be judged by the circumstances in which it is assessed."<sup>99</sup> The D.C. Circuit concluded that neither it nor the FCC has ever held "that all pricing disparities which may fail to recover full costs from the customer—however temporary or necessary to achieve the statutory policies of the Communications Act—are invariably banned by the antidiscrimination sections of the Act."<sup>100</sup> Thus, in order to be consistent with the Communications Act, a sound access charge regime need not give undue weight to the nondiscrimination concern to the exclusion of other valid public policy goals.

As discussed earlier,<sup>101</sup> aside from concerns about discrimination among local exchange users, the FCC articulated three other access charge principles, derived largely from Section 1 of the Communications Act.<sup>102</sup> One of these principles is to foster the efficiency of the telephone network. The FCC stated in the *Third Report and Order* that this goal could be viewed narrowly as "efficient utilization of a network" through "the creation of customer incentives," or more broadly as a "concern with the cost and quality of service."<sup>103</sup> Under either view, the Commission indicated that non-cost-based access charges would harm the enhanced services industry because "access pricing that does not reflect cost can turn computer technologies [*i.e.* enhanced services] 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."<sup>104</sup> By imposing non-cost-based access charges on ESPs, the FCC in effect would be inviting just such a result, which would not be in the public interest.

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99. 737 F.2d at 1136 (emphasis in original, citations omitted).

100. *Id.* at 1137.

101. See *supra* note 42-43 and accompanying text.

102. 47 U.S.C. § 151 (1988).

103. Third Report and Order, *supra* note 41, at 266.

104. *Id.* at 252.

Rather than emphasizing unduly its largely theoretical "nondiscrimination" concerns, the FCC should look as well to the relative importance of network efficiency.

In addition, the principle that uneconomic bypass should be discouraged also is implicated by the access charge treatment of ESPs. The FCC stated in the *Third Report and Order* that bypass involves the "possibility of users, particularly the nation's largest telecommunications users, abandoning the network for less efficient alternatives."<sup>105</sup> This "might mean higher long-run costs for those who were required to remain on the network," as well as "for those who were able to use bypass services."<sup>106</sup> No such viable bypass alternatives exist at present for ESPs. The required long-term concerted effort to develop and implement any feasible bypass options likely would be very costly to ESPs. Moreover, uneconomic bypass, by artificially restricting the volume of enhanced service traffic being provided over the public telephone network, would lower revenues from ESP business for the LECs, reduce efficiency, and impose increased costs on those customers remaining on the network. Conversely, by retaining, and even increasing, the number of ESPs using the local telephone network, more Americans will be attracted to utilize reasonably-priced information services, thereby reducing the shared cost burden for all other users. Thus, the prevention of uneconomic bypass not only benefits the information services market specifically, but all the users of the telecommunications network generally.

## V. RECONSIDERING THE ESP ACCESS CHARGES ISSUE UNDER THE NEW INDUSTRIAL POLICY PARADIGM

There is no question that access by ESPs to advanced telephone network functionalities and features is crucial in building a telecommunications network infrastructure that will bring an even greater number of Americans the benefits of the "Information Age." Given this fact, and the important role of the information services industry in the development of this country's economic future, the FCC should not impose what in effect are enormous financial penalties on ESPs simply because they wish to use relatively inexpensive advanced network functionalities and features (BSEs) in conjunction with their present local telephone access arrangements. Unfortunately, as explained in the previous section, thus far the FCC continues to focus exclusively on the perceived nondiscrimination goal to the exclusion of other important objectives, such as promoting network efficiency, preventing uneconomic

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105. *Id.*

106. *Id.*

bypass, and promoting universal service in terms of increased consumer access to reasonably-priced information services.

The FCC has pending before it a number of petitions for reconsideration of its *Part 69 ONA Order*.<sup>107</sup> Thus, the FCC has the opportunity at this crucial juncture to reevaluate its prior decision. If not reconsidered, the FCC's ONA pricing decision necessarily will impede the ability of information service providers to provide consumers with advanced information services at reasonable prices that promote widespread usage.

Among other things, the FCC's action is inconsistent with the new industrial policy's "multiplier" principle. In fact, the *Part 69 ONA Order* ignores the principle altogether because the higher rates that ESPs would be required to charge would repress demand for their services. Thus, rather than having a "multiplier effect," the FCC's actions would have a constricting effect on the development of new services and technologies.

Moreover, contrary to Commissioner Duggan's concerns about fostering growth in private markets, the *Part 69 ONA Order* likely will result in considerable economic damage to the market for enhanced services. Under the FCC's decision, ESPs are left with a no-win "Hobson's choice" either to retain their present state-tariffed access arrangements without the ability to associate that access with the promised feature-rich federal BSEs, or to purchase above-cost, usage-sensitive federal BSAs in order to use the federal BSEs. Given the thousands of domestic ESPs, each with different customer markets, cost structures, and service configurations, some ESPs may choose one of these "options" and some another. As a result, the market for enhanced services will be artificially skewed because of the negative impact of a regulatory policy will outweigh actual competitive differences in service choice, quality, or cost.

For example, some ESPs may be forced to exit the market entirely rather than pay usage-sensitive carrier access charges to utilize needed BSEs, thereby depriving the market of additional sources for information services. Other ESPs may decide to use federal ONA features, but the excessive cost increase required to do so necessarily will limit their ability

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107. See, e.g., Petition for Partial Reconsideration of CompuServe Incorporated, CC Docket No. 89-79, filed August 26, 1991; Petition for Reconsideration of ADAPSO, CC Docket No. 89-79, filed August 26, 1991; Petition for Reconsideration of BT North America, CC Docket No. 89-79, filed August 26, 1991. These petitions ask that the FCC require the local exchange carriers to offer ESPs a Basic Serving Arrangement that is designed specifically for ESPs. They also request that the Commission enable ESPs to associate federally-tariffed Basic Service Elements with their present state-tariffed access arrangements, at least until the new BSA has been developed. In August 1992, the FCC issued a *Public Notice* soliciting additional comments regarding these pending petitions. Public Notice: Additional Comments Solicited with Respect to Issues Raised in Petitions for Reconsideration of the Part 69/ONA Order, 7 F.C.C.R. 5309 (1992).

to invest in other new services and applications, and could curtail their service to customers. Still other ESPs, likely the majority, will decline to use federal ONA services and face the distinct possibility in the future of being left behind technologically and competitively in their provision of advanced and efficient services to the public. Such a likely combination of defunct, financially troubled, and/or technologically-limited ESPs will do nothing to advance the market for information services in the United States.

The international leadership of the United States in the information services field also could be jeopardized should the FCC not reconsider its *Part 69 ONA Order*. Among other things, the positive trade balance traditionally associated with the American information services market<sup>108</sup> could be reversed should domestic ESPs be forced to operate under the Commission's present ONA pricing rules.

Finally, it is also evident that under the *Part 69 ONA Order* the private market for information services will be further skewed toward those ESPs affiliated with the local exchange carriers and away from unaffiliated, independent ESPs. For the local exchange carrier-affiliated ESPs participating in federal ONA, the high carrier access charge rates which comprise the new BSA are, in effect, being transferred from one local exchange carrier pocket to another. The LEC affiliates will be insulated largely from the full financial effect of the Commission's decision, and thereby will possess a distinct—and unwarranted—advantage over unaffiliated ESPs.<sup>109</sup>

All these various artificial skews of the information services market caused by the FCC's access charge policy, rather than helping private market forces and fostering "arenas for competition," will only stifle the efforts of ESPs to provide consumers with advanced and reasonably-priced information services. For this reason, the FCC should not impose usage-sensitive carrier access charges on information providers as a condition precedent to obtaining new technologically advanced network features.

Given the demonstrated need for an access arrangement that ESPs can use to acquire federal ONA services, the employment of an appropriate industrial policy paradigm dictates that the FCC create a cost-based, flat-rated Basic Serving Arrangement tailored to the specific needs of ESPs. By stripping this new BSA of all non-cost subsidies and those features and functionalities not used or needed by ESPs, the Commission will create a federal access arrangement that will encourage

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108. See U.S. INDUSTRIAL OUTLOOK '92, *supra* note 26, at 26-1.

109. In this situation as well, the local exchange carriers will have an increased incentive to keep BSA rates above costs, thereby contributing to the economic distress of independent ESPs.

more efficient use of the telephone network and help prevent uneconomic bypass of the public network. A cost-based federal access arrangement designed for ESPs passes the economic "multiplier" effects test because, while no public funds will be expended in support of enhanced services, the result will be the continuing growth of this dynamic and vital industry. This is a key point, because it shows that application of industrial policy need not require direct expenditure of public funds. The particular application of sound industrial policy discussed here would not entail spending any taxpayer money.

In addition, a new cost-based access arrangement will allow ESPs to utilize all new and advanced ONA features and functionalities on a uniform, nationwide basis. Rather than stifling and preempting private initiative and "arenas for competition," a new BSA for ESPs will help spur the national market for information services. Thus, in furtherance of a sound industrial policy that properly balances the considerations relevant to the Commission's access charge principles, the FCC should act quickly to create a cost-based Basic Serving Arrangement designed to meet the unique needs of ESPs.

In the interim, while the Commission is undertaking to fashion a cost-based BSA for use by ESPs, it should allow ESPs to utilize federally-tariffed Basic Service Elements in conjunction with their present state-tariffed business lines. Again, no public outlays are involved, but such a policy would spur the continued proliferation of technologically-advanced information services and development of a more efficient telecommunications network.<sup>110</sup>

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110. This article's focus on the specific issue of carrier access charges should not be interpreted as indicating that a new industrial policy paradigm could not, and should not, be considered in formulating other government policies which affect information services. For example, one recent use of industrial policy in this area is the information services "superhighways" that have been created in the past twenty years as a partnership of public and private resources and management. Legislation sponsored by then-Senator Albert Gore, the High-Performance Computing Act of 1991, P.L. 102-194, 105 Stat. 1594 (1991), was signed into law in December 1991 and promises to help stimulate the information services and computer markets for years to come.

In addition, the FCC also possesses the authority to require the LECs to modify the very architecture of their local exchange networks to accommodate the needs of multiple providers and services, including ESPs. In November 1991, the FCC issued a *Notice of Inquiry* in CC Docket No. 91-346 seeking comments on the architecture that the local exchange carriers intend to use in implementing their proposed Advanced Intelligent Network (AIN). In the Matter of Intelligent Networks: Notice of Inquiry, 6 F.C.C.R. 7256 (1991). In August, 1993, the Commission released a *Notice of Proposed Rulemaking* in this proceeding which would require the major LECs to provide "mediated" access to these networks. Notice of Proposed Rulemaking, CC Docket No. 91-346, FCC 93-380, \_\_ F.C.C.R. \_\_, \_\_ (released August 31, 1993). In order for this country to fully realize the benefits of the Information Age, future LEC networks should not be based on the closed, non-responsive, and monopolistic model of the present, but rather should be designed to be as open, responsive, and pro-competitive as possible.

## VI. CONCLUSION

Commissioner Duggan's September 1992 speech urges us to take another look at the often maligned concept of industrial policy. Rather than denigrating and rejecting industrial policy, Commissioner Duggan has suggested a sensible framework for thinking more unabashedly about the employment of government's powers in ways that further the public interest. The time may be ripe for policymakers to rely, not just on market forces alone, but market forces in conjunction with a properly-formulated industrial policy paradigm, in order to maximize the public good.<sup>111</sup>

In particular, a newly-formulated industrial policy might be applied to consideration of the FCC's access charge regime. The Commission has the opportunity to reassess its access charge regime so that new and advanced enhanced services can continue to be provided to consumers on a reasonably-priced, competitive basis. Without the FCC's reassessment, however, it is likely that its Open Network Architecture program, which was touted as a key to the development of this country's information infrastructure, will fail. Rather than benefiting enhanced service providers, the ONA program will actually cause harm to ESPs. Nonetheless, it is not too late for the FCC to rethink the employment of a new industrial policy paradigm that melds the public good with the private interest in the information services area.

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111. In September, 1993, the Clinton Administration released with considerable fanfare a policy initiative related to what it called the National Information Infrastructure (NII). DEPARTMENT OF COMMERCE, THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR CHANGE (released September 15, 1993). The policy commits the Administration to the development of a national information infrastructure that "enables all Americans to access information and communicate with each other using voice, data, image, or video at anytime, anywhere." *Id.* at 2. While the NII initiative does not specifically address the pricing of information services in general, or the impact of local exchange carrier access charges in particular on the pricing of such services, the NII paper does adopt as one of nine principles and goals an extension of "the 'universal service' concept to ensure that information resources are available to all at affordable prices." *Id.* at 4. Regarding private sector/public sector relationships, the policy paper states that "carefully crafted governmental action can complement and enhance the benefits of . . . private sector initiatives." *Id.* Of course, one of the principal ways the government can encourage wider availability and usage of information services—that is, movement towards accomplishment of the "universal service" goal—is for the FCC to reconsider the access charge treatment of enhanced service providers as suggest in this article.