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WORKING PAPER NO. 28

THE PROCESS OF TELECOMMUNICATIONS REGULATION IN CANADA

by

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TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

Résumé

L'auteur passe en revue la réglementation des télécommunications (surtout la tarification) relevant de trois juridictions différentes -- le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC) et ses prédécesseurs; la Commission des services d'utilité publique de la Nouvelle-Écosse et le gouvernement de la Saskatchewan qui considère que toute entreprise publique dans cette province doit être réglementée par l'État. Les avantages et les inconvénients de la réglementation par le biais d'un organisme de réglementation établi par la loi (OREL) et par les ministères de l'État sont examinés en détail. L'auteur examine notamment la nature de la législation, la structure extérieure (soit les règles relatives aux nominations et à la durée des fonctions, le budget, la procédure d'appel et les règles qui assurent l'indépendance financière de l'organisme de réglementation), ainsi que les exigences du fonctionnement interne (les questions de procédure, comme les préavis et les règles régissant les affectations budgétaires permanentes).

On a beaucoup écrit pour déplorer la "délégation d'autorité" aux OREL et le fait qu'alors, les politiques qui en résultent sont établies à l'extérieur du Parlement. D'autre part, le but de la réglementation, qu'il s'agisse de corriger les imperfections du marché ou de redistribuer les revenus, fait aussi l'objet de commentaires. Il ressort de ce document que la réglementation des télécommunications permet d'articuler la politique publique et que la délégation aux OREL du pouvoir d'établir des politiques est vraiment voulue par le Parlement; il serait donc naïf de penser que celui-ci pourrait reprendre l'autorité qu'il ne veut décidément pas exercer.

La conception même des institutions dépend nettement des objectifs de la réglementation. Or, étant donné que nous envisageons la réglementation comme le moyen d'établir des politiques dans un environnement qui est en quelque sorte dépolitisé, la mise au point de procédures de garantie devient nécessaire. L'auteur fait une analyse des procédures et des règles du jeu actuel et indique les lacunes qu'il y découvre.

L'étude présente un certain nombre de recommandations devant permettre une plus grande imputabilité des OREL ainsi qu'une meilleure équité, comme par exemple :

1) des objectifs de réglementation plus explicites et prescrits dans une loi;

2) le recours à un comité spécial du Parlement sur les organismes de réglementation établis par la loi, chargé de les surveiller; chaque OREL se devrait, chaque année, de présenter à ce comité son budget, ainsi qu'un exposé sur ses objectifs et un rapport de ses décisions;
3) la nomination des membres des OREL par le comité spécial susmentionné, sous réserve de l'approbation par le Cabinet;
4) la fixation d'un mandat d'une durée de sept à dix ans pour les membres, sous réserve d'un "bon comportement";
5) l'interdiction, pour un membre, de travailler pour une entreprise ou une personne dont la cause serait soumise à l'organisme de réglementation, et cela, pendant une ou deux années après avoir quitté ses fonctions au sein de cet organisme;
6) l'abolition des appels au Cabinet;
7) l'utilisation d'énoncés de politiques (bien qu'ils puissent ne pas être tellement utiles); certaines directives, plus spécifiques, devraient être référées au Comité permanent;
8) l'adoption des règles de procédure récemment établies par le CRTC;
9) un recours plus grand à des audiences portant sur des thèmes génériques;

10) l'augmentation du budget des OREL au moyen d'une taxe imposée sur les avoirs nets des entreprises réglementées;
11) le partage des coûts des audiences entre tous ceux qui doivent y comparaître;
12) l'incorporation, dans le coût horaire des audiences, des "externalités" imposées par un intervenant à tous ceux qui doivent y rester présents et écouter;
13) le paiement de frais, après coup, aux intervenants qui viennent pour communiquer des renseignements utiles;
14) une hausse sensible du traitement des membres des OREL;
15) le recours possible à une commission de réglementation fédérale-provinciale (comme l'a suggéré le Comité Clyne).

Si la réglementation est appliquée par un ministère, alors l'auteur recommande les modifications suivantes (dans le cas de la Saskatchewan) :

1) Doter le Comité spécial d'un personnel professionnel et lui fournir des renseignements supplémentaires;
2) aviser les parties intéressées de tout projet de modification importante des activités ou des taux;
3) donner le pouvoir au Comité spécial de tenir des audiences publiques;

4) engager d'autres employés pour le Secrétariat des communications.

Summary

The regulation of telecommunications (principally rate setting) is examined in three jurisdictions — the Canadian Radio Television and Telecommunications Commission (CRTC) and its predecessors; the Nova Scotia Board of Commissioners of Public Utilities and the process of regulation in Saskatchewan whereby a publicly-owned firm is regulated by the government. The advantages and disadvantages of regulation by Statutory Regulatory Agency (SRA) and by government department are examined in detail. In particular, we discuss the nature of the legislation, the external environment (appointment and tenure rules, budget, appeal mechanism, rules for financial independence of the regulator) and the internal environment (the procedural issues such as notice, rules for standing budget allocations).

Much has been written deploring the 'delegation of authority' to SRA's and the resulting policy setting outside Parliament. At the same time, the purpose of regulation be it correcting imperfections in markets or redistributing income is also discussed. The view in this paper is that telecommunications regulation exists to enumerate policy and that the delegation of policy setting to SRA's is a conscious act by Parliament; as a result it is naive to suggest that Parliament take back the authority it does not wish.

Institutional design clearly depends on the objectives of regulation. Since we view regulation as policy setting in a somewhat depoliticized environment, the design of procedural safeguards follows. The present

procedures, rules of the game are analyzed and found somewhat wanting.

A number of recommendations are made to ensure the greater accountability of SRA's as well as fairness:

1) more explicit legislated objectives for regulation
2) the use of a Parliamentary Select Committee on Statutory Regulatory Agencies to oversee the agency; the SRA would annualy present its budget, articulate its objectives and review its decisions before the Committee
3) the appointment of members of an SRA by the Select Committee subject to Cabinet approval.
4) tenure for members for seven to ten years subject to 'good behaviour'
5) the prevention of a member's working for a party before the regulatory board for one to two years after his leaving office.
6) the abolition of appeals to Cabinet
7) the use of policy directives (although they may not likely be useful); specific policy directives to be referred to the Select Committee.
8) the adaption of the procedural rules recently established by the CRTC
9) the greater use of generic hearings
10) the raising of the SRA's budget by taxing those regulated via a net asset charge
11) the bearing of hearing costs by all those appearing at the hearing
12) the incorporation in a per hour hearing cost of the 'externalities' imposed by one intervenor on all those who must sit and listen
13) the awarding of costs to intervenors, ex post, for informative interventions

14) a substantial increases in salaries of members of SRA's

15) the possible use of a joint federal/provincial regulatory board (as suggested by the Clyne Committee)

For regulation via a government department, the following changes are recommended (for Saskatchewan).

1) The provision of a professional staff as well as additional information to the Select Committee

2) The giving of notice to interested parties that a significant change in operations or a change in rates is being contemplated

3) The ability of the Select Committee to call public hearings

4) The hiring of additional personnel to the Communications Secretariat.

CHAPTER ONE

REGULATION: WHY, HOW AND FOR WHOM?

1.0 Introduction

Telecommunications firms in Canada do not generally operate under competitive conditions; instead their operations, including the ability to set prices, are under government control. In all provinces except Saskatchewan, telecommunications firms are regulated by some form of statutory regulatory agency (SRA). Brown-John (1976) has defined an SRA as

> "a statutory body charged with the responsibility to administer, to fix, to establish, to control or to regulate an economic activity or a market by regularized and established means in the public interest."[1]

This study for the Economic Council of Canada addresses the impact of the regulatory process, i.e. the workings of this statutory body on the regulated industry. We discuss, in particular, the environment surrounding the process — the accountability of the regulator for his actions and the degree of independence of the regulator from politicians. By the process we mean the rules both formal and informal by which the SRA is established and by which it arrives at its decisions. The rules then are the rules generally of administrative law as well as the internal procedures of the particular SRA being examined. Administrative processes are not usually examined in detail by economists, economic analyses of regulation generally ignore these procedural issues.[2] Numerous economic and econometric models have been developed which examine how the presence of regulation affects the regulated utility.[3] Few of these models, however,

examine the specific institutional framework in which regulation works — the appointment procedures; the budget of the agency; the presence or absence of an appeal mechanism; etc.[4] Instead, regulation is hypothesized as an either/or mechanism — it exists (is effective) or it does not exist (it is not effective). For example, in the Averch-Johnson model, regulation of natural monopolies is hypothesized as either lowering the profit rate below the monopoly level (effective regulation) or not affecting monopoly profits.[5] Regulation is, however, much more of an institutional process, i.e., it may work partially or completely or not at all; the degree to which regulation is effective is, however, likely a complex endogenous process. Moreover, regulation may have effects other than or in addition to the lowering of monopoly profit rates, effects such as the price structure or the degree of coverage of the service. The institutional framework is most important since it provides the rules within which firms ask for price increases, customer object and the regulator makes decisions. Rules and procedures as well as the enabling legislation determine the accountability of regulators and the independence of the regulator from the political process. These rules and the degree of political independence determine the effectiveness of regulation and also determine the winners and losers in the regulatory game.[6]

Most economists writing about the subject of economic regulation have pondered as to the objective function of the regulator — how does the regulator arrive at decisions, what is it that the regulator wishes maximized — his own self-interest, the profits of the regulated, the welfare of poor consumers?[7] It is evident that the objective function of the regulator depends upon the issues of the accountability and responsibility of regulators or their independence to make decisions. The regulator's objective function is then dependent on the institutional

framework. The degree to which regulators can maximize any specific interest (including their own) depends on the rules of the game, the institutional rules which constrain the outcomes.

A regulatory agency is defined here as independent if the regulator is able to maximize an objective function other than that of his ultimate political masters. The extent of agency independence depends on a large number of explicit details of the regulatory process. First, the degree of independence is a function of who is appointed to the regulatory agency and the length of their term. Appointing life-long political friends makes it easier for the political process to implicitly influence the regulatory process. Short term appointmentments (two to four years) ensure that the regulator considers his career advancement after his tenure as regulator — again implicitly bringing the political process into the regulatory process. Appointing Board members for life removes some of this political pressure. Secondly, making Board decisions rescindable by the Cabinet ensures that the governing party's views will be considered by the regulator.[8] Complete freedom from any appeal procedure, on the other hand, increases the SRA's potential independence. The outcome of any given rate application will differ depending on whether the regulatory agency views itself as a fact-finding tribunal whose decisions are based on strict rules of evidence or alternatively views itself as essentially a policy-making body where evidence inside and outside the transcript is essential in arriving at a 'judicious' decision. In the former case, the decision is based on the evidence and the SRA considers itself to be purely judicial; in the latter case, the SRA consider itself a policy setting body and takes all the environment including that outside the evidence into consideration before arriving at a decision. The method of both arriving at the annual budget of the agency and determining how it is

spent is also crucial for the process, the independence of regulators and their expertise. Later, in this chapter, the institutional framework is disaggregated into three major areas and discussed in detail: the enabling legislation, the external environment (appointment procedures, appeal mechanism; budgetary procedures) and the internal environment (the internal rules of the game). These few points, however, indicate why the process is of interest to economists studying regulation.

This study is also important for the legal profession. In the past, lawyers tended to feel that designing a process which explicitly stated in the law that it was 'fair' meant that it would be. For example, Kerr, writing on the Board of Transport Commissioners for Canada[9], states that "The Commissioners, like judges, are removable only upon impeachment by Parliament and are therefore independent of the Crown or the Government: section (3)". The explicit assumption is that removal from office is the only control that politicians have over regulators. More recently, lawyers have become increasingly interested in designing administrative procedures which are "concerned with fairness, effectiveness, efficiency, principled decision-making, authoritativeness, comprehensivility and openness"[10]. It is the purpose of this study to examine the impact of these criteria on the outcomes of the regulatory process.

Generally, lawyers are not concerned with the effects of the process on the economic outcomes. The criteria used by lawyers to judge the optimality of a regulatory process are indeed not necessarily the same criteria as used by economists. One reason, of course, is that each is concerned with different aspects of the process. The economist is interested in the rates actually designed; the lawyer in 'fairness, comprehensibility and openess.' Moreover, there may be conflicts between the desired outcomes

of the two — the economists goal of economic efficiency may be incompatible with the lawyers concept of efficiency; economists goals for rate setting may be inconsistent with lawyers goals of fairness. It is clear, however, that to study regulatory processes requires some objective or goal against which to describe and judge the process.

We are then primarily interested in the objectives of regulation and how the regulatory process accomplishes these objectives. In later sections, several conflicting economic theories of the motivations for regulation are given explaining, in general, the use of statutory regulatory agencies. It is to the specific economic motivation for regulation tempered by lawyers concepts of proper administrative procedures that we turn. The key question for this paper is the design of a regulatory process which ensures the independence of regulatory decisions from the influence of short run political expediency but which at the same time ensures that regulators are accountable and responsible for their decisions.

There are two basically different ways in which this research could be organized. One method would be to develop some normative theory of the behaviour of regulators and test that theory with data for the telecommunications sector. I intend to follow a second approach — to discuss the reasons why telecommunications is regulated, to study three different actual models of regulation, to analyze the behaviour implied by this evidence and finally to suggest new regulatory processes which ensure some correct degree of independence and accountability for regulators.

The three models of regulation are three different jurisdictions within Canada — the regulation by Federal authorities of Bell Canada, the regulation of Maritime Telephone and Telegraph by the Nova Scotia Board of Commissioners of Public Utilities and the process of telecommunications

regulation in Saskatchewan whereby, in essence, the Caninet regulates a publicly-owned telecommunications firm. These three jurisdictions have been chosen because they depict three different procedural models. Federal telecommunications regulation has been under the jurisdiction of quasi-specialized bodies, the Board of Transport Commissioners (BTC) (1938 to 1966), the Canadian Transport Commission (CTC) (1967-1975) and the Canadian Radio-television and Telecommunications Commission (CRTC) (since 1976). Telecommunications in Nova Scotia has been regulated by a general purpose regulatory Board which has, at this time, jurisdiction over telecommunications, electric utilities, gasoline prices, bridge tolls, the hours of service stations and motor carrier licences. In Saskatchewan, Saskatchewan Telecommunications is a Crown Corporation, controlled by directors appointed by the Government and reporting to its holding company, the Crown Investments Corporation as well as to a Select Standing Committee of the Legislature. No public supervision of operations and rate setting occurs outside the political process.

The analysis of telecommunications regulation in these three jurisdictions will highlight a number of important issues. First, are their different characteristics of regulation due to the use of specialized versus general regulatory bodies? Second, do differences arise because of the political base for the regulators? The Nova Scotia Board is appointed by the Nova Scotian Cabinet to regulate telephones rates in Nova Scotia. The CRTC, however, is chosen by a Federal Cabinet to regulate telephone rates in Ontario and Quebec. Theories we shall discuss, suggest that as a result of these differences in representation of the political masters, the N.S. Board should be more concerned with the structure of local telephone rates than the CRTC. In addition, as we will see, there are differences in the

appointment procedures and budgetary process which should lead to differences in the 'independence' and accountability of the regulatory agencies.

A major distinction in the processes lies in rate setting procedures. In Saskatchewan, as discussed, a government-owned firm, Saskatchewan Telephone, supplies most telecommunications services. Sask. Tel. is not regulated by an independent regulatory Board. Rates in the other two jurisdictions under study, those set by the CRTC and the N.S. Board are determined in an open process. The companies in these two latter jurisdictions apply for rate increases and after due notice, public hearings are held where in an adversary procedure, the firm's evidence is subject to cross-examination by interveners, and the Board. In Saskatchewan, however, no public hearings are held. Instead, the telephone company requests a rate increase, which the Cabinet accepts, rejects or modifies. There is then no direct public participation in rate setting in Saskatchewan other than through the politicians elected by the public. An important question is the degree of openness of the process in Saskatchewan as compared to the more formal regulatory processes in Nova Scotia and before the CRTC. These differences in the institutional structure between the processes in Nova Scotia and before the CRTC on one hand and the process in Saskatchewan on the other hand will be important for a number of issues.

To discuss and evaluate the process, we need two elements, an analysis of processes and some basis against which to judge events. The process is good or bad both in terms of precepts of administrative law (fairness, etc.) and in how the process allows regulators to meet the objectives of regulation. We therefore begin by examining tenets of administrative law then turn to an examination of the possible motivations for the regulation of telecommunications — the objectives of regulation.

1.1 Administrative Law and Processes

An administrative agency, statutory regulatory agency, derives its power from a statutory delegation by the Legislature. This delegation of authority may be to only apply the law as it reads or the delegation may be more general and allow law elaboration or even law setting — the making of rules as they apply broadly over a number of possible cases rather than case by case law application.[11] In the broadest delegatory category, the Legislature may allow the SRA to engage in policy application, elaboration and even policy setting.[12] Defining narrowly the mandate of the agency retains policy setting for the Legislature, a broad mandate allows the SRA not the Legislature to set policy. On one hand, it appears desirable to delegate sufficient discretionary powers to allow an agency to adjudicate diverse cases and, on the other hand, such delegation leads to a loss of political responsibility. This conflict has been analyzed by many political scientists, lawyers and public administrators. Some authors see a need for a broad delegation of power to allow the agency to regulate in the public interest where the the Legislature "was neither equipped nor willing"[13] to clearly enunciate policy. This view essentially is that the Legislature is hard-pressed to handle the broadest of policy questions and has neither the time nor the expertise to engage in specific rule-making for areas as narrowly defined as telecommunications. The view that a broad delegation of power will serve 'the public interest' is based, in addition, on the assumption that administrators are efficient, disinterested, welfare-maximizers — perfect bureaucrates who only have the ideal of society at their heart. This assumption would be unacceptable to most economists who would see bureaucrates as maximizing social welfare if and only if the incentive structure facing the bureaucrats forced them to maximize social welfare rather than their own self-interest.[14]

Bureaucrats generally or members of SRA's in particular are not immune

to political pressure. The broader the delegation of authority to an SRA, the greater the amount of political pressure brought to bear in the regulatory process, political pressure otherwise destined for the political arena. Politicians cannot evade pressures to enunciate policy; if broad policy and rule-making authority is delegated to an agency so are the pressures inherent in the political process delegated to the regulatory process. The problem, of course, is that regulators are not elected, and they may not be responsible or accountable to any specific constituency. As a result, regulators with broad delegatory authority can engage in policy setting without the checks and balances explicit in the real political process - the election of members of Parliament, at least as often as every four years.

Judge H. Friendly suggested that:

> "Lack of definite standards creates a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect. Although pressure produces diffuse decisions, it is likewise true that diffuse decisions produce pressure."[15]

Jaffe has recently stated that:

> "Where the ends and means of an agency's role are highly defined, ... the effects of the political process on the agency are marginal ... the bureaucratic virtues and vices are predominant; highly rationalized administrations embody the advantages of stability, equality of treatment, order, comprehensibility and predictability, and the defects of rigidity and displacement of objectives by bureaucratic routine."[16]

Discussions of whether broad policy delegation is appropriate or not, cannot therefore be made without an analysis of the political or private group influences both on Parliament and on the SRA. Jaffe, Freund and others are correct - a broad delegation of powers to an SRA does intrude political forces into the regulatory arena. Some authors have therefore argued for a minimization of rule-making and policy-making authority by an SRA, retaining all policy setting for the Legislature.

In 1928, Freund stated that "...the appropriate sphere of delegated authority is where there are no controverisal issues of policy or of opinion."[17]

In 1969 McRuer Report suggested that statutory discretion be minimized.[18] This Report called for a mandatory procedure code, explicit judicial review and rule-making by Parliament. Willis (1968) and Doern et al. (1975) have criticized the McRuer Report for stressing lawyers values at the expense of other values, namely the minimization of "...delay, expense and formality attendant upon court-like procedures".[19]

The Law Reform Commission feels that SRA's are given "... broad mandates, vague goals and priorities which are not necessarily consistent with each other.... In the case of the Canadian Radio-television and Communications Commission no initial purpose section was inserted in its enabling act.... The problem of reconciling different goals seems to be built into the structure of such agencies and it is a question of policy as to which goal receives the greatest attention at any given time."[20]

For SRA's to engage only in the application of law under explicit policy guidelines couched in legislative directives requires two fundamental propositions. First, the Legislature would have to articulate explicit policy in each area where agencies now set policy. Second, the interest group pressure which is evident in regulatory hearings would be given access to the political deliberations involved in policy settings. There are a number of reasons why I feel that neither proposition can be met in a Parliamentary government. This view, which runs throughout this study is based on the feeling that in most cases the kinds of policies required for the development of regulated sectors are too detailed for consideration by an over-worked Parliament. Moreover, the political process may not lead to the desirable amount of access by <u>all</u> private interests. Therefore,

regulation by an SRA (as compared to regulation within a department) may be a desirable method of enunciating and developing public policy in certain sectors. However, to characterize the regulatory process in this way requires a careful construction of the checks and balances both within the regulatory arena and in the relationships between the regulators and politicians (and therefore between regulators and interest groups).[21] We will, later in this study, be examining the regulatory process in Saskatchewan where telecommunications rates are set within a closed process as compared to the open regulatory procedures in Nova Scotia and Federally, discuss the relative benefits of rate setting in camera or within an SRA.

Before analyzing a number of alternative processes, it is useful to have a framework in which to subdivide their various components. Doern et al. (1975) divide the determinants of agency behaviour into seven sectors: broad political and social values; economic characteristics of the industry or activity regulated; the nature and mix of governing and political function; legal and policy mandate; organizational public interest style; organizational structure; personnel.[22] Sabatier (1977) characterizes the direct influences on agency policy as including statutory resources (nature and clarity of policy directives, ability to engage in rule-making); technical and monetary resources; attitudes of agency officials; its sovereigns; its constituencies; other agencies as well as a number of indirect influences such as socio-economic factors, political culture, technology, public opinion and the mass media; actual conditions and perceived problems.[23]

Our interest is somewhat narrower than that of the two authors quoted above, since only the telecommunications sector is under analysis. In addition, in our view the details of administrative law as applied by the agency and the courts is essential in determining the nature of independence

and accountability. There are a number of external influences on the regulator, external at least to the specific cases they hear; who is appointed, the enabling legislation, etc. There are also a number of internal elements to the cases - how the specific institutional process provides access to the 'public' or to specific interest groups; how the regulators assess the evidence - adherence to strict court like rules of evidence or allowing hearsay evidence; the 'fairness' of the process; the formality or informality of the process, etc. Therefore the institutional surroundings of regulation encompass a vast array of material which I will clarify under three broad headings:

1) Objectives of Regulation (as given in the enabling legislation)
2) External Environment
3) Internal Environment (procedures of the internal process specific to the SRA)

These are discussed in turn.

Objectives of Regulation

The enabling legislation sets out what the regulators are to do, e.g. set milk prices (Ontario Milk Marketing Board) or determine the routes of interprovincial pipelines (the National Energy Board). As we have discussed, objectives can be written concisely and unambiguously, leaving little or no room for rule-making or policy setting by the SRA. Alternatively, the objectives can be broad and vague, leaving great scope for policy development by the SRA.

As will become apparent, telecommunications regulation has until recently revolved around the regulator's setting "just and reasonable" rates. The objectives of telecommunications regulation of Bell Canada and Maritime Telephone and Telegraph, as written in the legislation, have been broad and quite vague. Many interpretations of 'just and reasonable' can

be made. Thus great scope has been left to the relevant SRA's to set policy (within the limits of the external and internal checks, however. Doern et al. (1975) would suggest that vagueness is because "statutory discretions are often the legislative equivalent of saying, 'Here is a problem. We have set out in the statute some very general policy guidelines: now go away and deal with it in the public interest'."[24] Of course, the regulatory process must be designed to ensure that the general problem is dealt with by the regulators in the public interest. Therefore, the vaguer the mandate, the more crucial is the necessity of having the 'correct' internal and external influences on the process. An explicit mandate, detailing exactly what and how the SRA was to accomplish would leave little discretion, the SRA would be less able to substitute its goals for those of politicians, therefore, there would be less need for proper administrative rules.

External Environment

The environment which I label as external to the regulator is also largely a function of the enabling legislation. The external environment to a large extent determines the accountability of the regulator; the internal rules; its responsibility. In this study attention will be directed to five elements of this external environment.

a) Appointment Procedures, Tenure and Term

Are the regulators appointed by the Cabinet or by a committee of the House? Is tenure for a short fixed term or until retirement? Can the regulator be dismissed without cause?

b) Rules for Independence of the Regulator

Does the regulator have to maintain an arms length contact with the regulated? Can the regulator accept a job with the regulated immediately after 'retiring' from the SRA?

c) Appeal Procedure and Policy Direction

Can there be appeals in law and/or in fact? Can there be appeals to Cabinet? Is there an explicit mechanism for policy directives?

d) Powers of the Regulator

Does the SRA have discretionary powers to interpret its Act? Can the SRA engage in rule-making? Is the SRA involved in policy formulation or policy advising? How can the SRA implement its rulings - does it have teeth? What are the procedures to adjudicate complaints?

e) Budget

How is the budget determined? Can the regulator raise its own budget by taxing the regulated? Who does the regulator report to? Does the budgetary process for the regulator involve the same estimating procedure as for all government agencies? Has the budget been 'reasonable'?

Internal Environment

The internal issues represent the methods by which the SRA attempts to carry out its objectives given the external environment. These internal issues are determined by the actual process and the method by which the SRA spends its budget.

a) Allocating the Budget

Does the SRA engage staff sufficiently professional to deal with the regulatory issues? Does the SRA build up in-house expertise or depend mainly on consultants?

b) Hearings Procedure

Does the SRA handle its hearings as a legal court or is it informal? Is cross-examination allowed at all times? Are there

time limits on cross-examination? Are only lawyers allowed to cross-examine? Do the hearings use strict rules of evidence?

c) Public Access

How is public access guaranteed? What are the rules and procedures of notice; are notices written so that a layman can understand them? What are the rules on interrogatories; on late applications to intervene; on confidentiality of information? Where is the onus of proof - on the regulated firm or on the intervener? Are many applications by the regulated determined ex parte? Does the SRA always give written reasons for decisions? Does the SRA travel to distant communities?

d) Hearing Time

How lengthy is the hearing process and does the process encourage efficiency? Is there use of issue hearings? Is there a mechanism for automatic adjustment of rates? Are there firm rules on the use of past, present or forward test years; the use of annualization and normalization procedures; the methods of accounting for subsidiaries' acts?

e) Staff/Board Relations

What are staff/Board relations? What is the role of Board counsel - counsel for the Board, unrepresented consumers or whom? Does Board counsel take on an adversarial role? Is the Board briefed by staff before or during the hearings? Does the Board make use of staff or are staff only for use of Board counsel? Who writes the initial draft of the reasons for decision - staff or Board? Are staff reports always presented in evidence and subject to cross-examination?

f) Interpretation of Mandate

Does the Board engage in rule-making? Does it interpret its objectives broadly? Does the Board anticipate developments or wait for interveners to raise them? Do Board members examine thoroughly? Does the Board initiate hearings into generic issues? Does the Board examine issues other than the general revenue requirement - the structure of rates, service quality, investment, unregulated services, subsidiaries?

Having laid the foundation for the examination of regulatory processes, we turn to a detailed examination of the objectives of regulation.

1.2 Objectives of Regulation and Implications for the Process

A number of economic theories have been developed attempting to, generally, explain the presence of regulation. These theories can be aggregated into two broad categories. The first group ('public interest' theories) suggest that regulation is imposed in order to end 'market failures'. The unregulated market exhibits undesirable characteristics which competition, by itself, cannot erase. As a result, regulation is imposed to end or correct these failures of competitive forces. The second group of theories ('capture' theories) suggest that regulation is imposed primarily to redistribute income, not to correct market failures. Some private interest, be it the industry or customers of the service, are better off because of regulation while other interests are worse off.[25]

The 'public interest' and 'capture' theories have not been sufficiently developed to allow strong statistical testing of the hypotheses presented. The 'capture' theory as formulated by Stigler (1971), Posner (1973) and Peltzman (1976) does not *a priori* allow one to determine either the specific industries which would be regulated or the specific group in an

industry which would benefit from the imposition and presence of regulation. Stigler, for example argued that regulation exists primarily for the benefit of the industry.[26] Industries, it was suggested demand regulation in order to achieve stability, higher profits or control over entry. Politicians supply regulation in order to receive votes or company dollars. Posner, on the other hand, argued that industry was not the only interest group which can supply benefits to politicians.[27] As a result, regulation could in Posner's view, benefit (redistribute income towards) specific customers of the firm; the customers with political power. Peltzman extended Posner's analysis, arguing that regulatory agencies aid politicians by supplying vote margins through using regulatory powers to redistribute income to specific groups.

The 'public interest' theory was advanced in 1966 by Marvor Bernstein who formulated a 'life cycle' hypothesis of regulation. Specific issues of the day, he suggested cause special coalitions to form. These coalitions disband once the legislature establishes the regulatory machinery designed to redress the grievances of the coalition. The regulatory machinery tends to become 'captured' by the specific groups who appear before the agency. While Bernstein did not examine the nature of regulatory processes in detail, it is evident that the rules of administrative law, rules of evidence and the use of written reasons for decision tend to bias regulatory decisions towards the interests of those who can afford to appear at the hearing. It is these specific issues of the process that are the core of this present analysis.

Regulatory agencies determine issues such as the prices for various services based on evidence given in an adversary procedure. A number of authors have attempted to determine the nature of this adversary procedure - the regulatory game. Some authors conceive of the regulatory process as

essentially a bargaining process - the agency compromises among the various conflicting views. Joskow (1974, 1977) has argued that the regulatory process goes through two phases - equilibrium, and disequilibrium or the search for a new equilibrium. The goal of the regulatory agency in Joskow's view, is to minimize conflict. Over time, the agency develops rules and procedures which are known by and acceptable to all. New issues however generate conflict and the agency attempts to reestablish equilibrium by finding new rules that will smooth out these conflicts.

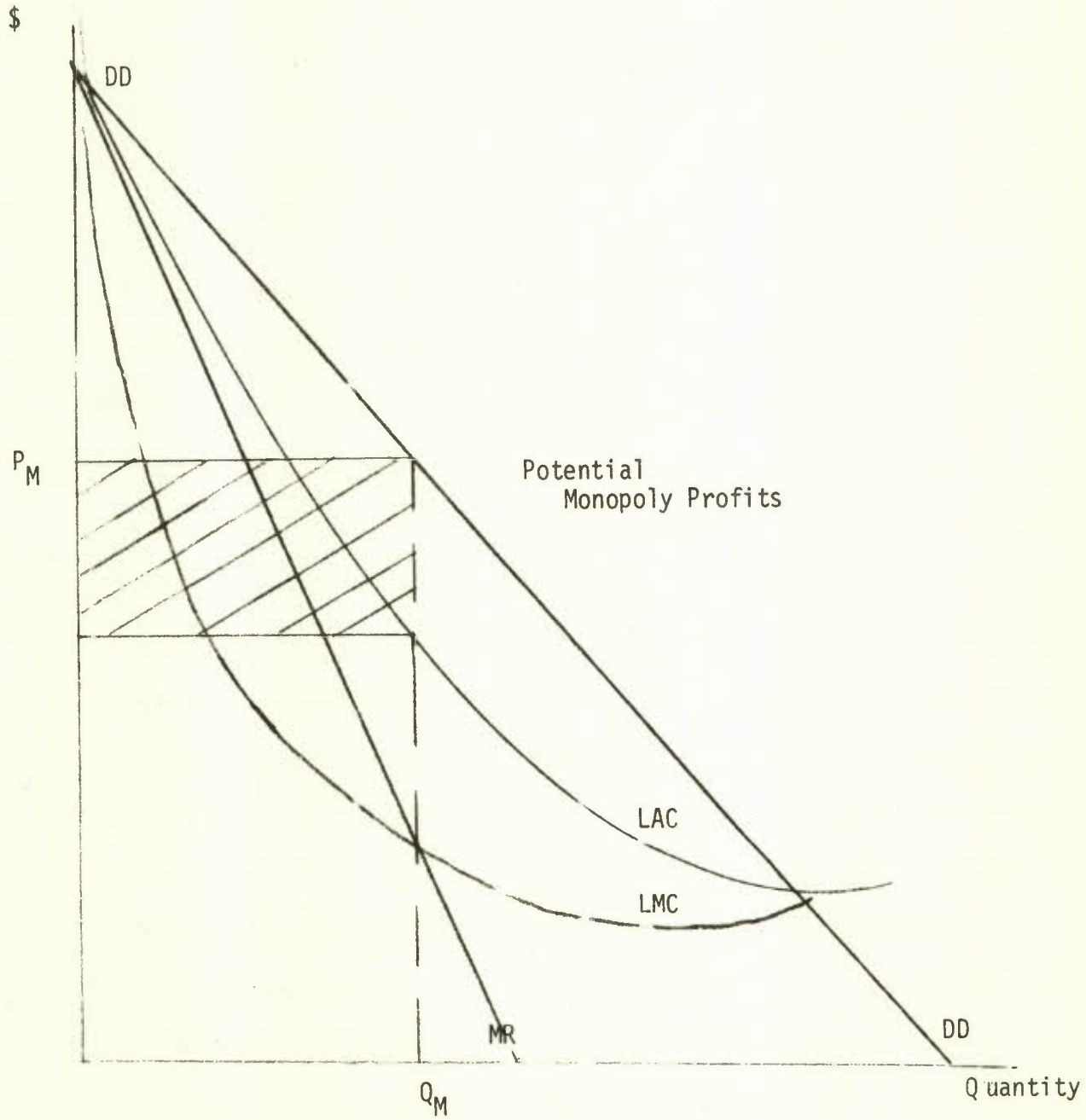
Owen and Braeutigam (1978) have written a most interesting book stressing that the administrative process is the reason for regulation - "... the procedure is the outcome".[28] There are two features of administrative law which are crucial - the delay that any party can make in the process and the grant to groups of equity rights in the status quo. Administrative law acts then to slow down the process of change. This according to Owen and Braeutigam is the main purpose of regulation - to remove certain sectors from the operations of the unfettered market, to thus minimize the uncertainty of market forces. Market forces threaten those who are not able to instantly adapt. Administrative processes are slow and ponderous - hearing, appeals, delays. Regulation therefore operates to protect the interests of groups in the status quo. Regulation makes it difficult for innovation or other risky activities to harm the interests of specific groups. It is the slowness and the openness of administrative decision making which is the raison d'ętre of subjecting private enterprise to regulation. Owen and Braeutigam then basically view regulation as a response similar in nature to nationalization - the use of public deliberation rather than market force determination.

The market failure or public interest theories as applied to telecommunications would argue that regulation was imposed by society (its representatives - the politicians) to end destructive competition and to recognize the natural monopoly characteristics of telecommunications.[29] IF telecommunications production is characterized by natural monopoly characteristics, as depicted in Figure 1, then competition in the short-run is wasteful and in the long-run only one firm would survive with the ability to earn monopoly profits. If industry demand (DD) is small compared to the economies of single firm production (downward falling costs curves in Figure 1), then regulation by forcing output above the monopoly level (Q_M) could increase social welfare. In this paper, I do not intend to argue the existence or absence of natural monopoly characteristics of telecommunications. Of interest here are the implications of the objectives of regulation for the process. If regulation is designed to end the kinds of market failure that telecommunications would exhibit in a free enterprise world as depicted in Figure 1, then the process is essentially one of fact-finding - to determine the shape and slope of demand and cost curves. Regulation designed to end market failures is then not policy making.

Were regulation solely aimed to end market failures, the delegation of authority over telephone rates from the government to a statutory regulation agency (SRA) is quite sensible. Politicians are not technocratic decision-makers with either the ability or the time for a detailed analysis of demand and cost curves for some specific sector such as telecommunications. It is better to set up an agency designed to determine the facts (of demand and cost) and thus set rates in the

Figure 1

Natural Monopoly



'public interest'. Being essentially a fact-finding and not an adversary process, telecommunications regulation under this hypothesis of market failure objectives can be essentially apolitical and nonparticipatory. Decisions would not involve the weighting of conflicting objectives, as a result, regulators would not be demi-politicians or policy-makers. Once the facts were known, it would not be in the interests of any group to participate in the regulatory process. Participation is expensive and can only be worthwhile if potential benefits exceed participation costs. If regulation is a fact-finding exercise, there can be no private benefits to a specific interest group's participation in the regulatory process since participation cannot affect the facts of demand and costs.

As a result, if telecommunications regulation was essentially fact-finding, we would not expect interest groups to appear at rate hearings, since their appearances do not serve any end - private or public. If we were convinced that telecommunications regulation simply involved technocratic decision-making, then we would consider interest group participation in the regulatory process to represent an attempt by private groups to massage the facts so that the private benefits would exceed the participation costs.

In this technocratic vision, rules of natural justice, rules of fairness, rules of evidence, all the precepts of administrative law need not apply except so far as to ensure that the facts spoke for themselves. Lawyers need not even be present, since the evidence would be essentially accounting, finance and economics. The regulatory board would have sufficient staff to examine demand and costs and audit the firm to ensure that truth was served.

The appointment procedures for regulators would ensure many years of service since much detailed knowledge of the industry was necessary. Appointments could be made by joint parliamentary committees, since the regulator was apolitical and could not dispense favours to any specific constituency. The regulatory board could also be responsible to a joint parliamentary committee instead of a cabinet minister or the Governor-in-Council, again since the decisions of the Board were neither political - nor redistributive - all good people hearing the facts could only come to one decision.

Legislative policy directives would have limited use, and appeals to cabinet would be inimical were market failure the motive of regulation. Policy directives would have some value were the facts presented in any single case a subset of some larger evidence that policy-makers alone were aware of. For example, setting rates based on the facts might ignore the externalities of telephone service. The policy-maker could then direct that universality of telephone service was a goal of society and that the deficit in providing local service to the poor would be made up by a tax on all toll service. Cabinet appeals would be unnecessary and counter-productive in this world of regulation for market failure. Once rates were set on the basis of demand and costs, how could a policy-maker change rates without changing the essence of regulation from one of correcting market failure to one of income redistribution?

This discussion of the 'correct' regulatory process when market failure is the sole motivation for regulation has been rather extreme and very much involved setting up a 'straw man'. For two main reasons, actual regulatory processes in the telecommunications sector are not at all like

the process just described. First, regulation is not simply fact-finding. Regulators approve the structure of rates using broad social values such as universality and rules of thumb such as the value of service. As we will see, cross subsidies appear to be an important ingredient in telecommunications regulation. It is then important for groups to argue that they deserve the subsidy (price below marginal cost) rather than the tax (price above marginal cost). Secondly, the 'facts' are not as transparent as the previous discussion of the regulatory process allowed. Much of the regulatory game involves defensive posturing by the regulated in hiding essential information or arguing that information is privileged because of potential competitive harm which would be incurred were that information generally available.[30] If we assume that regulation exists for the purpose of closing market failures and also assume imperfect rather than perfect information about demand and costs, then the regulatory process is drastically changed. With imperfect or shielded information, private groups (including the regulated) can subvert technocratic regulation into regulation which is self-benefiting.

We turn to a discussion of the nature of the regulatory process when the primary purpose of regulation is income distribution rather than the erasing of market failures.

Much has been written about the nature of the political process, its particular market failures and the consequent supply of regulation by politicians.[31] We have already touched on this point in discussing Bernstein (1958) and Joskow (1974). Why do most political parties, for example, favour milk marketing boards, agencies which redistribute income from the many (milk consumers) to the few (milk producers)? I, as a consumer but not a producer of milk, would always vote against milk marketing boards, but I cannot vote on marketing boards alone, I must vote on all the issues brought up in an election campaign. I examine party X's

platform which consists of 100 items, 99 of which I approve and one, a milk marketing board which makes me worse off by $10.00 per year. The most I would spend, per year, to gather information on the costs of a milk marketing board or to combat the establishment of this agency would be $9.99. Spending any more, per year, would be unwise since these transaction costs would exceed the costs to me of just paying higher milk prices. I would change my vote to another party (Y) that was against the milk marketing board as long as the annual expected value to me of the entire platform of party Y was no less than $9.99 below the expected value to me of party X's platform. If not, I would then, de facto, vote for the milk marketing board, as would all other consumers like me.

If the formation of a lobbying organization - the Anti-Milk Marketing Board (AMMB) was attempted (say, by an entrepreneur), I would be expected to donate $10.00 to the AMMB, that being the marginal harm I would suffer under the Board. Yet, if I am but one of many milk consumers, I will not volunteer a donation. I would always assume that the AMMB will be formed if others join and I do not, since surely formation of the AMMB must be independent of any single decision to volunteer $10.00. If the organization forms then I gain without volunteering a $10.00 donation since I cannot be excluded from the benefits (lower milk prices). The AMMB cannot exclude those who do not donate to its establishment from purchasing milk at the lower price of milk resulting from disbandment of the Milk Marketing Board. I am clearly better off, therefore in any case, by not donating $10.00 to the AMMB. My optimal strategy is then to become a 'free rider'. Hence the 'free rider' problem (gains without benefits) plus the transactions costs (costs to the entrepreneur) necessary to establish the AMMB will prevent its successful formation. Because of these two market failures,

(free riders, transactions costs) regulation, the power of the state to coerce economic action, can benefit the few (in this example, milk producers) at the expense of the many (milk consumers).

If politicians wish to redistribute income, there are reasons for and against the use of regulation as the instrument.[32] Regulation as an instrument has many benefits to the politician who wishes to distribute income towards some group without casting a public light on the process or the amount. A subsidy of $10,000,000 paid directly to Ontario milk producers would generate much publicity, annual legislative debates and necessitate the raising of an additional $10,000,000 in tax revenue to pay for the subsidy. In addition, each resident would act to become a milk producer in order to gain a share of the rent; cows would appear on the streets of North York. Establishing a self-regulating agency with powers to set price and quotas which have as their effect a transfer of $10,000,000 to existing milk producers is clearly a superior instrument, for the politicians and the milk producers. Because of the quotas, rents are not dissipated on would-be milk producers. The subsidy is levied annually without need of legislative approval. Moreover, no tax revenue has to be raised since the tax is internal to the industry, as a result the government deficit does not increase even though largesse has been distributed to some specific group through the use of government power. It is simple to show that these internal subsidies are inefficient, i.e., raising taxes by changing the equality of price and marginal cost results in inefficiencies (deadweight losses) in consumption[33].

Let us hypothesize that politicians wish to subsidize some particularly important group - rural voters - in order to swing rural votes to their party; a vote in a rural riding being more important than a vote in an

urban riding. To persuade, via a subsidy of telephone rates, a sufficient number of people to vote for a specific party's platform to win a seat will entail far fewer voters in compartively rural ridings than in urban ridings, therefore the amount of the subsidy is small when rural voters are subsidized. If politicians were pure self-interest maximizers whose desire was to be elected, we would then see subsidies in those ridings that were relatively easy to swing. If a government department regulated telecommunications rates directly, we would then not be surprised to see rural telephone users subsidized. Telephone rates are set, however, in Nova Scotia and Ontario, by regulatory agencies. Politicians wishing to favour rural telephone customers are however at a disadvantage by delegating regulatory power to an SRA. Yielding regulatory power to a self-appointed group will achieve the desired objective of transferring income to that group (milk farmers).

Delegating an SRA to accomplish the income distribution that politicians desire leads to a very treacherous path. Once the regulatory agency has been established, why should it decide to redistribute income as the politician wants? Unless the legislation specifies the exact subsidy to specific groups (it would then be liable to the same political problems as a direct subsidy), the regulatory agency may not know who it is supposed to benefit. In addition, having established administrative rules of evidence and being bound to make a decision based on the evidence, the SRA may be unable to distribute income in the manner in which the politicians want. There is then a dilemma facing politicians - the use of regulatory agencies to distribute income has a large number of benefits as compared to a process of direct subsidies, yet when establishing an SRA, the indirect subsidies may go to the wrong groups. Politicians would then be careful in structuring the SRA to ensure that political influence would be paramount. One method

of maintaining political presence at agency deliberations is to ensure that the incentive structure facing the regulator incorporates politician's values. Political control could thus be maintained through the appointment procedure, the terms of office, the nature of the appeal mechanism and the use of policy directives or moral suasion.

If the purpose of regulation is income distribution, then the desired process is very different from the required process when regulation is purely 'fact-finding'. Politicians would want a process designed to subsidize the group who will buy them power. As a result, political pressure on the process would be maximized. Regulators would be chosen on the basis of their political instincts, or as Trebilcock has put it there is a "tendency to retread retired political warriors and revered party bagmen by appointing them to positions on agencies...".[34] Appeals to Cabinet or policy directives would be an essential ingredient of the regulatory process to ensure that the regulators did not 'foreget' their mandate. The budget of the SRA would be under close control to prevent independent development. Some private interest group involvement before the regulatory tribunal would be necessary in order to determine what benefits that group wanted. This regulatory process, in its brief description is far different from the process described as necessary for a pure technocratic problem-solving mandate.

Instead of this quite cynical view of regulator regimes, we could accept the broader view of regulation as being policy development because the politicians are unable or unwilling to engage in explicit rule-making. Again, political pressures and feedback would be necessary (as contrasted to the case where the SRA indulges in pure fact-finding exercises) in order for the politicians to articulate the final policy themselves. Regulators would still be chosen because of their political instincts and the process

would have a number of means for politicians to interact with regulators, including the use of an appeal mechanism to the political masters and/or policy directives. However, the process would be far more open than in the case where politicians have, a priori, decided to subsidize some particular group via an SRA. In Joskow's (1974) terminology, the SRA would be engaged in developing compromises among competing groups. After all, that is the nature of policy formation - elaborating a problem and determining the view of various groups as to the problem's solution. The problem could be the correct set of socially acceptable prices for telephone services, with the SRA as the broker among the competing demands. One can imagine Parliament or Cabinet being able to articulate policies for foreign dealings, taxation, regional development, etc. How is Parliament, however, able to articulate a view as to whether competition or monopoly is the better market structure for telecommunications or deal with explicit rate structures? The answer would involve determination of many economic and econometric issues, issues perhaps beyond the capacity of Parliament (Cabinet) to examine in detail. Telecommunications is an important sector in the economy, but only one of many industries. Parliament could use an SRA to determine the facts of an issue specific to an industry such as social costs under alternative industrial structures and have the SRA articulate appropriate public policy. For policy development/pressure group amelioration, the desirable regulatory process would include a number of checks and balances for politicians themselves, quite correctly, to accept or reject those policies. One would imagine that politicians would find it desirable for all interested parties to intervene. From the public standpoint, it may be better to have policies at least initially, articulated in a regulatory process. As Owen and Braeutigam suggest, those processes are open and fair, especially when contrasted to the political process.

Governments do determine complex policies for many areas without the use of SRA's. Policy articulation is aided by a professional staff housed within a government department.

Many authors have dismissed regulation as in essence, a process too easily captured by a well-organized interest group. We can develop an example to show that regulatory processes also are susceptible to 'market failure', a market failure analogous to the failure we examined in the political arena to support a group aimed at improving the welfare of many people, each by a small amount (the difficulty in forming the AMMB). It is expensive to intervene at a Bell Canada rate hearing, for example, if some organization, the Citizens Against Increases in Residential Telephone Rates (CAIRTR), asked for donations to fight a proposed $10.00 increase in the annual rates for residential telephone service, any single individual because of the 'free rider' problem would decline. As a result, the group would not form. The two market failures - free rider and transactions costs - mean that large unorganized groups would be under-represented at regulatory hearings. IF, this lack of representation diminishes the efficiency of the regulatory process, then representation must be encouraged. This representation is necessary however, if and only if, regulation is essentially policy development. If, regulation is fact-finding, interest group appearances are unimportant (unless there are facts not openly brought out in the regulatory process). If, regulation is for the purposes of distributing income to preordained specific groups, in order to maintain politicians in office, appearances by other politically unfavoured interest groups at regulatory hearings are useless since they cannot affect the outcome.

Therefore, to examine the nature of the regulatory process and to design a process which has the 'correct' degree of accountability, inde-

pendence and political involvement requires a detailed examination of the actual processes of telecommunications regulations in Canada.

1.3 Regulation by SRA or Government Department

One can imagine regulation occurring through one of two alternative procedures - the process involving an SRA and regulation by a government department.

Let us consider the development of explicit policy within a government department for an area such as telecommunications rate setting. The government department would utilize internal staff (perhaps have consultants) and come to a decision with input or at least approval by the Minister. No hearings would take place; no formal notice of proceedings would be given. This is not to suggest that public participation would not take place. Interest groups would lobby to have their position accepted. Where rate setting, however, is purely for efficiency purposes, one can imagine a government department determining the correct facts and setting economically efficient rates. As we have suggested, when regulation exists solely to end market failure, there is no need for a fair judicial process. Using a government department to set rates in such a case is palusible since an open process could not ensure 'better' or 'fairer' rates. We can conclude, therefore, that regulation for ending market failures could just as well be undertaken in camera by government departments as in an open process before an SRA. What, however, if telecommunications rate setting is not primarily designed to correct market failures but to redistribure income? Utilizing a government department for this purpose instead of an SRA generates both benefits and costs for society. First, the expense of an SRA, the bureaucarcy, the hearings are foregone. Second, the political pressures impinging on an SRA and its delegated decision makers are instead addressed at politicians. Third, the process is secret rather than open. Fourth, the potential gains

and losses for private pressure groups change as the decision making focus shifts from the regulatory arena to the political arena. In particular, the potential for tied-in pressure exist at the political level but not at the regulatory level.

By tied-in pressure we mean the ability of an interest group to tie its desired outcome in the telecommunications sector to promises the group offers in other sectors. Such a tie-in is not possible in the regulatory game, since the telecommunications SRA is not interested in the unemployment rate in the province, potential votes for the political party or other favours; politicians, however, are interested in these areas. The tie-in pressure is possible in the political arena when it is unlikely that the interest group has exerted all its monopsonistic political power.

Tied-in sales are deemed possible for firms with monopoly power when that firm has not fully exercized that power or where the tied-in sale allows price discrimination which could not otherwise occur. In both these cases (unexerted power, price discrimination), the tied in sale increases the firm's monopoly profits. As an analogy, for tied in pressure to be profitable, it is necessary for an interest group to have some degree of monopsonistic power, and for the interest group to have either not fully exerted that power or to be able to engage in pressure discrimination (as defined below). The interest group is interested in maximizing its profits from the monopsonistic power it has. The group can hope to fully utilize its political power in one area in order to receive all its benefits there, but this may be impossible for a number of reasons. First, it may be too obvious for the group to receive all its political spoils in one area. Second, the group may be diverse enough to not be able to agree on one specific area for gain receiving. Third, the group may, by tieing-in its

pressure, (pressure discrimination) be able to exact more spoils than by simply setting a monoposonistic price in one market. Pressure discrimination would be possible for an interest group with monoposonistic political power if the elasticity of supply response by politicians differs among sectors. Such differing responses are possible and the interest group may then be able to increase its gains by tie-in pressure.

One cannot, therefore, be indifferent as between interest group pressure in regulatory proceedings and in the political arena. Taking telecommunications as our specific example, an interest group is not able to promise votes or higher employment depending on the outcome in a hearing before the CRTC while it can make such promises to cabinet. One would therefore expect less political pressure (because of the inability to tie-in) for a decision made at a regulatory hearing as compared to the decision making process within a government department. Whatever the purposes of telecommunications regulation, we could all agree that tie-in pressure which tends to increase political spoils of some interest group is not in society's interest (just as monopoly profits in goods manufacture is not in society's interest). As a result, other things being equal, one would favour regulation by an SRA rather than by a government department. Other things are not equal, however.

Stigler has suggested that some industries may not favour regulation because the regulatory process gives smaller firms a greater voice than they would have under competitive conditions and that regulation also allows outsiders into the industry's decision making process. Examining the pros and cons of regulation by an SRA as compared to a government department also shows changes in the distribution of power, as we have suggested above. Regulation via a government department would tend to be less responsive to the smaller firms or outsiders than an open regulatory process, <u>ignoring</u> the issue of tie-in pressure. In a proceeding before the SRA, all who present

absence of any fairness criteria at the departmental level may negate most participation to an ancillary role. The use of a government department to regulate as compared to using an SRA generates different costs and benefits for individual interest groups and for society as a whole. The costs of the process are far lower when it occurs at a departmental level; these costs are the direct monetary costs plus the costs of delay. For society, the benefits of using an SRA to articulate policy are openess, fairness and the avoidance of undue political pressure or as we have called it - pressure discrimination. Most government policy is made within departments, the outcomes are favourable or governments get defeated. As many have pointed out, the political process does not necessarily lead to efficient outcomes because of its inherent market failures. As a result, one cannot take the evidence that most policy is set by departments not SRA's as proving the superiority of a departmental instrument in every case. In particular, where an issue such as the setting of absolute and relative telephone rates to be done within a government department, it is possible for the outcome to be inefficient and inequitable; in our view more inefficient and unequitable than if those rates were instead set by an SRA.

Footnotes to Chapter One

1. Brown-John (1976), p. 154.
2. Exceptions are Joskow (1974).
3. For example see Baumol and Klevorick (1970), Bailey (1973).
4. Joskow (1974) explicitly examines
5. Averch-Johnson (1962).
6. M. Trebilcock (1975).
7. For example see Trebilcock et al (1978), Posner (1971).
8. The costs and benefits of political appeals are discussed in later chapters.
9. R. Kerr, The Board of Transport Commissioners for Canada, Queen's Printer, Ottawa 1958.
10. Law Reform Commission (1980), Chapter 6.
11. This disaggregation of law and policy into setting, elaboration and application is after the Law Reform Commission (1980), Chapter 2.
12. In later chapters, the question of the appropriability of agency policy setting is discussed.
13. K. Davis (1971) p.49.
14. See Hartle.
15. Friendly (1960), "A Look at the Federal Administrations Agencies", 60 Columbia Law Review, p. 440.
16. Jaffe (1973), p.1188.
17. As quoted in Jaffe (1973), p.1185.
18. Royal Commission of Inquiry into Civil Rights (McRuer Commission). (Report, Vols. 1 and 2, Toronto: Queen's Printer (Ont.), 1968 and 1969).

19. Doern et al (1975), p.197, Report Nos. 1 and 2, Toronto, Queens Printer, Ontario 1968, 1969.
20. Law Reform Commission (1980), Chapter 3.
21. The Law Reform Commission feels that those who make the rules should not sit in judgement on specific applications.
22. Doern et al (1975), p.210.
23. Sabatier (1977) p.423-424.
24. Doern et al (1975), p.197.
25. See Stigler (1971), Posner (1974), Peltzman (1976) and Trebilcock et al (1978)
26. Stigler (1971), "A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit". p.3.
27. Posner (1971) argues that regulation is a form of taxation, interal taxes being levied to provide serives to some customers at below cost.
28. Owen and Breautigam (1978), p.20.
29. See Kahn (1971) Volume II, Chapter 4.
30. Owen and Breautigam (1978) discuss the strategic use of information in Chapter 1 and 2.
31. See Stigler (1971), Trebilcock et al (1978), Hartle (1979).
32. Hartle (1979).
33. For a proof see Waverman (1975).
34. Trebilcock (1978), p.636.

evidence must be dealt with (if the SRA gives reasons for decision), it is then difficult to ignore any position. Regulation by a government department, on the other hand, where no reasons need be given can ignore issues and voices. One can then conclude that the larger firms in an industry would favour regulation by a government department over regulation by an SRA while the smaller firms would prefer regulation by an SRA.

This discussion has assumed to this point that the same participants appear both at a hearing before an SRA and lobby the government. Such an assumption is not necessarily valid. First, the costs of participation at a regulatory hearing can be far higher than the costs of lobbying government. An individual can oppose a Bell Canada rate application before the CRTC in two ways — by fully attending and participating in the hearing or by filing a written intervention. It is likely that those who fully intervene in regulatory hearings — cross examine, present evidence and argument — have more influence on the decision than those who only file letters. The cost of a full intervention are high and lead, as a result, as we have suggested, to a market failure — the absence of unorganized groups at regulatory hearings. Such a market failure, however, also characterizes the operations of the political market. Hypothesize a group that attempts to form to lobby the Department of Communications (D.O.C.) to reduce telephone rates. Assume that the costs of lobbying the D.O.C. are far lower (one tenth) than the costs of participating in a hearing at the CRTC. Therefore, if the necessary per capita donation was $10. to fund the group to appear at regulatory hearings, it would only be $1. per capita for the costs of lobbying the D.O.C. Whether the required per capita donation is $1. or $10., the "free rider" principle in both cases suggests that voluntary donations will <u>not be made</u>. In addition, the organizational costs, the costs of canvassing are the same irregardless of whether the anticipated donation is $1.00 or $10. We can therefore conclude

that large unorganized groups will not coalesce for the purposes of fighting rate increases at the SRA or departmental levels. One additional factor must be discussed, the ability or desire of pre-existing organizations to appear before an SRA or to lobby a government department. The high participation costs of a regulatory proceeding and the inability to tie-in an intervention with other efforts would likely prevent all organizations except those with a direct stake in the outcome from appearing before an SRA. However, the lower costs of lobbying a department and the ability to tie-in pressure means that such organized groups could appear before a department. Whether they would appear or not depends on whether a group had a cohesive opinion on telephone rates.

The lower costs of participation at the department as compared to SRA forum does initially suggest that more participation will occur at the departmental regulatory arena than at an SRA. As we have suggested above, pre-existing groups would participate more at the departmental forum. For participation by individuals, two diverse pressures exist. On the one hand, the lower participation costs could cause individuals to participate more at the departmental level, especially through having their M.P. intervene. On the other hand, the formal proceedings and requests for intervention by SRA's would tend to encourage participation. An individual might not know who to contact or be unaware of the issues were regulation to take place within a government department.

To summarize, one could expect some greater degree of participation at regulatory functions solely residing within a departmental structure than at SRA proceedings. However, this greater degree of participation also involves different group pressures. In particular, it might involve the tie-in pressure of some group with unexerted monopsonistic power. Such participation is not generally in the public interest. Moreover, the

CHAPTER TWO

REGULATORY SUPERVISION, AN OVERVIEW

2.0 Federal Jurisdiction and Bell Canada

Bell Canada was incorporated by a special statute of the parliament of Canada passed in 1880 and amended several times since. The 1880 statute declared that the company was to be allowed to operate a telephone business between two or more points anywhere in Canada. In 1882, the following provision was added to the Charter of Incorporation:

> "..... the said company shall have power subject to existing rights to extend its telephone lines from anyone to any other of the several provinces of the Dominion of Canada from any point in Canada to any point in the United States of America."
>
> (S.C. 1882, c. 95, s.3)

Another phrase added in 1882 stated;

> "The said active incorporation is hereby amended and the works thereunder authorized, are hereby declared to be for the general advantage of Canada."
>
> (S.C. 1882, c. 95, s.4)

Lederman suggests that the purpose of these amendments was to clearly put the operations of Bell Canada within the jurisdiction of the Federal Government.[1] He is, however, of the opinion that the British North America Act and the powers given to Bell Canada in the statutory declaration of 1880 demonstrate that Bell was and is subject to federal jurisdiction.[2]

In the early 1900's, the city of Toronto attempted to regulate Bell Canada on the basis that the local calls in Toronto were entirely within Ontario.[3] Bell Canada was operating a local business in the Toronto exchange area as well as carrying toll messages to points outside Toronto and points outside the province of Ontario. The city's case rested on two

points: first, that the local aspect of Toronto exchange rates had always been under provincial jurisdiction; second, that in 1880 there had been no inter-provincial telephone lines actually constructed by the company, and therefore the federal charter was meaningless since the company was not a connecting work. Both the Ontario Court of Appeal and the Judicial Committee of the Privy Council rejected these arguments, on the basis that only a federal charter could have effectively allowed connecting works as stated in the 1880 incorporation. The Privy Council refused to separate the local and toll business, stating that Bell Canada was a single undertaking and that the charter of the company had considered "one single undertaking". The Privy Council went on to say that organizational unity and the operating reality of the telephone business meant that one could not divide local from toll service since the customer was using the same phone and the same drop lines for both types of service.

In 1903 the Railway Act was passed, giving jurisdiction over rail traffic and tolls to a new administrative agency, the Board of Railway Commissioners for Canada[4]. Before 1903, regulation of railroads, principally rate-making, was in the hands of the Railway Committee of the Privy Council. The Railway Committee (first established in 1851 under legislation of the the Province of Canada) was not independent of the federal Government. However, the Board of Railway Commissioners for Canada was independent of the Cabinet. Political and judicial control over the Board was maintained after 1903 by permitting appeals to the courts on questions of law or jurisdiction while the Governor-in-Council could disallow or change any Board order, decision or rule. In 1906, this Board of Railway Commissioners for Canada was given regulatory jurisdiction over Ball Canada.[5] In 1938, the Board was given wider jurisdiction over transportation and its

name was changed to the Board of Transport Commissioners for Canada.[6] Jurisdiction over telephone and telegraph still remained under the Railway Act. No great changes in the method of regulation of transport or telephone and telegraph occurred until 1967. Following the recommendations of the MacPherson Commission, in 1967 the Canadian Transport Commission was formed to administer the National Transportation Act.[7] The Commission also took over jurisdiction of the Railway Act leading to regulatory jurisdiction over Bell Canada. That jurisdiction was exercised initially by the Railway Transport Committee and later by the Telecommunications Committee (established in 1972) of the Canadian Transport Commission. Nine years later the jurisdiction over telephone and telegraph passed from the Canadian Transport Commission to the Canadian Radio-television and Telecommunications Commission (CRTC).[8] This change resulted from two papers: the 1973 Federal document entitled, Proposals for a Communications Policy for Canada ("Green Paper") and a 1975 Federal document, Communications: Some Federal Proposals ("Grey Paper"). The predecessor CRTC had been given jurisdiction over broadcasting in 1970.[9] The principal regulatory powers of the CRTC over telecommunications generally still lie in the Railway Act, principally Sections 320 and 321 (380 and 381 prior to 1967). Supplementary regulatory powers for complaints[10]; for procedures for the holding of hearings,[11] and to issue orders and make regulations[12] are contained in the National Transportation Act.

In the last 13 years federal jurisdiction over Bell Canada has been enhanced by changes in both the regulatory powers contained in the Railway Act and by changes in the powers of incorporation of Bell Canada.[13] Prior to 1967, Section 380 (2) of the Railway Act said as follows -

> "notwithstanding anything in any Act passed before the seventh of July, 1919, all telegraph and telephone tolls to be charged by the company, and all charges for leasing or using the telegraph or

telephones of the company are subject to the approval of the Board, and may be revised by the Board from time to time; this subsection does not apply to the use of telegraph or telephone wires where no toll is charged to the public."

In the 1967 revision of the Railway Act, Section 381 was inserted in its entirety.

381. (1) All tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

(2) A company shall not in respect of tolls

(a) make any unjust discrimination against any person or company;

(b) make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic, in any respect whatever; or

(c) subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatever;

and where it is shown that the company makes any discrimination or gives any preference or advantage, the burden of proving that the discrimination is not unjust or that the preference is not undue or unreasonable lies upon the company.

(3) The Commission may determine, as questions of fact, whether or not traffic is or has been carried under substantially similar circumstances and conditions, and whether there has, in any case, been unjust discrimination, or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the company has or has not complied with the provisions of this section or section 380.

(4) The Commission may

(a) suspend or postpone any tariff of tolls or any portion thereof that in its opinion may be contrary to section 380 or this section; and

(b) disallow any tariff of tolls or any portion thereof that it considers to be contrary to section 380 or this section and require the company to substitute a tariff satisfactory to the Commission in lieu thereof or prescribe other tolls in lieu of any tolls so disallowed.

> (5) In all other matters not expressly provided for in this section the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.
>
> (6) In this section and section 381A, the expressions "company", "Special Act", "toll" and "traffic" have the meanings assigned to them by section 380.

The effect of the addition of this subsection in 1967 was to give to the Commission for the first time a general authority respecting traffic rather than simply tariffs.

In 1970, Section 381 (2) which had previously stated that "A company shall not in respect of tolls ... make any unjust discrimination ... " was amended to read in Section 321 (2), that "A company shall not, in respect of tolls or any services or facilities provided by the company as a telegraph or telephone company ... make any unjust discriminations."

In addition in 1970, the exemption of regulatory oversight over private line and other leased (competitive) services was removed.[14]

Amendments in 1968 to the Bell Canada's Charter of Incorporation permitted foreign attachments subject to reasonable requirements as determined by the company and as arbitrated by the Commission. Bell Canada's basic powers are given in Section 5 of its Charter of Incorporation as follows:

> "5.(1) It is hereby declared as subject to the provisions of the Radio Act and of the Broadcasting Act and of any statutes of Canada relating to telecommunications or broadcasting, and to regulations or orders made thereunder, the company has the power to transmit ... and in connection therewith to build, establish, maintain, and operate in Canada or elsewhere, alone or in conjunction with others, either on its own behalf or as agents for others, all services and facilities expedient or useful for such purposes, using and adapting any improvement or invention or any other means of communicating.
>
> (3) The company shall, in the exercise of its power (under subsection 1), act solely as a common carrier and shall neither control the contents nor influence the meaning or purpose of the message emitted, transmitted or received as aforesaid.)"

2.1 Objectives of Regulation

The objectives of telecommunications regulation as contained in the Railway Act as revised in 1967 and 1970 are principally to prevent 'unjust discrimination' by the carriers against customers or competitors[15]. There is no provision in the Railway Act requiring economic efficiency, the provision of service at the lowest cost or an objective of 'ending market failures'. The objectives are then vague allowing great latitude to the SRA to determine policy within the broad confines of 'just and reasonable' rates.

The Liberal government introduced a new Act respecting telecommunications regulation, Bill C-24 in 1977.[16] Bill C-24 died on the order paper in Janury 1979. There were also bills in 1974-76 and 1978-79 rewriting telecommunications legislation that were not enacted. Bill C-24 is significantly different from the Railway Act in a number of provisions; principally the objectives of regulation and the method of government control over the agency.

Section 3 of Bill C-24 stated

"It is hereby declared that

(a) efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunication services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; ...

(c) all Canadians are entitled, subject to technological and economic limitations, to reliable telecommunication services making the best use of all available modes, resources and facilities, taking into account regional and provincial needs and priorities;

(d) telecommunication links within and among all parts of Canada should be strengthened, and Canadian facilities should be used to the greatest extent feasible for the carriage of telecommunications within Canada and between Canada and other countries; ...

(o) the rates charged by telecommunication carriers for telecommunication facilities and services should be just and reasonable and should not unduly discriminate against any person or group;

(p) innovation and research in all aspects of telecommunication should be promoted in order to improve Canadian telecommunication systems and to strengthen the Canadian industries engaged in the production of broadcast programming and the manufacture of telecommunication sytems and equipment; and

(q) the regulation of all aspects of telecommunication in Canada should be flexible and readily adaptable to cultural, social and economic change and to scientific and technological advances, and should ensure a proper balance between the interests of the public at large and the legitimate revenue requirements of the telecommunication industry.

and that the telecommunication policy for Canada enunciated in this section can best be achieved by providing for the regulation of the Canadian broadcasting system and of telecommunication undertakings over which the Parliament of Canada has legislative authority by a single independent public body."

Note, that while rates are to be 'just and reasonable' (as in the Railway Act), telecommunications are to be efficient (a), safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada (a), reliable (c). Regulation is to be 'flexible and readily adaptable' (q) and innovation is to be promoted to strengthen Canadian industries manufacturing telecommunications products (p).

While the objectives of telecommunications regulation in Bill C-24 appear on the surface to be more clearly described than in the Railway Act, these objectives are largely contradictory. The CRTC is told to ensure efficiency yet to safeguard cultural and other goals; regional interests are to be considered as well as the maintenance and expansion of Canadian-made telecommunications equipment. Examples could be devised to show how efficiency might require U.S.-produced equipment or that the safeguarding of the cul-

tural fabric requires the minimization of regional diversity. These objectives would put more constraints on the behaviour of the CRTC, but they do indicate that Government policy (at least Liberal government policy) in telecommunications is both multi-objective and not completely articulated.

2.2 External Environment

(a) Appointment Procedures and Tenure

Prior to 1919, members of the Board of Railway Commissioners of Canada could be removed by the Cabinet "for cause"[17]. In 1919 the Act was amended such that Commissioners held office during good behaviour, a tenure scheme similar to that of Supreme Court of Canada and Exchequer Court Judges[18]. In 1938, when the Board of Railway Commissioners became the Board of Transport Commissioners (BTC), the 6 members of the BTC were appointed by the Federal Cabinet[19] and held office during good behaviour for a term of 10 years[20] or until they reached the age of 75 years[21]. The members could be removed however at any time by the Cabinet "upon address of the Senate and House of Commons"[22]. Upon expiration of their term of office they were eligible for reappointment if not disqualified because of age[23]. In 1951, eligibility for appointment was qualified by the phrases "for a period not exceeding 10 years"[24] which may have meant that a person could only serve 2 consecutive terms or which may only have meant that the ten year term was applicable on appointment or reappointment.

In 1967 when the Canadian Transport Commission (CTC) replaced the BTC, a maximum of 17 members could have been appointed by the Cabinet[25] to hold office "during good behaviour" for their appointment terms which could not exceed 10 years[26] or until they reached the age of 70 years[27]. CTC mem-

bers could have been removed "for cause" at any time by the Cabinet[28]. They could have been reappointed for subsequent terms which again could not exceed 10 years, until they were disqualified by age.[29]

Presently, the CRTC has both full time and part time members. The full time members form the Executive Committee which has the responsibility for the regulation of telecommunications[30]. These full time members hold office "during good behaviour" for their appointed terms which may not exceed 7 years (or 5 years in the case of part time members) or until they reach the age of 70 years[31]. Any CRTC member may be removed at any time by the Cabinet "for cause"[32]. Also a member "is not eligible ... to continue as a member" upon engaging in a "telecommunications undertaking, upon obtaining, other by will or succession, an interest in such an undertaking or in the manufacture or distribution of telecommunications apparatus" or upon ceasing to be a Canadian citizen ordinarily resident in Canada[33]. Members may be reappointed unless disqualified.

(b) Rules for the Financial Independence of Regulators from the Regulated Utilities

No member or officer of the BTC could directly or indirectly hold or acquire any share or security of any company subject to the Railway Act (such as a telephone company), or any interest in any device, appliance, machine or patent that could be used as part of the equipment of railways, rolling stock or any other work or undertaking subject to the Railway Act[34] (such as a telecommunications undertaking). A member or officer was given three months to dispose of any such interest that might be acquired by will or succession[35].

Whenever a member was interested in a matter before the BTC or was "of kin or affinity to" any person interested in such a matter, the Cabinet could appoint a temporary commissioner to hear that matter in place of the interested member. However, if the Cabinet made no such substitution, the interested member was not disqualified from acting[36].

No member or officer of the CTC may directly or indirectly, (a) have any interest in a transportation[37] company, in any undertaking of such a company or in any obligation of such a company or undertaking, (b) engage in manufacturing or selling of transportation equipment or in any transportation enterprise, or (c) have any interest in any device, appliance, machine or patent that may be used as part of the equipment of the transportation industry or of any work or undertaking subject to, inter alia, the Railway Act[38] (such as a telecommunications undertaking). Also, engaging in such activities or acquiring such interests would probably be "cause" for removal of a member by the Cabinet. A member or officer is given three months to dispose of any such interest that may be acquired by will or succession[39].

An example of the consequences of maintaining telecommunications regulation as a mere appendage to railway regulation, was that members of the CTC were not legally prohibited from having an interest in the telecommunications companies they regulated, from manufacturing or selling telecommunication equipment, or from engaging in a telecommunications enterprise.

As in the case of BTC members, whenever a member is interested in a matter before the CTC or is "of kin or affinity to" any person so interested, the Cabinet may appoint a temporary commissioner in place of the interested member. Again, if the Cabinet makes no such appointment, the interested member is not disqualified from acting[40].

A person is not eligible to be a member of the CRTC if he directly or indirectly, as shareholder, director, officer or otherwise, is engaged in a "telecommunications undertaking", has any interest in such an undertaking, or has any interest in the manufacture or distribution of telecommunication apparatus[41]. Also, a member "is not eligible ... to continue as a member" if he is so engaged or has acquired such an interest[42]. Members or officers are given three months to dispose of any such interests which they may acquire by will or succession[43].

Also, it can be argued that the conflict of interest provisions which apply to the CTC under the National Transportation Act, apply to the CRTC or at least to the Executive Committee of the CRTC, so far as those provisions apply to telecommunication interests of members or persons related to members[44].

Such conflict of interest rules are somewhat naive, since they assume that the self-interest of the regulator will not be to maximize the profits of the regulated as long as he has no shares in the firm. The regulator, after his seven years as a member of the SRA could however join the staff of regulated firms, practice law as an advisor or representative of the regulated firm or act as consultant to the regulated.

(c) The Appeals Mechanism

c.1 Political appeals

The same provision for a Cabinet appeal has stood under the regulation of telecommunications by the BRC, BTC, CTC and now the CRTC (s.64(1) of the National Transportation Act)[45]. Under this provision the Cabinet may vary or rescind any order, decision, rule or regulation of the commission upon its own motion or upon the petition of an interested party. Any order which the Cabinet may make is binding on the parties and on the Commission.

c.2 Judicial appeals

Prior to 1951, decisions of the BTC could be appealed to the Supreme Court of Canada "upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction, or both", with the leave of the BTC.[46] Also questions of jurisdiction could be appealed to the Supreme Court of Canada with the leave of a judge of that court[47]. After 1951, decisions of the BTC could only be appealed to the Supreme Court of Canada upon questions of law or of jurisdiction, with the leave of a judge of that court.[48] Also, upon the application of any party, at the request of the Cabinet, or upon its own motion, the BTC could state a case for the opinion of the Supreme Court of Canada upon any question that in the opinion of the BTC was a question of law or of jurisdiction.[49]

Decisions of the CTC and CRTC may be appealed to the Federal Court of Appeal upon a question of law or of jurisdiction, with the leave of that court.[50] Also, upon the application of any party, at the request of the Cabinet, or upon its own motion, the CTC or CRTC may state a case for the opinion of the Federal Court of Appeal upon any question that in the opinion of the Commission is a question of law or of jurisdiction.[51]

c.3 Judicial review

Besides the statutory provisions for appeals to Cabinet or to the courts and for unilateral action by the Cabinet, the decisions of the BTC, the CTC and the CRTC were and are subject to judicial review at common law. under S.28 of the Federal Court Act.

Basically, the reviewing court has the power to set aside or quash a decision which the agency did not have the power to make, in other words,

a decision made without jurisdiction. The agency may never have had the statutory authority or jurisdiction to entertain the matter before it or the agency committed a "jurisdictional error" in the course of its proceedings which caused it to lose the jurisdiction it had.[52] The role of the courts is not to substitute its own decision for the decision of the agency, but to ensure that the agency remains within the statutory and common law limits on its powers. For example, the common law imposes certain requirements of procedural fairness on the agency.[53] For example, if the agency relies on an interpretation of its enabling statute which is "patently unreasonable" and "cannot be rationally supported" by the language of the statute, then there are grounds for quashing the decision of the agency.[54]

(d) Budget

The budgets of the federal regulators of telecommunications (BRC, BTC, CTC, CRTC) follow standard federal government budgetary procedures. Presently, the CRTC produces estimates of its budgetary needs, these estimates along with those of other federal government agencies and departments are considered in detail by the Treasury Board. The budget of the CRTC is then dependent on overall expenditure policies of the federal government. In times of austerity, the CRTC could then be affected by government decisions to reduce expenditures.

The CRTC has attempted to gain a measure of autonomy in its spending by taxing the utilities for special studies. The costs of the consultant's reports on the Revenue Sharing Plan in the 1980 TCTS hearing has been assessed against Bell Canada and B.C. Telephone. That assessment is under appeal.[55]

(e) Powers of the Regulator - Scope for Rule-Making

The mandate of federal telecommunications regulation is primarily one of rate review. Under the CRTC, existing sections of the Railway Act have been interpreted widely to cover nondiscriminatory access to facilities,[56] and the quality of service.[57] Johnston calls this rule-making "the major difference between the CRTC's approach to telecommunications regulation and that of the Canadian Transport Commission ...".[58]

Neither the Railway Act nor the National Transportation Act provide supervisory powers over telecommunications to federal regulators. Predecessor agencies to the CRTC did not attempt to use Sections 320 and 321 (revised) of the Railway Act to regulate broadly. The CRTC has attempted, largely successfully, to broadly affect developments for the carriers under its jurisdiction.

Several cases before the CRTC, namely the Telesat[59] and Interconnection[60] decisions relied on public interest tests unwritten in any enabling statute. The CRTC has had to examine the broad areas of the benefits of competition and the extent of natural monopoly without either express guidance in law or policy directives from Parliament. In addition, as we have suggested determining 'reasonable' rates also relies on the agency's determination of competing interests. The three communications Bills, none of which passed first reading, would have broadened the regulatory powers of the CRTC at the same time as providing for policy directives and clearer objectives in the law.

2.3 The Federal Department of Communications

The Department of Communications was established in 1969 by the Government Organization Act.[61] In the Act "all matters relating to telecommunications and the development and utilization generally of communications undertakings, facilities, systems and services for Canada are to be exercised by the Minister of Communications."[62] The Minister shall

> "(a) coordinate, promote and recommend national policies and programs with respect to telecommunications services for Canada, ...;
>
> (b) promote the establishment, development and efficiency of communications systems and facilities for Canada;
>
> (c) assist Canadian telecommunications systems and facilities to adjust to changing domestic and international conditions;
>
> (d) plan and coordinate telecommunications services for departments, branches and agencies of the government of Canada;
>
> (e) compile and keep up-to-date detailed information in respect of communications systems and facilities and of trends and developments in Canada and abroad relating to communication matters;
>
> (f) take such action as may be necessary to secure, by international regulation or otherwise, the rights of Canada and communication matters."

The Department presently has 8 multiple functions: the regulation of technical standards; technological research and development; policy research into economic and social matters; the coordinator of use of telecommunications by government; the operator of telecommunications undertakings for experimental purposes; the international spokesmen on telecommunications; the inter-governmental liaison for federal and provincial issues and nation-wide affairs; technology assessment.

Insofar as exercising its jurisdiction for the regulation of technical standards the Department manages the radio frequency spectrum and allocates frequency bands for various uses. This allocation is achieved by licensing radio stations, inspecting facilities, monitoring transmissions and examining and certifying radio operators. The Department also evaluates the technical aspects of broadcast and cable T.V. license applications and advises the CRTC as to their acceptability. In the areas of technology assessment and economic and social policy research the Department has enumerated in a number of annual reports, areas of interest and research which would appear to conflict with jurisdiction of the CRTC.

The DOC in its roles as coordinator and bulk buyer of telecommunications services for the federal government and as an operator of experimental telecommunications undertakings could obviously be in conflict and act in a partisan role in the regulatory process. In 1966, the government telecommunications agency (GTA) was established under the aegis of the D.O.C. to undertake the overall coordination and planning role for the largest user of telecommunications in Canada. The GTA has not intervened in rate cases although as a buyer of telecommunications the government must have views on both the level and structure of rates.

In their 1972-73 Annual Report, the DOC described its activities underlying the formation in 1971 of a working roup to study inter-regional telecommunications, that group representing the carriers in the provinces as well as the federal government, and to access the existing facilities, forecast requirements for the year 1972 and conduct a general review of the way in which the carriers intended to meet these challenges. In addition, "a major review of the telecommunication equipment supply industry was also started during the year. ... Interconnection, the attachment of

equipment to telecommunications carriers networks is a subject of a study begun in the fall of 1971." In its 1972-73 report, the DOC also states that it is examining "a revision and consolidation of federal legislation relating to telecommunications; provision for more effective regulation of telecommunications carriers subject to federal authority; and the establishment of a single federal agency to regulate both broadcasting and the operations of the carriers subject to federal authority".

In its 1974-75 Annual Report, the Department announced that it was studying corporation and financial structures, the economic activity and inter-corporate relationships of the telecommunications industry in Canada. In its 1975-76 Annual Report, the Department announced that it was developing econometric models for Bell Canada and British Columbia Telephone. As well, DOC was studying EAS and the procurement practices of telecommunications carriers. In that year the Department "had reached agreement with federally regulated telecommunications carriers to allow certain customer-owned attachments to the telephone systems". This agreement could not have been exhaustive since several years later the CRTC had to decide the issue separately.[63]

In the 1977-78 Annual Report the Department said, "the Department must ensure that the future communications environment ... is developed with due regard for the impact upon social and cultural values and upon the quality of life in Canada, as well as upon the Canadian economy. At the same time, the Department must ensure the Canadian communications systems provide an acceptable level of service at reasonable cost - locally, regionally and internationally". In this report, the Department also said, "although the tariffs of federal regulated carriers are regulated by the CRTC, the Department develops policies and programs related to communications carriers and the telecommunications industry as part of its general mandate." In that

same report the Department announced it was undertaking a study of station ownership, northern communications, the public message telegraph, a study of the quality of telephone service in Newfoundland, computer communications and various telecommunications studies. Included under telecommunications studies were "a pilot study to forecast the demand for non-voice telecommunications services over the next decade." In addition, "a program of short term analysis and forecasting of Bell Canada was initiated and the operational model for medium term analysis of federally regulated common carriers was implemented." Studies were conducted into the issues of cost allocation and cross-subsidies in the provision of telecommunications services. Research on designing the general framework for evaluating capital expenditures by the telecommunications industry was undertaken.

In its role for inter-governmental liaison and analysis of nation-wide affairs, the DOC goes beyond the mandate of the CRTC and provincially regulatory agencies. This coordinating role involving consultation with the provincial governments touches matters coming within the regulatory mandate of the CRTC and provincial regulatory agencies. There may be conflicts between the policies arrived at at this political level and the policies arrived at by the regulatory agencies. An example of this is the issue of 'Pay T.V.' where the Minister of Communications has in effect reversed the CRTC.[64] These conflicts will always work out to the advantage of the politicians since in our parliamentary system, regulatory agencies are not independent and are quite naturally subject to political control. Given the vague mandate of the CRTC to set just and reasonable rates (among other objectives) within the narrowly defined structure of existing federally chartered telecommunications firms, it is necessary to have a policy coordinating body outside the CRTC. The alternative would be to have the CRTC operate

as a multi-function regulatory agency adjudicating rates as well as exercising discretionary policy-making powers and acting as advisor to the government. We return to these issues in Chapter 4.

2.3.1 Nova Scotia Board of Commissioners of Public Utilities and the Regulation of Maritime Telephone and Telegraph

2.3.2 Introduction

The Public Utilities Act, R.S.N.S. 1967, c.258, establishes the Board of Commissioners and lays out the Board's powers and responsibilities in the regulation of telephone, as well as other utilities in the Province. Maritime Telephone and Telegraph (MT&T), a private company which supplies almost 100% of the Province's telephone services, has come before the Board for rate reviews seven times since 1952. An analysis of these rate reviews as they relate to the Act governing the inter-relationship between these two bodies is contained in Appendix 2.

2.3.2.1 Maritime Telephone and Telegraph, Ltd.

The first commercial telephone was installed in Halifax in 1878 by the Dominion Telegraph Company. The Western Union Telegraph Company established offices a year later. The plant and rights of both of these companies were purchased by Bell in 1880 and 1881 respectively.

The Nova Scotia Telephone Company was incorporated by statute in 1887 with a mandate to supply telephone services to the Halifax area and as much of the rest of the province as feasible. They purchased the Bell operations in Nova Scotia and New Brunswick in 1888 but resold the New Brunswick interest to Bell in 1889.

In 1910 Maritime Telegraph and Telephone Company, Limited was incorporated by statute with head offices in Halifax. In 1911 it purchased Nova Scotia Telephone and became the major telephone system in the province.

The Act of Incorporation gave the company wide powers to expand its operations through both construction programmes and acquisitions and amalgamations. Even before the company had acquired Nova Scotia Telephone it had begun to buy out the smaller, independent telephone companies throughout the province. This process continues up to the present as the company gradually acquires the last few remaining rural telephone systems.

2.3.2.2 Regulation of Telephone Service in Nova Scotia

In 1903, debate began in the Nova Scotia Legislative Assembly on means of controlling the telephone company monopolies. Windsor and Aucoin (1978) aruge that "the political economy of the time immediately ruled out one of the two basic alternatives, namely public ownership. The principle characteristics of the political philosophy of the Premier of that time, George Murray, was that governments had to formulate public policies with 'infinite caution' in an effort to avoide alienating segments of the population."[65] It was therefore decided that regulatory control could be achieved by the government via the Cabinet (the Lieutenant-Governor-in-Council).

Chapter 26 of the Nova Scotia statutes of 1903-04 therefore required all telephone companies in Nova Scotia to file their rates and charges with the Provincial Secretary and empowered the Lieutenant-Governor-in-Council to alter, modify or reduce the tariffs.[66] Provision for public hearings was also contained in the Act. "Six years after it had established this regulatory process, one in which the Cabinet was engaged in the highly

political activity of awarding some groups, and depriving others of the economic benefits associated with the rates charged for telephone service, the role of the Cabinet was sharply curtailed."[67]

The Public Utility Act of 1909, An Act to Establish a Board of Public Utility Commissioners, S.N.S. 1909, (9 Edwd. VII C.1) replaced Chapter 26 and was the first attempt at independent regulation of telephone companies in Nova Scotia. The Act defined a "Public Utility" to be anyone who, "may own, operate, manage or control any plant or equipment for the conveyance of telephone messages" and also included heat, light, water and power under the term "Public Utility". Provision was made for the appointment of three commissioners by the Lieutenant-Governor-in-Council, thus removing the direct responsibility for rate-making from the Cabinet and shifting it to a new agency.

The 1909 Act established a practice of assessment of the regulated utilities by the Board for the Board's expenses. It required utilities to file their rate schedules with the Board and empowered the Board to make investigations of any matters under its jurisdiction. The Lieutenant-Governor-in-Council retained the power to hear appeal from, "any person aggrieved by any decision or order of the Board". The entire Act contained 22 sections.

The 1909 statute was replaced by the more extensive Act of 1913.[68] The new Act contained 97 sections and forms the basis of the current legislation. Study 2(b) of the Federal Telecommission Study (1971) notes that the Nova Scotia statute was patterned largely on the Act establishing the Board of Railway Commissioners in Wisconsin in 1907.

The 1913 legislation contained some important new sections. Commissioners were barred from holding any interest in regulated companies. The Board itself was given powers equivalent to that of the Supreme Court of Nova Scotia and was empowered to make valuations of public utilities (rate base). The Board was empowered, as well, to establish methods of book and record-keeping (i.e. uniform system of accounts) and to determine depreciation rates. The independence of the Board was enhanced by the removal of the appeal section of the 1909 Act. The Lieutenant-Governor-in-Council could no longer hear appeals and the only appeal route was via the Supreme Court and then only on points of law or jurisdiction.

The question of tenure is not covered in the 1913 Act and, indeed, has been altered a number of times in the intervening years. The current Public Utilities Act, R.S.N.S. 1967, c. 258, is clearly the descendant of this 1913 legislation.

2.3.3 Objectives of Regulation

The 1903 Act did not state any objectives for telecommunications legislation, presumably the government acting as regulator would set these objectives. The 1913 Act stated that the term public utility applied to the "... conveyance of telephone messages ..."[69] and that

> "18. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.
>
> 19. All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect to service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions. The taking of tolls, rates and charges contrary to the provisions of this section and the regulations made pursuant thereto is prohibited and declared unlawful. ...

> 48. No public utility shall charge, demand, collect or recieve a greater or less compensation for any service performed by it than is prescribed in such schedules as are at the time in force, or demand, collect or receive any rates, tolls or charges not specified in such schedules. The rates, tolls and charges named in the schedules, so filed and approved as aforesaid, shall be the lawful rates, tolls and charges until the same are altered, reduced or modified as provided in this Act. ...
>
> 50. No public utility shall abandon any part of its line or lines, or works, after the same has been operated, without notice to the Board, and without the consent in writing of the Board, which consent shall only be given after notice to the city, town or municipality interested, and after due inquiry had."

The 1967 Act empowers the Board to regulate the services of "the conveyance or transmission for compensation by a public utility of telephone messages" [70], as follows:

> "18. Whenever the Board shall believe that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investiagtion of any matter relating to any public utility should for any reason be made, it may, on its own motion summarily investigate the same with or without notice. ...
>
> 63. (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions. ..."

The mandate for the Board is therefore limited to regulate "telephone messages" but within that jurisdiction the objectives are extremely broad and, as is established below, the Board has significant powers for rule-making (policy development).

2.3.4 External Environment

(a) Appointment Procedures and Tenure

The 1909 Act did not state the terms of office for commissioners: Section 2 said "said commissioners and clerk shall be sworn to the faithful performance of the duties of their respective offices before entering upon the discharge of same."[71] In 1922, the Act was amended to limit the term of commissioners to ten years.[72] This amendment was repealed in 1943 due to fears that the limited term of office had infused the Board with political patronage.[73]

Under the 1967 Public Utilities Act, "each commissioner whether heretofore or hereafter appointed shall hold office during good behaviour"[74] and "unless otherwise directed by the Governor-in-Council, a commissioner shall cease to hold office when he attains the age of seventy years".[75]

Independence from Regulated Industries

The 1909 Act did not stipulate that commissioners should be independent of interests in the firms they regulated. The 1913 Act did state

> "4. No commissioner shall be directly or indirectly employed by or interested in any public utility or interested in any share, stock, bond, mortgage, security or contract of any such public utility; and if any such commissioner shall voluntarily become so interested his office shall become vacant; and if any such commissioner shall become so interested otherwise than voluntarily, he shall, within a reasonable time, divest himself of such interest, and if he fails so to do his office shall become vacant.
>
> "5. If any commissioner is so interested in any matter before the Board, or if any commissioner shall be unable to act by reason of illness,

> absence or other cause, the Governor-in-Council may appoint some disinterested person to act as commissioner in his stead in and about such matter or until such disability comes to an end. Any person so appointed may complete any unfinished business in which he has taken part, even if the commissioner whom he has replaced has returned or has become able to act.
>
> "6. No commissioner shall be disqualified by reason of being the lessee or user of a telephone or the purchaser of power, water or electric current or service from any public utility, from acting in any matter affecting such public utility."

These provisions are carried forward almost word for word in the 1967 Act.

(b) Rules for the Financial Independence of Regulators from the Regulated Utilities

The 1913 Act established a degree of financial independence for the Commission far beyond that of most SRA's. Section 9 of the 1913 Act stated that

> "The annual expenses of the Board, including the salaries of the commissioners, clerk and counsel, and the compensation to referees, experts, accountants, stenographers and typewriters shall be borne by the several public utilities having gross earnings ... to the amount of five thousand dollars. ... the Board shall assess upon each of such public utilities its just proportion of such expenses in proportion to its gross earnings for the preceding year ..."

A similar provision is included in the current Act.[76] In addition, this Act states that

> "63. (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

> (2) The taking of tolls, rates, and charges contrary to the provisions of this Section and the regulations made pursuant thereto is prohibited and declared unlawful."

Note that the expenses of the Commission do not include costs of legal staff. Section 5 of the 1967 Act states that staff of the Attorney-General's offices will be counsel of the Board, "... to represent and appear for the Board in all actions and proceedings ... to commence and prosecute all actions and proceedings directed or authorized by the Board ... to advise the Board and each commissioner when so requested ... and generally to perform all duties and services as solicitor and counsel to the Board ..."[77] for these services, a sum of three thousand dollars is payable to the Minister of Finance and Economics.[78]

(c) Appeal Mechanism

The 1909 Act did not provide for political appeals since the Cabinet was the regulator. Nor was there a provision for judicial appeals.

In 1913, a judicial appeal mechanism was instituted

> "An appeal shall lie to the Supreme Court in banco from any final decision of the Board upon any question as to its jurisdiction or upon any question of law ..."[79].

The 1967 Act contains the same provisions with the Appeal Division of the Supreme Court as the appellate body.

Since its establishment in 1913, there has not been a right to appeal any decision of the Commission to the government. There never has been an appeal mechanism on questions of fact. As a result, if the Board stays

within its jurisdiction and the law, its decisions cannot be appealed. There has in fact been only one appeal and that case did not involve a Commission's decision but a municipality's assessment against Maritime Telephone and Telegraph.[80]

Janisch and Huber (1975) do not feel that the language of the statutory provisions relating to the appeal mechanism accounts for the paucity of cases. Instead, they argue that the process is not conflict-orientated because of pressures for compromise.

(d) Budget

Since the 1913 Act which established a Board outside direct government control, the Board has had the powers to raise its budget by taxing those it regulates.

> "The annual expenses of the Board, including the salaries of the commissioners, clerk and counsel and the compensation to referees, experts, accounts, stenographers and typewriters, shall be borne by the several public utilities having gross earnings ... of five thousand dollars ..."[81]

In the 1967 Act, the expenses of the Board are to be "... assessed upon and borne by the public utilities which carried on business ... due regard being given by the Board to the gross earnings of each such public utility ..."[82]

The province can advance funds to the Board[83] and, as noted, the legal staff of the Board is provided by the Attorney-General's office at a nominal sum of $3,000 per year.

(e) Powers of the Board and Scope for Rule-Making

The Nova Scotia Board of Commissioners of Public Utilities has broad quasi-judicial powers for rule-making and investigatory procedures. These powers have existed since 1913 and include

> "Any decision or order made by the Board under this Act may be made a rule or order of the Supreme Court of Nova Scotia, and shall be enforced in a like manner ..."[84]
>
> "The Board may from time to time, make, revoke and alter rules and regulators for the effective execution of its duties and of the intentions and objects of this Act ... such rules and regulations, when approved by the Governor-in-Council shall have the force of law."[85]

The Board can order evidence and subpeona witnesses,[86] "compel every public utility to comply with its provisions of this Act",[87] make orders with respect to tolls,[88] order public utilities to produce information.[89] A Board's order need not show justification.[90] The Board of its own motion may investigate "... any matter relating to any public utility ...". Finally, "the Board shall have the general supervision of all public utilities ..."[91].

2.3.5 Rate Regulation

Of specific concern to us are the statutory provisions relating to rate regulation. These deal mainly with the valuation of rate base and depreciation.

2.3.5.1 Valuation

The Board is empowered to evaluate the property and assets of any utility at any time. Staff undertaking the valuation are to be paid by the utility.

The determination of the property is to be on the basis of "prudent original cost" minus accrued depreciation. The straight-line method of depreciation is recommended in the Act but the Board may alter this.

2.3.5.2 Depreciation

The utility itself is required to keep accurate records of its annual depreciation rates in all its classes of assets and may be required to report these to the Board "from time to time" - usually at rate reviews. Again the straight-line method is specifically mentioned in the Act.

The Board, however, reserves the right to determine "proper and adequate annual rates of depreciation" and, in addition, requires the utility to submit to the Board for approval any construction or improvement expenditures in excess of $5,000. New construction funds come out of a prescribed depreciation fund.

2.3.5.3 Rate Base

The Board is empowered to determine a separate rate base for each type of service supplied by the utility. The valuation method outlined above (3.5.1) is to be employed in this determination.

The Board may make allowance in its determination for: (a) working capital; (b) organization expenses: (c) construction overheads; (d) cost of the valuation itself; and (e) costs of land acquisition for future requirements.

The Board may revise the rate base at its discretion but pending such revision the existing base remains in effect with some alterations. Amortization of certain expenses may be charged as operating expense and included in the rate base without a wholesale revision.[92]

2.3.5.4 Annual Earnings and Tolls

The Act allows that, "every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base".[93] The Board also fixes tolls, rates and charges to be paid to the utility.

2.3.6 Summary

The Board of Commissioners in Nova Scotia clearly has broad powers to regulate the utilities under its jurisdiction. It has the power to set both the rates and the rate base and all security issues must first receive its approval. In addition, it may investigate and enforce any suspected breach of its orders or of the regulations under the Act.

The Board's independence from political control or interference is only slightly tempered by the appointment powers of the Governor-in-Council. However, given the tenure provisions and the typically lengthy term of most commissioners, the appointment power is relatively insignificant.

In fact, the Board is likely as independent a quasi-judicial body as one could have in Canada. The Board is independent in setting its budget and has broad rule-making and investigatory powers.

2.4.0 The Regulation of Telecommunications in Saskatchewan

2.4.1 Introduction

The province of Saskatchewan was created in 1905 by the Dominion Act.[94] At that point in time, the population was 350,000 and there were some 3,250 telephones in existence,[95] half of these telephones being operated by Bell Canada. Both the newly formed Liberal and Conservative parties promised

major expansions of telecommunications as a major part of their party platforms, the Liberals winning the first election. In 1908, Premier Scott said, "we propose to link together all the main towns in the province by trunk telephone lines to be constructed and conducted by a department of the government and in addition, we propose to assist the settlers to create their own telephone systems and link them up with our trunk lines".[96] A report in 1908 on the telephone system recommended that the provincial government own and operate the trunk facilities but that the municipalities alone offer local exchange services.[97] The reasons for not directly involving government in local exchange development were twofold: first, that the construction of these facilities would require too much money and second, that provincial ownership would result in cross-subsidization between localities.

> "Again, if the government owned the local exchanges there would be a strong tendency on the part of the people to expect a uniform rate for service in all towns and villages the population of which most clearly corresponded. These towns would in many cases be several miles apart and their variations and local conditions would be such that what was a paying rate in one exchange might entail the operating at a loss at another. ... In other words it may be possible for the people in one city to be contributing $5.00 a year more in cost per telephone in order that the citizens in another part of the province might have their telephones $5.00 a year less than cost."[98]

Three Acts dealing with telecommunications were passed by the Saskatchewan Legislature in 1908. The first of these, The Railway and Telephone Department Act created a Department of Railway and Telephones headed by a commissioner.[99] That department could purchase, construct or operate telephone systems as well as interconnect with any rural, private, foreign or municipal telephone system. All municipal, rural and private systems were required to provide all information on rates, and tariffs for telephone

service to the commissioner. The commissioner could change the rates if after an investigation he thought that the rates were unreasonable or discriminatory. The Municipal Telephone Act of 1908 authorized the municipalities to construct and operate telephone systems within their boundaries as well as approving financing for these systems through debenture issues.[100] The Act was repealed in 3 years and only five municipalities operated under it. The Rural Telephone Act, established the rights of rural cooperative telephone companies.[101] That Act enumerated means of raising capital and left these rural systems exempt from assessment and taxes. The only assistance provided by the government was the provision of telephone poles. Initial government intervention in the Saskatchewan telephone industry was based on a desire by the provincial government to construct long distance telephone facilities but to allow municipalities and rural communities to provide the local telephone systems that they required without government support. In 1909, the government purchased all the Bell Canada properties in the province as well as the second largest system, the Saskatchewan Telephone Company renaming the firm, Saskatchewan Government Telephones. By the end of 1909, the government had constructed 640 miles of trunk lines and had purchased 492 miles of trunk facilities.[102] Through 1912 the government continued to purchase private companies and by repealing the Municipal Telephone Act of 1908, the government was approaching monopoly ownership of trunk lines and municipal telephone systems while leaving the rural systems to co-ops.

In 1913 the government restructured the Rural Telephone Act.[103] The Rural Telephone Act of 1913 included several interesting provisions for rural systems to raise capital. Provision for equity capital was included as well as the right for rural companies to borrow through debenture issues.

Rural companies were also given the right to tax the land adjacent to the telephone lines. This structure remained essentially unchanged until the mid 1940's.

In 1944 the CCF government took over in Saskatchewan. The Depression and the drought had lowered farm incomes and as a result the rural telephone co-ops were in severe difficulties. The government and the Department of Telephones were being pressed to provide assistance to these co-ops or to have Saskatchewan Government Telephone take them over. The government established the Warren Commission to examine the rural telephone service. The Report of that Commission stated that the takeover of the rural lines by SGT would result in annual costs which would be impossible to raise. Instead of a takeover, the Report recommended a program of technical and financial assistance to the rural telephone companies. In 1947, SGT was reorganized as a Crown Corporation under the umbrella of the Government Finance Office (GFO). The GFO served as a holding corporation for most of the Crown Corporations and acted as a central coordinating agency. The GFO was initially seen by the CCF party as a central mechanism for coordinated control and general overview of Crown Corporations subject to Cabinet direction. The prime instrument for exercising policy control over Crown Corporations was control over capital expansion. With the Liberal government takeover in 1964 the role of the Government Finance Office was decreased and most of its administrative functions were undertaken by the Department of Finance.

> "This reduction in the role of the Office left room for potential increases in the independence of the Corporation Boards. However, there was not at the time a government policy environment that would lead to a more significant role for Crown Corporations generally or for individual corporations, and so the Boards appeared not to have adopted an aggressive stance nor to have tested their possible independence."[104]

With the re-immergence of the NDP government in 1971 the influence of the GFO was re-established. The GFO did not return to its previous role however, as many of the questions of borrowing and finance were left with the Department of Finance; instead the GFO was revised into more of a policy bureau. From 1971 until 1978, the government considered "... the key question ... the manner in which the Cabinet can exercise control and guidance over Crown Corporations - the main options being direct ministerial control of Corporation, control through Cabinet committee structure similar in function to the Treasury Board, or some mix of the two."[105] The addition of six new commercial ventures between 1973 and 1975 and therefore the increased magnitude of the Crown Corporate sector meant that the government required additional means of coordinating the capital requirements and the actions of these corporations. This led to the restructuring of the GFO by the Crown Corporations Act of 1978, that Act specified in greater detail the responsibilities of the Boards of Directors of Crown Corporations.

The CIC structure reflects the long standing policy that first, supervision of investment and capital expenditures are the basic means of control over Crown Corporations; second, that growth and investment are dependent on both borrowing and retained earnings, therefore, the CIC determines the percentage of net income that the corporation is allowed to reinvest; third, that coordination of the various capital requirements are needed to insure orderly borrowing, and finally, that aside from control over capital expansion, day-to-day operations should be the responsibility of management.

2.4.2 The Present Process of Telecommunications Regulation in Saskatchewan

There are seven elements of the present regulatory process of telecommunications in Saskatchewan, as follows:

1. The enabling of Saskatchewan Telephone as set out in Chapter S-34, Revised Statutes of Saskatchewan, 1978.
2. Management of SaskTel.
3. The Board of Directors of SaskTel.
4. The Crown Investments Corporation and its Board of Directors.
5. The Minister responsible for SaskTel and the Cabinet.
6. The Communications Secretariat reporting to the minister responsible for Communications.
7. The Parliamentary Select Committee on Crown Corporations.

2.4.2.1 Act of Incorporation - Objectives of the Enabling Legislation

The Saskatchewan Telecommunications Act lists the powers of the corporation (Part 1), the procedures for acquisition of property by expropriation (Part 2), the procedures for acquiring rights of way (Part 3) and matters of finance and accounting (Part 4).[106] The Act does not establish the objectives of the corporation, i.e. there is no legislative mandate for either 'just and reasonable rates' or non-discriminatory practices. Nor is there a requirement in the Act for universality of service. The purpose and powers of the corporation are given in Section 9 and provide for the construction, maintenance and operation of the telecommunications system, and cooperation with other telephone companies in Canada for inter-provincial service. Subsection 9, part 2 deals with rates "the telecommunications services provided

by the corporation and the acceptance or use thereof by any person are subject to the charges, rates, terms and conditions established and revised from time to time by the corporation and set out or described in a schedule that shall be available for public inspection at the business offices of the corporation during business hours".

2.4.2.2 Management - The Objectives of SaskTel

The senior management of the corporation are appointed by the Board of Directors. Sub-section 6 of the enabling Act states that the Lieutenant-Governor-in-Council shall designate one of the persons constituting the corporation to be the Chairman. The Minister of Telephones is the Chairman of SaskTel while the President of SaskTel is the Deputy Minister of Telephones.

The management of SaskTel has published a booklet entitled "Basic Mission Statement" (undated) which lists the obligations of the corporation. Page 5 of this document states that SaskTel is granted an exclusive market franchise within the geographical area it serves (note, however that the enabling Act does not grant this monopoly right). "Secondly, it [SaskTel] is obliged to serve all applicants within the franchise area without unreasonable discrimination and, thirdly, it is accountable to the public with respect to the prices that it charges and conditions of its service".[107] The Basic Mission Statement also states that

> "the delivery system is a 'natural' monopoly for those services where universal access is required. While to date this monopoly has been limited to the voice services, the future will require that other message forms and services be available under the utility concept. ... However, some of our services compete with those offered by other providers. We believe that for these services utility obligations are removed and SaskTel has the freedom to provide them on a selective basis."[108]

The service ideal as presented in this document is to provide six basic functions, namely universal access, privacy, immediacy, two-way simultaneous send/receive, choice of message form, and choice of message content. In order to meet these service ideals, the general business mission is to offer access without unreasonable discrimination and to "refrain from meeting the request of individuals or groups for preferential treatment."[109] Management explicitly recognizes the directives and guidelines of government.[110] Services will be priced so as to encourage as many Saskatchewan residents as possible to subscribe to basic telecommunications services, however, the prices must provide sufficient revenues to pay all the costs of doing business including "a reasonable return on investment".[111]

Competitive services are to produce as large a profit as possible and to "achieve and/or maintain a dominant position in the telecommunications market."[112]

The financial objectives as stated in the document are somewhat contradictory. They are: to price to encourage universal access, to distribute charges equitably, to price so as to encourage operating efficiency, to ensure that competitive services are not a burden on basic telecommunication services, and to produce rates that are easy to administer and simple to understand.[113]

2.4.2.3 Board of Directors

The Board of Directors of SaskTel consists of eight to ten people who are appointed by the Crown Investment Corporation on the recommendation of the Minister of Telephones. Two ministers are on the Board; the Minister

responsible for SaskTel and the chairman of SaskTel - Minister of Telephones - and the Minister in charge of Communications. The secretary of the Board of Directors is a representative of the Crown Investment Corporation but is not a member of the Board. Normally, another CIC official is on the Board of Directors. In addition, the Director of the Communications Secretariat (an agency under the Minister responsible for Communications) sits on the Board of Directors. The remaining members of the Board are private citizens generally representative of the population. Directors appear to have indefinite terms, but are not appointed under "good behaviour" clauses.

The Boards of Directors of Saskatchewan Crown Corporations have functions similar to the functions of the Boards of private firms in certain ways and also act as intermediaries between the Cabinet and management. The Board is responsible for a number of elements, principally establishing the Corporation's goals and objectives and establishing and reviewing the Corporation's long term and annual plans. The Board of Directors reviews proposals for rate changes and examines the financial operations of the Corporation monthly. The Board of Directors approves or rejects recommendations for appointments to management.

Like private firms, the Board is itself responsible to constituencies - the Crown Investment Corporation, the company holding ownership in the various crown corporations, and to Cabinet.

2.4.2.4 Crown Investment Corporation

The Board of Directors of SaskTel are responsible to the Crown Investment Corporation (CIC) for their decisions as well as being responsible to the Minister of Telephones. The CIC and its Board does not however scrutinize the operations and policies of the respective Crown Corporations in the same

detail as the Treasury Board scrutinizes the operations of government departments, mainly because of the above described role of the Boards of Directors of the respective Crown Corporations.

The Board of Directors of CIC are all Cabinet ministers except for the managing director (chief executive officer of CIC) who is on the Board, at the moment. The Board of Directors of CIC can review and approve, reject or amend the goals and/or objectives of SaskTel. CIC must approve SaskTel's capital expansion plan and its construction plan for the year. In addition, all rate recommendations come from the Board of Directors of SaskTel to CIC. Only in an overview, does CIC examine the total budget of SaskTel as well as the budgets of other crown corporations.

As described above, the purpose of the CIC (and the GFO before that) is to ensure that the combined demands for capital of the individual crown corporations can be met in the capital market and to provide for orderly financing.

The total staff of CIC (including clerical and support personnel) presently consists of 40 people divided into five divisions. One person specifically examines SaskTel operations (two others assist). The CIC has not yet had to defer projects because the sum of the combined capital demands have been greater than the potential borrowing. However, occasionally, the timing of borrowing has been altered. All borrowing for SaskTel and the other crown corporations is done through the Department of Finance. The borrowing is in the Saskatchewan government's name and guaranteed by the province.

The operating budget (as opposed to the capital budget) is not directly examined by CIC because of the fear that CIC would then become involved in the day-to-day operations and thus assume responsibilities of management

as well as of the Board of Directors.

Before the establishment of CIC, all rates proposals went directly to the Cabinet. They are presently reviewed by the CIC before going to the Cabinet; the grounds for review are not specified. All rate proposals do proceed to the Cabinet as an information item; if there has been some contention about the rates or if the rate increases are substantial they are sent to Cabinet as a decision item.

2.4.2.5 Minister Responsible for Telephones and Cabinet

The Minister of Telephones is the Chairman of SaskTel, sits on the Board of Directors of SaskTel and sits on the Board of the Crown Investment Corporation. There are therefore a number of instances in the regulatory process where politicians have a direct say in the operations and development of SaskTel. The Cabinet is ultimately responsible for the operations of SaskTel and the operations of its holding company - the Crown Investment Corporation. Any issue of such importance that it effects the overall shape of a crown corporation or the crown corporation sector will be dealt with by Cabinet. These issues include major changes in goals and/or the objectives of SaskTel; annual capital spending proposals of the crown corporation sector, all changes in rates proposed by SaskTel. In addition, the Cabinet through Orders in Council is responsible for various rules and regulations which are required by the governing legislation of SaskTel (e.g. changes in procedures for depreciation and other financial accounting matters).[114] In addition the Crown Investment Corporation and ultimately the Cabinet determine the amount of net earnings of SaskTel which are remitted as dividends to the government. At the moment that dividend is 50% of earnings. The

Minister for Telephones as Chairman of SaskTel is responsible for answering questions in the legislature from day-to-day. Cabinet generally leaves final operating decisions to the expertise of the company.

2.4.2.6 Communications Secretariat

The Communications Secretariat was established in 1975 as an advisor examining planning, service and rates over the long term and their inter-relationships with the other communications facilities both within and outside the province. The Director of the Communications Secretariat reports to the Minister responsible for Communications and also sits on the Board of Directors of SaskTel. The Communications Secretariat examines issues such as cable T.V., pay T.V. and broadcasting and represents the province at inter-governmental communications conferences.

An example is useful to highlight the differences in Saskatchewan regulatory control and responsibility for policy setting. The CNCP request for inter-connection with Bell Canada was a matter for the Communications Secretariat whereas a CNCP request for inter-connection with SaskTel is the responsibility of the Ministry of Telephones. Telecommunications issues which are considered overall policy issues rather than pure corporate matters, involve the Communications Secretariat.

2.4.2.7 Select Standing Committee on Crown Corporations[115]

The Select Standing Committee on Crown Corporations was established in the 1946 session of the Legislative Assembly of the province of Saskatchewan. Membership in the Committee is proportional to party representation

in the Assembly. There are presently 16 members on the Select Committee, with a government member as chairman. The Cabinet ministers responsible for crown corporations may also be on the Select Committee (a policy similar to that of other provinces, except British Columbia).

In the 34 years since the inception of this Committee, there have been a number of changes in its scope and the degree of scrutiny allowed, in attempting to define its proper role. At first, the Committee only examined the operations of the crown corporations for the last annual fiscal year. In the session following the 1948 election, the Committee recommended to the Assembly that it be allowed to examine current and past operations of the corporations. The government granted that request but discontinued the procedure of allowing questions on crown corporations to be asked in the House on the grounds that these questions should be asked in the Committee. Since Committee proceedings were not published whereas proceedings of the House were, this change in procedure caused a number of difficulties. In addition, including a reference to past operations meant that the Committee in any one year would be looking at the past activities of the Committee as well as the crown corporations. By 1951, the terms of reference of this Select Committee had been narrowed to examining the most recently completed fiscal year for crown corporations. Full rights of scrutiny are allowed with respect to the annual reports and financial statements of the crown corporations subject to limitations of the provision of confidential information. In addition, written questions can be submitted in the House concerning past activity of the crown corporations. These questions can be referred to the Select Committee, answered there and appended to the Report of the Committee to the House. As of 1979, the proceedings of the Committee are published in Hansard.

Footnotes to Chapter Two

1. W.R. Lederman, "Telecommunications and the Federal Constitution of Canada", in H.E. English (ed.) Telecommunications for Canada, Methuen, 1973.
2. Ibid.
3. Toronto Corporation vs. The Bell Telephone Company of Canada, [1905] D.C. 52.
4. The Railway Act, S.C. 1903, 3 Edw. VII, c.58.
5. An Act to Amend the Railway Act, 1903, 6 Edw. VII, c.42.
6. The Transport Act, S.C. 1938, c. 53
7. The National Transportation Act, S.C., 1966-67, c.67.
8. C.R.T.C. Act, S.C. 1974-75-76, c. 49.
9. Broadcasting Act, S.C. 1967-68, c. 25; re-enacted - RSC 1970, B-11.
10. The Railway Act, Suppl. Reg., S.C. 1966-67, s.64.
11. Ibid s.48.
12. Ibid ss. 17 and 19.
13. This discussion has been greatly aided by the CRTC's analysis presented in the appeal to the Challenge case.
14. RSC 1970, C.35 (First supp.), 5.3
15. The extension of undue discrimination to apply against competitors occurred in the Challenge case.
16. Bill C-24
17. Railway Act, S.C. 1903, c.50, S.8; re-enacted and amended - RSC 1906, c.37, s.3 (superior court judges appointed to BRC could only be removed "upon address of the Senate and House of Commons"); re-enacted and amended S.C. 1919, c.68, s.9(3).

18. Supreme Court Act, RSC 1906, c.139, s.9; RSC 1927, c.35, s.9; RSC 1952, c.259, s.9(1); RSC 1970, c.S-19, s.9(1); Exchequer Court Act RSC 1906, c.140, s.10; RSC 1927, c.34, s.9; RSC 1952, c.98, s.9(1); RSC 1970, c.E-11, s.10(1). These judges hold office during good behaviour but may be removed by the Governor-General (rather than the Governor-in-Council) upon address at the Senate and House of Commons. The term 'good behaviour' was dealt with in Chesley vs. Council of the Town of Lunenburg (1916), 28 DLR 571 (NSSC en banco).
19. Railway Act, S.C. 1903, c.58, s.8; re-enacted - RSC 1906, c.37, s.3 ( ); amended - S.C. 1908, c.62, s.1 (increase number of members from three to six); re-enacted - S.C. 1919, c.68, s.9(1); RSC 1927, c.170, s.9(1); RSC 1952, c.234, s.9(1); repealed - S.C. 1966-67, c.69, s.94.
20. Railway Act, S.C. 1919, c.68, s.9(3); re-enacted - RSC 1927, c.170, s.9(3); RSC 1952, c.234, s.9(3); repealed - S.C. 1966-67, c.69, s.94.
21. Railway Act, S.C. 1903, c.58, s.8; re-enacted - RSC 1906, c.37, s.3( ); SC 1919, c.68, s.9(4); RSC 1927, c.170, s.9(4); RSC 1952, c.234, s.9(4); repealed - S.C. 1966-67, c.69, s.94.
22. See note 21, supra.
23. Railway Act, S.C. 1903, c.58, s.8; re-enacted and amended - RSC 1906, c.37, s.10(4) (add qualification "if not disqualified by age"); re-enacted, S.C. 1919, c.68, s.9(5); RSC 1927, c.170, s.9(5); RSC 1952, c.254, s.9(5); repealed - S.C. 1966-67, c.69, s.94.
24. S.C. 1951 (2nd sess.), c.22, s.1(1).
25. National Transportation Act, S.C. 1966-67, c.69), s.6(1); re-enacted - RSC 1970, c.N-17, s.6(1).
26. National Transportation Act, SC 1966-67, c.69, s.6(3); re-enacted - RSC 1970, c.N-18, s.6(3).

27. National Transportation Act, SC 1966-67, c.69, s.6(4); re-enacted - RSC 1970, c.N-17, s.6(4).

28. See note 26, supra.

29. National Transportation Act, SC 1966-67, c.69, s.6(5); re-enacted - RSC 1970, c.N-17, s.6(5).

30. Canadian Radio-television and Telecommunications Act, S.C. 1974-75-76, c.49, s.12(1) and s.14(2).

31. Ibid, s.3(2).

32. Ibid, s.3(4).

33. Ibid, s.5.

34. Railway Act, S.C. 1903, c.58, s.11(2); re-enacted - RSC 1906, c.37, s.15(1); amended - SC 1908, c.62, s.5 (extend to cover officers of the BTC); S.C. 1919, c.68, s.14(1) (add "or of any other work or undertaking subject to this Act" to second branch); re-enacted - RSC 1927, c.170, s.14(1); RSC 1952, c.234, s.14(1); repealed - S.C. 1966-67, c.69, s.94.

35. Railway Act, S.C. 1903, c.58, s.11(2); re-enacted - RSC 1906, c.37, s.15(2); S.C. 1919, c.68, s.14(2); RSC 1927, c.170, s.14(2); RSC 1952, c.254, s.14(2); repealed - S.C. 1966-67, c.69, s.94.

36. Railway Act, S.C. 1903, c.58, s.11(1); re-enacted - RSC 1906, c.37, s.14; S.C. 1919, c.68, s.13; RSC 1927, c.170, s.13; RSC 1952, c.234, s.13; National Transportation Act, S.C. 1966-67, c.69, s.8; RSC 1970, c.N-17, s.8. Logically, it would appear that this provision was intended to encompass interest which did not present conflicts as deleterious to the regulatory process as those interests encompassed by the first provision discussed. For example, ownership of stock

in CPR by a spouse would probably have been a prohibited indirect interest while such ownership by a cousin might have been too indirect and might not have been disqualifying.

37. The term "transportation" includes, railway, air, commodity pipeline, shipping and motor vehicle transportation.

38. National Transportation Act, RSC.1966-67, c.69, s.9(1); re-enacted - RSC 1970, c.N-17, s.9(1).

39. National Transportation Act, S.C. 1966-67, c.69, s.9(2); re-enacted - RSC 1970; c.N-17, s.9(2).

40. See note 20, supra.

41. Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-75, c.49, s.5(1).

42. See note 41 supra. This appears to provide for automatic disqualification to act as CRTC members if such an interest is acquired. In any case, it would probably be "cause" for removal by cabinet.

43. Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-76, c.49, s.5(2).

44. The CRTC regulates telecommunications through the Railway Act and the National Transportation Act (Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-76, c.49, s.14(2). Under the National Transportation Act, "commission" is defined to mean the CRTC when used in relation to telegraphs and telephones. There is no doubt that the provision for a cabinet appeal in that Act is in relation to telegraphs and telephones (Inuit Taprrisat v. The Right Hon. Jules Leger et al, [1979] 1F.C. (C.A.)). See note 45 below. By analogy, the conflict of interest provisions are also

in relation to telegraphs and telephones, so far as they may be so construed rationally.

45. Railway Act, S.C. 1903, c.58, s.44(2); re-enacted - RSC 1906, c.37, s.56(2); S.C. 1919, c. 68, s.52(1); RSC 1927, c.170, s.52(1); RSC 1952, c.234, s.53(1); National Transportation Act, S.C. 1966-67, c.69, s.64(1); RSC 1970, c.N-17, s.64(1).

46. Railway Act, S.C. 1903, c.58, s.44( ); RSC 1906, c.37, s.56( ); S.C. 1919, c.68, s.52(8); RSC 1927, c.170, s.52(3); repealed - S.C. 1951 (2nd sess.), c.22, s.4. The provision was amended by S.C. 1910, c.50, s.1 to require notice to the other parties of the grounds of appeal and to require application to the BTC for leave to appeal to be made within one month of the administrative reform being appealed. (With an exception for special circumstances).

47. Railway Act, S.C. 1919, c.68, s.52(2); RSC 1927, c.170, s.52(2); repealed S.C.1951 (2nd sess.), c.22, s.4. The provision was amended by S.C. 1906, c.42, s.3 to require notice to the other parties and by S.C. 1919, c.68, s.52(3) (via re-enactment) to require application to the court for leave to be made within one month of the administrative action being appealed (with an exception for special circumstances).

48. S.C. 1951 (2nd sess.), c.22, s.4 (amended RSC 1927, c.170, s.52); Railway Act, RSC 1952, c.234, s.53(2); re-enacted - National Transportation Act, S.C. 1966-67, c.69, s.64(2); RSC 1970, c.N-17, s.64(2); amended - RSC 1970, c.44(1st Supp), s.10 (change from the Supreme Court of Canada to the Federal Court of Appeal).

49. Railway Act, S.C. 1903, c.58, s.43; re-enacted - RSC 1906, c.37, s.55; S.C. 1919, c.68, s.43 (also, amended to extend to questions

of jurisdiction as well as questions of law); RSC 1927, c.170, s.43; RSC 1952, c.234, s.44; National Transportation Act, S.C. 1966-67, c.69, s.55; RSC 1970, c.N-17, s.55; amended - RSC 1970, c.10 (2nd Supp), s.55 (change from the Supreme Court of Canada to the Federal Court of Appeal).

50. See note 48, supra.

51. See note 49, supra.

52. Recent Supreme Court of Canada decisions include Service Employees' Internation Union, Local No. 333 v. Nipawin District Staff Nurses' Assoc., [1975] 1 SCR 382 and CUPE, Local 963 v. New Brunswick Liquor Corp., (1979), 26 N.R. 341 (S.C.C.).

53. Possible example is London Cable TV.

54. See note 1, supra. In both these cases, the agency's interpretation of its enabling statute was not found to be patently unreasonable nor irrational.

55. Federal Court File A-441-79.

56. Challenge Communications v. Bell Canada, Telecom Decision CRTC 77-16, December 23, 1977.

57. See Bell Canada Increase in Rates, Telecom Decision CRTC 78-7, August 10, 1978.

58. C.C. Johnston (1980), The Canadian Radio-television and Telecommunications Commission, Draft Study Prepared for the Law Reform Commission of Canada, p.93.

59. Telesat Canada, Proposal Agreement with Trans-Canada Telephone System, Telecom, Decision CRTC 7710, August 24, 1977.

60. CNCP Telecommunications Intercommunication with Bell Canada, Telecom, Decision 79-11, May 17, 1979.

61. Government Organization Act, S.C. 1968-69, c.28, ss.7-12.

62. Department of Communications Act, RSC 1970, c.C-24.

63. See note 56, supra.

64.

65. P.238.

66. An Act to amend Chapter 33, Acts of 1903 entitled, "An Act Relating to Telephone Tolls", 304 Edwd VII, 1903-4, Chapter 36.

67. Windsor and Aucoin (1978), p.

68. An Act to Consolidate and Amend Chapter 1, Acts of 1909, "An Act to Establish a Board of Public Utility Commissionors" and Acts on Amendment thereof, 3 Geo v. 1913.

69. Note 65, supra, s.2(6).

70. Public Utilities Act, Chapter 258, R.S.N.S. 1967, as amended by 1970, Chapter 65; 1972, Chapter 51; 1976,Chapter 32; 1978, Chapter 23.

71. An Act to Establish a Board of Public Utility Commissions, 9 Edwd VII, 1909, Chapter 1.

72. Windsor and Aucoin (1978), p.211.

73. Windsor and Aucoin (1978), p.241

74. Note 68, supra, 52(4).

75. Note 68, supra, s.2(5).

76. Note 68, supra, s.14(1), (2), (3).

77. Note 68, supra, s.5(1), (2).

78. Note 65, supra, s.5(3).

79. Note 68, supra, s.62.

80. Windsor and Aucoin (1979) p.247.

81. Note 68, supra, s.9.

82. Note 70, supra, s.14(1).

83. Note 70, supra, s.13(1).

84. Note 70, supra, s.57.

85. Note 70, supra, s.51.

86. Note 70, supra, s.53.

87. Note 70, supra, s.20.

88. Note 70, supra, s.38.

89. Note 70, supra, s.39.

90. Note 70, supra, s.59.

91. Note 70, supra, s.42.

92. Note 70, supra, s.39(5).

93. Note 70, supra, s.42(1).

94. Most of the historical discussion in this section is from D.W. Smythe, "A Study of Saskatchewan Telecommunications", July 1974, unpublished.

95. Smythe (1974), Ibid p.5.

96. Quoted in Smythe (1974), Ibid p.3.

97. Dagger, F., Report, to the Premier, March 25, 1908.

98. op. cit., p.8.

99. 8 Edw. VII, 1908, Chapter 5.

100. 8 Edw. VII, 1908, Chapter 6.

101. 8 Edw. VII, 1908, Chapter 7.

102. Smythe (1974), p.28.

103. S.S. 1912-13, Chapter 23.

104. Crown Investments Corporation of Saskatchewan, "Public Enterprise in Saskatchewan", Dec. 1979, p.30.

105. Ibid, p. 28.

106. R.S.S. 1978, Chapter S-34.

107. SaskTel., Basic Mission Statement, p. 5. Note, that no similar franchise right has been granted by the Provincial legislature to any other company.

108. Ibid., p. 5

109. Ibid., p. 6.

110. Ibid., p. 6.

111. Ibid., p. 6.

112. Ibid., p. 7.

113. Ibid., p. 8.

114. Note 106, supra, s. 36.

115. This discussion is largely taken from note 104, supra, pp. 21-24.

CHAPTER THREE

AN ANALYSIS OF THE PROCESS OF RATE SETTING

3.0 Bell Canada

All the rate cases since 1950 for Bell Canada have been analyzed (see Appendix 1 for a detailed examination of the case between 1949 and 1974. A number of points stand out.

Bell Canada:

1) The number of intervenors increased 8 years ago in the 1972 rate case; before that the number of intervenors appears to fluctuate somewhat. There were a significant number of major interventions in the 1950's.
2) The province of Ontario did not intervene in rate hearings until 1966 when the attorney general's department appeared; the intervention by the province of Ontario was not labelled as an Ontario Government intervention until 1972.
3) The Quebec government first intervened in 1969.
4) The major interventions in the 1950's and 1960's were provided either by city (town, municipal) governments or by groups of municipalities (first appearing in 1958).
5) Throughout this period, numerous special interest groups (United Electrical Radio and Machine Workersof America, Industrial Wire and Cable Ltd., Canadian Civil Liberties Association) appeared.
6) Residential consumers were not specifically represented at the hearings until 1973/1974, when the Consumers Association of Canada appeared.

7) The three major motivations for rate applications by Bell Canada have been:

   a) the construction programme required rate increases to support investment,

   b) the cost of raising capital (to meet expansion) had risen,

   c) costs other than construction had increased.

8) In many cases, intervenors opposed the construction programme; the regulator in the great majority of cases sided with the company's position on the need for construction.

9) In 1919, the first Bell Canada rate case, the Board of Railway Commissioners for Canada accepted the company's proposed toll charges but reduced the increase in exchange rates. (The Board of Railway Commissioners for Canada, Judgements, orders, Regulations and Rulings IX (1919 pp. 63-71). The policy of keeping local rates low at the expense of toll rates is then an old and well established practice.

   In a number of important instances, the regulator opposed the company's desire to raise the monthly charge for local service. In one case (1973), the regulator was told by the Cabinet to disallow its recommended increase in connection charges.

10) The Regulator has at times pressured the company to raise its debt to equity ratio.

11) The Regulator has not often disallowed operating expenses (in 1950, $500,000 was disallowed; in several years annualizing wage increases for future test years were disallowed).

12) The relationship between Bell and its subsidiaries (particularly Northern Electric) was an important issue in each rate case.

13) The relationship between Bell and AT&T was also raised in most rate cases.

14) Rules for accounting, especially for deferred income taxes, were frequent subjects of analysis in the rate cases.

15) Until recently, the Regulators felt that in the absence "of definite proof that there has been failure to exercise proper judgement in the circumstances", (1950 rate case); management decisions should hold. The CRTC has, however, recently stated

> "In short, while the Commission has no desire to 'manage' the companies subject to its regulatory jurisdiction, it does not consider itself restricted by any purely conceptional dividing line in investigating and determining matters properly coming before it."
>
> (Decision May 23, 1978, Rules of Procedure)

16) Before control of federally chartered telecommunications firms passed to the CRTC, there was only one major instance of a Regulator initiating an inquiry into telecommunications matters, the 1966 review by the CTC of the method of regulating Bell. In that case, the CTC moved from earnings per share regulation to rate base, rate of return regulation. Most telecommunications cases to come before the BTC or CTC involved rates. (The CRTC has decided a number of cases on other issues, see Chapter 2.)

17) The Regulators, at least until recently, did not reject "value of service" pricing, i.e. price discrimination was accepted.

"...although broad, relative cost trends are not ignored, the individual cost of specific services in a particular case are not controlling and rates are based primarily on the relative value of the service to the customer."

(1958 Rate Case, C.955.172, Decision p. 23)

18) The Regulators did not accept the arguments made by Counsel for larger cities and municipalities that there was unjust discrimination against their residents. The Regulators refused to accept intervenor's views that extension telephones be dropped from the calculations which grouped cities by exchange size for the purpose of rate setting. (see, 1950 rate case, 1972 rate case)

19) Bell Canada received all or most of its requested revenue increase in 1949/50, 1951/52, 1958/59, 1970, 1973/74, 1976/77.

20) Bell Canada received far less than its requested revenue increase in 1957/58, 1968/69, 1971/72, 1972/73, 1975, 1978.

21) Of the 4 Bell Canada rate cases before the BTC, Bell received substantially all its request in 3 cases.

22) Of the 7 Bell Canada rate cases before the CTC, Bell received substantially all its request in 3.

23) Of the 2 Bell Canada rate cases before the CRTC, Bell received substantially all its request in 1.

From these brief observations (and from a closer examination of Appendix 1), it is, I think, clear that the Regulators forced local rates to increase by less than toll rates. Regulators also accepted rate making principles which implicity involved cross subsidization. First, value of service pricing and exchange rate groupings imposed higher prices for areas with larger numbers of telephones. Secondly, area wide pricing meant equality of prices even though costs of service might vary.

These cross subsidies deserve thorough analysis. Three crucial questions come to mind. First, why would the regulators wish to subsidize certain groups, given that the regulators were supposedly divorced from

political influences? Secondly, how did the pressures in the regulatory process lead to these subsidies? Third, was public welfare well served by those subsidies, and therefore by the process which caused them?

The major intervenors in the 1950's and 1960's were individual cities or municipalities (Montreal, Toronto) and associations of municipalities. In 1950 for example, the cities of Toronto, Montreal, Ottawa, Hamilton and Woodstock, Quebec, Valley Field, Trois Rivieres, St. Thomas and Galt and Guelph individually appeared. In addition, the Boards of Trade of 5 cities (Toronto, Ottawa, Dundas, Port Hope, Simcoe) and Chambers of Commerce of 9 cities (Windsor, Peterborough, St. Thomas, Oakville, Trafalgar, Midland, North Bay, Sarnia, Oshawa) jointly intervened. In 1951, 8 cities again individually appeared (the only intervenors). In 1958, 35 cities in Ontario and Quebec formed a joint intervention; 7 other cities appearing individually. The only other intervenors in 1958 were the Canadian Labour Congress and the United Electrical Radio and Machine Workers Union. In 1966, (a 'generic' hearing on the method of regulation rather than a rate case), the Canadian Federation of Mayors and Municipalities , the Association of Ontario Mayors and Reeves, the Ontario Municipalities Association, the Union de Quebec Municipalites and 105 Ontario and Quebec municipalities jointly intervened. Other than occasional appearances by smaller municipalities, no organized city intervention occurs again.

The regulators of Bell Canada have been appointed by Federal politicians. Moreover, most of the period since 1906 saw regulators who held office until age 75 and who could only be removed "upon address of the Senate and House of Commons."[1] These two facts - judicial independence and appointment by a wider political constituency than its regulatory jurisdiction,

should have made regulation insensitive to local political issues. The regulator would not necessarily feel that this self-interest would be maximized by improving the welfare of those customers of Bell Canada who proportionately consumed large amounts of local service and small amounts of toll service. While we have not examined interventions at the 1919 rate case, one likely hypothesis is that strong interventions by local user groups achieved this result.[2] The natural question then is as we asked above - why did these groups appear when the 'free rider' and 'transactions costs' problems suggest that groups will not form to intervene?

Why would a municipality appear at a Bell Canada rate hearing? Let's take as our example the city of Montreal which was the major intervenor in the 1949/1950 rate case. The city of Montreal could have appeared for two purposes. First the city could have appeared on its own account because it was a major user of telephone services. The city government had a large number of telephone lines for various functions in order to communicate with the public at large. In order to minimize this bill, the city represented itself at the hearing. A second answer would be that the city appeared on behalf of its residents. We know it is not in the interest of any single user of telephone services to appear at a hearing which lasts some 50 sitting days. We also feel that no group would voluntarily form to intervene on behalf of residential customers because of the ubiquitous free rider and transaction cost problems. But, municipal governments are already formed to serve some interests of the residents of that locality. We have no evidence before us to suggest that those running for mayor or aldermanic offices would state in their platform that they would oppose Bell Canada rate increases. This probably would have been unlikely since

there had not been a rate increase since 1920. One can however see that an announcement of substantial increases in local rates could cause a discussion of this rate increase at a municipal meeting. Concerned private citizens, an alderman or perhaps the mayor could come to a meeting and suggest that these local rate increases were not in the interests of their constituency. Once the issue had been raised at a meeting of the municipality, it would have been difficult for any member of the municipal government to oppose the intervention of the city at the rate hearing. Members of the municipal government could have argued that theoretically they were not the representatives chosen to fight telephone rate increases; that it was not their responsibility and that they should not be held accountable for what happened to telephone rates. Rate increases however make good newspaper material as average municipal meetings do not. I would imagine that any local municipal officer who suggested at a meeting that the municipality not fight local rate increases would have received much bad press. It would therefore not be in the interest of any single member of the municipal government to oppose the idea that the municipality intervene at the Bell Canada rate hearings. The free rider problem would of course not exist since the municipal government itself is small consisting of 10 to 20 people, each of whom would not, as indicated above, have an interest in opposing the intervention. Transaction costs problems would be minimal because the city government of course had tax revenue which it could use to appear. As a government, i.e. a body with discretionary authority to raise and spend dollars, the city of Montreal would not have to ask for voluntary donations to intervene at Bell Canada rate hearings. As a result, I would suggest

that pressure by several citizens or a single memeber of the municipal government could cause municipal governments to intervene at a rate application. As a result we see the intervention of very small municipalities. At the 1949/50 rate case the municipalities of St. Thomas, Guelph, Galt intervened together, appeared at the entire hearing, presented arguments and requested seven interrogatories. One should note from Table 3-1 that all the interveners suggested the same amount of surplus and very similar amounts for the debt equity ratio. One would therefore have to suppose that they had met before or during the hearing and determined their arguments. Also note, however, that it is clearly not in the interest of each of the cities in Table 3-1 to request the same rate increase. Bell Canada's local rates increase with city size. Therefore the residents of Toronto and Montreal, for example, pay far more for local service, either residential or business, than do residents of St. Thomas, Guelph, Galt. Bell Canada's value of service pricing charges higher rates for larger municipalities because there are more people to call and therefore the 'value' of a telephone is supposedly greater. As private interest groups, many of these cities would then have opposing views on how to distribute the generally agreed upon total revenue increase; each wishing the other to pick up the burden. There were other reasons why we would not expect all these cities to agree on a single rate structure. First the mix of residential and business traffic would be very different in these cities. For example the city of Toronto would have a large proportion of business traffic while the city of Trois Rivieres would not. In addition, the desire for the relative increases in local versus long distance rates would also vary by city depending on the mix of local and long distance traffic.

TABLE 3-1

BELL RATE CASES

Item:	Year: 1949 - 50 File # : C-955.170	1951 - 52 C-955.171
i) Sitting Days	50	5
ii) Interrogatories	173	
iii) Witnesses		
-Bell	23	6
-Non-Bell	8	1
iv) Revenue Increase Requested	$25.7m	$15.8m
v) Revenue Increase Granted	$25.7m	$14.3m
vi) ROR - Requested	ns	ns
- Granted	ns	ns
vii) ROR on Common Equity - Requested	$2 + 50¢	$2 + 56¢
- Granted	$2 + 43¢	$2 + 43¢
viii) Intervenors Total Number	10	8
Names:	1) City of Toronto 2) City of Montreal 3) City of Ottawa 4) Hamilton/Woodstock 5) City of Quebec 6) City of Valleyfeild 7) City of Trois Rivieres 8) St. Thomas, Galt, Guelph 9) Miss Sophie Kohen 10) Boards of Trade (5) and Chambers of Commerce (8)	1) City of Toronto 2) City of Montreal 3) City of Ottawa 4) City of Quebec 5) City of Hull 6) City of Sherbrooke 7) Hamilton/Woodstock 8) St. Thomas

Table 3-1 cont'd.

BELL RATE CASES

Item:	Year: 1957 - 58 File # : C-955.172	1958 - 59 C-955.173
i) Sitting Days	15	10
ii) Interrogatories		
iii) Witnesses -Bell -Non-Bell	 9 3	 9 5
iv) Revenue Increase Requested	$24.2m	$17.2m
v) Revenue Increase Granted	$10.3m	$17.2m
vi) ROR - Requested - Granted	ns ns	ns ns
vii) ROR on Common Equity - Requested - Granted	$2 + 65¢ $2 + 43¢	$2 + 43¢ $2 + 43¢
viii) Intervenors Total Number	10	11
Names:	1) City of Montreal 2) City of Ottawa 3) Municipality of North York 4) Municipality of Scarborough 5) Municipality of Chambly P.Q. 6) Municipality of Aylmer P.Q. 7) Drummondville/Grantham West P.Q. 8) Cdn. Labour Congress 9) United Electrical, Radio and Machine Workers Union 10) 35 Municipalities/Cities in Ontario and Quebec	1) 57 Ontario & Quebec Municipalities 2) Montreal 3) Scarborough 4) North York 5) Lachine P.Q. 6) Canadian Labour Congress 7) Alberta, Saskatchewan and Maritimes Transportation Commission 8) Prov. of Manitoba 9) Prov. of British Columbia and BC Union of Municipalities 10) BC Tel. 11) CN-CP Railways

Table 3-1 cont'd.

BELL RATE CASES

Item:	Year: / File # :	1965 - 66 C-955.176	1968 - 69 C-955.178
i)	Sitting Days	22	44
ii)	Interrogatories		
iii)	Witnesses -Bell		23
	-Non-Bell		8
iv)	Revenue Increase Requested		$83.6m
v)	Revenue Increse Granted		$27.5m
vi)	ROR - Requested	7.0%	8.0%
	- Granted	6.2% - 6.6%	7.3%
vii)	ROR on Common Equity - Requested	8.5%	10.5%
	- Granted		8.8%
viii)	Intervenors Total Number	7	11
	Names:	1) Attorney-General, Prov. of Ontario 2) Cdn. Fed. Mayors and Municipal Assoc. Ont. Mayors and Reeves Ontario Municiapl Assoc. Union Quebec Municipalities 3) Industrial Wire & Cable 4) Consumers Gas 5) Communist Party of Canada 6) International Municipal Signal Association 7) United Electrical, Radio and Machine Workers Union	1) Ministry of Justice, Prov. of Ontario 2) Govt. of Quebec 3) Cdn. Fed. Mayors and Municipal 4) Hotel Assoc. of Canada 5) Carlyle Gilmour 6) Telephone Answering Service Assoc. 7) North York 8) Eugene Whelan, M.P. 9) Robert Archer 10) Hudson Janisch 11) T. Eaton Co.

Table 3-1 cont'd.

BELL RATE CASES

Item:	Year: 1970 File # : C-955.180	Year: 1971 - 72 File # : C-955.181
i) Sitting Days	8	23
ii) Interrogatories		10
iii) Witnesses -Bell -Non-Bell	5 1	2
iv) Revenue Increase Requested	$32.0m	$78.1m
v) Revenue Increase Granted	$24.m	$47.2m
vi) ROR - Requested - Granted	7.6% 7.5%	8.2% - 9.0% 7.8% - 8.2%
vii) ROR on Common Equity - Requested - Granted	9.2% 9.0%	10.5% 9.5%
viii) Intervenors Total Number	5	5
Names:	1) Ontario Attorney-General 2) Govt. of Quebec 3) Assoc. of Ontario Mayors and Reeves 4) Hotel Assoc. of Canada 5) Carlyle Gilmour	1) Govt. of Ontario 2) Govt. of Quebec 3) Assoc. of Ontario Municipalities 4) Hotel Assoc. of Canada 5) Carlyle Gilmour

Table 3-1 cont'd.

BELL RATE CASES

Item:	Year: 1972 - 73 File # : C-955.182	Year: 1973 - 74 File # : C-955.182.1
i) Sitting Days	25	51
ii) Interrogatories		
iii) Witnesses		
-Bell	8	13
-Non-Bell	0	9
iv) Revenue Increase Requested	$36m	$51.8m
v) Revenue Increase Granted	$36m	$51.8m
vi) ROR - Requested	7.8%	8.6% - 9.3%
- Granted	7.8%	8.6% - 9.1%
vii) ROR on Common Equity - Requested	9.5%	11% - 12.5%
- Granted	9.5%	11% - 12.0%
viii) Intervenors Total Number	14	14
Names:	1) Govt. of Ontario	1) Govt. of Ontario
	2) Govt. of Quebec	2) Govt. of Quebec
	3) Assoc. of Ont. Municipalities	3) Assoc. of Ont. Municipalities
	4) Hotel Assoc. of Canada	4) Hotel Assoc. of Canada
	5) Carlyle Gilmour	5) Carlyle Gilmour
	6) Cdn. Cable TV Assoc.	6) Consumers' Assoc. of Canada
	7) Corp. des Enseignant du Quebec	7) Bell Canada Traffic Employees Assoc.
	8) Native Marathon Dreams	8) Inuit Tapirisat
	9) Lincoln & Grimsby Farmers. Bus. & Professional Assoc.	9) Action Bell Canada
	10) Windsor & District Labour Council	10) Greater Montreal Anti-Poverty Group
	11) K. Rubin	11) Centre for Public Interest
	12) Telephone Answering Service Assoc.	12) Golden Age Assoc.
	13) La Federation du AGEF du Quebec	13) J. Rootham
	14) Corp. of Teachers of Quebec	14) C. Brown

Table 3-1 cont'd.

BELL RATE CASES

Item	Year: 1975	1976 - 77
	File # :	
i) Sitting Days	26	24
ii) Interrogatories		780
iii) Witnesses		
-Bell	8	14
-Non-Bell	1	4
iv) Revenue Increase Requested	$110.3m	$171.4m
v) Revenue Increase Granted	$110.3m	$162.0m
vi) ROR - Requested	8.4%	10.1%
- Granted	8.4%	9.98&
vii) ROR on Common Equity - Requested	9.2%	12.8%
- Granted	9.2%	12.6%
viii) Intervenors Total Number	12	15
Names:	1) Govt. of Ontario	1) Action Bell Canada
	2) Govt. of Quebec	2) Communications Union Canada
	3) CAC	3) CAC
	4) Inuit Tapirisat	4) Inuit Tapisat
	5) NAPO	5) Carlyle Gilmour
	6) Action Bell Canada	6) NAPO
	7) Civil Liberties Assoc.	7) MTC Ontario
	8) Carlyle Gilmour	8) Min. Comm. P.Q.
	9) Township of Spanish River	9) S.A. Rowan
	10) Jonh Rodriquez, M.P.	10) Conseil Scolaire d'ile de Montreal
	11) Regional Municipality of Peel	11) Cdn. Fed. of Communications Workers
	12) Municipalite du Canton d'Ascot	12) Shell Canada
		13) Ville de Sherbrooke
		14) Seymour Stern
		15) Coop. de Devel. Riviere-du-Loop

Table 3-1 cont'd.

BELL RATE CASES

Item:	Year: 1978 File # :
i) Sitting Days	33
ii) Interrogatories	
iii) Witnesses -Bell -Non-Bell	 19 11
iv) Revenue Increase Requested	$398.9m
v) Revenue Increase Granted	$248.0m
vi) ROR - Requested - Granted	10.66%-11.12% 9.97%
vii) ROR on Common Equity - Requested - Granted	13.5%-14.5% 12.0%
viii) Intervenors Total Number	17
Names:	1) CNCP Telecommunications 2) R & D Combines Investigations Branch 3) MTC Ontario 4) Govt du Quebec 5) CAC 6) Wa-Wa-Ta Society 7) NAPO 8) Inuit Tapirisat 9) Tagramicitic Nipingat 10) CAC - Quebec 11) Action Bell Canada 12) L.J. Szabo 13) Cdn. Fed. of Communications Workers 14) Institute des Consammateurs 15) Carlyle Gilmour 16) Canadian Press 17) S.A. Rowan

One criticism of federal regulation of telecommunications before the CRTC took over jurisdiction was the lack of examination of the structure of telephone rates. One can see that the majority of the intervenors were not eager to discuss these issues since their coalitions were relatively fragile groupings of diverse customers. Other than the arguments in 1950 and 1972 by the larger cities that the value of service pricing principle discriminated against customers in their cities, the rate structure was not a crucial issue in the cases. Nor was Bell Canada interested in having its rate structure challenged. Moreover, the regulators always consistently accepted the principle. During the period, organized intervention which began with the appearances of individual municipalities turned to appearances of groups of municipalities and finally representation of provincial governments with no or few municipalities appearing after 1968/69. When municipalities appeared in their own right, they could argue for lower rates for themselves. However, it is difficult to conceive of an intervention by 57 cities and municipalities (as in 1956/57) arguing for a specific structure of rates, since a specific structure would benefit some members of the group at the expense of other members. The public interest or groups of private interests represented by the province of Ontario should be easier to discern. Given our arguments on the market failures in political markets, one would expect representatives of provincial governments to represent at rate hearings those interests which would ensure re-election. This hypothesis would then suggest that the Ontario Government would argue for lower telephone rates to smaller communities, i.e. those communities where fewer votes are needed to hold a seat in parliament, i.e. the provincial government would not be opposed to value of service pricing since that principle presumably benefitted those voters whom they wished to subsidize. In fact, the Province did not seriously challenge value of service pricing in its interventions.

From examination of the rate hearings, it is clear that certain well organized intervenors attempted to use the process to discuss and attempt to redress issues which were not germane to rates. Industrial Wire and Cable, for example, examined the relationship between Bell and Northern Electric, arguing that the prices Bell paid for equipment were discriminatory. Undoubtedly, the relationship between the telecommunications firm and its subsidiaries is important for regulation to be effective. However, the rate review process is not the arena to discuss such issues especially as they concern competitors of the subsidiary. First, such discussions distract attention from the question of rates. Second, the rate hearing process is not well set up to deal with the intrusion of more general issues. Third, discussions of these types impose externalities on other groups who must pay their lawyer to sit through 15-20 sitting days many of which are irrelevant to that individual intervenor's position. Interventions then can act to exacerbate the market failures implicit in the regulatory process by increasing the costs of intervention for others. There are other examples of this type of intervention - the United Electrical Radio and Machine Workers Union and other unions attempting to negotiate wages through the rate hearing process.

There are another set of interventions which are likely to appear in any regulatory process - the intervention of cohesive groups with the explicit desire to redistribute income their way (i.e. to lower their specific rates). For example, the Hotel Association of Canada was an active intervenor in 5 hearings (1968/69, 1970, 1971/72, 1972/73, 1973/74). In one year, the Association presented a very strong case involving most issues. In other years, the Association, in effect, only lobbied for lower rates

for its members. These interventions were never very successful in reducing rates or increasing commissions to hotels and the Association has not appeared at Bell Canada rate hearings since 1973/74.

These events are consistent with many of the hypotheses we raised in two earlier chapters. First, market failure is evident - large unorganized groups did not coalesce to appear at Bell Canada hearings (the CAIRTR did not form). Cohesive groups formed for other purposes (a firm - Industrial Wire and Cable; labour unions) did appear but presented evidence which articulated their specific interest only. Other pre-existing groups (hotel association) appeared, again, attempting to win specific favours for their constituents. More difficult to analyze are the appearances of groups of municipalities and later in the period interventions by both the Quebec and Ontario provincial governments. It is to this that we turn.

In the 1949 BTC rate hearing a number of municipalities intervened. The major points they raised concerned the construction program being too extensive; that program mainly involve the conversion to manual (rural exchanges) and a conversion to hand-held receivers. The City of Montreal called for cost studies to avoid "uneconomical development and unjust discrimination." The Cities of Ottawa and Quebec City objected to extensions being used in determining rate groupings. Note that Ottawa and Quebec City would involve many government extensions. The main arguments of the municipalities revolved around the allowed rate of return, the debt equity ratio, allowable wage rates, allowable depreciation rates, commercial expenses, maintenance expenses and the "unreasonably liberal and expensive pension plan." The municipalities also questioned the service agreement between Bell Canada and AT&T (1% of gross revenue) and formally asked for an extension of BTC jurisdiction over Northern Electric. The municipalities argued that the accounting practices tended to distort fixed plant in the

interest of the company not subscribers.

In 1952 Bell proposed an increase in local rates only. The interveners stated that it was discriminatory not to raise revenue from toll services as well. The major intervener in this case was the City of Toronto. Other questions concerned the debt equity ratio.

In the 1957 and 1958 hearings the major intervener was a group of thirty-five cities in Ontario and Quebec. A number of cities and municipalities appeared on their own behalf; namely, Ottawa, Montreal, Scarborough, and North York. Only the thirty-five cities, Scarborough and North York were present throughout the entire hearing. All the interveners recommended a range for the debt equity ratio between 45% and 50% and a reduction in earned surplus from the $0.43 per share allowed by the Commission in previous decisions to $0.27 per share. They also argued that expenses were too high and that deferred income taxes should be normalized rather than flowed through. There were questions also on Bell's payments to Northern Electric for equipment. Note there were no questions on the rates structures as they existed between different size municipalities. The only discussion of rates structure involved the differentials between the regulated and unregulated activities of Bell Canada. The interveners spent a considerable portion of their cross examination on the matter of the capital cost allowance and the deferred tax provision introduced into the Income Tax Act in 1954. The BTC allowed Bell's normalization procedures. The Province of Ontario appealed the BTC decision in respect of the Board's approval of the use of normalization of deferred income tax provisions. Privy Council Order No. 1958-602 rescinded the Board of Transport Commissioners Order No. 93401 of the 10th of January 1958. The government directed the Board of Transport Commissioners as a matter of rate making principle that tax equalization reserves (deferred tax credit accounts) should not be regarded

as necessary expenses or requirements determining rates and charges. In a second case heard in 1958 the BTC re-examined these issues. Bell in this case reverted to its pre-1954 procedures and did not utilize deferred accelerated depreciation at all. The interveners submitted that PC No. 1958-602 implied that the course of action chosen by Bell should be disallowed. The Board in its ruling stated that one could not go behind the working of the Order in Council. In particular the management of Bell could not be forced to accept any particular accounting procedure. Note, that there is no rate case until 1965-66. In that case, the Government of Ontario recommended that Bell go back to its method of normalizing accelerated depreciation charges because the procedure of not accounting for them at all made subscribers even worse off.

The 1965-1966 hearing was requested by the BTC in order to determine a just and reasonable permissible level of earnings for Bell Canada. The major intervener was the Canadian Federation of Mayors and Municipalities. The interveners approved the change from an earnings per share basis for regulation to a rate of return basis but did not approve Bell's requested rate of return of 8.4%. The interveners suggested a lower rate of return and a higher debt equity ratio.

In the 1968 case there were eleven interveners including two governments (the Ontario Ministry of Justice and the Government of Quebec, as well as the Canadian Federation of Mayors and Municipalities). The interveners discussed rate of return, debt equity concepts and whether telephone subscribers in general should subsidize users of unregulated services. No discussion occurred on the rate structure.

In the 1970 rate hearing the three major interveners were the Ontario Attorney General, the Quebec Government and the Association of Ontario Mayors and Reeves and the Ontario Municipalities Association.

Bell had requested a 6.25% increase in exchange service rates and no increase in long distance rates. The Ontario Attorney General argued that this was irrational. The CTC in its decision allowed only a 3.75% increase in rates for basic exchange services because of the need to maintain a fair distribution of the burden of the increase to the residential and small business subscribers.

In the 1971-72 rate hearing, the major interveners were the Ontario Government, the Quebec Government and the Association of Ontario Municipalities. The interveners especially the Ontario Government and the Association of Ontario Municipalities argued that rate groups should be based on the number of main telephones excluding extensions. The CTC argued that extensions should be included for otherwise Montreal and Toronto would have not borne "their just and reasonable share in the increase necessary for Bell's revenue requirements."

The next case occurred between the years 1972 and 1974 and had two segments because the original CTC decision was unilaterally suspended by the Federal government. The major interveners were the Ontario Government, the Quebec Government and the Association of Ontario Municipalities. The Ontario Government, primarily, questioned Bell's proposed 50% increase in installation rates on the basis that these were not cost-related and that the social impact had not been examined. The CTC in its decision allowed these increases. The Federal government objected much more strenuously to these increases than had the interveners. In their reversal of the decision the Federal Government suggested a reduction in installation charges by the establishment of appropriate differentials and service charges between installations requiring a visit and those not requiring a visit (a point raised by the Province of Ontario). The Federal Government requested that the CTC examine the social impact of any additional increase

in residential and installation charges especially for low income subscribers. Note that no intervener appealed the original decision of the CTC. In the second part of this case, the interveners dealt mainly with rate of return issues and elements of rate base. The Ontario Government for the first time argued for information on cost of service in order to evaluate the equity of the rate structure. Basically the Ontario Government was concerned that basic service subsidized other services especially the new varieties of toll communications services and data transmission.

The essential points of this brief summary of the arguments raised by municipalities in their interventions in Bell Canada rate cases since 1949 are as follows. The municipalities rarely discussed issues of rate structure, i.e. the relative prices among different sized cities; instead they addressed general issues tending to lower the required revenue of Bell Canada. It was fairly easy for the municipalities to argue for a higher debt equity ratio than proposed by Bell Canada, for lower rates of return on capital overall and on equity capital, that expenses were too high and that income taxes were not properly accounted for. Given the existing rate structure and assuming that increases in rates tended to be proportionally spread across the rate structure (which was true) than any combined exercise which tended to reduce the overall rate of return for Bell Canada or its overall allowed expenses would tend to reduce the rates for every customer. Two points of contradiction stand out however. The first of these is the objection by the municipalities against increases in local rates above the increases proposed for toll rates. If the average customers telephone bill was equally divided between local exchange charges and toll charges, then the municipalities should have been indifferent to equal increases in toll and exchange rates. The municipalities seemed to have taken their mandate to represent residential customers and small businesses, ostensibly those

customers of Bell Canada whose bill would consist primarily of local exchange rate charges. In addition, in the early 1970s, the Province of Ontario began to question the rate structure and proposed two changes - that extensions not be included in rate groupings (thus tending to decrease the relative rates for cities with large number of extensions, that is, government and business cities, Toronto and Ottawa) and secondly, that cost of service studies be undertaken to examine the equity of rates. We have argued above the province would tend to argue for changes in relative rate structures which would benefit the smaller customers. The first proposal by the Province would have benefited residents of larger cities (the wealthier or at least business) while the second proposal would have benefited residential customers since it was aimed primarily at what the province felt were too low rates for services aimed at large business.

3.1 The Process and Federal Regulation of Telecommunications

In Chapter One, we raised the issue that the internal process established by the SRA might impact on the outcomes of the regulatory process. In this section, we attempt to examine these aspects of the internal process insofar as they affected rate setting for Bell Canada.

(a) Allocating the Budget

Determining the expenditures incurred by federal agencies in regulating federal telecommunications carriers is a difficult task since federal telecommunications regulation was until recently appended to the federal regulation of transportation. In Tables 3-2 to 3-4 various expenditures of federal regulatory agencies are presented. Since the Canadian Transport Commission took over the responsibilities of the Board of Transport Commissioners,

the Air Transport Board and the Canadian Maritime Commission, the expenditures of the latter three Boards are given so that the total expenditures on transportation (and telecommunications) regulation are visible. Thus in 1966/67, the quantity called 'Expenditures' equalled $1,499,000 for the BTC, ATB and CMC combined (see Table 3-2). In 1966/77, the CTC's 'Expenditures' were $1,939,000 (see Table 3-3). Included in 'Expenditures' are salaries and wages; professional and special services; travel; freight express and cartage; office expenses, etc.

It is impossible from these figures to breakout the expenses involved in regulating telecommunications, but the figure is likely small. The CTC had no telecommunications staff since it was told from the beginning that it was losing regulatory powers over telecommunications. In 1979/80, the total expenses of the CRTC amounted to $14,921,000. However, the expenses of the staff of the telecommunications branch was only $1,088,200.[3] In 1979/80 there were 10 days of telecommunications hearings involving an expenditure of $37,500 for direct costs - travel, reporting services, rental of hall and equipment, etc.[4] On average, 60 days of telecom. hearings are held. Assuming 60 days of hearings, and that half of the commissioners handle telecommunications (as compared to broadcasting/cable) issues, the total current expenses of the CRTC's telecom. regulation would amount to $1,500,000. In Table 3-5 are listed the expenses of the Department of Communications, expenses amounting to far more than the amount spent by the CRTC on telecommunications regulations.

(b) Hearings Procedure

Both the BTC and CTC employed strict quasi-judicial procedures - they

Table 3-2

Predecessors of the Canadian Transport Commission (Thousands of Dollars)[1]

Fiscal Year	Board of Transport Commissioners			Air Transport Board	Canadian Maritime Commission		Aggregate of Administrative Expenses for the BTC, ATB and CMC
	Aggregate of Commissioners' Salaries	Administrative Expenses[2]	Expenditures[3]	Expenditures[3,4]	Administrative Expenses[2]	Expenditures[3]	Administrative Expenses[2]
1950-51	55.0	616	671	216	133	138	966
1951-52	48.3	667	715	230	131	132	1029
1952-53	55.6	809	864	239	130	130	1177
1953-54	64.6	864	929	252	133	133	1249
1954-55	64.6	905	970	248	137	137	1290
1955-56	69.7	897	967	248	132	133	1277
1956-57	75.7	869	945	267	136	136	1272
1957-58	89.0	1001	1090	291	144	144	1436
1958-59	92.5	1035	1128	336	161	161	1532
1959-60	87.2	1082	1169	375	143	143	1601
1960-61	91.0	1160	1250	470	152	152	1782
1961-62	89.0	1209	1298	564	161	161	1933
1962-63	89.0	1222	1311	615	184	267	2021
1963-64	100.8	1265	1366	633	188	320(a)	2086
1964-65	118.0	1373	1490	687	204	344(a)	2264
1965-66	118.0	1465	1538	751	236	309(a)	2452
1966-67	127.9	1652	1780	934	223	337(a)	2809
1967-68	61.8	828	890	500	109	109	3306(b)

(a) In these years, the difference between Administrative Expenses and Expenditures was due to the expense of degaussing Canadian Government ships.
(b) In this transition year, this aggregate includes the Administrative Expenses of the newly established Canadian Transport Commission ($1,896,000).

1 The figures in this table were obtained from or based on figures contained in Public Accounts of Canada which is prepared annually by the Receiver General of Canada.

2 Administrative Expenses comprises salaries and wages, terminable allowance, professional and special services, official reporting services, travelling expenses, freight and express, postage, telephones and telegrams, publication of reports, office stationery, supplies and equipment, advertising and sundries.

3 Expenditures is the sum of expenditures reported by standard objects, namely: civilian salaries and wages, civilian allowances, professional and special services, travelling and removal expenses, freight, express and cartage, postage, telephones and other communication services, publication of reports and other material, advertising and exhibits, contributions, grants, subsidies, etc., not included elsewhere and all other expenses. The amounts of contributions, grants, subsidies, etc., is not included in the figures presented here because they are large and they are not related to telecommunications (e.g., railway subsidies and ship-building subsidies).

4 Administrative Expenses equal Expenditures.

Table 3-3

Canadian Transport Commission (Thousands of Dollars)[1]

Fiscal Year	Administrative Expenses[2]	Administrative and Support Services	Regulation and Control[3]	Expenditures[4]
1967-68	1869(a)	N/A	N/A	1939(b)
1968-69	4119	N/A	N/A	4198
1969-70	5758	N/A	N/A	5763
1970-71	N/A	2041	2331	7286
1971-72	N/A	2185	2860	7843
1972-73	N/A	2852	2089	9739
1973-74	N/A	2834	3328	11919
1974-75	N/A	3797	4520	15430
1975-76	N/A	4678	5971	19643
1976-77	N/A	4207	10577	20037

(a) In this transition year, the aggregate of this quantity for the BTC, ATB, CMC and CTC is $3306 thousand.

(b) In this transition year, the aggregate of this quantity for the BTC, ATB, CMC and CTC is $3438 thousand.

1 The figures in this table were obtained from or based on figures contained in Public Accounts of Canada which is prepared annually by the Receiver General of Canada.

2 This measure is the same as Administrative Expenses in Table 3-2.

3 The amount of Grants and Contributions which was not applicable to telecommunications, at all, has been subracted.

4 This measure is the same as Expenditures in Table 3-2. As in Table 3-2 the amount of grants, contributions, subsidies, etc. which was large and was not applicable to telecommunications, has been subtracted. Expenditures include expenditures for Administrative Support Services and for Regulation and Control. The figures given for Administrative and Support Services and for Regulation and Control are components of 'Expenditures'.

Table 3-2

Predecessors of the Canadian Transport Commission (Thousands of Dollars)[1]

	Board of Transport Commissioners			Air Transport Board	Canadian Maritime Commission		Aggregate of Administrative Expenses for the BTC, ATB and CMC
Fiscal Year	Aggregate of Commissioners' Salaries	Administrative Expenses[2]	Expenditures[3]	Expenditures[3,4]	Administrative Expenses[2]	Expenditures[3]	Administrative Expenses[2]
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1951-52	48.3	667	715	230	131	132	1029
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(a) In these years, the difference between Administrative Expenses and Expenditures was due to the expense of degaussing Canadian Government ships.
(b) In this transition year, this aggregate includes the Administrative Expenses of the newly established Canadian Transport Commission ($1,896,000).

1 The figures in this table were obtained from or based on figures contained in Public Accounts of Canada which is prepared annually by the Receiver General of Canada.

2 Administrative Expenses comprises salaries and wages, terminable allowance, professional and special services, official reporting services, travelling expenses, freight and express, postage, telephones and telegrams, publication of reports, office stationery, supplies and equipment, advertising and sundries.

3 Expenditures is the sum of expenditures reported by standard objects, namely: civilian salaries and wages, civilian allowances, professional and special services, travelling and removal expenses, freight, express and cartage, postage, telephones and other communication services, publication of reports and other material, advertising and exhibits, contributions, grants, subsidies, etc., not included elsewhere and all other expenses. The amounts of contributions, grants, subsidies, etc., is not included in the figures presented here because they are large and they are not related to telecommunications (e.g., railway subsidies and ship-building subsidies).

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1974-75	N/A	3797	4520	15430
1975-76	N/A	4678	5971	19643
1976-77	N/A	4207	10577	20037

(a) In this transition year, the aggregate of this quantity for the BTC, ATB, CMC and CTC is $3306 thousand.

(b) In this transition year, the aggregate of this quantity for the BTC, ATB, CMC and CTC is $3438 thousand.

1 The figures in this table were obtained from or based on figures contained in Public Accounts of Canada which is prepared annually by the Receiver General of Canada.

2 This measure is the same as Administrative Expenses in Table 3-2.

3 The amount of Grants and Contributions which was not applicable to telecommunications, at all, has been subracted.

4 This measure is the same as Expenditures in Table 3-2. As in Table 3-2 the amount of grants, contributions, subsidies, etc. which was large and was not applicable to telecommunications, has been subtracted. Expenditures include expenditures for Administrative Support Services and for Regulation and Control. The figures given for Administrative and Support Services and for Regulation and Control are components of 'Expenditures'.

Table 3-4

Canadian Radio-Television and Telecommunications Commission

(Thousands of Dollars)[1]

Fiscal Year	Administration	Research	Expenditures[2]
1975-76	5367(a)	690(a)	10557(a)
1976-77	5740	690	12050
1977-78	7641	466	15061
1978-79	5294(b)	N/A	14921

(a) For this fiscal year, the figures for the now defunct Canadian Radio-television Commission are given for purposes of comparison.

(b) This figure may or may not be comparable with the figures for preceding years because of a change in the break-down of Expenditures.

1 The figures in this table were obtained from Public Accounts of Canada which is prepared annually by the Receiver General of Canada. The measure, Administrative Expenses, reproduced in Table 3-2 and Table 3-3 for the predecessor agencies is not available for this agency.

2 This measure is the same as Expenditures in Table 3-2 and Table 3-3. However, the amounts of grants, contributions, subsidies, etc., have not been subtracted because they are small and they are grants in relation to research which may be relevant to telecommunications. The figures given for Administration and for Research are components of 'Expenditures'.

Table 3-5

Department of Communications (Thousands of Dollars)[1]

Fiscal Year	Total Cost[2]	Total Net Expenditure[3]	GROSS EXPENDITURES									
			Total[4]	Departmental Administration	National Telecommunications Development	International Participation	Strategic Planning	Radio Spectrum Management	Communications And Space Applications R&D	Space Applications	Telecommunications Research	Employee Benefit Plan
1968-68	N/A	12831	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1969-70	12901	13429	20317	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1970-71	12964	13897	22541	2178	651	503	511	6076	12421	--	--	--
1971-72	23181	21647	30279	3356	909	547	1715	7795	15957	--	--	--
1972-73	35186	33357	42974	4028	1299	656	1957	9628	24606	--	--	--
1973-74	44957	44689	55092	8175	1445	769	1361	10750	31157	--	--	1435
1974-75	51437	51512	62755	7785	2629	1162	1780	13948	33107	--	--	2344
1975-76	58252	54849	69456	8766	3196	1272	--	18828	--	21290	12889	3215
1976-77	41900	39180	60174	8356	2802	1494	--	20467	--	11462	12233	3360
1977-78	68824	74391	78394	9396	4989	1965	--	23839	--	22451	11355	4399
1978-79	96584	100785	104811	11471	6114	2657	--	26329	--	39414	14039	4877

[1] The figures in this table were obtained from Public Accounts of Canada which is prepared annually by the Receiver General.

[2] Total Cost is Total Net Expenditure less receipts credited to revenue plus the value of services provided by other government departments plus accommodation provided by the department to other departments.

[3] Total Net Expenditure is Total Gross Expenditure less receipts and revenues credited to the department's budget on the vote on appropriations to the department.

[4] Includes $201 thousand for government telecommunications systems in the 1970-71 fiscal year.

were courts of record; cross-examination was allowed - only counsel were allowed to question witnesses; full transcripts were kept and reasons for decision were published. The Telecommunication Committee of the CTC utilized regional hearings in at least one Bell Canada rate case.[5] The CTC proposed a formula for automatic rate adjustments for certain uncontrollable costs.[6] Jurisdiction over telecommunications passed to the CRTC before the formula could be implemented. In one of its first decisions, the CRTC abolished the formula.[7] Further details of the present hearings procedure are given below in section 3.3.1.

(c) Public Access

It is safe to say that public access was available under either the CTC or BTC but never encouraged. Standing was available to any interested party. Notice was relatively ample, but published primarily in the Canadian Gazette, not widely read by the public. Notices of general rate applications were only recently inserted in bills. Janisch concludes that the CTC "has been somewhat introverted in its regulatory activities. It has never actively sought to explain its role either to the wider public or to the industry it regulates".[8]

Neither the BTC nor the CTC awarded costs to intervenors. In 1974, the CTC contemplated appointing an independent counsel to assist intervenors in preparing their cases but concluded that such a recommendation was unwarranted.[9]

Janisch notes two cases where the CTC dealt with claims by an applicant that confidential information not be released; in one the confidentiality was not respected, while in the second it was.[10]

3.2 Internal Issues - Procedure of the CRTC

3.2.1 Introduction

On the 20th of July 1979, the CRTC published new telecommunications rules of procedure pursuant to Subsection 14(2) of the CRTC Act and Section 65 of the National Transportation Act. These rules of procedure culminated a three year analysis of procedures which began on July 20, 1976 when the CRTC issued a statement "Telecommunications Regulation - Procedures and Practices" followed by public hearings beginning in October 1976. Kane (1980) compares and contrasts the procedural requirements of the CRTC prior to its takeover of telecommunications regulation with the procedure in the new rules as of July 1979 and the procedure used by the Telecommunications Committee of the CTC. Prior to its takeover of telecommunications the CRTC used very informal procedures, witnesses were not sworn, there was no cross-examination, there was in short little adversarial confrontation.

> "In distinct contrast, the Telecommunications Committee of the CTC conduct its proceedings with a full panoply of legal trappings including the key ingredients of sworn testimony and cross-examination. ... If one was to have put the CRTC's rules of procedure beside the CTC's general rules very little difference would be observable in their structure and content. But rules of procedure are really only a skeleton to be fleshed out by the Commissioners under respective regulatory tribunals in the exercise of the indiscretion, since fundamental, legal matters such as cross-examination and swearing of witnesses were not specifically provided for but rather evolved from particular determinations and specific proceedings."[11]

The revamped CRTC used the results of the initial public hearings in the following two years to test certain principles of procedure and on May 23, 1978 issued a decision: CRTC Procedures and Practices in Telecommunications Regulation which summarized the hearings and gave conclusions.

The Commission invited written comments on these draft rules and took the comments into account before establishing its July 1979 rules on procedure.

The preamble to the 1979 rules of procedure enunciates the follow objectives:

> "(a) to ensure that Commission proceedings are of sufficient focus and depth to permit the highest possible quality of decision-making;
>
> (b) to assist regulated companies to deal effectively with Commission concerns in respect of specific proceedings and on an on-going basis;
>
> (c) to facilitate involvement of the public in the regulatory process through greater informality and public access;
>
> (d) to increase the capacity of intervenors to participate at public hearings in an informed way; and
>
> (e) to eliminate unnecessary delay in the regulatory process."

The rules of procedure set out a number of substantive changes dealing with interested parties and notices, confidentiality, interrogatories, and cost awards.

3.2.2 Interested Parties, Standing and Notice

Section 7 of the rules of procedure states that a person or association may be registered as an interested party in respect of an application before the Commission. Any person or association registered as an interested party will receive copies of information and proposed tariff changes filed with the Commission by the utility. The Commission distinguishes between applications for approval of new or amended tariff pages and applications for general rate increases. The filing of a new or amended tariff page generally needs 30 days notice. An interested person may intervene by

submitting a letter of intervention. That letter would state the intervenors views and whether he intended to appear at a public hearing if one should be held. The Commission need not hold a public hearing but can dispose of the application after requiring further information from one or more parties.

For general rate increases the procedure is more elaborate. At least 30 days prior to making an application for a general rate increase the regulated company must file with the Commission Directions of Procedure elaborating the purpose and scope of the application effective date of the changes in rates and a proposed newspaper advertisement and mailing insert. From the date of filing of the application at least 45 days must ensue for the filing of letters of intervention, notices of intention to participate and interrogatories; at least 75 days for the filing of responses to interrogatories and at least 180 days for the proposed effective date of the rate changes. The mailing insert to customers must be sent within one month of the proposed application. Interested parties can intervene by submitting a letter, making a submission at a regional hearing or participating at the central hearing. To appear at the central hearing the intervener must on or before the date prescribed in the directions of procedure give notice of intention to participate.

3.2.3 Confidentiality

Section 19 of the Commission's rules of procedure detail the requirements for the maintenance of confidentiality of information. 19(1) states that "where a document is filed with the Commission by a party in relation to any proceeding, the Commission shall place the document on the public record unless the party filing the document

asserts a claim of confidentiality at the time of such filing." This claim for confidentiality must be accompanied by details of the specific direct harm which will be caused to the party claiming confidentiality. Any party wishing the disclosure of confidential information must file with the Commission a document indicating the public interest in the disclosure.

"Where the Commission is of the opinion that, based on all the material before it, no specific direct harm will be likely to result from disclosure, or any such specific direct harm is shown but is not sufficient to outweigh the public interest in disclosing the document, the document shall be placed on the public record."[12] Where the Commission feels that the direct harm to the utility outweighs the public interest than the Commission can use one of three procedures; it can order that the document not be put on the public record, it can order an abridged version of the document to be placed on the public record or it could order that the document be disclosed to parties at a hearing to be conducted in camera.

Section 19 of the rules of procedure is dependent on the interpretation of the relevant statutory provisions, Sections 331 and 335 of the Railway Act. Section 331 allows for publication of confidential information when "necessary in the public interest" and Section 335 allows publication under "good and sufficient reasons for so doing".

3.2.4 Interrogatories

The Commission permits interrogatories to be directed to the utility (Section 17(1)) and provides a time limit for answers and a procedure for

arbitrating unsatisfactory responses. Supplementary interrogatories are allowed "in respect to questions arising out of the responses of a regulated company to previous interrogatories and may with the consent of the Commission be addressed to the company." Kane (1980) states "the information gathering process has not been satisfactory in the Commission's view, and it has decided that considerable information could be provided in the form of responses to an initial, comprehensive set of interrogatories covering the topics and questions that arise in virtually all rate cases."[13] In the 1980 Bell Canada rate case this standard set of interrogatories has been submitted to the company.

3.2.5 Cost Awards

The Commission allows the awarding of intervenors costs under the statutory provision of Section 73 of the National Transportation Act where "costs of and incidental to any proceeding before the Commission ... are at the discretion of the Commission ... [who] may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed." Sections 44 and 45 of the new rules of procedure deal with cost awards. These costs may be awarded to an intervenor who "has or is representative of a group or class of subscribers that has, an interest in the outcome of the proceeding of such a nature that the intervenor or group or class or subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding; and has participated in a responsible way; and has contributed to a better understanding of the issues by the Commission." The Commission allows for an interim award of costs within 30 days of an application being made to it for a

general rate increase. Note that the operative words are representative, responsible and understanding. Although the wording of the sections are in terms of general rate increase applications the Commission has awarded costs in other applications as well.

3.2.6 Other Aspects of the Internal Process - The CRTC

The Telecom. side of the CRTC does not follow the strict judicial model of regulatory agencies. The Board counsel is more than an advisor on the legal matters of the Act (that being the self-imposed mandate of the CTC). CRTC Board counsel meets with staff and commissioners during a hearing. The commissioners use staff but cannot be directly biased by staff since the CRTC is a court of record. The facts must be on the record to be used in the decision. However, points of view of the staff and Board counsel can be stressed in the 'backroom' and thus indirectly affect Board decisions. The role of Board counsel is to establish a complete record; to represent the views of the staff. Board commissioners do not use Board counsel to ask questions which seek more than additional information or elaboration. Staff, but not counsel assist in the writing of the decision. Staff prepare background papers or summaries of testimony.

3.3 Maritime Telephone and Telegraph

3.3.1 Rate Relief

MT&T came before the Nova Scotia Board of Commissioners of Public Utilities seven times for rate relief in the 1950 to 1978 period (and eight times since 1919). Except for the 1977 decision, MT&T received substantially all its revenue requests. The greatest number of intervenors

was in 1966, when seven appeared. In 1966 and 1975 only one intervenor appeared. In 1952, the first rate case since 1919, four intervenors were present; the cities of Halifax and Sydney, the town of Glace Bay and the Rural Telephone Companies Association, as represented by the Inspector of Rural Telephone Companies. In 1966, the one intervenor was the Nova Scotia Innkeepers' Guild. In the 1969/70 rate case, five intervenors appeared - Pye Electronics, the city of Sydney, the United Mine Workers of America, local 4527, the Nova Scotia Innkeepers Guild and the Nova Scotia Federation of Labour. Only Pye Electronics intervened throughout and cross-examined MT&T witnesses. Other than two interventions vis written briefs (Innkeepers Guild, Federation of Labour), argument was not submitted by intervenors. The Pye Electronic intervention was aimed at enhancing its ability to compete with MT&T in providing mobile exchange service. Both the Innkeepers Guild and the Federation of Labour aimed their submissions at issues close to their self interest. In 1974, two interveners were present. The St. Margaret's Action Group for Extended Area Service made a brief submission at the conclusion of evidence relating to their particular needs. The Consumers Association of Canada intervened throughout and provided the most indepth discussion of a wide range of issues ever before the Board. In 1975, only Pye Electronics intervened. In 1977, three intervenors were present - the Innkeepers Guild, the Federation of Labour and Professor M. Bradfield of Dalhousie University. In 1978, there were six interventions - the Innkeepers Guild, the Federation of Labour, M.R. Marshall, Professor P. Hubert, IAS Computer Group, and 4 Halifax hotels who made a joint representation. In this 1978 case, Board counsel, made the most indepth intervention that counsel ever made, outlining 10 major issues for consideration by the Board. Intervention at MT&T rate

hearings compared to the Bell Canada rate hearings was more limited; intervenors in Nova Scotia normally did not appear throughout nor provided argument; specific interest group intervention was more important in Nova Scotia. The Nova Scotia Association of Municipalities did not intervene in many MT&T rate cases nor did the province.

A number of significant points stand out from the analysis of MT&T cases presented in Appendix 2.

1) A ruling of the Board in the 1919 case appears to explicitly endorse the subsidization of rural systems by urban systems "to encourage development in the small rural exchange districts of a character which encourates interconnection with the larger cities".

2) The Board appears to have accepted a value of service rate making philosophy in order to implement province wide uniform pricing and service.

> "It is a long and well established principle of rate making that telephone rates are made on a system wide basis ... . The principle followed in rate making is that the cost of service increases proportionately with an increase in the number of stations and, correspondingly, the value of exchange telephone service to any subscriber varies directly with the number of subscribers he is able to reach ... . The principle that rates are made on a system wide basis on the value of the service rendered as determined by the number of subscribers in the exchange, is long established."
>
> (Board of Commissioners, 1952 Report, pp. 136-138)

3) The Board has become more concerned with quality of service especially since 1974.

4) The Board approved increases in revenue requirements but attempted not to set minimum and maximum allowed rates of return on capital.

5) The construction programme was a major topic in most rate cases. MT&T operated on a 10 year construction plan up until 1976. In 1975, the Board ordered 5 year plans instead. From 1966 to 1976, the construction programme was aimed at modernizing plant and ccnverting all telephones to dial.

6) The Board has jurisdiction only over "telephone messages", as a result nearly 40% of MT&T revenues are outside its purview - TCTS and U.S. toll calls and a wide variety of business related telecommunications services.

7) Most hearings have been ex parte, including new service offerings, construction forecasts and EAS plans.

8) The Board has not initiated hearings nor have there been generic hearings on broad issues.

9) The Board does not follow strict rules of evidence; the hearings can be informal.

10) A substantial number of intervenors have been special interest groups whose appearances has been aimed at improving their service or lowering their specific rates.

11) The debt equity ratio, the construction programme and cross subsidization have been important topics in rate hearings.

12) A number of specialized topics e.g. uniform system of accounts, depreciation rates have often been raised during rate hearings.

There is then an interesting contrast between what has occurred with the federal regulation of Bell Canada and the provincial regulation of MT&T.

John McManus has stated that the federal regulation of telecommunications (at least until 1973) shows "... clear evidence that the telecommunications firms under its control are not treated as "chosen instruments". There seems to have been little political pressure in the past towards achieving national policy goals through this industry".[14]

It is, however, probably correct to label provincial regulation of telecommunications in Nova Scotia as fulfilling provincial policy objectives - the provision of universal service and the subsidization of service in areas of low population density. This was accomplished even by having, as we have seen in Chapter 2, a Board which was very free from direct political influences. Board members, generally, have been appointed until age 70 and hold office with good behaviour. The Board assesses the regulated firms to cover its budget and does not therefore have to depend on general tax revenues as distributed by the Province. Why then has the Board accepted policies of cross subsidization? There are likely 4 reasons:

1) Government legislature initiatives such as the Rural Telephone Act of 1913 which announced government policy.
2) The use of the Attorney-General's office to provide Board counsel.
3) The limited use of in house staff at the Board.
4) The Board's identification with residential customers in a relatively small province.
5) The lack of strong interventions.

The government announced policies to subsidize rural telephone users in 1913 and gave the Board the same role over mutual telephone companies as it had under its own Act.[15] The government defined a rural district as "any part or parts of a municipality or municipalities". The slow rate of development of rural telephones caused the Board to commission an engineering study which was received in 1918 and stated

> "In order to encourage telephonic development in the small rural exchange districts of a character which enables inter-communications with larger cities, it is necessary to give service in these communities which (including a fair rate of return on investment to give the service) costs more than service requisite to rural needs alone, and any deficiency in revenue which thereby results in the smaller exchanges must be made up in the larger exchange."
>
> (Report of the Board of Commissioners of Public Utilities, 1918, p. 19)

The Board in accepting the Report accepted the principles of cross-subsidization.[16]

> "In the opinion of the Board such an approach was the only means by which telephone service could be provided at just and equitable rates in a province where "the long irregular coast line with centres of population clustered around it produce an uneven distribution of population".[17]

This is then an example of legislative means of directing policy development by a regulatory board.

The Nova Scotia Board because it has no internal full-time counsel relies on the Attorney-General's office for legal support. This is a clear avenue of information and advice from politicians (or at least the Attorney-General) to regulators. In 1978, Board counsel began the hearing by provid-

ing 10 areas of concern. It's difficult to believe that these were not the issues that the government was concerned with.

The lack of Board professional inhouse staff and the Board's reliance on outside consultants makes political pressures more persuasive since the Board by not building up internal expertise is more susceptible to outside influences.

The lack of strong interventions in Nova Scotia requires additional analysis. We would expect that the 'free rider' and 'transactions cost' problems would be even more persuasive in Nova Scotia than in Ontario and Quebec. The number of sitting days at MT&T rate cases are not proportionately less than at Bell Canada rate cases (the proportion being the assets of the firms or the number of telephones in service). As a result, the costs of intervening at an MT&T rate case are likely similar to the costs of intervening at a Bell Canada rate case. With a much smaller population in Nova Scotia, however, each potential volunteer to an intervention would be asked for more money than if he were in the Bell Canada territory. The market failures would then be more pronounced in MT&T territory than in Bell Canada territory. Actual events appear to bear this out - there were fewer interventions in Nova Scotia and a greater number of the interventions were very specific interest groups. In particular the interventions by groups of municipalities which occurred in Bell Canada rate cases in the 1950's and 1960's were not as evident in Nova Scotia. Two reasons account for this. First, the expense of intervening would have been a greater percentage of the total cost of the municipal government in Nova Scotia than in Ontario since we have argued that the levels of cost for interventions were similar in both jurisdictions. Second, residential subscribers in Nova Scotia likely

Table 3-6

MT&T Rate Cases

	Item	1952	1966	1969-70
i)	Dates	Feb. 12-26/52	Dec. 7/65-Feb. 7/66	Nov. 3-Dec. 11/69
ii)	Sitting Days	7	13	8
iii)	Intervenors	4	1	5
iv)	ROR - requested	5.53% ('52) 5.97% ('53)	6.31% ('66) 6.40% ('67) 6.02% ('68)	6.8% (70-71) 7.09% (71-72)
	- granted	as above	as above	as above
v)	Major Issues	Quality of Service Cross Subsidization	Quality of Service	ROR on equity Construction Program

Continuation of Table 3-6

	Item	1974	1975	1977	1978
i)	Dates	June 4-Aug. 13	Sept. 4-19/75	Feb. 22-Mar. 3/77	Feb. 14-Apr. 17/78
ii)	Sitting Days	11	12	7	15
iii)	Intervenors	3	1	3	6
iv)	ROR - requested	8.75%	8.7%	8.8% (1977) 8.9% (1978)	8.6% (1978) 9.0% (1979)
	- granted	as above	as above	Substantial downward adjustment to tariff	Tariffs approved with some adjustments
v)	Major Issues	Value of Service	Debt/Equity Ratio ROR Common Equity	Uniform System of Assounts Capital Structure	Debt/Equity Ratio Subsidiaries

felt that they were receiving benefits from the existing system. In that system provincial politicians chose 'independent' regulators and the external and internal structures to the regulatory process likely caused the regulators to identify with residential customers.

3.3.2 Other Aspects of the Internal Process of the Board of Commissioners of Public Utilities of Nova Scotia

The Board is a court of record, but uses relatively informal procedures; strict rules of evidence are not followed. However, only lawyers can cross-examine witnesses. There are presently seven Board members; one of whom is the brother of a recent President of MT&T (he never sat on telecom. cases). Board members specialize in areas; the Board as a whole does not consider individual decisions.

Board members do not take part in preparing Board counsel's case, although Board counsel and staff (consultants) are in close contact with the Board during the case. Board consultants normally appear on the stand, present their views and are subject to cross-examination. Decisions are always based on the record. In rendering decisions, Board consultants help write the decisions, but Board counsel does not.

The Board has not awarded costs, and has no mandate under the Acts (aside from motor carrier licence requests) to provide costs.

As we have seen there is no political appeal mechanism in the Act nor a provision for policy directives. The Board would welcome policy directives as a legitimate means of recognizing political interests but also maintaining Board independence.

Representatives of the Board stated that although they are independent, "they don't want to get into a battle with the people" and "who gets

the most votes gets the most attention."[18] The Board would then appear to recognize the realities of politics and flavour its decisions accordingly.

3.4 Procedural Issues in Saskatchewan

3.4.1 Number of cases, cabinet overrides

For an academic, one of the great virtues of regulation via an SRA is the volume of material assessed; at least one knows when there was a rate case! The great problem in studying the rate setting process in Saskatchewan is that all the information one can acquire are the rate increases, expost. There is no information available on the rate increases proposed by the company, the interventions by interest groups (but how would they learn of a rate increase proposal), and the final juggling of interests by the Cabinet. Heresay suggests that there have indeed been conflicts, the government, at times, refusing to increase the rates as proposed by Sask Tel. One can easily imagine that regulation by a government department could entail lower rate increase than regulation by an SRA especially near election time. The Saskatchewan government would have to accept the responsibility of increasing telephone rates without the benefit of an independent agency to take the blame.

Initially we had planned to examine the increases in local and toll rates for Bell Canada, Saskatchewan telephone and MT&T in order to determine whether the process of regulation affected rate structures. Trying to determine average rates and quality and accounting for flows from the revenue settlements procedure proved too difficult however. Our basic hypothesis developed in the previous chapters was that rate regulation by department could be susceptible to 'too' much interest group pressure and result in

inefficient and unequitable rate structures. There is no evidence in Saskatchewan to support that view. Table 3-7 indicates the rate increases for Saskatchewan telephone over the 1949 to 1979 period; there were rate increases in 1953, 1959, 1960, 1967, 1975, 1977, 1978, 1979. For Bell Canada, there were rate increases in 1950, 1952, 1958, 1969, 1970, 1972, 1974, 1975, 1977 and 1978. There was then a lower periodicity for Saskatchewan telephone rate increases than for Bell Canada rate increases; especially in the early 1970's. We have, unfortunately, no way of telling why this was so. Saskatchewan Telephone may have been more efficient, enjoyed economies of scale or simply not been allowed to increase rates. In addition, the very substantial increase in local (18.1%) and toll (15.3%) rates for Saskatchewan Telephone in 1975 may have entailed some catching up.

What is especially noteworthy is the relative absence of toll rate increases other than in 1960 and in 1975 and thereafter. Recollect that for Bell and MT&T, the regulator prevented the company from increasing local rates and leaving toll rates relatively unchanged. Note, we have not explicitly examined relative rates for local and toll service; we are relying on weak evidence that there were more toll rate changes outside Saskatchewan, some forced by regulators. Two hypotheses are consistent with this weak evidence. First, regulation by a department (as in Saskatchewan) was less susceptible to pressures from municipalities who appeared before federal regulators. Second, the welfare of Saskatchewan residents depended more on toll rates than did the welfare of Ontario or Quebec residents. The 1966 census indicates that the rural population as a percentage of total population was 51.0% in Saskatchewan, 21.7% in Quebec and 19.6% in Ontario (1971 Canada Yearbook, p. 221). Not having

TABLE 3-7

SASKATCHEWAN TELEPHONE — RATE CHANGES
1950 - 1979

LOCAL TELEPHONE RATE CHANGES

March 1953	- A General Rate increase of 13.0%.
September 1959	- A 10% increase on rates for the cities of Regina and Saskatoon.
November 1960	- A General Rate increase of 8.6%.
March 1967	- A General Rate increase of 7.5%.
November 1975	- A General Rate increase of 18.1%. ($ 6.5 Million added revenue in 1976)
April 1977	- A General Rate increase of approximately 9%.
April 1978	- A General Rate increase of approximately 8%.
April 1979	- A General Rate increase of approximately 6%.

PROVINCIAL TOLL RATE CHANGES

1954 - Station to Station Calling Introduced (no Revenue Impact).

1960 - A price increase of 8.6%. - First Toll Increase. ($1.6 Million added revenue).

1966 - A price reduction on Station to Station calls over 100 miles introduced. Higher rates on Person to Person Calls. (Net Revenue effect insignificant).

1968 - Lower late nite rates on Direct Distance Dialed Calls. (Net Revenue effect insignificant).

1971 - Uranium City given regular Saskatchewan toll message rates. (Net Revenue effect insignificant).

1972 - "One Minute Minimum" Direct Distance Dialing Schedule in Saskatchewan. (Net Revenue change insignificant).

1975 - A price increase of 15.3%. (1976 Revenue increase on $ 3.75 Million).

1977 - A price increase of approximately 10%.

1978 - A price increase of approximately 8%.

1979 - A price increase of approximately 6%.

transcripts of Saskatchewan Cabinet debates before us, it is difficult to discriminate between hypotheses.

3.4.2 Aspects of the Internal Procedure - Saskatchewan

The various elements of the regulatory apparatus for control of telecommunications development were detailed in the previous chapter. The major features are:

1) the management of Saskatchewan Telephone
2) the Board of Director of Saskatchewan Telephone (Minister)
3) the Crown Investments Corporation (CIC)
4) the Communications Secretariat
5) the Parliamentary Select Committee on Crown Corporations.
6) the Cabinet — power to veto any rate changes proposed by SaskTel.

It appears that supervision is divided into three categories — supervision of day to day operations (management, Board of Directors), supervision of capital expenditures (CIC) — longer term planning (Secretariat). The Select Committee primarily plays a watchdog role. Political interventions can occur at all levels since the Chairman of Saskatchewan Telephone is the Minister of Telephones; the Board of Directors of CIC are all Cabinet ministers; the Select Committee meets every year. It is difficult to directly discuss the issues of the internal process — procedure, public access, accountability, notice to interested parties, confidentiality, etc. Officials in Saskatchewan impressed me with their conviction that access to the system was open; accountability was ensured since politicians were directly involved. However, the analytical presentation presented in previous chapters, I think does suggest that the potential for abuse and undue political pressure exists in a departmental regulatory structure. What I find <u>particularly</u> vexing is the lack of notice to an interested

party that a change (rates, goals, etc.) is being contemplated. Equally troubling is the absence of any concept of fairness in the procedure. Certainly, politicians are open to the public, but the problem is that they may be too open and to wrong kinds of pressures (pressure discrimination and tie-in pressure as discussed earlier). We make recommendations in the last chapter for improvement in departmental regulatory procedures.

3.5 Statistical Explanation of Bell Canada Rate Application Decisions

Sufficient data was gathered for the Bell Canada rate cases over the period 1949 to 1978 to attempt to determine the factors which affect the percentage of Bell's request actually granted by the regulators.

For Bell Canada, five measures of success were investigated:

Model 1

$$\text{QUOREV} = \frac{\text{revenue increase granted}}{\text{revenue increase requested}}$$

$$\text{QUOROR} = \frac{\text{rate-of-return on total average capital granted}}{\text{rate-of-return on total average capital requested}}$$

$$\text{EQUROR} = \frac{\text{rate-of-return on common equity capital granted}}{\text{rate-of-retrun on common equity capital requested}}$$

Model 2

$$\text{QROR} = \frac{\text{(rate of return on total capital granted - rate of return currently allowed)}}{\text{(rate of return on total capital requested - rate of return currently allowed)}}$$

QROREQ = Same as QROR but for common equity capital

The explanatory variables were:

NWITB: the number of witnesses called by Bell Canada

MAINI: the number of main intervenors (intervenors who appeared throughout the hearing, who conducted cross-examination, and who presented final argument)

REVRQ: The absolute amount of the revenue increase requested by Bell Canada

QRORI: the increase in the allowed rate-of-return on total average capital requested by Bell Canada, as a fraction of the current allowed rate-of-return.

CPIG: the increment in the Canadian CPI from the year prior to the year of application to the year of application, as a fraction of the CPI in that prior year.

NMOS: number of months since last rate case

CPIT: percentage increase in the CPI in the test year

CPIA: percentag increase in the CPI in the year of the application

CR: the increase in the allowed rate of return on common equity requested by Bell Canada, as a fraction of the current allowed rate of return.

T: year of application.

The model was of the simple form:

$$S(\bar{x}) = C + \sum_{i=1}^{N} \alpha_i x_i$$

where $S(\bar{x})$ is the measure of success, x_i is an explanatory variable and α_i its coefficient, and C is a constant. Ordinary least squares were used.

The basic parameters of the rate applications are given in Table 3-8. The data for the five measures of success are given in Table 3-9. Notice that there is not very much fluctuation in either of the measures of success based on rate of return but a greater variance in the percentage of the absolute revenue request granted. The constructed independent variables QROR and QROREQ show much greater movement.

TABLE 3-8

BELL CANADA RATE APPLICATION PARAMETERS

	1949-50	1951-52	1957-58	1958	1968-69	1970	1971-72	1972-73	1973-74	1975	1976-77	1978
Date of Application	12 Oct 49	31 Aug 51	16 Oct 57	25 Jun 58	06 Dec 68	12 Jun 70	05 Nov 71	10 Nov 72	15 Aug 73[1]	30 May 75	03 Nov 76	01 Feb 78
Date of Decision	15 Nov 50	21 Feb 52	10 Jan 58	10 Oct 58	25 Sep 69	01 Dec 70	19 May 72	30 Mar 73	15 Aug 74	22 Dec 75	09 Jun 77	10 Aug 78
No. of Sitting Days	50	5	15	9	44	8	23	25	47	26	24	33
No. of Days of Pre-hearing Conference	0	3	0	1	1	1	3	1	3	0	3	2
No. of Main Interveners[2]	6	3	2	3	3	4	5	4	4	6	9	12
Total No. of Interveners Making an Appearance[3]	10	8	10	11	11	5	6	14	14	16	18	23
No. of Bell Canada's Witnesses	23	6	9	9	21	5	10	8	13	8	14	19
No. of Interveners' Witnesses[3]	8	1	3	5	8	1	2	0	9	1	4	11
No. of Months from the Last Decision to the Present Rate Application	181	9.5	66.5	5.5	120	8	11	6	4.5	9.5	10	8
Revenue Increase (millions of dollars)[4]												
Requested	(27.5)	15.8	24.2	17.2	83.6	32.0	78.1	36.0	51.8	110.3	171.4	398.9
Granted	27.5	14.3	10.3	17.2	27.5	(24)	47.2	36.0	51.8	110.3	162.0	248.0
Rate of Return on Total Average Capital (%)[5]												
Requested	(6.2)	(6.3)	(6.0)	(5.8)	8.2	7.6	8.2	7.8	8.6	8.4	(10.1)	(10.85)
Granted	(6.1)	(6.0)	(5.7)	(5.8)	7.3	7.5	7.8	7.8	8.6	8.4	(9.98)	(9.97)
Rate of Return on Common Equity Capital[6]												
Requested (%)	(8.0)	(8.1)	(7.7)	(7.0)	10.5	9.2	10.5	(9.5)	11.0	9.2	(12.8)	13.9
($ earnings per share)	2.50	2.56	2.65	2.43	—	—	—	—	—	—	—	—
Granted (%)	(7.7)	(7.7)	(7.0)	(7.0)	8.8	(9.0)	9.5	(9.5)	11.0	9.2	(12.6)	12.0
($ earnings per share)	2.43	2.43	2.43	2.43	—	—	—	—	—	—	—	—

. . . . /Cont'd.

Continuation of Table 3-8 . . . /2

Footnotes

1. This application was originally made on 10 November 1972 as "Part B" of the two part application made on that date, but was amended on 15 August 1973.

2. The main interveners comprise those interveners who appeared throughout the hearing who conducted cross-examination and who presented final argument.

3. Minor interveners, such as individual consumers, who appeared and who made submissions in the nature of argument by the vehicle of sworn testimony are counted as interveners but not as witnesses. These interveners did not present final argument.

4. All figures have been annualized. The figures in parentheses for 1949-1950 and for 1970 are estimates.

5. The figures in parentheses for the four early cases are based on earnings per share figures, and on the actual capital structure and embedded cost of debt for the test year. The figures on parentheses for 1976-1977 are based on an annualization of the annualization of the the revenue increase, on an estimated income statement (Exhibit B-76-15) and on an estimated capital structure and costs of debt and preferred equity (Exhibit B-76-231). The figures in parentheses for 1978 are based on Bell Canada's estimates for capital structure, cost of debt and cost of preferred equity, which were accepted by the CRTC.

6. For the figures in parentheses for the four early cases, see footnote 5. The figure in parentheses for 1970 is based on rates of return (overall and on common) requested and those estimated for the case of no revenue increase. The figures in parentheses for 1972-1973 are based on the figures for 1971-1972. For the figures in parentheses for 1976-1977, see footnote 5.

TABLE 3-9

MEASURES OF SUCCESS

QUOREV	QUOROR	EQUROR
.905063	.952381	.950617
.425620	.950000	.909091
1.00000	1.00000	1.00000
.328947	.890244	.838095
.750000	.986842	.978261
.604353	.951219	.904762
1.00000	1.00000	1.00000
1.00000	1.00000	1.00000
1.00000	1.00000	1.00000
.945158	.988119	.984375
.621710	.918894	.863309

QROR	QROREQ
-.50	0
1.0	-
.625	.514
.667	.500
.429	.333
1.00	1.00
.929	.944
-.011	-.462

What variables would we expect to influence the degree of success in Bell Canada rate applications? One would expect that since the federal regulatory agencies based their decisions on the evidence in the hearing, that the greater the number of witnesses called by Bell Canada then the more successful the company's application would be. Secondly, the greater the number of main interveners, the less successful Bell Canada would be in their rate applications as evidences would mount in opposition to Bell's case. It is also reasonable to expect that the greater the absolute amount of the revenue increase requested by Bell Canada the less successful they would be since large absolute increases make bad press and the Board's might be reluctant to approve very large increases. Similarly, the greater the increase in the desired rate of return as a fraction of the current allowed return, the less successful one would expect Bell Canada to be. One would also expect that the greater the rate of inflation the more successful Bell Canada would be in its application, other things being equal, since the economy as a whole would be experiencing higher prices. We have also included the year of application as an explanatory variable in case there is some consistent time pattern to regulatory awards. Finally, the number of months between applications for rate relief should be inversely related to Bell's success rate, the agencies not appreciating those who come often to the trough.

The statistical results were surprisingly good. A high degree of explanation was achieved in a cross sectional analysis with few degrees of freedom. The results are given in Tables 3-10 (Model 1) and 3-11 (Model 2). The differences between the two models revolve around different interpretations of the dependent variable measuring the success of rate of return increase applications and slightly different independent

TABLE 3-10

REGRESSION RESULTS: BELL CANADA DEGREE OF SUCCESS

MODEL 1

$S_t = C_t + a_t NWITB + b_t MAINI + c_t REVRQ + d_t QRORI + e_t CPIG + f_t CPIA + g_t CPII$

(12 observations)

									$\bar{R}^2$	LF	F
QROREV											
(1)	2.78*	.052	.204**	-.006**	-2.32				.77	7.03	3.71
	(.93)	(.037)	(.068)	(.002)	(1.22)						
(2)	-1.16	.076*	.207**	-.007**	-2.86**	3.55*			.83	10.04	4.99
	(.033)	(.033)	(.058)	(.002)	(1.06)	(1.86)					
(3)	-4.12	.102*	.280*	-.008**	-3.66*	7.11	.033	-.035	.87	11.36	2.84
	(9.98)	(.048)	(.119)	(.002)	(1.52)	(9.69)	(.12)	(.11)			
QUROR											
(1)	1.23***	.008**	.031***	-.001***	-.388**						
	(.08)	(.003)	(.006)	(.0002)	(.11)				.90	33.93	14.26
(2)	1.18***	.006	.022*	-.0009***	-.334**			.0005	.72	35.14	12.08
	(.096)	(.004)	(.009)	(.0002)	(.115)			(.0005)			
EQUROR											
(1)	1.31***	.011*	.047**	-.002**	-.520*						
	(.157)	(.006)	(.012)	(.0004)	(.206)				.86	26.63	9.03
(2)	1.22***	.009	.035*	-.001**	-.451**			.0007	.87	27.21	6.81
	(.198)	(.007)	(.02)	(.0004)	(.236)			(.0009)			

TABLE 3-11

REGRESSION RESULTS: BELL CANADA DEGREE OF SUCCESS

MODEL 2

(1) INDEPENDENT VARIABLE QREV (11 observations)

$S_t = C_t + a_t NWITB + b_t MAINI + c_t NMOS + d_t REVRQ + e_t CPI + f_t CPIA + g_t QRORI + h_t ER + k_t T$

										$\bar{R}^2$	LF
(1)	16.15	.075**	.208**	-.005*	-.007**	2.01		.474	-1.36	-.068	.957	17.54
	(14.67)	(.029)	(.093)	(.003)	(.003)	(1.77)		(1.77)	(.95)	(.008)		
(2)	-.37	.065**	.144*	-.005**	-.006**	2.38*			-.92**		.931	14.89
	(.30)	(.021)	(.067)	(.002)	(.002)	(1.31)			(.41)			
(3)	20.73	.074*	.334**		-.01				1.59	-.01	.83	10.00
	(16.79)	(.033)	(.088)		(.003)				(.56)	(.009)		
(4)	-.22	.054	.263		-.008				-1.33		.78	8.51
	(.37)	(.003)	(.070)		(.002)				(.54)			
(5)	-.37	.060	.253		-.008	2.22			-1.32		.83	9.92
	(.37)	(.029)	(.068)		(.002)	(1.83)			(.52)			
(6)	-.26	.089	.41		-.011		-.008		-1.89		.83	10.25
	(.35)	(.030)	(.12)		(.003)		(.006)		(.65)			

. . . . /CONT'D

TABLE 3-11 (CONT'D.)

REGRESSION RESULTS: BELL CANADA DEGREE OF SUCCESS

MODEL 2

(2) INDEPENDENT VARIABLE QROR (8 observations)

$S_t = C_t + a_t NWITB + b_t MAINI + c_t NMOS + d_t REVRQ + e_t CPIG + f_t ER + g_t T$

								$\bar{R}^2$	LF	F
(1)	-4.80	.292	1.33	.026	-.039	-2.54	-8.89	.83	1.24	.80
	(4.62)	(.213)	(1.12)	(.035)	(.031)	(10.1)	(8.89)			
(2)	-5.51	.322**	1.46**	.03	-.043**		-9.97*	.82	.99	1.78
	(2.67)	(.13)	(.72)	(.02)	(.02)		(5.67)			

(3) INDEPENDENT VARIABLE QROREQ (7 observations)

$S_t \quad C_t + a_t NWITB + b_t MAINI + c_t NMOS + d_t REVRQ + e_t CPI + f_t CPIA + g_t ER$

								$\bar{R}^2$	LF	F
(1)	-1.14**	.113**	.315**	-.005	-.131***			.90	3.17	4.28
	(.57)	(.048)	(.143)	(.006)	(.004)					
(2)	-1.97**	.167*	.522		-.019		-2.02	.92	4.27	6.06
	(.81)	(.072)	(.162)		(.006)		(1.64)			
(3)	-1.97	.167	.522**		-.019*	.080	-2.01	.92	4.27	2.42
	(1.26)	(.101)	(.23)		(.008)	(6.5)	(2.36)			
(4)	-1.77**	.060	.128		-.011***	.020***	-.289**	.99	10.11	13.24
	(.51)	(.067)	(.214)		(.005)	(.01)	(1.31)			

variables. In Model 1 the degree of success is based simply on the ratio of the return granted to the return requested; in Model 2 the degree of success is based on the incremental return allowed divided by the incremental return requested.

Turning to the results for Model 1, in the first section of Table 3-10 are the statistics for Bell's degree of success in achieving its desired total amount of revenue. In the second equation in that section, all the variables are significant, at least at the 90% level. The results indicate that Bell Canada's success in its request for an absolute increase in revenue is positively correlated with the number of witnesses it presents, the number of main interveners and the percentage increase in the consumer price index. Bell Canada's degree of success is inversely related to the absolute amount of the revenue request and the increase in the average allowed rate of return requested. The signs and all the coefficients are, as expected, except in the case of the number of interveners variable. The positive association of the number of interveners with the success of Bell Canada likely is a result of the concurrency of the growth of Bell Canada and the great increase in the number of interveners especially in the 1970s. The results indicate that Bell Canada obtains 7.6% more of the revenue increase it requests for each additional witness it calls. Bell Canada forgoes 0.7% of its request for each additional $1m it requests. That is, at the very most, it can only hope to obtain $0.993m of each additional $1m it requests. Bell Canada obtains 3.6% of the revenue increase it requests for each additional 1% increase in the CPI. And Bell Canada forgoes 2.9% of the revenue increase it requests for each additional 1% increase in the allowed rate-of-return on total average capital which it requests. Again, although the sign is

not as expected, the number of interveners variable is important. For each additional intervener, Bell Canada obtains .21% more of its requested revenue increase. This somewhat curious result again is due to a coincidental correlation between the increase in the number of interveners in the 1970's and the increase in the allowed expenses of Bell Canada which was not one of the explanatory variables investigated.

The results explaining the measure of success based on the rate of return of total capital and common equity have some surprising results. The first point to note is that the constant in all cases is significantly greater than 1. This indicates that upon application Bell has a good chance of receiving all its request. Note, that its only one case is the constant significantly greater than one. However, it must be borne in mind, that, on the average, the first 92% of the rate of return requested is merely the rate of return allowed by the last rate application decision. This suggests that more than an application is required to maintain the current allowed rate of return. Interestingly, this accords with the regulatory policy, enunciated from time to time, that no minimum rate of return will be set and maintained, and that each rate application will be examined in the context of the prevailing conditions in the capital markets and the economy in general. It also suggests a more complex measure of success - a measure introduced in Table 3-11.

Examining in detail the results for the degree of success in achieving the requested rate of return on common equity capital, we can see that Bell Canada can obtain approximately 1% more of the rate of return it requests by calling an additional witness. The results also indicate that rate application outcomes are sensitive to the absolute amount of the revenue increase requested. Bell Canada foregoes between .1% and .2% of the rate

of return on common equity it requests for every 1 million dollars in increased revenues that it requests. Furthermore, Bell Canada foregoes between .45% and .53% of the rate of return on common equity it requests for each 1% increase in the allowed rate of return on total average capital which it requests (e.g., an increase from 8.00% to 8.08%). As mentioned above, the sign of the coefficient for the number of interveners' variable is counter-intuitive. For each additional intervener, the results indicate that Bell Canada obtains between 3.5% and 4.7% more of the rate of return it requests. In no case does the change in the CPI affect the degree of success achieved for return on capital.

In Table 3-11 we present the results for Model 2. We turn first to the results explaining Bell Canada's degree of success in obtaining its requested increase in total revenue. Six equations are shown, the differences between them being the omission of certain variables. The first equation includes all the relevant variables, four are significant. Bell's degree of success in its absolute revenue request is positively related to the number of witnesses it calls and the number of main interveners and negatively related to the number of months since Bell's last application and the absolute amount of the revenue request. In this first equation, neither the change in the CPI, nor the amount of the increase requested in the rate of return of capital, nor the increase requested in the rate of return on common equity, nor the year of application significantly affect the degree of success. In the second equation two of the insignificant variables are dropped; all the remaining variables become significant. In this case, Bell's degree of success in its request for an absolute revenue increase is positively related to the number of witnesses it calls, the

number of main interveners, and the percentage increase in the CPI. The revenue request success is negatively related to the number of months since last application, the absolute amount of the revenue request, and the amount of increase requested for the rate of return on total equity. The remaining four equations delete other variables; we will use the second equation for our interpretation. These results indicate that the calling of an additional witness leads to an increase in 6.5% of the revenue requested. Bell Canada, however, foregoes 0.6% of its request for every 1 million dollars in additional revenue requested. Moreover, a 1% increase in the requested return on total common equity capital leads to a .9% decrease per $1 million request for absolute revenue. Bell Canada receives 2.4% of the revenue increase request for each additional 1% increase in the CPI. Once again the number of main interveners is an important explanatory variable. For each additonal intervener, Bell Canada obtains .21% more of its absolute revenue request.

The second and third sections of Table 3-11 present the results explaining Bell's degree of success in obtaining its incremental request in rate of return on total capital and on common equity, respectively. For the incremental rate of return on total capital, the second equation indicates four significant variables although the F statistic signifies that the equation itself is barely significant. The results obtained in other sections do stand out, however, namely that Bell Canada's degree of success is positively correlated with the number of witnesses it calls as well as the number of main interveners and negatively correlated with the amount of its absolute request and the amount of increase it requests in the rate of return on common equity. The results explaining the degree of success achieving the incremental desired return on common equity are somewhat better. The signs

on the coefficients are the same as those that have been found in the rest of this analysis, and the equations themselves are significant.

To summarize the results, all the evidence suggests that Bell Canada's degree of success is positively related to the number of witnesses that it calls. This result is not completely surprising since the Commissions base their decisions on the evidence before them. The result does however indicate that Bell can affect its own success rate by the amount of evidence it produces. We have no way of measuring 'relevant' evidence or witnesses. The results also indicate that Bell's degree of success is positively related with the increase in the consumer price index. The results invariable indicate that the Commission however is reluctant to grant Bell's total request, that the absolute amount of the increases requested both for total revenue and for the rate of return on capital negatively affect the success rate. In addition the shorter the time period between rate applications the lower Bell Canada's degree of success. The surprising result was the always positive association between the number of main interveners and Bell's success rate. We feel that this association is spurious based simply on the large monotonic increase in the number of interveners over the period.

In Table 3-12 we present the elasticity of response for the degree of success in achieving absolute revenue requests as estimated in a double-log model. The coefficients indicate the elasticity of the independent variables or the degree of success. A 1% increase in the number of Bell witnesses, for example, leads to a .46% increase in the success rate.

TABLE 3-12

ELASTICITY OF RESPONSE

QREV

NWITB	.46
MAINI	.88
NMOS	-1.58
REURQ	-1.03
RORP	-.06
CPI	1.93
ER	1.63
T	.38

Footnotes to Chapter Three

1. See Chapter 2, 3.4(c).
2. We have not examined evidence to back up this assertion.
3. Communication from C.R.T.C. June 1980.
4. Ibid.
5. Bell Canada Amended Application B, File No. C.955.182.1, August 15, 1974 — [1974] CTC 412.
6. Telecommunications Committee, Order No. TO474, August 15, 1974.
7.
8. Janisch (1979), p.83.
9. See Janisch (1979) p.85.
10. Janisch (1979) p.27,77.
11. Kane (1980).
12. CRTC, Rules of Procedure, SOR/79-554.
13. Kane (1980), p.
14. J. McManus, "Federal Regulation of Telecommunications in Canada", in H.E. English (ed.) Telecommunications for Canada (Methuen, 1973, Toronto).
15. H.C. Windsor, "The Public Interest and the Regulation of Telephone Service in Nova Scotia - A Case Study of the Board of Commissioners of Public Utilities", M.A. thesis, Dalhousie, May 1976, p.27.
16. On the issue of cross-subsidization see also H.N. Janisch and R.B. Huber, "A Critique of Provincial Regulation of Telecommunications in the Atlantic Provinces", Volume 8, Canadian Communications Law

Review, December 1976, and B. Lesser and J. Chamard, "Telecommunications Regulation in Nova Scotia", Government Studies Programme, Dalhousie University, April 30, 1976.

17. Windsor, op. cit. p.65.

18. Discussions with Board members, December 1979.

CHAPTER FOUR

JURISDICTIONAL ISSUES: ANALYSIS AND ASSESSMENT

4.0 Divided Jurisdiction: Rule-Setting and Policy-Making

The Law Reform Commission in its working paper on administrative law states "To the extent that there is no minister actually responsible or accountable before Parliament for the operations of the government agency, one can say that there has been an investiture of power to the agency by the legislature, rather than a mere delegation of the authority."[1] We have, in this paper, been concerned with the operations of this investiture of power in the regulation of telecommunications in three jurisdictions; two of these jurisdictions utilizing statutory regulatory agencies. There are a number of advantages and disadvantages to the use of SRA's as an intermediary between the Legislature and the industry or activity which is regulated.

The disadvantage of using an SRA to regulate activity is basically the lack of an appropriately designed incentive structure for the regulators so that regulators maximize societal goals rather than their own. The investiture of decision-making power in the hands of independent agencies automatically creates a division between the voters on the one hand and the regulators on the other hand who carry out the voters' mandate. Investiture or delegation of power to make regulations and policy outside the Legislature therefore weakens ministerial and parliamentary responsibility. This weakening of responsibility can mean that the Parliament (or Cabinet) of the day refuses to take responsibility for the actions in the regulated

arena; arguing that it is not politicians' fault that telecommunications prices are increasing but the fault of industry or the regulator. Some authors have suggested that Parliament and the Cabinet have final authority over regulatory agencies because the legislation enacting the agency can be changed at any point in time. The view that the threat of rewritten legislation as a 'backstop' forces the agency to hold the political line is likely misguided. Legislation cannot be passed that quickly. Moreover, to change the legislation involves more than merely reading an Act three times in the House. The interest groups have to be consulted; if not consulted they will surely complain about the rewriting of the legislation. We have seen sufficiently numerous versions of a 'new' Communications Act and a 'new' Anti-Combines Act in this country to indicate that new legislation is not an immediate or even a short term possibility.

Since 1974, three government sponsored bills rewriting the federal regulatory powers over telecommunications have died on the order paper.[2] In addition, numerous private members bills amending the Broadcasting, Railway and National Transportation Acts have not been passed. An instructive example of the supposed ability of Parliament to enact or rewrite legislation are the various attempts to rewrite the Combines Investigation Act. Of the 32 proposed amendments to the Combines Investigation Act since the opening of the twenty-seventh Parliament in 1966-67, four have passed into law.[3] It is therefore, I feel, unreasonable to accept the view that Parliament is able or willing to quickly rewrite legislation. Parliament has been unable to do so in many cases when they have carefully studied an area. They are unlikely to be able to do so simply reacting to a recalcitrant agency.

It is therefore likely true that delegation or investiture of power in an SRA does weaken ministerial and parliamentary responsibility. It is my contention that this delegation occurs in order to weaken parliamentary responsibility for an area where the 'correct' policy is unknown.

Policy and law can each be divided into three sets of activities - policy setting, policy elaboration and policy application; law setting, law elaboration and law application.[4] Both policy and law setting are presumably the sole jurisdiction of the Legislature. Policy is established by legislation, speeches, controls, taxes, subsidies, etc.; law is established by passing legislation. Policy elaboration involves the translation of general policy as set forth both by the legislation and by other rules and guidelines which can be established either by the legislature or the regulatory agency. Policy application consists of "adjudication or other decision-making requiring the interpretation and application of policy within the framework of the statute."[5] Similarly, law elaboration consists of rules, standards and policy guidelines, the relatively specific legal criteria used in the process of administrative action; using these rules, standards and policy guidelines in making specific decisions on particular cases is law application. The question of the independence of statutory regulatory agencies must involve the question of the appropriate division of powers between the legislature and the SRA in each of these six areas. If delegation or investiture to an agency is generally thought to weaken parliamentary responsibility it must therefore be true that an SRA is invariably conceived of as becoming involved in either policy and law setting or policy and law elaboration; responsibilities which could be or should be the jurisdiction of parliament. It appears misguided to continually rail at policy setting by SRA's. Since

Parliament has not acted to diminish the investiture of its power in independent agencies, one must conclude that this weakening of parliamentary responsibility is desired by Parliament. If Parliament has not designed this investiture of power, the remedy is transparent. The appropriate use of jurisdiction by Parliament would be to set and elaborate both policyand law and to leave only the applications of this policy through law to a statutory regulatory agency. For Parliament to set and elaborate policy and law would require a number of changes in the present regulatory scheme - a set of well-defined objectives in the legislation, strict parlimentary control over the agency and parliamentary ratification of any rule, guideline or principle established by the agency.

Policy-setting and elaboration solely by Parliament will solve a second disadvantage attributed to SRA's - that those who make the rules sit in judgement on specific applications.

If SRA's are in effect policy-making bodies, overall policy for an area if implemented and established by both the Legislature and the regulatory agencies can be replete with inconsistencies. Conflicts and problems can easily arise when policy is in the hands of a number of authorities. One assumes that politicans are sensitive to voters needs and requests. The regulators, however, are only sensitive to the needs and requests of those who appear in the regulatory hearing. Since they have different constituencies, the Legislature and the regulator can make different policies especially if each is trying to reduce the conflicts among those who are pressuring them. Inconsistent policy development makes no one better off. Moreover, the regulatory agency may not have the resources to do sufficient policy analysis or may actually feel that it is just involved in judicial decision-making when it actually is involved in policy-making because

of the vagueness of its mandate. The Nova Scotia Board is an example of a quasi-judicial body which attempts to refrain from policy development. In my view, all regulatory agencies especially ones such as the CRTC or the Nova Scotia Board of Commissioners for Public Utilities are directly involved in policy-making. They are involved in policy-making for a number of reasons. First, the objectives of the Acts are so vague that they offer little guideline to a judicial or judicious decision. Let us single out rate-making for analysis. One could argue that rate-making was purely adjudicatory if it simply involved the application of well-known principles. On the basis of the Railway Act which says that rate regulation by the CRTC shall be to make just and reasonable rates, I would aruge that a case could be made for a wide variety of different rate structures, each of these rate structures being just and reasonable based on different criteria or objectives. Justness and reasonableness are not good principles for decision-making, as a result, rate-making is not a simple adjudicative task but involves the use of discretionary or policy-making authority. Given that Parliament has left objectives in the Railway Act vague since that Act was first drafted in the 1880's leaves one to believe that the objectives of telecommunications regulation are largely unknown to Parliament. Creating a statutory regulatory agency to make rates which are just and reasonable gives wide discretion, too wide discretion for a purely judicial adjudicative body. Therefore, if there is a dichotomy in policy development between Parliament and the SRA, that dichotomy exists because Parliament is unable to articulate set and elaborate policy. To criticize SRA's for being policy setting devices outside parliamentary approval is whistling in the wind

since Parliament has precisely set them up that way. To criticize the establishment of SRA's as leading to inconsistent applications of government policy is to assume that there is a government policy. Again the answer is for both policy and law-setting and elaboration to be precisely done by Parliament. If there is concern that the CRTC has become too independent, that the CRTC has become too concerned with policy development and thus too little concerned with the application of law then the answer is simple; take those powers away from the CRTC. But to whom shall we give those powers? They could be delegated to a department within the government leaving policy and law application to the CRTC. That is, the Department of Communications could be given the power to set and elaborate all federal telecommunications policy in this country. The poor record of the DOC to establish a policy over an area where it has no regulatory jurisdiction and where an active regulator is involved in policy-setting highlights the problem of divided jurisdiction between rule-making and regulation. In addition, in earlier sections we have expressed concern that the nature of regulatory oversight by government departments has a set of fundamental problems, namely the lack of openess and fairness.

A second fundamental reason why SRA's are engaged in policy-making is that policy elaboration by Parliament is necessarily incomplete for areas such as rate-making. Owen and Breautigam discuss the differences between agency goals and decisions.[6] They suggest that one cannot look at the decisions of an agency as independent of its goals. I would take an additional step; there may be no goals but only decisions i.e., telecommunications policy development is essentially an ad hoc, case by case, adjudicative process. The purpose of regulation may be to articulate goals and to set policy. It is too easy, I think, to conceive

of government's as having articulated long term policy developments and goals. Politicians may be too involved in short run problem solving and too concerned with re-election to be engaged in long term policy development. The fact is clear that most regulatory agencies including the ones examined in this paper have very vague goals. Why does Parliament continue to establish very broad and vague mandates for these statutory regulatory agencies? One answer is that Parliament does not know what goals to set. The regulation of telecommunications generally and the setting of 'reasonable' rates specifically are after all most difficult tasks. Telecommunications is a quickly changing complex highly technocratic industry. The correct policies towards telecommunications may be unknown at any point in time to a specific Parliament. As a result, agencies are established with broad mandates to create goals. This helps to explain why there tend to be appeal mechanisms for these highly complex and technocratic regulatory agencies. In its guise of policy-maker were the regulatory agency to enunciate a goal which the government or the Cabinet of the day do not like, then that specific goal can be overturned. I would suggest that it is easier for governments to overturn specific decisions or to overturn specifically enunciated goals than to a priori develop an entire set of long term strategies for the regulation of any area.

Given the existence of statutory agencies, there also exist differences in procedures and procedural safeguards. The rules of evidence, the rules of procedure, notice, the method and application of the rules of decision may differ greatly between SRA's. This, of course, is inefficient and unfair. Any multi-industry firm operating in several regulated industries would find it difficult to know which procedure was being followed and to understand the differences. It is basically unfair to subject similar forms

of administrative behaviour to different safeguards and different procedures. Why should a firm that operates in the telecommunications sector receive 30 days notice, be assured that all rules of evidence would be followed, be given a quick decision followed by completely detailed reasons for decision when a firm in the trucking industry would not face the same conditions? Fairness should entail some common procedure, some common safeguards against arbitrary use of discretion.[7] This problem does not suggest that all SRA's should be disbanded and all their activities be taken up by government departments. Were all regulation to take place in government departments, differences in procedural safeguards would be probably guaranteed, since the processes would be secret and not be public. Owen and Breautigam stress that the purpose of regulating activity under the rules of administrative law is to ensure fairness, to guarantee access and to slow down the process of change. Subjecting all regulated activity to internal government processes would eliminate the fairness, openness and objectivity which are essential characteristics of administerial processes.[8]

Statutory regulatory agencies were set up for a wide variety of purposes. In many cases they were set up to depoliticize decisions, and to engage in fact-finding which was beyond the powers, the ability or the time of Parliament. Many activities that regulatory agencies engage in are repetitive and involve specialized understanding and knowledge which if built up over time make decisions easier to arrive at, more uniform and less 'political'. One overriding constraint on the possibility of greater political control over regulated activities is the limited time that Parliament

has to examine any issue. To conceive of Parliament sitting for 55 days in a Bell Canada rate case is impossible. All the reasons which led to the establishment of regulatory agencies in order to take these tasks away from Parliament are the very reasonswhy they cannot be given back. Moreover as we stated earlier, it may well be true that there is no enunciated public policy, no policy which the great majority of voters would agree on for these areas. To maximize political control may then be to maximize short run uninformed expediency.

The problem in a nutshell is as follows. Completely independent regulatory agencies have no constituency which can vote them out of office. As a result, a completely independent regulator can maximize his own self-interest and not that of any group since he would not be accountable or responsible for his actions. At the same time, complete political control over all the decisions now being undertaken by regulatory agencies could remove many detailed technical questions from an open fair process and put them at the mercy of short run political motivations. The advantage of complete political control is that the voters can remove the politicians from office. Politicians are accountable for their actions and responsible to a specific constituency which has the power to change the politicians when the constituency disapproves of the politicians' actions. The correct amount of independence for a regulatory agency is to remove it sufficiently from political control so that purely short run political issues such as an impending election will not affect the application of the law. At the same time, regulators must be sufficiently accountable for their actions. There are a wide variety of controls and practices which ensure accountability as well as sufficient independence. These procedures involve the division

of the elaboration and application of policies and laws between the political masters and the regulators; insuring that appointment and budgetary procedures for the agencies allow them independence and ensuring that the process is open and fair to all. We provide our recommendations in the last chapter.

4.1 Divided Jurisdiction — Federal/Provincial Relations

Bell Canada, B.C. Telephone, CNCP Telecommunications and Teleglobe are federally regulated because they are incorporated under federal charters. The other communications carriers are regulated provincially. CNCP Telecommunications offers services in all provinces - Bell Canada offers services in Ontario and Quebec and with the other telephone companies offers telecommunications services across Canada under the Trans Canada Telephone System (TCTS). The tariffs of the TCTS have been filed with federal and provincial regulators, but have not been extensively examined until the recent CRTC hearing into TCTS rates and the method by which the members distribute the revenues. The Federal Department of Communications does examine interjurisdictional telecommunications aspects. The CRTC or its predecessors have never exercised jurisdiction over the provincial telephone companies. However, two recent cases before the CRTC have raised the ire of the provinces who feel that their jurisdiction is indirectly threatened. In the Interconnection case, the CRTC approved the interconnection of CNCP with the Bell Canada local facilities for the provision of switched data services. The provinces, principally the Maritimes objected to the hearing, arguing that the correct scope for competition in the telecommunications sector was a matter beyond the jurisdiction of the CRTC.

Provincial hackles were further raised when the CRTC undertook to examine Bell Canada's and B.C. Telephone's requests for increases in TCTS rates under the following 7 issues:

1. Whether the settlement procedures employed by the TCTS member companies are fair and reasonable and in the best interests of subscribers and the public;

2. Whether the rates charged on a cross-Canada basis for each of the TCTS services, including those of Telesat Canada, are just and reasonable;

3. Whether the terms of restrictions upon which services or facilities are offered by the TCTS members, including Telesat Canada, are reasonable and do not confer an unjust advantage on any person or company;

4. Whether the relative treatment by TCTS of competitive and non-competitive services is just and reasonable;

5. Whether the TCTS construction program is reasonable and whether the information generated and employed in the planning of TCTS facilities and services is appropriate and sufficient;

6. Whether TCTS, including Telesat Canada, is sufficiently responsive to the demand for the transmission of programming and other information services at a reasonable cost;

7. What the information requirements of the regulatory agency should be in regard to future TCTS rate cases.

Provincial governments objected that the settlement procedures (RSP) were outside the jurisdiction of the CRTC, that the RSP had been approved by

the Governor-in-Council and that the information requested by the CRTC on the operations of provincially regulated carriers was outside the CRTC's jurisdictions.

In the 1973 Green Paper on telecommunications policy (Proposals for a Communications Policy for Canada) the federal government announced its intention "to develop in consultation with the provinces a statutory declaration of national telecommunications objectives, taking due account of provincial needs and interests which will provide a frame of reference for the federal regulatory body in exercising its authority"[9] .

A Federal-Provincial Working Group in Competition/Industry Structure in Telecommunications was established in 1978, met 6 times and issued its first report in February of 1979. The group stated the policy objectives in telecommunications to be the following:

> "Developing and maintaining an efficient telecommunications infrastructure which can provide universal access to a broad range of telecommunications services at economic and equitable rates is a fundamental goal of public policy.
>
> Public policy also should permit a wide degree of consumer choice and should ensure that services are of high quality and responsive to consumer demands.
>
> Innovation and efficient use of societal resources should be encouraged.
>
> The development of telecommunications systems and services should contribute to regional development, encourage growth in employment in Canadian industry and enhance its international competitiveness.
>
> Canadian control must be assured and in the areas of ownership. management and technology. Canadian participation should be maximized."[10]

The CRTC has established two inter-governmental liaison committees. The first was the Committee of Inquiry to study the dispute between the

city of Prince Rupert and the British Columbia Telephone Company. The city of Prince Rupert had applied to the CRTC because it could not arrive at a satisfactory arrangement with British Columbia Telephone Company to share the revenues from toll calls billed to its subscribers. The CRTC considered that this application raised fundamental general principles on the distribution of shared revenues. They therefore established a committee including representatives from British Columbia and Ontario and chaired by a senior CRTC staff member. This committee met privately with the city of Prince Rupert and the British Columbia Telephone Company and solicited comments from other interested parties. The Committee issued its report in March 1979. The CRTC then invited comments on this report from interested parties. After digesting the report and the comments the Commission issued its decision, that decision not involving representatives from the two provinces. In its decision, the CRTC acknowledged the importance of the federal/provincial cooperation. It is doubtful whether the provinces would acknowledge the benefits of the liaison.

In its decision to examine TCTS rates, the CRTC established a joint inter-governmental committee.[11] This committee was made up of representatives of provincial regulatory bodies plus a representative of the government of Saskatchewan (which does not, as we have seen, utilize an independent regulatory body to oversee SaskTel.) and the governments of Ontario and Quebec (which do not have regulatory powers over major telecommunications carriers). Schultz (1979) finds the structure of this committee disturbing since it encompasses both inter-regulatory jurisdictions and provincial governments.

This committee was principally to be involved in a study process where the Commission's consultants Peter Marwick and Partners examined the

mechanisms of the Revenue Sharing Plan and its predecessor settlements procedure - the Full Division Plan. "Even with a narrow, ostensibly technical, mandate, given the acrimonious background to the issue of TCTS regulation and the membership of the inter-regulatory committees, there are legitimate concerns that such a committee could play a filtering rather than a monitoring role and that sensitive points could be resolved by means of the Committee acting as a forum for inter-governmental negotiation."[12] It is clearly a problem if this inter-regulatory jurisdiction liaison committee assists in policy development.

Here we would have the worst of all possible worlds, policy decided by private negotiations among regulators, "because instruments originally designed for consultation have been transformed into instruments for decision-making which is subject only barely or not all to effective checks or controls."[13]

It is patently clear that the present jurisdictional divisions in telecommunications are unsatisfactory. Local telephone rates in Ontario, Quebec, B.C. (and in part of Newfoundland) but nowhere else are set by the CRTC, an agency appointed by the Federal Cabinet, whereas tariffs for inter-provincial services do not appear to be regulated by any public agency, federal or provincial. Both extremes are untenable.

Regulatory agencies, we have decided, are to be held accountable by politicians since politicians are themselves accountable to voters. This model of accountability, however, assumes a correspondence bewteen the jurisdiction of the regulator and the constituency of the politician. This correspondence is lacking in the case of the CRTC's supervision of Bell Canada. It would appear unreasonable to have policy directives emanate

from a Federal Cabinet which might determine the percentage of the revenue requirement to be raised from local versus toll services for Bell Canada and B.C. Telephone only. To solve this issue, either one of two solutions are possible. First, the CRTC could regulate all activities of all telecommunications carriers, thus ensuring equality of treatment across the country. Second, the intra-provincial activities of all telephone companies could be regulated provincially leaving inter-provincial regulation to the CRTC. Note, that I do not consider it a useful solution to have all communications regulation delegated to the provinces. That delegation would be unsatisfactory for it would leave all inter-provincial decisions basically to the companies. Yet there are clear, fundamental inter-provincial telecommunications policy issues which must be determined by a national body.

Moreover, there are important issues today - attachments and terminal equipment, competition, enhanced services, the telecommunications/computer interface - which could then be decided differently by the nine different jurisdictions. These differences in policy could have unfortunate side effects in manufacturing, research and development, and the setting of standards so as to penalize the development of Canadian technology. It is unthinkable to allow fractured regulatory authority over as important an area as telecommunications. In addition, there are presently several carriers (Telesat, Teleglobe, CNCP) which could not be accountable, in any meaningful way, to separate provincial jurisdictions. This number of true national carriers is likely to grow in the future as increased competition arises. It would be unfair to subject national carriers to ten separate provincial jurisdictions, with no overriding ability to exercise national concerns in the face of provincial autonomy.

Would it be possible to reformulate the jurisdiction of the CRTC so it encompasses inter-provincial telecom. matters only, leaving purely intra-provincial matters to the separate provinces? To do so would be to mimic the U.S. experience and the division of responsibility between intrastate and interstate services. That division of responsibility has resulted in attempts to allocate between jurisdictionsthe plant used in common to produce both inter and intrastate services. I am not convinced that the U.S. experience should be replicated in Canada; the division of plant between inter and intra-provincial classes of service would likely become a political decision, the end product of which might be no better a result than today's system.

To recommend complete federal jurisdiction over all telecommunications matters would be most naive in the present political climate. Abstracting from political reality, such an approach has much to recommend it.

There is a third possible approach, one recommended by the Clyne Committee as well as CNCP Telecommunications and Bell Canada, the use of a joint federal/provincial regulatory agency.

A joint federal/provincial committee could oversee both intra and inter-provincial matters with a selective choice of commissioners; purely intra-provincial matters being decided by representatives of that province; purely inter-provincial matters being decided by federal representatives.

4.2 Divided Jurisdiction: Federal Regulation of Bell Canada

4.2.1 Introduction

We have not in this study attempted to indicate whether regulation is 'effective' or not. Regulation is viewed instead as a complex endogenous

process whereby telecommunications policy is elaborated. Alternative views of the purpose of regulation would suggest either the closure of market failures or the redistribution of income (the divergence between prices and costs of telecommunications services). As the effects of regulation can only be considered in relation to the purposes, some theory must be advanced. The evidence suggests to us, that the purpose of telecommunications regulation is policy elaboration and it is against that goal that we judge actual processess. The federal process is a relatively open one, relatively in the sense that without cost awards, large diverse groups of interested participants may not appear simply because of the market failures preventing organization or representation of the group. The federal process is also one tending to have the full panapoly of administrative law — the trappings of fairness, due process, etc. As these trappings increase the costs of appearing before the SRA, their benefits must carefully be weighed against these costs. Federal jurisdiction over Bell Canada is also divided — an unknown division of policy setting between the CRTC and Cabinet and division of some authority between the CRTC and the DOC.

At the beginning of this study, the procedural environment was divided into three main sections — the legislation and the external and internal environments. We have earlier criticized the enabling legislation (Railway Act, National Transportation Act) as too vague in its setting of the objectives of telecommunications regulation. However, assuming that the purpose of regulation is policy setting, then objectives cannot be fully developed in the legislation. One can, however, envision clearer objective setting them simply requesting 'just and reasonable' rates. The telecommunications bills of the last several years have attempted to more

clearly define the objectives, given the years of experience under the Railway Act. Section 3 of Bill C-24 (which died on the order papers in January 1979) attempted to set out a large number of objectives — efficiency, safeguarding of cultural and social fabric, reliability, recognition of regional needs, the use of Canadian facilities, just and reasonable rates without undue discrimination, and the promotion of innovation and research. Are these well articulated objectives? I think not. Essentially, these objectives are motherhood issues, issues which could be raised about the operations of any industry. Could we not say that the same issues (except perhaps the safeguarding of the cultural fabric) were involved in the pulp and paper, food processing or metal mining industries? These objectives in Bill C-24 do not address the major issues in telecommunications regulation — the correct structure of the industry and degree of monopolization in each service area — terminal equipment, local service, message toll, competitive; the degree of competition among facilities; the degree of vertical integration; the degree of cross ownership of media; the degree of cross ownership of facilities; the interconnection between competitors (Bell and CNCP, Bell and CATV); the correct standards for service quality and reliability; the degree of cross subsidization of rates both intra and inter service; the degree of universality of service.

Were Parliament able to enunciate objectives for telecommunications regulation, they could begin somewhat as follows:

> The objective of regulation is an efficient, equitable and technologically advanced telecommunications sytem. This is to be achieved by promoting competition as far as possible in both services and facilities consistent with the economics of operation of telecommunications systems including the ownership of manufacturing subsidiaries.

A general objective like this one would set the broad policies within which the CRTC could regulate. While the exact degree of competition would be for the CRTC to determine (within the external and internal environments); the basic philosophy is set out in the enabling legislation.

In the next chapter we discuss changes in the external and internal environments, changes designed to allocate jurisdictional responsibilities.

4.2.2 Divided Jurisdiction: CRTC and DOC

In theory, the CRTC and the DOC are quite distinct. The DOC is an integral part of government operations, providing the staff of the Minister of Communications; the CRTC applies the relevant sections of federal legislation to the regulation of federally chartered telecommunications firms. In our analysis, however, we saw that the two agencies were not completely distinct. The DOC has developed econometric models of Bell Canada and British Columbia Telephone, companies over which the CRTC, not the DOC has jurisdiction. In its 1977-78 Report, the Department announced that "although the tariffs of federally regulated carriers are regulated by the CRTC, the Department develops policies and programs related to communications carriers and the telecommunications industry as part of its general mandate." However, the DOC may wish to 'develop policies and programs' affecting Bell Canada. These can only be implemented either by the CRTC or in the passage of new legislation. We have criticized Bill C-24 (and other recent announced federal Communications bills) as still containing vague, often conflicting and generally unworkable objectives. It is unclear to us how all the

research sponsored by DOC on federally regulated telecommunications firms assisted in the rewriting of the legislation. The DOC's announcement in 1974-75 that it had reached agreement on customer-owned attachments with the federally-chartered telecommunications firms did not solve the issue as the CRTC is still attempting to pursue its policies on this matter. I am not trying to single out the DOC for blame, the fault is both in the division of authority between the CRTC and the DOC as well as the vague mandates of the CRTC, the lack of cooperation, in fact the competition between the two agencies and the lack of jurisdiction for the DOC. In some ideal world, the DOC would develop policy and the CRTC implement it. In reality, the CRTC has more policy making ability than the DOC, yet the DOC is the more accountable agency, since it is responsible to the electorate. Even in the role of intergovernmental and federal-provincial relationships, the CRTC would appear to have more real policy setting power than the DOC. Not only has the CRTC heard cases likely affecting nonfederally chartered telecommunications firms (Interconnection, TCTS) but the CRTC has also in these cases set up inter-regulatory committees which in one case included provincial government representation.

Conflicts between the DOC and the CRTC are not limited to the issue of general jursidiction, they also involve particular cases and decisions. The existing appeal mechanism allows appeals to the Cabinet, appeals which are not heard in any form of 'fair' hearing. In this hearing, the DOC can make representations, these are not made available to either the parties involved in the dispute or the CRTC. Therefore, any competition between the two agencies can turn out to be essentially 'unfair', since the DOC has the ability to make unknown representations

to an ultimate jury where presumably the 'head' of the DOC, the Minister of Communications, is the chief judge.

The conflicts between the DOC and the CRTC can be minimized by three changes, namely, a more explicit enunciation of the objectives of federal regulation (as has been suggested above), an elimination of the present appeal to Cabinet of CRTC decisions (as is discussed below), and a shifting of some staff functions to the CRTC. This last point needs amplification. It is useful for the chief policy working body — the DOC — to produce policy analyses, including economic and econometric analyses. However, it is at least equally important for the CRTC to undertake sophisticated economic analyses in order to fulfill its mandate. At present, CRTC research appears basically to be reactive — addressing the issues raised in specific cases; DOC research is more orientated towards basic research, examining essential issues in the industry. The DOC, for example, has constructed econometric models of Bell Canada useful for examining issues such as economies of scale and economies of scope, issues important in examining optimal industry structure. However, it is the CRTC, not the DOC, which has to decide the degree of competition allowed for Bell Canada; as a result, the CRTC should be capable of constructing and analyzing econometric models. The problem as we have discussed is that under the present structure both the DOC and CRTC are policy-making bodies — the DOC determining legislation and advising the government on appeals to Cabinet, the CRTC deciding cases in the context of a broad legislative mandate which allows the CRTC to also set policy. This conflict can only be ended by having one policy-making body. It is naive to think that the CRTC will be given only law application as its

purpose. The conflict between the DOC and the CRTC will then continue; however, clearer objective setting and a transfer of some modelling ability (essentially a larger budget) to the CRTC should alleviate some of the conflict. This conflict between adjudicative and policy-setting bodies is not unique to telecommunications. The Ministry of Energy, Mines and Resources determines energy policy; the National Energy Board determines specific issues such as the route of interprovincial pipelines and exports of oil and natural gas, as well as being policy advisor to the government on certain issues. The NEB has a far clearer objective than the CRTC, yet the NEB still engages in policy setting. The NEB and EM&R have coordinated some research activities. We would therefore recommend a coordination of DOC and CRTC research activities as well as a shift of some basic research activities to the CRTC.

Footnotes to Chapter Four

1. Reform Commission, ibid., p. 12.

2. Bill C-43,(1974-76, 30th Parliament, 1st session); Bill C-24, (1877-78, 30th Parliament, 3rd session), Bill C-16, (1978-79, 30th Parliament, 4th session).

3. This includes both government sponsored and private member bills. The failed government sponsored bills were C-256 (1970-72); C-42 (1974-76); C-13 (1977-78); Bell C-227 was not passed when originally presented (1973-74) but resurfaced and was passed in 1974-1976.

4. This division is taken from the Law Reform Commission, Chapter 2.

5. op cit.

6. Owen and Breautigan, ibid., Chapters 1-2.

7. Law Reform Commission, ibid., Chapter 6.

8. op cit.

9. Green paper, p. 23

10. First Report, p. 2

11. Inter Regulatory Committee on TCTS Rates and Practices. Other joint regulation committees are the Prince Rupert Committee and the Inter Governmental Committee to Report on Satellite Distribution of Television Programming and Pay T.V.

12. R. Schultz; "Recent Developments in Federal Provincial Liaison", prepared for National Symposium Law and Policy
13. on Canadian Communications 24-26 January 1980; published as, Centre For Studies in Regulated Industries - Working Paper 80-10; p.26

13. R. Schultz; ibid.

CHAPTER FIVE

RECOMMENDATIONS: AN ACCOUNTABLE PROCESS

5.0 Introduction: General Recommendations

Our goal is to develop an institutional design which is an open, fair and accountable means of developing and applying economic policy. Our view is that Parliament's objective for SRA's is that they articulate economic policy within a set of legislative constraints. Our analysis of 2 SRA's indicates that the institutional design — this set of constraints as well as the internal procedures followed by the Board — is important in determining the outcomes. We speculated earlier that SRA's given broad mandates could maximize their own objective functions rather than that of their political masters. The evidence suggests to us that this objective function appears to be the minimization of conflict. The present two procedural systems (SRA, government department) do not fully meet desirable criteria. Before turning to our explicit recommendations, we discuss the various methods by which Parliament can control SRA's.

The Parliament of the day or Cabinet has 7 methods of affecting the decision-making of regulatory agencies:

1. Legislation and Parliamentary Oversight - policy and law setting, elaboration and application
2. Appointments
3. Budgets
4. Ex parte communications, policy statements, personal contacts
5. Interventions
6. Appeals
7. Policy directives

5.1 Legislation and Parliamentary Oversight

We have already discussed legislation and the possibility of the government using policy and law to control SRA's. Parliament, Cabinet or the Minister responsible can influence either policy or law by legislation or elaboration. On equity grounds, it would appear to be a misuse of political discretion to have political influences on the application of policy or the application of law within the agency. Application to specific cases should be beyond the narrow influences which can permeate political decisions. It is surely in the application of law that we do want independence. It is in the application of law and policy that we want a procedure and procedural safeguards that ensure that all interested parties are heard and that a decision is taken on the merits of the application and with the full panoply of safeguards. If there is a role for political involvement in the regulatory process it is in the setting of policy and law and also in the elaboration of policy and law. How these policies and laws are elaborated is of course a different issue. IF government has a policy in the area, then the legislation as well as all rule-making should be clearly established by Parliament leaving only the application of this policy to the SRA. The SRA is still needed since the application of policy may involve adjudication of conflicting applications (T.V. licences) or amelioration between adversary positions (cost of capital for a regulated utility) where political elements should not be involved. In areas where the government has no clearly defined policy, or if policy can only be decided after an SRA's hearing the merits of a number of positions, then other instruments for accountability of the SRA are needed. Note, that the use of an SRA to develop policy can be an exercise in the openness of the political process allowing interested parties a voice.

An important question is the relative openness of a regulatory process as compared to the openness of a political process. The Nova Scotia Board and the CRTC develop some of the telecommunications policies which in Saskatchewan is solely the responsibility of Parliament (the government). The regulatory process attracts groups which have the funds to appear, to partake in policy-setting. Two problems arise - disorganized groups are not heard, well-organized groups can have disproportionate power. The advantage is that the process is open - the various demands are publicly articulated and the absence of certain groups is evident. What of the political process? Again, disorganized groups may not be heard although as we have suggested, it is relatively less expensive to lobby an M.P. than to intervene at a Bell Canada rate hearing for 55 days. As we have discussed, however, the political process and its distribution of largesse is more accessible to cohesive groups. The disadvantages of the political process are the articulation of demands in private and therefore the unknown tradeoffs of demands.

While it is difficult to envision legislation as the means of day to day control by Parliament over an SRA, the legislation, if articulated properly, can set the basic framework for operations of the agency. We have already recommended a simple general preamble for legislation:

> "The objective of regulation is an efficient, equitable and technologically advanced telecommunications systems. This is to be achieved by promoting competition as far as possible in both services and facilities consistent with the economies of operation of telecommunications systems including the ownership of manufacturing subsidiaries."

We do not agree with the Law Reform Commission's suggestion that all rule making by an SRA be certified by Parliament. Such a process would introduce inordinate delay into regulatory proceedings and tend to unnecessarily reduce the SRA's responsibility.

A superior method of control, in the large, over agency behaviour is the use of a Select Parliamentary Committee on Regulatory Agencies. This Committee would consist of representatives of all political parties (in proportion to their representation in the House) and would have a staff (or at least access to DOC staff.) The legislation would make the SRA responsible to the Select Committee in the following ways:

1) Annual reviews. The SRA would announce its budget for the following year, articulate its objectives and explain how its decisions met their objectives. The agency would not be subject to cross examination and time for questioning would be limited.
2) Appointments to the SRA. The Select Committee would appoint the members of the SRA (described in more detail below).

5.1.1 Appointments

It is clear that the appointments to regulatory agencies can affect the decisions taken. Appointment procedures can operate in two ways to achieve political control. First, the commissioners could be appointed on good behaviour (i.e. for life) but the appointees could be political allies of the government. In contrast, non-political appointees could be made but only for a short period in office. The effect of these two contrasting policies may however be quite the same. Appointments for life under good behaviour would appear to make the regulator independent of any political influence.[1] However, the regulator may not wish to be a regulator forever but to move on to another job either within the government or elsewhere. If he is appointed to the agency because of his political motivations or connections then as long as that party remains in power the

regulator is not independent. Similarly, appointing someone not connected with the political process to an agency but giving that person a brief mandate may impinge the politicians' incentives on the regulator.

Appointment procedures have been examined by the Law Reform Commission.[2] They suggest that:

1) nominations for appointments to regulated agencies be more open
2) existing associations in the private sector could be asked to comment on a short list of nominees "in appropriate circumstances"
3) prior consultation with provincial governments might be desirable with respect to appointment to major regulatory agencies.

In addition, the Commission suggests that the members of SRA's be clearly professional and be subject to annual formal performance evaluation.

Most of these suggestions by the Commission are unlikely to be headed. However, it is difficult to make constructive suggestions since it is clear that many appointments to SRA's are politically motivated. Few appointments are likely motivated by how the person is expected to react in a particular case; the political element is usually party ties or reward for past service.[3] Those with strong party ties or those who are rewarded for past service are unlikely to rock the political boat.

The regulators of telecommunications have discretionary policy and rule-making authority. Telecommunications is highly complex, quickly changing and evidently an area where legislators are unable or unwilling to determing concrete policy. The individuals appointed to these regulatory agencies have latitude and as a result, the ability of individuals is important. In other cases, where the SRA is effectively constrained by instruments

and as a result accountable to the Legislature and principally involved in law application; the overall ability of individuals may not make much difference in hearings.

In any event, political accountability because of gratitude or connections is not the kind of accountability desirable. Accountability, like the regulatory process itself, should be open not circumspect, and subject to rules not private contact.

I would therefore recommend the following appointment procedure:

1) Appointments to SRA's be made by the Parliamentary Select Committee which oversees the agency.

2) Appointment to the Chairmanship or Associate Chairmanship of an SRA be subject to Privy Council approval.

3) (naive) Appointments to SRA's should consist of the most highly qualified people available.

4) Salaries of members of SRA's be commensurate with the high ability of the individuals.

5) Appointments should be for 'good behaviour', but for a term of 7 to 10 years.

The last recommendation is to ensure that appointees are immune to political pressure while on the agency, are there long enough to both learn the technical aspects and leave their mark, and finally to ensure that new members are brought in to promote new ideas. Too short a tenure will not allow sufficient time for the member to become aware of all the intricacies of the industry. In addition, most new appointees will have speci-

fic knowledge and issues they wish to deal with. A number of years of service are necessary for any member to affect agency decisions. Too long a term for members of SRA's, on the other hand, may create unnatural rigidities in agency decisions, cause sympathy for one adversary to affect decisions, and generally prevent new or different examinations of the issues before the agency.

5.1.2 Budget

The budgetary process which determines the funds needed and spent by the agency is clearly crucial to the independent functioning of an SRA. It is dififcult for a regulatory agency to be independent of the government, when its budget may be tightened because of unfavourable decisions or if the agency is given insufficient funds for a staff large enough to independently carry out its mandate. The budgetary process and the amount of money alloted to a regulatory agency are then important in both establishing the independence of the agency (subject of course to the correct procedures and divisions of power in terms of setting, elaborating and applying policy and law) and in order for the agency to carry out its mandate effectively and efficiently. Regulatory agencies must have sufficient full-time professional staff to examine in detail the complex issues of telecommunications regulation at present and in the future. It is impossible for any agency to effectively deal with the issues that come up in rate and other hearings, to evaluate the construction program and deal with issues such as the 'correct' degree of competition or monopoly without a large and competent inhouse staff which can undertake independent analyses. Uninformed

decision-making by regulatory agencies due to improper budgetary allocations is the worst kind of political interference. It makes the agency appear independent when in fact it is emasculated and unable to arrive at decisions which are fair and correct for policy purposes. One way to ensure independence in funding is for the SRA's budget to be determined without government control. The budgetary procedure of the Nova Scotia Board of Public Utilities Commissioners is a good example of independent funding. That Board is able to tax those it regulates for its costs of operation. Establishing this kind of procedure for most regulatory agencies which regulate a specific industry or firm would divorce the agency from government budgetary constraints and government attempts to influence the SRA through the budgetary process. There are numerous advantages to a process of letting the SRA 'tax' those it regulates. First, the regulatory agency establishes its own budget in terms of its needs and desires. An agency which has determined a need to hire additional professional staff can do so even if the government of the day is committed to a decrease in over all government expenditures. In the face of austerity the agency can still maintain an effective role given the increasing complexity of the issues that the agency has to deal with. Secondly, since the regulation of telecommunications is ostensibly for the benefit of the telecommunications using customers it seems equitable to have those customers alone pay for that regulation rather than taxpayers in general. There would appear to be no efficiency or equity criteria which would suggest that taxpayers who were not telephone users or who were infrequent users of the service should pay for the regulation of telecommunications. The CRTC (or the Board of Commissioners for Public Utilities) would then receive its budget in two ways. First, its normal day-to-day operations

would be charged against those it regulates. Second, any hearings would be charged against the specific firm regulated and the intervenors.[4] For example, assessing costs of a Bell Canada rate case to Bell Canada and therefore its customers would ensure the achievement of a number of efficiency objectives. If the firm or an intervenor attempted to delay the regulatory process, then all intervenors would object that their telephone rates were being increased because of that intervention or because of the firm's behaviour. It would appear that since the parties to a Bell Canada rate hearing are interested in rates, making the parties and therefore all customers accountable and responsible for the costs of a rate hearing would tend to limit the hearing process. In addition, the externalities involved in each intervention should also be billed. An intervenor appearing at a rate hearing, cross-examining witnesses, presenting evidence and argument imposes costs on himself and also costs on the other parties. Given the number of interventions and issues to be raised, as determined at a pre-hearing conference, an estimate of the hourly cost of the hearing can be made. This cost would include the costs of the regulatory commission as well as the expenses of all intervenors for time spent at the hearing. An intervenor then wishing to ask two hours worth of questions would be faced with not only the cost of his own lawyer but the costs of the entire process for that two hours. This of course raises the cost of intervention to a specific intervenor by internalizing the externalities involved in intervention. By forcing intervenors to be responsible for the total burden that they impose on the regulatory process, nuisance interventions will be minimized. In order to prevent useful interventions from being penalized by the full cost process, cost awards to intervenors should include a component for this externality fee. At the end of a Bell Canada rate hearing, for example, the costs of the hearing process would be known;

these costs attributable to Bell Canada would be the hearing costs attributable to Bell Canada evidence, cross-examination, etc. plus the full costs of intervenors to whom the CRTC awards costs. Other intervenors would be liable for the total costs (including externalities) of their intervention.

The use of the procedure of taxing the regulatees for the day-to-day operations of the agency in Nova Scotia has not been completely successful. First, the Nova Scotia Board does not charge separately for hearings. Second, the Board's total budget seems to be too low for its purposes and its use of internal professional staff as a result too modest. One wonders whether the Board is unwilling to increase its budget for fear of drawing criticism from those it regulates.

5.1.3 Ex Parte Communications

Ex parte communications, policy statements and personal contacts are forms of external influence on the elaboration of policy by an SRA which should be discarded. It is very difficult to ensure that policy-makers and politicians never meet with the regulators and in so doing influence their decisions. Statements over dinner by a minister alluding to some case or suggesting some policy are not sufficient guides to agencies. If the government wishes to enunciate policy let them do so formally in a written declaration to the agency and where the agency can comment. Most people would agree that ex parte communications and personal contacts should not be used to influence agency behaviour.

I would go further and suggest that 'policy statements' also be disbanded. There are numerous examples of a particular minister making a policy

statement which is later revised or even reversed by the Prime Minister. The decisions of SRA's should not depend on the day-to-day swings in government policy or the misarticulations of policy by ministers. There is also the important issue of determining whether there has been a policy statement. Does an after-dinner speech by a minister including an 'I think that ...' statement represent government policy? Should the SRA be dependent on the ability of the media to interpret speeches and gestures in order to articulate policy? In my view, there are only two means of enunciating policy for the use of an SRA - parliamentary legislation and parliamentary policy directives.

5.1.4 Interventions

There could be a role for interventions by government agencies or ministers in regulatory hearings. The problem with the ex parte type of communication described above is their very secrecy and the unknown influence they may have. If a minister or department wishes to intervene in a hearing before an independent agency and state its goals, desires and thoughts and be subject to cross-examination, then the fairness of the procedure is maintained. There appear to be few reasons why a government agency could not appear as an intervenor at the same level as other interventions before a statutory regulatory agency. In certain provinces, of course, there are ombudsmen which have appeared before regulatory agencies. The ill-fated revisions of the Anti-Combine Laws permit the Director of the Combines Investigation Branch to intervene before regulatory agencies when issues of competition were involved. In the Province of Nova Scotia, the Attorney-General's Department provides the legal support for the Board of Commissioners of

Public Utilities. One one occasion, that support appeared to be an intervention in the case. There is no reason why an SRA could not go outside the government for legal help by either having a permanent Board counsel or by engaging private firms for this purpose. Utilizing the Attorney-General's office or the Department of Justice within the government is too close to political influence and could lead to the questioning of the fairness and independence of the regulatory process.

5.1.5 Political Appeals

The Railway Act and the CRTC Act presently include appeals both to the judiciary and to the Cabinet. In general, most authors (myself included) are opposed to appeal procedures to Cabinet. There are many arguments against these types of appeals. I turn to the Law Reform Commission's analysis in describing these problems.[5] First, appeals to Cabinet make it difficult for intervenors to decide where to direct applications and arguments. Why should intervenors spend much time and effort developing a detailed intervention before the regulatory tribunal when instead a simpler and much more direct application to the Cabinet could achieve the desired result? The case before the Commission is heard on its merits. Appeals to the Cabinet are policy appeals. Policy appeals in a closed process are really simply a form of lobbying. Allowing the Cabinet to change or reverse a decision of the SRA based on these external lobbying influences is patently unfair. Political appeals give the impression of procedural fairness since the entire case is heard on an evidentiary basis by the SRA but then the decision can be reversed on grounds unrelated to the considerations

that the agency took into account in making its decision. Therefore reviews by the Governor-in-Council or Cabinet really detract from the integrity of the administrative process. Interested intervenors with great political strength can ignore the regulatory process and aim their entire case at Cabinet. So of course can the regulated firm. The firm can appeal the decisions as easily and as readily as an intervenor. Having Cabinet appeals I would think then gives the firm an incentive to present as little evidence and as little information in the regulatory arena as possible. Why should the firm fight the case on its merits if it thinks the political process will allow it to win the case, whatever the merits? In my view, allowing political appeals, after the fact, ensures that the regulatory process will not develop the kinds of information and arguments required so that the case can really be decided on its merits. Allowing political appeals gives incentives for intervenors and the regulated firm to lobby within the regulatory process aiming at the final court-the-Cabinet. Incentives are then placed in the system whereby issues will be examined not in terms of their content but in terms of their political appeal.

An appeal procedure to Cabinet is also demoralizing to the SRA, having heard a case and spent much time in making a just and reasonable decision. The SRA can be overruled in a second process where few procedural rules are followed. The appeal proceedings are both confidential and flexible without rules of evidence or rules of fairness. As a result decisions may be reversed without providing all interested parties a full opportunity to participate. Moreover those making the decisions may not have the full information and will not have the full knowledge for the basis of the previous decision. As the Law Reform Commission states this could lead to public apprehension and undermines public belief in the legitimacy of the

government of the day. I agree with many of the authors and the Law Reform Commission that these appeals be abolished except on the prerogative of mercy or decisions based on humanitarian grounds. And when there is an appeal, the Governor-in-Council should be given the authority to either rescind the decision in whole or to refer it back to the agency. The government should not be allowed to rewrite parts of the decision.

5.1.6 Policy Directives

If the government is not allowed to reverse or change policy as estimated by an SRA, how can the agency be made accountable? Hudson Janisch among others has written extensively on the benefits of policy directives as the 'correct' form of government influence. Where an agency does not know what objective to maximize and where changes in legislation are difficult, then the government can formulate policy directives which enunciate in general terms the nature of government policy. The specific application of this policy to individual cases is still the mandate of the agency. For a number of reasons, I am far less sanguine than most on the potential value of policy directives. As expressed, often in this paper, I am quite cynical as to whether governments of the day have policies at all specifically designed for use by a regulatory agency. Perhaps the use of directives will be beneficial both to the agency and the government by forcing the government to enunciate its policies more clearly than it has in the very vague objectives of the Railway Act and in National Transportation Act. Those in favour of directives feel that they can be made general enough so as not to apply to specific cases but specific enough so that they will not be vague and meaningless. I am unsure as to how this can be done.

Let us take telecommunications and recent cases as our examples. One assumes the government has no policy directives when it comes to rate cases, i.e., that the regulatory agency can determine rates that are just and reasonable as well as the revenue requirement, the appropriate rate base, accounting rules and the like. It is clear that a great deal of effort would have been saved had the government's announcement of allowing TCTS to purchase Telesat been in the form of a policy directive to the CRTC. In the face of government approval of that purchase, the CRTC held a hearing and on the merits of that hearing determined the case to the contrary. An appeal to Cabinet by the TransCanada Telephone System saw the CRTC decision reversed. What would a government directive have accomplished? A directive suggesting that it was government policy that TCTS and Telesat Canada merge could have prevented the CRTC from examining the case at all. However, the CRTC analysis in an open and fair public hearing determined that the interests of the public as enunciated by the provisions of the governing statutes for the CRTC were not well served by that merger. Government directives are necessary of course for those considerations outside the jurisdiction of the CRTC and those public policies and provisions which are beyond the mandate of this specific agency. One can imagine questions of national defence, security, balance of payments, national integration, relationships with third countries, etc. as being mandates of and issues of concern to the government but not of concern to the CRTC. But, the proposed TCTS/Telesat merger was under the jurisdiction of the CRTC. Would a policy directive in this case have been policy setting, policy elaboration or policy application? Was this case a question of general government policy or a specific application of a policy? As the second example, consider the Interconnection case where CNCP Telecommunica-

tions applied for interconnection with Bell's local network for the purpose of offering business switched data services. Should the government have articulated a policy directive stating that there be competition or monopoly in telecommunications? How could such a directive be determined without examining the specific issues and information developed in the case? How is the Government of Canada to have a policy on competition or monopoly in telecommunications without any information as to which policy would maximize Canadian welfare? The DOC could examine the issue and provide evidence to the government. However, the DOC has no jurisdiction over Bell Canada. It is my opinion that policies for telecommunications cannot be developed without examining specific issues in an enormous amount of detail, an amount of detail too large for Parliament as a whole to contemplate discussing. Therefore, in my view, policy directives are not likely to be of value in telecommunications regulatory hearings. Either these policy directives will be as general as the objectives of the present Acts or the policy directives will be so specific that they will determine a particular case without analyzing the merits of that case. There is also the fear that policy directives will only be issued because of pressures for a decision on a particular pending case. In addition, policy directives without parliamentary approval are an undue exercise of executive power. If policy directives are allowed, they should emanate from Parliament and allow the SRA to hold a hearing on the directives. After the hearing, the directive can remain changed, since policy direction is the prerogative of Parliament. Policy directives of this type will mimic generic hearings on wide-ranging topics. Therefore, it would appear to be the best policy development for the Cabinet to order generic hearings, where the DOC is an intervenor and where the government has final say over policy.

5.1.7 Internal Environment and Cost Awards

The general recommendations made in the last 7 sections set out the broad external environment of the SRA ensuring its accountability and responsibility. The SRA could not fulfill its mandate, however, without ensuring that interested parties appear. An external environment which is perceived as fair will tend to attract interventions, interventions aimed at the issues in the case, not aimed at the political masters. In addition, an internal environment which is also perceived as open and which gives adequate notice will also attract interventions. We can do no better in this paper than recommend that all SRA's adopt the internal procedure developed by the CRTC. While one may quibble with minor details of the procedure, overall it is excellent both in its content and in the context in which it was developed.

One issue of the internal environment deserves special elaboration — cost awards. The rate cases for Bell Canada and Maritime Telephone and Telegraph over the last 30 years provide impressive evidence that the 'free rider' and 'transactions cost' issues do lead to real market failures and are not simply economists empty constructs. Incentives must be given for unorganized groups to appear since the SRA is engaged in policy development based on the evidence it hears. We, therefore, recommend the awarding of costs to intervenors. We recognize the problem in assessing which intervenors ought to be rewarded. The procedure used by the CRTC has much to recommend it — the awarding of costs, ex post, to those who made informative (as opposed to nuisance) interventions. The determination of the boundary of 'informative' interventions is subjective but this does not mean that no cost awards should be given. Cost awards are however only one part of the process of making regulation more accountable

and responsible. Allowing the SRA to tax those it regulates for the costs of the process and incorporating externality fees into the costing procedure are important concepts and should also be adopted.

5.2 Appointment Procedures and Tenure

CRTC members are presently appointed by the Governor in Council for seven years. They hold office under 'good behaviour'; while members may be dismissed 'for cause,' no such removals have occurred. The term and status of CRTC members appears reasonable, terms longer than seven years might induce too much 'independence', less than five years, too little independence. Tenure under 'good behaviour' conditions is essential to prevent any undue influence.

The appointment procedures presently used could be improved, consistent with enhanced accountability and responsibility for the agency. As the enabling legislation is a creation of Parliament and not the party in power so, as we have recommended, should SRA's be responsible to Parliament(rather than a Minister or Cabinet). We would recommend a structure of control modelled somewhat on the method of controlling Crown Corporations in Saskatchewan. The CRTC would become accountable for its annaual activities to a Select Standing Committee on Regulatory Agencies. Membership in this Committee of the House would be proportional to party representation in the House, with a Cabinet Minister as Chairman. The proceedings of this Select Committee would be published in Hansard . The CRTC would be expected to:

a) articulate its budget and spending patterns

b) enunciate the objectives of telecommunications regulations as it perceives them

c) discuss its decisions and how they fulfilled the objectives.

In addition, the Select Committee, not the Governor in Council, would appoint Commission members. This new method of control would make the CRTC less independent of Parliament but more independent of the party in power. At present, the CRTC need not defend its decisions, budget or articulate its objectives before any publicly elected body. To force it to do so would, I feel, make the CRTC more accountable as well as forcing Parliament to more clearly articulate telecommunications policy. We examine each of these four suggestions (budget, objective enunciation, decisions discussion, appointments) in turn.

It is essential that the amount of the CRTC's budget and its allocation among functions be reviewed by some body other than the Treasury Board. Since we recommend that the CRTC raise its own budget by taxing those it regulates, it is natural to have this new budgetary process annually reviewed by the Select Committee.

We have stated that one of the major potential failures of regulation by an SRA lies in the ability of the regulator to maximize his objective function. Given our view that telecommunications regulation is essentially policy articulation, it is clear that the members of the CRTC can maximize their own interest in setting policy. However, forcing the SRA to enumerate those objectives as well as defending their decisions before Parliament in a forum whose proceedings are published will prevent gross long term misapplications of the mandate. Two potential costs should be discussed. First, the proceedings of the Select Committee could be used for pure political maneuvering by one party against another. The proceedings could degenerate into a political side show. The second potential problem rests in the potential for the regulators to become too sensitive to the political forces in the Parliament of the day, too aware of having to defend the decisions and therefore tending to make decisions which will be 'popular'

rather than just. Two instruments can be used to prevent these two abuses. First, the Select Committee could be given a small staff or some limited access to DOC personnel. There is no worse arena than one composed of uninformed judges. Were the Select Committee able to avail itself of technical expert advise, the proceedings need not degenerate into a purely bipartisan political venue. To prevent the Committee's usurping the SRA's role, question time would be limited. In addition, while we have suggested that the SRA 'defend' its decisions, we mean defend in the small rather than in the large. The members of the SRA would tell the Committee how their decisions met their stated objectives; we do not envision the members of the SRA being cross examined as to why a particular intervenors point of view was not accepted.

There is a great deal of merit in having the Select Committee appoint the members of the CRTC rather than the Cabinet. Cabinet appointments to SRA's are often accused of being crassly political. Crass politics has its merits when it ensures that the members of the SRA do not maximize their own self interest; however, there are superior means of ensuring accountability. One such means is to have the Select Committee (subject to Cabinet approval) appoint the members of the SRA as well as having the SRA report to the Committee each year.

5.2.1 Appeals Procedure

Two Bell Canada rate cases were overturned by the Cabinet, one in 1958 after appeal by the Province of Ontario; the second in 1973 when the Federal government unilaterally suspended the CTC decision. We recommend abolishment of this ex post appeal procedure. Instead, we are proposing more precise

legislation, annual review by the Select Committee and the use of policy directives (although policy directives may not be the saviour of accountability that other authors suggest).

Policy directives can come in two forms. First, are general policy directives not specifically aimed at a particular issue. An example will aid in understanding the point. We have suggested that the legislation encompasses a broad policy statement that the goal of telecommunications regulation be an efficient system and that this goal be furthered by encouraging competition (subject to any economies of single firm production). A policy directive could accomplish the same end as rewriting the legislation and have the advantage of being easier to enact. There is also some merit in having the policy directive examined by the Select Committee. Such an examination would ensure that the directive was not partisan. However, the government of the day is responsible for policy and requiring the Select Committee to approve such policy might be an infringement on the government's normal role.

A second form of policy directive would be addressed to a specific issue such as the recent acquisition of Telesat by TCTS. We have already discussed the pros and cons of having the SRA or the government decide such specific issues. Eliminating cabinet appeals would prevent the method by which TCTS and Telesat were allowed to joint together. Without political appeals, there need be a mechanism by which government policy can direct the SRA to a specific end. In the case of issues like the TCTS/Telesat purchase, our preferred approach would be that the government not be able to direct the decision without the possibility of a hearing taking place. Instead, we would suggest a procedure whereby such a policy directive

would be placed before the Select Committee and notice of the directive given to all interested parties (as well as being publicly announced). If there are objections to the directive, then the SRA would hold a hearing on the subject and make a recommendation to the Select Committee. Final approval of the directive would however rest with the Select Committee rather than the SRA. This approach, while cumbersome, would prevent the use of policy directives to in effect curb the real role of the SRA without ensuring some procedural fairness.

5.2.2 Budget

The CRTC should be independent of government in determining its budget in order to ensure the absence of political controls. Moreover, the budget of the CRTC should be raised from those who benefit from the CRTC's role. We therefore recommend that the annual budget be determined by the CRTC, presented to the Select Committee and raised from those it regulates. This 'tax' on the regulated would consist of special hearings fees, incorporating externalities taxes, and assessments for general administration and research against the regulated firms, perhaps on an asset basis as is presently done in Nova Scotia.

We also recommend an expansion of the budget of the CRTC to encompass broader research into the basic economics of telecommunications, but ensuring that this research is coordinated with that of the DOC.

5.2.3 Rules for Financial Independence

The present rules for financial independence ensure that the regulator will not bias his decisions favouring a party to a hearing in order

for the regulator to benefit financially. As a result, rules prevent the ownership of shares in parties to hearings, etc. However, in most cases, the major capital the regulator has is his human capital, his ability, intelligence and knowledge. One major means of the regulator benefitting from his decisions is for him to be employed by or consult with parties before the Commission after his term is over. Such employment can take one of two forms — payment for past services rendered or purely because of the ability and knowledge possessed by the regulator. In most cases, it may be difficult to distinguish between these two forms. It would therefore appear appropriate to forbid, for say 12 to 24 months after leaving office, a regulator from acting for or being employed by any party that appeared before his SRA while he held office. To counteract the effect that this rule might have on individual's decisions as to whether to join an SRA or not we also recommend substantial increases in salaries. These salary increases will also tend to attract better qualified people.

5.3 Other Procedural Issues

Several other points need be made. First, the publication of adequate reasons for decisions is an important element in ensuring SRA accountability. The CRTC (as well as the Nova Scotia Board) does produce a document at the end of a hearing summarizing the main issues, the positions of interested parties and the SRA's view. Such practices should be encouraged.

Hearings before the SRTC and the predecessor agencies have involved some unnecessary discussions. Both the regulated firms and especially the intervenors 'test' the rules of the game. As a result, discussions ancillary to the case take up much time, discussions such as the role of subsidiaries, accounting rules and the like. Three procedural changes can

eliminate these discussions. First, the Board should clearly establish the accounting rules of the game and minimize any questions of these rules — normalization and annualization principles, test year basis, etc. Second, as is presently used by the CRTC, a pre-hearing conference can establish a basis of commonality among parties to a hearing. Third, any broad issues which tend to reappear such as the relationship between Bell and Northern Electric should be examined in separate generic hearings and not in specific rate hearings.

Generic hearings have a great deal of merit and their use should be encouraged. We would suggest that they are an excellent forum for assisting in articulating policy (as long as the other recommendations made here are incorporated.) In addition, the Select Committee should be given the power to request the SRA to hold a generic hearing on a topic.

Finally, the issue of confidentiality must be discussed. On one hand, the regulated firm suggests that information is privileged, its use by others would render it at a competitive disadvantage. On the other hand, the lack of complete information renders the SRA's task much more difficult. Our basic view is that confidentiality should be minimized. One of the recognized 'costs' to the firm of being publicly regulated should be the provision, the making public, of much of its data. However, to minimize the misuse of data requests, the interviewers must establish (as they must now), the need for the information. In addition, where a competitor of the regulated firm requests data, that firm should be asked to divulge the same information itself. This would tend to give the regulator more knowledge as well as preventing intervenors from using interrogatories as weapons.

5.4 Interjurisdictional Aspects

The CRTC appears to have overstepped its authority in its use of interjurisdictional committees. We are not suggesting that the CRTC does not have jurisdiction over any or all aspects of inter and intraprovincial telecommunications. We are only concerned that the accountability of the regulators becomes enormously weakened when ad hoc committee of regulators make policy.

We commented in the introductory chapter and in Chapter Four on the theoretical difficulty of having a federally accountable body — the CRTC — determine telephone rates in three provinces. We suggested that the differences in the locus of power between the CRTC, on one hand, and the Nova Scotia Board, on the other hand, would lead to differences in behaviour since politicians from Manitoba, for example, who help determine the CRTC have little regard for telephone rates in Ontario. The evidence does suggest different behaviour — the Nova Scotia Board, although more independent in theory than the CRTC, appears to be more susceptible to general public perceptions even though interest group pressure is largely absent from the regulatory arena.

These two principles — the need to coordinate the locus of accountability with the interest groups served and the need to produce a more effective mechanism for control over interprovincial telecommunications suggests a need to change the structure of the CRTC. We do not recommend this change strongly since the issue could be viewed as outside our frame of reference. However, fools and economists tend to tread where they shouldn't. The combined provincial/federal committee as recommended by the Clyne Committee and CNCP should be carefully studied. No other solution appears practicable.

I vehemently oppose removing the federal jurisdiction over telecommunications and handing it to the provinces; this would seriously divide and balkanize telecommunications development. Similarly, the division of jurisdiction and therefore assets of telecommunications carriers into inter- and intra-provincial spheres is unworkable. That leaves the present institutional structure or the Clyne Committee's recommendations.

5.5 Recommended Changes — Nova Scotia

5.5.1 Legislation and Parliamentary Oversight

It is recommended that the legislation empowering the Nova Scotia Board of Commissioners of Public Utilities to regulate telecommunications be made more explicit along the general lines suggested earlier. It is also recommended that a Parliamentary Select Committee be established to oversee the Board. All the other recommendations on these issues made for the CRTC are also made for Nova Scotia, but are not repeated here.

5.5.2 Appointment Procedures and Tenure

It is recommended that the Select Committee appoint members to regulatory boards, subject to Cabinet approval.

The present rules for tenure — good behaviour until the age of 70 — would appear to be too liberal. It is recommended that the term be reduced to seven to ten years.

5.5.3 Budget

The Nova Scotia Board has the power to determine its own budget.

This is considered to be an important feature for independent regulatory behaviour and its adaption has been recommended for the CRTC. The Nova Scotia Board, however, appears to set its budget too low. This appears to be the major failing of the regulation of telecommunications in Nova Scotia. The Board is engaged in policy-making. This is evident from the broad statutory powers given the Board under the Act to regulate (with vague objectives), investigate and supervise. It is also evident from Board statements, some which were quoted earlier.

It would appear impossible to engage in policy-making for as complex an area as telecommunications with a professional staff of one accountant. The competence and experience of the commissioners is not being questioned - but their work load is large given 16 Acts to administer. In Table 5-1 are shown the assessments of the Board against MT&T (as well as the insignificant assessments against the other telephone companies). In 1979 Board assessments amounted to % of MT&T revenues. It would not appear to be unreasonable to double or triple the assessment in order to hire sufficient internal professional staff to deal with the complex issues which are now being raised.

There is no substitute for Board policy-making within the government. The Office of Communications Policy consists largely of one individual. Again, additional staff is warranted for analysis of the broad policy issues of communications policy and inter-jurisdictional problems which are outside the mandate of the Board.

The province is relatively small and relatively poor. Board Commissioners then likely have a level of prestige beyond that received by their counterparts in Ottawa. The quite strict judicial flavour of the Board and its independence appears to have been interpreted by Board members as giving

TABLE 5-1

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES - NOVA SCOTIA

ASSESSMENTS - TELEPHONE/PUBLIC UTILITIES

	Assessments-Telephone	
	M.T.&T.	Other
1946	$ 7,240.96	$ 61.95
1947	8,625.87	85.85
1948	9,937.01	99.28
1949	10,618.76	117.60
1950	10,161.05	109.63
1951	10,685.65	110.74
1952	11,072.24	109.04
1953	13,002.39	105.42
1954	12,407.97	98.63
1955	13,407.69	158.70
1956	14,164.67	153.30
1957	17,968.14	154.17
1958	16,527.21	136.51
1959	16,527.21	136.51
1960	16,946.40	138.25
1961	17,404.55	123.33
1962	18,734.17	113.70
1963	19,964.07	116.69
1964	18,999.17	85.10
1965	22,952.37	102.05
1966	23,700.30	107.91
1967	30,962.93	117.32
1968	34,353.61	56.12
1969	33,569.13	26.03
1970	41,785.97	31.36
1971	42,798.79	32.19
1972	64,148.03	40.31
1973	63,166.88	34.02
1974	81,504.95	47.61
1975	74,372.98	41.13
1976	60,666.22	31.99
1977	64,172.56	32.15
1978	73,929.19	36.59
1979*	82,069.35	100.00

* 1979 Assessment made in November 1979 and based upon estimated expenditures for 1979. New procedure beginning 1st quarter 1980 will be to render assessment for the upcoming year (i.e., 1980) in the first quarter of that year based on latest actuals of preceding year and estimates for the current year.

them a role in fostering and protecting development of Nova Scotia. The Board appears to have enormous respect in the province. This respect is likely due to the integrity exercised by the Board, its provision of a role of fostering universality of service and the lack of major interventions in MT&T rate cases.

Increasing the monies spent on telecommunications research both at the Board and government levels can only help in the transition to the more complex issues which will develop in the 1980's.

5.5.4 Appeal Procedures

Under the enabling legislation, decisions of the Nova Scotia Board can only be appealed as to jurisdiction or on questions of law. No appeals are allowed to the government.

There have been no appeals. There are, however, two examples of policy 'direction' — the Rural Telephone Act of 1913 which announced government policy and which was adapted by the Board, reversing its earlier view; the use of the Attorney General's Office to provide Board Counsel. The first example is a legitimate use of parliamentary authority. The use of the Attorney General's office should be dispensed with. It is recommended that the Board have its own full time Counsel.

5.5.5 Other Issues

Most of the discussion in this chapter has revolved around the CRTC. All the recommendations made there are also made for the Nova Scotia Board. The recommendations on the use of written reasons for decisions,

the use of generic hearings, policy directives, etc. would all prove valuable additions to the procedures presently being used in Nova Scotia.

5.6 Recommended Changes — Saskatchewan

All our recommendations to this point have involved the use of SRA's for policy development and application, some of these recommendations have been based on the experience and method of control used in the province of Saskatchewan. In that province, regulation, policy development, application are done within a government department.

The pros and cons of the two approaches to regulation have been discussed. The study could have been augmented and correspondingly improved, by examining the other two Prairie provinces where publicly owned firms are regulated in open processes. That comparison could have more concretely shown the effectiveness of controlling a publicly owned firm via two difficult regulatory modes.

There do appear to be several areas of improvement possible in the Saskatchewan process.

The use of a Select Committee, one of our major recommendations, has been taken from the Saskatchewan experience. In reading the transcripts of the hearings in Saskatchewan, some failings of the experience are evident. The failings deal with the lack of information and staff available to the Committee (principally the nongoverning parties). It is unlikely that members of the ruling government will seriously question the operations of a publicly owned firm; the problem does not exist to the same extent, of course, where the firm is privately owned. Therefore, one would expect the Select Committee approach to work best for the CRTC and

less well in Saskatchewan. In Saskatchewan, the government tends to defend the company, since the Minister of Telephones is Chairman of SaskTel, such defense is understandable. However, this position of ownership and responsibility appears to have reduced the Committee's effectiveness. The only means of ensuring more detailed examination is by giving the Committee a staff and more information on the operations of SaskTel. By so doing, however, there is some risk in the Committee's degenerating into bi-partisan warfare. Again, such a degeneration is less likely to occur when the government is not also managers of the firm. In any event for the Select Committee format to have a chance of working effectively, informed questions must be asked. A staff would ensure greater information for Committee members. The Committee can presently ask any questions as to the current operations of SaskTel; we would expand this role to allow questioning of the policy of SaskTel.

One of the main defects of a departmental process is the lack of openness or even notice. Residents can always call their M.P. to complain about the company and its rates but there is no advance warning that a change in operations or rates is about to occur. We therefore recommend that SaskTel announce in a bill insert that it has applied to the government for a rate change. This notice would ensure that interests will access the politicians. Ratepayers in all other provinces have the ability to be informed in advance of any major change in the operations of the telephone company. We see no reason why this notice procedure cannot apply to Saskatchewan.

The major defect of this type of process is the lack of procedural fairness — even with proper notice how do interested parties ensure that their voice is taken into account? Two opinions are possible. Procedural

fairness is unimportant since the politicians can be removed from office if their decisions are grossly unfair. However, given the market failures present in the political market, relying on the 'market' forces to ensure that rates are properly set seems suspect. We would therefore recommend an enhanced role for the Select Committee — any rate change or major change in operations would be submitted to the Select Committee. The Committee need not hold public hearings on the requested changes but a public hearing could be called. If the Select Committee is of the opinion that the proposed change is significant then it could order a public hearing. That hearing would include procedural safeguards such as a transcript but not necessarily encompasses the entire spectrum of procedure presently employed by the CRTC, for example. We are therefore recommending an enhanced role for the Select Committee — a staff, notice of changes in SaskTel. operations and the ability to hold hearings. These recommendations are made to ensure a greater public awareness and openness for the process of regulation by government department. It may be argued that these recommendations remove some aspects of control from the government and give it to a Parliamentary Committee, in effect transforming the Committee into a mock SRA. There are, in our view, many advantages to opening up the process and few disadvantages. The advantages lie in the assurance of greater public access,the disadvantages lie in greater bureaucratic procedures. As Owen and Braeutigam have argued, procedures are necessary safeguards. Since SaskTel. is already regulated, there are likely few costs to greater public information and Parliamentary oversight.

One other recommendation involves the government's 'watchdog' the Communications Secretariat. As we have suggested for both the CRTC and

the Nova Scotia Board, a greater research role for the Secretariat would be valuable.

5.7 Postscript: An Economist's View of Administrative Law or the Dismal Scientist Aghast.

The suggestions for change made in the earlier sections of this chapter will find some supporters, some detractors but few will be openly hostile or repelled. Let me now appall many by examining the principles of administrative law purely from my personal viewpoint.

The process used by an SRA consists of a legal hearing whereby 'cases' are mounted, attacked, argued and decided, primarily by lawyers. Is the adversary process, however, the best or the only procedure to be used for regulatory agencies?

If thepurpose of regulation is to close market failures, i.e., to determine facts, an adversary process is not at all well suited. If the purpose of regulation is policy development, it is unclear that it is society's interests to have those with the biggest budgets, best lawyers and greatest ability to cross examine, determine policy Even if the goals of regulation are to redistribute income, it is unclear that one wants as Doern has put it for 'lawyers' values' to determine the outcomes.

To an outsider to the legal profession but a student of regulation, I am not at all convinced that the present form of adversarial procedures are at all efficient or equitable because they reward the quick, the golden tongued and the well heeled. The process may because of the implicit value systems reward lawyers values to the exclusion of other members of society. The amassing of more and more procedural

safeguards, the continual expansion of hearing sizes in order to encompass all interests appears to be an inefficient attempt to mimic an Athenian parliamentary system.

The time has come to re-examine the entire essence of the process not just details of safeguards; I, for one, would vote for an abolition of all courtroom hearings except in special circumstances and move instead to the use of file hearings as they have been used by the CTC and NEB. Application, evidence, argument move by being written rather than spoken in a hearing. Cross examination is absent except in so far as one can attack another person's position in writing. The purpose of cross examination in a court of law is well suited to determining the evidence of a witness to a first degree murder but not at all well suited to determining either economic facts or an interest groups position. Views of interveners on the evidence can be given in writing and the Commission can surely judge which view is correct without any courtroom drama. The costs of this file hearing procedure would be far far lower than the costs of the present three ring circus. Lowering the costs by eliminating appearances will reduce the market failures but not eliminate them since a well organized brief will require extensive analysis of Bell's data. We would therefore still recommend cost awards.

The use of file hearings will not do away with the neeed for other procedural safeguards. Rules for notice, the forms of evidence, confidentiality, etc. will still be needed. In addition, a pre-file hearing conference would be valuable in determining the major points of contention.

This postscript is written with little hope that it will be implemented. However, it is a serious recommendation which would do much to cut the costs of regulatory procedures for individuals and for society as a whole. It has the virtue of being a brief brief.

Footnotes to Chapter Five

1. We have seen such appointment procedures in Nova Scotia.

2. Law Reform Commission, ibid., Chapter

3. Reschenthaler (1976) has suggested that commissions may be captured by "beauroctatic symbiosis" whereby staff of the Commission finds gainful employment with the regulated and lawyers serving the boards move on to lucrative private practices representing the regulated. Stigler (1971) also views after service per se payments as the norm. The view in the paragraph is that ex ante, not ex post 'payments' are made.

4. This is to ensure that the costs of specific cases, such as rate hearings, are charged to only those at that hearing.

5. Law Reform Commission, op cit., p.

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Appendix 1

SUMMARY OF BELL CANADA RATE CASES

1. Board of Transport Commissioners Decision C.955.170, 12, October 1949

1.0 Introduction

On the 12th of October 1949, Bell Canada applied for a rate increase which would yield an estimated 20.6% increase in gross revenues if in force for the full year of 1950. The last general increase in rates had been on the 21st of February 1927. Bell Canada asked for the increase in order to maintain the $2.00 dividend and a 50¢ per share surplus required to maintain the credit of the company. The company discussed its capital expansion plans and its need to raise $141 million over the three years 1950-52. The regulatory agency, The Board of Transport Commissioners, allowed $2.43 per share for 1951 in its decision dated the 15th of November 1970. The revenue deficiency was found by the Board to be $25.7 million and rate increases were approved to meet this. Some five hundred thousand dollars in expenses were disallowed.

The hearing began on the 3rd of March 1950 and ended on the 2nd of June 1950; there were 50 sitting days, all in Ottawa. Table 1 lists the number of interveners, the number of interrogatories and other aspects of the case. As can be seen, the main arguments revolved around the equity ratio and the amount of surplus to be allowed. The interveners were all local municipalities except for the Boards of Trade of Toronto, Ottawa, Dundas, Port Hope, and Simcoe and the Chambers of Commerce of Windsor, Peterborough, St. Thomas, Oakville-Trafalger, Midland, North Bay, Sarnia

and Oshawa. Most interveners were present throughout the hearing and undertook cross examination. While Bell Canada presented 23 witnesses, the city of Montreal presented 5, cities of Hamilton and Woodstock 1, and the city of Quebec 2. The city of Montreal requested 110 interrogatories, the cities of Hamilton and Woodstock 43 interrogatories, the city of Toronto 13, and the cities of St. Thomas-Guelph-Galt 7. Of the 10 interveners, one was a private citizen who sent a letter and did not appear.

While the hearing was ensuing, Bell applied for interim rates on the 9th of May 1950. The Board of Transport Commissioners on the 7th of July 1950 allowed the full requested increase for some and 50% of their requested increase for others (e.g. basic exchange service). [See 955.170.]

The full decision of the 15th of November 1950 [see 955.170] was signed in full by two commissioners [MacPherson and Wardrope] while a third, Sylvestre, wrote a separate opinion. While Sylvestre concurred with the conclusions of the judgement, he felt that Bell should have collected what it was entitled to by reclassifying exchanges which had grown. The result of not reclassifying these exchanges was to subsidize some localities at the expense of others.

1.1 Construction Program

In this case Bell set a precedent by suggesting that capital expansion required an increase in rates. In the decision on pp. 27-28, Bell is quoted as saying that the proposed construction program was "necessary in order to provide adequate services in the areas in which the company operates; but without it, people in Ontario and Quebec simply would be deprived of the

services they want and have a right to expect". The construction program embraced the gross estimated expenditures for (1) land and buildings, (2) central office equipment, (3) station equipment, (4) exchange lines, (5) toll lines, (6) general equipment. In this case, items 2, 3, and 4 were the major ones. The interveners on the other hand (Decision, p. 29) submitted that the proposed construction program was too extensive; and that the special act of parliament creating Bell did not have any provision obliging Bell to provide all the services proposed; that even if Bell was allowed to proceed, the full construction should not be acknowledged in the rate making process. Their interveners suggested that Bell was only required to provide "reasonable service" and as a result Bell should in fact "refuse to provide certain services as being unreasonable and thus reduce some of the proposed expansion". The interveners also contested Bell's short-lived additions to manual equipment which would soon have to be replaced by dial. They challenged the unnecessary haste to convert to handheld receivers. The interveners challenged Bell's suggestion that "held orders" was a valid indication of demand for telephone service. As a result, these interveners suggested that any deficiencies in dividends or surplus could be attributed to over expansion in the construction program.

The Board held in its decision on p. 30 that although the construction program was large on the evidence it was designed for the provision for immediately needed and future services to the benefit of the public. "It is based upon the long experience and knowledge of practical men who have surveyed the field of the consequent requirements." The Board stated that it was not prepared to say the proposed level of services were beyond "reasonable" level. "The public demands and is

entitled to have furnished it and it is also in the public interest to have, modern and efficient means of telephone techniques".

The Board of Transport Commissioners appears to have disregarded the interventions when it suggests that the construction program is to the advantage of the public even though the public (that is the interveners) suggested that the expansion program was unnecessary. Therefore the Board of Transport Commissioners took Bell Canada's views of what the public wanted as compared to the views of the local municipal governments.

1.2 Rates

The BTC's decision on p. 37 quotes Bell as stating that the costs of providing service were not the determining factors in rate setting. Other factors were the value of service along with the principle of area wide pricing. Bell suggested that it did not undertake and would not undertake cost separation studies as in the U.S. since these studies arose simply because of divided jurisdiction of regulatory bodies.

The Board on p. 37 quotes its approval of the company wide principle of area wide pricing in its 1927 decision. The Board states that it is not feasible or reasonable to base rates on costs of providing service in particular localities. The witness for the city of Montreal however had stated that cost studies were essential to avoid "uneconomical development and unjust discrimination". (p. 38) Unjust discrimination was said to occur if some subscribers were given service at less than cost. The Board restated its position on p. 39 that "the grouping principle is a reasonable and fair method of applying rates". The Board stated that the value

of service is recognized by the grouping principle and that the larger the number of telephones the greater the value of service. The Board also stated that it did not think that the larger exchanges subsidized the smaller exchanges. Two of the interveners, Ottawa and Quebec City, objected to the inclusion of extensions in total telephone counts determining local rates as the large number of extensions in government offices tended to bias the rate upwards in those localities. The Board rejected this as being a invalid argument.

Other than these two points, no material objection was made to the principle of grouping.

The Board did make a number of changes to Bell's rates. Since there was no automatic procedure to shift exchanges between rate groupings depending on how they gained or lost customers, the Board suggested that Bell bring to the attention of the Board any situation which might require a permanent increase or decrease in exchange groupings. The Board issued circular no. 267 to this respect. The Board also ordered all exchanges to be properly regrouped before allowing any rate increases. The Board in its decision on p. 42 did not approve of the Metropolitan area service plan (EAS) since there had been no consultation with the subscribers.

In terms of toll rates, Bell had requested that the spread between night and day rates for Ontario and Quebec be reduced by increasing night rates more and that the spread between person to person and station to station be widened to encourage station to station calls. The Board approved the rates for toll and private line service in toto.

The Board rejected the discounts to be applied on rates for wall sets and desk sets (as opposed to modern head sets) as this would mean an increase in revenues of 1.25 million which would have been raised elsewhere.

The Board in its final decision affirmed its interim increases in the rates.

1.3 Debt and Equity

In the Decision on p. 34, Bell was quoted as saying that its stock was purchased because of its investment character, its earnings, dividend record and expectation of continued dividends; that it has been the policy of Bell to pay a reasonable dividend ($2.00). Furthermore this $2.00 dividend must be maintained to attract the capital required for the construction program. The $2.00 dividend on the average equity per share for 1949 would yield 6.26%. The dividend rate of $2.00 had been approved by the Board in 1927 and was then set at 8% on par value. The interveners suggested that the dividend rate was too inflexible and that there was no need to maintain the $2.00 amount, since the changes in the income tax act since 1927 had given shareholders a 10% exemption of dividend income. The Board concluded on p. 25 that it was in the interest of subscribers that Bell be able to attract new capital on favourable terms as and when required, and therefore that the dividend rate was not excessive. In the short run, a decrease in dividends would increase earnings available for construction but in the long run this reduction in dividends would diminish Bell's credit position and subsequently increase the cost of raising equity capital.

Bell argued that it needed a surplus per share in addition to a dividend payment. In 1945 this surplus amounted to 12% of the outstanding capital stock and at March 1950, 3.6%. Bell suggested that the proposed rate increases for 1950-51 would lead to a surplus of 50¢ per share per year or 2% of the outstanding capital stock. The Board in earlier cases had approved the 2% figure. The interveners suggested that the purpose of the surplus was to equalize dividends over time not to give a margin of safety for low earning periods. With regulated rates, a surplus did not have to be large. The average overall surplus for 1927-1949 was 20¢ per share and Bell had been able to raise equity with such a surplus and therefore this surplus should be maintained in the future.

The Board in its decision on p. 36 stated that the surplus in recent years had not been unreasonable. The Board accepted that the highest surplus per share would be 43¢ in 1951 under the proposed rates and that this would be a fair amount.

Bell suggested that prudent financial management indicated that the ratio of equity be approximately 1/3. Interveners suggested that the debt ratio could be increased to 50-60% without any financial harm to the corporation. The current debt ratio at the end of 1949 was 44.6%. The equity financing in place for 1950 would lower that ratio to 40.3% and financing plans for the next two years would lower the ratio below that even further. The interveners stated that since the cost of debt was lower than the cost of equity, Bell should move to the highest debt equity ratio acceptable to the financial community. Four witnesses were called by the interveners including Professor Bonbright. Bonbright said that a 45-50% debt ratio

would be conservative. Two interveners for the cities of Montreal and Quebec said that even a 60% debt ratio would be acceptable for a regulated utility. The interveners showed that the interest coverage over the past 24 years had been 2.7 and even with a 50% debt ratio for 1952 the interest coverage would be 2.95. The equity ratio the interveners pointed out was at its highest in 1949 and that it had been as low as 23.9% in 1924. The interveners submitted that a high equity ratio did not affect the cost of debt.

The Board in its decision said that the question of what may or may not be an appropriate debt ratio was largely academic. The real issue was whether for rate making purposes the cost of Bell's financing proposals should be allowed as an expense. They accepted the financing decisions as being freely determined by Bell management and that as a result the actual 40% debt ratio should be used by the Board in its calculations.

By ignoring the interveners request for cost separation studies the Board in affect accepted the structure of rates as set by Bell Canada. The Board in its decision on p. 5 says this

> "it must be admitted that under efficient management tolls and charges should be such that they would normally include all reasonable and normal expenses including taxes and also a sufficient amount for reasonable dividends and surplus to maintain the credit of the company so that as and when advisable new capital can be attracted to meet new demands for service or for the modernizing of existing facilities. The interests of management and subscribers are parallel to this point and beyond this the subscribers shall not be asked to contribute."

The Board suggested that there was 'reasonable zone' where the functions of management shall not be usurped. Otherwise the Board would scrutinize tolls and charges and expenses for unreasonableness, unjustness and

discrimination.

The Board looked at increases in total operating revenues and total operating expenses over the 1939-40 period. With an index of 100 in 1939, revenue in 1949 was 152.7, and expenses, 201.4. The Board found that Bell's estimated revenues for rate making purposes were deficient by approximately 24.7 million and rates designed to meet this deficiency were approved.

Bell showed that wages had increased some 70% since 1939. The composite depreciation rate had been virtually constant since 1939 (1949 - 4.3%). This constancy occurred because adjustments tended to be offsetting in the 28 categories of plant and equipment. The interveners are quoted on p. 12 of the decision as suggesting that Bell had not proven that the depreciation rates were proper. In 1927 the BTC had allowed a 5.41% depreciation rate. The interveners suggested that Bell's techniques were designed to find shorter than proper plant lives, that is depreciation was too high. The Board in its decision said on p. 15 that in the absence "of definite proof that there has been failure to exercise proper judgement in the circumstances" the depreciation rate proposed by Bell should be accepted. The interveners had suggested that the onus of proof was on Bell to prove that the depreciation rates were not onerous. In this decision the Board put the onus in fact on the interveners not on Bell.

The interveners had also suggested that Bell's commercial expenses were too high. Commercial expenses consist of local commercial operations (business transactions on telephone, etc. accounts), general commercial operations (personnel management and development, forecasting and studies), sales and connecting company relations (public telephone commissions and

advertising). The Board in its decision on pp. 24 and 25 said that not sufficient evidence was avilable to indicate any "needless excess" in the commercial expenses. The Board said that it hesitated to replace management decisions when "lacking positive evidence of knowledge plainly indicating contrary action". Again the onus is put on the interveners to prove the contrary case, the case that really can not be proven without company data.

It was shown that telephone directory revenues exceeded expenses by 2.9 million. The Board states on pp. 25 and 26 that (following a British Columbia Telephone case) it had no jurisdiction to regulate advertising operations or telephone directory operations hence the rate of return earned on these operations.

The interveners also suggested that current maintenance expenses were too large and that the capital plant had increased 80% during the 1945-49 period whereas current maintenance expenses had increased 120%. The Board in its decision on p. 16 said that no evidence showing that current maintenance expenses were unreasonable was available.

The interveners also suggested that the pension plan used by Bell was unreasonably liberal and expensive. This plan was fully funded to cover all future contributions over the remaining service periods of existing employees. The Board in its decision on p. 22 noted that the interveners did not offer any alternative to the existing pension plan and the Board had no basis on which to find the pension plan too liberal.

The interveners also attacked Bell's service agreement with AT&T. AT&T owned 12% of Bell's shares and prior to 1923 Bell paid nothing to AT&T although advice and services were received. The interveners had

three points to make: first, that no evidence was available showing that the agreement between AT&T and Bell was negotiated at arm's length; second, there was no proof or insufficient proof that the services rendered by AT&T were worth the payment of 1% of gross revenues; third, that the contracted payments were not based on actual and ascertainable costs. The Board in its decision on p. 18 said "cannot find sufficient justification for disallowance of the terms of the agreed upon remuneration in whole or in part for rate making purposes". The Board quotes a 1927 judgement that "the function of the Board is one of corrective regulation not of management". Therefore since management has decided to pay, this contract must be reasonable.

The interveners in this case as in 1927 formally requested that the BTC inquiry extend itself to the affairs of Northern Electric. The Board refused, saying that Northern Electric was not within the jurisdiction of the BTC. The Board however recognized that the 'close' relationship between Northern Electric and Bell Canada meant that the arrangements between the companies had to be carefully scrutinized. The Board in its decision on p. 21 stated that Bell had provided sufficient proof that the prices it paid Northern Electric for equipment were not unreasonable. The Board cited an auditor's study showing that prices were lower to Bell than to the next most favourite customer of Northern Electric. This of course was a study by Bell's auditor. The Board also stated that Bell benefited from the economies of scale enjoyed by Northern Electric in its total production. These economies of scale would be unavailable to Bell had Bell created an internal purchasing agent storekeeper warehousing repair and other arrangements department.

The interveners also attacked Bell's accounting principles stating that Bell departed from FCC accounting regulations in a number of instances. Bell admitted these differences submitting they were due to differences between the U.S. and Canada. The Board states in its decision on p. 32 that it had never prescribed accounting practices to be followed by the companies within its jurisdiction; the question was whether the practice adapted by Bell was fair and reasonable. The Counsel for the city of Montreal summarized the interveners position that the departure from FCC accounting practices had a tendency to distort the fixed plant in the interest of the company not the subscribers. The departures included: (1) taxes and plant under construction were not capitalized; (2) plant acquired was put on the books at replacement costs instead of original cost or the cost to Bell; (3) re-usable materials were evaluated at replacement costs; (4) the depreciation reserve was not broken down into corresponding plant accounts; (5) dollars received in aid in construction were not credited to a fixed plant but instead to capital surplus; (6) many costs with regard to labour for construction were not charged to capital; (7) the property record did not show adequately and accurately the years when the plants were placed in service. Most contentious were (1), (5) and (6). The Board in its decision on p. 34 declared that five hundred thousand dollars in expenditures should be allowed for rate making purposes as they should be properly charged to capital accounts. The reasoning behind the Board's decision was that the new construction program was much greater than in the past and therefore higher construction charges over a short period time would be reflected in much higher rates if these costs were not amortized.

Finally in this decision other than questioning of the economies of scale in Northern Electric operations there is no discussion of economies of scale in telecommunications.

2. Board of Transport Commissioners Decision C.955.171 13 November 1951, 21 February 1952

2.0 Introduction

Bell applied in August 31, 1951 for additional revenues of $15.8 million for the full year 1952. Bell sought an icnrease in rates only for local exchange services and equipment. The debt equity ratio would be 40/60 in 1952 with the raising of $57.5 million equity in 1952. The BTC found a deficiency of $14.3 million for 1952 based on earnings of $2.43 per share and a 40% debt ratio. The Board of Transport Commissioners however made Bell spread the rate increase over long distance as well as exchange services.

There were six interveners, all of them municipal governments. There were two preliminary hearings. On the 26 of September 1951, the interveners requested a time extension to file. The second preliminary hearing was on the 31 of October 1951. On October 24 and 25, the Board of Transport Commissioners heard an application from Bell for an interim increase. The main hearing began on the 7 of January 1952 and ended on 11 of January 1952, involving five sitting days in Ottawa.

If the proposed interim rates had been in effect for the entire year Bell would have earned $2.67 per share. With two months at interim rates and ten months at proposed rates Bell would earn $2.56. The Board in its decision on p. 6 stated that they had approved the $2.00 dividend plus a 43¢ surplus in 1951 and that 56¢ was unjustifiable. They would allow a 43¢ surplus per share. The interveners suggested that in the last case in 1950 the Board actually had not approved a 43¢ surplus. The Board had approved rates which would yield a 43¢ surplus in 1951.

2.1 Rates

Bell had asked for an increase in rates only for local service. In the Board's interim order of the 13 of November 1951 it approved a 5% increase in rates for all services. Bell did not want an increase in toll call rates fearing a decrease in usage. The Board felt that all rates should increase because costs had gone up and an increase in costs should be borne by all revenue functions. In its interim decision the Board said that an interim increase was justified and could not be avoided since Bell's expansion program was necessary to meet public demand and therefore an increase in rates was required. However, the burden of increased costs should not fall entirely on exchange services. In its final decision in 1952 on p. 7 the Board maintained the increase in long distance rates and pay phone rates authorized in the interim order. The Board adjusted the other rates proposed by Bell to yield the overall revenue increase. The interveners had objected to raising additional revenues entirely from local exchange services and suggested it was discriminatory not to raise any additional revenue from long distance calls. The interveners used Bell's evidence which showed that 60% of long distance cost were wages and wage bill had risen. The interveners had suggested "that rates must be fair and equitable between themselves".

In the interim decision, Bell is quoted as saying that the increase in rates was necessitated by circumstances beyond Bell's control and not contemplated by the Board in its decision of the 15 of Nov. 1950. The increase in costs was mainly due to two wage settlements subsequent to the 15 of Nov. 1950 and an actuarial study on pension costs also subsequent to that decision. Moreover, the income tax rate had increased by 5 percentage

points and there was a defense surtax of 20% on income taxes paid. Of the $15.8 million in the increased revenues sought $10 million was required to meet increased taxes.

2.2 Debt Equity Ratio

Bell in its decision on p. 5 estimated its average debt ratio at 40%, if a financing plan to raise $57.5 million in equity in 1952 was carried out. The Board notes its 1950 decision where it doubted that Bell could raise $50 million of equity in 1951 and $45 million in debt in 1952. In fact, Bell raised $40 million in debt in 1951 and now proposed to raise $57.1 million in equity. The Board in its decision allowed Bell to pursue its proposed financing for 1952 and accepted a 40% average debt ratio. The interveners in the argument (the main intervener was the city of Toronto, it was supported by the city of Montreal and the city of Ottawa in most of its arguments) suggested that Bell's financing program should be the issuing of debt of $51.5 million instead of equity plus Bell's other portions of the financing program leading to a 47% debt ratio.

3. Board of Transport Commissioners Decision C.955.172 16 August 1957, 10 January 1958

3.0 Introdution

In an application dated the 16 of August 1957, Bell Canada requested an increase in revenue of $24.2 million for the 1958 calendar year based on earnings of $2.65 per share. The Board found a revenue deficiency of only $10.3 million based on a 40% debt ratio and $2.43 per share. As Table 1 shows there were 10 main interveners. The major intervener was 35 cities in Ontario and Quebec. These cities included Galt, Guelph, Hamilton, Hull, Ottawa, Quebec City, St. Thomas, Trois Rivieres, and Toronto. A number of cities and municipalities appeared on their own behalf namely Montreal, Ottawa, Scarborough, North York, Chambly, Que., Aylmer, Que., and the cities of Drummondville and Grantham West, Que. In addition, the Canadian Labour Congress and the United Electrical Radio and Machine Union also intervened. Only the municipalites of Scarborough, North York and the combined intervention of the 35 cities were present throughout the hearing. Only the '35 cities' and Montreal, Scarborough, and North York provided argument, the arguments of Montreal and North York being very short. All the interveners recommended a range for the debt ratio between 45 and 50% and a reduction in the surplus from the 43¢ per share allowed by the Commission in previous decisions to 27¢ per share. Bell presented 9 witnesses, intervener 1, (the 35 cities) 2 witnesses and Scarborough, 1 witness. There was no preliminary hearing. The first day of hearings was the 18 of November 1957 and the last day of hearings was the 12 of December 1957; fifteen sitting days were involved in Ottawa. A large

number of written submissions were received by the BTC. The city of Montreal, the Canadian Labour Congress and the city of Aylmer supported the intervention of the 35 municipalities.

Bell in its application asked for a revenue increase to yield earnings of $2.65 per share in 1958 on the basis of the average number of shares outstanding or $2.44 per share on the basis of the number of shares outstanding at the end of 1958. These amounts were needed in order for Bell to remain financially sound and to have a high credit standing in order to be able to attract capital. In the two year period 1957-1958 Bell needed 239 million in capital from external sources for its construction program. Bell estimated its net income per share in 1952 to have been $2.47, $2.40 in 1946, $2.15 in 1957 and $1.99 in 1958. Bell argued that in the 1952 decision the Board had allowed the equivalent of a 7.7% rate of return on average equity per share. As of December 31, 1957, this would require $2.65 per share. In 1927 the Board had approved $2.50 per share or 9.02% rate of return on equity per share. In 1927, equity per share amounted to $27.92; in 1957 it was estimated to be $34.60.

3.1 Construction Program, Costs

The interveners argued that permanent financing should not be undertaken until revenues were flowing in sufficiently to pay for the construction. There was a serious time lag between the receipt from new financing and the receipt of revenues from new construction. The interveners also argued that the common stock of Bell had the effective status of bonds; they did not require the surplus. Investors in Bell stock earned an adequate rate of return higher than on other utilities.

In 1956, the market price of Bell stock was 30% above its value in 1952 even though Bell was attempting to show that the surplus per share had fallen. The interveners based their desired $2.27 per share earnings on data for 5 U.S. Bell operating companies, their payout ratio and their dividends.

The BTC in its decision on p. 23 states that $2.43 is reasonable and that Bell had been able to finance a substantial capital program each year since 1950. During that period the level of permissive earnings was $2.43 per share.

Bell argued that it had been able to observe cost increases until 1957 by increases in efficiency, decreases in taxes and increases in non-operating revenues. For the forthcoming year this would be impossible and its revenue deficiency was $24.2 million. Bell also argued that the share of local service revenue in total revenue had fallen from 74% in 1928 to 61.2% in 1958 leaving Bell vulnerable to more volatile revenue sources. The major intervener (the 35 cities) argued that Bell had not demonstrated the need for an increase in rates. The size of the construction program and changes in equity per share did not establish the need to increase rates. The only amount proven by Bell was an increase in the wage bill of $6.4 millions per year. Scarborough also argued that there was no justification for an increase in rates. The United Electrical Radio and Machine Workers Union also argued that an increase was neither necessary nor justifiable in view of Bell's financial record over the last 10 years. The Union argued for the nationalization of Bell. All 3 of these interventions are quoted extensively in the Decision. The Board in its decision found revenue deficiency to be $10.3 million based on a 40% debt ratio and $2.43

per share permissive earnings. In examining expenses, both Bell and the interveners seemed to be arguing different things. Bell argued that employee expense per telephone had risen from $3950 in 1952 to $4240 in 1956 even though the number of employees per thousand telephones had fallen. The 35 city intervention showed that the increase in employee expense in the 1952-56 period had been 48.3% while the increase in operating revenue over the same period had been 48.5%. Operators wages per telephone had fallen from $12.00 in 1952 to just $11.50 in 1956. The municipality of Scarborough objected to the self-administered non-contributory pension plan saying that it was costly and in great excess as compared to what Canadian industry was offering.

For the first time an intervener spent a large portion of its intervention discussing the advantages of deferred income taxes. Bell was using deferred tax accounting rather than normalization in its statements for rate making purposes. Scarborough argued that Bell received a permanent tax savings from the deferred income tax scheme and that the savings flowed through to shareholders rather than subscribers. The Canadian Labour Congress supported Scarborough in this intervention. Bell argued as, quoted in the Decision on p.20, that keeping a deferred credit income tax account was proper for rate making purposes, and that the intervention was fallacious on three grounds: (1) that Bell would continue to expand its investment in depreciable assets; (2) that the assets now in use would be replaced at aggregate values not below the cost of those replaced; (3) that tax law on regulations would remain generally consistent. Bell said that if these 3 assumptions were accepted by the Board then Bell was then protected

against guessing wrong. The 35 cities argued that as long as Bell continued to expand there was no reason to suppose Bell would ever had to pay the deferred income taxes. That in the absence of a universally accepted treatment of deferred taxes and lacking proof of the necessity of the deferred credit account, the subscribers rather than Bell should benefit. Just and reasonable rates should be based on actual cost and actual taxes paid. And this policy of Bell meant subscribers were forced to make involuntary contributions to capital.

The Board in its decision on p. 22 stated that Bell could continue to make the provisions for deferred taxes in its deferred credit account for rate making purposes. However, this decision was subject to review in the future. The Board also stated that in line with previous findings, the pension plan was a proper expense. A contributory plan would not necessarily result in lower total expenses. The Board however disallowed the expense claim for possible wage increases in 1958. The Board stated that it was not proper to allow for rate making purposes future increases in wages which would be subject to future collective bargaining. The Board argued that during the previous five year period Bell had maintained average earnings of $2.42 per share and had absorbed increases in wage cost.

3.2 Debt Equity Ratio

Bell argued that any debt ratio of more than 40% was not healthy and it would have difficulty raising capital. Bell also argued that it was appropriate for telephone utilities to have less leverage than electric utilities since telephone companies faced greater risk and instability of revenue. The 35 cities argued that Bell's experience did not support its claim that it was more vulnerable than electrical

utilities. Moreover the company was regulated and could come in for rate increases. In addition the company had reserves such as deferred credits for income taxes to fall back on. Bell was exposed to little economic risk as it was a monopoly. Bell had not maintained the average debt/equity ratio found reasonable by the board in its 1952 decision - 40/60. As a result Bell must bear any burden flowing from this policy. Subscribers and investors would benefit from a debt equity ratio where debt was 45-50%. The muncipality of Scarborough argued that a 50/50 debt/equity ratio could and ought to be attained. More expensive equity financing put an unnecessary burden on subscribers.

The Board in its decision on p. 19 stressed the distinction between the actual debt/equity ratio at any point in time - the ratio that is affected by decisions with respect to raising capital and "what, for rate making purposes, may properly be deemed to be a debt ratio that is at the same time fair to the company and to its witnesses". The Board stuck to its previous decisions setting a 40/60 debt/equity ratio as acceptable and fair. The Board therefore used the 40% debt for rate making purposes while the actual debt ratio was 37.8% for 1958. Therefore a $2 million adjustment downward in Bell's estimated revenue deficiency was made. The Board suggested that if the debt equity ratio did not average out to 40%, then Bell's earnings would be less than what was permitted in the Decision.

3.3 Rates

The Board in its decision on p. 23 says "although broad, relative cost trends are not ignored, the individual cost of specific services

in a particular area are not controlled and rates are based primarily on the relative value of the service to the customer". The Board suggested that none of the submissions at the hearing were directed to the present or proposed rate structure as such. In addition the Board was not concerned with nonregulated services. On p. 24 of the decision Bell Canada is quoted as saying "no increases were proposed for certain services such as private line channel of various bands which to a very large extent made use of facilities the company had available for the conduct of its general telephone business. Some of these services were susceptible to competition and could not be increased at this time without sustaining a loss on revenue. Therefore they enabled the company to secure additional revenue which helped reduce the amount required from telephone users in general." Bell did state however that the rate of profit on nonregulated business was on the whole greater than on its regulated business.

The Board on p. 24 approved the consolidation of exchange groups (1) (1-500 telephones) and (2) (501-1000 telephones). The Board also approved upgrading of exchanges which had grown in size. The Board in its decision said that the spread between station to station and person to person calls were widened to reflect the increased costs of person to person calls. On the question of nonregulated business, Bell witness Handly (volume 1004, book 3, pp. 6300-6327) stated that pricing was affected by the quantity of the "relative value" as well as the fact that some services could be supplied by other companies. Bell's objective was to price competitive services so as not to impose a burden on telephone subscribers. He stated that the offering of nonregulatory services was in the interests of telephone subscribers for two reasons - the services were complimentary

to telephone services and the additional revenue eased the burden on telephone subscribers. However Bell had no figures available which compared the rate of return on regulated and nonregulated business. There were no records separating a plant into regulated and nonregulated activities and questioned whether regulated services were subsidizing the unregulated services.

Also of interest in this hearing was the relationship between Bell and Northern Electric, primarily Bell's investment in Northern and its purchases of equipment from Northern.

Bell stated that regular studies were always being undertaken on the prices paid by Bell compared to prices paid by other customers. These studies showed that generally Bell got appreciably lower prices. In the 1952 decision Bell had owned 56% of Northern Electric's common stock. Due to the AT&T consent decree in the U.S. in 1956 whereby AT&T had to sell its shares in Northern Bell, Bell in 1958 owned 90% of Northern common stock. The Northern dividend had increased in 1957 from $3.00 per share to $4.00 per share yielding a 11% return on Bell's investment. Northern's payout ratio changed from 26% prior to AT&T's sale of its shares to 54% in 1958. The 35 cities argued that the earned surplus of Northern was excessive and that this surplus should be taken into account in assessing the financial needs of Bell. The Board in its decision said that its jurisdiction over Northern was limited and that based on the evidence Bell's investment in Northern was not prejudicial to the interestes of subscribers at that time. They based the notion of prejudicial interest on the prices paid by Bell as compared to other prices. The Board said it could not order Northern to pay certain dividends. The only way the Board considered the financial status of

Northern was as an investment.

3.4 Economies of Scale

There was only one reference to economies of scale in this case Bell witness Handly (volume 1004, book 1, pp. 6061-6062) said that the changes in telephone technology led to the cost of long distance circuits falling as volume rose and therefore rates should be kept at levels which would attract high volume usage.

4. Board of Transport Commissioners Decision C.955.173 25 June 1958, 10 October 1958

4.0 Introduction

Bell, in an application on the 25th of June 1958 amended on the 16th of September 1958 asked for an increase in rates for exchange and long distance services and equipment. Bell requested a 17.2 million revenue increase to yield $2.32 per share net income or 11% below the permissive level. The Board granted a $17.2 million increase or a 8.5% general increase in revenue to give estimated earnings of slightly less than $2.43 per share for 1959. The board suggested that the amount of the proposed increase by Bell was reasonable but that the Board disallowed Bell from including forecasted increases in wages in its estimated revenue requirement. In addition the Board ordered the use of straight line rather than deferred taxation. There were 11 interveners at this hearing, one intervener representing 57 municipalities in Ontario and Quebec appeared throughout, presented argument and one witness. A second intervener was the city of Montreal which appeared throughout, presented argument but no witnesses. The municipality Scarborough presented arguments but did not appear. The municipality of North York did not appear but did present argument. The city of Lachine, Que. did not appear but presented argument. The Canadian Labour Congress did not appear throughout but did present argument. The Alberta, Saskatchewan and Maritimes Transport Commissions appeared, presented arguments and had one witness. The province of Manitoba intervened but did not present argument and did not appear. The province of British Columbia and the B.C. Union of Municipalities did not appear throughout but did provide two witnesses and arguments. Both B.C. Tel and CN-CP railways intervened but did not appear and did not present argument.

This case then represents a change from past cases in that although the standard number of municipalities in Ontario and Quebec showed up so did regulatory commissions from other provinces as well as a number of provinces themselves. Bell Canada presented 9 witnesses. The hearings began on the 16th September 1958 and ended on the 3rd of October 1958; ten sitting days having ensued, all in Ottawa. The Board also received a small number of written submissions.

The first day of the hearing was taken up entirely by motions for intervention. British Columbia, Alberta, Saskatchewan, Manitoba and the Maritimes Transport Commission (Nova Scotia, New Brunswick, P.E.I., Newfoundland) applied to intervene, to appear by counsel, to adduce evidence and to submit argument. Their intervention was to be limited to questions of depreciation and income tax. All this was due to Privy Council Order In Council #1958-602 which rescinded the Board of Transport Commissioners Order #93401 of the 10th of January 1958 approving the revisions to tariffs as requested by Bell Canada in the previous case. The government directed the Board of Transport Commissioners that as a matter of rate making principle credits to tax equalization reserves (deferred tax credit accounts) shall not be regarded as necessary expenses or requirements in determining rates and charges. CN-CP railways and B.C. Telephone opposed the motions for intervention by the provincial Transport Commissions.

4.1 Deferred Income Taxes

The Board in its decision on p. 6 said that the principle behind the treatment of depreciation and deferred income tax as expenses is "of

substantial public interest and may directly affect the interest of the interveners"; therefore the motion for intervention was granted on a limited basis. The interveners could cross-examine on the principles at issue in the motions. The interveners could only have one counsel cross-examine one witness. The Board would later rule if necessary on restrictions with respect to time limits for interveners' witnesses or arguments. After this ruling on the first day of the hearing, CN-CP railways and B.C. Tel. took no part in the proceedings. The Board's ruling in the B.C. Tel. case had been reserved pending the hearing of evidence in the Bell case; the Board wanted full consideration of all evidence before deciding its policy with respect to depreciation and deferred income taxes as expenses. These interveners did limit their case as per the ruling of the Board. The Board also affirmed its decision of the 19th of January 1958 with respect to debt ratio, Northern Electric, pension plan, surplus and permissive earnings per share.

It is therefore easy to see that this case revolved around the notion of deferred income taxes. Prior to 1949, Bell claimed straight line depreciation for income tax purposes. Between 1949 and 1953 Bell claimed "diminishing value" basis but could not claim more than charged on the books of the company. Effective Jan. 1, 1954, Bell could claim "diminishing value" depreciation regardless of the amount charged on the books of the company. When and how much of the CCA to claim in any one year was up to management. Since Bell had to raise large amounts of capital each year it claimed its maximum CCA beginning in 1954. This followed the accounting procedure recommended by Bulletin 10 of the Canadian Institute of Chartered Accounts. Bell did this because it wanted the use of these interest free funds. PC 1958-602 changed this and Bell reverted to its pre-1954 procedures. Bell submitted that

when and how CCA should be claimed depended on the facts of each case and PC 1958-602 only applied when CCA was being claimed. The interveners in response submitted that PC 1958-602 implied that where income tax was less because the capital consumption allowance was greater than regular depreciation then no deferred liability existed. The major intervener argued that it was the obvious intention of the Governor in Council that the course of action in fact chosen by Bell should be disallowed. The decision to pay more in taxes than it was immediately required to do indicated that Bell had refused to accept the ruling. The interveners argued that the present case was identical to the case presented to the Governor in Council. It was the duty of management to pay the smallest amount of income tax possible and the intent of the Order in Council had been that the immediate benefit of these tax rulings would go to present subscribers.

Bell's arguments were as follows. It claimed a maximum CCA and charged straight line depreciation on books therefore leading to a tax saving. As a result profits were overstated. Bell felt that the straight line method was a proper method of depreciation and that any saving experienced by present subscribers would be an escape from their proper share of costs. Bell rejected the argument that they claim the maximum CCA and claim the same in the books for rate making purposes as this would be improper and would require a greater increase in rates. The present subscribers' burden would be larger than proper and rates would fall for future subscribers. As a result Bell chose as its claim for income taxes the same depreciation as that in its books.

The Board in its ruling said that one should not go behind the wording of the Order in Council. Bell could continue the practice it had selected, a practice not prohibited by the income tax legislation. The Board

appeared to accept the argument of the company that its securities following the deferred credit income tax accounting procedure would be more attractive than those of a company which claimed CCA without this accounting procedure. The Board said " in view of Bell's present financing needs the decision of management in this respect seems fully justified.

4.2 Rates

The Board notes on p. 17 that no submissions of any kind were made at the hearing with respect to the revised rate structure proposed by Bell. Therefore they accept as they had done previously all Bell's revisions.

5. Board of Transport Commissioners Decision C.955.176 04 May, 1965, 04 May 1966

5.0 Introduction

This hearing was requested by the Board of Transport Commissioners. Its objective was to determine a just and reasonable permissive level of earnings and to determine a basis for setting that level. Explicitly excluded from this review were the current rates being charged by Bell Canada, even if the determination of the permissive level of earnings would seem to justify a change in rates. While the Board requested the review, it was on the basis of a Bell Canada request that the basis of regulation be shifted from a dividend plus surplus per share to a more common basis of rate of return on rate base. Seven interveners appeared at the hearings and these interveners are shown in Table 1. The major intervener was the Canadian Federation of Mayors and Municipalities. Appearing under this agency were also the Association of Ontario Mayors and Reeves, the Ontario Municipal Association, Union of Quebec Municipalities, and 105 Ontario and Quebec municipalities. These interveners supplied two witnesses. Another major intervener was the Industrial Wire and Cable Co. which also provided two witnesses. The main interest of Industrial Wire and Cable was the relationship between Bell and Northern Electric. Bell Canada supplied 6 witnesses. The hearings began in Ottawa on the 4th of May 1965 and lasted for 22 sitting days, the last day of hearings being the 29th of June 1965. The decision took almost 11 months to write.

5.1 The Method of Regulation: Rate of Return on Rate Base

Bell Canada requested a change from its previous basis of regulation in terms of earnings per share to a return on average common equity capital outstanding or average total capital outstanding. Bell Canada witnesses stated that the change would stimulate efficiency profits while preventing monopoly profits. They recommended an allowed range of return rather than one single figure. Bell Canada witnesses suggested a fixed dollar return per share destroyed the incentive for investment efficiency and that earnings per share should not be independent of the underlying book equity per share (p. 565). Investors examine the potential for a growth in the earnings per share, not the rate of return on book equity. This profits incentive regulation would be superior to cost plus regulation. The relevant criteria for determining allowable returns should be (1) Bell's long term ability to yield earnings (profit) to investors comparable to other companies adjusted for risk and uncertainty; (2) maintaining the financial integrity and credit of Bell Canada; (3) present and future ability to attract necessary capital. Bell Canada suggested that the rate of return should have a "a zone of reasonableness" (p. 625). Moreover, Bell argued, the Board was not unlimited in the matters to consider in determining just and reasonable rates. The Board should consider the welfare of the country not just the Bell shareholders and subscribers. The Board should consider the interest of future as well as present subscribers. A modern and efficient communication system was essential to the business development of the country. Bell required the raising of millions of dollars year after year and therefore its sound financial health was necessary to the nation. A level of earnings

or rate of return comparable with other industries having similar risks was therefore necessary. A reasonable range was required since the rate of return might slip but the Board would not set increased rates immediately. Similarly if the rate of return rose the Board should not immediately decrease rates. Bell asked for an increase in the rate of return to "preserve the integrity of the investment" Bell suggested that 7% on average total capital outstanding and 8.5% on average common equity were necessary.

The interveners put up a strong attack on the numbers requested by Bell but approved of the change in the method of regulation. The witnesses for the mayors and municipalities (intervener 2) said that they were aware of no U.S. utility which was regulated on the basis of surplus and dividend per share and only 1 which was regulated on the basis of average total capitalization. Most U.S. utilities (2/3) were regulated on the basis of original cost less accrued depreciation. That method gave a rate base which in general was equivalent to total average capitalization but more difficult to calculate. This intervener suggested that since Bell had other operations besides telephone services, the Commission must consider the propriety of using total capitalization as the rate base in setting telephone rates. The Federation of Mayors and Municipalities, the United Electrical Radio and Machine Workers of American and the Communist Party of Canada all stated that it was unnecessary to increase the rate of return over Bell's present earnings. Intervener 2 said that Bell should be allowed an overall return of 6.1% to 7% on common equity capital which would be equivalent under the old method to $2.59 per share. This intervener preferred the use of total common equity as the rate base since this would avoid leverage. Intervener 2

agreed that Bell's capital structure was not inflated and that total capital employed would be a good basis for regulation.

The Board did choose total average capitalization as the rate base as compared to total average equity capital. The Board stated that it felt free in future cases to make adjustments to the total average capitalization rate base for rate making purposes.

Intervener 2 stated that Bell's arguments that national economic goals should be considered in rate making and in setting the rate of return were unreasonable. Bell's subscribers should not bear the burden of stimulating the national economy. This stimulation was the government's role not the role of the regulatory body. Intervener 2 attacked the basis by which Bell arrived at its estimated rate of return on common equity of 8.4%. Intervener 1 stated that the comparisons made by Bell witnesses between Bell and other companies were not valid for 15 reasons. These reasons included the following: U.S. companies had historically higher rates of return than Canadian; U.S. companies had different capital structures; Bell had not tried to examine its cost of capital which was the only basis for the allowed rate of return; telephone companies were different from electric utilities; there were different risks and uncertainties between Bell Canada and the comparable companies presented by Bell witnesses. Moreover Bell did not show that the 'comparable' firms were in competitive industries. Bell argued that it should earn the same rate of return as industrials generally because differences in market risk and uncertainty were made up by differences in capital structure. Intervener 2 said that this was a fallacious argument for which no evidence was presented. Intervener 2 also

argued that the Board should not set a range of rate of return but rather one fair return. The Board should not set a floor without a ceiling as Bell seemed to be advocating. Bell had suggested that the Board declare that the present rate of return was not in excess of a just and reasonable return, i.e. that the present return was a floor. The intervener suggested that Bell was so unique that a comparison with other firms was very difficult. In conjunction with the capital attraction test, it was not necessary for Bell to offer the same rate of return as other riskier firms because market capitalization took the different risks into account in setting market prices.

Intervener 1 suggested that Bell's request to increase the rate of return to "preserve the integrity of the investment" was an unwise argument. No obligation was on the Board to protect shareholders against inflation. In fact too high a target of rate of return probably contributed to inflation. The expectation of inflation was capitalized into market price. This intervener also examined the difference between market and book value. For 1961-64 inclusive, the market price was 150% of book value and that a 7% rate of return on equity would maintain this 150% ratio. Halpern has argued in more recent cases that if the market price exceeds book value then the firm is being ineffectively regulated. For a firm regulated on an original cost rate base, rate of return-cost of capital method, then the market price of shares should equal the book value. Any differential therefore between market price and book value indicates the percentage by which the regulated rate of return is above the cost of capital. In fact after the decision in this 1966 case, the market to book ratio of Bell Canada stock fell sharply.

One may therefore question why Bell actually did ask for a change in the method of regulation since from examining the trend of share prices, it is evident that earnings per share was a more liberal form of regulation then rate of return on rate base.

In addition in comparing U.S. and Canadian firms, interveners suggested taking into account the dividend tax credit in Canada. Interveners were very suspicious of Bell's comments that the change of regulation would provide incentives for efficiency. Bell Canada did not prove that such incentives were lacking or needed and of course inefficiencies are very difficult parameters to regulate without interfering in management decisions. Finally, intervener 2 argued that the 1964 rate of return of 3.63% on total capital or 7.35% of total equity was just and reasonable. Morevoer this was not at the upper limit of the permissible range of the rate of return and one should not interpret the actual earnings of 1964 as a floor or minimum. It should be noted that intervener 2's method of calculating the cost of capital relied mainly on the earnings price ratio requiring that the market price of the stock equal book value.

The Board in its decision on p. 715-716 said that the enabling statutes did not directly empower the Board to fix a rate base and set a permissive level of earnings but that the Board had jurisdication via its power to fix and enforce just and reasonable rates. Therefore the Board set a permissible level but did not guarantee any rate of return. The Board also decided to use a very narrow range because a single figure could not be accurately fixed. The Board allowed a range of between 6.2% and 6.6% on total capitalization. This did not entitle or guarantee the firm to earn that amount. If Bell's earnings exceeded 6.6%, the Board expected Bell to file proposals for rate reductions.

5.2 Debt Equity Ratio

Bell Canada argued that a 40/60 debt equity ratio was prudent and reasonable. Moreover, the increase in the cost of debt in the post-1969 period led to an increase in risk to the bond holder because of the decrease in interest coverage since 1952. Intervener 2 argued that the capital structure was unduly conservative and that the percentage of long term debt could be increased. All U.S. utilities had debt in excess of 40% except Bell operating companies which had been criticized by regulatory commissions as being unduly conservative. Intervener 2 suggested that a 45-55% debt ratio would not be unreasonable. Bell said that the 40% debt ratio had been a prudent management decision for the last 15 years, that it was within the proper domain of management as declared by the Board and that decisions of the Board indicated that the BTC declined to interfere with management decisions with respect to business matters. Bell argued that the short term advantage of an increase in debt must be weighed against the uncertainty in the future when the debt must be retired. Risks inherent in the interprise increased with the debt equity ratio. In order to maintain its bond rating and to have ready access to capital markets, Bell could not rely too heavily on debt. Bell's revenues were becoming increasing volatile, there was a downturn generally in business; the rigidity of expenses namely obsolescence and depreciation and the deterioration of the interest coverage ratio to 3.4 in 1964 meant that a 40% debt ratio might even be too high.

Intervener 2 said that the debt ratio should be raised to 50% as it was for electric utilities (p. 656-675) because debt was cheaper for the subscriber. Moreover the utility did not need interest coverage as high as Bell had.

The Board in its decision says that as in the 1958 decision the Board would adjust the debt ratio for rate making purposes. In 1958 the Board assumed a 40% debt ratio when the actual ratio was less. The Board considered that the 40% debt ratio was still fair and reasonable to Bell and to its subscribers. The Board did not wish to interfere with the management of Bell. The Board did not agree with intervener 2's assumption that the debt ratio could be increased to 50% without increasing the cost of debt significantly and harming the financial health of Bell.

5.3 Revenues and Expenses

Bell argued that 3 elements led to an increase in the risk of its revenues namely (1) the high level of telephone saturation, (2) the high proportion of revenue from long distance services, (3) because of technological change a greater variety of services were available to customers. Bell showed that a 1% change in revenue led to a 2.2% change in earnings. Moreover expenses were fixed because of depreciation and there was increased risk in revenues. Intervener 1 said that the pension plan should be made contributory to ease the burden on the subscriber and that Bell should change its method of depreciation. Bell had not claimed CCA for tax purposes since 1958. Bell should be allowed to revert to claiming CCA and to keep a deferred tax account which was not included in the rate base. As we have seen the 1958 ruling was that deferred taxes should flow through to income. The intervener showed that the benefits for subscribers would be greater by having a deferred tax account if rates did not allow a rate of return on this fund. The applicant on p. 551 said that the rate of return

was checked from time to time on a sampling basis for competitive services and that it was at least 7%.

The Board said that the pension plan as is was reasonable and proper. Also the depreciation expense as is was proper and a reasonable cost to be borne by the subscribers.

5.4 AT&T Bell Service Contract

Bell paid 1% of local and toll revenues to AT&T in return for research, consultation and non-exclusive licences to patents. Bell presented evidence to justify this expense in the form of benefits accruing to Bell including a decrease in operating expenses. Bell argued that the revenue basis was the best measure in the long term of the value of this service agreement. The Board ruled that the agreement seems to have been proper and that Bell demonstrated the worth of the agreement and its reasonableness in terms of payment.

5.5 Northern Electric-Bell Relationship

Bell called 4 witnesses on this relationship and interveners called 2. As was indicated earlier the main intervener on this issue was Industrial Wire and Cable, a competitor of Northern Electric. It's unclear that a case to determine the method of return was the best ground for attacking the Bell-Northern relationship.

Bell argued that the prices for items received were governed by a clause in a supply contract which said that the price had to be the lowest

price charged to any other customer of Northern. An auditor's sampling study showed that that was true. Bell argued that there was no adequate substitute for the present arrangement; competitive tenders and long term contracts would not suffice. The counsel for Industrial Wire and Cable argued that price comparisons between Bell and non-Bell for Northern Electric business were completely inadequate measures of the reasonableness of the prices paid by Bell since the comparisons used in evidence by Bell covered only 1/3 of Northern Electric non-Bell business. The reasonableness of the prices depended on the reasonableness of the rate of return being earned by Northern Electric; even though Bell Canada received the lowest price, there still may be excess profits on all sales. The reasonable rate of return for Northern Electric was the same return as allowed Bell, the intervener claimed. One must therefore examine costs because there was no established competitive price since Northern Electric had most of the market. The Council for the Mayors and Municipalities argued that Bell earned 15.28% on its investment in Northern Electric in 1963 and that these high profits showed up in Bell's plant accounts due to its expenditures on capital. In addition, the relationship between Bell and Northern should be taken into account in fixing Bell's permissive rate of return. The counsel for Industrial Wire argued that it could well be the case that the rate of return on Bell business was high and that the rate of return on non-Bell business low. The intervener argued that Bell's reliance on its internal auditor's report was unsatisfactory for two reasons - first exports were excluded from the price comparison and second there was no evidence whether the market for non-Bell business was competitive or not. Industrial Wire and Cable suggested that the Board order Bell to furnish information

on Northern's cost as separated by broad product categories and by Bell non-Bell categories. The Council for the Municipalities argued that the transactions between Bell and Northern should be at cost plus a 7% return on equity.

The Board said on p. 726 that as long as it was satisfied that prices paid by Bell were fair and reasonable and that Bell's investment in Northern did not prejudice the interest of subscribers, there was no need for the Board to regulate the rate of return of Northern on Bell business. However, the rate of return of Northern Electric would be considered as one measure of the fairness and reasonableness of prices paid by Bell. The Board had available Bell's breakdown of Northern Electric's capital devoted to Bell and non-Bell business. The Board found that the rate of return on capital devoted to Bell business was lower than the rate of return on capital devoted to non-Bell business. The Board rejected the submission that the rate of return of Northern Electric should be restricted to that of Bell since risk and uncertainty were far different for an electric equipment manufacturer. The Board stated that Bell and Bell's subscribers derived advantages from the relationship which would not be available if Northern Electric were restricted to Bell business. The Board also found that Northern electric's overall rate of return on capital was within the range of rate of returns earned by other industrials and about the same as that earned by Western Electric.

6. Canadian Transport Commission Decision C-955.175 06 December 1968

6.0 Introduction

This is the first case involving the Canadian Transport Commission rather than the Board of Transport Commissioners. Bell applied on the 6th of December 1968 for increases in exchange and long distance service rates which if in effect for the full year 1969 would increase revenues by $83.6 million. Bell asked for an overall rate of return of 8% which included 10.5% on average common equity and a debt ratio of 40%. The case began in Ottawa on May 20, 1969 and ended on August 1, 1969. There was a preliminary hearing involving one day. There were 11 interveners including two governments (Ontario Ministry of Justice and the Government of Quebec), three associations (The Hotel Association of Canada, the Telephone Association and the Canadian Federation of Mayors and Municipalities). The Canadian Federation of Mayors and Municipalities appeared for 256 municipalities in Ontario and Quebec, the Ontario Municipal Association, the Association of Ontario Mayors and Reeves, and the l'Union des Municipalités du Québec. Four individuals appeared (the most prominent of which was Hudson Janisch), as did the Borough of North York and the T.E. Eaton Company. Only 7 made appearances namely, the governments, the Federation of Mayors and Municipalities, the Hotel Association, the Telephone Answering Service Association, the Borough of North York and T.E. Eaton Comapny. The Hotel Association and the Telephone Answering Service Associations raised issues which were specifically of interest to them. An interim decision was made on the 25 of September 1969 to allow an increase in revenue of $27.5 million based on an overall rate of return of 7.3% and a rate of return on average common

equity of 8.8% using a 47.1% debt ratio.

6.1 Debt Equity Ratio

The actual debt ratio at this point was 47.1%, Bell tried to argue that the 40% ratio was the one they were aiming at and the one the Board of Transport Commissioners had found reasonable. Bell argued that it was going to raise $186 million in equity over the next 12 months and refund $130 million of debt.

6.2 Rate of Return

The interveners suggested that a maximum return of 7-7½% was reasonable. The interveners pointed out that Bell had earned a higher rate of return than the rate prescribed in the last decision. In 1966, Bell earned 7% as compared to 6.6% allowed. Bell used the same argument as in the past to show that it should earn the same rates as comparable unregulated industrials or comparable electric utilities. The interveners rejected the comparisons with unregulated industrials and pointed to the most recent case involving AT&T [(1967)(79 PUR (3D) 179 at 186 and 195)]. In that decision, the FCC noted that differences in capital structures did not account for differences in risks, (again an argument that Bell was trying to make as in the past.) The interveners argued that one could not compare Bell with electric utilities which had higher debt ratios and higher percentages of preferred shares. They also argued that one could not compare Bell with Canadian banks which were less risky and which had a debt ratio of .04%. The CTC in its decision on p. 7 said that the maximum or permissive rate

of return should not be the sole test of justness and reasonableness of rates. The CTC decided not to set a maximum rate of return at this time but that it would maintain "constant surveillance over Bell's affairs and take any steps that may in the future call for further relief".

The Board in its decision selected 3 categories that Bell argued most affected the increase in costs that were occurring, namely unlisted numbers, service charges and long distance calls, and increased tariffs for these 3 categories only. All other rate increases, namely those for local exchanges, were denied.

The counsel for Ontario argued that Bell should be ordered to separate investments in plants between regulated and unregulated services in order to examine whether telephone subscribers were subsidizing users of unregulated services. The CTC in its decision on p. 9 said that it would be in the public interest to examine the feasibility of cost and revenue separation and that Bell was directed to undertake such a study. The CTC also suggested that the tax allocation method used by Bell were proper for both regulated and nonregulated business.

7. Canadian Transport Commission Decision C-955.180 12 June 1970, 01 December 1970

7.0 Introduction

Bell Canada applied on the 12 of June 1970 for a 6.25% increase in the monthly tariff for residential and business exchange services. These increases were for the categories denied rate changes in the decision of September 1969. If in effect for the full year of 1970 these rate revisions would have increased revenues by $30 million. Bell's reasons for the application were the increase in costs incurred since September 1969 (9 months previously) of $32 million in expenses and $13 million in construction costs. The hearing took 8 days and was completed in September 1970. There was a one day preliminary hearing. Five interveners appeared - the Ontario Attorney-General; the Quebec Government; the Association of Ontario Mayors and Reeves and the Ontario Municipal Association; the Hotel Association of Canada and Mr. C. Gilmore appearing on behalf of Quebec farmers, other Canadian farmers, the elderly and people on fixed incomes. There were 6 witnesses - 5 for Bell Canada and 1 for the Ontario Government. Only the Ontario Attorney-General, the Association of Ontario Mayors and Reeves and Mr. Gilmore provided argument.

The interveners argued that this application was premature and was simply a disguised request for a review of the September 1969 decision. The Association of Ontario Mayors and Reeves argued that one needed a long period from the last decision to examine its full effects. The setting of new rates also required a prior period on which the regulator could rely. At least, a full year should pass before any new application was made. The

Association of Mayors and Reeves argued that one could not grant increased rates simply by looking at costs; one had to also examine the rate of return for otherwise only shareholders would benefit from increases in productivity. This intervener argued that the rate of return in 1970 was in line with the Sept. 25, 1969 decision even with the alleged increase in costs. The CTC in its decision on p. 4 examined changes in the operating ratio that had occurred since 1959. The operating ratio is equal to the percentage of operating revenue absorbed by operating expenses before other income, operating taxes and interest charges. The operating ratio fell from 69% in 1959 to 61.2% in 1968.

The applicant argued that a new wave of inflation had occurred in 1968 and 1969 and that was the cause for the application. Interveners (of the Association of Ontario Mayors and Reeves) argued that there was no legal obligation to protect shareholders of utilities against inflation. The CTC in its decision on p. 5 looked at changes in the CPI, the wholesale price index, and the price for 30 industrial materials.

One of Bell Canada's major points was that its net income was insufficient to attract the capital required for the construction program and a further reduction in this program would endanger service capability in the future. The Ontario Attorney-General argued that the onus was on Bell to show that they had effected savings in areas where the construction program could be cut back. The CTC in its decision on p. 6 raised the issue of jeopardy of the quality of service and the ability to meet the demand for service. The CTC stated that improvement of earnings was an essential factor in the ability of Bell to sell any form of new equity on

favourable terms.

7.1 Fairness, Just and Reasonable Rates

Bell had requested a 6.25% increase in exchange services in order to maintain some reasonable proportion to long distance rates. The Ontario Attorney-General argued that this was irrational, that one needed some scheme or pattern for increases and decreases of rates. Rate structures must be without discrimination; and it was not justifiable to ask for a rate increase just to maintain some proportion to other rates.

The CTC in its decision on p. 9 allowed only a 3.75% increase for basic exchange services because of the need to maintain a fair distribution of the burden of the increase to the residential and small business subscribers. Although this is clearly a matter of cross-subsidization there is no explicit reference to costs and no cost benefit analysis or explicit income distribution grounds to allow this kind of subsidy.

8. Canadian Transport Commission Decision C-955.181
05 November 1971, 19 May 1972

8.0 Introduction

Bell applied on the 5th of November 1971 to revise tariffs which, if in effect the full year 1972, would increase revenue by $78.1 million. This increase in revenue, the applicants suggested, was necessary because of the external financing of $200 million required for the construction program of $525 million needed to maintain the quality of service and to meet demand. Without the rate increase, Bell estimated its overall rate of return for 1972 to be 7.0% and stated that its rate of return for 1971 was 7.4%. Bell asked for a rate of return on equity of 8.2% to 9.0%. With the rate increase, the rate of return for 1972 was estimated to be 8.2%. The hearings began on March 1 and ended on March 30, 1972. There were two perliminary hearings on January 10, 11, and 17 of 1972. Interveners were the Ontario Government who asked for 79 interrogatories; the Quebec Government who asked for 37 interrogatories; the Association of Ontario Municipalities; the Hotel Association of Canada and Mr. C. Gilmore.

Bell argued that inflation had substantially increased and that the long term bond yield would be between 7½% and 9% for the next five years involving 5% and a 3% inflation premium. The CTC in its decision on p. 13 refers to the inflationary process in the context of R&D expenditures only. The CTC in its decision on p. 2 finds no basis to question the necessity of the $525 million construction progarm. The interveners argued that the estimate of revenue for 1972 was too conservative. The CTC in its decision examined the operating ratio which was estimated to increase from 62.8%

in 1971 to 66.1% in 1972. The CTC therefore gave Bell an increase in revenue of only $47.2 million and suggested they improve their operating ratio.

8.1 Rate of Return

The interveners in general agreed that some increase in the rate of return was required but not to 8.2%. The CTC in its decision on p. 17 decided to set a maximum permissive rate of return, something it had declined to do in its last decision. It set this at 8.2% (based on 6.2% debt; 6.8% preferred and 9.5% common equity) and allowed a revenue increase which would yield an estimated rate of return of 7.8%. Bell in assessing its cost of capital had suggested that convertible preferred equity be evaluated at the cost of equity capital. The interveners in general opposed this and the CTC appeared to agree with the interveners by looking at the " actual cost" of convertible preferred.

Bell in its application requested that the CTC examine a movement to a net plant rate base. In its decision the Commission said that it would do so "at an appropriate time".

The CTC in its decision on p. 30 refered to confidential information provided by Bell on rate of return and comparative prices. On p. 31 the Commission stated that Bell's rate of return on its investment in Northern Electric in 1970 was 10.34% and that Bell's rate of return on all subsidiaries (in terms of the dividends received) was 6.46% for 1971.

8.2 Depreciation

The Ontario government opposed Bell's movement to equal life grouping methods of depreciation initiated on Jan. 1 1971. The intervener criticized

the adoption of ELG at this time in view of the forthcoming cost inquiry. The ELG method seemed to have resulted in an increase in the depreciation allowances in the early years. The CTC in its decision on p. 10 was willing to accept ELG.

8.3 Rates and Rates Structure

The CTC in its decision on p. 19 approved an increase of 50¢ for an unlisted number because of the increase in cost of keeping unlisted numbers would otherwise be "unjust discrimination against listed subscribers". The Commission on p. 20 approved a usage fee for mobile telephones rather than a flat monthly rate because of fairness. Bell had argued that heavy users were tying up channels and were being subsidized by users with low volumes. The CTC on p. 20 approved a 100% increase in the tariff for tie trunk terminals because of the high cost of providing them.

Bell wanted to change cities then on the incremental plan to the Waiting Factor Plan (WFP) for total count of telephones for rate grouping purposes. The interveners, especially the Ontario government and the Assoc. of Ontario Municipalities, had argued that rate groups should be based on the account of main telephones excluding extensions. The CTC on p. 24 states that there is no alternative but to include extensions and it allows the adaptation of WFP for total telephone count. The CTC said that under the old incremental plan, Montreal and Toronto would not have borne "their just and reasonable share in the increase necessary for Bell's revenue requirements."

9. Canadian Transport Commission Decision 'A' C-955.182 10 November 1972, 30 August 1973

and

Canadian Transport Commission Decision 'B' C-955.182.1 15 August 1974

9.0 Introduction

This decision has two segments (A and B) because the original CTC decision of the 30 of March 1973 was suspended, reviewed and altered by the Federal Government especially with respect to the approved two-stage 50% increase in service charges to residential subscribers. The initial application was dated the 10th of November 1972 and involved an application by Bell for increased rates as of January 1, 1973 which if in effect for the full year 1973 would allow a 7.8% return on total average capital; the rate of return allowed in the 19 May 1972 decision. The amount of the increased revenue would be $36 million. The CTC allowed substantially all increases asked for including the 7.8% rate of return on total average capital. The CTC noted that the revenue would only increase by $21.5 - $22 million for 1973 since the rates would not be in force for all of 1973. The first decision (A) was dated the 30th of March 1973. Hearings lasted from January 10 to February 16. There was one preliminary hearing on the 18th of December 1972. There were 14 interveners involving 2 provincial governments, 7 associations and 2 private citizens. Interveners are shown on Table 1. The major interveners were the first three - the Ontario Government, the Quebec Government each of whom asked for 52 and 53 interrogatories respectively and the Association of Ontario Municipalities.

The Federal government recommended a review of the whole area of service charges. They suggested a reduction in installation charges by the establishment of appropriate differentials in service charges between installments requiring a visit and those not. The Federal government requested that the CTC examine the "social impact" of any additional increase in residential installation charges especially for low-income subscribers. The Federal government also requested a better analysis of the impact of the construction programs on costs and revenues and the quality of service.

9.1 'A' Decision

9.1.1 Revenues, Costs and Rates

The Ontario government suggested that the revenues for 1972 were better than estimated at the last hearing and therefore that the revenue forecast for 1973 should be increased. The Hotel Association of Canada suggested that Bell take into account demand elasticities.

The CTC agreed that the $36 million revenue increase requested was not fully required because Bell had underestimated its revenue for 1973.

The interveners generally questioned the construction program which in 1972 had been estimated at $420 - $550 million and which was now estimated to be $590 million. The interveners also stated that the program estimated at $525 million in 1972 actually cost only $508 million with no serious consequences with respect to service. The Ontario government stated that a cut in the $590 million budget would not lead to serious consequences with respect to the quality of service. That intervener also suggested that

Bell was arrogant in spending $17 - $18 million with respect to the requested 25¢ charge for directory assistance assuming that the charge would be approved. Bell had also spent money in the changeover for a 20¢ pay telephone charge again assuming it would be approved. The latter rate change was not approved and the 25¢ information charge was only approved after 3 free calls.

As we have seen from the Federal government's involvement, the main issue seems to have been the increase in installation rates. Bell had asked to increase these charges by 50% and the CTC in its decision on the 30 of March, p. 15 had allowed that increase while allowing slightly lower rates for subscribers who did not move frequently. The Ontario government had raised the question of why service charges were the same whether or not a visit was required to the customer premises. The Hotel Association raised the issue of the allocation of costs versus the value of service principle in rate making with respect to service charges and argued that Bell was trying to have it both ways. The Ontario government wanted to know to what extent rates were cost related. The Ontario government stressed that the social impact of increasing service charges from $11 to $22 had not been examined by Bell. The Hotel Association argued that the onus was on Bell to prove that its rates were just and reasonable; that Bell tried to argue that rates were based on the value of service and yet rate increases were based on cost increases. The Hotel Association wondered why there were no service charges for data services and paging services and why this was just and reasonable. Bell said they did not charge because of "competitive factors" euphemistically known as the value of service. The Hotel Association also argued for interconnection tariffs to be regulated and for an exceptionally

liberal interconnection tariff policy.

Both the Ontario and Quebec governments objected to the inclusion of the investment in Telesat Canada in the rate base. They also objected to the acceptance of $7.4 million for the cost of channel rentals in 1973 as an allowable expense.

9.1.2 Competition and Efficiency

The Ontario government argued that it was cheaper to take voice and data services from Bell then voice services from Bell and data services from CN-CP and therefore that Bell was acting as an unequal competitor. The Hotel Association argued that Bell's practice was to keep the tariffs for competitive services as low as possible in order to lead to an increase in the demand for those services and to make up the losses from the monopoly services. The Hotel Association also questioned Bell's statement that if not allowed the full desired increase in revenues it would absorb the short fall in long distance service charges. The issue, as the Hotel Association saw it, was the elasticity of demand for long distance services. The Ontario government also said that competitive factors might lead to rates being set below the actual revenue requirement because of 'value of service' pricing, the area wide pricing principle and competitive factors. Their example was teletype.

9.2 'B' Decision

9.2.1 Introduction

The second part of the application began in Ottawa on January 16, 1973 and ended on June 4, 1973. Fifty-one sitting days were involved in

5 locations, 1 day in Montreal, 1 day in Toronto, 49 days in Ottawa, a hearing examiner spent one day in Coral Harbour and 1 day in Frobisher Bay taking 6 and 5 oral depositions respectively. There were 14 main interveners involving numerous interrogatories. Including oral depositions (of which there are 46) the interveners included 3 provincial governments, 19 municipal governments, 31 associations, 2 companies, 1 M.P. and 55 private citizens. These associations requested 105 interrogatories (all by the Consumers' Association of Canada); private citizens requested 7, the Quebec Government, 90; and the Ontario Government some 900. The sitting days included 2 days in Ottawa on a preliminary question of law (January 16 and 17, 1974) and then 47 days on the application itself, February 4 - June 4. The preliminary question of law was answered in a decision of February 6, 1974. Only the Ontario and Quebec governments, Mr. Gilmore and the Consumers' Association of Canada intervened in the full proceedings. Bell provided 13 witnesses and the interveners provided 9.

The first of 3 decisions in this B phase of the original application took place on the 21 of December 1973 at the end of the pre-hearing conference. The thrust of the pre-hearing conference was to meet with the interveners and prospective interveners to discuss the coming proceedings and matters which may aid in their disposition. The Centre for Public Interest Law intervened saying the new application was an appeal of the 'A' application and that it should therefore not be entertained. The CTC said that they were not persuaded by the objection and that to them A and B were distinct applications for different time periods. The opening two days in January involved the Hotel Association, the Centre for Public Interest in

Law and others raising the question of cost awards. The interveners were especially angry at the number of rate increase applications. The CTC said it had no mandate to give financial assistance (as opposed to awarding costs) to perspective interveners. In addition Bell had no choice under law except to seek approval from the CTC whenever management decided that rates should be increased. The interveners also asked for a socioeconomic study of the telephone system and rates, especially service charges with respect to the government review of the 30th of March 'A' decision.

The Quebec Government also raised the point of law that Northern Electric should be investigated as if it were within the jurisdiction of the CTC for 3 reasons; (1) Northern Electric was a business forming part of Bell; (2) Northern Electric was a telephone company within the meaning of the statutes; (3) Northern Electric enjoyed the powers and provided the services conferred onto Bell by parliament. The CTC said that it would not because: (a) Northern Electric was a distinct corporate entity; (b) it was not a telephone company because it could not operate a telephone system and charge tolls; (c) Bell's power to manufacture telephone equipment as conferred by parliament was exclusive. The CTC said that it could scrutinize relevant relations between Bell and Northern but that it would not regulate Northern.

Questions were raised as to the evidence that Bell should produce and on the availability of evidence on the Bell-Northern relationship. Since the government had suspended the allowed increases in service charges and had recommended a better analysis of construction programs, Bell said that it had the information requested by the government and the CTC said it would

hear the evidence and then decide if it was sufficient. As the cost inquiry study on deferred income taxes was not ready the CTC would proceed with hearing the full application.

9.2.2 The Rate of Return

Bell had requested an overall return of 8.6% - 9.3% involving a rate of return on common equity of 11% - 12½%, 6.6% on debt, 7.7% on nonconvertible debt and 6.8% on convertible debt. Myron Gordon who appeared as a witness for the Consumers' Association of Canada said that as of January 1, 1974 Bell's cost of capital was 8.48% with a cost of equity of 10.63% and a cost of preferred of 7.1%. Professor Gordon suggested an increase in the overall cost of capital to 8.64% because of an increase in the return to equity to 10.95% which would allow the raising of new common equity without hurting present shareholders. Professor Gordon suggested that a rate of return of common equity of 10.95% would yield a price of 5% - 10% above book value.

The Quebec Government wanted a minimum period that the new rates would be in effect; approval of the construction program in advance; and a set rate of return for Bell on its investment in Northern Electric before a ruling on the maximum permissive rate of return.

The Ontario Government argued that there was no clear basis in the evidence on which to determine a fair rate of return and one should adopt the rate of return methodology involved in the cost inquiry.

The CTC in its decision on p. 42 said that the cost of common equity was higher in 1974 than in 1972, one reason being inflation. The CTC accepted the 6.6% - 6.8% cost of debt for 1974, 7.7% for nonconvertible preferred, and

6.8% for convertible preferred. The CTC accepted the 48.5% debt ratio and 11% - 12% range for common equity. The overall permissive range of the rate of return for 1974 would then be 8.6% to 9.1%.

9.2.3 Rate Base

The CTC in its decision on p. 35 noted that the only discussion with respect to the rate base involved inclusion of deferred income taxes and that no change would be ordered. Professor Gordon had argued that deferred income taxes should not be included in the rate base.

9.2.4 Revenue Requirements

A number of interveners had questioned Bell's estimates for 1974 because of the approximately 6% underestimate of 1973 revenue in the last hearing. The CTC in its decision noted that the first 6 months actual revenue was 1.68% higher than Bell's estimate. They therefore estimated that the rate of return in 1975 would reach 8.6% if revenue continued to overrun estimates by 1.5%.

9.2.5 Rates and Rate Structure

Bell argued that 4 principles were involved in determining rates - one, the value of service; two, the recognition of cost; three, the company-wide principle; four, service classifications. The Ontario Government questioned the validity of Bell's 4 principles. Their witness (Bell Melody) stated that these principles were so broad and vague that they could justify any rate structure that management desired. The Ontario Government argued that

information on the cost of service was necessary to evaluate the rate structure and that one must break down costs on a service by service basis. The Ontario Government was concerned that basic service subsidized other services especially the new varieties of telecommunication services and data transmission. The Canadian Cable T.V. Association challenged the company-wide principle (i.e. one rate schedule for services in all areas regardless of the actual cost of serving any geographic area). They called a witness (Professor J. McManus) who argued that all construction projects should pay their own way, and that the marginal rate of return on new investments should at least equal the cost of capital. Furthermore, he argued rural subscribers should pay the higher cost of servicing them and that subsidizing rural subscribers was a function of government not of Bell. The counsel for the Canadian Cable T.V. Association argued that there is no general reason why one group of consumers should subsidize any other group. The CTC in its decision on p. 56 commented that the social impact of rates would be inflexible under the view of the Canadian Cable T.V. Association.

9.2.6 Construction Program

The interveners in general argued that the construction program suggested by Bell amounting to $720 million overestimated needs and that many projects were delayable. The CTC in its decision on p. 20 noted the inclusion in the construction program of expenditures to increase the quality of multi-party non-urban service by reducing the number of parties per line. The cost of this program was estimated to be $37 million in 1974. The CTC on p. 24 in its decision asked Bell to draw up a comprehensive plan for upgrading

the quality of service in non-urban areas. On pp. 25 and 26 of the decision the CTC asked Bell to increase the capital expenditure projections for 1975 in order to increase the quality of service in non-urban areas. The Association of Ontario Municipalities had shown that after the 'A' application had been decided there was virtually no decrease in Bell's construction program even though the increase in rates had been substantially refused by the CTC and then the Federal government. It is clear from these decisions that the cross-subsidization is a desired objective of both the CTC and the Federal government.

9.2.7 Socio-economic Aspects

The government review of the 30 of March 1973 'A' decision had requested a socio-economic study of increases in rates, especially installation fees. Many interveners were concerned with these aspects including the ability of low income groups to pay fair and reasonable rates. Some interveners had advocated nationalization of this essential service, others advocated government subsidy or heavy cross-subsidization. The CTC stated in its decision that a broad socio-economic study with respect to telephone service would be pursued at an early date.

9.2.8 Deferred Income Taxes.

Professor Myron Gordon for the Canadian Cable T.V. Association had favoured the flow-through method of deferred income tax accounting. The flow-through of deferred income taxes into income for regulatory purposes was necessary for otherwise the consumer would be contributing to capital through forced investments. Furthermore, deferred income taxes should not

be included as part of the rate base. Another witness for this intervener argued that the flow-through method was approved by the Canadian Institute for Chartered Accounts for certain regulated and similar interprises by Articles 3470.13 and 3470.56 - 3470.58 in the CICA Bulletin on Corporate Income Taxes. The Association of Ontario Municipalities also argued that deferred taxes be considered in the present as forced investments in Bell. The CTC made no change.

9.2.9 Quality of Service

The Consumers Association of Canada desired quantitative standards of quality. Tagramicitic Nipingat argued that any increase in rates for a service could only be justified if it related to the increased quality of that same service. Many other individual interveners held that same position. The Innuit Tapirisat held that the quality of service for the Northwest Territories was poor. The CTC in its decision on p. 57 said that the most perplexing area was rural service. The increase in quality for non-urban services required greatly increased capital expenditures and the issue was where that revenue would come from. The CTC suggested that non-urban subscribers realized the problem and would be willing to pay more for better service. This is a subtle attack on the company-wide principle by suggesting the creation of a new service category for 4 party line. However the attack was not sufficiently strong.

9.2.10 Rate Adjustment Formula Procedure (RAFP)

In its decision on pp. 43 and 82, the CTC referred to inflationary trends and pressures and the resulting 'uncontrollable' increases in costs

and therefore the increase in frequency of rate relief applications. To relieve the burden of frequent rate cases the CTC proposed a Rate Adjustment Formula Procedure (RAFP) that would be effective in 1975. RAFP would reduce the frequency but not eliminate rate hearings. It would focus on identifiable and non-controllable increases in costs and would be tailored to each carrier. It would be limited to wages, salaries and fringe benefits, taxes (excluding income taxes) depreciation and other expenses. Productivity adjustments would be included in RAFP and RAFP would not account for variations in cost of capital. RAFP was not introduced by the CRTC.

Appendix 2

MARITIME TELEPHONE AND TELEGRAPH

1 Rates Cases 1952-1978

Between 1952 and 1978 there were seven rate cases involving MT&T before the Nova Scotia Board of Commissioners of Public Utilities. The bulk of these have been quite recent (1970, 1974, 1975, 1977 and 1978) and seem to have broken the trend of long intervals between rate increase requests by the utility. Prior to 1970 MT&T had come before the Board only three times for rate reviews in 1919, 1952 and 1966.**

A review of the 1952 cases follows. The reviews are based on the actual transcript proceedings and the case decisions. Each case is analyzed according to a number of items of interest.

It should be noted at this point that the construction program is not a subject in every hearing and that the statutory approval necessary for construction programs is often handled outside of the open hearing process itself. In conversation with the current Commission Chairman, J.S. Drury, a two-step approval process was discussed. In the first stage MT&T submits a construction plan with complete estimates which are then approved or disapproved. If approved then construction may proceed and final costs are submitted for approval at the completion of the project. Not all requests are approved (the Chairman noted a recent EAS proposal which was quashed) but they are considered without a hearing.

** Some minor revisions had been incorporated into the 1934 General Tariff, but no general rate review.

It should also be noted that final argument by Board Counsel, interveners and the applicant is not a fixed feature of the Nova Scotia hearings despite its popularity in other regulatory jurisdications. It is quite normal for these cases to end with the conclusion of the evidence. There also does not appear to be any formalized interrogatory process, although transcript undertakings are not unknown.

1.0 MT&T - 1952 Case

1.1 Introduction

This was the first case dealing with a general rate increase since 1919. Minor revisions had been incorporated into the 1934 General Tariff (Traffic) Schedule and this was the basis for adjustments.

The hearings lasted from 12 Feb. 1952 to 26 Feb. 1952 covering seven sitting days in Halifax. Hanway (Chrmn.), Farquhae and Outhit were the Board members presiding. There were four interveners, the cities of Halifax and Sydney, the Town of Glace Bay and the Rural Telephone Companies Assoc. as represented by the Inspector of Rural Telephone Companies. The total transcript ran only 471 pages.

1.2 Economies of Scale

There is no discussion of economies of scale in this case. In fact discussion of economic issues is noticeably absent.

1.3 Rate Structure

A substantial part of the transcript deals with the issue of toll versus exchange revenues (see Feb. 25, 1952, p. 351 and on). Mr. Bethune

(city of Halifax) questions McKay (MT&T) extensively on the ratio of toll to exchange revenue. This issue is also relevant to the cross-subsidization issue. (See 2.1.8.)

1.4 Construction Programme

Capital expenditures and the construction programme are only discussed in the case in the context of expenses. The construction programme itself is not challenged.

1.5 Rate of Return

MT&T requested and was granted 5.53% (1952) and 5.97% (1953). The company presented figures showing that without a rate increase ROR would fall below 3% on total rate base in 1953. There seemed to be general agreement by the Board and interveners that this (the below 3% ROR scenario) was unacceptable.

1.6 Bell Connection

Board Counsel (Mr. MacDonald) questioned the MT&T witness directly on this point. "Do you find that the engineering advice that you receive from the Bell Telephone Company under your contract is predicated largely on the use of Northern Electric equipment?" (p. 160). The company vigorously denied this and the matter was not pursued.

The more general issue of the engineering contract with Bell for information and consulting received more attention. MT&T had paid Bell $19,000 for this service in 1951 (1/3 of 1% of gross) and was asked to

justify this expenditure - which they did.

Bethune (p. 163) cross-examined on the position of Bell as a shareholder and asked whether MT&T was obliged by some contractual arrangement to have two directors from Bell on their Board. MT&T denied this.

1.7 Quality of Service

Rates for manual and dial were equalized in the proposed rate schedule. Yarmouth complained vigorously (1500 signature petition) about not getting dial and MT&T defended by simply saying that there were more pressing needs.

The Rural Telephone Companies requested that the rates not be approved and that dial not be made mandatory for them.

1.8 Cross-Subsidization

There was extensive discussion of cross-subsidization particularly in the context of toll rates versus exchange rates and rural rates versus urban rates. One argument was that urban rates were higher than justified by cost alone in order to subsidize rural rates in order to increase toll traffic.

(p. 375) Q: How do you justify increasing rates in one area to enable the company to supply local service in another area at rates below cost?

A: ...the more telephones, within the ... Province, a subscriber can talk to, the more benefit there was to the business community.

A ruling of the Board in the 1919 case explicitly endorsing a policy of rural expansion subsidized by urban systems for the benefit of the total system was cited in this case (p. 376). The operative phrase

was, "to encourage telephonic development in the small rural exchange districts of a character which encourages interconnection with the larger cities." MT&T agreed with this interpretation.

There were calls for a cost separation study following extensive discussion on the ratio of toll revenue to exchange revenue and both to total revenue (pp. 353-360). The company was unable to provide estimates of expense related to toll and exchange services in the manner in which estimates of revenue had been produced.

The issue of cross-subsidization also arose in the case of the high charge for extension phones on jacks. MT&T explained that the higher cost was related to a higher incidence of damage to phones which can be moved about the home.

1.9 Competitive Services

At page 379, the MT&T witness discusses the need to keep toll rates low in order not to hamper business and to keep people from switching to telegrams. This issue is not really pursued, however, and this statement is really related to the controversy over toll versus local rates.

1.10 Observations

This was the first hearing of the post-war period and some of the issues raised here, such as the call for cost separation studies, were to come up again in hearings in the 1960's and 1970's. Nevertheless the rates established in 1952 were to stand for fourteen years before another general review.

2 1966 Rate Case

MT&T had not come before the Board for a rate increase since 1952, and despite the proximity of this case to the modern cases of the 1970's, it more closely resembled the preceding case than the successive cases.

The company came before the Board seeking rate increases that would yield a rate of return on rate base of 6.31% in 1966 (part-year only), 6.4% in 1967 and 6.02% in 1968 for an average of 6.24% over the period. This is similar to the three-year span cited by the company in the 1952 case. Also similar to the 1952 case is the company's arguments for the increases. These rest largely, as in 1952, on the declining rates of return then being yielded by rates approved 14 years previously and operative during a period of great expansion in the telephone system. The Board concurred with the Applicant and approved the new rate schedule with only very minor revisions. In addition, a revised rate base of some $77.5 m, up from only $22.5 m in 1952, was approved by the Board.

The hearing itself took place at the Board's Halifax offices from December 7, 1965 to February 7, 1966. There were 13 actual sitting days. Active intervention was limited to the Nova Scotia Innkeepers' Guild.

The Board spent a considerable amount of time on the rate base and other financial matters. It also dealt with the company's construction programme and its quality of service. Regarding quality of service, the Board notes in its decision that,

> It is the opinion of the Board that the services supplied by the Applicant during the past five years have been reasonably adequate, but it has been observed by the Board that the Applicant has failed to implement service improvements, modernize its equipment and replace plant to keep pace with the changes in the telephone art ...

The Board also chastised MT&T on the issue of dial services - "there are many subscribers who should have dial service who do not" - and on multi-party service.

In this case, no mention was made of economics of scale or competitive services. Except for the discussion of the lack of speed in extending dial service, no discussion took place on issues of cross-subsidization.

In any event, the new rate schedule was approved in April, 1966.

MT&T 1969-70 Rate Case

2.0 Introduction

The hearing commenced on Nov. 3, 1969 and lasted until Dec. 11, 1969. There were 8 actual sitting days. The hearing took place at the Board offices in Halifax and was chaired by Mr. Outhit. The transcript runs some 597 pages and a 40 page decision was released on Feb. 25, 1970.

There are no interrogatories in this case nor is there any final argument contained in the transcript. The transcript itself is not indexed by subject.

There were 5 interveners in the case. They were Pye Electronics Ltd., the City of Sydney, the United Mine Workers of America, Local 4527, the Innkeepers Guild of Nova Scotia, and the Nova Scotia Federation of Labour. Two of these interveners, the Innkeepers Guild and the Federation of Labour submitted written briefs to the hearing. Only one intervener, Pye Electronics, conducted any cross-examination. In addition, none of the interveners with the exception of those mentioned who submitted a written brief, gave anything in the form of final argument. All in all the level of activity by the interveners was relatively low.

2.1 Rates

The company proposed a new tariff schedule which would yield a 7-8% increase on the rate base over the period. The specific figures given by the company were 6.8% in the first full year which would be primarily 1970 and part of 1971 and 7.09% in the next year. MT&T contended

that its present rates were too low and company counsel Mr. MacKeigan outlined the company's reasoning on the rate increase in his introduction to the case.

> "The company seeks adjustment of rates to cover increasing costs and to improve the rate of return on capital so that it would be just and reasonable for investors present and prospective. An adequate rate of return is essential to maintain credit, to compensate suppliers of capital and to attract new capital. A competitive rate of return is essential also to telephone users - since without regular and large inputs of capital the company's construction program cannot be sustained and without the construction program the company cannot meet the demand of the public for improved and ever expanding service."

No changes in the rate structure were proposed and the attention of the hearing was clearly on the amount of money which the new rates would yield, not on the structure of relative rates. With the exception of some multi-party rates, the Board approved the new tariff schedule in its entirety. In the Board's decision no mention is made of the rate of return, debt equity ratio or the return on common equity that this approval of the new rate schedule would generate.

2.2 Construction Program

The construction program was noted above as one of the major factors justifying a rate increase in 1969. Net telephone plant in service in 1969 was $127 million and increases of approximately $20 million per annum over the next 3 years were projected in the course of the hearing. The Board deals extensively with this subject in its decision at pp. 9-15 and recommends implementation of the construction program. The

Board notes a large number of complaints which it has received from the public concerning the quality of service from the company. It uses these complaints as one of its justifications for approving the construction program as submitted.

2.3 Rates of Return

One of the problems in analysing the decisions and the cases before this Board is that the Board does not appear to deal with specific rates of return or even percentage increases in the rates which it is deciding upon. The Board recognizes the tariff schedule itself and either approves or rejects that tariff schedule. The approval of the tariff schedule submitted by MT&T in this case yields rates of return previously mentioned in these notes. The subject of rate of return does appear in the transcript and is discussed at length but it does not appear at all in the decision.

2.4 Rate of Return on Common Equity

MT&T called an outside witness to discuss the rate of return on common equity, and his testimony covered nearly 50 transcript pages. He noted that because of rising interest rates, MT&T stock was trading very near its book value, thus a new issue would tend to dilute both the earnings per share and the book value of the stock. The clear implication here is that the company is unable to raise new funds through offers of shares at this point. The witness also noted that the company's debt/equity ratio at the end of 1968 stood at about 45/55 (debt 44.17%). The witness

recommended that a rate of return of 10-11% of common equity would be required to keep the company stock marketable.

Despite this lengthy testimony, there is no relationship given in the hearing between the price of the company stock and the rates being requested by the company. It is merely implied that the raise in rates required will help bring about an increase in the rate of return on common equity for the company.

2.5 Rate of Return on Total Capital

Another expert witness was called by MT&T to discuss its required rate of return on total capital. He noted that the rate of return on total capital (funded debt plus shareholders equity) had steadily declined from 7.36% in 1967 to 6.98% in 1969. He also noted that the company was considering bonds for future financing because of the poor return on common equity.

Again, although a large portion of the transcript is taken up with the discussion of declining rates of return on total equity, this is largely unrelated to the actual rate increase itself. There is no discussion of the effect of a one percent increase or decrease in the tariffs on rates of return on common equity or total capital.

2.6 Cross-Subsidization

There was some discussion of this topic initiated by Mr. Outhit specifically on the relationship between toll and local rates. Under the

proposed tariff schedule local rates were to rise, on average, by about 12% but toll rates would rise by only about 5%. This discussion is not developed to any length.

2.7 Miscellaneous

The low level of intervener participation left quite a few issues more or less untouched. There was no significant discussion of economies of scale, quality of service or affiliation with Bell Canada.

Of some interest, however, was the intervention by Pye Electronics. Pye was concerned with the proposed rates for mobile exchange service. The Board decision at p. 33 sums up the Pye case as follows,

> "Submissions were made on behalf of Pye Electronics Ltd..... and exception was taken by this company in two areas: 1) that the proposed mobile exchange rates were too high for subscribers who wished to own their own equipment; and 2) that the applicant should be required to separate its capital costs and operating costs for its unregulated services and that before any general increases in rates is granted to the applicant the Board should give consideration to the matters contained in the company's submission.and cause to be conducted a detailed examination of all aspects of the applicants business."

The Board rejected the Pye submission on both counts. First, the Board gave interim approval to the proposed rates for mobile exchange service, noting that Pye Electronics was not, at that time, supplying any units that used the applicant's mobile exchange service. Second, the Board noted that the applicant did not maintain and had never maintained separate records of capital costs and operating costs with respect to its

unregulated services. The applicants' witnesses stated to the Board that they were confident that the unregulated services were not to any degree subsidized by the revenues from regulated services and that the benefits flowed in the other direction. The Board went on to say that it was aware of the increasing size and importance of the unregulated services provided by MT&T and further noted the decision of the Canadian Transport Commission regarding Bell on Sept. 25, 1969. In that decision Bell was ordered to undertake a study of methods and procedures appropriate for determining cost and revenue separations between regulated and unregulated services. The Nova Scotia Board would await the outcome of that report before making further comments on this situation. These comments are noted at pages 33 - 34 of the Board's decision.

3 1974 Rate Case

3.0 Introduction

The hearing took place at the Board offices in Halifax from June 4 to August 13, 1974. There were eleven actual sitting days. The Board panel consisted of Messrs. Filleul, Meagher and Connolly with Mr. Outhit acting as presiding member.

There were only two interventions in the case, the Consumers' Association of Canada (CAC) and the St. Margaret's Action Group for Extended Area Service. The St. Margaret's Action Group made a brief submission at the conclusion of the evidence. The CAC conducted an active intervention throughout the case on a wide range of issues and were represented by Mr. B. M. Graham and Mr. H. N. Janisch. Their intervention contributed to the lengthiest transcript of any MT&T rate case up to that time (960 pages) and to a 38-page Board decision.

3.1 Rates of Return

MT&T's proposed new Tariff Schedule was designed to increase revenues by 10.3% or $8.2 million in 1975. This increase would yield a rate of return on rate base of 8.75%. MT&T had claimed that a return of 8.75% to 9.25% was the minimum reasonably needed to meet their obligations. The new Tariff Schedule included increases of 95¢ per month for residential service (one, two, four and multi-party lines); from 95¢ to $3.00 per

month for business services and 5¢ and 10¢ increases in the minimum long-distance charge and the person-to-person differential respectively. The Board approved the new Tariff Schedule but denied MT&T amendments to the Schedule defining Exchange, Long-Distance and other services as the "provision of the transmission of voice messages." The definition remained as, "telephone communications within an Exchange Area," for Exchange Service and similarly for long-distance and other.

3.2 Rate Base

The Board awarded the applicant a substantial increase in the rate base. The length of time since the last valuation was the principal factor in the size of the increase. The rate base was valued at $118.7 million on December 31, 1968 and this was increased to $181.5 as of December 31, 1973. This amounted to an absolute increase of 53%, however, evaluated over the five-year term this represents an increase of slightly less than 9% compounded annually.

3.3 Construction Programme

In the 1974 hearing the Board again, as in 1970, reviewed the progress of the Applicant's ten-year construction programme started in 1966. MT&T's total annual capital expenditures in the 1970-1973 period were: 1970 - $22.6 million; 1971 - $21.5 million; 1972 - $27.9 million; 1973 - $42.6 million. A closer analysis of these figures showed that the bulk of these funds went towards growth expenditures to meet increases

in demand rather than to the replacement and modernization of existing facilities. During this period, 1970-1973, the number of telephones in service increased by over 80,000. At the same time the company was continuing its dial conversion and reduction of multi-line programmes.

The Board expressed its approval of the company's progress in its decision, "the Board believes that this planned proposal (the ten year program) is in the public interest and is entitled to approval".

3.4 Capital Structure

The most significant point to emerge from the lengthy discussions on this issue was the continuing inability of the company to issue common stock. This problem had financial impact in three related areas.

Firstly, the company's debt/equity ratio rose to an all-time high of 52/48. In consequence of this, the times interest earned ratio dropped to 4.1 in 1973 from 5.2 in 1969. Finally, in 1972, the company issued preferred shares for the first time in fifty years. An additional issue was marketed in 1974. The Applicant argued that this situation was undesirable and that new common equity was necessary to maintain a balanced capital structure. This in turn necessitated a higher rate of return on rate base to yield a return on common equity of between 11% and 12%. This range was desirable, since it would be attractive to investors.

The Board's expert, Mr. E. N. Wright, analysed the Applicant's financial structure and earnings and a number of his recommendations were included in the Board's decision. These were mainly of a technical accounting nature and called for the applicant to re-examine its policies

on allowance for working capital, its level of interest during construction and the matter of deferred income taxes. Mr. Wright concurred with the Applicant on the matter of an 11% - 12% return on common equity.

3.5 Cross-Subsidization: Why Value of Service?

One of the main points of the Consumers' Association of Canada's intervention was their concern with the Value of Service approach used by MT&T in its rate-making process.

Mr. Waller of MT&T described the objective of the company's rate philosophy as the implementation of the concepts of system-wide pricing and service. Under these concepts, company services cannot be separated and categories of service are useful only for price relationship purposes. System-wide pricing does not reflect specific costs of any particular class of service. Value of service overrides relative costs, and it is impossible to determine with an acceptable degree of accuracy the cost of an individual's service.

The CAC argued that the Value of Service approach can and does result in inequities to consumers in the allocations of costs to various services. A subscriber requesting a particular service should be required to bear the true cost of that service alone. The consumer should not be required to support unnecessary consumption of other services stimulated by the pricing of those services at zero or nominal value. The CAC specifically criticized free directory assistance and the lack of an installation charge for residential extension phones in this regard.

The Board, while fully accepting the Applicant's rate-making

philosophy, directed MT&T to examine the costs relating to its Free Directory Assistance Service and to,

> "Undertake some cost of service studies for the purpose of testing on a spot basis the validity of various rates presently determined on the value of service."

4 MT&T 1975 Rate Case

4.0 Introduction

The hearing took place at the Board offices in Halifax from September 4 to 19, 1975. There were 12 actual sitting days. There was only one intervener, Pye Electronics, who was represented by Counsel and made a submission. The Board panel was chaired by Mr. Outhit with Messrs. Harris and Meagher being the other sitting members.

4.1 Rates of Return

MT&T had come before the Board for a rate increase only a year earlier. This was the first time that MT&T had requested a rate review in consecutive years. MT&T argued that the rates approved in 1974 (effective Oct.1, 1974) were not providing the expected and approved rate of return and that the greater than expected rate of inflation was rapidly increasing the costs of the construction programme and other operations. The company requested rates that would yield a rate of return on rate base of 8.7% in 1976. The actual revenue increase was estimated at $14.4 M or 14.3%.

Some of the major features of the new rates were a $1.50 increase in the monthly residential charge, a $0.95 to $5.00 increase in the business monthly charge, a directory assistance charge and a charge on overdue accounts.

The Board approved the new General Tariff effective December 1, 1975. The directory assistance charge (25¢) was approved, effective February 1, 1976. The interest charge on overdue accounts was disallowed, pending further study (to be submitted by July 1/76).

In its 1974 decision the Board directed MT&T to retain independent accounting experts to examine a number of accounting practices and other factors affecting original installed cost and rate base. Peat, Marwick found that the utility's accounting practices were sound and in conformity with Board regulations (i.e. Uniform System of accounts). Consequently, the Board approved a substantial increase in MT&T's rate base following the study by Peat, Marwick, Mitchell. The rate base of $181.5 million (at Dec. 31/73) was increased to $226.3 million (Dec. 31/74). This was a percentage increase of almost 25%, an absolute increase of not quite $45 million. However, the company's desire to have its compulsory (TCTS) investment in Telesat Canada ($738,000) and other investments in Island Telephone and Maritime Computers included in the rate base was denied.

4.2 Return on Equity

The discussion and evidence surrounding rates of return on the company's common and total equity base were largely the same as in the 1974 case. The company argued that it had not been able to issue common shares since 1967 due to unfavourable market conditions and returns but that with its debt now at 53% it felt obliged to increase common equity in order to balance its capital structure and keep its debt issues attractive.

The 8.7% rate of return on rate base that would be generated in 1976 by approval of the proposed Tariff schedule would produce a 12.7% return on common equity and 10.2% on total capital. The company felt that this was the minimum appropriate return necessary to fulfill its financing objectives. The Board agreed with this assessment but cautioned that,

> ... if the Applicant is to maintain its improved financial position through 1977 it must give early consideration to reduction in operating expenses and to modification of its capital works for 1977.
>
> Board Decision, p. 35

4.3 Construction Programme

The construction programme was a major topic of the 1974 hearing but did come up again in the 1975 hearing as a result of rapidly rising cost estimates in the face of high inflation. The company operates on 10 year construction plans, the last one being completed in 1976 having been approved in 1965. The Board ordered MT&T to produce "a detailed outline of the objectives of the construction programme proposed to be undertaken in the five year period subsequent to 1976" to be filed with the Board by July 1, 1976. This outline relates to the Board's comments on the company's financial position noted above.

4.4 Quality of Service

Quality of service was a major topic of the hearing. The Board commissioned, prior to the hearing, a consulting firm (CRC Consultants)

to undertake a study and make a report on the company's quality of service. The Board seemed quite satisfied both with the report and with the state of quality of service of MT&T. The Board included some lengthy quotations in its decision from the company witness and from the consultant's report. The concluding paragraph of the consultant's report states that

> The MT&T performance, measured against the standards described in this report, seems to include a good standard of service.
>
> Board Decision, p. 23

The Board made no orders or recommendations in its decision on MT&T quality of service.

4.5 Miscellaneous Issues

A number of other issues came up in the course of the hearing. Most prominent of these were two accounting items, Capitalization of Overheads and Allowances for Funds Used During Construction and Deferred Income Taxes. Both of these issues stemmed from the Peat, Marwick, Mitchell consultants report.

Also discussed in the hearing was the issue of Public Relations and Advertising. Although the absolute amount involved in this item in the budget is small, its high profile and rapid percentage increase prompted the following stern warning from the Board,

> If the Applicant continues to apply for rate increases of the magnitude covered by its present applications, every item of expenditure, regardless how small it may be in relation to the total operating budget, will have to be carefully scrutinized.
>
> Board Decision, p. 38.

4.6 Observations

The Board's decision (Item 19) ends with a direction for the submission of five different studies on a variety of issues to be undertaken by the company and filed with the Board, with a July 1, 1976 deadline.

1) a detailed outline of the objectives of the construction program proposed to be undertaken in the five year period subsequent to 1976;
2) a detailed treatise dealing with the services which constitute "telephone message service" and the services which fall outside the Board's jurisdiction;
3) a report outlining proposed guidelines for future extended area service applications and specifying those exchanges likely to be affected, the said report to deal with the issues of EAS, basic telephone service, the concept of varying rates to reflect cost as well as size of exchange, the role of optional EAS and related matters;
4) an analysis of existing Tariff objectives and possible alternatives;
5) a study reviewing capital contributions by subscribers and the justification for same.

5 MT&T 1977 Rate Case

5.0 Introduction

The hearing took place at the Board offices in Halifax commencing on February 22 and ending on March 3, 1977. There were seven actual sitting days. Mr. Outhit chaired the three man panel with Messrs. Meagher and Kirby as sitting members. There were three interveners; the Innkeepers Guild of Nova Scotia, the Nova Scotia Federation of Labour and Professor Michael Bradfield of Dalhousie University. Intervenor participation was not active and none of them intervened throughout the proceedings. The transcript of the hearing ran just over 800 pages.

5.1 Rates and Rate Base

MT&T sought a general increase in its tariffs schedule which would yield a rate of return on rate base of 8.8% in 1977 and 8.9% in 1978. Monthly rates for residential service (main line) would be increased by $1.40 to $1.75; business monthly rates by $2.00 to $5.25 depending on the rate groups; there were other proposed increases in long-distance rates.

These proposed changes amounted to increases for residence main, extension and mileage services of 19.6%, 20.0% and 12.7% respectively and 19.9%, 20.0%, 21.0% and 27.3% for business main, extension, sytem and mileage. They would have generated additional revenues of

$17 million in 1977 and $18 million in 1878. The Board, citing the A.I.B. guidelines, reduced all of these proposed increases to 11%, but allowed 20% increases in additional features such as coloured sets and touch-tone service.

The Board also determined and approved a new valuation of the rate base. The December 31, 1974 rate base of $226.3 million was increased to $321.3 million as of December 31, 1976. This was an increase of 42% or 19% compounded annually over the two year period. In awarding this increase the Board simply notes that,

> The Board believes that the Applicant has maintained its plan and property records during the period since the 1975 decision of the Board in accordance with account classifications and procedures prescribed by the Board;
>
> Board Decision 1977, pp.67

The Board also noted that it had taken into account the new procedures recommended in the 1975 case by the Applicant's independent accounting experts (Peat, Marwick, Mitchell).

5.2 Construction Programme

In 1976, MT&T completed its major modernization objectives as set out in the ten-year programme approved in 1965-66. The most significant result of this programme was the conversion of the entire MT&T system to dial service. Consequently the proposed construction expenditures for the 1977-79 period showed a marked weighting in favour of growth and away from modernization. The company's proposed spending on construction for 1977, 1978 and 1979 was $57.5 million, $67.8 million

respectively. Approximately 75% of this expenditure was to be growth related with the remainder going towards modernization (11%) and replacement (14%).

The company contended that a major objective of the growth expenditures was to improve quality of service by shortening the time required to meet new service requests. In addition Extended Area Service was to be provided for eight pairs of exchanges in 1977 and six pairs in 1978. The company indicated a long-term goal of subdividing the entire province into 15 extended area service areas.

The company also proposed the introduction of 'phone stores' in the Halifax-Dartmouth area. This was the only area of the company's construction programme on which the Board noted any reservations. The Board ordered the company to undertake a report on this programme and to review the report with the Board before proceeding with any further work on the project.

5.3 Capital Structure

In 1976 the company issued one million shares of common stock at $17.50 per share. This was the first public common equity issue by the company since 1967. This put the applicant's capital structure in 1976 at 52.6% debt, 11.9% preferred shares and 35.5% common shares. This was very close to the company's previsouly stated preferred capital structure of 50% debt, 15% preferred and 35% common equity.

Mr. E.J. Hicks, MT&T Vice President-Finance indicated that in the next two years, under the proposed tariff, debt would range between

46%-50%, preferred equity between 12% and 14% and common equity between 39% and 40%. He stressed the company's intention to issue more common equity on a regular basis but lamented the inadequate dividend payout that necessitated shares being sold at below book value. Only greater earnings could rectify that situation and avoid further dilution of the common equity.

He also noted the drop in the times interest earned ratio from 2.7 in 1972 to 2.1 in 1976. Unlike previous discussions on times interest in past hearings, these figures are after tax. Before tax figures would be much higher.

The company's financial experts, while stressing the desirability of higher earnings, noted that,

> [A]dequate rate relief is a factor in determining the risk associated with an investment in the common shares of a utility. Adequate rates should lead in time to a higher price for the common shares of Maritime Telegraph and Telephone, ...
>
> quoted in the Board's Decision at p.23

5.4 Uniform System of Accounts

The hearing dealt extensively with certain revisions to Circulate 2A-1971, the regulations prescribing a unifrom system of accounts for telephone companies. The proposed changes were designed to allow MT&T to expense certain costs which were then being capitalized. These changes were the result of an extensive study conducted by the Canadian Transport Commission and the Trans-Canada Telephone System.

The Board concurred with the proposed changes and a new Circular 2A-1977 was issued and effective from July 1, 1977.

5.5 Summary and Conclusions

In addition to those decisions made by the Board and already mentioned, in this review the Board directed MT&T to undertake reviews and studies on some other topics. In particular, the Board ordered a review of the "Relationship of Major Components of Service to Regulated Revenue". This was an issue that could be traced back to the 1952 hearing and involved the percentage of total revenue attributable to residence, business, and intra-provincial toll and the question of whether these component percentages should be maintained or changed.

6 MT&T 1978 Rate Case

6.0 Introduction

This is perhaps the most interesting rate case to appear before the Board. A much wider range of issues were covered in this than in any previous case. The hearing itself commenced on the 14 of Feb. 1978 and lasted until the 17 of April of that year, with 15 actual sitting days. This was the last case chaired by Mr. Outhit, and 2 present members of the Board, Mr. Meagher and Mr. McManus, were also on the panel. The hearings took place at the Board offices in Halifax.

This case was unusual for a number of reasons, one being the large number of interveners present. There were 6 interveners in the course of this hearing: 1) the Innkeepers Guild of Nova Scotia; 2) the Nova Scotia Federation of Labour; 3) M.R. Marshall, a student; 4) Professor Paul Hubert, an economics professor at Dalhousie; 4) R.I. Nelson, president of IAS Computer Corp. in Halifax; 5) and 4 Halifax hotels represented jointly by counsel (the Chateau Halifax, the Hotel Nova Scotian, the Holiday Inn and the Citadel Inn). There were no interrogatories or final argument in this case, and none of the interveners intervened throughout. However, each of them raised some interesting issues for the case.

Another interesting feature of this case was the active participation of Board Counsel. Board Counsel opened the case with a lengthy opening statement uncharacteristic of past cases. In this statement he outlined the issues which he felt would be important to the hearing. Board Counsel

(Messrs. G.A. Duncan and G.H. Evans) noted 10 issues of concern to the Board. Some of the more interesting of these issues were:

1. the return on equity for which Board Consultant was retained to prepare evidence
2. the options available to the company to reduce the capital needs.
3. the phone store system
4. the problems associated with identifying both revenues and expenses in those areas which had been labeled unregulated
5. the response of MT&T to the results of the quality of service study which was conducted for the Board by C.R.C. Consultants in the course of the last hearing.
6. the consideration of present and possible future service offerings such as mobile radio and mobile exchange, data communications, bulk discounts, terminals and data processing.
7. consideration of certain general regulations contained in the tariff particularly those associated with disputed bills, service request charges, network protection devices and the possible conversion to the metric system.

In addition to Board counsel and the already noted interveners there were a number of letters of concern submitted to the Board. These included submissions by Mr. Mike Marshall, New Democratic candidate for Dartmouth South; by Senator Connolly; a submission by the Nova Scotia government employees association; a letter from Mr. J.W. Budd from Brookfield; a letter from Evan Scott organizing secretary of the Sydney chapter of the Canadian Pensioners

Concerned Incorporated; a letter from a Mrs. Anderson, secretary of the Northside Senior Citizens Pensioners Club; a letter from James C. Boyd on behalf of himself as a senior citizen and from Mrs. Irene MacKenzie on behalf of herself as a senior citizen.

The interest in this case is reflected in the 1800 page transcript which accompanies it. This is nearly twice the size of the longest previous rate case, the 1974 case, which ran some 960 pages. It is more than twice the size of the 1977 case (the previous year's case) which ran just over 800 pages.

In the following sections, we attempt to briefly outline the main issues of the hearing.

6.1 Rates of Return

In the opening statement of the president of MT&T, W. S. Robertson outlines the proposed rates of return that the company would receive with an approval of the new general tariff. Based on the existing tariff, (that is the rates approved in the 1977 hearing), the rate of return on rate base for 1978 would be 7.9% and the rate of return on total invested capital would be 9.7%. For 1979 these figures would be 8% on rate base and 9.8% on total invested capital. Robertson states, "on the basis of the proposed rates it is estimated that the rate of return on rate base in 1978 will be 8.6% and that the return on total invested capital will be 10.5% and that in 1979 the rate of return on rate base will be 9% and the rate of return on total invested capital 10.9%."

Beginning with this statement, the argument over the rate of return and the capital structure of the firm continues for hundreds of pages throughout the transcript. One of the main issues which evolves in the hearing is the payout ratio of dividends made by the company over the preceding years. The Board in its decision notes that the dividend payments had been too high in previous years thus hampering the company's ability to finance internally. Another issue which caused a great deal of concern in the hearings was the capital structure of the firm. There is no clear criteria for establishing a debt/equity ratio for public utilities but MT&T, as is not uncommon, shows a preference for equity financing as opposed to debt financing. The capital structure table on p. 28 of the Board's decision shows a tremendous increase in the previous 7 years (that is from 1970-1977), in preferred equity offerings. While debt stays exactly the same in 1970 as in 1977 at 48.8%, preferred equity has risen from 1.1% to 15.9%. In the same time common equity, that is shares, have dropped from 50.1% of the capital structure to 35.3% of the capital structure. This illustrates the difficulties which the company has had in floating its common share issues in a period of high inflation and high interest rates. The marked rise in preferred equity is a good indication of the company's tenacity in pursuing the equity financing route however. There is clearly hesitancy on the company's part to go above the 50% debt ratio in its financing structure, although no clear reason is given for this hesitancy.

The 'times interest earned ratio' is cited by the company as an issue of major concern to it. The decline in the ratio in the period from

1968-1979 has been somewhat less than dramatic, however, going from 5.7% in 1968 to an estimated 3.9% in 1979. The implication given here is that the declining times interest earned ratio was making it more difficult for the company to float its bonds. It is not mentioned in the hearing however that the times interest earned ratio when used with monopoly public utilities is not necessarily an efficient indicator of its ability to maintain its debt position. The company went on to make a strong case for a raise in rates predicated on the necessary return for its equity offerings. Mr. Hicks, the company's expert witness, expressed the concern that the return on common equity then being earned by the applicant would be inadequate for the purposes of issuing common equity during the next two years. Specifically, common equity financing would require an increase in the rate of return on common equity in the 13.5-14% range at a minimum. Derek Leach in his expert testimony on behalf of the Board states on p. 1698 of the transcript that, "I mentioned that I believed that Maritime could increase its debt ratio by 10-12% before it would run into a serious constraint from the standpoint of interest coverage". While he qualifies this comment somewhat he summarizes by saying, "so that giving you the numbers just to set them on the record, the area of capitalization which I have in mind is 56-58% debt, 10-12% preferred and 30-34% common share equity, not below 30% common share equity." That is at p. 1700 of the transcript.

6.2 <u>The Bell Affiliation</u> (Intervention by Labour)

The question of the Bell affiliation comes up during a lengthy

discussion by J.K. Bell on behalf of the Nova Scotia Federation of Labour. Mr. Bell was concerned with the export of jobs and funds from Nova Scotia and the Atlantic provinces to other provinces and countries due to the expenditure outside the province on electronics equipment. He claimed that approximately $200 million were spent annually by the four Atlantic telephone companies on equipment procurement outside the region and that these funds, if spent in Atlantic Canada, could form the basis of an electronics industry. He blamed the failure for this to occur on the companies' technological commitment to Bell and AT&T equipment.

While generally opposing the proposed increase in the general tariffs the Federation of Labour also had one interesting suggestion to put before the Board. The Federation suggested "we called upon the government of the province in public and through our submission to the Board last year to appoint a person or persons whom we called the public intervener who would be charged to examine the company's application and oppose it if he or she saw fit in the interests of the people of the province." The Board made no comment on this proposal in its decision.

6.3 Company-owned Subsidiaries

Mr. R. I. Nelson of the IAS Computer Corporation Limited of Halifax made a submission before the Board dealing with the wholly owned subsidiary of MT&T called Maritime Computers Ltd. (MCL). The main points of his submission dealt with the relationship between MT&T and its two wholly-owned subsidiaries, MCL and Island Telephone (PEI).

Mr. Nelson claimed that MT&T was attempting to disguise the poor

financial condition of its unregulated subsidiary, MCL, by amalgamating its financial results with those of Island Telephone under "Other Income" in company financial reports. He was especially concerned with the fact that computer services companies, like his own, had to buy their data communications lines and facilities from MT&T and in the process provide forecasts of their data needs. He did not feel that providing such sensitive business information to the parent of a major competitor was a satisfactory arrangement.

The Board, in its decision, dealt indirectly with this submission in two areas. In the first area, accounts receivable, the Board noted that accounts due from MCL to MT&T were not treated in the same fashion as other subscribers. The Board directed MT&T to immediately end this practice and to make accounts receivable from MCL subject to normal collection practices and interest charges.

The Board also touched on this subject in the area of unregulated services. Although MCL is not explicitly mentioned, the Board expressed concern over the possible impact of unregulated activities or the company's financial position. The Board concluded its remarks on unregulated services by saying that,

> the Applicant is therefore requested to meet with the Board in the near future to discuss the desirability of exercising Board jurisdiction in areas heretofore called "unregulated".

Mar 9/92