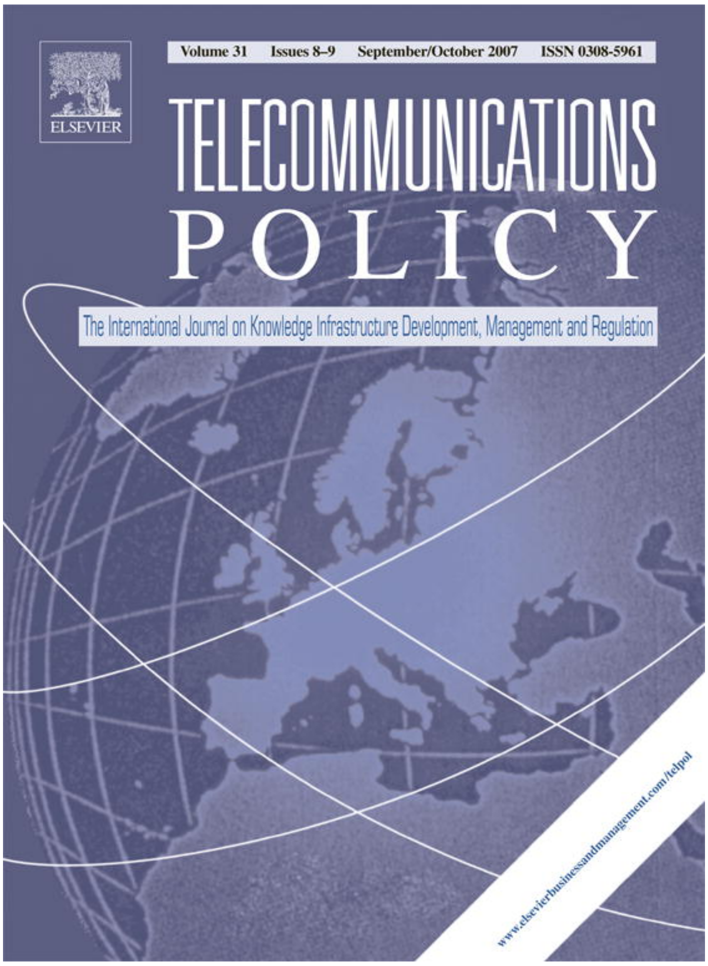
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Another instance where privatization trumped liberalization: The politics of telecommunications reform in South Africa—A ten-year retrospective

Robert B. Horwitz[a,*], Willie Currie[b]

[a]*Department of Communication, University of California-San Diego, USA*
[b]*Association for Progressive Communications, 6035 Broadway #8A, New York, USA*

Abstract

Soon after the first democratic election in 1994, South Africa passed legislation to revamp the telecommunications sector—to roll out telephone service to the previously disadvantaged and establish an independent regulator to oversee the reform. The Government sold a 30 percent stake in the state-owned incumbent network operator, Telkom, to expand telephone service to under-serviced areas and populations. Ten years on, the reform has largely failed. Telkom, granted a 5-year period of exclusivity to expand the network, has used its monopoly power to thwart competition. It has raised prices so high as to be damaging to the economy. The Regulator has been largely sabotaged by the Government, in part due to the consequences of the haste to privatize, in part because the ANC leadership has been loath to trust democratic structures outside of its immediate control. The situation has opened up opportunities for rent-seeking under the ideological aegis of Black Economic Empowerment. The paper examines the relative failure of reform in South Africa in the context of internal South African politics and against a backdrop of sectoral reform in similarly situated countries.

Keywords: South Africa; Telecommunications; Privatization; Liberalization; Regulation; African National Congress; Black Economic Empowerment

1. Introduction

The first democratic, all-race election brought to power the African National Congress in 1994 and with it a mandate to transform nearly all South African institutions from their apartheid pedigree and point of reference. A process to reform telecommunications ensued soon after the electorate voted in the ANC as the dominant partner in a Government of National Unity. Following an unusual participatory, consultative policy process, Parliament passed comprehensive legislation in 1996 to revamp the sector, roll out telephone service to the previously disadvantaged, and establish an independent regulator to oversee the reform. Government thereupon sold a 30 percent equity stake in the state-owned telecommunications incumbent

*Corresponding author.
E-mail addresses: rhorwitz@ucsd.edu (R.B. Horwitz), wcurrie@apc.org (W. Currie).

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network operator, Telkom, to help facilitate the expansion of telephone service to under-serviced areas and populations (Republic of South Africa, 1996a).[1]

Ten years have now passed since the passage of the Telecommunications Act. By most accounts, the reform of South African telecommunications has been at best a bare success and at worst a medium-term failure. The Act granted Telkom a 5-year period of exclusivity to expand the network and prepare itself for eventual competition. Telkom, essentially managed by its equity partner Thintana Communications (itself a partnership between the American telecommunications giant SBC Communications (now, after merger, renamed AT&T) with a 60 percent stake and Telekom Malaysia with 40 percent), satisfied the letter of its rollout obligation to build 2.81 million new lines, but not the spirit of its universal service mandate. Telkom's high prices for installation, rental, and calls (and sociologically inappropriate billing mechanisms in rural areas) resulted in the disconnection of the vast majority of the new lines.[2] Thus, whereas access to telephone service in South Africa has improved considerably since 1996, gains in connectivity have been accomplished almost entirely due to the market-led growth of pre-paid mobile telephony rather than by the legislatively mandated rollout of the fixed line network of the incumbent operator. Despite massive investment and construction, in the 10 years from 1996 to 2006 the final reckoning of the number of fixed line subscribers increased from 3.919 million to just 4.708 million. In a population estimated at between 44 and 47 million, this represents a current penetration rate of just 10 percent (and falling). In the same time period, mobile subscribers increased from under a million to over 19 million (Telkom, 1997a; ITU, 2005; US Securities and Exchange Commission, 2006, p. 9, 15).[3] Yet, notwithstanding the impressive growth of mobile, prices for telecommunications services in South Africa—including mobile—are strikingly high by international comparisons to countries with roughly similar characteristics.[4] Thus mobile telephony—not Telkom—did increase access to communications, but high prices constrained use. The growth and flexibility of

[1]This overview is necessarily compressed and thus imprecise. In fact, the process of institutional reform in South Africa had begun well prior to the 1994 election, rooted in the actions and politics of the internal democratic civil society and organized labor structures that had carried on the anti-apartheid struggle during the 1980s while the ANC was in exile. The communications sector was an early focus of institutional reform. Deliberations over the status of broadcasting, initiated by media sector civil society groups, were taken directly into the national constitutional political negotiations known as the Convention for a Democratic South Africa (CODESA) in the 1990–94 transition period, largely because the South African Broadcasting Corporation (SABC), the putative public broadcaster, had served for decades as a National Party-aligned apartheid bulwark, and its transformation was deemed mandatory in the lead-up to the election period to come. See Horwitz (2001).

[2]Telkom engaged in a post-paid billing system and did not understand how to demand payment from customers who did not have a mailing address. Requiring rural customers to pay their bills at the nearest Post Office meant an extra taxi ride expense to a location that may have been rather far away. Billing practices were one reason for the huge customer churn and eventual disconnection in the rural areas (Nkenke Kekana, former chair (ANC) of the Parliamentary Portfolio Committee on Communications for the ANC, interview by author. Johannesburg, September 8, 2006).

[3]In fact, the number of main (fixed) lines to subscribers is lower even than reported, because Telkom's figures include several hundred thousand ISDN channels. Note that Telkom itself has a 50 percent position in Vodacom, the leading mobile operator.

[4]The best assessment comes from Hodge (2005a, 2005b). Also see Efficient Research (2004). Hodge compared the telecommunications prices of 15 countries, including a group consisting of international ''best practices'' countries (like Canada and South Korea) and another group comprised of countries similar to South Africa in terms of input costs, geographical dispersion of the population, income dispersion, and level of development (such as Brazil and Morocco). The data reveal the following about South African telecommunications prices:

- *Business Asynchronous Digital Subscriber Line (ADSL) broadband*: the most expensive of the 15 countries sampled, more than nine times as expensive as the cheapest country surveyed.
- *Domestic leased lines*: the most expensive of 12 countries surveyed, 102 percent more expensive than the average price sampled.
- *International leased lines*: approximately three times higher than the next most expensive country sampled, and 31 times more expensive than the cheapest country out of 11 sampled.
- *Retail ASDL broadband*: the most expensive of the 15 comparison countries.
- *ISP monthly fees*: the fourth most expensive in the comparison group of 13 countries (but highest when calculated according to purchasing power parity).
- *Business international peak calls*: the fifth cheapest of 15 comparison countries.
- *Peak local calls*: the most expensive of the 15 countries sampled, 199 percent more expensive than the average price.
- *Mobile-to-fixed calls*: the second most expensive of 15 countries surveyed, 107 percent higher than the average price.
- Retail off-peak local calls: the second most expensive of 14 countries sampled, 79 percent more expensive than the average price.
- Off-peak mobile calls: the fifth most expensive of 15 countries sampled, 37 percent more expensive than the average price.

value-added network services (VANS), including Internet access, have been constrained not just by high prices for leased lines, but by a highly litigious and sometimes predatory Telkom. This is not simply a sectoral problem. Because telecommunications are an input into virtually all productive activities, high tariffs and constrained service offerings are now recognized as a tax on industry and a drag on economic growth.[5]

The Regulator, initially known as the South African Telecommunications Regulatory Authority (SATRA), then the Independent Communications Authority of South Africa (ICASA) when SATRA and the Independent Broadcast Authority merged in 2002, has not been particularly effective. Its authority has been limited through a cumbersome dual jurisdictional structure with the Ministry of Communications. And the Government's mistrust of the Regulator's independence has resulted in efforts to control it. The Ministry itself had a structural conflict of interest as both the policy-maker for the sector and the custodian of the state's considerable shareholding in Telkom. As a result, policy in the sector has unfolded in fits and starts, marked by many controversial incidents and abrupt reversals of strategy, the cancellation of ICASA regulations by the Minister, and the delay of competitive entry notably in the licensing of a third mobile and a second network operator (SNO).[6]

In short, South African telecommunications has been a sector plagued by poor policy and monopolistic behavior. This article explores the South African telecommunications sector 10 years after its reform legislation and tries to account for the relative failure of that reform. As always in policy and regulatory matters, the story is dense and complicated, but can be distilled into three interrelated themes:

1. Privatization—the selling of a state infrastructure asset to a private party—won out over liberalization—opening the sector to entry and fostering conditions for competition. This is best seen in three incidents:
   a. The initial 1996 legislation, which eliminated the liberalization timetable worked out in the preceding White Paper policy process in favor of ministerial discretion, largely in order to satisfy the demands of Telkom's strategic equity partner (SEP), Thintana Communications.
   b. Telkom's ongoing utilization of its monopoly over the backbone network and invocation of its legal exclusivity in order to inhibit the growth of competitive VANS and Internet service provider (ISP) services, and the relative inability of the Regulator to combat either Telkom's predatory designs over upstream and downstream competitive offerings or deal successfully with the company's litigiousness.
   c. A regulatory struggle over Telkom's tariffs in which ICASA was compelled to approve high increases in local service in order to protect the value of the company's 2003 Initial Public Offering.

   In sum, the Government partially privatized the incumbent network operator and by contract and policy protected it from competitive challenge.
2. Government distrust of "State Institutions Supporting Constitutional Democracy" as provided for in Chapter 9 of the South African Constitution, including institutions with various degrees of independence from government, such as the Auditor-General, the South African Human Rights Commission, and ICASA. The ANC-led government has been leery about permitting real independence for these "Chapter 9" institutions, and, at least in the case of ICASA, has not given it adequate operating resources. The Regulator suffered not only from having to do many difficult tasks quickly without adequate human skills capacity, but was in effect not permitted to develop and exercise those capacities because its authority and budget were so often undercut by the Ministry and its Department of Communications. That environment, in which a duly constituted democratic body was largely foiled in its efforts to do its job, dovetailed with the larger political environment of ANC actions to consolidate political power in 1996, a relative lack of transparency in decision-making, and the discouragement of public criticism generally speaking—the latter the legacy of the ANC's exile culture of democratic centralism. In short, ANC political culture undermined independent regulation of the telecommunications sector.

[5]President Thabo Mbeki (2005) himself has commented critically on high telecommunication costs on a number of occasions, most prominently in his "State of the Nation" address to Parliament in 2005.

[6]See the fine work on these matters by Alison Gillwald and other members of the Link Centre at the University of the Witwatersrand, especially the sector performance reviews (Gillwald & Esselaar, 2004; Gillwald & Kane, 2003). A good compilation of reports and relevant news articles can be found at the website hellcom.co.za. Telkom tried to shut down this critical, sarcastic website on grounds of intellectual property infringement, but was not successful.

3. Societies in transition from one political and economic orientation to another are particularly subject to ''rent-seeking'' behavior, especially where the privatization of state assets is concerned. Privatizing state assets is often a high-stakes, complicated process with few reliable institutional controls or applicable precedents. The debacle of privatization in the former Soviet Union stands as a startling example of how clever former bureaucrats and middling entrepreneurs captured key state assets for a fraction of their real value (see Barnes, 2006). The privatization process in South Africa is a far cry from that of the USSR. Still, privatization in South Africa has taken place in a political environment distinguished by the ANC's project to create a national black bourgeoisie through Black Economic Empowerment (BEE). The otherwise laudable goal of spreading economic opportunity and power to previously disenfranchised black South Africans coalesced with ANC efforts to place comrades in the commanding heights of the economy and, correspondingly, a small number of well-connected comrades maneuvering for major clout in the business world. The result has been an empowerment process that enriches a very few and largely fails to benefit the masses.[7]

The article proceeds to engage these three themes through the analysis of particularly telling examples from developments and policy conflicts in the sector since 1996.

2. From White Paper to legislation: how privatization subverted liberalization

If there is an ''original sin'' moment, an event that cast South African telecommunications reform along a particular path, it was the alteration of the White Paper as draft legislation went to Parliament in 1996. The Telecommunications Act vested in the Minister several of the powers the White Paper had reserved for the Regulator and eliminated the White Paper's painstakingly achieved liberalization timetable in favor of ministerial discretion regarding when and if various segments of the sector would be opened to competition (Republic of South Africa, 1996b).[8] The changes not only delayed the liberalization of the sector, they created jurisdictional conflicts that were easily exploited by an opportunistic incumbent network operator—resulting in the effective doubling of the exclusivity period. Like most incumbent operators, Telkom—managed by its savvy and almost congenitally litigious SBC equity partner—was bent on maintaining its sectoral dominance and thwarting potential competitors to its service offerings and profitability. The Ministry of Communications' ambiguous brief as both policy-maker for the sector and guardian of the value of the state's shareholding in Telkom afforded opportunities for politically expedient interventions. This was seen in numerous instances, most notably in ministerial intervention in SATRA's process to award a third mobile telephone license in 2000, the Minister's cancellation of ICASA's draft regulations on interconnection that same year, and pressure on ICASA to approve Telkom tariff hikes in 2002 in order to protect the value of the company's shares as the Government embarked upon a public offering of shares.[9]

[7] In economics, rent-seeking is the process by which an individual, organization, or firm seeks to gain through manipulation of the economic environment, rather than through trade and the production of added wealth. Rent-seeking behavior can be connected with, but should be understood as distinct from, corruption. Black Economic Empowerment in South Africa should be seen as rent-seeking within a particular political context of redirecting wealth and opportunities toward the previously disadvantaged black population through state contracts and tenders, etc., although it is increasingly being seen as corruption per se (Institute for Justice and Reconciliation, 2006). Indeed, widespread criticism of BEE as enabling the emergence of a very small, very wealthy black elite prompted the passage of the Broad-based Black Economic Empowerment Act (Republic of South Africa, 2004).

[8] Although the White Paper, like the Telecommunications Act, gave Telkom a 5-year period of exclusivity to fulfill a universal service mandate (the Act offered an optional sixth year), two elements of the White Paper would likely have opened the sector relatively quickly, without damaging Telkom. Resale of communications service by other private entities was to be permitted after 3 years, and self-provision of links to the backbone network was always to be permitted if and when Telkom could not accommodate the request with reasonable quality in reasonable time.

[9] This is in some respects an arbitrary list, as many other telling episodes mark the failure of policy and regulation in the sector. The third mobile telephone license episode, for example, too long and complicated to recount here, involved serious allegations of improper ministerial intervention in a regulatory matter (Nape Maepa, former chair of SATRA, interview by author. Johannesburg, September 4, 2006). The character and timing of the Minister's intervention into the licensing process, to wit, her insistence that a license award be made by a particular date, and that the award went to the Saudi backed Cell-C consortium, led many observers to speculate about a possible quid pro quo link between the Minister's intervention and the contemporaneous effort by the South African Government to sell arms to

The usual public explanation for the changes to the White Paper concerns timing. At the same moment that the telecommunications legislation was going to Parliament in 1996, Government was trying to cement a deal for an SEP for Telkom. The Regulator was not yet established and would not be up and running for months. More was at stake than just finding a particular SEP for Telkom; concluding this transaction would send an unambiguous signal to international investors that South Africa was a secure and desirable place to do business. Indeed, the winning bid of Thintana Communications for 30 percent of Telkom brought US$1.2 billion to South Africa, by far the largest single infusion of foreign capital in the country in the 1990s. But, while clearly important, the timing explanation is inadequate in and of itself, given other evidence. Minister of Posts, Telecommunications and Broadcasting Jay Naidoo and Department Director-General Andile Ngcaba were loath to cede ministerial power to the Regulator.[10] Ministry representatives and ANC parliamentarians fought very hard to limit the statutory independence of the Regulator in the final legislative debates in Parliament, arguing that SATRA, an institution of government—now a democratic government entrusted by the electorate to pursue transformation—should be ‘‘aligned’’ with government, not independent of it (Republic of South Africa, 1996c, 1996d, 1996e).

The Telecommunications Act and the implementation of the SEP deal turned out to have had serious consequences for years to come. By the time the SEP bidding came to a close, only one offer was left on the table, that of Thintana Communications. Although Deutsche Telekom (DT) and its investment banker advisers did submit bid documents, the bid was little more than appearance. At the last moment DT's board decided not to proceed with the submission. Its withdrawal represented a judgment that South Africa was not yet stable enough and the profitability of an investment in Telkom was too uncertain. As a consequence, SBC, the dominant partner in Thintana Communications, gained that much more additional leverage. According to Jim Myers, SBC's central operative in South Africa between 1994 and 1998, SBC had made a very strong bid and, having a good understanding of South African politics in that period, the American company sealed the deal by ‘‘romancing’’ the unions. Opposition to privatization by the unions had put the brakes on policy reform in the sector in the 1995–96 period. SBC flew several key South African union and government officials to San Antonio and Mexico City, where they conferred with union leaders at SBC and Telmex (another of SBC's significant investments). SBC had experience in South Africa. It had been the managing shareholder in MTN, one of the two (at the time) cellular telephone providers, with a 15.5 percent stake. While managing MTN, SBC focused on its bid for Telkom and participated in the due diligence bid process. When it became clear that SBC was the only player left in the SEP bidding exercise, the company temporarily transferred its entire San Antonio corporate office legislative team to South Africa to help draft the Telecommunications Act, to make sure the legislation comported with the company's requirements (Jim Myers, interview by author. Johannesburg, September 13, 2006).[11]

It is crucial to recognize the pivotal role of SBC in the transformation of South African telecommunications. Thintana signed a ‘‘Shareholders' Agreement'' with the South African Government in May 1997, which bound the Government to terms rather favorable to the company. *That document has never been released publicly*—its contents remain unknown even to the Regulator. Such secrecy presumably is highly unusual given that the agreement concerns a publicly owned vital infrastructure asset, in a polity where governmental

(*footnote continued*)
Saudi Arabia. Accounts of the various incidents of regulatory and policy breakdown can be found in, among others, Cohen (2003), Gillwald (2003), and Makhaya and Roberts (2003). Press accounts are chronicled on hellcom.co.za.

[10]Certain incidents are revealing in this regard. Minister Naidoo asked Koos Klok, a knowledgeable old-hand from the old Department of Posts & Telecommunications, then advising the Minister on the translation of the White Paper into draft legislation, whether the Minister would have more or less power under the White Paper policy. When Klok answered ‘‘less,'' Minister Naidoo responded, ‘‘This is unacceptable'' (Koos Klok, interview by author. Johannesburg, October 27, 1997). In the final stages of the writing of the draft legislation, Andile Ngcaba, then the Postmaster General, said he would never allow the Regulator to have power (Koos Klok, interview by author. Pretoria, September 15, 2006).

[11]Myers contends that the South African Government at that time was inexperienced at drafting legislation of this type and relied on the expert advice SBC was only too happy to provide. Indeed, the lack of experience of the new Department of Communications (reorganized and renamed from the old Department of Posts and Telecommunications in the wake of the passage of the Telecommunications Act) was so great that SBC and Telkom lawyers and advisers—pointedly *not* Government officials—wrote Telkom's 25-year Public Switched Telephone Service (PSTS) license, modeling it after the license that the British government had signed with BT (Gabriele Celli, Telkom executive of regulatory and public policy, interview by author. Johannesburg, September 16, 2006).

transparency is now officially prized. In spite of the secrecy, several of the central provisions of the Shareholders' Agreement can be gleaned from other documents. As part of the sale to Thintana Communications, the then Minister of Posts, Telecommunications and Broadcasting entered into an agreement with Thintana under which the company undertook significant operational and managerial responsibilities and acquired the ability to exercise effective operational and managerial control over Telkom until May 2002. Pursuant to the agreement, Thintana had the power to staff certain management positions, including those of chief operating officer, chief financial officer and chief strategic officer. In all these provisions, SBC dominated its Telekom Malaysia partner (Thintana Communications, 1997). SBC controlled Telkom by restructuring the key management committees and exercising voting supremacy within them. The individuals occupying these committee positions were seconded to Telkom from SBC and Telekom Malaysia (Telkom SA Limited, Thintana Communications LLC, SBC International-Management Services, Inc. and Telekom Management Services SDN.BHD, 1997; Telkom, 1997b).

In addition, Thintana and the Government were entitled to appoint a number of directors to Telkom's board of directors, based on their ownership of Telkom, and a number of Telkom's corporate actions were subject to specific approval by Thintana Communications and the Government or their board representatives. These matters generally included approval of business plans, annual budgets, training programs, payment of dividends, and the performance of obligations and the exercise of rights under Telkom's public switched telecommunications services license (US Securities and Exchange Commission 2006, pp. 43–44).[12] For the five years until May 2002, Thintana was entitled to appoint a majority of the members of Telkom's operating committee, thus granting it control over most of Telkom's significant operational matters. The Shareholders' Agreement was never made public because, according to Jim Myers, some of its provisions bound the Government so stringently and gave Thintana so much control, that had they become public knowledge it would have raised huge outcry. Clauses in the Shareholders' Agreement stipulated that once the Telecommunications Act was in place, neither Telkom nor Thintana would be compelled to follow any legislation that violated the Shareholders' Agreement. This created strong incentive for Government to prevent legislation that might violate—and make public—the Shareholders' Agreement (Jim Myers, interview by author. Johannesburg, September 13, 2006).

SBC's strategy was very clear, Jim Myers maintains: maximize the value of Thintana's investment during Telkom's 5-year exclusivity period and then exit quickly. Thintana seconded 75 employees to Telkom at the highest management levels, an arrangement that not only gave it working control over Telkom but was lucrative as well. As per the "Strategic Services Agreement," Telkom was obligated to pay the seconded manager salaries *and* transfer the same dollar amount per year—averaging close to US$1 million per SBC employee (and most of the 75 seconded managers were SBC)—to Thintana as a "strategic services personnel fee" (Telkom SA Ltd et al., 1997, p. 9, Schedules 1–3). Telkom's Annual Reports show that the company paid Thintana a "management fee" in the R260 million range per year in the middle years of its exclusivity period, representing about 16–17 percent of Telkom's net profit (Telkom, 2001).[13]

3. Telkom's exclusivity: shield and weapon

Virtually all of Telkom's actions were oriented toward extracting value. This would not ordinarily be surprising, but as a legally conferred monopolist, the company's explicit mandates were to expand telecommunications service to the previously disadvantaged and to develop advanced services for South African businesses. Of course, Telkom was also charged with protecting its own value and preparing

[12]SBC's share of the US$1.2 billion bid for 30 percent of Telkom came to $770 million. During the third quarter of 1998 SBC sold its interest in MTN to the remaining shareholders for $337 million, realizing a pre-tax gain of $250 million (US Securities and Exchange Commission, 2000). Looked at in terms of SBC's South Africa overall investment profile, after clearing $250 million profit from the sale of its stake in MTN, SBC won effective control of Telkom for a mere $470 million. Also worth noting is the fact that of the $1.2 billion Thintana paid for its 30 percent stake, $1 billion stayed in the sector to be used for the network rollout.

[13]To get a sense of Thintana's profits, consider an admittedly rough calculation for a sample year: 2001. Assuming that Thintana took 30 percent of Telkom's R1.641 billion net profits in 2001 (as corrected in Telkom 2003), this would have amounted to R452.3 million. Add the "management fee" of R260 million and the "strategic services personnel fee," at a conservative estimate of US$50 million (the annual average 2001 exchange rate was 8.29 rand to the US dollar, thus R414.5 million). Thintana's profit in 2001 was on the order of R1.127 billion.

itself for eventual competition. *This* was the mandate the company pursued with vigor. Telkom worked to police and even augment the exclusivity over the fixed-line network it was granted by the Telecommunications Act. The Act (and the PSTS license) authorized Telkom to provide, on an exclusive basis, national long-distance, international and local-access telecommunication services, public payphone services, telecommunication facilities for the provision of VANS and PTNs, and telecommunication facilities comprising fixed lines for the mobile cellular telephone operators (Minister of Communications, 1997a). Among other things, this meant that providers of VANS and Internet services were required by law to purchase leased lines and other means of telecommunications access from Telkom. But Telkom itself competed directly in the VANS, Internet access provider (IAP), and ISP markets, giving it the power and the incentive to favor its own offerings and/or hinder those of competitors. An early instance of this coalesced around Internet access.

The controversy over Internet access provides a window on how Telkom, even prior to coming under SBC's control but very much in keeping with the hard-nosed, litigious orientation of its future SBC manager, exploited its exclusivity claims to engage in anti-competitive practices and, beyond that, to use litigation to impose costs and delay.[14] Internet access in South Africa, as was the case in many countries, developed originally in the universities and largely beyond the range of Telkom's corporate radar (Janisch & Kotlowitz, 1998; Lewis, 2005). Using network infrastructure leased from Telkom, private ISPs had propelled South Africa to one of the 20 most Internet-connected countries in the world by the mid-1990s (Salaman, 1998; ISPA, n.d.). The Internet did come to Telkom's attention, and it launched SAIX, its own IAP, in June 1996 at a tariff considerably lower than other IAPs. In November of that year Telkom introduced intekom, a dial-up ISP. The private IAPs and ISPs, galvanized by the prospect of Telkom entering its markets even as it was also the company from which they had to lease lines to gain access to the backbone network, formed a trade association, ISPA. ISPA lodged a complaint with the Competition Board, South Africa's competition and antitrust agency, after the launch of SAIX, alleging that Telkom was unfairly leveraging its control of basic voice and data networks to engage in predatory pricing. The Competition Board initiated a process to define a policy framework for the Internet industry, but Telkom refused to provide audit information on the cost structure of SAIX and rejected the Board's jurisdiction in favor of the newly established SATRA.[15]

At SATRA, Telkom filed a counter-complaint that commercial ISPs were in contravention of its sphere of exclusivity, and asked the Regulator to amend its license to recognize Internet as part of its PSTS monopoly. ISPA argued that Telkom's complaint was indefensible in terms of any reasonable interpretation of the Act, which expressly identified the provision of e-mail as a VANS in the competitive arena (Republic of South Africa, 1996a, Section 40[2]). Accordingly, in one of its first rulings, SATRA decreed in October 1997 that access to the Internet would be applied under VANS licenses and that Telkom had no claim to exclusivity with regard to the provision of Internet access (SATRA, 1997). Telkom turned around and challenged SATRA's ruling in Pretoria High Court, claiming that SATRA had no legal basis for its decision. Although the court found for Telkom because of procedural violations on the part of SATRA, Telkom and the ISPs came to a commercial modus vivendi and Telkom declined to proceed further legally (Telkom v. Maepa, 1998). Still, because all South African Internet providers must lease lines from Telkom, and because dial-up access is subject to high, metered call tariffs, Internet use has weakened. If in the mid-1990s South Africa's Internet connectivity was 14th in the world, a decade later it dropped to 37th (ISPA, n.d.).[16]

[14]Nape Maepa, the first Chairman of SATRA, was advised by staff at the US Federal Communications Commission to watch out for SBC, that SATRA should expect lots of litigation from Telkom because of its SBC partner (Nape Maepa, interview by author. Johannesburg, September 4, 2006).

[15]Lewis (2005, p. 14) cites ISPA's allegation that Telkom pricing levels were up to 40 percent lower than the rates charged by existing ISPs. Suspicions were that Telkom could not in fact account for its rates for SAIX or intekom, very much in keeping with the international experience regarding incumbent network operators whose services are bundled within their vertically integrated networks. One way to cope with this problem is to require such operators to create separate subsidiaries for their services that encounter competition. This practice was not employed in South Africa. Makhaya and Roberts (2003, p. 54) argue correctly that the lack of costing information in general makes it impossible for the Regulator to judge whether the pricing decisions on the part of Telkom are in fact part of the elimination of cross-subsidies (as the company claims) or are its response to existing and prospective competition.

[16]Looking at the situation in a report commissioned by the Department of Communications in late 2003, the Yankee Group noted that the ITU had placed South Africa 78th on its Digital Access Index, below peer countries such as Poland, Hungary, Czech Republic, Brazil, Mexico, Chile and Malaysia. The ITU noted that South Africa had fallen more than any other country but one among the 40 countries that it had previously surveyed in 1998 (Finnie et al., 2003, p. 2).

As part of the effort to thwart competition by expanding the penumbra of its exclusivity, Telkom also challenged the private data networks offered by Value Added Network Service providers as a breach of its legal monopoly. Telkom's PSTS license gave it the right to contractually bind VANS providers to lease from it, with no resale, and no provision of voice. VANS were legally constrained from prompting or assisting users to bypass the PSTS. The relationship between Telkom and VANS providers began amicably enough. Members of the South African VANS Association (SAVA) would meet with some Telkom business managers once a month. By May 1999, with the ascension of SBC's Tom Barry as Telkom's Chief Operating Officer, Telkom managers were told to stop meeting with SAVA. Telkom now saw VANS, and particularly their provision of virtual private networks (VPN), as an express threat to Telkom's hold on its largest corporate clients (Mike Van Den Bergh, past president of the SAVA, interview by author. Johannesburg, September 4, 2006).[17] Telkom complained to SATRA that some VANS providers were offering services in violation of the company's exclusivity rights. Telkom insisted that a VPN constituted a PSTS service. Unhappy with SATRA's demurral on this question, Telkom began sending letters to VANS providers requiring that they confirm they were not using Telkom's infrastructure for purposes that violated Telkom's exclusivity. The letters specified various practices that, if followed, would severely curtail VANS services. The letters indicated that if the providers and customers could not so stipulate, Telkom could suspend provision of its leased infrastructure and would refuse to supply additional bandwidth to the VANS providers. Telkom in fact stopped supplying leased lines to AT&T in September 1999 (which prompted a complaint from the US Trade Representative that Telkom was in breach of international trade agreements) and refused to lease additional lines to VANS providers.

At the same time, Telkom's own VANS offerings were priced differently and more favorably than its competitors': Telkom priced a digital leased line according to speed, distance, and for the whole circuit; the price for its own VANS offerings was distance independent and charged customers for just half the circuit. Moreover, Telkom insisted that its VANS offering could bundle voice and data, whereas legally its competitors could not. Telkom increased the price of digital 2 Mb leased lines by more than 20 percent each year from 1998 to 2000. This resulted in a 4 to 1 price differential on a national VPN (Melody, Currie, & Kane, 2003, pp. 32–33; Mike Van Den Bergh, interview by author. Johannesburg, September 4, 2006; Makhaya & Roberts, 2003, pp. 52–53). Telkom actions were not just designed to capture VANS market share. They were oriented, according to a study commissioned by the Department of Communications, toward protecting its legacy data services, in particular frame relay and dial-up PSTN and ISDN (Finnie, Lewis, Lonergan, Mendler, & Northfield, 2003, p. 77). The Department for Trade and Industry (DTI) early on understood the problem of Telkom's ability to bottle up access to the network backbone. A high level delegation from DTI, including its Director-General, Alistair Ruiters, approached Andile Ngcaba, DG of the Department of Communications, in 2000 about high telecommunications prices and businesses having a hard time obtaining appropriate data telecommunication services. DTI wanted to open up the backbone network to allow two more network operators, in large part to accommodate the data communication needs of the 500 major South Africa corporations. Despite assurances from DG Ngcaba, nothing came of the proposal even after repeated written inquiries (Dave Kaplan, DTI economist, interview by author. Cape Town, September 10, 2006; Alan Hirsch, DTI economist, interview by author. Pretoria, September 15, 2006).[18]

SAVA's subsequent complaint regarding Telkom's anti-competitive behavior was upheld by a SATRA cease and refrain determination September 10, 1999, and a formal judgment of June 26, 2000 ordering Telkom

[17]A VPN is a private communications network often used within a company, or by several companies or organizations, to communicate confidentially over a publicly accessible network and to which access is controlled by firewalls and secure tunnels to enable private and secure use by authorized users. The growth profile of VPNs is very strong internationally and in South Africa (see Finnie et al., 2003, pp. 44–45).

[18]The question of access to the backbone network got embroiled in the process of amending the Telecommunications Act in 2001, as well. A curious moment transpired when Minister of Communications Ivy Matsepe-Casaburri announced that two new fixed network operators would be licensed and broadband providers liberalized—essentially replicating DTI's wish list. Soon thereafter this direction was reversed and only a second network operator would be licensed—one of several reversals the media dubbed "Ivy's 'flip-flops'." The Minister's first announcement was seen as having contributed to the significant reduction of the share value of Telkom when the Government was getting ready for its IPO. Protecting the share value was not unrelated to the power of Thintana. The Shareholders' Agreement reportedly gave Thintana the right to sell one share for every share Government would take to market. Thus, in order for the IPO to be financially viable, Thintana needed to be appeased so that it would not exercise its rights (Business Day, 2001; Minister of Communications, 2001; Republic of South Africa, 2001).

to supply additional bandwidth to VANS providers—both of which Telkom took to court on review and won on procedural grounds (Telkom v. Dikgale, 2001; Telkom v. Mayimele-Hashatse, 2000).In the midst of this fracas, SATRA sent finalized interconnection and facilities leasing guidelines to the Minister, guidelines that spelled out Telkom's common carrier obligations and specified a pricing formula. The Minister approved and published the guidelines in March 2000, but abruptly withdrew them a month later, on the basis that there had been insufficient public consultation and that the merger between the IBA and SATRA required further postponement so as to allow the IBA to participate in the process. Widespread speculation was that Telkom's unhappiness with the chosen pricing methodology and provisions for interconnection lay behind the Minister's cancellation of the policy (Business Day, 2000; Cohen, 2003; Department of Communications, 2000a, 2000b). ICASA also convened an inquiry on the status of VPNs, determining them to be part of a VANS (ICASA, 2001). But with the resolution of the matter frustrated by ICASA's problems following legal procedure, SAVA filed the complaint against Telkom with the Competition Commission (the replacement of the Competition Board). In February 2004 the Commission found that Telkom had engaged in anti-competitive actions, and fined the company R3.7 billion (Competition Commission, 2004). Telkom appealed the decision on jurisdictional grounds (reversing itself and claiming only ICASA had proper jurisdiction). The matter remains unresolved as of this writing.

The point in the VANS controversies was that Telkom refused to provide facilities on the basis of *its* interpretation of the Act and its PSTS license. Two government oversight bodies deemed Telkom's actions anti-competitive, and an important Cabinet Ministry—Trade and Industry—clearly concurred. Telkom essentially paid no heed to the fact that there was a Regulator statutorily authorized to make determinations regarding facilities and licenses, and the company challenged jurisdiction at every turn. If that failed, Telkom could exercise its ex parte influence on the Ministry to cancel regulations that it found particularly irksome, in this case the Regulator's 2000 interconnection and facilities leasing guidelines.

4. The distrust of independent government institutions: joint jurisdiction, weak regulator

All democracies possess various institutions—at some remove from the elected government—that exercise oversight of certain economic, social, and governmental activities. Regulatory agencies are among these institutions. The independent regulation of telecommunications, moreover, is required in a number of international and regional agreements. In any instance of oversight of this type, there is a balance to be struck between policy-making and regulation, even though there is an element of arbitrariness to the distinction. South Africa's balance between policy-making and regulation of the communications sector was bound up in the politics of the ANC's consolidation of power and the need to confront the faltering economy in the mid-1990s. Two consequential matters shaped the ANC's outlook in 1995–96: The National Party went into opposition, and it became clear that hitherto efforts to manage the economy under the Reconstruction and Development Programme (RDP) were not working. With the departure of the National Party from the Government of National Unity, the ANC was now in the position to assume genuine political power—*and* was now fully responsible for policy failures. The RDP, understood generally as a Keynesian inspired plan of growth through redistribution, represented a blend of approaches and mix of compromises rather than a coherent set of economic policies (Republic of South Africa, 1994). By the mid-1990s, the South African economy was hit by the fallout of the previous several years of apartheid budget deficits and political instability. Capital flowed out of the country, the national debt was up considerably, the Rand fell sharply against foreign currencies, and business investment had not materialized. A shift from the RDP's Keynesian orientation to fiscal stabilization and a focus on growth underlay the adoption of the Growth, Employment and Redistribution (GEAR) macroeconomic strategy, which had features of a locally imposed IMF-style structural adjustment policy (Gelb, 1998; Hirsch, 2005; Republic of South Africa, 1996g).

GEAR may well have been a shrewd macroeconomic plan to deal with the vagaries of South Africa's difficult post-apartheid economic situation as the country faced the realities of globalization. Alan Hirsch, among others, makes a robust case for GEAR's success, as well as consideration of the circumstances where the implementation of fiscal discipline was too stringent. For our purposes in this paper it was the *way* GEAR was adopted that is of note. Notwithstanding the strong culture of consultation and transparency in the politics of the Tripartite Alliance, the ANC leadership presented GEAR to its Congress of South African

Trade Unions (COSATU) and South African Communist Party (SACP) partners and civil society structures as a ''non-negotiable'' fait accompli. Accompanying, even part and parcel of the ANC's consolidation of political power, the imposition of GEAR was an important moment in the transformation of the broader political and ideological environment. That environment was one where the ANC leadership, aggravated by the time and effort required for consultation, and intent on understanding itself *as* the Government entrusted with a mission from the electorate, dovetailed with the old ANC exile culture of democratic centralism. It marked the beginning of the centralization of power in the presidency and of governing largely from above (Gumede, 2005). The new ideological atmosphere manifested itself with regard to the Chapter 9 institutions as deep suspicion of their putative independence.

In the case of the telecommunications Regulator, it meant establishing a kind of joint jurisdiction, or, in the terminology of scholars of the sector, ''regulatory dualism'' (Gillwald, 2003) and the ''capture'' of the Regulator from the beginning by the Government (Cohen, 2003). As seen above, the Telecommunications Act gave the Minister the responsibility for issuing Telkom licenses and determining whether and when various parts of the sector would be open to competition. The Act also gave the Minister power over interconnection policy and Telkom tariffs for an initial 3-year period. The Minister retained the power to invite and endorse applications for major licenses and to approve certain regulations drafted by the Regulator. The Act empowered the Regulator to assess license bids and make recommendations to the Minister, but it could not award a license—the Regulator merely ''issued'' a license on approval by the Minister. Only in the case of non-restricted licenses, such as VANS and PTNs, could the Regulator take a decision on its own. The Minister may issue policy directions. The Minister does not have the power to *issue* regulations, but she retains the power to *approve* certain regulations, without which the regulations cannot be promulgated. Because of this structure, real power, in the estimation of Nkateko Nyoka, former CEO of ICASA, lies in the *interpretation* of policy, a prerogative that rests with the Minister. And the Ministry is open—if only by virtue of its shareholding in Telkom—to industry (especially Telkom) lobbying (Nkateko Nyoka, interview by author. Johannesburg, September 14, 2006).[19]

When it could not control the Regulator structurally, the Ministry and political establishment endeavored to control it by two other means: through the ICASA Council appointment process and the budget. Although statutorily the appointment to Council was made by the President on the recommendation of the Parliamentary Portfolio Committee on Communications, in reality it was primarily the Ministry and Department of Communication that put forward nominees. The Portfolio Committee would publish a public call for nominations and then hold public interviews with a shortlist. The Ministry and Department of Communications would get surrogates to nominate preferred candidates and would follow-up with lobbying of the ANC parliamentary committee caucus, known as the Parliamentary Study Group. (And even then the Ministry—twice—tried to get Parliament to give it direct appointment power.) It is widely understood that some Council members have been, in former SATRA Council Chair Nape Maepa's term, ''political animals,'' that is, the Ministry or DG's minions, who typically consult with their government sponsors before votes (Nape Maepa, interview by author. Johannesburg, September 4, 2006).[20] The dynamic was explained in a more subtle manner by Mandla Langa, Chair of the ICASA Council from 2000 to 2005. Langa indicated that what matters in South African politics is *who* sends the policy, not necessarily the policy itself, reflecting in complicated fashion the ongoing metric of political capital in internal ANC relations (Mandla Langa, interview by author. Johannesburg, September 5, 2006).[21] Exiles and former Robben Island prisoners have more political capital than other ANC leaders, even those who carried on the anti-apartheid struggle inside the

[19]One caveat should be addressed. Government's suspicion of the independence of the Regulator and maintenance of control over it may have been born in part from the earlier experience of the Independent Broadcasting Authority's credit card scandal in 1995. The perception was that it was the IBA's independence that abetted corruption and that such independence needed to be trimmed. Even if credence is accorded this argument, Government's actions, by casting aspersions on the regulatory agencies as organizational entities rather than simply criticizing and punishing individual corrupt councillors, served only to weaken the organizations and the institution of independent regulation in general.

[20]Suzanne Vos, Member of the Parliamentary Portfolio Committee on Communications for the Inkatha Freedom Party, said that some ICASA Councillors were so beholden to their ministerial sponsors they supported the Ministry's bid to limit their own independence and power in the ICASA Amendment Act hearings (Suzanne Vos, interview by author. Cape Town, September 12, 2006).

[21]In this regard, the original SATRA Council may have suffered from the fact that its chair had less political capital than its Department-aligned Councillors.

country in the 1980s—and trust flows through these ANC networks of political capital. The political establishment, hitherto organized around President Mbeki, cultivates these networks of trust through the appointment process at all levels of government (Mbeki not only appoints Cabinet Ministers; he appoints all Director-Generals of Departments as well) and extends to the award of state contracts, tenders, and privatizations (Gumede 2005, pp. 40–41).[22] With regard to the Regulator's budget, ICASA is classified as a Schedule 3 institution by the Treasury, which requires that the Regulator's budget come through the budget of the Department of Communications. As Nkateko Nyoka avers, the Department typically required the Regulator to make the case about its budgetary needs, would not listen, and would cut its budget request. In Nyoka's view, the Regulator's budget was a little more than half of what was necessary to do the job properly. An inadequate budget also adds to the Regulator's political losses, as without money it cannot properly litigate court challenges, especially challenges made by companies with deep pockets, such as Telkom (Nkateko Nyoka, interview by author. Johannesburg, September 14, 2006).

The consequences of dual jurisdiction and the subjugation of the Regulator are perhaps best seen in the struggle over Telkom's tariffs. Those tariffs were administered under a price-cap regime, the now standard international model for regulating the prices of dominant network operators. According to the model, the operator's tariffs may be increased to cover the expected effects of inflation on the company's costs of providing a designated basket of services, but must be decreased to cover expected improvements in its productivity. The Minister set the initial price cap productivity figure in May 1997 at a very conservative 1.5 percent.[23] This ministerial determination also stated that future reviews of the rate regime should not have a material adverse impact on Telkom or its ability to meet universal and access obligations set out in its license (Minister of Communications, 1997b). ICASA commenced an inquiry on the rate regime in December 2000. Its inquiry found that the initial productivity factor was set too low and that residential customers were highly vulnerable to Telkom's rate rebalancing. ICASA concluded that rate rebalancing had already been taken too far and that residential customers were subsidizing Telkom's competitive VANS and other business services (Thornton & Hodge, 2006, p. 205). Moreover, the Regulator was convinced that Telkom had abused the use of inflation forecasts. On the key matter of the productivity factor, ICASA recommended setting the figure at 5 percent. This figure itself represented just an informed guess because Telkom had failed to produce regulatory accounts as required by law. Once again, Telkom did not (or could not, because of the bundled nature of its services) make costing information available. Fearful that Telkom would litigate yet again, ICASA reduced the productivity number to 3 percent (Thornton & Hodge, 2006, p. 206). Even so, Minister Ivy Matsepe-Casaburri did not approve the regulations. She sent them back to ICASA with a recommendation to return to the productivity factor of 1.5 percent—to which the Regulator complied (Stones, 2001).

Even after winning in the price cap struggle, Telkom refused to abide by ICASA's rate regime regulations. Using a gap in the law and the timing of the new regulations, Telkom published tariff increases before the new

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[22]Sometimes the political pressure brought to bear on people and institutions was not subtle at all. Those—even solid ANC members in regulatory or oversight positions—who asked tough but appropriate questions were attacked as troublemakers, or derided as Democratic Alliance supporters in an effort to bully them into silence (Yasmin Carrim, former ICASA Councillor, now member of Competition Tribunal, interview by author. Pretoria, September 15, 2006). Department of Communications DG Andile Ngcaba would occasionally impugn the commitment and even patriotism of his policy opponents. In the 2000 interconnection fracas between SATRA and the Ministry discussed previously, Ngcaba described SATRA's "defiance" as "the last kick of a dying horse… We don't have time for individuals who don't have the interest of the industry and government at heart," as reported by *Business Day* (2000). Earlier examples of this political dynamic include the parliamentary debates around the 1996 Telecommunications Act. Minister of Posts, Telecommunications & Broadcasting Jay Naidoo was hardly averse to deploying anti-apartheid struggle rhetoric to cast aspersions on those who defended the independence of the Regulator (Republic of South Africa, 1996f). And when Koos Klok helped the Telecommunications Forum express dissatisfaction with the changes to the White Paper in 1996, Ngcaba, at that point the Postmaster General, wrote Klok a letter advising him that he could be charged with sedition and that his position in the Department was being reconsidered (Koos Klok, interview by author. Pretoria, September 14, 2006). The point is that ANC political culture has not yet adapted fully to liberal democratic politics. In a fusion of morality and politics, the ANC leadership often demonizes opponents both internal and external to the party as foes to be destroyed rather than challengers to be confronted, engaged, and perhaps bested. For a theory-based perspective on the general phenomenon of what she calls antagonistic versus agonistic politics, see Mouffe (2000).

[23]Productivity factors typically range between 5 and 10 percent at this stage in a telecommunications reform process, according to longtime comparative telecoms scholar William H. Melody (2002). For purposes of comparison with South Africa's 1.5 percent figure, the productivity factor for British Telecom was set at 7.5 percent during the 1990s, 6.5 percent in the USA, 7.5 percent in Australia, and 3.0 percent in Mexico (cited in Gillwald & Esselaar, 2004, p. 23).

regime fell into place. Using a productivity factor of zero percent, Telkom's published tariffs effectively increased rates 5.5 percent. Telkom also removed the 50–100 km band from the call structure, making all such calls long distance. Facing continuing court challenges, ICASA reached an out-of-court settlement with Telkom, allowing the company to implement its tariff increases in exchange for a promise to keep its subsequent increases below the maximum permissible by the rate regime regulations. Telkom also agreed to a special lifeline service for emergency calls. The Minister approved and published the amended rate regime regulations in 2002 (Department of Communications, 2002).[24]

The result of Telkom's ability to cajole the Minister and defy the Regulator was that, for example, prices for a local 3-minute call at peak times between 1997 and 2002 increased 26 percent per year. These increases were in part responsible for so many customers dropping off the wire-line network. Telkom's triumph on the rate regime issue was yet another instance where privatization trumped liberalization and independent regulation, and thus inhibited the rational growth of the sector.[25] The immediate reason for ministerial interference and the Regulator's acquiescence on rates was the perceived need to maintain the value of the Government's shares in the upcoming Telkom IPO (Mandla Langa, interview by author. Johannesburg, September 5, 2006). The public offering of Government-held Telkom shares (initially planned for 2001 but put off until 2003) would bring a higher share price and more revenue to the treasury.

The subjugation of the Regulator's independence had other, unforeseen consequences. When approval for an second network operator was finally secured after years of delay, Government officials, including ICASA Councillors, went abroad hoping to entice foreign communication operators to bid. Cable & Wireless, in ICASA Chair Mandla Langa's bemused recollection, almost ran him out of its corporate office, saying it would never come in on the SNO due to South Africa's protectionist and non-independent regulatory structure.An article in the *Mail & Guardian*, quoting unnamed former ICASA Councillor, claimed that British Telecom also declined to make a bid for the SNO for similar reasons (Dawes, 2004). In general, South Africa had a great deal of trouble attracting viable bidders for its third mobile operator and its SNO, adding considerably to the delay of these services.

5. Privatization in societies in transition: "rent-seeking" and Black Economic Empowerment

What joint jurisdiction and limitation on the Regulator's independence and efficacy did secure was the financial health of Telkom and guarantee of lucrative profits for its Thintana partner. Telkom's operating revenues rose consistently every year. Its net profits and earnings per share dropped in 2000, then rose steadily and soared in 2004 and in the 2 years thereafter. It is difficult to settle on hard and fast numbers, because in each annual report Telkom "restates" or adjusts the numbers from previous years. Nonetheless, the following provide a pretty accurate picture of trends:

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Operating revenue (in billions of rands)	15.8	19.2	22.7	27.1	31.4	34.2	37.3	41.1	43.7	48.3
Net profit (in billions)	1.79	2.4	2.35	1.5	1.6	1.2	1.7	4.7	6.8	9.3
Earnings per share (in cents)	458	448.5	421.2	290.2	294.6	343.8	292.3	823.9	1246.7	1744.7

Source: Telkom Annual Reports, various years; US Securities and Exchange Commission (2006).

[24]Former ICASA Council Chair Mandla Langa conceded that ICASA's decision to withdraw from litigation on the rate regime had been a big mistake (Mandla Langa, interview by author. Johannesburg, September 5, 2006).

[25]In a devastating critique of Telkom's tariffs, veteran industry scholar William H. Melody (2002) argued that the 1.5 percent productivity factor was remarkably low by comparative standards and was clearly belied by the productivity gains Telkom itself trumpeted in its own Annual Report of 2002 (11 percent for its fixed line network and 29 percent for its mobile investment in Vodacom). Evaluating Telkom's proposed price increases to come into effect in 2003, Melody criticized the company's use of inflation data, as well. Although the 12.5 percent figure Telkom used to justify its tariff increase did reflect a momentary rise in the CPI, the effect of inflation on Telkom's costs was immaterial—indeed, Telkom was experiencing declining costs in its major purchases of the latest technology equipment in international markets. Very high tariffs (and profits) were not the province of just Telkom. Interconnection fees paid by Telkom to the mobile operators, though according to regulations cost-based, in fact were and continue to be priced well above costs, resulting in high fixed line to mobile call charges and an entry barrier for would-be entrants into the mobile and fixed-line markets (Hodge, 2005b, pp. 13–19).

Listed on the Johannesburg Stock Exchange and the New York Stock Exchange in March 2003, Telkom's share price reflected its monopoly position and its rising profit levels. In the words of the company's own Corporate Profile (Telkom, 2005), the share price "has more than trebled in value over the past two years, has led local and international communications markets. This performance reflects Telkom's financial stability, track record in growing market share, and ability to balance the pursuit of growth opportunities with the interests of employees, customers and communities." In fact, this is corporate-speak for the fact that monopolistic power empowered Telkom to thwart competition and realize high profits.

As for Thintana Communications, its 30 percent stake of Telkom purchased in 1997 for R5.45 billion (US$1.26 billion) was sold in two tranches in 2004: a 14.9 percent stake in June for R6.1 billion (US$1.02 billion) and the remaining 15.1 percent stake in November 2004 for R6.6 billion (about US$1.1 billion). It is difficult to track the final value of Thintana's investment beyond the figures stated above. Simpiwe Piliso (2006a) writes in the *Sunday Times* that Thintana realized R15 billion between management fees and share sales at the time it sold 14.9 percent of Telkom (just under half of its stake) in June 2004.

The South African treasury may have benefited in the short run from the initial privatization and the March 2003 sale of Government-held (share price sheltered) Telkom stock, and the latter sale represented South Africa's biggest attempt to spread share ownership to the black majority through what was known as the Khulisa share scheme.[26] But in the view of most analysts, and consonant with the analysis of this paper, the exchange of liberalization and competition for privatization was damaging to the larger economy.[27] Who else gained from a set of arrangements that, in any reasonable reckoning, did not much benefit residential telephone users or would-be users, Internet surfers, businesses requiring sophisticated data services, or the potential electronic services and ICT companies enamored of the Department of Trade and Industry? Here the brief history of South African telecommunications after 1996 intersects with some of the patterns of BEE.

The conversion of South Africa from its apartheid legacy of course had to extend not just to politics and government but to the economy and the internal workings of business. Nearly all business and other organizations have initiated processes that bring the previously disadvantaged into leadership, ownership, and management positions. This is what is understood by the widely used term, "transformation." But the initial pattern of transformation functioned largely to produce a small group of extremely wealthy black businessmen: enrichment rather than empowerment. Because most of this group consisted of highly politically connected ANC comrades, there is reason to understand the phenomenon as a conscious political project to seed ANC members into the commanding heights of the economy in a kind of political machine or political clientelism project. A few ANC discussion documents speak openly of establishing a national black bourgeoisie.[28] But this may be too conspiratorial. Suffice it to say that in the wake of the ascendance of the national bourgeoisie wing of the ANC, where the Government has no clear grand social transformation project (notwithstanding the ANC's paper on such), rent-seeking and clientelism—which is legitimated in terms of post-apartheid restitution, deracialization, and BEE—can thrive. The topic of the "gravy train" or quick, politically derived enrichment is a constant feature of contemporary South African everyday

[26]Government raised R4.3 billion from the 2003 listing (Business Day, 2004). Under the Khulisa scheme, historically disadvantaged individuals were offered a 20 percent discount on the IPO share-offering price. Khulisa share-buyers who hold onto their shares for 2 years will qualify for a loyalty bonus of one extra share for every five shares they own. All other South African citizens were allowed to buy shares at a 5 percent discount to the offering price (Gush & Ginsberg, 2003).

[27]Calculating the consequences of Telkom's dominance and high telecommunications costs on the South African economy in any definitive way is problematic, but most economists argue the negative effects have been significant. One report by telecommunications consultant Paul Cole, commissioned by the Universal Service and Access Agency of South Africa, calculated that in sample year 2002 consumers were forced to pay US$ 586 million more than they would have paid in a competitive market. The estimate of a "lost" US$ 2.23 billion to the South African economy was caused by lost foreign investments and extra expenditures on telecoms by consumers (Regulateonline.org, 2006). Another recent estimate, by Efficient Research chief economist Dawie Roodt, indicated that the lack of competition and Telkom's monopolistic behavior in the telecommunications arena between 2001 and 2006 cost the economy at least R50-Billion Rand in lost growth (MyADSL, 2006). Telkom itself, continuing to build out lines to the poor at great expense even when it was apparent that they were disconnecting and buying mobile phones, wasted about R17 billion (Hodge, 2005b, p. 3).

[28]See, for example, Mokaba (1997) and the much more measured and subtle ANC (1996). President Mbeki himself believes that a black capitalist class is one of the pillars of democracy in South Africa. He stated to a group of business leaders in 1999, "As part of our continuing struggle to wipe out the legacy of racism, we must work to ensure that there emerges a black bourgeoisie, whose presence within our economy and society will be part of the process of the deracialisation of the economy and the society" (cited in Gumede, 2005, p. 224).

conversation and news reports. Rent-seeking behavior prompted Parliament to pass the Broad-based Black Economic Empowerment Act in 2004 in order to establish controls over the transformation process and help spread out its benefits (Republic of South Africa, 2004).Still, insider rent-seeking has impacted and continues to affect the telecommunications sector. A couple of examples will suffice.

The 1996 Telecommunications White Paper did not address the strategic equity partner issue. That matter was left to the Minister of Posts, Telecommunications & Broadcasting, as the Tripartite Alliance was deeply divided on the issue of the privatization of state-owned enterprises, and it fell to the Minister to work out a modus vivendi with the trade unions. President Mandela replaced Minister Pallo Jordan with former COSATU General Secretary Jay Naidoo because, in the judgment of many observers, Jordan had not been able to get the unions on board with the SEP.[29] Recall that SBC, in the words of Jim Myers, ''romanced'' the unions. One particular amorous interlude involved Communications Workers Union chief Tlhalefang Sekano. Sekano was elected president at the union's founding in 1996, when the Posts and Telecommunications Workers Association (POTWA) merged with other smaller unions to create the CWU. Sekano's slate defeated that of POTWA's incumbent president, Lefty Monyokolo, who was known to be firmly opposed to the privatization of Telkom. Sekano was one of those union leaders whom SBC brought to San Antonio and Mexico City in 1996–97, and who presumably helped convince the CWU rank-and-file to go along with the SEP. Sekano was not just president of the CWU; he also became Executive Chairman of the Communication Workers Investment Company, and a member of the board of directors of Ucingo Investments, which held 3 percent of the ordinary shares of Telkom until September 17, 2003, when it was sold. Sekano was brought onto the Telkom Board of Directors in 2001, a period when Telkom was retrenching tens of thousands of unionized workers. He left the board in 2004 (making approximately R96,000 in fees per annum for his service to the board). Telkom's 2005 Annual Report (Telkom, 2006) states that Sekano was also the chairperson of Letlapa Security and a director of Telesafe Security. Letlapa Security owned an interest in Telesafe Security, a security company that provides physical security to Telkom. Telkom paid R16 million and R39.3 million to Telesafe Security in the years ended March 31, 2005 and 2004 for these services, respectively. There is no smoking gun of corruption here, but it goes toward the overall impression that some union officials, approving the privatization of Telkom and acquiescing to if not collaborating with Telkom management's outsourcing/downscaling processes, benefited from them personally under the aegis of BEE.

Department of Communications DG Andile Ngcaba, with a long history in the sector, clearly carried out a sectoral version of black economic empowerment. As Postmaster General in 1996, he awarded a data switch license to Vula Communications, days *before* the passage of the 1996 Telecommunications Act. The original owners of Vula were drawn from a BEE group that participated in the White Paper process; the license presumably was their reward for loyalty to Ngcaba. Vula became Wireless Business Solutions (WBS) following the sale of a portion of the company to an SEP to save it from collapse, following two years of interconnection negotiations that failed to result in commercial agreement. WBS got involved with Uthingo, which was awarded the lucrative contract to operate the national lottery. Interestingly, Tlhalefang Sekano was a director, since 1999, of Wireless Business Solutions.

Ngcaba was at the center of most of the policy in the telecommunications sector for more than a dozen years. He clearly favored Telkom as the agent of bringing telecommunication services to the previously disadvantaged, and acted to protect Telkom so as to defend the universal service obligation. Ngcaba was also described by one insider as ''always scheming about the sector to support his comrades.'' But he also served his own interests in a spectacular way at the end of his government tenure. While still Director-General of the Department of Communications, Ngcaba devised a strategy to bid for Thintana's shares if and when they came available. He even showed Jim Myers a CD of the plan and asked him to arrange a meeting with SBC. Myers refused. SBC also refused to meet with Ngcaba while he was still in the Government (Jim Myers, interview by author. Johannesburg, September 13, 2006). Ngcaba left the Department in December 2003 to take a position as chairperson of Dimension Data, an information and communication technology (ICT) supplier. His ascent to Dimension Data gave that company an entry point into Government and private ICT

[29] In fact, Jordan himself ascribed his sacking to political differences with Mandela over the appropriate form of discussion and decision-making process that should prevail in the ANC NEC and in Cabinet. Jordan wanted more openness; Mandela adhered to the caucus-based democratic centralist model (*Mandela: The Authorized Portrait*, 2006, pp. 296–297).

procurement, inasmuch as a transformation charter of ICT companies put in place a BEE procurement policy such that signatories promised to procure 70 percent of eligible procurement from excellent, good and satisfactory BEE contributors (ICT Empowerment Charter Working Group, 2005).

Thintana sold 14.9 percent of its stake of Telkom in June 2004 to South African and certain international institutional investors. Soon thereafter, Thintana announced its intention to sell the remaining 15.1 percent. In November a consortium led by Ngcaba that included the Women Investment Portfolio Holdings' Gloria Serobe and ANC national spokesman Smuts Ngonyama concluded an agreement to acquire Thintana's remaining interest in Telkom for several billion rand. Originally making separate bids, both Ngcaba and Ngonyama asked for Government backing for their respective offers, and, according to a solid press account, President Mbeki urged the two consortia to cooperate.[30] When the merged consortium could not get its structure in place before Thintana's deadline, the shares were bought and "warehoused" by the Public Investment Corporation (PIC), which manages R600 billion of public servants' pension funds (Piliso, 2006a). When the story broke, public outcry was such that the Government then asked the PIC to ensure a "proper" empowerment process, which led to the merged consortium's stake being reduced to 10.1 percent, of which the Elephant Consortium agreed to allocate another 3.37 percent for further broad based economic empowerment (Public Investment Corporation, 2005).

The hue and cry was raised not just by the usual critics, who saw Andile Ngcaba as the architect of a series of sweetheart policies that had protected Telkom's monopoly and placed Ngcaba himself in pole position to benefit from the deal by playing off the government's conflicting interests. The deal was denounced by COSATU and some ANC leaders, as well (Dawes, 2004; Rose, 2005). Not surprisingly, non-ANC members of the Parliamentary Portfolio Committee on Communications were scathing about Ngcaba, the sector generally, and how it has suffered under ANC control.[31]

6. Toward a conclusion

Despite the intricacies of this account of the reform of South African telecommunications since 1996, there are a few important lessons that can be drawn. The choice of privatization over liberalization and competition led to the entrenchment of the incumbent network operator. The Shareholders' Agreement and related contracts gave Thintana Communications, and more specifically, SBC, the power to obstruct competition and realize monopoly rents. The case of South Africa is mostly in keeping with the conclusion drawn from surveys of telecommunications reform in developing countries—that privatization without regulation does not improve service and even may decrease mainline penetration and connection capacity (see Walsten, 1999; Wellenius et al., 1993). In South Africa, privatization, though only partial, essentially created a private monopoly in place of the previous state monopoly. Because the institutional arrangement undermined independent regulation, it operated in a fashion ironically not unlike the old apartheid link between the Government and the licensee (the Post Office), albeit now with power having shifted from Government to the licensee (Telkom), and, more accurately, to the SEP (SBC). SBC did bring management smarts to Telkom, elevating its profitability and share price considerably. But this was accomplished largely through monopoly power. Indeed, Telkom and Thintana's profitability meant the transfer of huge resources from the broader economy to shareholders. High telecommunications prices and limited service offerings created a drag on general economic growth. And contrary to its central mandate, Telkom failed to increase teledensity.

[30] ANC Treasurer-General Mendi Msimang wrote a letter to Thintana assuring the company that the Government endorsed the Elephant consortium bid (Piliso, 2006b).

[31] Suzanne Vos, Member of Parliament for the Inkatha Freedom Party, interview by author. Cape Town, September 12, 2006; Dean Smuts, Member of Parliament for the Democratic Alliance, interview by author. Cape Town, September 12, 2006. Vos asserted that political negotiations around CODESA and the first couple of years after the election were tough, but cooperative and productive. The past few years, she said, were different, all about ANC control and major business deals among ANC comrades. Mincing no words, Vos described the political system at the moment as a "thugocracy." Smuts, whom everyone acknowledges to possess a keen understanding of the communications sector, was less pejorative but no less critical. "In the first 5 years this was a powerful Parliament," she said. "ANC MPs have lost their courage since 1999; this is now the second or third tier of ANC talent in Parliament." Yet even in the better years, Smuts asserted, Parliament was subservient to Government; DG Ngcaba essentially gave instructions to the ANC caucus in the Parliamentary Portfolio Committee.

Monopoly in and of itself does not *necessarily* produce such results, of course. But monopoly without effective oversight or regulation almost invariably does. The nearly congenital distrust the ANC-led Government displayed toward independent agencies weakened regulation and hence intensified the incumbent's power. An additional factor in an incumbent's power arises where the Ministry responsible for safeguarding the government's residual financial interest in the incumbent is also the Ministry making policy for the sector. The South African experience shows that the incumbent will tend to have the Ministry's ear, and—perhaps because—the Ministry is keenly attentive to the company's share price in the event of future public offerings. It may also be the case here—and this is speculative given the secret nature of the contract—that the Shareholders' Agreement forbade any governmental body from pursuing policies whose effect would liberalize the sector and hence "harm" Telkom. Finally, the retention of Government control through joint jurisdiction and the sabotage of effective regulation created opportunities for rent-seeking ANC comrades through subsequent privatizations—legitimated by the goal of Black Economic Empowerment. The newly passed Electronic Communications Act addresses some of the problems presented in this article, but it will likely take a long time to fix them (Republic of South Africa, 2006).[32]

There is a related issue that goes beyond South Africa. South Africa is the most powerful country in Africa. It is seen as a model, both economically and politically. The South African telecommunications reform formula became dominant in southern Africa and elsewhere in Africa during the latter part of the 1990s. Hence, the privatization trumps liberalization model for all intents and purposes became accepted as "best practice" in the Southern African Development Community (SADC) Protocol on Transport, Communication and Meteorology of 1996. And the model's general guidelines likewise in essence were adopted by the Telecommunications Regulators' Association of Southern Africa (TRASA), an organization inaugurated in September 1997 (SADC, 1996; TRASA, n.d.). It remains to be investigated whether and to what extent the problems that plague the South African telecommunications sector have effectively been exported to the rest of Africa.

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[32] As prominent telecommunications lawyer Lisa Thornton declared, given the economic stakes and the propensity of the players—especially Telkom—to go to the courts, it will likely take 10 years of litigation to resolve some of the most basic provisions of the ECA (Lisa Thornton, interview by author. Johannesburg, September 6, 2006).

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