

Analysis & Perspective

Focus on ATMs

Certainly the most controversial issue facing automated teller machine networks and their bank members is ATM surcharges. Since the PLUS and Cirrus networks eliminated their surcharge bans in April 1996, ATM surcharges have taken off like gangbusters. And although banks (and some non-bank ATM deployers) are enjoying the increased fee revenue, the public debate and the level of opposition to surcharges have intensified, and the threat of both federal and state legislation is looming on the horizon.¹

But how do surcharges affect consumers, banks, banking competition, and ATM networks? Is the evolution of surcharges simply the free market at work, or are banks just double-charging consumers? And are large banks using surcharges to hobble their smaller rivals, and should we care? How do surcharges impact competition and are they just the sign of a healthy "free" market? Are surcharges the end to the antitrust headaches of ATM networks, or do they portend even greater problems for the future?

This article tries to answer these questions and provide a constructive approach for banks, antitrust authorities, and bank regulators to address the problem of surcharges.

Regulatory, Competitive, and Antitrust Challenges of ATM Surcharges

By DAVID BALTO

When banks first began to deploy ATMs, they were promoted as a form of "no hassle" cash. Few networks explicitly prohibited surcharges, but these policies assured that consumers received ATM access at a known and dependable price. Surcharge prohibitions prevented opportunistic behavior by some ATM owners such as price gouging. Moreover, with the costs of ATM access internalized by the banks, both large and small banks were on a "level playing field," since each offered access to the same number of ATMs. This level playing field for ATM access spurred competition for retail deposits between small and large banks.²

ATM surcharges came about because of two problems, quite outside the control of banks and ATM networks. First, because ATM networks are joint venture

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restrictions on ATM charges, even a restriction mandating a price of zero can be considered a form of price fixing. The antitrust laws treat price fixing by competitors with a great deal of skepticism and often condemn it without consideration of whether it is efficient.

ATM networks, primarily the PLUS national network, fought the battle in antitrust courts for almost a decade (in fact, the first antitrust decision requiring the PULSE network in Texas to permit surcharges celebrates its dubious tenth birthday this month).³ Antitrust litigation is costly and complex, and only the PLUS network, with the backing of its parent, VISA, could afford the battle. From the plaintiff's perspective, antitrust provides the opportunity to secure treble damages, and PLUS seemed like a convenient and attractive target. PLUS argued that surcharge bans were pro-consumer and that ATM networks needed to "self-regulate" ATM charges to provide a uniform consumer friendly product of "no hassle" cash.

In 1995, PLUS finally won the battle in a lawsuit in Alabama, where the court held that its surcharge prohibition was pro-consumer because it was "designed to enhance economic efficiency, and render markets more . . . competitive," and that the rule "enhanced consumer welfare" and reduced consumer search costs.⁴ Their victory was brief, for there was another "court" for sur-

charge hungry institutions to play on—their state legislature—and on this court surcharge banks had a distinct “home court” advantage. Since 1989, local banks had used state legislation to trump the PLUS anti-surcharge rules (the first law was literally considered and passed at midnight in Nevada to permit a bank to surcharge at ATMs in Las Vegas casinos).⁵ From 1989 to 1995, 15 state legislatures enacted statutes to prevent networks from regulating surcharges.⁶

Ultimately PLUS decided the cost of self regulation and protecting consumers was too great and eliminated their anti-surcharge rule in April 1996.

These efforts at state regulation may be unfortunate examples of the law of unintended consequences. While legislators may have thought they were helping small banks and consumers, the long term effect of surcharges may not be particularly salutary for either.

A Two-Year Assessment. Impact on Banks. A preliminary picture of the world of surcharges shows that banks, especially large banks, are the main beneficiary of surcharges. Surcharging has led to some significant increases in ATM deployment, primarily at remote, low volume locations. (Of course ATM deployment was increasing at about 5 percent a year without surcharges). Surcharges have brought new non-bank ATM deployers into the market.

The impact on the bank's bottom line is substantial. Surcharges have brought a new and significant source of fee income. According to a recent US PIRG study, consumers paid between \$2.5 billion and \$3.0 billion in surcharges in 1997.⁷ That amount was above the almost \$1 billion in interchange fees banks already collected for these transactions.

Even those consumers who are willing to pay for surcharges pay a high cost.

Not surprisingly, relatively few banks have failed to jump on the surcharge bandwagon. The percent of banks that impose surcharges has increased to around 70 percent of all banks.⁸ Over 80 percent of large banks surcharge, while only 65 percent of small banks and 13 percent of credit unions surcharge. Moreover, the average surcharge increased from \$1.15 to \$1.23 from 1996 to 1997. On average, large banks charge a 15 percent higher surcharge than their smaller rivals, even though these large banks should have lower costs from greater scale economies.

Impact on Consumers. On the other hand, consumers clearly are unhappy with surcharges. Several consumer surveys have shown that only approximately 20 percent of consumers are willing to pay the additional charge.⁹ Over 80 percent of consumers have changed their behavior and now limit their ATM transactions to their own bank's ATMs. For these consumers, the result of surcharges are “the incredible shrinking ATM network,” far less convenience, longer searches, and longer waiting lines. Even a recent study by the staff of the Federal Reserve Bank of New York found that “to avoid surcharges many consumers are likely visiting ATMs that are less convenient than those used previously.”¹⁰

Even those consumers who are willing to pay for surcharges pay a high cost. Banks do not simply impose surcharges on those inframarginal ATMs—those that are not profitable absent surcharges; rather, surcharges are imposed on all ATMs. Thus, thousands of consumers who might never benefit from using one of these new ATMs pay surcharges at their local ATMs.

Consumers end up paying a hefty fee for some slight additional ATM deployment. For example, assuming that surcharging led to the deployment of an additional 40,000 ATMs, the “cost” of \$2.5 billion in surcharges amounts to over \$60,000 a year per “new” ATM.¹¹

Impact on ATM Networks. ATM networks seem to be the clear losers in a world of surcharges. Consumers no longer look for the mark of the regional ATM as the source of “no hassle” cash. To avoid surcharges, the vast majority almost exclusively use their own bank's ATMs. Not surprisingly, the trend of ATM network growth has been reversed. Before surcharges were permitted those networks experienced consistent ATM transaction growth, typically at about 5 percent a year. Surcharging reversed that trend. Last year ATM transactions decreased by about 10 percent, and some networks experienced a much greater loss in transaction volume.¹²

Competition. Those who advocate for surcharges suggest that surcharging is simply a “free market” at work. But is the market competitive?

Typically in a competitive market we would expect that price would be pushed down to marginal cost. That is, with any product, if there is sufficient consumer choice, consumers will seek out those competitors that offer the best combination of price, quality, and service. For an undifferentiated product like ATM access, one would expect that firms would compete aggressively on price, and prices would be driven down to marginal cost. Yet, as the evidence shows, in spite of an increase in the number of ATMs and the number of ATM deployers, the average price for surcharges has consistently increased over time.

The painful reality is that almost every region of the country is dominated by a monopoly ATM network. Competing against these monopolies is a daunting task.

Surcharges have been permitted in Texas since the 1988 PULSE arbitration decision. That decision actually permitted banks to assess surcharges or provide rebates. What has been the result in over a decade of recharging? First, contrary to the arbitrator's rosy belief in bank competition, no bank has offered rebates. Surcharges have consistently increased. And there is little evidence of any bank competing by “reducing” the amount of surcharge, or advertising that it offers a lower surcharge.

What about competition between networks? Some small banks have tried to form “no surcharge” alliances to counter the competitive threat posed by large banks imposing surcharges. These alliances often agree not to surcharge each other's cardholders, while reserving the

right to impose fees on cardholders from other institutions. Some ATM networks, generally smaller ones such as Magic Line, Shazam and Tyme have attempted to facilitate the emergence of these networks, by offering to switch their transactions.¹³

Yet, with the exception of an alliance in California, these endeavors have failed to garner a significant number of transactions, or more importantly, dampen the ability of the large banks to increase surcharges. Why?

First, the painful reality is that almost every region of the country is dominated by a monopoly ATM network. Competing against these monopolies is a daunting task. When the incumbent network offers almost complete ubiquity, it is hard to sell consumers on a much smaller network.

Moreover, many of these dominant networks have "nondiscrimination" rules that prevent individual banks from selectively surcharging cardholders of other banks. Ironically, networks adopted these rules in the late 1980s in response to the threat that some banks might surcharge. These nondiscrimination rules would impede the development of no surcharge alliances that wish to selectively surcharge. Last year, Georgia enacted a statute to prohibit these nondiscrimination rules.¹⁴

Second, in 15 states, the "pro-surcharge" legislation, passed to enable banks to surcharge, now presents an obstacle to the formation of these "no surcharge" alliances.

Third, in order for a network to be a viable alternative, it must have a critical mass of card holders and ATMs. Consumers who are used to universal ubiquity demand a sufficient diversity of ATM locations where they live, work and shop. In markets where one or two banks have a dominant share of ATMs it may be difficult to assemble a sufficient number of alternative ATMs to make a no surcharge alliance sufficiently attractive. For example, a group of small banks may have no locations in downtown metropolitan areas.

Impact on Banking Competition. The most interesting yet unexplored competition issue is the impact of banking competition generally. ATMs are an important form of competition between financial institutions. One factor consumers desire is a network of "surcharge free" ATM locations. Absent a shared ATM network, these consumers would locate their accounts with the bank with the largest internal network of ATMs. When banks first deployed ATMs, large banks with large proprietary ATM networks had a significant competitive advantage over their smaller rivals.

In the 1970s, this dynamic began to change as banks formed shared ATM networks. Shared ATM networks actually enhanced competition between banks by allowing small and large banks alike to share in a large number of ATM locations. In essence, a shared ATM network created a level playing field for ATM access, enabling both small and large institutions to focus competition on other retail factors such as interest rates, late fees, and other fees.

Recent studies by the Federal Reserve Board and consumer groups have shown that credit unions and small banks on average offer higher interest rates and lower fees for deposit and checking accounts.

ATM surcharges changed the pro-competitive aspects of ATM sharing. With surcharges, large banks can impose higher costs on the customers of small banks and credit unions. In turn, the large banks can try to induce customers to defect from these smaller institutions. In essence, ATM surcharges return the competitive dynamic to that which existed before ATM shared networks were formed.

Moreover, surcharges present a perverse form of price competition where firms can actually gain customers by raising prices (and the costs of their rivals). As Professor Paul Horvitz observes: "there is little downside to such a strategy—either you gain substantial market share or earn substantial fee income."¹⁵

It is important to recognize that small banks and credit unions often can be of far greater competitive significance than their size suggests. Recent studies by the Federal Reserve Board and consumer groups have shown that credit unions and small banks on average offer higher interest rates and lower fees for deposit and checking accounts. Simply they are often the leaders in providing the most efficient, consumer friendly level of service. Often they are far more committed and knowledgeable of local community concerns. Losing, or even hobbling these efficient, low-cost rivals will harm all consumers. Thus, preserving a level playing field may be important to bring consumers a competitive retail banking market.

ATM surcharges, especially surcharges imposed by the larger banks, could deter the ability of these smaller institutions to effectively compete. Because these smaller institutions cannot offer as large a network of "surcharge free" ATMs, consumers may depart to the larger banks. By focusing competition on the size of a bank's ATM network, competition in terms of interest rates and fees may be weakened.

Surcharges may focus competition on ATM availability, which will put small financial institutions at a competitive disadvantage. This, in turn, will weaken the ability of small institutions to compete for deposits, leading to lower deposit interest rates and higher fees. This loss of competition may be of particular concern in those markets where the retail banking market is concentrated among relatively few firms. Although consumers may benefit from some increase in the number of ATMs, they may ultimately lose, as competition for deposits is weakened.

The Role of Antitrust. Unfortunately, antitrust has been part and parcel of the difficulty of addressing surcharges. The antitrust laws treat price fixing by competitors with intense scrutiny. But after several years of

Chronology of ATM Antitrust Developments

- July 1988—Arbitrator rules Pulse network in Texas must permit surcharges
- 1989—Nevada Legislature in "midnight session" prohibits networks from regulating surcharges
- 1990—Nevada ban upheld by Ninth Circuit
- 1990-1995—14 other states follow Nevada's lead in preventing networks from controlling surcharges
- 1996—Plus and Cirrus networks drop surcharge ban
- 1997—Senate Banking Committee Chairman D'Amato introduces legislation and holds hearings on banning surcharges

litigation, the result was not wholly consistent decisions from the courts and one arbitrator.

First, those banks that wish to form no surcharge alliances may fear that they will be subjects of the next antitrust suit. One can imagine that a group of surcharge-hungry ATM deployers may sue, charging that a no surcharge agreement is an agreement of a price of zero. Antitrust enforcers can help clear the muddy waters by offering clear guidance that an agreement not to surcharge does not violate the antitrust laws. That guidance is well supported by the Alabama decision won by PLUS in 1995.

Although surcharge prohibitions by these new networks do not pose antitrust problems, surcharges in dominant networks pose a larger set of antitrust problems.

Interchange Fees. ATM owners already receive compensation in the form of a per transaction interchange fee paid by the card-issuing bank to the ATM owner. The interchange fees are typically set between 35 and 50 cents a transaction. Antitrust courts and enforcers have treated interchange fees with a very healthy dose of skepticism because they are price fixing by competitors. These fees have survived antitrust condemnation in part because they were necessary to compensate ATM owners for deploying ATMs.¹⁶ Now that the vast majority of ATM owners receive surcharges, does this justification still stand?

From an economic perspective the most efficient result is for one firm—either the ATM owner or the ATM networks—to set the price.

Moreover, ATM interchange fees appear inefficient, and the fee-setting mechanism is in paralysis. Although the costs of ATM deployment—communications costs, ATM terminal costs, etc.—have decreased over the past decade, ATM interchange fees have not changed.¹⁷ Thus, while ATM networks have decreased their switch fees about 18 percent over the last four years in response to lower costs, the fact that ATM interchange

fees have not decreased seems like a disturbing anomaly.

One reason why ATM networks may be reluctant to decrease their interchange fees is the threat of antitrust litigation. The last time an ATM network attempted to reduce interchange fees it was hit with an antitrust suit. Now that the number of non-bank ATM deployers has proliferated, the likely pool of antitrust plaintiffs has increased concomitantly.

From a common sense perspective, collecting interchange fees and surcharges is a "double charge," and that has been the label applied by Senate Banking Committee Chairman Alfonse D'Amato (R-N.Y.) and consumer advocates. But from an economic perspective, charging card-issuing banks both surcharges and interchange fees pose an even greater problem. When two firms set a price, they both try to secure as high a margin as possible. Typically the combined price will be higher than if only one firm set the price. This problem is called "double marginalization" because two firms try to secure the same margin.¹⁸

From an economic perspective the most efficient result is for one firm—either the ATM owner or the ATM networks—to set the price.

Probably the most prudent move for ATM networks from both a practical and antitrust risk perspective would be to adopt a rule that prevents the ATM owner from collecting both the surcharge and the interchange fee. Both the Independent Bankers Association of America and consumer groups have called for this alternative.¹⁹ In this way, at least the costs of the card-issuing bank will be reduced and perhaps these cost savings will be passed on to consumers in lower foreign fees that stem from the interchange fee.²⁰ Interestingly, the PLUS Board of Directors adopted this proposal in 1995, but it was not enacted by the VISA board.²¹ Representatives of both PLUS and Cirrus have said there are no technical obstacles to this alternative.

ATM networks might respond that there are two reasons not to adopt such a rule. First, they could be faced with antitrust litigation arguing that eliminating the interchange fee is illegal price fixing. But it would be difficult for the ATM owner to demonstrate harm, since it still collects compensation in the form of surcharges.

Second, any individual network may be reluctant to adopt such a rule unless all of its competitors adopt a similar policy. If only one network adopted such a rule, an ATM owner could still collect interchange fees by routing transactions over another network that permitted double charges. In effect, the networks are faced with a prisoner's dilemma.

Yet, networks could avoid that problem by permitting the card-issuing bank, rather than the ATM owner, to control the routing of the transaction. Having the card-issuer control routing will be more efficient, since it will choose the lowest cost route for the transaction.

Three other areas of ATM competition are probably worth continued and careful antitrust scrutiny:

- Do network nondiscrimination rules inhibit the development of alternative networks?
- Are ATM networks dominated by large banks which can disadvantage their smaller rivals?
- Can large banks use surcharges to harm their smaller rivals?

Nondiscrimination Rules. ATM networks would be wise to eliminate their nondiscrimination rules. Nondiscrimination rules may inhibit the development of lower

cost, no surcharge alternatives. Nondiscrimination rules have been attacked by both the Justice Department and the Federal Trade Commission where they have inhibited the development of alternative networks. For example, in 1995 the FTC challenged the use of a nondiscrimination rule by a pharmacy network in Tennessee because the rule kept its members from joining alternative networks, which sought to offer lower consumer prices by engaging in selective discounting.²²

ATM networks generally have avoided some degree of antitrust scrutiny because they were established as not-for-profit entities with governance spread over a large number of institutions, yet that structure is quickly changing, especially at the largest ATM networks.

Nondiscrimination rules may have been justified at a time where a network faced competition from numerous networks. However, network competition has significantly diminished in the past decade. Probably the prudent course would be for networks to abandon these rules.

Network Governance and Ownership. ATM networks generally have avoided some degree of antitrust scrutiny because they were established as not-for-profit entities with governance spread over a large number of institutions, yet that structure is quickly changing, especially at the largest ATM networks.²³ Networks are increasingly converting to a for-profit structure. Moreover, ownership in several networks is becoming increasingly concentrated, largely because of bank mergers, with some banks having an ownership interest with as much as 30 percent.

This change in ownership may have significant implications for intranetwork competition. As networks take on a proprietary character, with relatively fewer owners, they may be used by larger banks to disadvantage their smaller rivals. This was the basis of the one ATM case brought by the Antitrust Division—their 1994 suit against the MAC network—for effectively prohibiting smaller banks from seeking ATM-driving services from lower cost alternatives.²⁴ In addition, the Canadian Competition Tribunal required the Interac ATM network to convert from a for-profit to non-profit status in response to similar competitive concerns.²⁵

It is notable that those networks that have tried to facilitate the development of alternative no surcharge alliances are generally the not-for-profit, broad membership organizations such as Magic Line and Shazam. Perhaps the reluctance of larger networks to facilitate the emergence of no surcharge alliances is because they are dominated by large, surcharge-hungry banks.

Surcharges as a Form of Raising Rivals' Costs. Perhaps the most significant and troubling competitive problem is the ability of large banks to use surcharges as a predatory strategy to drive consumers from small banks and credit unions. Usually firms try to attract customers from rivals by lowering prices. Surcharges

provide a particularly attractive tool since they involve gaining customers by raising prices—a unique form of “win-win” predation. Because surcharges are imposed on customers of a rival bank, “there is little or no incentive to keep it low.”²⁶

Banks will argue that relatively few consumers have switched banks to avoid surcharges. That may be due to the fact that surcharges are still in their infancy. In other markets such as Texas, the banking market may be so unconcentrated that a predatory strategy may not appear likely to succeed.

In other markets where banking is more concentrated, this form of predation may pose a far more significant competitive threat. For example, in Massachusetts, where two banks have over 65 percent of the ATMs, a recent survey shows that 33 percent of the cardholders of small banks might defect to these dominant banks in response to surcharges.²⁷

Under the Clinton Administration, antitrust authorities are beginning to take a new look at predatory conduct. For example, the Transportation Department recently issued draft guidelines on predatory pricing by dominant airlines. ATM surcharges as a form of predation should be on the radar screen of the antitrust enforcers.

Study by Federal Regulators. Unfortunately, with the public and Congressional outcry over ATM surcharges, the multiheaded federal banking regulatory agencies have been quiescent. In fact, when ATM surcharge bans were being lifted, the Federal Reserve Board actually weakened the consumer disclosure provisions for surcharges.²⁸ A recent US PIRG survey recently found that the percent of ATMs that did not comply with these provisions had actually increased. How can the federal banking regulators make a meaningful contribution in this area?

Bank Merger Analysis. The Federal Reserve Board has been strangely silent on the role of ATMs in its bank merger analysis. Although ATMs are an important element of retail competition and arguably substitute for branches, the Federal Reserve Board has never discussed the impact of bank mergers on ATM competition. For example, when a merger gives a bank a dominant share of the ATM market, such as the Bank of Boston-BayBanks merger, or the rumored BankBoston-Fleet merger, the Federal Reserve Board should analyze the impact on ATM competition, whether the merged firm can engage in predation, or can dominate the ATM network. The board should evaluate the impact of bank mergers on ATM competition as a matter of course. The IBAA has suggested that the board consider the market power of the network, fees, routing rules, third-party processor requirements, and other rules that could disadvantage community banks in its merger analysis.²⁹

ATM Network Merger Analysis. The Federal Reserve Board has enthusiastically and uniformly approved every ATM network merger presented on the theory that bigger is better.³⁰ These decisions are inconsistent with enforcement actions taken by the Justice Department and the FTC challenging other network mergers. Beyond that, the board decisions have never analyzed the impact of ATM surcharges on bank or ATM network competition. More important, the decisions have not analyzed the role of other network rules, such as nondiscrimination provisions, that might inhibit the formation of competing networks.

Study of ATM Surcharges. As suggested earlier, the most significant impact of ATM surcharges may be on small banks and on retail banking competition generally. Moreover, ATM surcharges may lead to a more concentrated banking market. Each of these issues should be subject to a more comprehensive study by the banking agencies.

Better Enforcement of Consumer Protection Provisions. Markets work most effectively where consumers are fully informed of the costs of a service and their alternatives. Yet the current consumer disclosure requirements are weaker than those adopted by the national ATM networks, which require that a consumer be notified of the amount of the fee both on the computer screen and on a sign on the ATM. The Federal Reserve Board should strengthen the consumer disclosure provisions and then actively enforce them. Recent studies by consumer groups show that as much as 20 percent of ATMs lack the proper disclosure.³¹

Conclusion. ATM surcharges pose critical challenges to ATM networks, banks, antitrust enforcers, and bank regulators. Whether each of these groups can meet the challenge will dictate the likelihood of legislative action in the states or on Capitol Hill. Consumers are increasingly realizing that surcharges are a "double charge" and a "free market" is not one where prices only go up.

¹"Fee Foes make Headlines, Not Headway," *Bank Network News* (March 12, 1998).

² See Paul M. Horvitz, "ATM Surcharges: Their Effect on Competition and Efficiency," *Journal of Retail Banking Services*, Autumn 1996.

³David A. Balto, ATM Surcharges: Panacea or Pandora's Box? 12 *The Review of Banking and Financial Services* 169 (Fall 1996). After several years, the effect of the new surcharge policy is a matter of controversy. Compare Stan Paur, "ATM Fees Stir Debate," *Texas Banking* 1 (Sept. 1997) (describing competitive benefits of surcharge policy, especially in terms of additional ATM deployment) with "ATMs: Are Texans Paying More?" Consumers Union (June 24, 1996) (criticizing increased costs of ATM access for Texas consumers).

For a detailed discussion of the PULSE litigation and the antitrust risks faced by ATM networks in setting fees collectively, see David A. Balto, Antitrust Analysis of Financial Institution Joint Ventures, 16 *World Competition: Law and Economics Review* 107 (June 1993).

⁴*Southtrust Corp. v. PLUS System, Inc.*, 1995-2 Trade Cas. (CCH) ¶ 71,219, at 75,906 (N.D. Ala. Aug. 10, 1995).

⁵Plus lost a challenge to the Nevada statute on Commerce Clause grounds. See *Valley Bank of Nevada v. PLUS System, Inc.*, 749 F. Supp. 223 (D. Nev. 1989), *aff'd*, 914 F.2d 1186 (9th Cir. 1990).

⁶See testimony of Paul A. Allen, Vice President and General Counsel, VISA U.S.A., before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services (April 25, 1996), at 8.

⁷U.S. PIRG, "Big Banks, Bigger ATM Fees" (April 1, 1998); "Small Banks Blaze A New Surcharge Trail," *Bank Network News* (October 14, 1997) (estimating new revenue over \$2 billion).

⁸U.S. PIRG, *supra*.

⁹ Leigh Gregg, "ATM Surcharges and Card Fees: What's Happening; Exclusive Fees Survey Report," *Credit Union Executive* 4 (Jan. 11, 1998); Orla O'Sullivan, "To Surcharge or not to Surcharge," *ABA Banking Journal* 40 (Sept. 1997) (reporting survey that only 28 percent of consumers actually pay a surcharge); Stan Paur, "ATM Fees Stir Debate," *Texas Banking* 1 (Sept. 1997) (only 17 percent of consumers pay surcharges).

¹⁰ See James J. McAndrews, "ATM Surcharges," 4 *Current Issues* 3 (April 1998)

¹¹ The estimate of 40,000 ATMs may be generous. Some estimate the number of new ATMs at about 25,000. "Small Banks Blaze A New Surcharge Trail," *Bank Network News* (October 14, 1997).

¹²John M. Berry, "Determining When a Cash Cow Begins to Go Dry," *Washington Post* E1 (May 14, 1998); McAndrews, *supra*; Sullivan, *supra* (reporting Cash Station volume down one million transactions a month).

¹³ "Small Banks Blaze A New Surcharge Trail," *Bank Network News* (October 14, 1997); Orla O'Sullivan, "To Surcharge or not to Surcharge," *ABA Banking Journal* 40 (Sept. 1997); Gregg, *supra* (reporting on no surcharge alliance of more than 420 credit unions).

¹⁴For example, there have been cases of banks joining together to promote a "no-surcharge" coalition within a dominant ATM network, only to find themselves at odds with nondiscrimination rules of the network itself. See "EFT Rules Bend Under Surcharge Weight," *Bank Network News* (August 28, 1997).

¹⁵Paul M. Horvitz, "ATM Surcharges: Their Effect on Competition and Efficiency," 18 *Journal of Retail Banking Services* 57, 61 (Autumn 1996).

¹⁶Some commentators have suggested that the collective setting of interchange fees is a violation of the antitrust laws, although the practice has been upheld by the courts. Compare *National Bancard Corp. ("NaBanco") v. VISA USA*, 596 F. Supp. 1231, (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) (upholding challenge to collectively set interchange fees) with Dennis Carlton & Alan Frankel, "The Economics of Credit Card Networks," 63 *Antitrust L.J.* 643, 665-66 (1995) (describing why NaBanco was in error).

¹⁷ "Surcharge Fire Puts Heat On Interchange," *Bank Network News*, (June 24, 1997) (reporting testimony of the Electronic Funds Transfer Association that interchange fees have changed little over past 15 years).

¹⁸A recent study by the staff of the Federal Reserve Bank explained the inefficiency of double marginalization. See James J. McAndrews, "ATM Surcharges," 4 *Current Issues* 4 (April 1998)

¹⁹"Surcharge Fire Puts Heat On Interchange," *Bank Network News*, (June 24, 1997); "Is It the End of Interchange Fees?" *EFT Report* (August 14, 1996).

²⁰Many banks, especially small banks and credit unions, absorb the interchange fees in order to provide free or low cost ATM access. Studies have found that these smaller institutions are more than twice as likely to offer free ATM access as their larger counterparts. See testimony of Janice Shields, before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services (April 25, 1996), at 5.

²¹See "Surcharging: The Issue that Keeps Coming Back," *Bank Network News*, Dec. 14, 1994 at 1.

²² *In re RxCare of Tenn., Inc.*, No. C-3664 (June 10, 1996).

²³ Some antitrust enforcement officials specifically noted that the non-profit nature of these ventures and diverse ownership diminished the concerns that a network may act anticompetitively. See Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, "Antitrust Analysis of Joint Ventures in the Banking Industry—Evaluating Shared ATMs," Remarks Before the Federal Bar Association and American Bar Association (May 23, 1985) ("If a shared system were owned and operated by a minority of its members on a profit-making basis, its owners might have an incentive to raise the switching fees paid by non-owner members to supra-competitive levels. This concern is lessened to the extent that the system is operated on a not-for-profit basis.").

²⁴ *United States v. Electronic Payments Services, Inc.*, No. 94-208 (D. Del. Apr. 21, 1994), 59 Fed. Reg. 24711 (May 12, 1994).

²⁵ *D.I.R. and Bank of Montreal et. al.*, (CT-95/2 June 25, 1996). See Robert D. Anderson and Brian Rivard, "The Competition Policy Treatment of Shared EFT Networks: The Interac Case" (May 1998).

²⁶ "Electronic Evolution," *Electronic Payments International* 12 (March 1997).

²⁷ "Bankers, Consumer Advocates Spar Over ATM Surcharges," *American Banker* 18 (April 14, 1998); Orla O'Sullivan, "To Surcharge or not to Surcharge," *ABA Banking Journal* 40 (Sept. 1997).

²⁸ 61 Fed. Reg. 19662, 19672 (May 2, 1996). The prior version of the rule required disclosure on both the ATM and on the screen. 12 C.F.R. 205.9(a)(1) (1995).

²⁹ Testimony of William L. McQuillan, President IBAA, before the House of Representatives, Committee on the Judiciary on "The Effects of Consolidation on the State of Competition in the Financial Services Industry," at 8-9 (June 3, 1988).

³⁰ For a critique of these decisions, see David A. Balto, *The Murky World of Network Mergers: Searching for the Opportunities for Network Competition*, 42 *Antitrust Bulletin* 793 (Winter 1997).

³¹ "Fee Foes make Headlines, Not Headway," *Bank Network News* (March 12, 1998) (reporting study by Coalition for Consumer Rights in Chicago).