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Box 2 (Jackie's labels), Folder "Justice"

Letter, Donald I. Baker, Deputy Director of Policy Planning, Antitrust Division, U.S. Department of Justice, to Clay T. Whitehead, Subj: Domestic Satellites, 3/18/70, 2 pp., "Confidential"

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8/29/12	32) Letter Donald I. Baker to Clay T. Whitehead dtd. 3/19/70, subj: Domestic Satellites, 1 p., "Confidential"							

(b) Where the proposed services include television program transmission, the terms and conditions under which used the satellite system will be made available for a noncommercial educational network. We note that parties to this proceeding, such as ComSat and the ABC network, have proposed to provide satellite channels without charge for the interconnection of public and instructional broadcasting. We believe this to be in the public interest. Applicants proposing television program transmission service should also address the possibility of realizing a "peoples' dividend" to provide some funds for programming by noncommercial educational stations, as suggested by the Ford Foundation.

(c) Where the applicant is engaged in the business of providing a common carrier public message service, 11/ the proposal should provide full and detailed information concerning the manner in which the satellite operations will be integrated with terrestrial operations technically and economically, including:

(i) The manner and extent to which the facilities of the satellite system will be used at the carrier's option to augment terrestrial facilities for message, private line, and other existing or proposed services;

(ii) The extent, if any, to which satellite facilities will be used for services offered directly to the public, the nature of such services, the proposed charges, and the basis on which such charges are constructed.

(iii) The carrier's market and cost studies that demonstrate that expansion of the integrated system by use of the satellite technology is more economical than expansion by using other available technologies;

11/ Pending a final determination on our proposed interim policy relating to AT&T, it is not precluded from submitting an application. In that event, the application should address the questions set forth in this subparagraph (c).

12. The foregoing discussion (paragraphs 10-11) is meant to point up the uncertainties involved in the threshold question whether the public interest is furthered by the authorization of domestic satellite communications services at this time. In our judgment, however, these uncertainties cannot be resolved by another round of written comments or by additional studies. Indeed, a critical consideration in this respect would appear to be what persons, with what plans, are presently willing to come forward to pioneer the development of domestic communications satellite services according to the dictates of their business judgment, technical ingenuity, and any pertinent public interest requirements laid down by the Commission. In short, on the basis set out in paragraph 8, supra, it appears to us that domestic satellite communications do have the potential of making a substantial contribution to the nation's communications system. 3/ That being so, we should proceed with the authorizing process as promptly as possible, consistent with the public interest, since considerable lead time is required for research, design, development, construction and launch of the satellite before any authorized facilities would become operational. The next issue is how best to proceed and whether the public interest would be served by the delineation at this time of the system or systems to be authorized.

13. Type of Domestic Communication-Satellite Facilities to be Authorized--The parties to this proceeding have made various proposals for domestic systems, both permanent and pilot in nature. It has been proposed by the Ford Foundation and ABC that there be a special purpose system devoted primarily to the distribution of television programs. They urge that domestic satellites offer unique advantages for such a system which would involve one of a limited number of transmission points and a large number of reception points. Since the satellite can transmit the same signal to all areas from which it is visible, transmission costs would not be affected by either distance or the number of receiving points. The receive/only stations are relatively inexpensive. Therefore, it is urged that such a specialized system should be in a position to satisfy television needs at substantial savings in program transmission costs compared to the costs of existing services. It is also asserted that the policy commitments with respect to future action would be minimized, and that such a system would demonstrate the economic feasibility of the satellite technology for this purpose.

3/ When this proceeding was instituted in 1966, it appeared that a number of years might elapse before the spectrum allocations for communications satellites services would be re-examined by an international space conference. In view of the imminence of the 1971 space conference, prospective applicants may now prefer to await the outcome instead of proceeding at 4 and 6 GHz. While this factor may also present a pertinent public interest question, we think that it should be resolved in the context of our consideration of concrete applications for the 4 and 6 GHz bands which will contain analyses of potential interference vis-a-vis terrestrial operations and specify the length and cost of the terrestrial interconnections for earth stations.

21. Coordination with INTELSAT and Other Domestic Satellite Programs--Insofar as relations with INTELSAT are concerned, as noted above, we believe that the establishment of domestic satellite facilities would be fully consistent with our obligation to the single global system. The United States commitment to INTELSAT and the technical constraints on the use of orbital locations in synchronous orbits, as well as limitations on the available frequency spectrum and dangers of mutually harmful interference, establish the necessity for close coordination on these matters. In addition, intelligent planning, the possibility of achieving major economies, and the desirability of continuing to promote the single global system, indicate that the closest possible cooperation should be sought. The areas where coordination is essential include such matters as frequency use, prevention of harmful interference, and orbital space on the geostationary orbit. Before authorizing the use of particular frequencies or the placement of satellites at particular locations, we would bring the matter to INTELSAT for coordination purposes and if the latter has plans which would conflict with the frequencies or orbital spaces proposed, we would work out an accommodation in view of our obligations to the single global system of some 74 nations, including the United States. We would, of course, fulfill any coordination requirements called for by the International Radio Regulations, as well as those established in the Definitive Arrangements for INTELSAT which are now under negotiation. We would also encourage and lend our assistance to the exploration of other areas for possible cooperative effort to determine if joint action or sharing would be appropriate to achieve mutual benefits.

22. To avoid orbital space problems and possible interference, proposals for domestic satellite systems must also take into account the known plans of other countries who may have an interest in the use of the satellite technology for domestic communications purposes. For example, Canada has already selected two orbital locations for its proposed domestic system, which will require protection. 6/ Canada also has indicated an eventual requirement for a third satellite position, details of which are yet to be specified. As in the case of INTELSAT, it may be beneficial to explore areas of mutual cooperation to reduce costs, enhance efficiency and share the results of operating experience. There is also the possibility of a shared use of the space segment of a United States system or systems to serve the domestic requirements of another country or countries, or vice versa.

6/ The orbital locations chosen by Canada are 88 and 109 degrees West Longitude.

III. Proposed Rule Making

23. The Commission is concurrently issuing a notice of proposed rule making on the policies to be followed in the event of technical or economic conflicts between applications and on the appropriate initial role of AT&T in the domestic communications satellite field. Technical conflicts may arise in such areas as proposed orbital locations and frequency usage. Moreover, in the course of coordinating earth stations with terrestrial systems it may prove impossible in some instances to accommodate earth stations at desired sites without some adjustment in the frequencies and routes of terrestrial systems or other measures to avoid interference. Also, arguments of economic incompatibility may be raised, posing questions as to the proper effectuation of the Commission's responsibility under Section 1 of the Communications Act to exercise its regulatory functions in such a manner as to make communications services "available, so far as possible, to all people of the United States * * *."

24. It may be that conflicts will not arise, or will be resolved through negotiation or other procedures in a manner consistent with the public interest, so that the promulgation of rules will be unnecessary. However, in order to facilitate expeditious action on the applications, and to insure the prompt attainment of the benefits discussed in paragraphs 8-9 supra, the Commission clearly should follow such procedures as will "best conduce to the proper dispatch of business and to the ends of justice" (Section 4 (j) of the Communications Act). Rule making may be one such procedure. Applicants are therefore requested to submit comments in their proposals on the question of what policies would be appropriate in these areas. An opportunity will be afforded for the filing of reply comments by applicants and comments by other interested persons after the expiration of the time for filing applications (see paragraph 38 below). Since the rule making will be consolidated with this proceeding, material contained in the comments already on file need not be resubmitted.

25. Comments are also requested on what initial role of AT&T in the domestic communications satellite field would be appropriate. The most important value of domestic satellites at the present time appears to lie in their potential for opening new communications markets and for developing new and differentiated services that reflect the special characteristics of the satellite technology. Realization of this potential will require innovative technological and service planning and development, and may necessitate steps to promote a market environment conducive to new competitive entry. A question has been raised as to whether AT&T might discourage or foreclose entry by others into its special service markets through a policy of inter-service subsidy. The Executive memorandum recommended that facilities to be used by AT&T for specialized communications services "should be authorized only after a determination by the Commission on each application, based on public evidentiary hearings, that no cross-subsidization between monopoly public message and specialized services would take place in the development, manufacture, installation, or operation of such facilities." We are concerned that such a procedure might not prove fully effective to achieve a market environment conducive to innovation, new competitive entry, and the vigorous exploration and development of the special communications service potentials of the satellite technology. 7/

26. Aside from the possibility of market foreclosure through cross-subsidization, there is a question as to whether innovative satellite planning by AT&T would be constrained by its existing terrestrial facilities and services. Any satellite proposal would be supplemental to and compatible with the existing terrestrial network, and would reflect the carrier's necessary and predominate concern over the effects of the satellite technology upon its existing landline investments and markets. 8/ Moreover, AT&T is the dominant domestic carrier and other potential common

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7/ The practical problems and difficulties inherent in the establishment and implementation of regulatory standards by which to ascertain and correct cross-subsidy among AT&T's major interstate service classifications are well known to us. The problem has proven to be most difficult, complex and time-consuming. The evidentiary hearing procedure would necessarily entail the substantive burdens and delays involved in lengthy and cumbersome administrative investigations and hearings.

8/ AT&T has stated that it views satellite transmission as just another form of transmission similar in function to terrestrial microwave systems and coaxial cables, and that there are no communications services which could be offered by satellites which cannot now be offered by terrestrial facilities.

28. It is contemplated that a new carrier entrant will be capable of dealing directly with customers for its services. In other words, the "authorized user" policy, which has applied in the field of international communication and under which the satellite carrier is permitted to sell its services directly to users only in special cases, will not be applied to domestic service. This, in turn, raises the question as to the means by which a customer for service of a new carrier will obtain access from his location to the earth station of the carrier. From a technical and operational standpoint, there are a variety of methods by which such access can be provided. For example, the customer may arrange to provide connecting channels which he himself has constructed and owns or has leased under appropriate tariffs from existing carriers. Or it may be preferable for the new carrier to undertake provision of the access facilities by its own construction or by purchase or lease from a terrestrial carrier. Or arrangements for a joint through service may be entered into between the new carrier and the terrestrial carrier. Other types of interconnecting arrangements may also be feasible. Which arrangement will best suit a particular operation in terms of total efficiency and economy can only be determined in light of all of the circumstances of a proposed service offering. These are matters which we expect to be fully addressed by proposed system applicants in connection with their applications and, as necessary, in their responses to the Notice of Proposed Rule Making. We will also welcome the views and comments of existing carriers whose full cooperation is clearly needed for effective implementation of this policy. It is our expectation that existing carriers will not thwart or hinder the development of new and expanded common carrier services envisaged by this policy by the imposition of arbitrary restrictions on interconnection or through route arrangements or so-called exchange of facilities among carriers--established and new--or other means of accomplishing the desired objective of providing service directly to the customer. We will also expect that established carriers will review the compatibility of the terms and conditions of their existing tariffs with any new common carrier services which may be proposed by prospective carrier interests and which are determined by the Commission to serve the public interest, and make any necessary or desirable revisions therein. With respect to non-carrier systems, applicants may propose access to earth stations through their own facilities or through interconnettion with terrestrial carrier networks. It is expected that the same policies and practices applicable to interconnection of privately owned terrestrial systems with common carrier facilities will also apply to the interconnection of non-carrier satellite systems with terrestrial carrier systems, unless public interest considerations call for some different treatment.

IV. Procedure for Filing and Contents of Applications

29. Pending the adoption of forms and fees and the promulgation of rules governing technical standards for domestic communication-satellite facilities, applications should be filed in accordance with the procedure and technical criteria set forth below and in the attached Appendix D. Applicants making proposals under the technical criteria specified herein may also submit alternative proposals, reflecting what would be requested if there were different technical constraints and showing how the alternative would better serve the public interest.

30. It is expected that applicants will file a complete and comprehensive proposal for the entire system, describing in detail all pertinent technical and operational aspects of the proposed system, including, among other things: the technical characteristics, capacity, weight and quantity of satellites; the proposed orbital configuration, frequencies to be used 9/ and launch vehicle; the arrangements for tracking, te the technical characteristics, quantity, types an earth stations; the coordination with terrestrial avoid potential interference, the facilities for interconnection and local distribution including interface with terrestrial facilities that are or and operated by others and the nature of any agre interconnecting carriers; the factors of system q redundancy and maintenance; the types of services and the areas and entities to be served; the const

insert 47 CFR §21.26(a).

type std.

§ 21.26 Grants without a hearing.

(a) Where an application for radio f cilities is proper on its face and, where appears from an examination of the a plication, supporting data, and s other matters as the Commission m officially notice, that (1) the applican legally, technically, financially a otherwise qualified; (2) a grant of application would not cause harmful terference to an existing station or s tions for which a construction permi outstanding within its service area; a grant of the application would preclude the grant of any pending plications; and (4) a grant of the plication would serve the public inte convenience or necessity, the Commis will grant the application witho hearing.

9/ The only frequencies available for non-Government communication-satellite services are the 3700-4200 MHz band (satellite-to-earth) and the 5925-6425 MHz band (earth-to-satellite) on a shared basis with terrestrial common carrier fixed microwave stations. Pending any additional allocations for communication-satellite services that may result from the 1971 international space conference, all applicants shall request frequencies in these bands whether or not common carrier operations are proposed.

including timing of construction, estimated investment costs by year and estimated annual operating costs for the proposed system; the estimated volumes and types of uses to be provided; proposed charges for any operations on a common carrier or lease channel basis; the nature of the agreement by participants in any proposal for joint ownership and use of facilities on a cooperative basis including the arrangements for cost-sharing and for the exercise of managerial and licensee responsibilities; the legal, technical and financial qualifications of the applicant to implement the proposal; and the estimated time schedule. Where pertinent, applicants should also address the factors discussed in paragraph 34 below. In the course of processing applications, the Commission may, of course, request additional information. Applications will not be considered as accepted for filing until the Commission issues a public notice to that effect. In giving public notice of the first proposal accepted for filing, the Commission will specify a time period for the filing of applications by applicants who desire to have their proposals considered in conjunction with the first proposal, and the time period for the filing of comments on the rule making by other interested persons. In this way, we will have before us the complex of applications and comments we believe necessary for a determination as to policies.

31. We recognize that in an undertaking of this nature applicants may not be in a position to apply now for all of the facilities ultimately contemplated, or to specify some of the design and operational details of the facilities requested for initial operation, and may desire to modify their initial specific proposals in light of subsequent developments. Obviously, considerable flexibility must be afforded. Following any grant, the Commission may from time to time request further information. We also expect to be kept promptly apprised of all pertinent developments in the implementation of the authorizations and any significant modifications in the initial proposals. However, in order that the Commission may be in a position to take definitive action, applicants should, to the extent practicable, make specific application now for construction permits for all facilities requested for the commencement of operations, and describe as fully as possible the nature of any present plans for additional facilities (including at least an outline of the applicant's long range plan for the complete system).

32. A separate application for construction permit will be necessary for each space station and each earth station, including receive/only stations, 10/ transportable stations and any separate stations used for tracking, telemetry and command. Application should also be made in the appropriate service for any terrestrial interconnection and local distribution facilities to be owned and operated by the applicant. Common carrier applicants should request certification pursuant to Section 214 of the Communications Act. Information pertinent to the entire proposal need be submitted only once, and may be incorporated by reference in the individual applications for construction permits and/or Section 214 certification. Applications for space and earth stations need not be filed on any prescribed form, but should be complete in all pertinent details and contain the information described in the attached Appendix D. Applications for interconnecting terrestrial facilities should be made on the form prescribed for the service in which the applicant is eligible.

10/ We think that receive/only stations must be licensed by the Commission if they are to be protected from interference, and also to assure the quality of service intended for end use by the public. Our authority to do so stems from the fact that facilities would be an integral link in interstate radio communication. See Sections 2 (a), 3 (b), and 301 of the Communications Act. Cf. Section 103 (e) of the Communications Satellite Act; United States v. Southwestern Cable Company, 392 U.S. 157.

33. The comprehensive proposal for the entire system may be submitted in narrative form, with attached exhibits. In addition to the general system technical information specified in paragraph of Appendix D, the comprehensive proposal should include full and detailed information as to the following:

(a) Name and post office address of the applicant.

(b) Description of overall system facilities and operation, including the arrangements for access to the system between the premises of the users and the earth stations.

(c) Services to be offered and the estimated demand for such services.

Proposed use of system

(d) For proposed common carrier operations, the prospective customers or customer classifications, the proposed charges, and the basis on which such charges are constructed.

(e) Estimated total system construction and annual operating costs (both for the commencement of operations and, to the extent practicable, for facilities to be added at some later stage), including:

Research and development
Satellites
Launching
Earth stations
  Major transmit/receive
  Minor transmit/receive
  Receive/only
  Transportable
  Tracking, telemetry, and control
  (Estimated cost totals for each type of earth station may be calculated on the basis of the estimated average cost of a station of that type. The estimated average cost should be subdivided into components such as equipment, building, land, power, etc. Specific construction cost estimates for each earth station should be submitted with the application for the particular facility.)
Terrestrial interconnection and local distribution facilities to be owned by the applicant, or obtained by purchase or lease from a terrestrial carrier or through some other type of interconnection arrangement.
Other costs (legal, engineering, management, general overhead, and miscellaneous costs)
Annual depreciation, maintenance, and operating costs, indicating the basis on which such costs are calculated.

(f) Financial qualifications of the applicant to construct and operate the proposed system.

(g) Technical qualifications of the applicant to construct and operate the proposed system.

(h) Legal qualifications of the applicant, including direct and indirect ownership data, interests in other communications media, and other business interests. (Applicants whose legal qualifications are already a matter of record before the Commission may incorporate such information by reference. New applicants are referred to FCC Forms 301 and 401 for the type of information generally considered to be pertinent.)

(i) Public interest considerations in support of a grant.

34. All applicants should further address question (a) below, and questions (b), (c), and (d) where pertinent.

(a) Whether the system will be capable of providing service to Hawaii and Alaska. We believe that national unity will be served if domestic systems have the capability of serving these two States. Hawaii is presently receiving communications satellite service via the facilities of INTELSAT, though not the type of broadcast program distribution service that has been proposed in this proceeding, and we have authorized an earth station in Alaska. Our belief that domestic systems should be capable of serving Hawaii and Alaska does not reflect any view with respect to the continued use of INTELSAT facilities. But unless the capability is built into the domestic facilities at the outset, the possibility of providing any service to these States by means of these facilities will be precluded.

its original action upon the application and reconsider the same. Upon such reconsideration, it will either grant or set the application for hearing in the same manner as other applications are set for hearing.

§ 21.26 Grants without a hearing.

(a) Where an application for radio facilities is proper on its face and, where it appears from an examination of the application, supporting data, and such other matters as the Commission may officially notice, that (1) the applicant is legally, technically, financially and otherwise qualified; (2) a grant of the application would not cause harmful interference to an existing station or stations for which a construction permit is outstanding within its service area; (3) a grant of the application would not preclude the grant of any pending applications; and (4) a grant of the application would serve the public interest, convenience or necessity, the Commission will grant the application without a hearing.

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the Commission will not consider any other application, or any other application amended so as to constitute a major change therein (as defined in § 21.33), as being mutually exclusive with the application or applications under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business 1 business day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) within 60 days after the date of the public notice listing the first prior application (with which the subsequent application is in conflict) as having been accepted for filing. An application which is subsequently amended by a major change will, for the purposes of this section, be considered to be a newly filed application. Where major changes which do not relate to the mutually exclusive aspect of a proceeding are warranted, or in the case of multiple mutually exclusive issues where the warranted major changes serve to resolve one or more of the issues but do not relate to the mutually exclusive aspect of the proceeding, such changes or amendments will not serve to alter the existing mutually exclusive status so long as new conflicts are not created. An application filed after the appointed date as specified herein will be subject to disposal in accordance with the provisions of § 21.24(d) of the rules. As an exception, however, in dealing with the frequency bands 3700–4200 and 5925–6425 Mc/s, which are shared on a coequal, primary basis by the Point-to-Point Microwave Radio Service under this part and the Communication Satellite Service under Part 25, the Commission may consider planned future expansion of existing communication-satellite earth stations as being mutually exclusive with the application under consideration if brought to the attention of the Commission by the close of business 1 business day preceding the day on which the Commission takes action with respect to the application under consideration. To qualify for such mutual consideration the earth station must lie within coordination distance of the site of the point-to-point station in question and the earth station licensee must be able to document his planned expansion to the satisfaction of the Commission. Reciprocal treatment shall be afforded stations in the Point-to-Point Microwave Service in Part 25 of this chapter.

(c) Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to a grant thereof. Such objections shall be signed by the objector. The limitation on pleadings provided in § 1.45 of this chapter shall not be applicable to any objections filed pursuant to this section. Such informal objections will be considered by the Commission but will not be accorded the formal status of petitions as set forth in § 21.27.

(d) If a petition to deny the application has been filed in accordance with § 21.27, and the Commission makes the grant in accordance with paragraph (a) of this section, the Commission will deny the petition and issue a concise statement setting forth the reasons for denial and disposing of all substantial issues raised by the petition.

[33 F.R. 13002, Dec. 5, 1963, as amended at 33 F.R. 9658, July 3, 1968]

§ 21.27 Processing of applications.

(a) All applications for instruments of authorization covered by this part and

COMSAT DISAGREES '100%' WITH GRAVEL'S CHARGES ON SATELLITE SERVICE PROPOSALS FOR ALASKA; SENATE BILL WOULD ALLOW STATES TO OWN STATIONS

A charge by Sen. Mike Gravel (R., Alaska) that the Communications Satellite Corp. "appears to be engaged in a deliberate campaign to undermine the immediate application of satellite communications" services in Alaska was rejected by Comsat Friday, Sept. 19.

Comsat Chairman James McCormack, replying to a letter from Senator Gravel, expressed "100 per cent disagreement" with the charges made by the Alaska Senator two days earlier. Mr. McCormack said that Comsat is making every attempt to work with "all interested parties. . .in an effort to bring satellite communications to your state by way of a system which is both operationally suitable and economically attainable."

Meanwhile, Senator Gravel introduced a bill in the Senate to amend the Communications Satellite Act of 1962 to permit state ownership of satellite terminal stations." In a message read to the Senate when he introduced the legislation, Senator Gravel said it would produce cost savings and other benefits.

He declared that the "era of satellite communications has been stymied, let me qualify this to say, has been perverted by traditional use of formulas predicated on the amortization of terrestrial or submarine methods of transmission and distribution."

In his letter to Comsat, the Alaska Senator complained about cost figures that have been quoted regarding the furnishing of satellite services to Alaska. He said he has been furnished cost figures which indicate that "Alaska could have a comprehensive communications system within a price range that would make economic sense. . .Comsat's regressive position is seriously impairing the developments of an adequate communications system for Alaska."

Mr. McCormack pointed out that the figures referred to by Senator Gravel were included in a presentation intended to describe "several of the many alternative system configurations which appear. . .to provide suitable communications services for Alaska from an operational standpoint."

The Comsat Chairman pointed out that William Miller, of Comsat--the target of Senator Gravel's complaint--used the term "optimum solution" in reference to several configurations ranging in cost from $10,000,000 to $20,000,000 per year. Mr. McCormack said that Mr. Miller was presenting examples of more comprehensive satellite systems which "would provide a more favorable solution to Alaska's present and future communications requirements," but that lower costs have also been stated in discussing possible system configurations.

-End-

AT&T

February 16, 1979

TO: All Document Selectors and
Paralegals at NTIA

The purpose of the Wrap Up Sheet is to help us (AT&T) determine whether or not we have received from the Plaintiff all documents requested. Effective February 20, 1979 all Wrap Up Sheets should include the following:

(1) Indicate where the file or boxes came from. Labeling on the file or box may not always be sufficient. It may sometimes be necessary to identify specifically the contents of the file drawer in order to determine its origin.

(2) List the names associated with all personal files.

(3) A brief but detailed description of file.

(4) List the document request that the file appears to respond to. Attached is a simplified version of the document request for the Department of Commerce. It is suggested that this be used as a point of reference to enable you to comply with the above request.

Arline E. Coleman/tmh

Arline E. Coleman
Field Administrator
77-8E-33

AEC:tmh

Attachment

US v. AT&T
OUTLINE OF DOCUMENT DESIGNATION FOR THE DEPT. OF COMMERCE

REQUESTS: PARA. ITEM#:

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
E. B. CROSLAND, VICE PRESIDENT
393-3911

Dear Tom -

Attached is a copy of our year statement which we released following our discussions today.

Warmest personal regards -

Sincerely,
Ed

Oct. 15, '69.

Information Department
American Telephone and Telegraph Co.
195 Broadway, New York, New York 10007

For further information, please call:
James M. Freeman
212 393-3323

FOR IMMEDIATE RELEASE: Wednesday, October 15, 1969

(The following statement on domestic satellites was released today by the American Telephone and Telegraph Company.)

AT&T believes the wisest public policy at this time would be to permit any organization or group interested in establishing a domestic satellite system -- including the networks -- to apply for a license to establish and operate such a system.

We believe this approach would allow flexibility and incentive for creative private initiative, and would provide the most appropriate means for an orderly development of domestic satellites.

We have not had an opportunity to study the new CBS plan for a satellite system for the broadcast industry, but it would appear to merit consideration in the context of a careful appraisal of the most efficient use of the frequency spectrum and orbit space, as well as other relevant technical and economic factors.

Looking to the future, AT&T anticipates that, when it makes good technical and economic sense to do so, it will seek authorization to use satellites in its own operations.

Our recent studies indicate that satellite costs currently may be less favorable compared to terrestrial costs than appeared to be the case some years ago.

domsat

Justice

July 1, 1969

TO: Jon Rose

FROM: Tom Whitehead

This is the area I referred to in which legal problems abound that you might want to get involved in. Don Baker from Justice will be working on it with me, but primarily from the aspect of the feasibility of viable competition. The legal problems I have in mind relate to finding a device whereby ownership and risk are retained in the private sector while no right to continue operation is implied after the end of a trial period.

cc: Mr. Whitehead ✓

CTWhitehead:ed

July 1, 1969

MEMORANDUM FOR MR. FLANIGAN

Attached is a memorandum on the domestic communications satellite issue and a proposed memorandum for you to send to Chairman Hyde. The Hyde memo is necessary to get him off the hook in postponing Commission action on their draft order.

I have the necessary people identified and have two people detailed to me to work on this issue. I think we can come up with a very credible and impressive counterproposal.

Hyde is aware in a general way of my reservations and I would propose to use a variation of the attached memorandum as a talking paper for the group to get started with. It is not clear whether we will evolve a joint position that the Commission can incorporate as an order, or whether our output will take the form of a formal letter to the FCC; we will just have to wait and see how things work out.

If you have no objection, I propose to call the first formal meeting of this group for next Monday and to allow Hyde to make public the contents of the memorandum you sent to him.

Clay T. Whitehead
Staff Assistant

Attachments
cc: Mr. Flanigan
Mr. Hofgren
Mr. Trent
Mr. Rose
Mr. Whitehead
Central Files

CTWhitehead:ed

THE WHITE HOUSE

WASHINGTON

July 1, 1969

MEMORANDUM FOR MR. FLANIGAN

The Federal Communications Commission has drafted a proposed Order outlining interim policies regarding the establishment and operation of communications satellite systems for domestic services. Briefly, this Order would:

- Authorize a single multi-purpose system to incorporate standard voice services, television distribution, and certain specialized data services.

- Establish an Advisory Committee to the Commission, consisting of the major competitors for common-carrier and specialized satellite systems, for the purpose of developing a plan for the technical and operational design of the pilot system.

- Designate Comsat as Planning Coordinator for the development of this plan.

- Defer all decisions on potential ownership of pilot or operational systems, or segments thereof, until the technical design and operational plans are submitted to and approved by the Commission.

I believe we should oppose the Commission's approach to this issue, and seek an interim policy position on domestic satellites which is more definitive and which promotes greater innovation and flexibility on the part of the private sector. There are two basic reasons for doing so at this time. First, there are a number of basic objections to the Commission proposal when it is examined in the context of U. S. communications generally. Second, this is probably the only major decision for some time that gives us the leverage necessary to promote a re-examination of the need for extensive common carrier regulation of all U. S. communications by the FCC and to stimulate a more vigorous and innovative competition in the communications industry.

Background

The United States presently enjoys the most sophisticated, effective network of communications facilities and services of any nation, both common carrier and private. Because of our highly developed terrestrial systems, the role of communication satellites (or any new technology) in providing U. S. domestic services is both less striking and less easily discerned than is the case in other countries where satellites offer clear economic benefits.

Nevertheless, there is ample evidence that satellite technology could find many economic applications in the U. S. Specific proposals and cost analyses show cost or service advantages for some specialized services such as distribution of TV programs to local broadcast stations, communication with and between ocean vessels and high-speed aircraft, and meteorological data collection and exchange. Satellites may also enjoy a slight cost advantage for long distance carriage of "bulk" message and data traffic, though this is less certain at this time. Due to these generally favorable prospects, several major corporations (AT&T, Comsat, ABC, GE) as well as public-interest groups (Ford Foundation) have indicated a willingness to undertake the risk of establishing domestic satellite systems for various specialized or multi-purpose services.

Despite this interest and promise, incorporation of communication satellites into the highly-developed U. S. communications industry faces two serious impediments. First, wherever satellites appear competitive with existing terrestrial technologies, they pose a major uncertainty for regulated common carriers and threaten to weaken both existing and future rate bases. Second, FCC and Congressional policies make artificial distinctions between satellite and terrestrial technologies with respect to both ownership rights and public-interest objectives, and this raises both administrative and economic barriers to potential investors and users.

Evaluation of the FCC Approach

The FCC approach to this policy problem has the following problems:

(1) It would effectively lock the U. S. for the foreseeable future into a multi-purpose operation typical of common-carrier systems and would therefore impede the development and application of satellite technology for the specialized services for which it appears most promising in domestic U. S. communications.

(2) While the FCC cites the need to learn more about satellite technology and economics in domestic communications applications, the proposed Order precludes learning anything very significant by foreclosing the very kinds of systems we know least about and yet appear to offer the most potential.

(3) It precludes the industry from active exploration of the interplay of economics, technology, and operations which would stimulate active development of the potential for new uses and new services, by insisting on finding a way to accommodate the new technology to existing uses and operations and by forcing design of the system before the industry knows how ownership rights are to be established.

(4) It promises a "least common denominator" compromise solution by, in effect, requiring consensus among a consortium of mutually hostile interests, thereby extending to the domestic scene the demonstrated faults this approach has produced internationally.

(5) Finally, it places the burden of risk almost completely in the public sector rather than the private where it is appropriate, by insulating existing common carriers from "unfair competition" and by assuring adequate rate of return for the satellite system.

Action

We should inform the FCC that the Administration considers this an important policy issue and expects to have something to say on the matter in a short period of time. We should immediately

Background

The United States presently enjoys the most sophisticated, effective network of communications facilities and services of any nation, both common carrier and private. Because of our highly developed terrestrial systems, the role of communication satellites (or any new technology) in providing U. S. domestic services is both less striking and less easily discerned than is the case in other countries where satellites offer clear economic benefits.

Nevertheless, there is ample evidence that satellite technology could find many economic applications in the U. S. Specific proposals and cost analyses show cost or service advantages for some specialized services such as distribution of TV programs to local broadcast stations, communication with and between ocean vessels and high-speed aircraft, and meteorological data collection and exchange. Satellites may also enjoy a slight cost advantage for long distance carriage of "bulk" message and data traffic, though this is less certain at this time. Due to these generally favorable prospects, several major corporations (AT&T, Comsat, ABC, GE) as well as public-interest groups (Ford Foundation) have indicated a willingness to undertake the risk of establishing domestic satellite systems for various specialized or multi-purpose services.

Despite this interest and promise, incorporation of communication satellites into the highly-developed U. S. communications industry faces two serious impediments. First, wherever satellites appear competitive with existing terrestrial technologies, they pose a major uncertainty for regulated common carriers and threaten to weaken both existing and future rate bases. Second, FCC and Congressional policies make artificial distinctions between satellite and terrestrial technologies with respect to both ownership rights and public-interest objectives, and this raises both administrative and economic barriers to potential investors and users.

Evaluation of the FCC Approach

The FCC approach to this policy problem has the following problems:

(1) It would effectively lock the U. S. for the foreseeable future into a multi-purpose operation typical of common-carrier systems and would therefore impede the development and application of satellite technology for the specialized services for which it appears most promising in domestic U. S. communications.

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Action

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establish a working group with representation from DTM, CEA, Justice, and Commerce (with the FCC as an observer or member at their option) to attempt to work out an alternative approach. Our objectives would be to:

- foreclose (at least temporarily) the automatic extension of common-carrier regulatory policies to satellite communications until more experience is gained in domestic applications.

- minimize the regulatory impediments to technological and market innovation.

- use this approach as a wedge to encourage a more vigorous and innovative competition among communications organizations.

It is important to recognize that this is probably our last foreseeable opportunity to use a specific decision as a device for challenging the need for regulation as arbitrary and extensive as evolved by the FCC. This particular case is appealing because it goes to the basic principles of regulation and to the heart of the industry structure fostered by the FCC, yet it is not such a large economic issue that existing interests are severely threatened. Finally, there is a very good chance our approach would receive acceptance: the FCC is in a very awkward (and weak) position; we can offer a significant change from the status quo that is not patently adverse to ATT, Comsat, and other major interests; and there is so much uncertainty in the FCC and the industry that a strong Administration proposal would in all likelihood dominate public discussion. Finally, even if we are not able to sell a significantly improved approach, we can go on record in favor of clearly desirable end objectives.

Clay T. Whitehead
Staff Assistant

July 1, 1969

MEMORANDUM FOR

Mr. Rosel Hyde
Chairman
Federal Communications Commission

Federal policy towards applications of communications satellite technology is a most important issue for which the President and the Federal Communications Commission both have responsibilities. In our review of Federal policies relating to the communications industry, it has become clear that prompt action is desirable. It is also important that our initial policies encourage full exploration of the potential of this new technology and maximum feasible learning about the economics and technological role satellites can play in our already highly developed communications environment.

Toward these ends, I am asking a small group from appropriate agencies to examine this question over the next few weeks. I invite your participation in whatever capacity you deem appropriate. Our purpose will not be to address the merits of various applications and filings before the FCC, but to consider appropriate national policies.

Peter M. Flanigan
Assistant to the President

cc: Mr. Flanigan
Mr. Hofgren
Mr. Trent
Mr. Rose
Mr. Whitehead
Central Files

CTWhitehead:ed

FCC

THE NEW YORK TIMES, THURSDAY, APRIL 10, 1969

Justice Department Supports Expansion of CATV

By CHRISTOPHER LYDON
Special to The New York Times

WASHINGTON, April 9 — The Justice Department urged today that cable television be allowed to flourish as a competitive medium against newspapers and television.

In the far-reaching debate over the place of community antenna television systems in American communications, the department's antitrust division took a strong stand with the cable advocates against the better-established media.

In a letter to the Federal Communications Commission, which is considering new rules for cable TV, Richard W. McLaren, chief of the antitrust division, described the system as "the most promising means of achieving greater competition and diversity in local mass media communications."

Cable companies should be encouraged to produce programs, Mr. McLaren said, and should be allowed to sell advertising to pay for independent productions.

He also urged that television stations and newspapers be barred from controlling cable systems in their own markets.

The debate over cable television reflects its rapid development.

Community antennas were originally built to help outlying communities get better reception.

The coaxial cable that brings signals into the home can carry up to 20 channels, far more than can be received off the air on normal very high frequency stations. Thus cable is being recommended as a means of diversifying programs for big-city audiences even where reception is not difficult.

About 2,100 cable systems serve three million homes, for the most part in small communities. Sections of New York, however, are now being wired for cable television, and in many other big cities, cable companies are competing for franchises.

A Competitive Threat

Commercial broadcasters, sensing a competitive threat, have urged the F. C. C. to bar advertising from the programs that cable companies produce. At the same time, the established media in many cities have sought to buy their own cable systems as a hedge against competition.

The Justice Department urged the F. C. C. to "permit 'market forces' largely to determine the outcome of the probable competitive struggle between CATV and existing television stations."

The department suggested that the F.C.C.'s earlier regulation of cable TV had not been based simply on the public interest but on "a concern that CATV constitutes an economic threat to the local television stations, particularly to the marginal U.H.E. stations."

The battle between the two television systems, the department said, "must be resolved on the basis of the public interest in an efficient over-all communications system, rather than the economic dificulties (actual or imagined) of those with vested interests in established communications technology."

Under current F.C.C. regulations, cable companies are restricted from importing into big cities competitive programs that are being broadcast out of town.

The Justice Department urged the F.C.C. to relax these restrictions, but it did not specify details.

Cable operators feel that ultimate economic success depends on their freedom to distribute in any given city all the signals they can gather off the air from distant transmitters. They have acknowledged, however, that some arrangement must be made to pay distant broadcasters for the programs they distribute.

The department said that wherever TV stations and newspapers owned cable systems in their home cities, the combinations should be broken up. It said, however, that newspaper and television companies might be allowed to own cable companies in other markets. It added that independent radio companies need not be barred from buying cable systems, even in their own markets.

Most cable companies charge consumers an installation fee and a monthly subscription fee, about $5 a month.

The Justice Department said that cable systems should be allowed to seek further revenue from advertising, not only to support original programing but also to develop advertising markets for select, rather than mass, audiences.

Through such specialized audiences, the department said, CATV could provide "a new advertising outlet for smaller local firms which may not be able to afford the rates of existing TV stations."

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals.	)	Docket No. 18397

COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE

RICHARD W. McLAREN
Assistant Attorney General

DONALD I. BAKER
DANIEL R. HUNTER
PETER C. CARSTENSEN
Attorneys,
Department of Justice,
Washington, D. C. 20530

> [W]here a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors. Customers of any new carrier should also be afforded the option by the local carrier to obtain local distribution facilities under reasonable terms set forth in the tariff schedules of the latter. (¶67).

CONCLUSION

For all the above reasons, the Department of Justice urges that the Commission adopt the proposals of the Common Carrier Bureau, subject only to the clarifications and additional measures suggested in this Response. Prompt implementation of these proposals will not only greatly aid in the rapid development of a flexible, multifaceted modern communications system for the nation, but will also be a major step forward in effectuating the goal of combining the maximum amount of useful competition with the minimum degree of governmental control necessary to regulate the natural monopoly aspects of the communications industry.

Respectfully submitted,

RICHARD W. McLAREN
Assistant Attorney General

Donald I. Baker

Joel Davidow

Attorneys
Department of Justice

October 1970

DEPARTMENT OF JUSTICE

FCC
Justice

6/14/70

Tom -

I THOUGHT THIS MIGHT BE OF SOME PASSING INTEREST TO YOU. HOWEVER, AS YOU CAN SEE, IT REPRESENTS A FAIRLY UNUSUAL SITUATION.

FCC

Justice

DIBaker:mth

July 10, 1970

File: 60-211-0

Clay T. Whitehead
White House Staff

Donald I. Baker, Deputy
Director of Policy Planning
Antitrust Division

Increases in FCC License Fees

The question is what position you should take on the recent increase in FCC license fees.

Basically, I believe regulatory agencies should "pay their own way" - i.e., that the costs of regulation should fall on the regulated enterprise and/or the user of regulated services rather than on taxpayers generally.

The following is a quick comparison, from published sources, of what is done by a variety of regulatory agencies with respect to fees. Some (such as the Comptroller of the Currency) fully pay their way with fees, most others do not. However, there appears to be a trend toward increased self-sufficiency (as illustrated by the SEC).

APPENDIX

For Policies of Various Federal Regulatory Agencies

Atomic Energy Commission

It has some form of fee charged when they license a company to use their matericals. In fiscal 1969, the Commissioner returned $12 million from fees as compared with a budget of $2.6 billion. [1969 Annual Report p.87]

Civil Aeronautics Board

In fiscal 1969 the CAB collected $1 million in excess of their $9.9 million budget operating costs; in addition, the agency collected $79,000 in civil penalties assessed against carriers. [1969 Annual Report p. 52]

Comptroller of the Currency

His office had expense of $21.5 million and revenues of $23.8 million derived from "semi-annual assessments" ($20.65 million), examinations and investigations fees ($1.7 million), reports sold to the public ($807,647) and "revenue from investments" ($155,749). [1967 Annual Report p.23]

Federal Home Loan Bank Board

not disclosed

Federal Maritime Commission

As opposed to a budget of $3,7 million, they recovered $107,401 in fees derived from: freight forwarder license fees ($8,700), fines ($87,810), and "refunds" ($1,200). [1969 Annual Report, appendix]

Federal Power Commission

In fiscal 1969 the Commission collected fees and fines, etc. that totalled $8.2 million or 52 per cent of their annual budget of $15.9 million. They returned to the Treasury $78,000. Their collections came from (1) licensee "collections" of $6.1 million and (2) natural gas certificates application fees of $2.2 million. They claim that these collections "reimbursed the Commission." [1969 Annual Report p. 5]

Federal Reserve Board

not disclosed

Federal Trade Commission

not disclosed

Interstate Commerce Commission

In fiscal 1969 the Commission collected $1.3 million in fees; they then instituted a rule-making procedure to raise the fee level so that they would collect an estimated $5.5 million. They estimated that this fee schedule would raise an amount equal to "one-half the average direct costs incurred by the Commission." [1969 Annual Report, p. 105]

Securities Exchange Commission

The SEC collects fees for (1) registration of securities issued; (2) qualification of trust indentures; (3) registration of exchanges; (4) brokers and dealers who are registered with the SEC but who are not members of a registered securities association (i.e., NASD) and (5) certification of documents filed with the SEC.

The SEC covered its expenses through recent increases in fees.

Year	Appropriation	Fees Collected	Per Cent of Appropriation	Net Cost of SEC to Taxpayer
1967	17.55m	9.767m	56	7.782m
1968	17.73m	14.622m	82	3.107m
1969	18.62m	21.996m	118	(3.372m) (profit)

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DEPARTMENT OF JUSTICE

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- ☐ AS REQUESTED
- ☐ NOTE AND FILE
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REMARKS

FROM: NAME	BUILDING & ROOM	EXT.	DATE
D. J. Baker			8/10

6/7/70 Justice

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of	)	
An Inquiry Relative to the Future Use of the Frequency Band Between 806 - 960 MHz	)	Docket No. 18262

MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF PETITIONS FOR RECONSIDERATION AND REQUESTS FOR STAY

RICHARD W. McLAREN,
Assistant Attorney General,

DONALD I. BAKER
BARRY GROSSMAN
ALAN A. PASON
Attorneys,
Department of Justice
Washington, D. C. 20530

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of	)	
	)	
An Inquiry Relative to the	)	
	)	Docket No. 18262
Future Use of the Frequency	)	
	)	
Band Between 806 - 960 MHz	)	

MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF PETITIONS FOR RECONSIDERATION AND REQUESTS FOR STAY

As the executive agency charged with responsibility for enforcing the antitrust laws and protecting generally the public interest in a competitive society, the Department of Justice submits this memorandum in support of the Petitions for Reconsideration and Requests for Stay of the First Report and Order in Docket No. 18262.

The thrust of the Commission's action in Docket Nos. 18261 and 18262 is to meet the immediate "and more importantly" the future needs of the land mobile services, by allocating "substantial additional spectrum space" to such use. In order to meet the immediate pressures of urban congestion, the Commission has made available to all land mobile users a relatively small portion (12 MHz) of the lower seven UHF television channels (470-512 MHz).

Of that allocation, radio common carriers can expect to receive only a fraction of the space made available. The Commission has also allocated 115 MHz of spectrum space in the 806 - 960 MHz frequency range to land mobile services. "Private services" have been allocated 40 MHz of this space. The development of the remaining 75 MHz of spectrum (806 - 881 MHz) -- that set aside for common carrier services -- has been limited by the First Report and Order to wire-line telephone companies. Radio common carriers are thus foreclosed from participating in the development of this block of spectrum.

We believe that the prior allocation of this spectrum space to wire-line telephone companies, in advance of the development of technology to utilize it fully, is subject to serious policy objections.

The Commission is clearly faced with a serious problem of burgeoning demands from many quarters for spectrum space. Not only do land mobile users seek space to relieve current congestion, but the future of this service promises more license applications, an increased number of transmitters, and consequently, increased requirements for spectrum.

In response to the important problem of the long-term accommodation of these users, the Commission has invited

> A.T.& T., as well as others, [to] undertake a comprehensive study of market potentials, optimum system configurations and equipment design looking toward the development of an effective, high-capacity common carrier service in the band 806 - 881 MHz.

The Commission recognized that it was obvious from the record before it that

> much additional study and development are needed before answers can be found to all the technical and operational questions relevant to the optimum use of this spectrum space by the land mobile service.

We submit that, considering the present state of the art, it is important to encourage as broad a group as possible of innovative equipment designers and developer-manufacturers to work toward the resolution of this complex problem. Prior exclusion of radio common carriers from participating in the development and future use of the 806 - 881 MHz band is inconsistent with that goal. Such action may seriously dilute incentives for the radio common carrier industry and its equipment suppliers to make potentially valuable and important technical contributions. Consequently, we suggest that an exclusionary course of action at this time, when so few hard and fast facts exist upon which to make far-reaching long-term

decisions, is not in the best interest of achieving the most efficient and effective overall solution of the problem. Moreover, since the decision with respect to the development and use of the 806 - 881 MHz band is likely to have a significant impact upon the future growth and thus the very viability of the radio common carrier industry as a competitor of the Bell and independent telephone systems, we think it doubly important that the Commission refrain from any action that might prematurely lessen competition.

The role of competition as a tool for serving and protecting the public interest is well recognized. E.g., United States v. Radio Corp. of America, 358 U.S. 334 (1959). We believe, therefore, that its utility in that respect warrants every reasonable effort to preserve it. Reserving decision as to any exclusive allocation of the 806 - 881 MHz band until the facts have been more fully explored, thereby holding open the possibility of a competitive use of the band, can only stimulate the fullest development of that spectrum range.

In view of the potential importance of these issues, the Commission should not take any exclusionary action which at this point might be considered to be a preconceived

idea of what yet undeveloped technical systems will most effectively meet maximum public demands for land mobile service while utilizing the least amount of spectrum. Such vital issues should not be prejudged. A thorough and complete study of the "optimum use of this spectrum space", presenting the views and proposals of all interested parties would be highly desirable, as would fullest competition in the development of new technology. Such an approach may lead to spectrum conservation and may demonstrate that a "competitive use" of the band is both feasible and efficient. We do not see how postponing the final determination of a definitive allocation until after further research and development in which all interested and competent parties are truly encouraged to participate can have a detrimental effect upon a satisfactory resolution of the difficult spectrum allocation problems which face the Commission in this area. Cf. Domestic Satellite decision, Dkt. 16945, (March 24, 1970). On the contrary, maximizing the incentives for all interested parties to contribute their efforts to the solution of these problems would appear to be the effective way for the Commission to carry out its great mandate "to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges". Communications Act of 1934 §1, 47 U.S.C. §151.

CONCLUSION

For the reasons above-stated, the Department of Justice supports the Petitions for Reconsideration and Requests for Stay filed in Docket No. 18262; and recommends that the Commission amend the First Report and Order so that all interested parties have equal opportunities with respect to development of the 806 - 881 MHz band for domestic land mobile use.

Respectfully submitted,

RICHARD W. McLAREN
Assistant Attorney General

DONALD I. BAKER

BARRY GROSSMAN

ALAN A. PASON
Attorneys, Department of Justice

Dated: August 7, 1970

See reply

October 22, 1970

August 17, 1970

MEMORANDUM FOR

Don Baker
Chief of Evaluation Section
Antitrust Division
Department of Justice

Until I get a lawyer on board, I am going to take you up on your offer of assistance. In particular, I have three questions of varying legal content that I think you might be able to help me with.

First, I hear a lot about due process and would like to know what this means in terms of constraints on the FCC's actions and to what extent OTP is bound by such considerations. Secondly, I would like to know what the courts have said about competition vs. regulation in regulated industries and, in particular, to what extent a regulatory agency is free to regulate by simply "not regulating" but merely monitoring. Finally, I would like to know what the interactions between antitrust law and regulatory law are and how they are handled. Is the responsibility for conforming to the antitrust statutes in the hands of the Commission or is it in Justice?

Finally, could you please send me a good primer on antitrust policy and practice?

Clay T. Whitehead
Special Assistant to the President

cc: Mr. Whitehead
Central Files

CTWhitehead:jm

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DEPARTMENT OF JUSTICE

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- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

This is for the meeting this afternoon.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
D. I. Baker			10/2

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

IN THE MATTER OF ESTABLISHMENT OF POLICIES FOR POINT-TO-POINT COMMON CARRIER MICROWAVE SERVICE	}	DOCKET NO. 18920

RESPONSE OF THE UNITED STATES
DEPARTMENT OF JUSTICE

The Commission has requested the comments of interested parties on questions concerning authorization of new common carriers of point-to-point microwave service.

In general, we believe that the proposals set forth in the Commission's Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making and Order adopted July 15, 1970 (hereinafter "Notice of Inquiry") represent a forward-looking and imaginative way of dealing with the new and rapidly growing communication needs of the period ahead. The solution proposed in the Notice of Inquiry would rely considerably on competition as a source of technical and commercial innovation; this reliance, we believe, is sound as a matter of policy and is consistent with the law, as developed by the courts and the Commission in the decisions discussed below. It is of course important that the principle of competitive innovation not be frustrated by an endless

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20054

UNITED STATES

COMMENTS OF THE DEPARTMENT OF JUSTICE

In response to Public Notice 51094, dated July 1, 1970, the Department of Justice hereby submits its comments on "A Technical Analysis of The Common Carrier/User Interconnections Area", a Report of the Panel on Common Carrier/User Interconnections, Computer Science and Engineering Board, National Academy of Sciences (the "Panel").

These comments are directed to those findings and conclusions of the Panel which bear on the general policy decisions which the Commission must make in order to implement the Carterfone decision / in the area of communications common carrier/user relationships.

The principal conclusions of the Panel may be briefly summarized: uncontrolled interconnection can cause harm to personnel, network performance and property; and there are essentially two ways of preventing such harm, ie., the use of present tariff criteria which

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/ 13 F.C.C. 2d 420

specify that the carrier provide connecting arrangements and network-control signaling devices, and the establishment of standards and enforced certification of user-supplied equipment and personnel.

Because the Report of the Panel was prepared and submitted in wake of the Carterfone decision, we believe that its conclusions should be weighed with the objectives of that decision in mind. Carterfone recognized that the public interest requires greater freedom of access to communications common carrier networks than has existed in the past. Given the ability to interconnect with communications networks without lease or purchase of carrier provided equipment, users would be free to turn to other sources of equipment, including well recognized manufacturers and newly emerging suppliers. To say that such freedom would stimulate competition in this area, with its ultimate innovative benefits to those who use communications networks, as well as the carriers themselves, is clearly an understatement. Competitive stimuli have proliferated in the form of technological advancements and diversification of the industries making

extensive use of the networks, to the point that removal of undue restraints on interconnection should be more aptly characterized as the elimination of an obstacle than the creation of a stimulus. All of these concepts are embodied in the Carterfone decision, and should be recalled in evaluating the report of the Panel.

In view of Caterfone, it would appear that the conclusion of the Panel that present tariff criteria and carrier-provided connecting arrangements are an acceptable way of assuring network protection should be recognized as solely a technical conclusion; indeed, the mission of the Panel and the basis of its expertise do not justify any broader interpretation of the word "acceptable". Clearly, the adoption of this method of assuring network safety and reliability would, as a matter of overall policy, be unacceptable in terms of opening access to the network to those who wish to utilize harmless connecting arrangements, including network-control singaling devices, manufactured by others than carrier affiliates.

On the other hand, the conclusion of the Panel that the establishment of standards and enforced certification of user-supplied equipment and personnel constitute and acceptable way of assuring network protection, while probably intended as technical conclusion, could well be the basis for Commission policy favoring broader interconnection rights. A standards and certification program would, by its nature, open the interconnection area to all qualified participants, and could be the basis for implementation of the Carterfone doctrine.

The standards and certification program envisioned by the Panel encompasses a qualified standards organization, type certification of equipment, certification of installation and maintenance technicians, and, in general, assurance of continued reliability of devices designed, at least in part, to protect the network. The Panel concluded that the program must be nationwide in scope, and that authority for the program must rest with the "federal agency responsible for the tariffs". Further, the Panel was of the view that partial implementation of a plan would provide insufficient protection and

that a "careful step-by-step" effort is necessary to ensure the success of such a program. Self certification by manufacturers was deemed unsatisfactory.

The approach of the Panel to a standards and certification program is laudable for its awareness of the fact that a haphazard plan could result in confusion and an unacceptable level of miscalculation and error in the implementation of liberal interconnection arrangements. However, the Panel did not present the reverse side of the coin in this area, i.e., that extensive delay or an overly cautious approach to such a program could frustrate its objectives by unduly hindering the competitive efforts that manufacturers not affiliated with the carriers are presently capable of making. Inordinate extension of the present tariffs that limit the provision of connecting arrangements and network-control signaling devices to the carriers could drive many, less financially secure manufacturers from the field. Extension of their monopoly in this area could enable the carriers to achieve such a long lead over potential competitors that the objectives of the Carterfone

decision might never find their full fruition. Accordingly, we believe that time is of the essence in the development of the type of program that the Panel found acceptable in terms of network protection.

Since the Commission has the opportunity to develop a standards and certification program de novo, it is in the position to channel that program along a procompetitive path, and indeed should consider itself bound to do so by Carterfone. We think it important, from a competitive standpoint, that standards be developed with a view toward maximizing the number of ~~potential~~ qualified manufacturers that could potentially meet them. The standards developed should take account of the abilities of those who wish to meet them; in particular, undue market power in a limited number of potential competitors, including patent rights, should not be transferred to the interconnection area by the standards. _/ Since interconnection will insure to the benefit of users, carriers and competing manufacturers, it seems desirable to consider no technical requirement

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_/ Encouraging the transfer of market power to new areas when given the opportunity to prevent it would be anamolous indeed in light of International Salt Co. v. United States, 332 U.S. 392 (1947) and other cases under the antitrust laws which underscore the undesirability of such conduct.

as inflexible. For example, if the standards organization were to find a particular technical obstacle to the entrance of a number of competitors into the interconnection area that is a function of network characteristices it might wish to recommend a minor change in the network to accomodate its removal.

One specific issue in the general interconnection area has concerned the provision of network-control signaling devices. It seems obvious from the report of the Panel that a program of standards and certification can provide the degree of protection necessary to the network in the signaling area. The Panel specifically notes that the standards it envisions as providing acceptable network protection include network-control signaling. _/ Indeed, in this area, an abbreviated program is a good possibility, for the Panel recognizes the experience of manufacturers competing with the supply affiliates of the carriers when it notes that "general experience with telephones made by reputable manufacturers of telephonic equipment has indicated that the quality of network-control signaling units is on a par with those supplied by Bell." _/ Since the standards and certification

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_/ Report, page 8

_/ Report, page 36

program envisioned by the Panel encompasses installation and maintenance, there remain no substantial arguments against its applicability to network-control signaling.

We also note that the Panel concluded that the newer touch tone network-control signaling devices do not present the same dangers to the network as do dial-pulse systems. The Panel noted that the failure of a touch tone device is not interpreted by central offices as a wrong number, and will more likely result in a register time-out. The Panel considered this occupation of central office facilities "relatively insignificant" as a harmful effect when compared to those due to malfunctioning rotary dials. _/

These conclusions indicate that there is little case for perpetuating a tariff which limits the provision of network-control signaling devices to carriers. The conclusion with regard to the lessened dangers of touch tone devices certainly indicates that, at least with regard to these devices, potential competitive benefits

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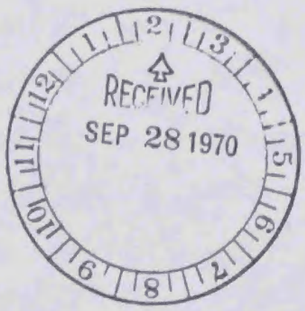
_/ Report, page 36

of freer interconnection weigh more heavily in the balance against potential harm. Indeed, the tough tone discussion in the report has bearing on the entire standards and certification program, for it suggests that such a program must be flexible enough to take account of varying threats to the safety and performance of the network, and must be particularly capable of prompt relaxation of restrictions that become outdated.

In conclusion, we think that the report of the Panel establishes that the present tariffs which limit the provision of connecting arrangements and network-control signaling devices to the carriers, and thereby inhibit competition in this area, are unnecessary to assure protection of the network. The type of standards and certification alternative presented by the Panel, if implemented without delay and channeled along pro-competitive paths, could be the basis for providing freer interconnection and real competition in this field.

Respectfully submitted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DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. GEORGE MANSOR		O.T.P.	
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- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
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- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

GEORGE - HERE ARE OUR COMMENTS (VERY TENTATIVE) ON THE NATIONAL ACADEMY/ INTERCONNECTION STUDY, RATHER LATE. DO YOU HAVE ANY VIEWS.

FROM: NAME	BUILDING & ROOM	EXT.	DATE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

Justice

OFFICE OF THE DIRECTOR

October 1, 1970

Dear Don-

In re: Comments of U.S. Dept. of Justice
on Public Notice 51094

I have reviewed the draft and think that it adequately reflects my views, in that it allows interconnect through carrier provided connecting arrangements, or by virtue of adequate test and standardization. With respect to the latter approach there is an implication that a Government agency, presumably the FCC, would provide adequate testing facilities and standards. Unfortunately, this would inevitably lead to bureaucratic delays, but this is an administrative matter and not germane to the real issues. If delays should become a problem, permission may be granted to industry to act as a testing agency on the FCC's behalf to assure timely action.

Sincerely,

George

George F. Mansur, Jr.

cc: Mr. Whitehead ✓

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

OFFICE OF THE DIRECTOR

October 1, 1970

Dear Don-

Re: Computer Inquiry, Dkt. 16979

There is a subtlety with respect to the boundary between data processing and message switching with which you may or may not be aware. I would like to briefly discuss it below so that you can clarify your comments to the FCC, if you see fit.

The key concept discussed here is in the formating of messages for transmission. The concept of store and forward implies to me at least, that a message (data stream) may be temporarily stored and subsequently forwarded without alteration of the format of the data stream. However, those in the business of message switching may wish to alter the format of the sequence, or the character of the data stream without changing its information content for one of two reasons:

1. It may be desirable to reformat data for the process of multiplexing with other data streams, or to remove housekeeping data not necessarily associated with the information to improve the transmission efficiency.

2. It may be appropriate for those in the business of message switching and transmission to offer a related service of formating messages in accordance with standards necessary to interface different makes and models of computers. It is not clear in my mind incidentally whether such "standardization" of data format is data processing or message switching.

It appears that the distinction between data processing and message

switching could properly be based on whether or not the information content of the message is altered in contrast to simply altering the structure or format of the message.

Sincerely,

George

George F. Mansur, Jr.

cc: Mr. Whitehead

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. GEORGE MAGUSON			
2.			
3.			
4.			

- ☐ SIGNATURE
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- ☐ COMMENT
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- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

FOR YOUR INFORMATION (AND TOM'S), THESE ~~[illegible]~~ ARE OUR ANSWERS TO SOME QUESTIONS COMMISSIONER JOHNSON ASKED AT THE COMPUTER INQUIRY.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
[signature]			

SEP 2 1 1970

RWMcL:DIB
82-16-287

Honorable Dean Burch
Chairman
Federal Communications
Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: Computer Inquiry, Dkt. 16979

Dear Mr. Chairman:

We offer the following comments on the questions which you submitted to us at the close of the oral argument on behalf of Commissioner Johnson who was absent at the time:

Question 1. Do you agree with the Commission's deferral of matters of privacy, interconnection, and the need for augmented common carrier services--issues which were raised initially in this proceeding?

Answer We believe that it is appropriate for the Commission to handle such questions as privacy, interconnection and new common carrier services in the context of other proceedings rather than through continuation of this particular inquiry. To us this seems a matter for the Commission to resolve on the basis of the orderly operation of its processes. All of these issues are of immediate economic importance and, with the possible exception of the privacy issue, they are clearly subject to the Commission's jurisdiction.

We think these are important, live issues; and we urge the Commission to press on with them with all due dispatch. The use of other docketed proceedings (e.g.,DKT. 18920) seems consistent with this goal.

Question 2. Do you believe the safeguards on anticompetitive activities by common carriers in this field are adequate? What specific surveillance activities would you recommend?

Answer. Requiring common carriers to conduct non-regulated data processing activities through separate, segregated affiliates (as originally proposed by the Department of Justice in its March 1968 brief */) seems an appropriate way to handle the problem. Therefore, we support the Commission's proposed solution in its Tentative Decision together with certain rather modest refinements suggested by us during the oral argument to deal with certain competitive problems. For your convenience, we repeat the substance of what we said in the oral argument on these points.

These competitive problems arise from the carrier over-paying for services from an unregulated affiliate; or for the affiliate under-paying for services from the carrier; or from the carrier using its monopoly position to discriminate against competitors of the affiliate.

The first problem occurs when the carrier buys computer services from its affiliate. If the carrier overpays for its computer services, it thereby transfers revenues from the communications rate payers to the data processing affiliate. In our 1968 brief, we recommended that this problem be avoided by barring all such transactions between the carrier and its affiliate (see pp. 80-82, 84). In other words, the affiliate

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*/ Response of the United States Department of Justice, Dkt. 16979, (March 5, 1970) at pp. 71-84.

would have to survive by offering remote access and other data processing services to the general public. We still think this is a sound and clear solution. The Commission's order does not go this far. It may be possible to draw some slightly less restrictive line when the data processing services are quantifiable and generally measurable. If these are to be competitively procured by the carrier, then its affiliate could be included among the eligible bidders.

The second problem is the carrier selling computer time to its affiliate. This point, not discussed in our prior brief, is raised by Western Union's proposal on interruptible access time. The cross-subsidy problem here is that the carrier might charge its affiliate too little and thereby subsidize it in that way. We think this involves some serious problems - for the costing process involved in Western Union's proposal is elusive at best. We think, at the very least, Western Union should be required to offer up its excess time on the basis of long term contracts with public specifications for which all data processors can bid and that between two bidders at the same price it must favor the non-affiliate. Even this may not be enough; there may be a good case for insisting that Western Union sell all - or most - of its excess capacity to non-affiliated parties, thus assuring arms length dealing and free market pricing. This would leave its data processing affiliate to purchase time on the open market.

The third danger is that the carrier will favor its unregulated data processing affiliate by taking discriminatory action against its unaffiliated competitors. Such discriminatory action might include leasing them "dirtier circuits," delays in offering service or making repairs, and so forth. This was exactly the problem the Commission had to face in the recent Section 214 Certificates decision (Dkt. 18509), involving carrier discriminations against independent CATV operators. The Commission's solution was to keep the carriers out of the CATV business in their service territories. So far, we have not yet had any parallel history of abuse here--and none may emerge -- but the Commission should specifically make clear in the current proceeding that it will apply the same solution if discriminatory practices appear.

There are various other ways that a carrier could use its monopoly position and revenues to favor its affiliate. One is by acting as sales agent for the affiliate. Another is through use of the carrier's name for the affiliate or the carrier bearing cost of promotion for the affiliate. Cf. Chattanooga Blow Pipe & Roofing Co. v. Chattanooga Gas Co., 360 F. 2d 79 (6th Cir. 1966). We think these should be prohibited, as ADAPSO suggests. Any use of common name or sales agencies involves problems of cross-subsidy on advertising. We would note in this connection that this is exactly what the 1956 antitrust decree against IBM requires: IBM was required to set up a separate service bureau corporation which was prohibited from using its name or trade symbols. United States v. International Business Machines, Corp., 1956 CCH TRADE CASES ¶ 68,245 (S.D.N.Y. 1956).

Question 3. The Commission has attempted to establish boundaries of where it will regulate and where it will not. Do you find those boundaries clear as a predictive device for the guidance of private entrepreneurs? Do you think it would be useful for the Commission to give illustrative examples demonstrating the boundaries--and could you suggest some examples?

Answer No boundary involving complex technical questions will be absolutely precise beyond all possible doubt. The key boundary is between data processing on one hand and message switching on the other - since carriers can only indulge in data processing if they use a separate, segregated affiliate. We think this line can be drawn with reasonable clarity. We sought to draw this line at page 14 of our 1968 brief:

> For purpose of analysis we divide such applications into two categories -- one called "remote access data processing" and the other called "message switching". Both types of system utilize two distinct components -- communications lines and computer facilities. However, message switching systems only store and forward information in the form it is received, whereas remote access data processing systems transform information (i.e., outgoing information is different from incoming information).

insure that the carriers do not indulge in excessive pricing of protective interface devices, since such excessive pricing will unnecessarily discourage the use of customer-owned terminal equipment. These are important and continuing questions.

Question 5. Are the requirements and limitations on Bell System activity in this area adequate?

Answer Basically, yes. The 1956 antitrust consent decree restricts AT&T to offering "common carrier communications services." United States v. Western Electric Co., 1956 CCH TRADE CASES ¶68,246 (S.D.N.Y. 1956). The Commission's Tentative Decision places remote access data processing outside the scope of common carrier communications and accordingly prevents AT&T from entry into this field. AT&T acknowledges the existence of this restriction and indicates it tends to confine its activities to communications and not to data processing.

The entry of an enterprise with the size and nationwide power of AT&T into unregulated data processing might raise serious questions from a standpoint of economic policy. The 1956 consent decree provides an adequate safeguard against this occurence.

The 1956 consent decree would not, in our view, prevent AT&T from offering a message switched communications service (e.g., a service based on charge per bit for computer use). We think that it is desirable that such flexibility exist. As was explained in answer to Question 3 above, we believe that an adequate distinction can be made between data processing on one hand and message switching on the other; and that the 1956 decree and the Tentative Decision would together confine AT&T to message switching type services and exclude it from data processing. This, it seems to us, adds up to an adequate safeguard, combined with adequate flexibility, so far as the Bell System's activities are concerned.

See also essentially the same discussion at page 59.

We think that this line is meaningful in terms of technology and workable as an administrative tool.

We do not see a pressing need for the Commission to provide illustrations, but there would certainly be no harm in such a course if careful selection were made, and the examples were not outrun by the technology.

Question 4. Professor Duggan and others suggest that the Bell System's and other carriers positions in the equipment field may have an impact in the data communications industry. Do you see any such problems?

Answer The fact that the Bell System and other carriers such as General Telephone have an interest in the communications equipment field may well have some impact on the development of data communications.

A communications carrier has a normal incentive to encourage customers to use terminal equipment leased from the carrier. This equipment is added to its rate base and the lease payments swell its communications revenues. The fact that it may also produce earnings for its affiliated equipment supplier no doubt increases the carriers' incentive to encourage such use. However, the incentive is still there regardless of the manufacturing affiliation; this may be seen from the fact that many independent telephone companies, with no manufacturing affiliates, have been strong enforcers and defenders of the restrictive common carrier tariff provision at issue in Carterfone and related tariff proceedings.

To summarize, carriers necessarily have incentives to encourage them to promote use of their terminal equipment regardless of the source of manufacturer. This places an important responsibility on this Commission, and on State regulatory bodies to insure that the carriers do not take an overly expansive view of network facility requirements in order to promote their own equipment. The Commission must also be vigilant to

We are mailing copies of this letter to counsel for all parties which participated in the oral argument.

Yours sincerely,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

By: Donald I. Baker
Deputy Director of Policy Planning

cc. Honorable Nicholas Johnson
Commissioner


RECEIVED
SEP 28 1970

CERTIFICATE OF SERVICE

I, Neil E. Roberts, hereby certify that I have this 24th day of September, 1970, sent by United States mail, postage prepaid, copies of the foregoing letter responding to questions submitted by the Chairman on behalf of Commissioner Johnson at the oral argument in this proceeding on September 3, 1970 to the following participants in said oral argument, as listed in the Commission's order adopted August 20, 1970:

Sidney Goldman, Esq.
Jack Werner, Esq.
Western Union Telegraph Company
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Washington, D. C. 20036

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Harold J. Cohen, Esq.
Alfred A. Green, Esq.
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Attorney for United States Independent Telephone Association

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Attorney For Continental Telephone Corporation

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Attorney For General Telephone And Electronics Corporation

Robert E. Conn
R. P. Romanelli
Western Union International, Inc.
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Attorney for Data Communications Association

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National Association of Manufacturers
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Attorney for National Retail Merchants Ass'n.

Joseph E. Keller, Esq.
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Attorney for American Petroleum Institute

Charles M. Meehan, Esq.
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Attorney for Utilities Telecommunications Council

Paul L. Muilenburg, Esq.
General Services Administration
Washington, D. C. 20405
Executive Agencies of the United States

Neil E. Roberts

Neil E. Roberts
Attorney
Department of Justice


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SEP 28 1970

Justice

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

October 8, 1970

DIRECTOR

To: Dr. George Mansur
Mr. Bruce Owen

From: Tom Whitehead

Don Baker called about the microwave-CATV package he sent over. The Commission has postponed the due dates on the CATV part, so whoever is worried about that, tell them they have a slight breather -- it's now due October 23. But the Justice Department is waiting for comments on the microwave thing.

I am taking my copy to read on the plane.

COMSAT ADVANCES SATELLITE TV PLAN

Would Supplant A.T.&T. as Prime Carrier of Shows in Bid to Ease Congestion

By JACK GOULD

The Communications Satellite Corporation has informed the White House of its immediate readiness to construct and operate a domestic satellite television system that would serve commercial and noncommercial TV networks and ease the mounting congestion in the nation's communications facilities.

James McCormack, chairman of Comsat, successfully appealed to Clay T. Whitehead, special assistant to President Nixon, to declassify the plans so that he could discuss its details this week with the presidents of the Columbia Broadcasting System, the National Broadcasting Company, the American Broadcasting Company and the Corporation for Public Broadcasting. The meeting may be held on Wednesday, probably in New York.

Stanton Proposal

A major feature of the Comsat plan would be to supplant the American Telephone and Telegraph Company as the prime carrier of TV shows from coast to coast, but Dr. John V. Charyk, president of Comsat, predicted that the utility's ground relay facilities would be quickly occupied by other communications requirements.

Mr. McCormack went to the White House after learning last Wedneesday morning tthat Dr. Frank Stanton, president of C.B.S., would recommend that evening that the TV industry construct its private satellite relay system rather than submit to the demands of A. T. & T. for an increase of $20,000,000 a year for the distribution of TV shows.

Even before Dr. Stanton spoke before the Audio Engineering Society at the New York Hilton, A. T. & T. issued a statement of its corporate position, saying that it was not immediately intereested in constructing a new domestic satellite and suggesting that it would be "wise public policy" to entertain applications from all comers.

A. T. & T. has been the prime relayer of broadcasting material since radio's earliest days and its unexpected statement clearly augured a major electronic upheaval in American communications.

A. T. & T. is known to be sensitive over consumer complaints about the efficiency of its existing service to individual subscribers and business concerns. The company was said to be anxious to correct that condition beforee assuming new and highly complex ventures.

At the White House, Mr. Whitehead agreed to the declassification of the Comsat plan, originally submitted on Sept. 8, with the proviso that its contents be made known only to the broadcast presidents meeting with Mr. McCormack. Neither Comsat nor the TV networks would divulge or discuss the text, but a copy was obtained through other sources in Washington after the declassification.

Told that the plan had become independently known, Dr. Stanton said that the Comsat proposal had appealing financial features.

The networks would be spared the initial construction investment, which he had placed at about $100-million, and relieved of the cost of training maintenance crews.

In New York, the passive A.T. & T. attitude was explained by a high official on the ground that the thousands of miles of cable and microwave facilities now leased on a wholesale basis to the television industry might be used on a retail basis for individual customers. The earnings potential was described as possibly greater than the $65-million a year sought from relaying TV.

The chief feature of the Comsat plan would be to enable all users of a domestic satellite system to gain direct access to the system without going through the established commercial carriers ,a policy that applies to the international use of satellites.

Eliminating the so-called "middleman" and his charges would make Comsat a full carrier in its own right and able to offer its domestic service not only to TV but to press associations, cable television networks if they are eventually authorized, and other industrial users. If the ground facilities of A.T. & T. should become overcrowded, Dr. Charyk told the White House, Comsat would be in a position to lend a helping hand in carrying long-distance calls.

With the present state of satellite communications techniques, Comsat believes the domestic system could carry with reliability 14 TV channels, any one of which would be available to handle simultaneouly as many as 1,800 telephone calls in an emergency.

Both domestic and international political considerations entered yesterday's developments. Isolated objections have been voiced to network domination of a private satellite television system, although Dr. Stanton had specifically acknowledged that the system would be open to all rivals. Comsat, on the other hand, is a private organization chartered by Congress.

Ironically, A.T.&T. holds an excess of 20 per cent of Comsat stock but the shares are also widely held by the public.

Dr. Charyk specifically observed that transfer of United States domestic traffic to a United States domestic satellite system would lead to reduced ownership dependency on Intelsat, the international group controlling satellites in global use.

This step, he said, would alleviate foreign concern over United States domination of space communications, a sore point with many countries lacking the economic and technical resources for launching satellites.

The COMSAT plan dovetails closely with many of the hopes of the commercial networks and of the possible users.

For the efficiency of the whole system, COMSAT said that it believed it should own those ground stations that would send and receive signals to and from satellites. These might be placed in or near strategic cities generating the largest volume of television programs or other informational matter. For broadcasters

interested only in receiving programs from the satellites, the operation could be a matter of choice, with either the owner or the satellite service assuming the job of maintenance.

The Comsat plan stresses that there will be continuing need for ground communication facilities, such as those operated by A. T. & T. But the corporation adds that not many more years can be wasted in putting into operation new space facilities capable of coping with the expected deluge of computerized data transmission, facsimile and other forms of recorded materials, as opposed to TV programs intended for general public consumption.

Alaska
Comm.

October 13, 1969

Dear Mr. Gravel:

Your letter for the President regarding the Communications Satellite Corporation has been referred to me for further consideration. We are indeed pleased to have your views.

As you point out in your letter, the communications industry is very complex and very interconnected. The Communications Satellite Act of 1962 tried to grapple with many unknowns in setting up the Communications Satellite Corporation. The Act has been very successful in providing for rapid introduction of satellites into international communications, and this has been of great benefit in tieing the United States to the rest of the world. It is entirely appropriate that seven years later we review the role of satellite communications within the United States and internationally, and consider whether or not any changes may be in order.

You can be assured that we are giving your views serious consideration.

Sincerely,

Peter M. Flanigan
Assistant to the President

Honorable Mike Gravel
United States Senate
Washington, D. C.

cc: Mr. BeLieu
Mr. Flanigan
Mr. Whitehead
Mr. Kriegsman
Central Files

CTWhitehead:ed

Cong

10/10/69

To: Mr. Flanigan

From: Tom Whitehead

Thought you should
answer this.

Copy.

October 10, 1969

Dear Mr. Gravel:

Your letter for the President regarding the Communications Satellite Corporation has been referred to me for further consideration. We are indeed pleased to have your views. As you point out in your letter, the communications industry is very complex and very interconnected. The Communications Satellite Act of 1962 tried to grapple with many unknowns in setting up the Communications Satellite Corporation. It is entirely appropriate that seven years later we review the role of satellite communications within the United States and internationally, and consider whether or not any changes may be appropriate. The Act has been very successful in providing for rapid introduction of satellites into international communications, and this has been of great benefit in tieing the United States to the rest of the world.

Be assured that we are giving your views serious consideration.

Sincerely,

Peter Flanigan
Assistant to the President

Honorable Mike Gravel
United States Senate
Washington, D. C.

cc: Mr. Tillion
Mr. Flanigan
Mr. Whitehead
Mr. Kriegsman
Central Files

CTWhitehead:ed

October 7, 1969

Dear Mike:

Thank you for your letter to the President in further reference to the matter of Alaska Satellite communications.

I know the President will be interested in having your additional views on this matter and you may be assured they will be given careful consideration.

With warm regard,

Sincerely,

Kenneth R. Belieu
Deputy Assistant to the President

Honorable Mike Gravel
United States Senate
Washington, D.C.

bcc: w/incoming to Clay Whitehead for FURTHER ACTION

KRB:MT:TO:ro

Thursday 10/2/69

2317

3:10 Checked with Eloise Frayer re the letter to the President dated 9/26 from Sen. Mike Gravel re Comsat and Alaska Communications.

She indicated the mail room received it last night; they just got the letter today. Mr. BeLieu will send an interim reply and will send the letter on to you for further draft reply.

Received 10/1/69
in This office

1 Sept 69

United States Senate

MEMORANDUM

Dr. Clay T. Whitehead
The White House

Tom,

F.Y.I.

B. W. Poirier

MIKE GRAVEL
ALASKA

United States Senate

WASHINGTON, D.C. 20510

September 26, 1969

The President
The White House
Washington, D.C.

Dear Mr. President:

At the moment the White House has several study groups mobilized to grapple with the domestic satellite issue, the Alaska satellite requirement, and Alaskan communications generally.

I would like to bring to your personal attention some existing deficiencies. I hope you will insure that your study groups not overlook appropriate corrective action. It is extremely important that this be done in a timely manner to avoid any agreements within the International Communications Satellite Conference (INTELSAT) which would be detrimental to the United States or to any region of the United States.

The complexity of the issue precludes a detailed presentation in this letter, but a few major elements should be identified. A brief discussion will illustrate their impact on the issues and on the public's right to finally be blessed with the rewards of its investments in space research.

I feel confident your review will bring you to the conclusion that:

- the Communications Satellite Corporation is unmanageable in its present form with industrial competitors on its board of directors.

- the Communications Satellite Corporation, as now chartered, cannot serve as an international agent and act simultaneously as a responsive and successful domestic institution.

- the United States should assure that the eventual INTELSAT agreement will not impede full and free utilization of satellite technology for domestic regional or domestic national public communications.

- the widest public access to educational and public broadcasting is the highest priority in the land for domestic applications of satellite communications.

In reviewing the hearings that led to enactment of the Communications Satellite Act of 1962, the record reveals the difficulty of legislating a new technology about which so little was then known. The main thrust was to instrumentalize American leadership in international application of the new science. Today we can look on the Act with far more expertise.

The Communications Satellite Corporation (COMSAT) has been seriously hindered by foreign governmental interests in lucrative submarine cables and their inflated profits. COMSAT has on its board of directors industrial representatives of competitors who have often litigated in opposition of COMSAT. It is little wonder that public COMSAT stockholders have not enjoyed a return on their investments. Moreover, the American public which paid for the research leading to this science has yet to enjoy continuous domestic benefits.

Yet the United States by its Memorandum of Understanding with India of September 18, 1969, will provide domestic services to that country by 1972 through a NASA satellite. Without quarrelling with the generous and reasonable India project, it is paradoxical that the United States has not been able to cope with her own applications.

The domestic issue has been permitted to stick in a quagmire of competitive, vested interest of network broadcasters and communications carriers. The profit-criteria has dominated the issue through devices of international commitments, technical regulations and other machinations to keep the issue boiling in uncertainty.

This national dispute is impacting disastrously on critical needs of our society for public, cultural telecasting and for scholarly exchanges between our academic institutions. It delays vitally needed solutions for certain regions such as Alaska or our overseas possessions like American Somoa.

I urge you, Mr. President, to offer amendments to the existing law which will provide the organizational structure, independent of foreign interests, to bring domestic satellite communications to the American public.

With kind regards.

Very respectfully,

Mike Gravel

COMMUNICATIONS SATELLITE CORPORATION

LUCIUS D. BATTLE
Vice President for
Corporate Relations

September 19, 1969

Dr. Clay T. Whitehead
The White House
Washington, D.C. 20500

Dear Tom:

I attach a copy of Jim McCormack's response to Senator Gravel. You will note that we ended up referring to the position Comsat had taken with respect to the White House study. We did not, however, mention a letter, and I hope that this reference, which we considered necessary, will not stir up interest in our full position.

If you have any questions, please call me.

Best regards.

Sincerely,

Lucius D. Battle

Attachment

COMMUNICATIONS SATELLITE CORPORATION

JAMES McCORMACK
Chairman

September 18, 1969

The Honorable Mike Gravel
United States Senate
Washington, D.C.

Dear Senator Gravel:

This is in reply to your letter of September 16 strongly attacking Comsat for appearing "to be engaged in a deliberate campaign to undermine" satellite communications for Alaska and for a "regressive position (which) is seriously impairing the development of an adequate communications system for Alaska." As painful as I find it to have to express one hundred percent disagreement with these statements, it would be even more painful to let them stand unchallenged on the record.

As the one U.S. communications entity solely devoted to progress in satellite communications, we can assure you that we have, from the beginning, actively pursued every visible opportunity for promoting satellite communications for Alaska.

Until the award of the sale of the Alaska Communications System to RCA, our efforts of necessity were confined to the area of our authorized activities, that is, interstate and international communications via an INTELSAT satellite. Even so, our enthusiastic efforts were unavoidably somewhat retarded by the concern of the Air Force managers of ACS that our application for an Alaska earth station might adversely affect the sale of ACS as directed by the Congress.

950 L'ENFANT PLAZA SOUTH, SW • WASHINGTON, D.C. 20024 • TELEPHONE 202 554 5020

The approval of the Talkeetna earth station by the Federal Communications Commission therefore came a good many months later than we had hoped for, but at least it was approved, and construction is now well along. In this connection, we should acknowledge the extensive help and support we received in this matter from two successive governors of Alaska and the many good citizens who have served on their communications task force.

We also want to emphasize again, as we have done many times in the past, that we have always regarded the Talkeetna station not just as a facility to improve interstate and international communications but even more importantly as the potential hub of an intra-state system for the happy day when U.S. domestic satellite communications may be authorized.

Accepting the disadvantage of adding even more bulk to this letter, I add two enclosures. The first is a copy of my letter to Mr. Robert W. Sarnoff, President of RCA, on the event of the announcement of the ACS award to RCA. As you will see, I urged with all of the persuasion at my command the immediate commencement of joint planning for "satellites for communications within Alaska."

The second enclosure presents an excerpt from the position taken by Comsat with respect to the White House domestic satellite communications study presently under way. As you will see, we put primary emphasis on the importance of an early decision in this matter because of its very great bearing on the future of Alaska communications.

Let me now turn to the specifics of your letter which are the apparent basis for your charges, to which my preceding comments relate. You refer to a press report of statements made by a Comsat official, Mr. William Miller, during his and my recent visit to Anchorage to participate in a public forum on the potential of satellite communications in Alaska.

Comsat began discussions on this subject with the late Senator Bob Bartlett in the fall of 1967. We have been involved in various discussions since that time with members of the Alaskan Congressional delegation and with various state and federal officials.

Our purpose has been to develop various satellite system configurations which -- operating in conjunction with existing and possible future terrestrial facilities -- could assist in resolving the communications needs of Alaska. Mr. Miller's comments in Anchorage were made in accordance with this purpose.

His speech in Anchorage was a continuation of Comsat's desire to present as accurate a portrayal as possible of the variety of satellite systems which can be established in Alaska as well as an estimate in each case of the costs which would be involved.

In short, his presentation was intended to describe several of the many alternative system configurations which appear, in Comsat's judgment, to provide suitable communications services for Alaska from an operational standpoint.

Mr. Miller used the term "optimum solution" in reference to several configurations ranging in cost from $10 million to $20 million per year.

The configuration estimated to cost $10 million per year would provide approximately 300 voice channels and one dedicated television channel through a 124-station network.

The system estimated at $20 million per year would provide about 1,500 voice channels and one dedicated television channel through a 163-station network, including six of the very large, high-capacity antennae.

Quite obviously, there are other ways in which satellite communications could be introduced in Alaska which would entail less annual costs. We do not deny this fact. Any less expensive proposals, however, would provide a satellite system of less capacity (either in space or on the ground or both) and thus fewer communications services for Alaska.

In your letter you refer to lesser cost figures confirmed by the highest authorities in the field. I am unfamiliar with the specific figures to which you refer and would be grateful if you would make them available to us with an indication of what services they would encompass and in what time frame, both factors being important to any accurate determination of cost for a satellite system for Alaska.

You may recall that -- as the result of a specific request from your office -- Comsat made a presentation to the Alaskan Congressional delegation on July 31 at the Capitol in which we described a system costing less than $10 million a year, designed to meet your estimates with respect to what Alaska could afford.

Mr. Miller's recent presentation in Anchorage was consistent with the July 31 presentation. His more recent cost estimates simply reflected examples of more comprehensive satellite systems which, in our judgment, would provide a more favorable solution to Alaska's present and future communications requirements.

With respect to your request for a cost effectiveness study on the subject of satellite communications in Alaska, it has been my opinion that the various alternative systems which Comsat has presented publicly on many occasions had fulfilled your request. If such is not the case or if we have failed to provide you with sufficient material, including cost estimates, on these various systems, I do hope you will accept our apology. We will be happy to review any of these presentations with you. Moreover, we are open to any suggestions you might have on any other more effective

ways in which Comsat can promote the solution of Alaska's communications deficiencies by way of satellite communications.

I can assure you in all sincerity, Senator, of our most earnest intentions on this subject, and that we shall continue to make every attempt to work with all interested parties -- including state and federal agencies -- in an effort to bring satellite communications to your state by way of a system which is both operationally suitable and economically attainable.

Sincerely,

James McCormack

COMSAT

COMMUNICATIONS SATELLITE CORPORATION

26 June 1969

Mr. Robert W. Sarnoff
President
Radio Corporation of America
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Sarnoff:

The announcement in this morning's press of RCA's successful offering for the Alaska Communications System gives me the reason for writing to you to emphasize the aspect of communications in our 49th state which seems to me to be of greatest interest. That is satellites for communications within Alaska.

As you may be generally informed, Comsat has made a major effort over the past two years to initiate satellite communications for Alaska. Handicapped by the absence of a commercial partner with which to work while the Air Force system was up for sale, we have nevertheless succeeded at least in securing approval by the Federal Communications Commission of an interstate/international earth station at Talkeetna.

To our way of thinking, however, this is only the beginning. This station can serve equally well as the keystone in a network of ground facilities for Alaskan state-wide services, and that is the point I want to emphasize.

We in Comsat are convinced that with forward-looking joint planning RCA and Comsat can in one giant stride help move Alaska communications from the poorest in our nation to a place along with the best. Educational broadcasting can be provided for, as can all of the other tools of economic and sociological development which depend in a substantial way on good communications.

Mr. Robert W. Sarnoff
26 June 1969

We believe moreover that the necessary cooperation will be forthcoming from federal and state authorities as a comprehensive and feasible joint satellite-terrestrial plan is produced.

I want to give all the weight I can to the idea of a major joint endeavor by RCA and Comsat toward the wide-scale introduction of satellite communications in Alaska. We should definitely include the possibility of a satellite designed specifically for Alaska, as well as the prospects for adding Alaska to the proposed overall U.S. domestic satellite system. A specially tailored Alaskan satellite system could well be the pilot for the larger system, an idea with very interesting potentials.

Sincerely,

S/ James McCormack

Excerpt from position taken by Comsat with respect to domestic satellite communications in connection with study by White House:

"In the case of Alaska, a critical time is at hand to determine the most effective and economical configuration for Alaska's internal and external requirements. The Alaska Communications System has recently been awarded to RCA, with a commitment by RCA for expansion, improvement of service and reduced rates. A major satellite earth station is under construction at Talkeetna, situated between Anchorage and Fairbanks. Proposals for an early capability for satellite communications in Alaska are under study by Comsat, NASA, RCA, and the responsible officials and representatives of Alaska. Any proposal that looks toward the maximum use of satellite links for Alaska's internal and external requirements, and toward an early connection of both with a domestic system, will work toward much improved and lower cost communications for the 49th state. Failure to provide timely access to satellites will chain the chief Alaska traffic streams to conventional facilities and will in the end make all communications more expensive for users in Alaska. The communications requirements of Alaska should be considered as an urgent, integral part of the domestic inquiry."

MIKE GRAVEL
ALASKA

United States Senate

WASHINGTON, D.C. 20510

September 16, 1969

Mr. James McCormack, Chairman
Communications Satellite Corporation
950 L'Enfant Plaza, S.W.
Washington, D.C.

Dear Mr. McCormack:

The Anchorage Daily Times of August 30th quoted William Miller of your organization as advising Alaska that an "optimum solution" for satellite communications would cost between $10 and $20 million" annually just for the satellite and the earth stations.

This is an outrageous statement, and I am surprised that you permit such statements by a purported expert. Certainly there is no limit to the amount of money that can be spent on communications. But the "optimum solution" is far below the $10-20 million annual range. Considering the number of meetings we have had on this point I cannot excuse Comsat's public insistence on an inflated figure as a case of simple misunderstanding. Comsat appears to be engaged in a deliberate campaign to undermine the immediate application of satellite communications in Alaska for the full range of intra-Alaska communications services.

The cost figures that I have, confirmed by the highest authorities in the field, indicate that Alaska could have a comprehensive communications system within a price range that would make immediate economic sense. In meetings with your representatives, these cost figures have never been denied.

Since February I have been attempting to secure from your organization a cost effectiveness study that

has been repeatedly promised as forthcoming. I trust that its eventual appearance will withstand the light of public examination.

Comsat's regressive position is seriously impairing the development of an adequate communications system for Alaska. I challenge Comsat to publicly justify the $10-$20 million annual program Mr. Miller so blithely talks about in print.

Sincerely,

Mike Gravel

cc:

Members of the Board of Directors
of the Communications Satellite Corporation

Members of the Federal Communications Commission

Dr. Clay T. Whitehead, Office of the President
General James D. O'Connell, Director, Office of Telecommunications Management, Executive Office of the President

Satellite Communication System For The State Still Is In Doubt

A vast amount of expert information on satellite communications for Alaska was aired in the past two days, but at the close of the first Alaska conference on satellite telecommunications, it was still doubtful when the state could expect such things as live television and educational television.

The proposed satellite communication network for the state was described as the "optimum solution," by William Miller, project manager for the Communications Satellite Corp.

However, he said the network would cost somewhere between $10 to $20 million annually for just the satellite and earth stations.

The smaller price he quoted would provided limited service to a limited area, while the higher cost would bring greater service to a larger area.

At the close of the conference Friday afternoon, Chairman George Sharrock, also chairman of the Alaska Federal Field Committee, said the meeting provided a "better perspective of our problems" in communication and "better ideas on how to solve them."

He said committees organized during the course of the conference would continue to look into such aspects as the realistic requirments of the state, the amount of revenues needed and sources for these revenues, possible use of a commercial system by the conventional and satellite systems and a realistic timetable for full satellite communication.

Committee reports were the last item on the agenda Friday.

The committees had been formed primarily to investigate aspects of the satellite demonstration program. Sharrock said, however, that until "we know where the money for this is coming from," he could not state definitely that the demonstration, using television as an educational medium, would go ahead.

The cost of this demonstration, according to Dr. Charles Northrip of the educational broadcast commission, who headed the requirements committee, would be in excess of $2 million. Although the state would obviously participate in the funding of this program to some extent, he said, "it is premature at this time" to outline full funding. More exploration, said Northrip, was needed in this area.

Anchorage, Alaska, Saturday Evening, August 30, 1969

ANCHORAGE DAILY TIMES

91ST CONGRESS
1ST SESSION

S. 2928

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 18, 1969

Mr. GRAVEL introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To amend the Communications Satellite Act of 1962 to permit State ownership of satellite terminal stations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 103 of the Communications Satellite Act of 1962 (47 U.S.C. 702) is amended by—

(1) striking out the word "and" where it appears at the end of paragraph (9) thereof and inserting in lieu thereof a period; and

(2) adding at the end thereof the following new paragraph:

"(11) the term 'State' means the government of a State of the United States, the government of a political

subdivision of any such State, or an instrumentality of the government of any such State or political subdivision.".

(b) Section (c) (2) of that Act (47 U.S.C. 721 (c) (2)) is amended by inserting therein, immediately after the words "authorized carriers", the words "and States". And that the word "system" in both places of this subparagraph will be changed to "systems".

(c) Section 305 (a) (2) of that Act (47 U.S.C. 735 (a) (2)) is amended by inserting therein, immediately after the words "communications common carriers", a comma and the words "to States,".

Justice

THE WHITE HOUSE

WASHINGTON

July 14, 1969

MEMORANDUM FOR TOM WHITEHEAD

FROM: JONATHAN ROSE

SUBJECT: DOMESTIC COMMUNICATIONS SATELLITE

I will be receiving a memorandum shortly from the Justice Department regarding our legal rights with respect to the planning for a Domestic Communications Satellite. It appears that under the Communications Satellite Act of 1962, a respectable argument can be made for the proposition that the President has been given long range planning and supervisory responsibility with respect to the creation of such a system. Therefore, we have a tenable argument in support of the proposed task force study.

We have, in addition, several procedural possibilities of delaying final FCC action in case of disagreement with our desire for a review. Given these facts, it does not seem to me that we should have too much trouble convincing Hyde that he should go along with our task force.

July 15, 1969

To: Mr. Jonathan Rose
White House
Room 9 - West Wing

Re: Domestic Communications Satellites

In regard to the FCC's impending decision on establishing a domestic communications satellite system, the question has arisen as to the powers of the executive branch to make the Commission stay its hand until the executive branch can formulate its views and present them to the Commission. The following alternatives seem available:

A. Prior to any FCC decision

The Commission's "Notice of Inquiry" in this matter cites as authority only the provisions of the Federal Communications Act of 1934 dealing with radio. 1/ However, any F.C.C. action concerning domestic communications satellites also appears to be governed by the Communications Satellite Act of 1962, 47 U.S.C. 701, et seq. ("CSA"). Section 701, subsections (a), (b) and (d) is broadly drafted to make the Act cover all

1/ 47 U.S.C. §303(g), which authorizes the Commission, inter alia, to "[s]tudy new uses for radio..", is the only legislative authority cited in the Notice of Inquiry.

communications via satellite. Subsection (d) specifically states that:

> It is not the intent of Congress by this chapter to preclude the use of the communications satellite system for domestic communications services where consistent with the provisions of this chapter. .

The CSA (47 U.S.C. §721(a)) grants the President broad powers to coordinate and supervise the activities of governmental agencies and "provide for continuous review of all phases of the development" (emphasis added) of a communications satellite system. §721(a)(2). These provisions arguably authorize the President to stay the Commission's proceeding. The provisions of §721(c), defining the FCC's powers in regard to communications satellites do not seem to suggest a contrary conclusion.

Therefore the President could exercise his powers under §721(a) in an attempt to hold up FCC action in this matter.

B. After FCC action

Two alternatives appear available. In any suit to enjoin the operation of an FCC order under 47 U.S.C. §402, the United States must be made a defendant apart from

the Commission. The United States, via the Department of Justice, has on occasions "confessed error" on an administrative agency in such a suit -- i.e., the United States has aligned itself with the plaintiff in attacking the validity of the administrative order. Therefore, if a party to the domestic satellite proceeding brings such a suit, the executive branch would be in a position to seek the setting aside of an FCC order it considers unsatisfactory.

An alternative would be for the Department of Justice to petition the Commission for rehearing under 47 U.S.C. §405, as a "person aggrieved or whose interests are adversely affected" by the Commission's action. Affirmative action by the Commission on such a petition would solve the initial problem of putting the Administration's views before the agency. A denial of the petition would enable the Department of Justice to seek judicial review under 47 U.S.C. §402.

Communications Act of 1934, as amended, and in addition includes, but only for purposes of sections 303 and 304, any individual, partnership, association, joint-stock company, trust, corporation, or other entity which owns or controls, directly or indirectly, or is under direct or indirect common control with, any such carrier; and the term "authorized carrier", except as otherwise provided for purposes of section 304 by section 304(b)(1), means a communications common carrier which has been authorized by the Federal Communications Commission under the Communications Act of 1934, as amended, to provide services by means of communications satellites;

(8) the term "corporation" means the corporation authorized by title III of this Act.

(9) the term "Administration" means the National Aeronautics and Space Administration; and

(10) the term "Commission" means the Federal Communications Commission.

TITLE II—FEDERAL COORDINATION, PLANNING, AND REGULATION

IMPLEMENTATION OF POLICY

SEC. 201. In order to achieve the objectives and to carry out the purposes of this Act—

(a) the President shall—

(1) aid in the planning and development and foster the execution of a national program for the establishment and operation, as expeditiously as possible, of a commercial communications satellite system;

(2) provide for continuous review of all phases of the development and operation of such a system, including the activities of a communications satellite corporation authorized under title III of this Act;

(3) coordinate the activities of governmental agencies with responsibilities in the field of telecommunication, so as to insure that there is full and effective compliance at all times with the policies set forth in this Act;

(4) exercise such supervision over relationships of the corporation with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States;

(5) insure that timely arrangements are made under which there can be foreign participation in the establishment and use of a communications satellite system;

(6) take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate communications satellite system is required to meet unique governmental needs, or is otherwise required in the national interest; and

(7) so exercise his authority as to help attain coordinated and efficient use of the electromagnetic spectrum and the technical compatibility of the system with existing communications facilities both in the United States and abroad.

(b) the National Aeronautics and Space Administration shall—

(1) advise the Commission on technical characteristics of the communications satellite system;

(2) cooperate with the corporation in research and development to the extent deemed appropriate by the Administration in the public interest;

(3) assist the corporation in the conduct of its research and development program by furnishing to the corporation, when requested, on a reimbursable basis, such satellite launching and associated services as the Administration deems necessary for the most expeditious and economical development of the communications satellite system;

(4) consult with the corporation with respect to the technical characteristics of the communications satellite system;

(5) furnish to the corporation, on request and on a reimbursable basis, satellite launching and associated services required for the establishment, operation, and maintenance of the communications satellite system approved by the Commission; and

(6) to the extent feasible, furnish other services, on a reimbursable basis, to the corporation in connection with the establishment and operation of the system.

(c) the Federal Communications Commission, in its administration of the provisions of the Communications Act of 1934, as amended, and as supplemented by this Act, shall—

(1) insure effective competition, including the use of competitive bidding where appropriate, in the procurement by the corporation and communications common carriers of apparatus, equipment, and services required for the establishment and operation of the communications satellite system and satellite terminal stations; and the Commission shall consult with the Small Business Administration and solicit its recommendations on measures and procedures which will insure that small business concerns are given an equitable opportunity to share in the procurement program of the corporation for property and services, including but not limited to research, development, construction, maintenance, and repair.

(2) insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations under just and reasonable charges, classifications, practices, regulations, and other terms and conditions and regulate the manner in which available facilities of the system and stations are allocated among such users thereof;

(3) in any case where the Secretary of State, after obtaining the advice of the Administration as to technical feasibility, has advised that commercial communication to a particular foreign point by means of the communications satellite

PRIVATE

Justice

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

(DRAFT)

Department of Justice
Washington, D.C. 20530

Honorable Mike Gravel
United States Senate
Washington, D. C. 20510

Dear Senator Gravel:

This is in response to your letter of February 12, 1970, requesting comments from the Antitrust Division on a proposed draft amendment to the Communications Satellite Act of 1962 as amended ("1962 Act"), 47 U.S.C. §§701-744. This draft amendment would, if enacted, eliminate direct control over the Communications Satellite Corporation ("Comsat") by the terrestrial communications common carriers ("carriers"). It would do so by (i) barring any representatives of the carriers sitting on the Board of Directors of Comsat after January 1, 1971, and (ii) barring carriers from owning any shares of Comsat stock after January 1, 1972.

In general, we would favor enactment of legislation along these lines to eliminate direct carrier control or influence over Comsat. Such a step, combined hopefully with some modification of regulatory constraints on Comsat's activities (discussed below), would significantly enhance Comsat's competitive potential.

The 1962 Act was a compromise. It ignored traditional policies that restrict the common ownership and control of competing modes of regulated business (e.g., 49 U.S.C.A. §5(14); 49 U.S.C.A. §78; 47 U.S.C.A. §314). Instead the 1962 Act provided for extensive carrier ownership of Comsat stock and for six carrier nominees as directors of the corporation. As a result carriers controlled half the shares and more than a third of the Board of Directors. American Telephone & Telegraph Company ("AT&T") alone is by far the largest Comsat stockholder, with 29 percent of the stock and 20 percent of the Board.

The arrangement has been criticized as being inconsistent with the stated Congressional policy "that the

corporation created . . . be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public" (47 U.S.C.A. §701(c)). Various commentators emphasized at the outset that extensive carrier participation was unlikely to promote either present or future competition to the maximum extent possible. (See Legislation Note, The Comsat Act of 1962, 76 Harv. L. Rev. 388, 398 (1962). See generally, Kirkpatrick, Antitrust in Orbit, 33 Geo. Wash. L. Rev. 89 (1964); Levin, Organization and Control of Communications Satellites, 113 U. Pa. L. Rev. 315 (1965); Schwartz, Governmentally Appointed Directors in a Private Corp. - The Communications Satellite Act of 1962, 79 Harv. L. Rev. 350 (1965); Schwartz, Comsat the Carriers, and the Earth Stations - Some Problems with "Melding Variegated Interests," 76 Yale L. J. 441 (1967).) Six years later the President's Task Force on Communication Policy criticized it in these terms:

> Comsat's interlocking directorate with the carriers has been a source of continued controversy. Experience has shown that in many areas, Comsat has interests conflicting with those of the terrestrial carriers. Despite [FCC decisions], which insulate them from . . . competition, the terrestrial carriers and Comsat are rivals in a very real sense. (Report, Chap. 2, p. 15, 1968).

In addition, such stockholding and interlocking arrangements involving competitors and suppliers are contrary to the normal antitrust rules contained in Clayton Act §§7, 8 (15 U.S.C. §§18, 19). Most of the judicial decisions under these provisions have ignored contentions that directors appointed by even such a minority owner (as AT&T) would be independent of those who nominated them, Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 314 (D. Conn. 1952), aff'd 206 F. 2d 738 (2d Cir. 1953); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177, 181 (D. Mich. 1963), pointing instead to the minority director's opportunity to persuade or compel relaxation of competitive vigor, and to learn competitive secrets, American Crystal Sugar Co. v. Cuban-American Sugar Co. 152 Supp. 387, 394, aff'd, 259 F. 2d 529 (2d Cir. 1958), and noting that it would be very difficult to show that a director had been improperly influenced by the views of his nominator since directorial decisions usually involve judgmental factors difficult to ascribe to the influence of the minority's special interest.

In these circumstances, we believe that a good case can be made for eliminating the direct carrier influence over Comsat. This approach is consistent with the Department's position in 1962, when we emphasized that we "place great importance on competition because the communications industry is particularly susceptible to domination by one company -- AT&T." Hearings on H.R. 10115 and H.R. 10138 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess., pt. 2 at 565 (1962) (testimony of Attorney General Kennedy). See also Hearings Before the Antitrust Sub-Committee of the House Committee on the Judiciary, 84th Cong., 2d Sess. at 420-23 (1956) (testimony of Assistant Attorney General Hansen). Moreover, it is consistent with the policy of this Administration: to place "more reliance on economic incentives and market mechanisms in regulated industries" so that "increased competition will eventually make it possible to let market forces assume more of the role of detailed regulation" in communications (Economic Report of the President 108-109 (1970)).

The problem is, however, only partially one of the Comsat corporate arrangements covered by the draft legislation. Regulatory decisions by the Federal Communications Commission have been at least as significant a factor in limiting Comsat's competitive potential vis-a-vis existing carriers.

Of particular significance is the FCC's Authorized User decision, 4 F.C.C. 2d 421 (1966), in which the Commission unanimously ruled that Comsat was to be only a "carriers' carrier," precluded from retailing its services directly to users (including the Government), except under "unique or exceptional circumstances" to be determined by the Commission. Because the Commission declared that it would authorize direct Comsat service absent a reduction in the carrier's rates "fully to reflect the economies made available through the leasing of circuits in the satellite system," some potential competition remained and was reflected in some very substantial rate reductions made by the carriers.

This decision was followed the same year by the Commission's Earth Station decision further reducing Comsat's potential to compete vigorously with the carriers. 5 F.C.C. 2d 812, 816 (1966). The Commission decided (reversing an earlier decision, 38 F.C.C. 1104 (1965)) that Comsat had to share ownership of all earth stations with the carriers: 50 percent was to be owned by Comsat, with the balance

apportioned among the other carriers on a use basis. The day-to-day management, and apparently, all equipment design and procurement decisions of the earth stations are thus made by a joint operating committee made up of Comsat and the carriers. The Earth Station order argued that this pattern of shared ownership and control would motivate the carriers to promote the use of the Comsat system, and contribute to it technologically. None of this has apparently happened. The carriers still prefer to use facilities which they own and control, the investment in which is large and wholly in their rate bases. However, because the FCC at this time is reconsidering its 1966 Earth Station decision in Docket 15735, it may be that further amendment of the 1962 Act is now not necessary to deal with this problem.

To summarize, we favor generally some legislation along the lines of the proposed amendments, in order to eliminate direct carrier control or influence over Comsat. However, unless combined with at least some reversal of the FCC's decisions protecting existing carriers from satellite competition, such legislation is not likely to enhance significantly Comsat's competitive potential.

Sincerely yours,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

THE WASHINGTON POST Friday, April 10, 1970 ... B

Rowland Evans and Robert Novak

Mitchell Has Not Mastered His Job, Republican Senators Now Believe

CONSIDERING the extreme embarrassment he has caused President Nixon, Republican senators, and the South, John Mitchell, the Presidents political chief, might have more trouble getting confirmed by the Senate for Attorney General today than his two personal choices, Judge Clement Haynsworth and Judge G. Harrold Carswell, had in their losing battles for the Supreme Court.

"The nation may blame President Nixon for this," Sen. Marlow Cook, the Kentucky Republican who voted against Carswell, told us, "but the fault lies not there. It lies in the Department of Justice."

What Cook said publicly was being said privately with hostile embellishments wherever two Republican senators gathered to discuss the second humiliation to Mr. Nixon in his efforts to fill that empty ninth chair.

Though little hard evidence is available yet to indicate that, in fact, Mitchell's days of glory are really ending, the handwriting is becoming visible on the wall. Its source is the surprising number of blunders and poor staff work that have been coming from the Justice Department, the political storm center of the Nixon administration and chief promoter of Mr. Nixon's Southern Strategy.

Evans Novak

TWO STORIES illustrate the point. One Republican senator, who remained uncomfortably on the fence for weeks during the Carswell debate, specifically asked Sen. Roman Hruska of Nebraska and Sen. Edward Gurney of Florida, Carswell's two key Republican backers, if they could arrange a personal meeting between him and Carswell.

Both said yes, of course, and passed the senator's request routinely to the Justice Department, assuming it would be quickly granted. After Wednesday's vote, the senator casually asked Hruska and Gurney why the Justice Department had not arranged the meeting. They were incredulous and had no explanation at all.

But that performance at Justice was standard all through the Carswell affair.

For example, another uncommitted Republican, Sen. Charles Mathias of Maryland, asked the Justice Department for two things: A chance to read some of Carswell's written judicial opinions and a chance to chat with him privately and off the record.

The opinions were duly sent him by Justice, but there was no answer at all to the second request. Ten days before the vote, the senator repeated his request, this time in writing. It was not even acknowledged.

Senators don't like to get a runaround from cabinet officers of their own party.

But the complaints now rising against Mitchell go well beyond this. Two last-minute political gimmicks employed by Justice in the Carswell fight hurt badly. First was the President's letter to Sen. William Saxbe of Ohio, claiming close to presidential immunity from Senate probing into the qualifications of the Florida judge. Some Republicans think that this letter, questioning the Senate's right to say no, swung a crucial vote against Carswell — that of Sen. Margaret Chase Smith of Maine, a senator who understands senatorial prerogatives.

THE OTHER was the round-robin letter of endorsement from Carswell's fellow judges. In the words of one Republican senator, "when they start logrolling with federal judges, I won't play."

Much of the political grievance againat Mitchell by the Republican left and center stems from his Southern Strategy. When Mitchell tried to scuttle the voting rights bill, these Republicans handed him a major defeat and voted to retain the heart of the 1965 law. When Mitchell reversed desegregation policy at the Health, Education and Welfare Department at the last moment and won a lower-court delay in the Mississippi school case, the Supreme Court unanimously struck him down.

Moreover, Mitchell is held accountable by Senate Republicans for the embarrassing plight of the President in the matter of electoral college reform. Mitchell let Mr. Nixon get way out on a limb in favor of direct election of the President, abolishing the electoral college, before the Justice Department thoroughly understood the ominous potentials of direct presidential elections.

Republican senators on the Judiciary Committee are now unable to get a realistic position from Mitchell, even though a committee vote on the House-passed direct-election bill is imminent.

Mitchell's problems, then, have two sources: Anxiety on the left over his Southern Strategy and rising discontent by all Republican senators that he simply hasn't mastered his job.

Justice

THE WHITE HOUSE

WASHINGTON

November 7, 1969

MEMORANDUM FOR

Mr. William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel
Department of Justice

In connection with the White House consideration of the domestic satellite issue now pending before the Federal Communications Commission (FCC), we request your consideration of the following questions relating to the Communications Act of 1934 (the 1934 Act), the Communications Satellite Act of 1962(the 1962 Act), and the antitrust laws. We understand that you may, in your consideration of the questions below, wish to consult with other divisions of the Justice Department or with the Federal Communications Commission for their views. Would you please advise us if, for any reason, you feel unable to provide helpful comment on any of the questions posed below.

1. Applicability of the 1962 Act.

(a) Does the 1962 Act govern, in whole or part, the FCC's authority to authorize a domestic communications satellite? (b) If so, does the 1962 Act establish Comsat as the sole entity authorized to construct and operate privately owned communications satellite facilities for domestic use? (c) Does the 1962 Act otherwise preclude the FCC from authorizing the construction and operation of satellite facilities or ground stations for domestic services by either common carriers or non-common carriers other than Comsat?

2. Comsat.

(a) Does Comsat's charter under the 1962 Act provide sufficient authority for it to supply domestic communications services outside the Intelsat system authorized by the 1962 Act under the more general authority of the 1934 Act? (b) If so, would Comsat's competitive entry into the domestic field cause a conflict of interest situation due to carrier representation on its Board? Would this violate either the 1934 Act or the antitrust law?

3. Minimum Regulation.

What is the minimum degree of FCC regulation over a communications system utilizing satellites now required by the 1934 Act (and the 1962 Act if applicable)?

4. Non-Common Carriers.

(a) Has the Federal Communications Commission power to treat any privately owned communications system utilizing satellites as a non-common carrier? (b) What are the consequences of doing so?

5. Impact on Carriers' Services.

(a) In allocating spectrum to non-carrier satellites, must the FCC consider the economic impact of a non-carrier's proposed use on services now offered by a common carrier?

6. Impact on Future Carrier Spectrum Needs.

(a) In allocating spectrum to non-common carrier satellites, must the FCC consider potential common carrier demands for the requested frequencies? (b) If so, what is the standard for measuring carriers' potential needs?

7. Interference.

(a) Does its authority over radio frequency allocations or its general supervisory powers over communications common carriers under the 1934 Act enable the Federal Communications Commission to modify, rescind, or otherwise regulate outstanding domestic point-to-point microwave radio service licenses and construction permits so as to minimize potential radio signal interference among such microwave systems and earth stations employed in providing communications services through satellites? (b) If the Federal Communications Commission has such authority, may it, upon its own initiative or upon application of the satellite operator, compel the locational modification of outstanding domestic point-to-point microwave radio service licenses and construction permits?

(c) Is the exercise of such authority contingent upon provisions of adequate compensation of the affected carrier, and, if so, upon whom does the obligation to provide such compensation rest?

8. Spectrum Allocation.

Does the FCC have sufficient authority either (a) to deny one spectrum applicant's license in favor of another when it can be shown the first can use cable with equal facility while the second cannot; or (b) to rescind licenses under the same conditions ?

9. Interconnection.

Under the 1934 Act (or the 1962 Act, if applicable), does the FCC have jurisdiction and authority to (a) regulate the terms of leases and interconnection arrangements between an existing communications common carrier and either a communications common carrier utilizing satellites or a non-common carrier utilizing satellites; or (b) require that an existing communications common carrier furnish facilities sought by a communications common carrier utilizing satellites or a non-common carrier utilizing satellites ?

10. Access to Network-owned Satellite.

If the three major television networks form a joint venture for domestic broadcast distribution through satellites, what would be the obligation of such a joint venture to supply satellite channels to others in the trade--including either a fourth network or a CATV network, or for one-time broadcasts--assuming (a) that excess system capacity exists or (b) that system capacity is fully utilized by the joint venture participants ?

11. Non-Compensatory Pricing.

(a) What Communications Act and antitrust procedures exist to prevent non-compensatory pricing by existing terrestrial broadcast distributors (principally, such as AT&T) designed to forestall the effective development of a competing broadcast distribution system utilizing satellites? (b) Is the answer different if the "non-compensatory" pricing is below "average" cost but not "marginal" cost?

Clay T. Whitehead
Staff Assistant

cc: Mr. Flanigan
Mr. Whitehead
Mr. Kriegsman
Mr. Jon Rose
Central Files

DBaker(Justice)/CTWhitehead/JRose:ed

Domgaard
Justice

Tuesday 11/4/69

6:45 Tom said someone from Don Baker's office would be calling about this. He basically wants to send this to Rehnquist.

7:10 TW said when Baker's office calls about the memo, tell them TW has learned that the Commission can require compensation for damages when it changes the operating license of a broadcast station and this apparently is done as a matter of course under authority of the 1934 Act. You should check that out in looking at the interference question with regard to common carriers.

Justice

November 4, 1969

MEMORANDUM FOR MR. FLANIGAN

Attached is a copy of a memorandum received from the Justice Department concerning Helen Bentley's promotional statements on behalf of the U. S. Flag Merchant shipping. I suggest you forward this memorandum to Mrs. Bentley with the attached memorandum.

Clay T. Whitehead
Staff Assistant

Attachments

cc: Mr. Whitehead
Central Files

CTWhitehead:ed

November 4, 1969

MEMORANDUM FOR HELEN DELICH BENTLEY

I am forwarding for your information the attached memorandum of law prepared by the Office of Legal Counsel at the Department of Justice.

Peter Flanigan
Assistant to the President

Attachment

cc: Mr. Flanigan
Mr. Whitehead
Central Files

CTWhitehead:ed

December 18, 1969

Dr. Clay T. Whitehead
Staff Assistant
Office of the President
The White House
Washington, D. C.

Dear Dr. Whitehead:

The Office of Legal Counsel has asked that the Antitrust Division respond to three of the legal questions on domestic satellites contained in your letter of November 3, 1969 to Mr. Rehnquist. These are question (relating to interconnection), question 10 (concerning access for competitors to a network-controlled satellite), and question 11 (concerning noncompensatory pricing). Question 10 is primarily one of antitrust policy, while question 11 has some antitrust issues; on the other hand, question 9 (which does raise some competitive issues) is basically a question arising under the Communications Act of 1934, and therefore we can claim no particular expertise with respect to it.

We understand that the Office of Legal Counsel will respond to the remaining questions in your letter.

9. Interconnection

Under the 1934 Act (or the 1962 Act, if applicable), does the FCC have jurisdiction and authority to (a) regulate the terms of leasing and interconnection arrangements between an existing communications common carrier and either a communications common carrier utilizing satellites or a non-common carrier utilizing satellites; or (b) require that an existing communications common carrier furnish facilities sought by a communications common carrier utilizing satellites or a non-common carrier utilizing satellites?

(a) Interconnection with common carrier systems. At common law, clearly one common carrier could not be required to link or connect its facilities with those of another, and as an obvious corollary, had no compellable obligation to furnish another common carrier facilities. 1/ Section 201(a) of the Communications Act of 1934 (47 U.S.C. §201(a)) purported to change this. That section imposed first, a duty upon the communications common carrier to furnish service upon reasonable request. 2/ Additionally, the plain language of the section granted the Commission power to compel a carrier "to establish physical connections with other carriers, to establish through routes and charges, and to establish and provide facilities and regulations for operating such through routes."

The Commission, however, has placed a somewhat restrictive gloss on this statutory provision. When a carrier interconnects by leasing plant and facilities to another so that the second carrier may provide a particular service or facility to its customers, the terms applicable to the transaction are usually set forth in a contract between the carriers. The Commission has taken the position that it has no general authority to modify, rescind, or in any other manner, regulate the terms of these contracts or require that one carrier furnish the facilities sought by another carrier 3/, because ". . .

1/ See, e.g., Atchison, Topeka & Santa Fe R.R. Co. v. Denver & New Orleans R.R. Co., 110 U.S. 667, 680 (1884); State v. Northwestern Bell Teleph. Co., 214 Iowa 1100, 240 N.W. 252 (1932); Home Teleph Co. v. Peoples Teleph. & Teleg. Co., 125 Tenn. 270, 141 S.W. 843 (1911).

2/ See, e.g., Coastal Auto Parts, Inc., F.C.C. Dkt. No. 18706, Memorandum Opinion and Order, October 27, 1969.

3/ It should be noted that the 1956 antitrust consent decree entered against AT&T imposed the obligation upon the Bell System to furnish leased facilities to Western Union. United States v. Western Electric, CCH 1956 Trade Cases ¶68,246 (S.D.N.Y. 1956), para. XVII(c).

the provision of facilities by one common carrier to another common carrier has not been regarded as a common carrier undertaking." 4/

To remedy this lapse, the Commission has asked Congress to make the provision of facilities by one carrier to another carrier a matter of explicit regulatory jurisdiction fully subject to Title II of the 1934 Act. Furthermore, the Commission has requested authority to require this service of the public convenience and necessity would be served.

> The authority being sought in the bill is . . . needed in order to avoid situations where there would have to be wasteful duplication of facilities in order to provide the needed service. 5/

No such general bill, however, has yet been successful.

However, when Congress enacted the Comsat Act, a provision granting this authority to the FCC was included. 6/ Hence, the Commission presently has explicit authority to compel terrestrial common carriers to furnish intercommection facilities to Comsat, and to supervise the terms and conditions of the necessary intercarrier contracts.

Despite inclusion of such specific authority as to Comsat, it is still highly probable that the above-quoted language of Section 201(a) of the 1934 Act authorizes the Commission to regulate and supervise common carrier

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4/ Senate Report No. 1584, 87th Cong., 2d Sess. 17 (1962). Compare Hearings Relan, F.C.C. Int. 8963, 5 P. & F. Radio Reg. 638, 659 (1951) (TV Interconnection case).

5/ Hearings Before the House Interstate and Foreign Commerce Committee, 88th Cong., 2d Sess. 10 (1964).

6/ 47 U.S.C.A. §721(c)(1962).

interconnections even when they involve provision of facilities. Thus, interconnection could be ordered with a domestic satellite communications common carrier, whether operated by Comsat or not.

First, the statutory language fairly plainly indicates that such explicit authority already exists, and the Commission's past requests for clarifying legislation are not dispositive. 6/ Second, as a general rule, restrictions administratively engrafted onto basic agency jurisdictional statutes are disfavored, 7/ and prior agency policy rarely conclusive. 8/ Third, regulation and indeed, compulsion, of intercarrier connection agreements [illegible] reasonably ancillary to the regulation of the participating common carriers, and often necessary to effect the purposes of the 1934 Act. Finally, the Commission itself seems to have recently abandoned its previous position; in its August 1969 Microwave Communications, Inc. decision, the Commission ordered interconnection through provision of facilities, stating:

> We have already concluded that a grant of MCI's proposal is in the public interest. We likewise conclude that, absent a showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest. 10/

6/ See United States v. Southwestern Cable Co., 392 U.S. 157, 170-78 (1968); American Trucking Ass'ns. v. Atchison, Topeka & Santa Fe R.R. Co., 387 U.S. 397, 418 (1967).

7/ See Social Security Bd. v. Nierotko, 327 U.S. 358 (1946).

8/ See [illegible] v. American [illegible], [illegible] U.S. [illegible] (19[illegible]); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

10/ Microwave Communications, Inc., 18 P. & F. Radio Reg. 2d 1037 (1969).

(b) Interconnection with non-carrier systems. There is apparently no clear FCC decision on the question whether a communications common carrier must interconnect with a communications noncommon carrier.

"'Private systems' service is in the 'gray' area between [common carrier] and non [common carrier] service." 11/ Most state courts and state utilities commissions have generally upheld telephone companies when they have refused to interconnect with other private or semi-private communications systems. 12/ This refusal has been most consistent where the private system was offering a communications service closely approximating or interchangeable with a service provided by the telephone company. 13/ The usual rationale has been that compelling such interconnection would somehow invade the telephone company's property rights or lawful franchise.

The FCC has concluded that the provisions of Title II of the 1934 Act are "generally pertinent, since the operator [of a private system] is in the position of a customer or user". 14/ Section 201(a) of the 1934 Act states that "it shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish communication service upon reasonable request therefor. . ."

11/ Mid-America Teleph. Co. v. Ohio Bell Teleph. Co., 40 P.U.R. 3d 244, 251 (Ohio Pub. Util. Comm'n 1961).

12/ See generally, In re Southwestern Bell Teleph. Co., 10 P.U.R. 3d 476 (Mo. 1955); Re New York Teleph. Co., 45 P.U.R. (NS) 409 (N.Y. 1942); Building Indust. Exhibits v. Cincinnati & Suburban Bell Teleph. Co., 71 P.U.R. (NS) 74 (Ohio 1947); Ohmes v. General Teleph. of S. W., 384 S.W. 2d 796, 799 (Texas Civ. Apps. 1964). See also Annot., Right and Duty of Telephone Companies to Make or Discontinue Physical Connection of Exchanges or Lines, 76 A.L.R. 953 (1932).

13/ See, e.g., State ex rel. Util. Comm'n v. Two-Way Radio Service, 272 N.C. 591, 158 S.E. 2d 855 (1968).

14/ Western Union, 5 P.&F. Radio Reg. 639, 660 (1950).

The Supreme Court has stated:

> We do not think it is necessary in determining the application of a regulatory statute to attempt to fit the relationship into some common-law category. It is sufficient to say that the relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission. 15/

In a related area, the Supreme Court has held under the Interstate Commerce Act that the obligation of a railroad common carrier to provide service upon reasonable request embraces a duty to provide service to other systems (in the case, trucking company piggyback operations), notwithstanding that such "person tendering traffic is a competitor. . . ." 16/ Although the trucking companies were common carriers, that fact apparently played little part in the court's decision.

Hence it is probable that within accepted common carrier precepts, the FCC has the authority to compel a communications common carrier to interconnect with private communications systems upon reasonable request therefor. Given the fact that the Domestic Satellite Service will probably be deemed interstate commerce, such authority should certainly suffice.

10. Access to Network-owned Satellite

> If the three major television networks form a joint venture for domestic broadcast distribution through satellites, what would be the obligation of such a joint venture to supply satellite channels to others in the trade--including either a fourth network or a CATV network, or for one-time broadcasts--assuming (a) that excess system capacity exists or (b) that system capacity is fully utilized by the joint venture participants?

15/ Ambassador, Inc. v. United States, 325 U.S. 317, 326 (1945).

16/ American Trucking Assoc. v. Atchison, Topeka & Santa Fe R.R. Co., 387 U.S. 397, 407 (1967).

[illegible]

(a) The Excess Capacity Situation. Here, it is assumed that the three major television networks propose to form a joint venture for domestic broadcast distribution through satellite(s) and the necessary related earth components. The legal form of the joint venture is not analytically important, but is assumed to be a separate corporation, with stock ownership and control divided among the joint venture participants in proportion to their capital subscriptions. It is here assumed that the space segment of the broadcast system consists of at least one satellite with a given channel capacity (e.g., a satellite dedicated to video broadcasting with a broadcast capacity of 24 video channels), and that the earth segment of the system consists of ground stations owned by the joint venture, by individual networks, or by local network affiliates. It is also here assumed that sufficient system capacity always exists to satisfy the requirements of the networks and anyone else desiring to participate. It is recognized that, depending upon demand for channels, this excess capacity situation - either on the satellite or the ground stations - might or might not exist or continue. The question here is whether, and on what terms, the joint venturers would have an obligation to make excess channel capacity available to other broadcasters.

Antitrust generally prohibits competitors in a given market from combining to exclude other actual or potential competitors from that market - a principle specifically applicable to joint business ventures formed by competitors. Associated Press v. United States, 326 U.S. 1 (1945). However, when that joint arrangement is itself legal, either because it is a natural monopoly or otherwise, then another antitrust rule comes into play: This requires a group of competitors controlling an essential resource or facility to provide access to it, on equal and nondiscriminatory terms, to all those who compete in the trade. United States v. Terminal R.R. Association, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945). 17/ The reason

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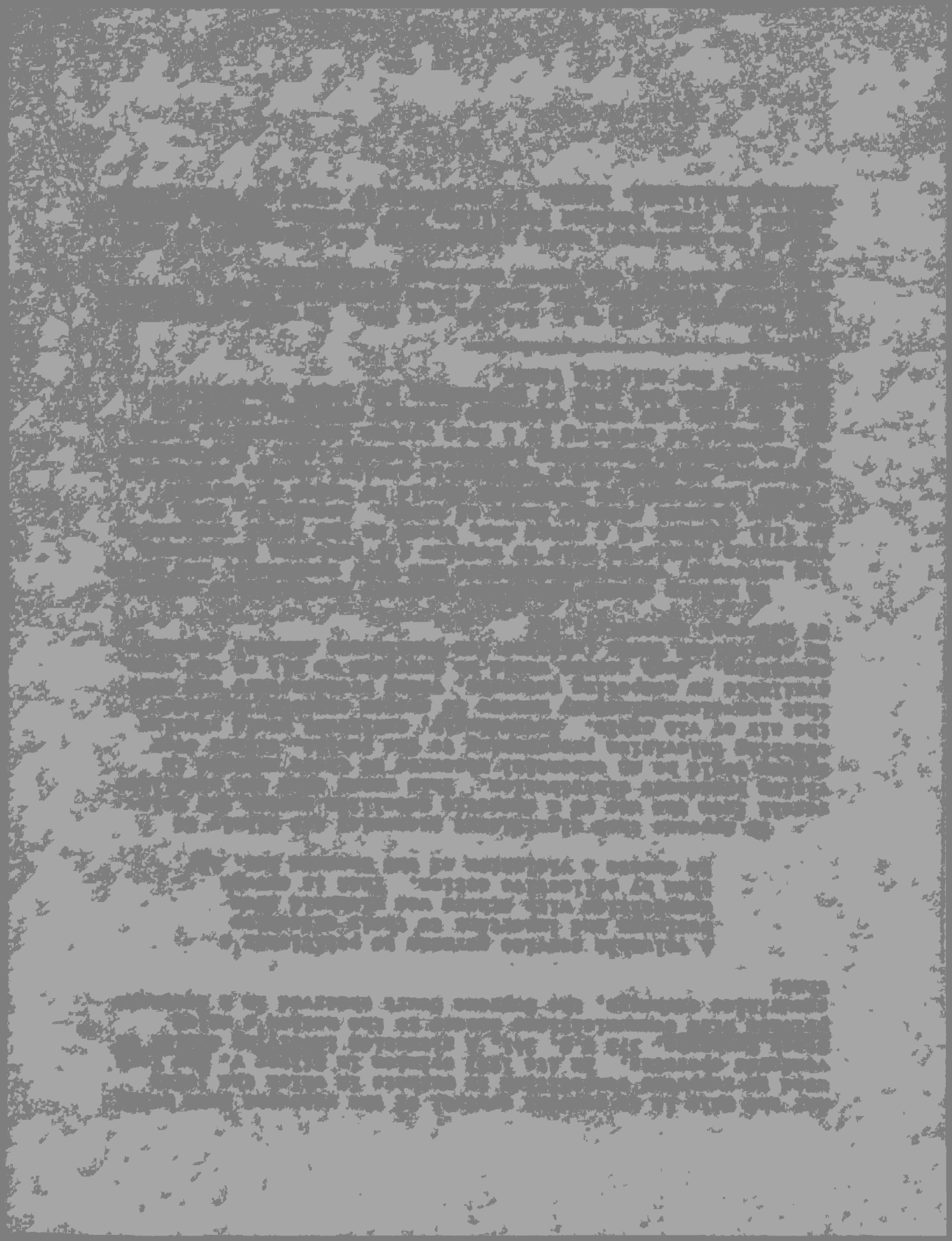
17/ This principle of equal and nondiscriminatory access to an essential resource or facility controlled by some, but not all, competitors in a given field, has been applied often to require access to markets or exchanges where such access is a prerequisite to effective competition. Gamco, Inc. v. Providence Fruit and Produce Bldg., 194 F. 2d 484 (1st Cir. 1952), certiorari denied, 344 U.S. 817 (1952) (a produce exchange building); American Federation of Tobacco Growers v. Neal, 183 F. 2d 869 (4th Cir. 1950) (a tobacco market); United States v. New England Fish Exchange 258 Fed. 732 (D.Mass. 1919) (a fish market); and United States v. Tarpon Sponge Exchange, 142 F.2d 125 (5th Cir. 1944) (a sponge market).



(b) The Limited Capacity Situation. In limited capacity situations, fair participation is still required. However, the process of determining fair access becomes more complex. In Gamco, Inc. v. Providence Fruit & Produce Bldg., supra, for example, the court dealt with a situation in which the access problem involved the right to lease space in a produce market building which had limited capacity. In formulating its remedy for the plaintiff, found to have been wrongfully excluded from its rental space, the court declared that (at 194 F. 2d 489):

> Upon remand the district court will proceed to ascertain and award the damages and appropriate counsel fees and further to determine as a court of equity the extent to which equitable relief should be awarded. In this it should be guided by the aim to restore plaintiff to its former competitive position so far as this can be done without taking away rights from innocent third persons. Thus the plaintiff should be accorded space in the building on terms similar to those accorded others, at once if available without dispossessing such innocent parties, otherwise as soon as available.

19/ footnote continued
There, at 224 U.S. 411, in discussing access to a joint railroad terminal facility, the Court stated that the joint venture could remedy its Sherman Act access problems by:

> First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.
>
> Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

It seems obviously sound that the one-time user, as a general principle of fair access, should be junior to the more continuous users, whether the original joint venturer or the later participants which pay (or wish to pay) for continuous channel capacity. While the one-time user should have a call upon idle channels, or off-peak periods on allocated channels, it should have no right to claim access to continuously-occupied capacity, other than that which might be bargained for commercially.

Another question of priorities caused by limited capacity would involve the competing claims of later arriving continuous-users who seek access to already occupied, channels after establishment of the joint satellite facility. If later claimants were to have the open-end right to channel space already occupied, the joint venture might well never be created; such a result would of course adversely affect competition and rates for broadcast distribution - a field now entirely controlled by A.T.&T. Therefore, in view of the present uncertainty of investment in the new field and the anticompetitive result from the project not going forward, we conclude that subsequent access should not be required provided (1) the sponsors of the joint venture had originally given notice to all over-the-air and CATV broadcasters and had given them a reasonable opportunity to participate on equal terms in the proposed satellite facilities; (2) in establishing the satellite system, the sponsors had not unjustifiably limited the system's capacity for the purpose of protecting their positions against the inroads of other broadcast competition; and (3) no usage of channel capacity could be shown as designed to preempt later use by new comers.

With respect to initial establishment of the limited capacity system, antitrust would seek to assure the broadest possible initial participation by all existing or potential competitors who may desire use of the facility. Assuming that a system with a given capacity is contemplated, the sponsors should give appropriate notice about the impending joint venture (i.e., its channel capacity, broadcast capabilities, expense, etc.) to all other networks, broadcasters, and CATV operators which might logically desire participation. Then, such potential users should be allowed to subscribe to the venture on fair, pro-rata terms, and to assure themselves of some full channel capacity. If other users wish to subscribe to some channel

capacity at the outset, they cannot be precluded from doing so simply because the capacity proposed in the initial system approximates the projected initial broadcast demand of the sponsors; in other words, the sponsors would have to cut back their demands, expand the satellite, or go ahead with a second one. If initial demand for satellite channels would exceed the level of capacity that would produce the lowest per-channel cost of capacity, the use of somewhat greater capacity and perhaps more expensive hardware might be required, and it would have to be shared among all users.

The foregoing procedure would have to be repeated as each new broadcast distribution satellite was established by the joint venture. Thus, any broadcasters or CATV operators who did not join the initial satellite might be given an equal opportunity to participate in subsequent satellites.

Finally, if some space in the satellite is not already occupied, it should be allocated to newcomers on a first come, first served basis. If applications are essentially simultaneous, the unoccupied space should be fairly allocated on a basis similar to that employed during the initial establishment of the facility.

The procedure outlined above would, we believe, satisfy the antitrust access requirements established in the St. Louis Terminal and Associated Press cases. It would appear to be more applicable to the space segment than the ground stations, where new increments of capacity can apparently be added to serve additional users.

11. Non-compensatory Pricing.

(a) What Communications Act and antitrust procedures exist to prevent non-compensatory pricing by existing terrestrial broadcast distributors (principally, such as AT&T) designed to forestall the effective development of a competing broadcast distribution system utilizing satellites? (b) Is the answer different if the "non-compensatory" pricing is below "average" cost but not "marginal" cost?

(a) Non-compensatory Pricing Generally. Sections 201(b) and 202(a) of the Communications Act (47 U.S.C. §§ 201(b), 202(a)) require common carriers to maintain "just and reasonable" charges for communications services and make illegal "any unjust or unreasonable discrimination in charges, practices," etc. for any services. Under these sections the Commission would appear to have ample authority to prevent non-compensatory pricing by existing common carriers, such as AT&T, which was designed to forestall development of a competing broadcast distribution system utilizing satellites.

A "just and reasonable" rate for a particular service has been held to be one that covers expenses and provides a fair return on invested capital. Wilson & Co. v. United States, 335 F. 2d 788, 797-98 (7th Cir. 1964), remanded on other grounds, 382 U.S. 454 (1966). While the "value of service" to users concept may be utilized in determining what constitutes a reasonable rate of return (ibid.), a rate which was non-compensatory probably would be unreasonable under most circumstances.

The antitrust laws are also relevant to the issue of non-compensatory pricing. Section 2 of the Sherman Act (15 U.S.C. §2) makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" of the United States. This provision generally prevents even a legal monopolist from reducing its prices below cost to forestall successful entry by a new competitor who has not also priced below long run cost or otherwise engaged in competitive unfairness. See, e.g., Union Leader Corp. v. Newspapers of New England Inc., 284 F. 2d 582 (1st Cir. 1960). Non-compensatory pricing may not be illegal in all other instances. See Turner, "Conglomerate Mergers and Section 7 of the Clayton Act", 78 Harv. L. Rev. 1313, 1340-41. However, when a monopolist intends to forestall new competition rather than simply to recoup a portion of invested capital or to prevent even greater losses, non-compensatory pricing may be unlawfully exclusionary. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 43, 76 (1911); United States v. New York Great Atlantic & Pacific Tea Co., 173 F. 2d 78, 88 (7th Cir. 1949); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 325-29, 346 (D. Mass. 1953).

(b) Marginal Cost Pricing. It has been argued frequently that selling at marginal rather than average cost should be permitted by regulatory agencies. See Turner, "The Scope of Antitrust and Other Economic Regulatory Policies", 82 Harv. L. Rev. 1207, 1233, n.49. Regardless of the merits of this position as a general rule, there should be little doubt that a regulatory agency should not permit pricing below average (but not marginal) costs if the effect is to forestall introduction of important new communications technology and competitive benefits. In such circumstances, pricing below average cost would be unjust, unreasonable or discriminatory under Sections 201(b) and 202(a) of the Act. This should be the case even if the justification is that the below average cost pricing is necessary to recoup fixed costs for investments which would become obsolete if a new system were developed.

It has been argued frequently that selling at marginal rather than average cost should be permitted by regulatory agencies. See Turner, "The Scope of Antitrust and Other Economic Regulatory Policies", 82 Harv. L. Rev. 1207, 1233, n. 49. Regardless of the merits of this position as a general rule, there should be little doubt that a regulatory agency should not permit pricing below average (but not marginal) costs if the effect is to forestall introduction of important new communications technology and competitive benefits. In such circumstances, pricing below average cost would be unjust, unreasonable or discriminatory under Sections 201(b) and 202(a) of the Act. This should be the case even if the justification is that the below average cost pricing is necessary to recoup fixed costs for investments which would become obsolete if a new system were developed. (Once the new competing system has come into regular service, a different situation may apply; at that time, the prior monopolist might be required by the marketplace to reduce its prices below even marginal cost because its technology has been rendered obsolete by the new system. 29/

29/ This type of situation might exist with respect to international undersea cables, if the Authorized User Decision, 4 F.C.C. 2d 421 (1966), did not prevent satellite-based prices from being offered directly to users.

Under the antitrust laws, introduction of marginal cost pricing by a monopolist is probably illegal if done only because of anticipation of entry by a specific new competitor, directed toward that specific company, and done with the intent of preventing such entry by the company. Introduction of selective below average cost pricing for an established specific service would probably prove these elements.

Sincerely yours,

/s/

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

Assistant Attorney General

Department of Justice
Washington

JAN 20 1970

MEMORANDUM FOR DR. CLAY T. WHITEHEAD
Staff Assistant, Office of the President

Re: Domestic Communications Satellite Program

This supplements my letter to you of today's date on the above subject.

We think it advisable to call to your attention a preliminary question not mentioned in your memorandum of November 7, but necessarily raised by any proposal for a domestic communications satellite program which does not involve seeking additional legislation. Since the prospective operators of communications satellite systems would not have the facilities for launching their satellites, you have informed us that it is the premise of all proposals for commercial domestic satellite communications systems that the National Aeronautics and Space Administration would be able to offer launch facilities and services to the operators of such systems on a reimbursable basis. There is some doubt whether NASA presently possesses such authority.

The Comsat Act specifically directs NASA to furnish satellite launching and associated services on a reimbursable basis to Communications Satellite Corp. ("Comsat"), the corporation chartered under that act. However, the act does not provide authority for furnishing such services to any other operator of a satellite communications system.

NASA contends that such authority may be found in NASA's basic legislation, the National Aeronautics and Space Act of 1958 ("Space Act"), 42 U.S.C. 2451-76. Section 203 of the Space Act, 42 U.S.C. 2473, provides, in relevant part:

"(a) The Administration, in order to carry out the purpose of this act, shall -

"(1) plan, direct, and conduct aeronautical and space activities;

* * *

"(b) In the performance of its functions the Administration is authorized -

* * *

"(5) * * * to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate * * *.

"(6) to use, with their consent, the services, equipment, personnel, and facilities of Federal and other agencies with or without reimbursement, and on a similar basis to cooperate with other public and private agencies and instrumentalities in the use of services, equipment, and facilities. * * *."

There is no question that the quoted authority in section 203(b) authorizes NASA, under certain circumstances, to launch satellites on a reimbursable basis for private corporations. This has been done, notably in the instance of the Telstar satellite launched for AT&T, and we are not aware that the legality of NASA's action has ever been challenged. However, Telstar was an experimental satellite, and there is a question whether NASA's authority to supply launch and associated services to private firms is not limited to situations in which the launch or operation of the satellite is for scientific purposes.

This question derives from the Space Act's definition of the term "aeronautical and space activities." Section 103 of the Space Act reads as follows:

"As used in this act -

"(1) the term 'aeronautical and space activities' means (A) research into, and the solution of, problems of flight within and outside the earth's atmosphere, (B) the development, construction, testing, and operation for research purposes of aeronautical and space vehicles, and (C) such other activities as may be required for the exploration of space; and

"(2) the term 'aeronautical and space vehicles' means aircraft, missiles, satellites, and other space vehicles, manned and unmanned, together with related equipment, devices, components, and parts."

It has been argued, in particular, by Comsat, that this definition limits NASA's authority under section 203 to activities related to research and development, so that furnishing launch services for a commercial satellite system would not be within NASA's authority.

In April 1969 this Office considered this problem in connection with a proposal that NASA provide launch services on a reimbursable basis for a domestic communications satellite for the Government of Canada. At that time NASA submitted to us a memorandum taking the position that NASA could provide launch services to either foreign governments or private interests for either experimental or operational satellite systems. Comsat argued that NASA lacked authority to furnish the services. We upheld Nasa's authority to furnish the launch services to Canada on the basis of those provisions of the Space Act, §§ 102(c)(7), 205, 42 U.S.C. 2451(c)(7), 2475, relating particularly to international cooperation. Letter of April 29, 1969 from myself

to the Legal Adviser of the State Department. We did not reach, therefore, the question whether NASA could provide such launch services to private interests.

As a legal matter the question appears to us a fairly close one. On the one hand, if one assumes that NASA's authority is limited to carrying on "aeronautical and space activities" within the literal definition of section 103, the making available of launch and associated services to operators of a domestic communications satellite system does not appear to be within the scope of such authority. Even if one were to argue that there would be scientific value in additional satellite launches, it appears to be the essence of the proposal you are considering that NASA would offer its services to any and all system operators approved by the FCC without any determination of the scientific value of their satellite or their system.

On the other hand, we recognize that a plausible case can be made for NASA's authority. The definition of "aeronautical and space activities" in section 103 was added to the 1958 legislation in Senate-House conference. The conference report throws some light on what the conferees had in mind:

> "The purpose is to make clear that the act is concerned primarily with research, development, and exploration. The use of the word 'activities' is intended to be broad in the area of outer space because no one can predict with certainty what future requirements may be.
>
> "It is not the intention of Congress, however, to construe activities so broadly as to include such

things as the operation of commercial airlines, the control of air traffic, the fixing of airworthiness standards, the setting of air fares, or the assigning of certificates of public convenience and necessity. Whether, in time, the new Administration will run a regular transport route to another planet or to the moon is not a matter of current concern. But the term 'activities' should be construed broadly enough to enable the Administration and the Department of Defense, in their respective fields, to carry on a wide spectrum of activities which relate to the successful use of outer space. These activities would include scientific discovery and research not directly related to travel in outer space but utilizing outer space, and the development of resources which may be discovered in outer space." 1958 U.S. Code Cong. & Adm. News 3192.

It is perhaps significant that the examples cited of activities excluded from NASA's responsibility by section 103 all involve regulatory authority and most would duplicate the responsibility of other agencies. They seem easily distinguishable from the provision of launch services. Furthermore, launch services could certainly be interpreted as within "a wide spectrum of activities which relate to the successful use of outer space," and might reasonably be regarded as part of "the development of resources which may be discovered in outer space," if we read "resources" to include the potentiality for using outer space for transmitting communications.

Moreover, a too literal interpretation of "aeronautical and space activities" may create difficulties elsewhere in the Space Act. Thus, section 102(c)(7) provides that the "aeronautical and space activities of the United States shall be conducted so as to contribute materially to * * * cooperation by the United States with other nations * * * in work done pursuant to this act and in the peaceful application of the results thereof." If NASA is limited to aeronautical and space activities, as narrowly defined, it would be unable to cooperate in the peaceful application of the results of such activities.

Evidently, to give effect to section 102(c)(7), one must interpret the term "activities," at least as applied to that subparagraph, to include the application of the results of research, etc., and we so construed it in our April 29 letter.

The other legislative history which has been cited for and against NASA's claimed authority in this area does not appear to us to resolve the question. In 1962 testimony on the Comsat legislation, Dr. Dryden, Deputy Administrator of NASA, indicated that if the legislation were passed, NASA would not launch an operating communications satellite for any private firm other than Comsat, but his testimony, considered as a whole, cannot be read as asserting that NASA lacked legal authority to do so.1/ Somewhat more significant, perhaps, was a colloquy between Dr. Dryden and Senator Pastore at a hearing held in 1963 after the passage of the Comsat legislation:

> Sen. Pastore: "I am making a distinction between firing a satellite for experimental purposes, and that is what Telstar is, against the fact that we have created a private corporation, to engage in a commercial business of telephony and video and what have you, insofar as commercial use of a satellite.
>
> "Now, I quite agree that the NASA had the right to charge and to allow A.T.&T. to shoot up an experimental satellite. * * * But it certainly hasn't got the power to grant A.T.&T. the right to shoot up a satellite and use it for commercial purposes and make a charge for it, without an act of Congress."
>
> Dr. Dryden: "That is right."2/

1/ "Communications Satellite Act of 1962," Hearings before the Senate Foreign Relations Committee, 87th Cong., 2d Sess., 262-66.

2/ "Satellite Communications," Hearing before a subcommittee of the Senate Commerce Committee, 88th Cong., 1st Sess., 67. It might be noted that Senator Pastore was Chairman of the Subcommittee on Communications and had been one of the leading supporters of the Administration's Comsat bill in 1962.

NASA has explained this colloquy as relating not to NASA's lack of authority to launch an operational satellite, but to "the lack of authority * * * in the other corporation to operate a commercial satellite system in competition with Comsat, because of the exclusive right Comsat had been given, under the Comsat Act, to establish and operate the global commercial communications satellite system."3/ This does not appear to us to be the most natural reading of the colloquy, but it must be recognized that exchanges such as this tend to be somewhat imprecise. What is significant is that, for whatever reason, both Dr. Dryden and Senator Pastore appeared to assume that any launch of a communications satellite other than on an experimental basis for a commercial user other than Comsat would require new legislation.

We see no need at this time to take a definite position regarding NASA's launch authority. The question seems fairly open to dispute, and it would not be appropriate for us to decide it without giving NASA and any other interested agencies a chance to present their views. An actual dispute has not arisen, and it is not entirely clear in what context one might arise. Comsat will probably question NASA's right to provide launch services, as it did at the time of the Canadian satellite proposal. However, it is extremely doubtful that Comsat would have standing to challenge NASA's authority in court. Alabama Power Co. v. Ickes, 302 U.S. 464, 479-81 (1938); Kansas City Power & Light Co. v. McKay, 225 F. 2d 924 (C.A. D.C. 1955), cert. denied, 350 U.S. 884 (1955).

Within the Government the feasibility of NASA's offering launch services would depend on the General Accounting Office's permitting NASA to credit reimbursements for launch services from satellite operators to its appropriation account, rather than to cover them into the Treasury as miscellaneous receipts, 31 U.S.C. 484; see 10 Comp. Gen. 510 (1931); 34 Comp. Gen. 577 (1955). Obviously, if such payments were not credited to NASA's appropriation, NASA would have to budget separately for anticipated costs of furnishing launching services. NASA informs us that GAO has in the past

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3/ NASA's Memorandum of Law dated March 5, 1969, p. 21.

permitted reimbursement for services rendered in connection with Telstar and other similar projects to be credited to the NASA appropriation. Conceivably, GAO might regard the question of the treatment of the reimbursed funds as hinging on NASA's authority to furnish the services. However, NASA informs us that it anticipates no difficulty from GAO on this score.

Since NASA concludes that it has the necessary authority and is prepared to proceed on that basis, there does not appear to be any occasion for an opinion from this Office at this time.

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Justice

May 1970

The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries

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Reprinted from
BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL
LAW REVIEW
Vol. XI, No. 4, May, 1970

THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE: THE ROLE OF COMPETITION IN REGULATED INDUSTRIES

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Antitrust—"our own, American form of nonplanning by Government action"[1]—enforces a commitment to "competition [as] our fundamental national economic policy."[2] However, antitrust has not traditionally been a major factor in most sectors of the American economy subject to direct government regulations. In such industries as communications, transportation and finance there has been little, if any, active effort to promote competition. Instead, traditionally there has been a tendency to protect regulated monopolists from outside competition, and a willingness to tolerate restrictive practices ancillary to basic monopoly.[3] The premise of regulation has been that governmental supervision is a sufficient method to secure reasonable economic performance by regulated enterprises.[4] In recent years, however, the less than fully satisfactory economic performance of

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The views expressed are those of the author and do not necessarily represent the position of the Antitrust Division. The author gratefully acknowledges the assistance of Kenneth G. Robinson (also of the Evaluation Section, Antitrust Division) in preparing this paper.

[1] Fortas, Portents of New Anti-trust Policy, 10 Antitrust Bull. 41, 42 (1965).

[2] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963).

[3] See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws 269 (1955); Adams, Business Exemptions from the Antitrust Laws: Their Extent and Rationale, Perspectives on Antitrust Policy 273 (Phillips ed. 1965). Adams leaves no doubt as to his conclusion: "In industry after industry, regulatory rulemaking and adjudication, operating within a broad delegation of discretion and reinforced by Congressional tolerance or support, have resulted in the elimination of both actual and potential competition." Id.

[4] See, e.g., Economic Report of the President 107 (1970).

many, if not most, of the regulated industries has given rise to criticism of, and a challenge to, the premise supporting governmental regulation.[5] A recurring theme in this criticism has emphasized the reluctance of regulators to utilize competition as a means of encouraging economic performance, thus permitting unnecessary inefficiency to be imposed on the economy.[6] The Antitrust Division has come into this situation as an outsider with a visible commitment to competition, and significant responsibilities as an enforcer of the antitrust laws and as an advocate for competitive policies. Its role has been to stress the necessity for competition as a source of efficiency and innovation by regulated enterprises in a wide variety of circumstances in which competition and specific regulatory goals are not incompatible.

I. The Antitrust Division

A. *Organization and Responsibilities*

The Antitrust Division, the largest of the ten divisions of the Justice Department, is the executive agency responsible for antitrust enforcement. Its professional staff, headed by an Assistant Attorney General, consists of approximately 280 lawyers and economists grouped in ten sections in Washington[7] and seven regional field offices around the country.[8] It has an annual budget of about eight million dollars—a figure considerably below that for most regulatory agencies.[9]

The Division's mandate covers a variety of statutory provisions

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[5] Presidential Task Force, Report on Productivity and Competition, (Stigler Report) (Feb. 8, 1969) 115 Cong. Rec. S 6473 (daily ed. June 16, 1969). (Senator Talmadge requested that this unpublished report be printed in the Record.) (5 Trade Reg. Rep. ¶ 50,250.)

[6] See L. Kohlmeir, The Regulators (1969); Posner, Natural Monopoly and Its Regulation, 21 Stan. L. Rev. 548 (1969); Turner, The Scope of Antitrust and Other Economic Regulatory Policies, 82 Harv. L. Rev. 1207 (1969). This current criticism reflects part of a continuing theme. These writers also criticize the inefficiency of overly comprehensive and detailed regulations. They point out, among other things, that such regulation creates two layers of management, the executives of the regulated firms and the public officers charged with supervising them. This situation tends to produce duplication of effort and enhances the tendency of the regulators to adopt the views of "their" industry. See also Economic Report of the President, 107-10 (1970).

[7] The sections are: Appellate, Economic, Evaluation, Foreign Commerce, General Litigation, Judgments & Judgment Enforcement, Public Counsel, Special Litigation, Special Trial, and Trial. Most of the Antitrust Division's activities before regulatory commissions, discussed below, have been undertaken by the Public Counsel and Evaluation sections.

[8] These offices are located in New York, Philadelphia, Atlanta, Cleveland, Chicago, San Francisco and Los Angeles. In addition, some local antitrust violations are handled by the various United States Attorney's offices acting under the general direction of the Antitrust Division.

[9] This Division in some years returns more in fines than its cost of operation.

designed to promote competition. It is exclusively responsible for the enforcement of the civil and criminal provisions of the Sherman Act,[10] and it shares enforcement of the Clayton Act with the Federal Trade Commission.[11] The great bulk of its enforcement activity is concerned with specific anticompetitive practices such as price-fixing, group boycotts and tying arrangements, and with mergers which produce less competitive market structures.

Section 1 of the Sherman Act[12] provides the basic weapon against anticompetitive business practices. Tempered by the hands of generations of judges and enforcers, it now covers not only such basic restraints as price-fixing[13] and market allocation,[14] but many more subtle restraints, including implied tie-ins[15] and patent licensing restraints.[16] Section 1 has been supplemented by Section 3 of the Clayton Act[17] which specifically prohibits tie-ins and exclusive dealing arrangements concerning tangible goods. The greater showing of anticompetitive injury thought to be required by the Sherman Act[18] has largely been eliminated, as the Supreme Court's more recent decisions reflect a strong tendency to assimilate the stricter Clayton Act standards into the Sherman Act.[19]

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[10] 15 U.S.C. §§ 4, 9 (1964).

[11] 15 U.S.C. § 21 (1964). The use of § 5 of the Federal Trade Commission Act to supplement Clayton and Sherman Act civil charges is long-standing. FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394-95 (1953); FTC v. Brown Shoe Co., 384 U.S. 316 (1966); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965).

[12] 15 U.S.C. § 1 (1964). Section 1 provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ."

[13] See, e.g., United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

[14] See, e.g., Burke v. Ford, 389 U.S. 320 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[15] See, e.g., Advance Business Sys. & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969); Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F.2d 764 (6th Cir. 1936).

[16] See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

[17] 15 U.S.C. § 14 (1964). Section 3 provides:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . , or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition . . . that the lessee or purchaser . . . shall not use or deal in the goods . . . of a competitor. . . .

See Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum L. Rev. 422, 433-36 (1965).

[18] See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609-10 & n.27 (1953). See also Blake & Blum, Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination, 74 Yale L.J. 1339, 1383-85 (1965).

[19] See, e.g., Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (tying arrangements); cf. United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964) (mergers).

The principal weapons for dealing with market power and structure are Section 2 of the Sherman Act[20] and Section 7 of the Clayton Act.[21] Section 2 is aimed at monopoly power within defined product markets. It outlaws anticompetitive attempts to acquire such power and probably outlaws the exercise of such power unless it is attributable solely to the defendant's skill, foresight, and industry.[22] Relatively few government antitrust cases have been brought under section 2, and it has not yet proved a conspicuously successful antitrust tool. The same cannot be said of Section 7 of the Clayton Act. Since it was extensively amended in 1950, it has become an extremely effective antitrust enforcement weapon for dealing with changes in market structures. The government has secured an almost unbroken string of victories before the Supreme Court in merger cases under this section.[23] As a result, section 7 now bars almost any significant horizontal merger between direct competitors,[24] or vertical mergers involving any significant market foreclosure.[25] It also prevents conglomerate mergers involving diminution of potential competition,[26] creation of dangers of reciprocity,[27] and certain other anticompetitive effects.[28]

These few statutory tools, and the competitive policies which lie behind them, increasingly have been applied by the Antitrust Division in the field of regulated industries. These efforts involve direct anti-

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[20] 15 U.S.C. § 2 (1964). Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . .

[21] 15 U.S.C. § 18 (1964). Section 7 provides in relevant part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[22] See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281 (1956).

[23] Justice Stewart emphasized this point in his dissenting opinion in United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

[24] United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[25] Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Kennecott Copper Co., 321 F. Supp. 95 (S.D.N.Y. 1964), aff'd, 381 U.S. 414 (1965).

[26] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

[27] FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963), aff'd, 320 F.2d 509 (3d Cir. 1963).

[28] Ekco Products Co. v. FTC, 347 F.2d 745 (7th Cir. 1965); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968).

trust enforcement action against regulated enterprises as well as advocacy of competitive policies before the various regulatory agencies; they appear to have produced a greater awareness of competitive issues on the part of at least some of those charged with regulatory responsibility.

B. *The Law Enforcement Role*

The Antitrust Division traditionally has brought both civil and criminal antitrust cases against regulated enterprises. These actions have challenged both particular anticompetitive conduct proscribed by Sections 1 and 2 of the Sherman Act, and merger transactions proscribed by Section 7 of the Clayton Act. Some of the merger cases have involved challenges to transactions already approved,[29] or subject to approval,[30] by the appropriate regulatory commission.

1. Anticompetitive Conduct

Several relatively recent antitrust cases have involved anticompetitive agreements among members of a regulated industry. None of the agreements had prior approval by a regulatory agency. In 1961 and 1963 the Department brought three sets of cases against commercial banks in New Jersey and Minnesota for price-fixing of bank loans and services.[31] The Minnesota cases included criminal indictments. Similarly, in 1969 the Division challenged the collective action of a group of private utilities in refusing to sell wholesale power to municipalities or to wheel wholesale power from generating plants of other companies to such municipalities.[32] This conduct, it was alleged, constituted a group boycott and an attempt to monopolize the retail distribution of electric power, in violation of Sections 1 and 2 of the Sherman Act. However, since none of these overtly anticompetitive agreements had been approved by a regulatory agency, these antitrust actions raised no direct conflict or questions of accommodation between antitrust prohibitions and the regulatory scheme.[33]

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[29] See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (involving prior approval by the Comptroller of the Currency).

[30] See California v. FPC, 369 U.S. 482 (1962) (staying FPC consideration of a pipeline merger during the pendency of a government antitrust suit challenging it).

[31] United States v. Hunterdon County Trust Co., Civ. 1100-61 (Blue Book No. 1639) (D.N.J., filed Dec. 26, 1961); United States v. Duluth Clearing House Ass'n., Cr. 5-63, Cr. 6; United States v. First Nat'l Bank, Cr. 3-63, Cr. 8; United States v. Northwestern Nat'l Bank, Civ. 4-63, Civ. 52; United States v. First Nat'l Bank, Civ. 3-63, Civ. 37; United States v. Duluth Clearing House Ass'n Civ. 5-63, Civ. 4; (Blue Book Nos. 1734-1739) (D. Minn., filed Feb. 8, 1963).

[32] United States v. Otter Tail Power Co., Civ. No. 6-69, Clv. 139 (Blue Book No. 2065) (D. Minn., filed July 14, 1969).

[33] Cf. Silver v. New York Stock Exch., 373 U.S. 341 (1963), where a private

2. Mergers

The Antitrust Division has not always been able to avoid such conflict. A considerable number of antitrust suits under Section 7 of the Clayton Act and Section 1 of the Sherman Act challenging mergers involving regulated enterprises have been brought. These cases, involving commercial banks, natural gas pipelines, and broadcast interests, generally represent a subsequent antitrust challenge to a merger transaction requiring agency approval.[34] Additionally, in those situations where the approving agency (typically the Interstate Commerce Commission) has statutory authority to immunize a merger from antitrust challenge, the Antitrust Division may litigate the matter before the Commission and appeal adverse determinations.[35]

The Antitrust Division's role as a litigant has developed most fully in the bank merger field, following the Supreme Court's landmark 1963 decision in the *Philadelphia Nat'l Bank* case.[36] Subsequent to this decision, Congress enacted the Bank Merger Act Amendments[37] of 1966 as an attempt to accommodate the antitrust and regulatory policies in the banking field, while minimizing the troublesome problems of divestiture. The special rules and procedures of this Act make provisions for subsequent antitrust challenge of agency-approved bank mergers,[38] but require that the Department of Justice file suit within 30 days,[39] and make the antitrust action subject to a special "convenience and needs" defense.[40] In addition, the 1966 Act provides for a special statutory stay to prevent consummation of the

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antitrust plaintiff's charge that the New York Stock Exchange had engaged in an illegal boycott was upheld in part on the ground that the challenged conduct was not subject to Securities and Exchange Commission supervision under the Securities Exchange Act of 1934.

[34] See the leading cases of United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (commercial banks); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (natural gas pipelines); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (broadcast license transfer).

[35] See, e.g., The Northern Line Merger Case, 396 U.S. 491 (1970), where the Antitrust Division was unsuccessful in blocking an ICC-approved rail merger. This same approach has been taken by the Antitrust Division in at least one case where the regulatory commission did not have the authority to immunize the transaction. In the FCC's *ABC-ITT* case, American Broadcasting Co., 7 F.C.C.2d 245 (1966), 9 F.C.C.2d 546 (1967), the Antitrust Division intervened before the Commission and took an appeal from its adverse decision, rather than file a separate antitrust action. The merger was abandoned while the appeal was pending in the District of Columbia Circuit.

[36] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[37] 12 U.S.C. § 1828(c) (Supp. IV, 1969).

[38] 12 U.S.C. § 1828(c)(7) (Supp. IV, 1969).

[39] 12 U.S.C. § 1828(c)(7)(C) (Supp. IV, 1969).

[40] 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969).

merger during the litigation.[41] It also requires that the banking agencies apply an antitrust competitive standard in approving bank mergers.[42] However this step does not seem to have influenced the Comptroller of Currency[43] in producing harmonization of standards. For example, from January, 1966 through July, 1968, the Federal Reserve Board and the Antitrust Division advised of serious anticompetitive effects in connection with 94 proposed mergers pending before the Comptroller and the Federal Deposit Insurance Corporation (of which the Comptroller is one of three directors). The Comptroller and the FDIC issued denials in only three of these cases. Ten others were stayed by antitrust suits filed by the Department of Justice and all but one of these involved approvals by the Comptroller.

A key issue in the post-1966 bank merger litigation has been to define the scope of the "convenience and needs" defense provided in the 1966 Act. The statute provides that a bank merger inconsistent with section 7 is illegal "unless . . . the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[44] The banks and the Comptroller have unsuccessfully urged a very expansive reading of this provision. On the other hand, the Antitrust Division has urged a limited construction, in accordance with the normal treatment of antitrust defenses.

The latter approach has generally prevailed in the Supreme Court. In its 1967 *First City Nat'l Bank* decision,[45] the Court emphasized that the non-competitive benefits must "clearly" outweigh the loss of competition,[46] and it placed the burden of proving the defense on the defendant banks. The next year, in *United States v. Third Nat'l Bank*,[47] the Court construed the statute as requiring affirmative proof that the "merger was essential to secure this net gain to the public interest."[48] It specifically placed on the defendant banks the

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41 12 U.S.C. § 1828(c)(7)(A) (Supp. IV, 1969).

42 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969).

43 The Comptroller of the Currency is responsible for all mergers in which the resulting institution is a national bank, the Board of Governors of the Federal Reserve System for all mergers in which the resulting institution is a state bank member of the Federal Reserve System, and the Federal Deposit Insurance Corporation for all mergers in which the resulting institution is a federally insured state bank outside the Federal Reserve System.

44 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969).

45 United States v. First City Nat'l Bank, 386 U.S. 361 (1967).

46 Id. at 370.

47 390 U.S. 171 (1968).

48 Id. at 189.

burden of demonstrating the unavailability of measures falling short of merger, for "[o]therwise, the benefits of competition, acknowledged by Congress, would be sacrificed needlessly."[49] Thus the Supreme Court has reaffirmed that the primary public need is for competitive banking structures.[50]

C. *The Role as Advocate for Competitive Policy*

In the last three years the Antitrust Division has appeared with increasing frequency as an advocate for competitive policies in a wide range of regulatory proceedings. This represents an extension of its traditional role as litigant before the agencies and the appellate courts in transportation merger cases where agency approval carried with it an antitrust exemption. It also represents an extension of its role as special adviser on competitive effects under the Bank Merger Act of 1960.[51]

The Division's role as an advocate for competition has covered mergers, market structures, and specific anticompetitive practices in a variety of industries, including broadcasting, communications, securities, and air transportation.

1. Broadcasting

In this industry "the principle of free competition"[52] has long been recognized and yet not been widely implemented by a Federal Communications Commission seemingly concerned primarily with financial capability as the prime determinant in broadcast licensing.[53] As a result, most local media markets have been highly concentrated in structure, with frequent cross-ownership arrangements between local newspapers, television and radio stations, while national networking has been limited to three alternatives.

Beginning with the celebrated *ABC-ITT* case in 1967,[54] the Antitrust Division has appeared frequently before the FCC urging more competitive policies in broadcasting. *ABC-ITT* was in form a license transfer proceeding under the Federal Communications Act; in fact,

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[49] Id.

[50] See Via, Antitrust and the Amended Bank Merger and Holding Company Acts, 53 Va. L. Rev. 1115, 1131 (1967). See pp. 584-86 infra, for full discussion of the significance of the premise in favor of competition.

[51] The Act required the Department to file a report on the competitive effect of each bank merger with the federal banking agency having jurisdiction over the merger; this was based on the premise that the Department had some expertise in measuring competition, and the more doubtful (as it turns out) premise that such reports would reduce policy conflicts between the Department and the regulatory agencies.

[52] See, e.g., FCC v. Sanders Radio Station, 309 U.S. 470, 474 (1940).

[53] See generally Note, Diversification in Communication: The FCC and its Failing Standards, 1969 Utah L. Rev. 494.

[54] American Broadcasting Co., 7 F.C.C.2d 245 (1966).

it was a conglomerate acquisition by International Telephone and Telegraph of American Broadcasting Company, the nation's third largest network. After the FCC had granted a routine approval in late 1966,[55] the Antitrust Division entered the proceeding and moved for a rehearing. It urged that the elimination of ITT as a potential entrant into networking was significantly anticompetitive and hence warranted Commission disapproval. While the Commission set the case for evidentiary hearing, it ultimately adhered to its original position.[56] However, the merger was abandoned while an Antitrust Division appeal was pending.

The Antitrust Division has since participated in two FCC broadcast licensing proceedings which raised competitive issues in local markets. In 1968 it opposed the transfer of a Beaumont, Texas television license to the only newspaper in the community on the grounds that it would constitute a violation of Section 7 of the Clayton Act.[57] The transaction was subsequently abandoned and the station sold to a newspaper operator in another city. In a more novel effort in early 1969, the Antitrust Division sought a full hearing on the license renewal of a monopoly television station in Cheyenne, Wyoming which was controlled by the only newspaper in the same market.[58] The Division's petition suggested that this local monopoly situation might be alleviated by issuing a qualified renewal, and giving to the applicant "a reasonable opportunity to dispose of its television station at its market value . . . ."[59] The Cheyenne case has been recently set for hearing and is still pending before the Commission.

Similarly, where the issue of competition in local media markets has been raised in FCC rule-making proceedings, the Antitrust Division has offered comments. In August, 1968 it supported the Commission's so-called "one-to-a-market" proposal which would limit future broadcast licensees to control of one broadcast outlet (AM, FM, or TV) in any local market.[60] In April, 1969 it supported a

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[55] American Broadcasting Co., 7 F.C.C.2d 336 (1967).

[56] For a full chronology, see American Broadcasting Co., 9 F.C.C.2d 546, 699 (1967).

[57] Beaumont Broadcasting Corp., FCC File No. BTC-5553 (1968). Later the same year, the Justice Department filed a civil antitrust complaint, under Clayton Act § 7, against the acquisition by a local television station owner in Rockford, Illinois of the monopoly newspaper in the same community. United States v. Gannett Co., Civ. No. 68 C 48 (Blue Book No. 2029) (N.D. Ill., filed Dec. 5, 1968). The Rockford acquisition—unlike the Beaumont one—did not require FCC approval, since there was no change in the control over the television station. The case was settled by consent decree requiring divestiture of either the television station or the newspaper. 1968 Trade Cas. ¶ 72,644 (N.D. Ill. Jan. 6, 1969).

[58] Frontier Broadcasting Co., FCC File No. BRCT-318 (1968).

[59] Petition of the Dep't of Justice at 25 (Dec. 30, 1968).

[60] Comments of the Dep't of Justice, FCC Dkt. 18110 (Aug. 1, 1968).

similar FCC proposed rule which would prevent a television station licensee from controlling a community antenna television (CATV) system in the same market.[61] The Commission has recently adopted both the "one-to-a-market" rule and the CATV rule.[62] Basically, these rule-making filings, like the filings in specific license proceedings, sought to apply to the broadcast licensing process the basic competitive principles developed under Section 7 of the Clayton Act and, to a lesser extent, under Section 2 of the Sherman Act.

Community antenna television is an important competitive factor in broadcasting. The Antitrust Division has emphasized this in two 1969 filings in the FCC's wide-ranging *CATV Inquiry*.[63] It noted that CATV offers "the most promising means of achieving greater competition and diversity in local mass media communications,"[64] and urged the Commission "to take affirmative steps to assure that CATV is permitted to reach its full potential as a communications media."[65] It urged limitations on cross-ownership of CATV systems by major competing local media (namely, TV stations and newspapers) in the same market.[66] It also opposed proposals before the Commission to protect over-the-air broadcasters by (1) restricting distant signal importation by CATV systems, (2) limiting CATV program origination, and (3) preventing interconnection of CATV systems. It stressed that such proposals would severely limit the effectiveness of CATV as a new entrant in mass media communications.[67] At the same time, the Antitrust Division noted that a local CATV system generally is a monopoly and would have to provide equitable access to its cable for independent sources of programming, in accordance with established antitrust principles.

2. Common Carrier Communications

The broad competitive issue in this field has been how to confine a natural monopoly to its necessary bounds. The telephone companies have long used their control over the telephone network as a means of discouraging customer-owned communications equipment, and con-

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[61] FCC Dkt. 18397 (1968).

[62] Multiple Ownership of Broadcast Facilities, FCC Dkt. 18110, — P&F Radio Reg. 2d — (1970); Second Report and Order, FCC Dkt. 18397, — P&F Radio Reg. — (1970).

[63] FCC Dkt. 18397 (1968).

[64] Comments of the Dep't of Justice, FCC Dkt. 18397, at 16 (April 7, 1969).

[65] Id. at 10.

[66] Id. at 15-26.

[67] Comments of Dep't of Justice, FCC Dkt. 18397 (Sept. 5, 1969).

trolling such ancillary items as dial advertising discs[68] and telephone directory covers.[69]

The Antitrust Division entered this field in 1967 with an amicus brief, supporting the FCC staff, in the Commission's *Carterfone*[70] proceeding. This proceeding questioned the telephone companies' strict "foreign attachment" tariffs which prevented use of most customer-supplied communications equipment. The Division claimed that such a blanket prohibition was unnecessarily restrictive, since the telephone network could be protected from harm by less restrictive measures, and the prohibition therefore constituted an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."[71] The Commission struck this tariff down in June, 1968,[72] and since then the Antitrust Division has actively participated in the Commission's attempts to formulate a new liberal tariff.[73]

The Antitrust Division also made a comprehensive filing in early 1967 in the FCC's broad-ranging *Computer Inquiry*.[74] This dealt both with restrictive communications carrier practices (such as the "foreign attachment" rule), and the various competitive problems posed by carrier entry into the data processing field.

The Antitrust Division has challenged restrictive telephone company practices in the CATV field. In a 1969 brief to the FCC, the Division urged that serious antitrust questions were raised by the telephone company practice of unnecessarily restricting CATV operators' access to telephone company poles and underground conduits, and the related practice of insisting that CATV operators offer no communications services other than CATV.[75] After the Bell System had announced that it would abandon these practices, the Commission issued an opinion declaring them illegal.[76]

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[68] Southwestern Bell Tel. Co. v. Dialite Dial Co., 102 F. Supp. 872 (W.D. Okla. 1951), appeal dismissed, 197 F.2d 523 (10th Cir. 1952).

[69] Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 136 N.E.2d 1 (1956).

[70] Carterfone Device, 13 F.C.C.2d 420 (1968).

[71] Brief for the United States as Amicus Curiae (Oct. 13, 1967), quoting Hush-a-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956).

[72] Carterfone Device, 13 F.C.C.2d 420 (1968).

[73] See AT&T Tariff Revisions, 15 F.C.C.2d 605 (1968).

[74] Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 7 F.C.C.2d 11 (1966); see Response of the Dep't of Justice, March 5, 1968.

[75] Comments of the Dep't of Justice, FCC Dkt. 18509, (July 11, 1969).

[76] Letter from AT&T to FCC Chairman Hyde (Oct. 28, 1969); Final Report and Order, 21 F.C.C.2d 307 (1970), modified, Memorandum Opinion and Order, 18 P&F Radio Reg. 2d 1799 (1970).

3. Securities

The broad problem in this area is that the nation's dominant securities market, the New York Stock Exchange, has long operated with little regard for competitive policies. It has operated on the basis of a system of collectively fixed rates, with various rules discriminating against non-members. While the Securities and Exchange Commission enjoys general supervision over the industry, the basic scheme under the Securities Exchange Act of 1934 is "self-regulation." The SEC has rarely exercised its formal powers to supervise exchange membership, procedures and rules under Section 19(b) of the Securities Exchange Act.[77]

Antitrust involvement in this field began in 1963 with a private antitrust case, *Silver v. New York Stock Exch.*,[78] in which the Solicitor General filed an amicus curiae brief arguing successfully against a general antitrust exemption for securities exchanges. The Supreme Court generally sustained this position in a decision which held that, "repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."[79]

In April, 1968 the Antitrust Division questioned under the *Silver* standard the basic scheme of rate-fixing practiced by the New York Stock Exchange. This came in the form of a comment filed with the SEC in a pending proceeding on reciprocity and related practices in which the Division's basic point of argument was that the widespread reciprocal practices were the product of an artificial pricing system. This led to a general SEC investigation of commission rates. The Antitrust Division offered testimony of several leading economists covering a range of competitive issues. In January, 1969 the Division filed a comprehensive memorandum recommending the elimination of most fixed rates on the grounds that they are not "necessary to make the Exchange Act work," as required by *Silver*, and recommended that changes be made in various rules which discriminate against non-members. The rate proceeding is still pending.

A third brief was filed by the Division in late 1969 criticizing the Exchange's proposals to relax the existing restrictions on public ownership of member firms. The main thrust of the criticism is that

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[77] The only example of the direct Commission action under § 19(b) involved an attempt by the New York Stock Exchange (NYSE) to undermine the regional stock exchanges by preventing NYSE members from trading NYSE-listed securities on the regional exchanges. The Commission struck down the rule in the *Multiple Trading* case, noting that "at best" it was an attempt to implement NYSE's own rate-fixing arrangement. Rules of the New York Stock Exch., 10 S.E.C. 270, 290 (1941).

[78] 373 U.S. 341 (1963).

[79] Id. at 357.

the proposals do not go far enough as "they do not represent a general opening of NYSE membership to those who can meet the objective criteria of honesty, solvency, and professional skill."[80]

The foregoing examples by no means exhaustively cover the Antitrust Division's increasing role as advocate for competitive policies. In 1969 alone, the Division filed two briefs with the Civil Aeronautics Board opposing, on antitrust grounds, two air carrier agreements which would have eliminated competition in non-carrier fields. The first brief involves reservation systems[81] and the other involves the travel agency business.[82] It also participated during 1969 in two Federal Power Commission proceedings involving a pipeline joint venture[83] and the competitive procurement practices for regulated utilities.[84] None of these issues has yet been acted on.

For the past few years the Antitrust Division has conducted a fairly intensive effort to promote greater acceptance of competition in regulated industries. It has gone beyond its traditional role as a party in adversary litigation, and become involved in general investigations, rule-making proceedings and industry inquiries. This effort has been generally recommended. The 1968 Neal Report[85] commented:

> In the regulated sector of the economy, the bias of policy and its enforcement is overwhelmingly against competition. This bias manifests itself in more permissive policies toward

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[80] Comments of the Dep't of Justice (Nov. 17, 1969) in response to SEC Securities Exchange Act Release No. 8717 (Oct. 8, 1969). For a record of the Division's initial actions in this proceeding, see Comments of the Dep't of Justice (April, 1968) in response to SEC Securities Exchange Act Release No. 8239 (Jan. 26, 1968); Memorandum of Dep't of Justice on the Fixed Minimum Commission Rate Structure (Jan. 17, 1969).

[81] The challenged arrangement would have required all air carriers to use a common reservation system; it would thus have eliminated any meaningful competition to the computer service company proposing the system. See Comments of Dep't of Justice, CAB Dkt. 20929 (May 28, 1969) (Aug. 21, 1969) (Jan. 20, 1970) (Feb. 11, 1970).

[82] The challenged arrangement would have required all air carriers to cease dealing with certain travel agents—mostly smaller ones—and would thereby have restricted competition in this field. See Comments of Dep't of Justice, CAB Dkt. 21305 (Sept. 12, 1969).

[83] Great Lakes Gas Transmission Co., FPC Dkts. CP66-110 (1969). This was a remand proceeding following the court of appeals decision that the Commission had failed to give adequate weight to competition in originally approving the scheme. Northern Natural Gas Co. v. FPC, 399 F.2d 953, 960 (D.C. Cir. 1968). Antitrust Division attorneys participated in evidentiary hearings and submitted briefs covering both the competitive effects of the transaction and the alleged countervailing benefits. See Reply of Dep't of Justice to Initial Brief and Motion of Michigan Wisconsin Pipeline Gas Co. and Michigan Consolidated Gas Co. (Dec. 5, 1969).

[84] The Division offered a brief and an oral argument supporting a Commission proposal to require some form of competitive procurement noted by pipeline companies and electric utilities subject to its jurisdiction.

[85] Presidential Task Force, Report on Antitrust Policy (Neal Report) (July 5, 1968).

> mergers and exemption of mergers from antitrust standards . . . . We believe that this bias is contrary to the public interest . . . [and] recommend further study of regulated industries to determine the extent to which competition and the competitive standards of the antitrust laws can be substituted for at least some aspects of regulation.[86]

The 1969 Stigler Report urged even greater activity by the Antitrust Division and recommended a formalization of its role as "the effective agent of the Administration in behalf of a policy of competition." It went on to emphasize that

> the regulatory commissions are largely out of control. . . . The economic triviality and irrelevance of much activity of the regulatory commissions is patent and inexcusable. . . . The commissions should have the merits of competition pressed upon them. Competition is not a matter of all or none, and the fact of regulation should not exclude competition . . . .[87]

The Antitrust Division's role as an advocate of competition is significant, and yet the existence of the role does not answer the question of how the interest of competition is to be balanced with other regulatory goals, before either the agencies or the courts.

II. The Search for a Unifying Standard

A. *The Relationship Between Competition and Regulation*

The decision to impose direct regulation on particular industries generally rests with Congress and it has based its decisions to regulate on a variety of economic, social and political considerations.[88] Typically, a government agency is given broad responsibility for a particular industry, and is charged, under the quite open-ended mandate of insuring that its industry's activities meet the "public interest," with evaluating and regulating such activities. In making its evaluation a wide variety of factors come into consideration. Competition is one such factor.

Direct regulation of course tends to eliminate competition to the extent that it imposes limitations on entry, pricing, and other commercial practices. Yet competition and regulation do not necessarily serve inconsistent goals. This point was recently emphasized by the Court of Appeals for the District of Columbia:

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[86] Id. at VII-4, VII-5.

[87] Presidential Task Force, Report on Productivity and Competition (Stigler Report) (Feb. 8, 1969) (5 Trade Reg. Rep. ¶ 50,250, at 55516).

[88] See generally C. Phillips, The Economics of Regulation 19 (1955).

> Despite a continuing debate, it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits.[89]

The decision to impose direct regulation has been made in two basic types of situations where competition was not fully satisfactory. The first involves a natural monopoly where competition simply is not economically possible such as the local telephone network. The economies of scale are so great that direct competition would be "a costly and idle gesture."[90] There, economic policy is the controlling consideration in the decision to regulate.[91] Regulation is necessary to secure the classic marketplace goals of efficiency and innovation. However, the courts have held that the regulatory scheme does not require maintenance of an absolute telephone company monopoly over all ancillary equipment, directories, and so forth.[92]

The second type of situation is where competition does not secure some specifically defined social goal. This is the basis for regulating both banks and securities markets. The solvency of banks is accepted as an overriding social goal, because the principle losses from bank failures fall on innocent depositors. Similarly, the issuance and trading of securities is regulated to insure full disclosure and fairness to the investing public, and continued confidence in the capital market. Regulatory supervision is directed to these specific goals. Neither scheme implies a general elimination of competition. The Supreme Court made this clear in its *Third Nat'l Bank*[93] and *Silver*[94] decisions; antitrust is only excluded to the extent *necessary* to make the specific regulatory scheme work.

On the other hand, where regulation is used as a means of offering protection from competition to those already subject to regulation it

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89 Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968).

90 Turner, The Scope of Antitrust and Other Economic Regulatory Policies, 82 Harv. L. Rev. 1207, 1208 (1969).

91 See C. Kaysen & D.F. Turner, Antitrust Policy: An Economic and Legal Analysis, 189-90 (1959).

92 See Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956); Carterfone Device, 13 F.C.C.2d 420 (1968); and discussion, pp. 580-81 supra.

93 United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

94 373 U.S. 341 (1963).

generally seems less justifiable. The two clearest examples are in the motor carrier and CATV fields. Both industries marked a new competitive challenge to existing interests—in one case the railroads and in the other the over-the-air broadcasters. This led Congress, with ICC support, to impose direct rate and entry regulation over the motor carriers,[95] and led the FCC, even without such a clear mandate, to regulate CATV programming (but not entry).[96]

Competitive and regulatory policies can come into contact in several situations. The regulatory agency often determines whether new entrants will be allowed to enter the field, or it is charged with responsibility for licensing those who apply for entry. The agencies also become involved with questions of acquisitions by and mergers of industries under their control. Agency and antitrust policies may also meet when the regulator is asked to authorize or approve specific restrictive practices. When a question before a regulatory agency touches both the agency's policies and competitive questions, the courts have made clear that competition is a basic element which must be considered.

This point was recently re-emphasized in the important 1968 Supreme Court decision of *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien.*[97] This decision made clear that serious anticompetitive effects "alone will normally constitute substantial evidence that the [proposal before the Commission] is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor."[98] On this basis the Court upheld the Commission's rule requiring the proponent of an anticompetitive proposal to "demonstrate that . . . [it] was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose . . . ."[99]

The Supreme Court had made a broadly similar point ten years earlier in *United States v. Radio Corp. of America,*[100] where it held that the FCC must consider antitrust principles in applying the public interest test of the Communications Act:

> Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give

[95] See, e.g., Coordination of Motor Transportation, 182 I.C.C. 263 (1932).
[96] See United States v. Southwestern Cable Co., 392 U.S. 157 (1968).
[97] 390 U.S. 238 (1968).
[98] Id. at 246.
[99] Id. at 243.
[100] 358 U.S. 333 (1959).

> him a monopoly of that area's major media of mass communications.[101]

Another particularly useful discussion of the significance of competitive considerations may be found in *Northern Natural Gas Co. v. FPC*, a recent court of appeals decision dealing with a pipeline merger. The court stated:

> Although the [Federal Power] Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the commission is obliged to weigh antitrust policy.[102]

B. *The Regulator's Problem—An Unstructured Inquiry*

These decisions make clear that the regulator is required to consider competition as a basic element in any "public interest" determination. Yet they leave unanswered a crucial question—how is the regulator to apply competitive policy in a clear, consistent manner? Competitive issues do not generally arise in isolated abstraction, but rather as part of intensely practical proceedings to determine *who* shall be permitted to enter or merge, or *what* those in the industry shall be permitted to do. Such proceedings can, and often do, involve many complex technical questions such as, in the communications field, "spectrum conservation" or "network integrity." They also can involve economic questions of equal complexity, such as "cross subsidy," at least where the agency must deal with pricing and service offerings. Most of these questions cannot be resolved with mathematical precision, which is one reason why regulatory proceedings can be both long and indecisive from the evidentiary standpoint. Yet it is in the context of such complex proceedings that the regulator must often face crucial questions of competitive policy.

When the question of allowing more competition is in issue, those regulated can usually be counted on to present an extensive case in opposition. Monopolists, including those which are regulated, rarely welcome intrusions from the marketplace. They will press the regulator with "technical" arguments and ominous predictions that new competition will seriously impair, or even destroy, the regulatory scheme. The regulator will be strongly urged to use his "so-called 'expertise' "[103] to resolve specific issues in favor of non-competitive solutions.

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101 Id. at 351-52 (dictum).

102 Northern Natural Gas Co. v. FPC, 399 F.2d 953, 958 (D.C. Cir. 1968).

103 See Judge Frank's dissenting opinions in Lichten v. Eastern Airlines, Inc., 189 F.2d 939, 946 (2d Cir. 1951); Old Colony Bondholders v. New York, N.H. & H.R.R., 161 F.2d 413, 450-51 (2d Cir. 1947).

The basic problem arises from the lack of a clear method of inquiry, which presently tends to be open-ended in scope and lacking in pre-assigned weights for individual factors. Even a relatively simple case can become complex and unpredictable in such circumstances. The President's Council of Economic Advisers has emphasized this point in its recent annual report:

> The fundamental problem lies in the complex and conflicting objectives that sometimes characterize economic regulation itself. Agencies are supposed to protect the present and future interests of consumers, employees, investors, and the Government. No one can begin to see the full consequences of current decisions on all these groups. As quasi-judicial bodies, the regulatory commissions tend to give much weight to precedent. As a result, change of any kind becomes hard to justify and even harder to allow when some affected group can claim immediate harm, whereas the potential beneficiaries are widely diffused and usually not represented. Yet innovation and adaptation are the dynamics of economic progress.
>
> There is no clear safeguard against these dangers, but reliance on economic incentives and market mechanisms in regulated industries would be a step forward.[104]

The current regulatory problem can be illustrated by trying to imagine how the famous *Charles River Bridge* case[105] would be decided by a regulatory agency today. The underlying issue would still be, as it was in the Supreme Court's 1837 decision, a competitive challenge to a monopoly toll bridge. But the arguments would be much more varied and complex. The Supreme Court only had to concern itself with the legal question whether the "Charles River Bridge" charter gave it an implied monopoly grant,[106] and hence protected it against erection of a parallel competitive span. The Court of course rejected this argument, stating that the rights of private property are to be "sacredly guarded," but the public interest must control.[107] Any

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[104] Economic Report of the President 108 (1970).

[105] Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

[106] A modern version of this argument is COMSAT's assertion that the 1962 Satellite Act implicitly gave it the exclusive right to offer domestic satellite service. See COMSAT Brief at 7-8, 12-13 and Supplemental Brief at 17, 19 in Domestic Satellite Inquiry, 2 F.C.C.2d 668 (1966). The New York Stock Exchange (NYSE) has argued in a similar vein that the Securities Exchange Act of 1934 implicitly "mandated" a system of non-competitive minimum commission rates. See NYSE Legal Brief at ¶¶ 2, 3, 7, 12, 14 (August, 1968), Commission Rate Structure of National Securities Exchanges, SEC File No. 40144 (1968) [hereinafter cited as *SEC Commission Rate Proceeding*].

[107] 36 U.S. (11 Pet.) at 547.

other construction, it added, would enable the holders of "old feudal grants" to prevent the growth of new methods of transportation.[108]

Today this case would probably arise before an independent commission charged with statutory responsibility for regulating private toll bridges, canals, and steamboats so as to serve the "public interest, convenience and necessity." The applicant for a competing span would present the commission with a proposal supported by detailed traffic estimates and projections, evidence of its financial and engineering capability, and a legal brief emphasizing the advantages of competition. The "Charles River Bridge" company would meet this challenge to its long standing monopoly with vast numbers of lawyers, engineers, accountants, and economists armed with a battery of statistics, performance tables, regression analyses, and a fine reputation for reasonable performance under the commission's continuous surveillance. Its arguments would be many and its evidence voluminous. Under the heading "economic policy," it would argue that the new service was not needed,[109] that it would threaten to produce "destructive pricing"[110] and "cream-skimming,"[111] while denying the public the benefit of "economies of scale"[112] which could be achieved with a single bridge. Its "technical" arguments would stress the need for unified "system planning,"[113] the lower technical standards of the competing applicant[114] and the risk that the competition would promote corner-cutting on maintenance and safety requirements.[115] Finally, there would be a variety of "public interest" or "convenience and needs" arguments, dredged up from old cases. Thus, it would be argued that a second

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[108] Id. at 553; cf. Munn v. Illinois, 94 U.S. 113, 127 (1877).

[109] See, e.g., the arguments of AT&T and other carriers in the Microwave Communications, Inc., 16 P&F Radio Reg. 2d 1037 (FCC 1969) [hereinafter cited as *MCI*]; and Carterfone Device, 5 F.C.C.2d 360 (1966), 13 F.C.C.2d 420 (1968).

[110] See New York Stock Exchange Economic Brief, *SEC Commission Rate Proceedings*, SEC File No. 40144 (1968). Note also the ICC's position that they must regulate the motor carriers in order to eliminate "destructive competition between truckers." Coordination of Motor Transportation, 182 I.C.C. 263, 362 (1932).

[111] See, e.g., AT&T's arguments in *MCI*, 16 P&F Radio Reg. 2d 1057 (FCC 1969). Allocations of Frequencies in the Bands Above 890 Mc., 27 F.C.C. 359, 367-68 (1959) [hereinafter cited as *Above 890 Mc.*].

[112] "Bell's watchword has been 'one system, one policy, universal service' . . ." Investigation of the Telephone Industry in the United States, H.R. Doc. No. 340, 76th Cong., 1st Sess. 145-46 (1939).

[113] See AT&T's argument in Carterfone Device, 5 F.C.C.2d 360 (1966), 13 F.C.C.2d 420 (1968), that "[Interconnection] would inevitably result in degradation of service." Brief and Proposed Findings and Conclusions of Bell System Parties at 20.

[114] See AT&T's arguments in *MCI*, 16 P&F Radio Reg. 2d 1037 (FCC 1969).

[115] Cf. the New York Stock Exchange's arguments on the effect of reduced commissions on industry standards in the *SEC Commission Rate Proceedings*, SEC File No. 40144, at 20-24 (1968).

bridge would adversely affect the scenic beauty of the river basin,[116] would complicate navigation and impede the fish.[117]

This modern version of the *Charles River Bridge* case makes clear that even a relatively simple case can become a morass. How is a diligent regulator to weigh this assortment of arguments involving so many considerations which cannot be readily measured or quantified? How can he do this in a rational manner which gives businessmen and lawyers reasonable guidance for the future? It has been suggested that an individual's capacity for making a sound judgment about a complex situation may be seriously impaired by supplying him with much information which he believes should be relevant but the influence of which on the situation is not clear.[118] This makes it very difficult to formulate any decision having both a rational basis and meaningful precedential value. Thus, even the same agency has handled basically analogous situations in contrary ways. For example, the FCC's decisions allowing microwave competition with domestic communications common carriers have been liberal,[119] while its decisions on satellite competition with international carriers have been highly protectionist.[120] Similarly, the SEC has been liberal in allowing competition with the New York Stock Exchange by regional exchanges in NYSE-listed securities,[121] but reluctant to allow such competition by over-the-counter dealers.[122]

Such open-ended inquiry can produce extensive delay—especially when combined with staff shortages or excessive caution—and as such can easily forestall potentially beneficial private activity, or even stop it altogether.[123] A mandate requiring that all innovations, however desirable, should be delayed in order to make sure that each particular

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116 Cf. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965).

117 Cf. Udall v. FPC, 387 U.S. 428 (1967).

118 Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 295 & n.22 (1960); cf. the discussions of the legal and practical objections to favorable consideration of post-acquisition evidence in the Sixth Circuit Court of Appeals decision, 358 F.2d 74, 82-83 (1966), and the Supreme Court's decision in the Procter & Gamble and Clorox Bleach merger case, FTC v. Procter & Gamble Co., 386 U.S. 568, 587 (1966) (concurring opinion of Harlan, J.).

119 See, e.g., *MCI*, 16 P&F Radio Reg. 2d 1037 (FCC 1969); *Above 890 Mc*, 277 F.C.C. 359 (1959).

120 See, e.g., Authorized Entities & Authorized Users Under the Communications Satellite Act of 1962, 4 F.C.C.2d 421 (1966).

121 Rules of the New York Stock Exch., 10 S.E.C. 270 (1941).

122 See Schapiro, Exhibit 1, in the *SEC Commission Rate Proceedings*, SEC File No. 40144 (1968).

123 See Prettyman, Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel, 39 A.B.A.J. 966 (1953), where Judge Prettyman expressed his feelings that "the inexplicable delays and expense we hear about [are not] due to the incompetence of counsel [or] to lack of craftsmanship in trial [but to] the wily lawyer with a weak case . . . who creates all possible confusion so as to delay to the bitter utmost the inevitable bad tidings." Id. at 970.

innovation is desirable should be avoided if possible.[124] Thus, the nature of the problem is clear. Now, as in 1837, we have the same basic public interest in competition as a source of innovation, efficiency, and low toll rates, but today we have no *method* of objectively weighing these advantages against the contrary arguments favoring regulation.

C. *A Suggested Resolution*

A clearer method of decision-making can be devised, where competition and so-called "regulatory" goals come into conflict. To accomplish this, there must first be clear recognition by the regulators and the courts that competition is a basic national economic policy, and the cornerstone of national economic strength.[125] Secondly, the basic regulatory goals in the industry involved must be clearly defined. Having defined its goals and recognized competition as a basic policy, the regulator should then place on the proponent of a non-competitive solution the burden of showing that it is *necessary* to achieve the regulatory goals so defined. This was precisely the basis for the Supreme Court decision in *Silver*: antitrust, and hence competition, were to be displaced only to the extent necessary to make the specific regulatory scheme of the Securities Exchange Act work.[126] Similarly, regarding bank mergers, the Supreme Court has made clear that the burden of proving the "convenience and needs" justification for an anticompetitive bank merger rests on the merging banks. They must prove not only that there is a non-competitive objective which should be assigned controlling weight, but that this goal could not be achieved by a less anticompetitive arrangement.[127]

It is important that the burden of showing necessity be placed on those who oppose competition, regardless of whether the question is raised by opposition to a new entry, a request for permission to merge, or a quest to institute a particular restrictive practice. The regulated enterprise has the incentive and resources necessary to raise non-com-

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[124] See H. Hart & A. Sacks, The Legal Process: Basic Problems in Making and Application of Law 875 (tent. ed. 1958). See also President Nixon's Memorandum to FCC Chairman Dean Burch, Domestic Satellite Inquiry, FCC Dkt. 16495 (Jan. 1970).

[125] The Council of Economic Advisers' recent annual report which urges "more reliance on economic incentives and market mechanisms in regulated industries" specifically applies this point to regulated industries. Such "industries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition. When regulation has stifled competition, performance has deteriorated. The clearest lesson of all, however, is that regulation should be narrowed or halted when it has outlived its original purpose." Economic Report of the President 108 (1970).

[126] 373 U.S. 341 (1963).

[127] United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967) (on general burden of proof); United States v. Third Nat'l Bank, 390 U.S. 171, 190 (1968) (on the requirement of least anticompetitive solution).

petitive values. It has detailed information of the operation of the particular system, be it the telephone network, the stock exchange, or a bank. To place the burden on the outside party is, in fact, to ask him to rebut a technical argument not yet made.[128] As the FCC *Carterfone*[129] and *MCI*[130] cases show, this approach necessitates diligent investigation and, even in *Carterfone* and *MCI*, the competitive solution might not have prevailed absent the active and imaginative role played by the FCC Common Carrier Bureau.

Any such method of resolving the "competitive" and "regulatory" goals will require regulatory performance of a high order, since the regulator will have to bear the burden of determining what economic activities are necessary. This will no doubt require both technical competence and administrative courage. The present non-method of inquiry has not been particularly successful. In many regulated industries, including motor carriers[131] and air transport,[132] it has been argued that progress has come not from direct regulation, but in spite of it.[133] Moreover, as noted above, competition and regulation are not polar extremes; competition should be affirmatively encouraged so long as it is not inconsistent with the basic regulatory scheme. Competitive alternatives offer the significant advantages to the regulator of simplified regulation, better performance, and the greater public confidence which flows from impersonal decision making by the marketplace.

Conclusion

The Antitrust Division has played a growing role, both as law enforcer and advocate, in industries covered by some form of governmental regulation. This has been paralleled by increasing recognition on the part of the courts that competitive policies can and should be applied as part of a regulatory scheme.[134] Thus, in *Philadelphia Nat'l Bank* the Supreme Court stated:

> The fact that banking is a highly regulated industry critical

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128 See ICC v. J-T Transp. Co., 368 U.S. 81, 86-87, 90 (1961); Dep't. of Justice Petition for Reconsideration of AT&T Tariff, 15 F.C.C. 2d 605 (1968), filed Jan. 23, 1969.

129 5 F.C.C.2d 360 (1966), 13 F.C.C.2d 420 (1968).

130 16 P&F Radio Reg. 2d 1037 (FCC 1969).

131 See Comment, National Transportation Policy and the Regulation of Motor Carriers, 71 Yale L. J. 307 (1961).

132 See Comment, Is Regulation Necessary? California Air Transportation and National Regulation Policy, 74 Yale L.J. 1416 (1965).

133 Adams, Business Exemption From the Antitrust Laws: Their Extent and Rational Regulation Policy, 74 Yale L.J. 1416 (1965).

134 See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968); Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968).

> to the Nation's welfare makes the play of competition not less important but more so. . . . [U]nless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy.[135]

The often controversial efforts of the Antitrust Division have emphasized this message in the regulatory arena. The Division's filings with regulatory agencies have been pragmatic documents dealing with competitive policy issues in the context of particular industry situations. They have reflected a healthy skepticism toward arguments for abandoning all competition to serve some other allegedly necessary goal. This has enabled the Division to play a distinctive role as an advocate for a national economic policy, not some particular vested interest.

The ultimate success of this effort will depend largely on the agencies themselves—in particular on their willingness to enforce competitive policies on their own motion, and on their ability to develop a meaningful method for balancing competition against other policies. If the agencies instead "leave competition to Justice," then the influence of a competitive voice will continue to be limited to the most serious cases, simply because the Antitrust Division lacks the resources to do more. In such circumstances the only alternatives available would be to increase substantially the Antitrust Division's enforcement capability, or to create some new substantial agency with such capability and interest, or to make extensive changes in the structure, proceedures and standards under which regulatory agencies operate.

[135] 374 U.S. at 372.

April 21, 1970

MEMORANDUM FOR

Mr. William Rehnquist
Assistant Attorney General
Office of Legal Counsel
Department of Justice

The attached memorandum on charitable contributions concerns the treatment accorded charitable contributions by Federal regulatory agencies.

We are considering making some initiative urging the regulatory agencies to allow charitable contributions as an expense for rate-making purposes. This would encourage considerably more such donations to voluntary organizations by rate-regulated corporations.

I would appreciate it if you would review the attached memorandum and advise whether there would be any problems with a Presidential letter to the regulatory agencies urging such an approach.

Clay T. Whitehead
Special Assistant to the President

Attachment

cc: Robert Mayo
Paul McCracken
Peter Flanigan
Len Garment
Tom Whitehead
Bud Krogh

CTWhitehead:jm

CHARITABLE CONTRIBUTIONS

This memorandum describes the accounting and rate treatment accorded charitable contributions by four federal regulatory agencies, the FCC, the ICC, the FPC and the CAB.

The memorandum also reviews the arguments for and against allowing charitable contributions as an expense for ratemaking purposes. It focuses on the principal argument against allowance, namely, if a utility can expense charitable contributions, it makes the consumer an "unwilling contributor."

The tax laws express a Congressional policy to encourage charitable contributions. Regulation has not only offset the statutory incentive to contribute, but imposes a penalty on the utility contributor.

It costs a utility almost twice as much to contribute to charity as it costs an ordinary corporation.

Government and industry should encourage regulatory commissions to abandon policies which result in unequal and discriminatory treatment of utility contributors so that utilities can assume the full burden of corporate citizenship without penalty.

Accounting

In general, the ICC Uniform Systems of Accounts treat charitable contributions as general operating expenses, while the FPC and FCC treat them as miscellaneous deductions from income. The CAB accounts for contributions as "miscellaneous nonoperating debits."

The ICC prescribes Uniform Systems of Accounts for 10 categories of regulated industry. Its accounts for Railroad Companies and (Oil) Pipeline Companies make no specific provision for charitable contributions.[1] It clearly treats charitable contributions as general operating expenses for Refrigerator Car Lines and Inland and Coastal Waterways Carriers.[2] It treats "donations" as general expenses for Electric Street Railways[3] and Maritime Carriers.[4] It treats "donations on account of catastrophes, epidemics, etc." as

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1 49 C.F.R. Pts. 1201, 1204.

2 Refrigerator Car Lines: Under the category "Operating Expense Accounts - General," Account 469, Other Expenses, includes "contributions for charitable, social or community welfare purposes," "donations to fire departments," and "donations to YMCA and similar institutions," 49 C.F.R. Pt. 1205; Inland and Coastal Waterways Carriers: Under the category "General Expenses," Account 467, Other Expenses, contains language almost identical to the foregoing. 49 C.F.R. Pt. 1209.

3 49 C.F.R. Pt. 1202, Account 89.

4 49 C.F.R. Pt. 1208, Account 944; also, Account 779 treats "Contributions to hospital" as an "Other port expense" under "Water Line Operating Expense."

general expenses for Express Companies.[5]

For Motor Carriers and Freight Forwarders, the ICC treats "contributions for charitable, social or community welfare purposes which have a direct or intimate relation to the protection of the property of the carrier or the development of its business or the welfare of its employees" as administrative and general expense; contributions which do not have such a "direct and intimate relation" are treated as income deductions.[6]

On the other hand, the FPC and the FCC treat contributions as a miscellaneous income deduction rather

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[5] 49 C.F.R. Pt. 1203, Account 62.

[6] Common and Contract Motor Carriers of Passengers: Administrative and General Expense, Account 4656, Other general expenses, subsection (b) and Income Deductions, Account 7500, Other deductions, subsection (e), 49 C.F.R. Pt. 1206; Class I and Class II Common and Contract Motor Carriers of Property, Operation and Maintenance Expenses, Administrative and general, Account 4680, Other general expenses, subsection (b) and Deductions from Ordinary Income, Account 7500, Other deductions, subsection (e), 49 C.F.R. Pt. 1207; Freight Forwarders: Account 414, Miscellaneous Income Charges, and Operating Expense Accounts, Account 630, Other Expenses.

than an expense.[7] The CAB accounting places contributions under "Profit & Loss Classifications, Nonoperating Income and Expense, Miscellaneous Nonoperating Debits,"[8] in effect an income deduction.

Effect of Accounting on Rate Treatment

A Commission ruling prescribing income deduction accounting is "purely an accounting matter" and does not decide what rate treatment the Commission will accord charitable contributions. Re Amendments to Pt. 31, 13 P.U.R.3d 163, 168 (FCC 1956); Re Amending Annual Report Forms, CCH Util. L. Rep.-Federal ¶ 5326, p. 5454 at 5354 (FPC 1967); to the same effect Re Accounting Procedure for Inv. Tax Credit, 50 P.U.R.3d 159, 168 (FCC 1963).

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7 Federal Power Commission: Class A and Class B Public Utilities and Licensees, Part 101, Account 426.1; Class C Public Utilities and Licensees, Part 104, Account 426.1; Class D Public Utilities and Licensees, Part 105, Account 426.1; Natural Gas Companies, Part 201, Account 426.1; Class C Natural Gas Companies, Part 204, Account 426.1; Class D Natural Gas Companies, Part 205, Account 426.1. All references are to 18 C.F.R.

Federal Communications Commission: Class A and Class B Telephone Companies, Part 31, Account 323; Class C Telephone Companies, Part 33, Account 7100; Radiotelegraph Carriers, Part 34, Account 5299; Wire-Telegraph and Ocean-Cable Carriers, Part 35, Account 5299. All references are to 47 C.F.R.

8 14 C.F.R. Pt. 241, Account 89.

The FCC justifies income deduction accounting on the basis that expense accounting might bury contributions in an expense account which "would require time-consuming and expensive reappraisal and analysis of each such item questioned in a regulatory rate proceeding and might be misleading to members of the public." 13 P.U.R.3d at 167. Income deduction accounting is "conducive to a rate case procedure whereby each contribution . . . can be advanced by the carrier as properly includible in operating expenses" and supported by pertinent evidence and argument. 13 P.U.R.3d at 167.

Nevertheless, if the Commission prescribes income deduction accounting, it raises a "presumption that the items in [the] account will not be allowed in the cost of service . . . in a rate case. Hence, the burden of proving the reasonableness of donations as a cost-of-service item falls upon the utility." Re Amending Annual Report Forms, CCH Util. L. Rep.-Federal ¶ 5326, p. 5453 at 5354 (FPC 1967); Re Accounting for Donations, Dues and Lobbying, 71 P.U.R.3d 440, 445 (N.Y. Pub. Serv. Comm'n 1967).

It is not wholly correct to say that when the Commission prescribes income deduction accounting, its decision is not dispositive for ratemaking purposes. Since Federal Power Comm'n v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962), the FPC and the FCC have conducted

2-phase rate cases, the first phase devoted to rate of return, the second to all other aspects of ratemaking.

In the first phase, the Commission accepts the utility's operating results as stated on the books and focuses on the major issue of rate of return. If the company's books show contributions as a below-the-line item, the utility has no opportunity to argue that they should be treated as expense items until the second phase of the case which may be long deferred.

Rate Treatment of
Charitable Contributions

FCC The FCC's position is equivocal. In the Private Line Case, the hearing examiner disallowed AT&T contributions as a "holding company expense" (34 F.C.C. 244, 278 (1961)), but the Commission restored the disallowance (34 F.C.C. 217, 223 (1963)).

On the other hand, AT&T petitioned for rulemaking in 1963 to prescribe expense accounting for charitable contributions. The Commission declined to institute rulemaking and wrote that "it is our opinion that the items of expenditure involved in your request may not properly be regarded as costs of furnishing communication service to the public." FCC letter dated June 26, 1963, File 9300. Upon reconsideration, the Commission said that its June 26, 1963 letter was concerned with accounting only and was not dispositive

for ratemaking purposes. FCC letter dated January 8, 1964, File 9210.

The Commission's accounting rules plus its June 26, 1963 letter reveal an inclination to disallow charitable contributions as operating expenses for ratemaking purposes; the Private Line Case is not a persuasive authority to the contrary.

ICC The ICC's policy is to treat charitable contributions as operating expense if they are "directly and intimately related to the protection of the property of the company or the development of its business or the welfare of its employees." Accounting of N.Y. Tel. Co., 188 I.C.C. 83, 94 (1932).[9] Its accounting rules for Motor Carriers and Freight Forwarders reflect this policy. Contributions made incidentally for the benefit of the operations of the company may be treated as expenses. These would include contributions to fire departments, business leagues, the YMCA and similar institutions.

FPC The FPC allows "contributions of a reasonable amount to recognized and appropriate charitable institutions" as expenses for ratemaking purposes. United Gas Pipe Line Co., 31 F.P.C. 1180, 1189 (1964). It would confine its approval to charities on the IRS list of exempt organizations.

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[9] Prior to the Communications Act of 1934, the ICC regulated telephone companies.

CAB The CAB does not allow charitable contributions as an expense for ratemaking purposes. Delta Air Corp., Mail Rates, 4 C.A.B. 501, 504 (1943); Reopened Pan Am. Mail-Rate Case, 35 C.A.B. 540, 550, 562 (1962); Aloha Airlines, Subsidy Mail Rates, 41 C.A.B. 44, 48, 56, 59 (1964).

Expense Treatment is Not Unlawful

Commissions have discretion to treat charitable contributions as operating expenses for ratemaking purposes. Many commissions do so. Priest, Operating Expenses in the Spotlight, 77 Pub. Util. Fort. 15, 16, 31 Note 7 (Feb. 3, 1966); United Transit Co. v. Nunes, 209 A.2d 215, 222 (R.I. 1965). In fact, some state courts have reversed commissions which disallowed charitable contributions. Southwestern Bell Tel. Co. v. State Corp. Comm'n, 386 P.2d 515, 544-45 (Kansas 1963); United Gas Corp. v. Mississippi Pub. Serv. Comm'n, 127 So. 2d 404, 416 (Miss. 1961); Application of Diamond State Tel. Co., 149 A.2d 324, 331 (Del. 1959).

And if the Commission in its discretion accords expense treatment for charitable contributions, the courts will not reverse them. West Ohio Gas Co. v. Public Util. Comm'n, 294 U.S. 63, 76 (1935); Board of Supervisors v. Virginia Elec. & Power Co., 87 S.E.2d 139, 149 (Va. 1955); Public Serv. Comm'n of N.H. v. State, 153 A.2d 801, 808-09 (N.H. 1959); City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249, 258-59 (Fla. 1968).

Reasons for and Against Allowing Charitable Contributions as an Operating Expense

The continuing colloquy between proponents and opponents of expense treatment for charitable contributions in rate cases has produced a list of arguments on both sides of the question.

People opposing expense treatment have argued that (1) expense treatment makes the subscriber to a monopoly utility service an unwilling contributor to charity, (2) contributions increase the cost of service without increasing the quantum or quality of service, (3) contributions may increase the cost of service to the point where a rate increase may be needed, (4) contributions are not necessary to provide service, (5) the corporate charter does not authorize directors to spend money for general public welfare purposes, (6) there is no consideration for the contribution, and (7) the contribution does not benefit the utility.

People favoring expense treatment argue that (1) the tax laws express a policy to encourage charitable contributions, (2) that refusal to treat charitable contributions as operating expenses will discourage contributions, (3) if contributions do not support public service activities, the government must do so - at greater cost because the government relies on paid workers whereas charities rely on volunteer workers, (4) contributions may

avoid the imposition of taxes for similar purposes, (5) corporate contributions accord with modern business practices, (6) contributions are a responsibility of corporate citizenship.

Also, (7) expense treatment accords with generally accepted accounting principles, (8) expense treatment accords with accounting under the tax laws, (9) utility contributions are not large enough to affect earnings, and (10) contributions do in fact benefit the utility and its subscribers.

These arguments, or some of them, were advanced in Accounting of N.Y. Tel. Co., 188 I.C.C. 83 (1932); Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 187 A.2d 475, 485 (Md. 1963); Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 401 P.2d 353, 374-75, 379-82 (Cal. 1965); Re Accounting for Donations, Dues and Lobbying, 71 P.U.R.3d 440, 445 (N.Y. Pub. Serv. Comm'n 1967). See also Priest, Operating Expenses in the Spotlight, 77 Pub. Util. Fort. 15, 16 (Feb. 3, 1966).

The Utility Consumer -
an Unwilling Contributor

The central argument against expense treatment for charitable contributions lies in the concept of the utility consumer as an "unwilling contributor." The consumer must avail himself of the utility's service, he must pay a price which includes the cost of service, and if the cost includes contributions, he is forced to make a contribution to charities he may not support.

The ICC described the argument as follows:

> ". . . When respondent makes contributions . . . and charges them to the expense of its telephone operations, it is in effect exacting . . . these contributions from the users of its telephone service. It is their right, and not the right of respondent, to decide what contributions . . . they shall make. Nor has respondent any powers of taxation. If contributions in sufficient amount are not made voluntarily and there must be resort to taxation, it is through the established agencies of Government that the taxation should be imposed, and not through telephone companies or other public utilities in the guise of expense for service furnished." 188 I.C.C. at 95.

To the same effect United Gas Pipe Line Co., 31 F.P.C. at 1190, n.10; Re Amendment to Rate Schedules of the S. New England Tel. Co., Conn. Pub. Util. Comm'n, Docket No. 10769, Finding and Order dated April 23, 1969, p. 15; Re Chesapeake and Potomac Tel. Co., Md. Pub. Serv. Comm'n, Case No. 6233, Order dated Nov. 19, 1969 p. 28; Re Pacific Tel. & Tel. Co., 53 P.U.R.3d 513, 586 (Cal. Pub. Util. Comm'n 1964); also, the Pacific Tel. & Tel. Co. (Cal. Sup. Ct.), Chesapeake & Potomac Tel. Co. and New York Tel. Co. Accounting cases, cited supra.

Analysis of the "Unwilling Contributor" Argument

To determine what is the proper rate case treatment for charitable contributions, we must squarely face the question, is the utility consumer truly an "unwilling contributor." Is he any more of an unwilling contributor than the ordinary consumer or the ordinary taxpayer. If

he is an unwilling contributor, is he seriously hurt. Are there public policy considerations justifying the imposition of some burden on the utility consumer.

(1) All consumers are unwilling contributors.

Analysis shows that the consumer fares the same in both utility and competitive markets. Suppose we have a product which is fully competitive. Prices will seek the level of the lowest-cost manufacturer. If he includes contributions in his cost of service, then the consumer must make a forced contribution to buy in this market.

FCC Commissioner Doerfer recognized this fact:

> ". . . It is common knowledge that charitable contributions from any business establishment ultimately come from the pockets of the people. Obviously, they are recouped in the sales price of the product or the service. There appears to be no valid distinction upon this ground whether it be a private corporation or a public utility." 13 P.U.R.3d at 170.

(2) Stockholders are unwilling contributors.

When a corporation makes a contribution to charity, it is interesting to speculate on who has made the contribution. Is it paid for by the consumer as an increased price or is it paid for by the stockholder as a profit foregone. Indeed, it is both.

The argument that utility consumers are unwilling contributors echoes similar arguments made a generation ago about stockholders. Note, "Donation to Educational Institution,

etc." 102 U. Pa. L. Rev. 243, 246-47 (1953); Note, "Corporations - Ultra Vires Acts, etc." 52 Mich. L. Rev. 751, 752-53 (1954). When directors voted to make corporate contributions, it was argued that this made stockholders unwilling contributors. Today, that point of view is almost universally rejected, in many cases by statute. Priest, "Charitable Dispositions: Corporate Giving," 1962-1963 Va. L. Weekly Dicta at 111; Note, "Donations to Educational Institution, etc." 102 U. Pa. L. Rev. 243, 245 (1953).

(3) Taxpayers are unwilling contributors.

The taxpayer is also an unwilling contributor. In 1969, American individuals and corporations contributed $16.0 billion to charitable organizations. N.Y. Times, March 31, 1970 at 22. If we assume that these individuals and corporations paid income taxes at a median incremental tax rate of 25%, this means that the Federal Government forewent approximately $4.0 billion in taxes because of taxpayer contributions to charity. You and I had to pay higher taxes to make up the difference.

We are all unwilling contributors whether we are subscribers to a monopoly utility service, an ordinary consumer, a stockholder or a taxpayer. How is it that the law gives corporations and ordinary taxpayers the right to force us indirectly to make contributions to charities we may not support.

(4) Congressional policy favors charitable contributions.

The answer is, the tax laws express a Congressional policy of encouraging charitable contributions. Charities fill a vital role in meeting community needs. A need arises for a new hospital, or to aid the victims of disaster, or to deal with any number of community needs. Citizens identify these needs and organize to meet them. Society benefits from their effort and government is relieved of a major responsibility.

Society does not have the resources to meet all of its problems today, it must establish priorities. In each community, the local citizenry is best equipped to say where society should direct its efforts. When the citizenry is sufficiently aroused to form a community organization to deal with a problem, public policy requires the government to back them up.

Washington cannot identify and serve every social need. But it does give support to public-spirited citizens who reach out to serve those needs by encouraging taxpayers to support them through charitable contributions. And Washington protects itself from supporting frivolous community efforts by establishing procedures whereby the Internal Revenue Service passes on the tax exempt status of charitable organizations.

It is a pleasant by-product that charities often serve public needs at a lower economic cost than government

agencies. Charities make extensive use of volunteer personnel whereas government often generates expensive and cumbersome bureaucracies to do the same job.

Today, the influence of government is great in all institutions. Many people, particularly in the field of education, fear that reliance on government support will lead to state control or state domination and a possible erosion of academic freedom. Government control does not conform with America's traditional reliance on private enterprise to achieve social and economic goals. Private support through charitable contributions tends to reduce the influence of government in private institutions. And, at the same time, it tends to reduce some of the many demands on government.

Because society recognizes the vital role charities play in meeting public needs, it tolerates an economic system which makes us all to some degree unwilling contributors. It places limitations on the degree to which an individual can make society an unwilling contributor to his personal charity by placing limits on charitable deductions in the income tax laws. Similarly, regulatory commissions can place limits on the degree to which utilities can make their consumers unwilling contributors by allowing for ratemaking purposes only those contributions which meet the regulatory tests of reasonableness and prudence. FCC Commissioner Doerfer, dissenting. 13 P.U.R.3d at 169; Southwestern Bell Tel. Co. v. State Corp. Comm'n, 386 P.2d 515, 545 (Kan. 1963).

(5) Regulation penalizes the utility contributor.

The tax laws provide an incentive for taxpayers to contribute to charity, but regulation has transformed this incentive into a penalty for utilities.

If an ordinary corporate taxpayer contributes $1,000 to the American Cancer Society, he can deduct $480 on his income tax. This reduces his real cost to $520. The Federal Government contributes $480 through abatement of taxes.

If a utility contributes $1,000 to the American Cancer Society, we are told, first, it is not an expense, it cannot be charged to consumers, it must be charged to stockholders. On the other hand, we are also told that the $480 tax reduction must be used to reduce operating taxes, which consumers pay, and not to reduce the real cost of the contribution charged to the stockholders.

Accountants express this thought by saying that we charge contributions "below-the-line" (i.e., after the determination of operating income) but we credit operating taxes, an "above-the-line" expense account, for the tax reduction associated with the contribution. This means the stockholder makes the contribution but the consumer receives the tax benefit. The utility loses its entire incentive under the tax laws to make charitable contributions. In fact, it costs the utility stockholder almost

twice as much to contribute to charity ($1,000) as it costs the ordinary taxpayer ($520).[10]

The FCC justifies its refusal to treat the tax effects of contributions in the same manner as it treats contributions on the basis that the accounting would be complicated and might be interpreted as showing that the Commission inclined toward tax normalization accounting. 13 P.U.R.3d at 168 (1956). At that time, this could have had ramifications as to the proper accounting and rate treatment for accelerated depreciation, a problem mooted by the Tax Reform Act of 1969.

Conclusion

Faced with a hostile or uncertain regulatory environment and the prospect that contributions may penalize their shareholders, utility management will contribute less to the solution of social problems through private effort, less than is their wont and less than corporate management in general.

If Congress continues to believe that private charities perform a vital role in meeting community needs, if it wishes to encourage public support for these charities, and if it wishes to permit all citizens, personal and corporate, regulated and non-regulated, to contribute on an equal and

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10 The Kansas Commission normalized the tax effects of charitable contributions in Southwestern Bell Tel. Co. v. State Corp. Comm'n, 386 P.2d 515, 544-45 (Kan. 1963).

nondiscriminatory basis, steps should be taken to eliminate the penalty imposed on utilities who seek to exercise their corporate citizenship.

Commissions should be encouraged to permit contributions, reasonable in amount and to recognize charities, as a part of a utility's cost of service for ratemaking purposes. Because of the trend toward multiphased rate cases, it is important that Commissions also amend their accounting rules to provide for expense treatment for charitable contributions so that they will be recognized as costs in the early phases of rate cases.

Neither Congress nor Commissions should establish limitations on charitable contributions beyond those included in the tax laws.[11] Rather, Commissions should decide whether contributions meet the tests of reasonableness and prudence in each case that comes before them.

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[11] Five percent of taxable income. 26 U.S.C.A. § 170(b)(2).

Justice

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

RWMcL:DIB
60-211-0

May 12, 1970

Dr. Clay T. Whitehead
Staff Assistant to the President
Executive Office Building
Room 110
17th & Pa. Ave., N. W.
Washington, D. C. 20500

Dear Tom:

Your NCTA effort was splendid. It is perhaps a little unkind to us lawyers and bureaucrats--but, so long as you give us prospective future "former Anti-trust Division employees" preference under your regulatory scheme, we shall not interpose mere objections as to form.

Sincerely yours,

DONALD I. BAKER
Deputy Director of Policy Planning
Antitrust Division

Justice

May 21, 1970

MEMORANDUM FOR

Dr. Myron Tribus
Assistant Secretary
for Science and Technology
Department of Commerce

I see no objections to the Department of Commerce providing whatever technical assistance to the State of Alaska would be useful to them. However, I think we should be aware of two caveats.

First is, as you note, the difficulty in financing a substantially expanded activity. The second is that we should not become too deeply involved in the quasi-judicial aspects of the RCA certification. I am not at all sure what the legal problems might be there, but it would be wise to ask Jim Lynn or someone in the Justice Department to advise on that matter. And from a purely political standpoint, I think it would be undesirable for the Department to be cast in the role of antagonist against RCA's plans.

Clay T. Whitehead
Special Assistant to the President

cc: Mr. Whitehead
Central Files

CTWhitehead:jm

THE ASSISTANT SECRETARY OF COMMERCE
WASHINGTON, D.C. 20230

MAY 15 1970

MEMORANDUM FOR

Dr. Clay T. Whitehead
Staff Assistant
The White House

You should be aware of the enclosed correspondence. Despite a reasonably explicit statement of our Alaskan communications study plan, the state government now envisages a substantial expansion of the DoC role. We agree that assistance is required in the RCA certification proceeding. But note the reservation on additional financing.

I will be seeing Governor Miller this coming weekend and plan to discuss this among other matters.

Myron Tribus
Assistant Secretary
for Science & Technology

Encl.

Re Hayden

MAY 12 1970

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL — ANCHORAGE BRANCH

360 K STREET — SUITE 105
ANCHORAGE 99501

May 6, 1970

ctor Edgar Hayden
ffice of Tele-Communications
epartment of Commerce
4th and E Street N.W.
ashington, D.C. 20230

e: RCA Certification Proceedings

ear Mr. Hayden:

Pursuant to our conversations of last week I am formally asking the Office of Tele-Communications, Department of Commerce, to assist the State of Alaska in the presentation of questions involving the public interest in the coming hearing before the Alaska Public Service Commission. It is my understanding that your office will be able to provide technical and other advisory assistance covering those issues which will be heard before the Commission. Such assistance will be in the form of pre-filed testimony and oral testimony, as well as assistance in the cross examination of RCA witnesses. Of course, any assistance your office may offer will be subject to the Attorney General's approval. This office must have complete control over every aspect of the proceeding.

It is also my understanding that the State of Alaska is under no obligation to provide any further financial assistance for these services. If financial contributions must be made by the State, this office must know at this time exactly the extent of that contribution. However, it is my understanding that no such contributions are to be made at this time. If you have any other understanding please inform me at once.

Thank you for all your assistance and suggestions during my stay in Washington. I would appreciate your comments concerning the above matter.

Very truly yours,

Sanford M. Gibbs
Assistant Attorney General

Encls.
cc: Tom Wardell
SMG/mo

MEMORANDUM — State of Alaska

TO: Sanford Gibbs
Assistant Attorney General
Anchorage

DATE : May 4, 1970

FROM: G. Kent Edwards
Attorney General

SUBJECT: R-CA-PSC

By: Thomas M. Wardell
Deputy Attorney General

I am enclosing herein a copy of a letter this date addressed to Edgar C. Hayden, Director, Alaska Telecommunications Program, Office of the Assistant Secretary of Commerce, Washington, D.C.

Per our previous telephone conversations, I trust that you will write Mr. Hayden directly confirming your meeting last week; specifying those areas wherein his office will be of assistance to you in presenting the public interest in the subject proceeding; and confirming that the State of Alaska will not be financially obligated in any way for the services to be rendered. I would appreciate a copy of said letter.

When time permits, I would appreciate receiving a report of your meeting last week so that I can forward a copy of same to the Secretary of State. I trust the Attorney General will be kept up-to-date on your proposed strategy in this case.

Encl.

GKE:TMW:em

May 4, 1970

Edgar C. Hayden, Director
Alaska Telecommunications Program
Office of the Assistant Secretary
of Commerce
Washington, D.C. 20230

Dear Mr. Hayden:

I wish to thank you for your letter of April 17, 1970.

On receipt of your aforementioned letter, I arranged with Mr. Sanford Gibbs, Assistant Attorney General, for Mr. Gibbs to confer directly with you in Washington, D.C. Mr. Gibbs informed me by telephone conversation last week that the subject meeting has been most fruitful and that he will be corresponding with you this week.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By: Thomas M. Wardell
Deputy Attorney General

GKE:TMW:em

COMPETITION IN THE SKY

Remarks by

DONALD I. BAKER
Deputy Director of
Policy Planning
Antitrust Division
Department of Justice

Prepared for Delivery At
NBC Affiliates Convention

Waldorf Astoria Hotel
New York, New York

May 21, 1970

The Administration thinking on domestic satellites proceeds from a very simple premise: that the free market should control the allocation of resources to the extent feasible. This mundane notion is, we find, broadly applicable to the field of domestic satellites.

In this country, fortunately, competition is the rule and regulation the exception. We resort to direct regulation in two types of situations where competition is not fully satisfactory. The first involves a natural monopoly (such as the local telephone network) where competition simply would not work in economic terms. The second type of situation is where competition does not secure some specifically defined social goal - such as the solvency of banks or of full disclosure to the securities investor. Neither exception seems applicable to domestic satellites. Here competition is workable in economic terms and there are no overriding social goals that dictate a non-competitive solution.

There is the problem of spectrum scarcity - but this turns out not to be controlling. The technical committee appointed by the White House found that, using conventional parameters (such as 30 ft. antennas), enough orbital space exists within the 4-6 GHz range to accommodate at least 16 satellites, each capable of covering all 48 states -- and

many more covering smaller regional areas. Not all these "slots" are available to the United States - for Canada and others have claim - but at least half of them can probably be counted on. We also found that a domestic satellite system was likely to cost at least $100m to build. Needless to say, that's not cheap admission, even for the big ticket operators. Moreover, novel services are involved and commercial success cannot be guaranteed. In the face of these commercial realities, spectrum space suddenly becomes much less of a problem. In fact, we found that open entry would not be likely to produce enough applicants to fulfill the eight or so nationwide orbitable "slots" that might be available for their use. In sum, the satellite spectrum space might well be about as available as UHF channel space is in most remote areas of the country - that is to say generally available to any licensee willing to risk his shirt.

Why, we asked, should not the same principle be applied to domestic satellites? In other words, the FCC could adopt a basically open entry policy at the initial stage of satellite development - thereby letting the marketplace determine what kinds of systems (if any) are put up. Basically, this would permit any financially qualified party to obtain an allocation of space more or less on a first-come first-served basis.

This arrangement has some important advantages. First of all, it would clearly simplify the regulatory process. Administrative uncertainties and delays are a serious source of concern, especially where one is dealing with new technology. One has only to look at the FCC's Domestic Satellite proceeding to see this point: Five years have elapsed since ABC made its original proposal. Lawyers and bureaucrats have spent thousands of hours on the subject. They have launched some impressive piles of paper - but no operational satellite. The whole process has been slow, uncertain, and costly. It should be avoided as a model if at all possible.

Secondly, competitive entry can be expected to produce better economic results - especially in terms of technical and service innovations. Of course, even under competitive entry, we would not expect a large number of systems right away. The price tag is simply too high. This means that, at best, any competition in satellite service offerings would tend to be among a few oligopolists (or between them and the terrestrial common carriers). Such competition is unlikely to lead to vigorous price competition - and yet some price competition might well be possible, especially where excess or off-peak capacity is involved. And, here as in some other industries, technological competition is still quite possible indeed, even among a few oligopolists.

Moreover, I would stress that entry confined to one or two entities as a result of market forces would be quite different in effect from the same result achieved by regulatory action. Such a marketplace result would suggest that those with capital, resources, and experience see relatively modest opportunities in satellite communications for domestic purposes at this time; but the door would remain open to them (assuming available spectrum space) if and when market conditions or technology justified it. Thus, such a competitive entry policy -- even combined with very limited actual entry -- would continue to act as a spur to innovation of low-cost technology. Limited entry achieved by regulation would, on the other hand, probably tend to inhibit technical innovation by those not having some financial stake in the system chosen and reduce the incentive for competitive innovation by those involved in the system. While there might be an opportunity for later entry, those left out might well conclude that they would not have a substantially better chance the next time around; and this would in turn lead them to devote their capital and technical resources to other areas of innovation and growth where regulatory barriers were lower.

The Administration proposal advocates competitive entry into satellites. At the same time, it does not represent an

a priori commitment to any particular satellite scheme. We made that very clear in the statement:

> "Government policy should encourage and facilitate the development of commercial domestic satellite communications system to the extent that private enterprise finds them economically and operationally feasible. We find no reason to call for the immediate establishment of a domestic satellite system as a matter of public policy. Government should not seek to promote uneconomic systems or to dictate ownership arrangements; nor should coordinated planning or operation of such facilities be required except as essential to avoid harmful radio interference."

This approach is challenged by Commissioner Cox in his recent dissent to the Commission's Domestic Satellite order. He feels that the Commission "should affirmatively seek . . . proposals for a high capacity multi-purpose system." Such an approach would involve "pooling the resources of as many users as can be accommodated in a basic high capacity system, while still holding out the possibility of separate systems for those who could be better served in that way." This embodies a regulatory judgment that one form of development is preferable to others. I find this troublesome. As an antitrust lawyer, I suppose I am entitled to be skeptical of broad joint ventures covering most actual and potential competitors; they tend to create the temptation and opportunity to hold

back on innovation for commercial reasons. 1/ As an antitrust lawyer, I am also skeptical of such regulatory judgments - particularly where they involve new and emerging technology. History suggests that regulation has been much kinder to the lawyer than the inventor.

Let me summarize. We in the Administration have sought to find policies that are consistent with the needs of a rapidly advancing art. First, our proposal would simplify FCC decision-making; the process would be much more expeditious and predictable than past regulatory methods, and much less dependent on second-hand data, uncertain projections of demand and technology, and slanted claims and counter-claims of highly interested litigants. Secondly, it would encourage potential innovators and suppliers to focus more concretely on the markets for new services. It would encourage them to search out the needs and desires of potential users -- and their willingness to pay for the costs of particular new services. And,

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1/ See, e.g., the Government's complaint in United States v. Automobile Manufacturers Ass'n., Civ. No. 69-75-WJC (filed January 10, 1969); this was settled by consent decree requiring separate action, CCH TRADE CASES ¶72,907 (1969).

by the same token, it would also force potential users of satellite services to think through the benefits and the economics more thoroughly than they have in the past. Pie in the sky is great - so long as someone else has to pay for it.

The Administration's competitive approach sounds fairly simple - at least when compared with the alternatives. Of course, we all know that it is not simple in absolute terms. There are a variety of complex legal and other issues which I have spared you in the interest of brevity. Particular arrangements could raise tough antitrust questions - covering such subjects as joint ventures and access of local terrestrial communications networks.

Let me mention one example by way of illustration. One-way television distribution appears to offer the most immediate economic use of domestic satellites. Such satellite distribution could eliminate the elaborate terrestrial networks now required and produce substantial savings to its users. This in turn might lead the major television networks to form some sort of joint venture to run such a satellite system. 2/ Unless such a system included non-network

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2/ For the purpose of this discussion, I am assuming that the formation of such a joint venture would not, of itself, violate Clayton Act §7 or Sherman Act §§1-2. But cf. United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

interests, it might reduce competition in networking and broadcasting; existing networks would benefit from the advantages of a more efficient system, while the outsiders would suffer from being excluded. This kind of issue is familiar in antitrust. It has been faced in a number of antitrust cases involving essential joint facilities - such as the Associated Press, a terminal railway, or a produce market. 3/ The rule which has emerged from these decisions - which would be applied to network joint venture - requires that those controlling such an essential facility grant equitable access to all those in the trade on equal and non-discriminatory terms. With a broadcast distribution facility, this would clearly include other networks, independent broadcasters and CATV operators. How, you might ask, would such access work with a satellite? I would suggest something along the

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3/ Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n., 224 U.S. 383 (1912); American Federation of Tobacco Growers v. Neal, 183 F. 2d 869 (4th Cir. 1950); Gamco, Inc. v. Providence Fruit and Produce Bldg., 194 F. 2d 484 (1st Cir. 1952), cert. denied, 344 U.S. 817 (1952).

following lines. When such a joint venture satellite system was being set up, all interested parties would have to be given a chance to join and participate or at least lease channel space. Enough satellite capacity would have to be built by the joint venture to meet all firm commitments. However, once the satellite was up, and all capacity was in use under firm commitments, nothing would have to be done at that time. Late-comers desiring access would simply have to wait until the next new satellite was built.

This is but one example of the specialized issues one can envision. They are difficult, but not insoluble. We think that antitrust - the traditional regulator of most of the economy - can provide satisfactory implementation for the competitive scheme the Administration proposal embodies.

6/10/70

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of	)	
	)	
RKO GENERAL, INC. (KHJ-TV)	)	DOCKET NO. 16679
Los Angeles, California	)	File No. BRCT-58
	)	
For Renewal of Broadcast License	)	
	)	
FIDELITY TELEVISION, INC.	)	DOCKET NO. 16680
	)	File No. BPCT-3655
For Construction Permit for	)	
New Television Broadcast Station	)	

BRIEF OF DEPARTMENT OF JUSTICE AS AMICUS CURIAE

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BRIEF OF DEPARTMENT OF JUSTICE AS AMICUS CURIAE

I. INTRODUCTORY STATEMENT

This proceeding involves a competing challenge to the Application of RKO-General Inc. ("RKO") for renewal of its broadcast license to operate station KHJ-TV on Channel 9 in Los Angeles, California. On August 11, 1969, the Hearing Examiner issued an Initial Decision denying the application for renewal. 16 RR 2d 1181 (1969) He made extensive findings both as to the licensee's programming and its competitive practices in securing advertising. He recommended that the license be granted to the competing applicant, Fidelity Television Inc., Norwalk, California ("Fidelity").

Among other things, the Examiner found that the applicant had practiced various forms of reciprocity in order to secure advertising for this station. Reciprocity has been described by the Supreme Court as "one of the congeries of anticompetitive practice at which the antitrust laws are aimed. . . ." F.T.C. v. Consolidated Food Corp., 380 U.S. 592, 594-5 (1965). The Examiner's findings raised serious question of possible antitrust violations by the applicant. The Department of Justice is filing this Brief amicus curiae to give the Commission the benefit of its views on these questions. These considerations are clearly relevant to the Commission's licensing responsibilities under the Communications Act, for the Commission is obliged to consider "the reasonableness of such . . . . practices in the light of . . . many relevant factors including alleged antitrust violations." United States v. Radio Corp. of America, 358 U.S. 334, 348 (1959).

Our discussion of these issues rests entirely on the factual findings of the Hearing Examiner. 1/

1/ On March 7, 1967, the Department of Justice filed suit against RKO and its parent General Tire and Rubber Company. United States v. General Tire & Rubber Company, C-67-155 (N.D. Ohio). The case is still pending as there has not been any adjudication on the merits. For the purpose of this Brief, we are not relying on any additional information received in the course of discovery in the General Tire case.

This is a somewhat unusual renewal proceeding: it involves findings that a licensee has engaged in affirmative anticompetitive practices. The present proceeding does not raise any of the broader policy questions on market structure which are at issue in the Commission's "one-to-a-customer" 2/ and other cross-ownership proceedings, 3/ and which were discussed in the Commission's Policy Statement on license renewals of January 15, 1970. The instant case also differs from the Frontier Broadcasting case, where the Department has supported a hearing on license renewal on the ground that the licensee held undue market power in the relevant market. In that case, as no allegation of affirmative anticompetitive conduct was involved, the Department recommended that there be a limited license renewal so that Frontier could dispose of either its television license or its interests in other media in the market. See In re Application of Frontier Broadcasting Co., FCC File No. BRCT-318. Unlike the above proceedings, what is at issue here is not market structure, but anticompetitive conduct by a particular licensee--RKO.

2/ FCC Dkt. 18110.

3/ CATV Rule Making, FCC Dkt. 18397.

In its Policy Statement, the Commission stated that, "if the applicant for renewal of a license shows in a hearing with a competing applicant that its service program during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted." (emphasis added) The Commission stressed that, in using the term "substantially," it meant "solid" or "strong" performance as distinguished from service only minimally meeting the needs and interests of the area.

Our position is that a broadcast licensee which has engaged in the type of reciprocity practices found by the Hearing Examiner--practices which we believe violate the antitrust laws--can never be regarded as "substantially" meeting its public responsibilities under the Communications Act of 1934, or being free of "serious deficiencies." Accordingly, if the Commission sustains the Examiner's findings on these issues, it should reject RKO's application

for renewal. We take no position on whether the license should be awarded to the competing applicant Fidelity or whether the proceeding should be opened up to applications by others.

II. THIS PROCEEDING

This proceeding began in 1966, when RKO applied for the renewal of its license to operate KHJ-TV on Channel 9 in Los Angeles. Shortly thereafter, Fidelity filed an application for a construction permit tooperate a station on Channel 9 in Norwalk, California. The Commission issued an order on June 8, 1966, finding the applications of RKO and Fidelity mutually exclusive and directed that a hearing be held to determine which of the applications would better serve the public interest. Evidence was taken. Following the filing of United States v. General Tire & Rubber Co., this proceeding was reopened to consider the reciprocity issue. In doing this by a Memorandum Opinion and Order released March 11, 1968, the Hearing Examiner made clear that evidence on the alleged reciprocal trade practices of RKO must be "patently germane to RKO's stewardship of KHJ-TV." Extensive evidence was then taken on reciprocity.

On August 11, 1969, the Hearing Examiner issued an Initial Decision denying RKO's application for renewal and recommending that a construction permit be awarded to Fidelity. As shall be more fully discussed below, the Examiner made extensive findings that RKO had engaged in

reciprocity as a means of selling advertising on KHJ-TV. He found that the programming performance of KHJ-TV had also been poor:

> [A]n inordinate amount of time was devoted by KHJ-TV to a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a-bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, hour after day, week after week, month after month, year after year, ad infinitum ad nauseam. To hold, and such is the holding, that this kind of air-time utilization does not serve the public interest is an exercise of restrained understatement. Such air use by a station serves well the interests of the station and the advertiser. As the record amply demonstrates, it barely touches service to the public, much less service in the public interest. (Initial Decision, p. 100).

III. FACTUAL BACKGROUND

After a full hearing in this proceeding, the Hearing Examiner found that RKO had engaged in reciprocity. His findings included the following relevant factual information on the applicant and its reciprocity practices.

A. The Applicant

RKO operates AM, FM or television stations pursuant to licenses granted by the Commission in Boston, New York, Memphis and Los Angeles. RKO is a wholly-owned subsidiary of General Tire & Rubber Company ("General"). General and its subsidiaries engage in a wide variety of activities in addition to broadcasting. They manufacture and distribute automotive tires, plastic products, rocket propulsion systems, chemicals, rubber goods, military ordnance components, and electronic equipment and various other industrial products. General and its subsidiaries also operate movie theatres and community antenna television systems and furnish commercial air transportation. (Finding 23 and 24.) 4/ Finding 22 contains official notice taken by the Hearing Examiner of Fortune, May 15, 1969, page 170: that source discloses in 1968 General had total revenues in excess of one billion dollars and total assets of 812 million dollars.

4/ All references herein to "findings" are to findings contained in the Hearing Examiner's Initial Decision.

B. RKO Practiced Reciprocity

As the Examiner recognized, reciprocity may be defined as the direction and allocation of a firm's purchase of goods and services so as to promote the sale of its products. The essence of the arrangement is the willingness of a Company A (in this case RKO) to buy a particular product from Company B on the understanding or expectation that Company B will make certain purchases from Company A. 5/

5/ The Supreme Court in FTC v. Consolidated Foods Corp., 380 U.S. 593, 594-95 n. 2 (1965), cited with approval the following exposition of reciprocity:

> A reciprocal buying arrangement may arise either through formal contract or through an informal understanding that may be scarcely distinguishable from a mere policy of cultivating the good will of a large customer. The essence of the arrangement is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases. The goods bought are typically dissimilar in kind, and in the usual case could be obtained from other sources on terms which, aside from the reciprocal purchases, would be no less advantageous. Where such a relationship is well established, it prevents the competitors of each company from selling to the other company, and affords to each company whatever increase of size and strength can be derived from an assured place as supplier to the other. Edwards, in National Bureau of Economic Research, Business Concentration and Price Policy, 331, 342 (1955).

The Examiner's findings show that this reciprocity was intentional.

General and RKO established a "trade relations" program in the early 1960's. "Trade relations" were described as negotiations between two companies with the central theme being "if you buy from me, I buy from you." (Finding 126) Such a reciprocity program usually involves officers of the company other than its usual sales personnel. The Examiner found the record to contain substantial evidence of sales made by General personnel who were not members of General's sales staff. (Finding 126) The key General and RKO personnel in the trade relations program were identified as John G. Ragsdale, General's Director of Trade Relations; James B. Filsoh, Ragsdale's West Coast Assistant; G. Lawrence Murphy, Jr., Ragsdale's Assistant in Akron, Ohio; Robert E. Wilke, RKO's Director of Corporate Relations; Harry Trenner, RKO's West Coast Division Director; Donald Quinn, RKO's Director of National Sales; and Sam Slate, Vice President of RKO. (Finding 127).

John G. Ragsdale, as General's Director of Trade Relations, established files on all companies purchasing from or selling to General and its subsidiaries as well as files on other

companies included in Fortune Magazine's listing of leading corporations in the United States. The contents of Ragsdale's files included information as to the amount of annual sales or purchases between General (including RKO and other subsidiaries) and its suppliers or customers, the appropriate company personnel contacts, and the status of relations between the companies. (Finding 128)

Reciprocity involves various kinds of conduct, but it can be roughly divided into two types. One form of reciprocity is overt. It involves explicit agreements resulting either from mutual negotiation or coercion. The second form involves more subtle efforts to convince suppliers to redirect their purchasees to the company which is buying from them and results in informal, but implied, agreements. Such pressure is usually applied informally by a high ranking official of one company to a counterpart in another.

The Examiner found that General and RKO engaged in reciprocity involving explicit agreements. His findings state that General and RKO would engage in bilateral negotiations with a supplier or would-be supplier in furtherance of their reciprocity policy.

1. The Hearing Examiner found that in the case of Olin Matheson, General entered into a specific "verbal" agreement that in return

for General's purchases of polyols, an Olin Matheson product, Olin Matheson would purchase radio and television advertising from RKO. Finding 175 of the Hearing Examiner's decision describes that agreement, and shows how it was used to try to obtain similar agreements with other companies:

> A Report of Call dated April 30, 1963, written by J. W. Fleck of Union Carbide and circulated to six Union Carbide officials, covered an interview between Fleck and D. A. Kepler, Director of Purchasing for General Tire and Rubber. The report began by noting that Kepler had disclosed further details of a General Tire deal on polyols with Olin-Matheson. These were the details listed by Fleck:
>
> "1) Agreement between General and Olin is verbal; not written.
>
> 2) Basis for agreement is Olin's purchase of Radio and Television advertising from General's RKO affiliation.
>
> 3) General have agreed to make a minimum dollar purchase of polyols. We think this probably is an exchange of dollars on a fixed ratio in return for a fixed amount of advertising dollars.
>
> 4) There is no definite duration for this agreement." (Emphasis added)

This arrangement bore fruit for RKO and specifically KHJ-TV. Although Olin Matheson had purchased no advertising

from that station in 1962 or 1963, it spent $12,350 in advertising on KHJ-TV in 1964, the year after the deal was made. (Finding 177).

2. The Examiner found that in 1962 General and RKO entered into a "reciprocal arrangement" with Pepsi-Cola Company. In return for General's agreement to increase its purchases of Pepsi for use at General's plants, Pepsi agreed to expand the advertising purchases of Pepsi bottlers from RKO's radio and television stations. (Findings 178-84) As a result of this arrangement it was predicted that RKO "should in the future share to a greater extent in the Pepsi-Cola spot campaigns where the RKO stations are involved." (Finding 180)

The Hearing Examiner also found instances in which General and RKO engaged in more subtle types of informal reciprocity agreements.

1. The trade relations personnel listed above initiated contacts with various suppliers of General and its subsidiaries. These contacts were usually made with a supplier's "trade relations" man or with its sales (rather than purchasing or advertising) department. Generally, in the course of

these contacts the RKO "trade relations" man pointed out the supplier's sales to General, emphasized the "mutually beneficial association" and "present business relationship of the companies," and brought to the attention of the supplier the RKO Stations soliciting advertising business. The Examiner's findings indicate that in a number of instances advertising revenue was generated or augmented solely on the basis of these reciprocity contacts. (Findings 140, 167, 180).

2. The findings show that RKO and General personnel on a number of occasions referred to General's purchases from a prospective advertising customer in their attempt to get suppliers to make advertising purchases. (See Findings 130, 138, 144, 163, 198). The Examiner's findings also disclose that selection of General's new suppliers were made with a view to their availability as customers and their vulnerability to reciprocity tactics. (See Findings 140, 142, 167, 171, 175).

3. A concrete example of this subtle approach is found in RKO's dealings with the General Electric Company.

The Hearing Examiner's Finding 163 demonstrates the technique:

> On February 26, 1962, Wilke wrote to R.D. Moore, Director of Trade Relations, General Electric. The body of the letter reads as follows:
>
> "Confirming our conversation, the locations and types of our several broadcast facilities are as indicated below."
>
> "I would certainly appreciate your mentioning to Marty King in Cleveland that RKO General is a division of the General Tire Company. I am sure an awareness of the mutually beneficial association between General Electric and General Tire will be helpful to us when Marty is directing the placing of his radio and television schedules."

Thus the findings show that General regularly exercised its purchasing power to engender reciprocal dealings. They establish that General used its massive purchasing power to obtain advertising for its broadcasting subsidiaries. These findings leave no doubt that General, RKO and KHJ-TV have practiced reciprocity, that they have made reciprocal buying agreements, and that RKO and KHJ-TV have benefited from such practices.

IV. Reciprocity, As Found To Have Been Practiced By General And RKO, Would Violate The Antitrust Laws And The Competitive Policy They Embody.

The practice of reciprocity of the type General and RKO were found to have engaged in have been condemned as violations of the Sherman Act and the Federal Trade Commission Act.

The district court in United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966), made clear that agreements markedly similar to those found by the Hearing Examiner would be in violation of Section 1 of the Sherman Act. General Dynamics' "special sales program" was found to take advantage of the considerable purchasing power of the defendant and to reap the benefits of reciprocal arrangements. The court held that agreements entered into pursuant to the program would be anti-competitive and unlawful if a not insignificant amount of commerce were involved. In an earlier opinion in the same case, the judge observed (246 F. Supp. 156, 167):

> The defendant has systematically injected reciprocal dealing into its sales negotiations. Thus the agreements which are the product of this anticompetitive practice, with the effect of barring competitors from the market, are in restraint

> of trade, their purpose being to hamper free competition in the market. See White Motor Co. v. United States, 372 U.S. 253, 261-262, 83 S.Ct. 696, 9 L.Ed. 2d 738 (1963).

The Supreme Court has held that reciprocity:

> is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in "an irrelevant and alien factor,"--F.T.C., p.____, intruding into the choice among competing products, creating at the least "a priority on the business at equal prices." F.T.C. v. Consolidated Foods, 380 U.S. at 594.

In the Ingersoll-Rand case, reciprocity was described as "particularly destructive of competition because it transforms substantial buying power into a weapon for 'denying competitors less favorably situated access to the market'. United States v. Griffith, 334 U.S. 100, 108, 68 S.Ct. 941, 92 L.Ed. 1236 (1949)." United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 552 (W.D. Penn. 1963) aff'd 320 F. 2d 509. Cf., Allis-Chalmers Co. v. White-Consolidated Industries, Inc., 414 F.2d 506 (3rd Cir. 1969).

Reciprocity resembles tying arrangements; both involve use of power in one market to distort competition in another.

For this reason the courts in condemning reciprocity rely on the cases condemning tying as, the Supreme Court did in the Consolidated Foods case. Of tying the courts have said it serves "hardly any purpose beyond the suppression of competition," Standard Oil Co. of California v. U.S., 337 U.S. 293, 305-306 (1949) and that it has a "pernicous effect on competition and [a] lack of any redeeming virtue . . ." Northern Pacific R.R. Co. v. United States, 356 U.S. 1, 5 (1958). See also Fortner v. United States Steel Corp., 394 U.S. 495 (1969).

Additionally, overt reciprocity has long been struck down by the Federal Trade Commission under Federal Trade Commission Act §5, 15 U.S.C. §45, which prohibits "unfair or deceptive acts or practices." California Packing Corp., 25 F.T.C. 379 (1937); Mechanical Mfg. Co., 16 F.T.C. 67 (1932); see also Waugh Equipment Co., 15 F.T.C. 232, 246-47 (1931). Consolidated Foods Corp., Trade Reg. Rep., 1961-63 FTC Complaints, Orders, Stipulations ¶16,182 at 20,977-20,978 (1962). This statutory provision generally follows antitrust rules, but is more flexible in its scope, F.T.C. v. Brown Shoe Company, 384 U.S. 316 (1966), and the decisions under it are of relevance

to the Commission in applying the public interest test of the Communications Act. See National Broadcasting Co. v. United States, 317 U.S. 190, 222 (1943).

Informal agreements such as those found to have been used by RKO and General in their dealings with General Electric Company (see supra, p.14) are also viewed as devices for accomplishing the same anticompetitive result and have also been condemned by the Supreme Court:

> Reciprocal trading may ensue not from bludgeoning or coercion but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice. United States v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965).

The anticompetitive effects of the practice of reciprocity were described by the Federal Trade Commission in the Consolidated Foods case, Trade Reg. Rep., 1961-63 FTC Complaints, Orders. Stipulations ¶16,182 (1962):

> [Reciprocity] transforms substantial buying power into a weapon for "denying competitors less favorably situated access to the market." It distorts the focus of the trader by imposing between him and the traditional competitive factors

> of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of his product. In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and ultimately the allocation of resources. Obviously, this practice strikes at one of the basic premises of a free enterprise economy.

Similarly, the practice of reciprocity, as a selling aid in the commercial broadcasting industry may seriously impair the desired competitive process which allocates business on the basis of price, quality, and service in the industry. To the extent that a broadcast licensee can rely on reciprocal purchasing power to obtain advertising, it may cease to try to provide the quality of product and service which he would have had had he been faced with competition.

If the Hearing Examiner's findings with respect to reciprocity are correct, RKO's immunity from competitive pressures may have contributed to the very poor programming which the Examiner found KHJ-TV had offered. (Initial Decision, p. 100).

As a general rule, a commercial television station's financial success depends upon its capacity to broadcast attractive programming and to sell its broadcast time to advertisers. These two factors are interdependent, in that good programming attracts the larger audiences and better ratings sought by potential advertisers and advertisers provide the station with revenue necessary for attractive programs and resultant impressive ratings.

The findings show, however, that KHJ-TV was not under the same pressure to furnish quality programming to attract the advertising dollar. Instead, a telephone call to or luncheon with an executive of one of General's suppliers and a few well-placed words about "mutual advantages of doing business with each other" became the mode of competition, and replaced or at least diminished the needs of KHJ-TV to compete for advertising by the introduction of better programming on Channel 9. Considerations of quality and popularity of KHJ-TV's programming, as well as rates charged advertisers, may well have been displaced in whole or in part by General's reciprocity dealings. The influence of

competition as a regulator of quality, price and service may have been diminished. 6/

The Examiner's findings show instances in which General's suppliers were ready to give RKO stations their advertising dollar if "all things were equal on quantity and price." (See Findings 131, 169). These reciprocity practices are anticompetitive; competing stations did not have the same opportunity to simply meet KHJ-TV's price or quality, but were required to offer a better price or program to get this business. Here, as in the Consolidated Foods case, reciprocity was "an irrelevant and alien factor," which intruded into the choice among competing products, creating at the least "a priority on the business at equal prices." FTC v. Consolidated Foods Corp., 380 U.S. 592, 594 (1965) (emphasis added).

6/ As stated in Turner, Conglomerate Mergers and §7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1387 (1965):

> Competition works satisfactorily only when success rests on lower prices, better quality, better service, and the like. Reciprocity distorts the pattern of trade away from the ideal, with no compensating economic advantage. (Emphasis added).

According to the findings, a single licensee is engaged in reciprocity. However, the Commission must be concerned with broader implications. If reciprocity should become pervasive in the broadcasting industry, substantial volumes of advertising would be placed on a non-competitive basis. Independent broadcasters would be placed at a competitive disadvantage and could be expected to try to remedy such a situation by affiliation with larger enterprises. 7/

To summarize, we urge that the Hearing Examiner's findings, if adopted by the Commission, require the conclusion that General and RKO's reciprocity practices contravene the fundamental competitive policies of our economic system, and would violate the antitrust laws.

7/ See United States v. Northwest Industries, Inc., 301 F. Supp. 1066, 1088 (N.D. Ill. 1969):

> There has been evidence that the practice of reciprocity has been increasing in the American economy since the end of World War II; and it is clear that increasing aggregate concentration and mergers of large companies result in increased opportunities for reciprocity, encouraging the exchange of reciprocal favors and tending to discourage new enterprises from entering an industry. Indeed, opportunities for reciprocity increase geometrically as an enterprise becomes larger and more diversified.

V. THE PUBLIC INTEREST STANDARD REQUIRES THAT RKO's APPLICATION BE DENIED

A. Anticompetitive Conduct Is One Basis For Not Renewing A Broadcast License

Before the Commission may grant or renew a broadcast license it must find that such an action will serve the public interest, convenience and necessity. The courts have held that one important element in determining the effect on the public interest of a broadcasting license renewal is whether such a grant or renewal will have any adverse effect on competition. E.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943). "Congress intended to leave competition in the business of broadcasting. . . ." Commission v. Sanders Radio Station, 309 U.S. 470, 475 (1940).

Thus anticompetitive conduct by licensees is clearly contrary to the public interest and grounds for disqualification. As the Supreme Court said over 25 years ago:

> [T]he Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. National Broadcasting Co. v. United States, 319 U.S. 190, 222 (1943).

The Commission has acted consistently to promote and protect competition in broadcasting by adopting rules against anticompetitive conduct. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (chain broadcasting); Storer Broadcasting Co. v. United States, 351 U.S. 192 (1953)(7-7-7 rules). These rules reflect the Commission's responsibility to promote the public interest in full and effective competition. As the Court of Appeals for the District of Columbia has said:

> [I]t is settled that practices which present realistic dangers of competitive restraint are a proper consideration for the Commission in determining the public interest, convenience and necessity. National Broadcasting Co. v. United States, supra; Mansfield Journal Co. v. Federal Communications Commission, 1950, 86 U.S. app. D. C. 102, 180 F.2d 28. And the elimination of this danger is consistent with the Commission's duty under the Act to "encourage the larger and more effective use of radio in the public interest." Metropolitan Television Co. v. FCC, 289 F.2d 874, 876 (D.C. Cir. 1961).

In the area of licensing, the Commission itself has long adhered to the very broad policy that:

> only those persons should be licensed who can be relied upon to operate in the public interest, and not engage in monopolistic practices. When passing upon application of persons who have engaged in

> is not here in issue. The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interst from holding the general policy of Congress to be applicable to questions arising in the proper discharge of its duties. Whether Mansfield's activities do or do not amount to a positive violation of law, and neither this court nor the Federal Communications Commission is determining that question, they still may impair Mansfield's ability to serve the public. 9/

Thus, it is the conduct of the applicant and whether such conduct comports with the general public policy of promoting competition which the Commission must consider, Philco v. FCC, 293 F. 2d 864 (D.C. Cir. 1961), and not whether the actions were strictly legal or illegal. The ultimate consideration is that the Commission should not renew a broadcasting license under the public interest standard in the face of facts which show that the licensee has not behaved in the public interest. Office of Communications

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9/ It is interesting to note that the Lorain Journal, which was commonly owned with the Mansfield Journal, was subsequently found to have violated the antitrust laws by virtue of the conduct on which the Commission based its refusal to grant a license. Lorain Journal v. United States, 342 U.S. 143 (1951).

of the United Church of Christ v. FCC, 16 RR 2d 2095 (D.C. Cir. 1969).

In this connection, it is important to emphasize that broadcasters are held to a very high standard of performance. This point was underscored by the Court of Appeals in the Church of Christ decision.

> By whatever name or classification broadcasters are temporary permittees--fiduciaries--of a great public resource and they must meet the highest standards which are embraced in the public interest concept. Office of Communications of the United Church of Christ v. FCC, 16 RR 2d at 2103.

B. The Examiner's Findings Necessitate The Denial of RKO's Application For License Renewal of KHJ-TV

The applicant for renewal has the burden of showing that he has operated and will continue to operate in the public interest; the Commission may not grant a renewal unless the record establishes with substantial evidence that such a renewal would be in the public interest. Office of Communications of the United Church of Christ v. FCC, supra. See also Commission's Policy Statement on Comparative Hearings Involving Renewal Applications.

The Examiner's findings on reciprocity, if sustained, would not allow the Commission to conclude that the renewal of this license would be in the public interest. Such reciprocity practices simply do not "meet the highest standards which are embraced in the public interest concept." Office of Communications of the United Church of Christ v. FCC, 16 RR 2d at 2103.

CONCLUSION

The Hearing Examiner has found that General, RKO, and KHJ-TV have used and benefitted from reciprocity, and that this was a substantial and sustained program which included both subtle understanding and outright agreements. Such is, in our view, a violation of the antitrust laws, and contrary to the public interest. Accordingly, the Department of Justice recommends that, if the Commission affirms these findings, it should deny RKO's application for renewal of its license to operate station KHJ-TV in Los Angeles, California.

Respectfully submitted.

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June 10, 1970

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served this date on each party of record by mailing same, postage prepaid, to the parties or their counsel.

Keith I. Clearwaters

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June 10, 1970