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DEPARTMENT OF JUSTICE

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REMARKS

Re: FCC Microwave Inquiry (Dkt. 18920)

I enclose two copies of our proposed response typed up in final. I propose to file it tomorrow afternoon (October 8). We are already almost a week late, and I would like to avoid any further delay.

All your various comments were clearly helpful. Do you have any more?

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Donald I. Baker			


RECEIVED
OCT 8 1970

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules.	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 approach to the rapidly growing communication needs of the period ahead. 1/ The solution

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1/ We note that although the title of this notice of inquiry refers to "microwave" services, the specialized services in question may well be delivered and in end by a combination of various microwave relays, cable transmission systems and local loops. Thus it appears that the issue is not limited to microwave but in a broader sense is whether to authorize the entry of specialized communications carriers to perform services other than public telephone transmission.

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 public policy and consistent with the law as developed by the federal courts and the Commission. It is of course important that an announced policy of competitive entry not be frustrated by endless, burdensome and repetitive hearings, by denial of access to local distribution channels, or by abuse of the monopoly power of the established carriers. We believe that these dangers can be surmounted in ways outlined in this Response and in the Notice of Inquiry.

Our response is directed to the five questions set out at page 13 of the Notice of Inquiry:

"A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and, if so,

"B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances;

"C. What standards, procedures and/or rules should be adopted with respect to such technical matters as the avoidance of interference to domestic communications satellites in the 6 GHz band, the avoidance or resolution of terrestrial frequency conflicts and route blockages both vis-a-vis the facilities of established carriers and among the applicants, and the use of frequency diversity;

"D. Whether some measure of protection to the applicants' subscribers is called for in the area of quality and reliability of service;' and

"E. What is the appropriate means for local distribution of the proposed services?"

A. Whether Allowing the Entry of New Carriers Would Be In the Public Interest

The initial question is the fundamental one. For the reasons explained below, we believe that it would be in the public interest to authorize new carriers of specialized communication services in addition to AT&T and Western Union. This conclusion is supported factually and legally by past decisions of the Commission and the courts, and by most studies in this area.

It appears to be the consistent conclusion of all expert studies in this field that the facilities and service offerings of the established carriers are not responsive to modern needs for specialized communication and data transmission services. Surveys conducted by new applicants and rule-making proceedings of the Commission have also revealed that the customers themselves recognize the need for new, highly specialized, variously packaged and economical communications services. Given this recognized need and the evidenced and perhaps even inherent limitations of the established carriers with their older facilities and highly uniform pricing policies,

it has been suggested and there is every reason to conclude that the ultimate benefit of a competitive entry policy will be more varied, more responsive, more innovative and more economically priced and packaged specialized communications services for the American public.

Secondarily, it has been concluded by a number of different economic policy study groups and previously by the Commission itself that a policy of fostering competitive entry is likely to aid the regulatory goals of the Nation, by encouraging product and service innovation and creating the strongest possible incentive for cost control and rate minimization.

Lastly, a policy of fostering competitive entry is consistent with the national policy embodied in the Antitrust laws, which policy has been consistently held by the federal courts to be as fully applicable in regulated industries as is feasible in light of the specific regulatory scheme.

I. Commission Decisions

Beginning with the Above 890 decision in 1959, the Commission made clear that the service monopoly of AT&T and Western Union should not be extended to microwave transmission. In the Matter of Allocation of

Frequencies in the Bands Above 890 Mc., 27 F.C.C. 359 (1959); 29 F.C.C. 825 (1960). It thus permitted users with sufficient resources and requirements to build and operate specialized microwave systems tailored to their needs. If such larger users are permitted to enjoy those benefits and economics of specialization, it is entirely appropriate that the same benefits and economies be extended to smaller users by authorizing new specialized common carriers catering to their needs.

The Commission took an important first step in this direction in the recent M.C.I. proceeding, where it approved, after an evidentiary hearing and a positive finding by the Hearing Examiner, MCI's proposed service between Chicago and St. Louis. In re Applications of Microwave Communications Inc., 18 F.C.C. 2d 953 (1969). That decision was made in light of virtually all the considerations that are now raised again in this broader proceeding. Specifically, the Examiner and the Commission found that there was demand for this point-to-point microwave service, and that plans of the type offered by M.C.I. would meet needs not met by the established carriers and offer significant advantages, including more flexible service and lower rates based on lower cost. Also, the Commission concluded that in the particular context of point-to-point microwave transmission

of computer data, competition would produce the important benefits of better service, lower cost, and faster innovation - advantages clearly not confined to the Chicago-St. Louis route at issue in the M.C.I. proceeding. Western Union, one of the major opponents of the original M.C.I. application, acknowledged in its reply brief that:

> If M.C.I.'s showing here is sufficient, then the same showing would suffice for other routes and the same "public need" undoubtedly exists between Chicago and New York, New York-Washington, St. Louis-New Orleans and other attractive routes. [p. 34]

The existence of "public need" was further documented by the responses filed in the Commission's Computer Inquiry (Dkt. 16970). They revealed a solid consensus among developers and users of computer services that presently available common carrier rates and services were not adequate for the needs of computer users and developers. Most favored new competition in providing economical, flexible and customized services. See, e.g., responses by B.E.M.A., G.S.A., Univac and American Newspaper Publishers' Association.

Finally, the Commission's recent action in the Domestic Satellite inquiry makes clear that allowing competition with existing carriers is an appropriate way to encourage new and better communications services

for the benefit of the public. In re Establishment of Domestic Communication-Satellite Facilities by Non-governmental Entities, Dkt. No. 16495 (March 20, 1970).

2. Judicial Decisions

Moreover, authorization of new competitors in this area is entirely consistent with court decisions which increasingly have stressed the crucial role of competition in promoting efficiency and innovation in regulated industries.

Even United States v. RCA Communications, Inc., 346 U.S. 86 (1953) - an older decision sometimes cited for the contrary proposition - makes this point clearly. That case involved the rather unusual circumstance where the Commission had authorized additional common carrier service though it found no potential public benefit. In the course of its opinion, the Supreme Court stated that:

> Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for supplementary or auxiliary support. . . . There can be no doubt that competition is a relevant factor in weighing the public interest.
>
> * * * * *
>
> We think it not inadvisable for the Commission, when it makes manifest that in doing so it is conscientiously competing

> the discretion given it by Congress, to reach a conclusion whereby authorizations should be granted wherever competition is reasonably feasible.
>
> * * * * *
>
> In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific finding of tangible benefit. . . . In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, . . . but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. [346 U.S. at 93-97]

In RCA, the FCC had found, inter alia that:

1) Existing facilities were adequate to handle the traffic;

2) Business obtained by MacKay would not come from new demand but would simply be that diverted from RCA or others;

3) MacKay would not provide lower rates or better service;

* * * *

9) Significant competition in providing radio telegraph service already existed; . . .

[See RCA v. FCC, 201 F. 2d 694, 696 (D.C. Cir. 1952]

In striking contrast, the original M.C.I. proceedings and this proceeding involve findings by the Commission or its staff (1) that existing facilities are not adequate for

new specialized needs, (2) that demand is likely to multiply many times over and thus new entrants will not be diverting significant present business from existing carriers, and (3) that the new applicants are likely to provide better service and lower rates than those of AT&T and Western Union. Moreover, it has been found that there is little competition at present in regard to private line services such as those proposed, since the Bell System's only existing competitor, Western Union, has merely copied the AT&T tariffs and uses facilities leased from AT&T. Given these findings, it would be entirely appropriate for the Commission in this case to authorize new competition and justify such an authorization in terms of the standards set forth by Justice Frankfurter in the RCA Communications case, supra.

More recently, in Carter Mt. Transmission Corp. v. FCC, 321 F. 2d 359, 362 (D.C. Cir. 1963), the Court of Appeals stressed that the Commission should administer its regulatory duties "in light of the purposes which the Sherman Act was designed to achieve." Similarly, in Atlantic Seaboard Corp. v. Federal Power Commission, 404 F. 2d 1268, 1272 (D.C. Cir. 1968) the court stated

that the Power Commission "may properly look to the existence of some competition, even if entry is limited by legal barriers or regulatory necessity, as an important and effective tool in increasing efficiency and quality of service." See also United States v. Dixie Highway Motor Corp., 389 U.S. 409 (1968); ICC v. Parker, 326 U.S. 60, 70 (1945).

Many other recent appellate decisions contain a similar emphasis on the importance of preserving and enhancing competition in regulated industries:

United States v. Radio Corp. of America, 358 U.S. 334 (1959);

Silver v. New York Stock Exchange, 373 U.S. 341 (1963);

Thill Securities Corp. v. New York Stock Exchange, F. 2d (7th Cir. 1970);

United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 190 (1968);

Federal Maritime Comm'n. v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968);

Natural Gasoline Co. v. Federal Maritime Comm'n., 385 F. 2d 736 (9th Cir. 1968).

Northern Nat. Gas Co. v. Federal Power Comm'n., 399 F. 2d 953, 980 (D.C. Cir. 1968); and

City of Fredericksburg v. Atlantic Power Commission, F. 2d (D.C. Cir. 1970).

As the Supreme Court has stressed, when an industry is "a highly regulated industry critical to the Nation's welfare," this "makes the play of competition not less important but more so." United States v. Philadelphia National Bank, 347 U.S. 321, 372 (1963). Thus, as a matter of law, there can be no doubt that the Commission can, and indeed should, give substantial weight to competitive benefits likely to flow from the proposals set forth in the Notice of Inquiry.

3. Recommendations by Government Agencies and Advisory Groups

Commission authorization of competitive microwave services would be consistent with the recent recommendations of various expert government studies which have urged greater reliance on competion in specialized communications services as well as in regulated industries generally.

In 1968, the President's Task Force on Communications Policy recommended a general policy of allowing more competition to existing communications common carriers, and specifically recommended "Liberalized Entry into Inter-City Private Line for Hire Service." (Final Report, Chpt. 6, p. 10) The Task Force saw this development as leading to greater consumer satisfaction and more rapid technological

advance. It was concluded in this regard that, "additional competitive pressure, even if confined to supplementary services, could be an important factor in gauging and maintaining high performance in this industry." (Id. at 12).

In 1969, President Nixon received the report of a Special Task Force on Productivity and Competition which he had asked be created under the leadership of Professor George J. Stigler of the University of Chicago. That task force advised the President that there should be a major reorientation of regularoty policy. They recommended:

1. Entry of new firms should be encouraged wherever an absolute contradiction with regulatory goals is not involved.

2. Allow much freedom in price competition. [Congressional Record, June 12, 1969, pp. 6350-52]

In 1970, the President's Council of Economic Advisers recommended that:

> [M]ore reliance on economic incentives and market mechanisms in regulated industries would be a step forward. The record in transportation and communications, and other examples in this chapter, point to that lesson. Industries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition. [Economic Report of the President-1970 At p. 108]

> Regulation [of telephone service] should be carried out in such a manner that it does not prevent or limit competition in sectors that are not natural monopolies. Recently, after a series of Federal Communications (FCC) and court decisions, new carriers of private wire and microwave have been permitted, with beneficial effects on rates and services.

Lastly, it was noted that:

> It is the Administration's hope that increased competition will eventually make it possible to let market forces assume more of the role of detailed regulation. [At p. 109]

Thus, the consistent recommendation of all experts who have studied this issue in the last two Administrations has been that more competition in specialized communications fields such as microwave data transmission is both necessary and desirable. 2/

4. The Problem of "Cream-Skimming" and Its Effect on Average Cost Pricing by AT&T

In opposing authorization of the initial M.C.I. application, AT&T argued that M.C.I. was seeking to "skim the cream" of lucrative, high volume markets and that a trend of this would threaten the viability of AT&T's established policy of "average cost pricing,"

2/ This conslusion is also in accordance with the recommendations of the Commission's own consultants. For example, Donald Dunn of Stanford Research Institute and a Commission consultant in the Computer Inquiry, urged greater competition in this field. See "Computers and Communications: Policy Issues," 34 Law & Contemp. Prob. 369, 383 (1969).

i.e., charging the same amount for the same service in all markets, regardless of variations in particular situations. The "cream skimming" problem was also raised by the dissenting Commissioners in the M.C.I. case. The majority of the Commission in the M.C.I. case expressly rejected this argument, as did the Common Carrier Bureau in this proceeding. We agree - largely for the reasons set forth in paragraphs 36-40 of the Notice of Inquiry.

First of all, it is not clear that the new applicants are "cream skimming." They offer proposals that would provide new types of service to a large number and wide variety of American cities in all regions. Given that very few business, government or institutional customers for this service are likely to exist in rural areas or small towns, coverage of most major cities can hardly be characterized as "cream skimming" (See Paragraph 38). Moreover, it is entirely rational for these new competitors to test and develop the market for their product in selected, favorable markets, much as AT&T has done with devices such as its "Picturephone."

Second, the competition offered to AT&T by these applicants should not affect the Bell System's revenues

or average cost pricing for public switched telephone service, since presumably that service is self-supporting. The public policy reasons favoring universal service and average cost pricing clearly apply with far greater force to public telephone service than to point-to-point data transmission. 3/ In fact, AT&T itself has strayed considerably from uniform or average-cost pricing in its own marketing of data transmission services. Its "Telpak" tariffs are obviously more favorable to large users in major markets than to smaller customers. Its "Series 11,000" tariffs are only offered in the Northeast.

Third, the new competition in point-to-point transmission will not threaten the financial stability of AT&T and the public switched telephone service it provides. As is pointed out by the Notice of Inquiry, this specialized

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3/ Unless there are strong public policy reasons to favor businesses located in rural areas over those in major metropolitan areas, sound economic policy would suggest that the optimal allocation of resources occurs when services are priced according to marginal costs rather than average costs. As the Hearing Examiner in M.C.I. noted, "the averaging method is embedded neither in the Decalogue or the Constitution." Ronald Coase of U.C.L.A. concluded that "It is probably more appropriate for price differentials to reflect cost differentials in this field than is the case in telephone service." Coase, supra, at 383.

market only accounts for a small percentage of Bell System's total revenues (See Paragraph 40). Moreover, in such a fast-growing market, AT&T's revenues from it are likely to grow substantially even if new entrants were to capture a major share of the business (See Paragraph 39). Also, the probability that many of the new entrants will hire AT&T facilities for local distribution means that the Bell System revenues will grow even when the customer chooses a specialized carrier for intercity transmission.

In addition, it does not appear that the possibility of adverse competitive effect on Western Union constitutes a substantial reason for limiting the entry of new microwave companies. In its recent authorization of the sale of Bell's "TWX" facilities to Western Union (Dkt. 18519), the Commission has sanctioned a substantial lessening of competition in order to strengthen Western Union. In that proceeding, Western Union took the position that it did not fear the competition of M.C.I. and believed that the prompt transfer of Bell's facilities would give it sufficient lead time to stand up to such "indirect" competition. (Dkt. 18519 at para. 30). We note finally that it would not be sound regulatory policy to use the desirability of a national telegraph system as a

justification for protecting Western Union from competition in fields that are quite separable from message telegraph service and in which it may be weak or inefficient.

3. Limiting the Competitive Response of Established Carriers

The Notice of Inquiry makes clear that:

> "Established carriers would, of course, be free to compete on equal terms with the new entrants and might obtain a very substantial portion of the specialized communications market." [Paragraph 39]

This competition from the established carriers is highly desirable. As the Commission recognized in M.C.I., the benefit of competition from the new specialized carriers lies not only in the new rates and services they offer, but in the more competitive services that the established carriers may offer in response to their challenge. 4/ AT&T's new Series 11,000 tariffs and its recently announced new switched data transmission

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4/ The Court of Appeals for the District of Columbia Circuit recently made the same point on the role of new competition in the regulated natural gas industry: "It is through the enhanced efforts made by the [present] supplier in response to such pressure that competition reaps its benefits." [Atlantic Refining Corp. v. Federal Power Commission, 406 F. 2d 1253, 1271-73 (D.C. Cir. 1968)]

network are striking evidence that even the threat of new competition can generate substantial new service offerings from the established carriers.

At the same time, there is a danger, as recognized in the Notice of Inquiry (Para. 41), that AT&T might overreact to this new competition by offering new specialized services at unreasonably low rates subsidized out of public message telephone revenues. See, e.g., American Trucking Ass'n. v. F.C.C., 377 F. 2d 121 (D.C. Cir. 1966). This is one of the most difficult issues the Commission will have to face. Clearly, specialized competitors potentially affected by a new Bell System tariff have a right under Section 204 to challenge it before the Commission as being unreasonable and discriminatory in violation of Sections 201 (b) and 202 of the Communications Act.

It seems likely that self interest will encourage such protest whenever grounds for it even arguably exist. However, to deal with such protests, the Commission must have detailed knowledge of Bell System's costs; and this may require special steps to insure that AT&T's costs for specialized services are segregated

from those public message telephone services. 3/ Moreover, to be an effective safeguard against predatory pricing, the Commission's tariff challenge procedure will have to be swift. Since the law now provides that tariffs go into effect if not disallowed within 90 days, long delays work to the benefit of the carriers. Thus, certain Telpak tariffs challenged as discriminatory eight years ago, have been in effect for most of the period since then -- a period long enough to exhaust any but the hardiest competitor. Certainly there is a need for administrative devices that will expedite review of Bell System tariffs by the Commission and its staff.

In addition, the Commission should consider applying in this area the Executive Branch recommendation in the Domestic Satellite proceeding (Docket 16495) that new Bell System facilities for specialized communications services should be authorized "only after a determination by the Commission on each application, based on public

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3/ Of course, the Commission has broad powers under Section 219 to require detailed financial reports from AT&T.

evidentiary hearings, that no cross-subsidization between monopoly public message and specialized service would take place in the development, manufacture, installation, or operation of such facilities." (Memorandum, January 23, 1970).

The Notice of Inquiry emphasizes that there should not be "any protective umbrella to shield the competitors . . . or any artificial bolstering of operations that cannot succeed on their own merits." (Para. 44) We entirely agree with this conclusion. Although the new entrants will be deemed "common carriers," it is obvious that future Commission decisions concerning service, rates and abandonment of service by such carriers should reflect the policy of competition that justified their entry in the first place. Such "carriers" will probably be providing specialized services to institutional users rather than the public generally, and partial alternative forms of service will likely exist for their customers and entry remain open for new competitors. In other words, if competition is to be allowed within the context of common carrier regulation, the substantive content of that regulation must be altered to reflect the differing factual circumstances and

regulatory purpose. Thus, carriers offering new services should be allowed to succeed or fail based on the commercial merits of their specialized services. They may be "carriers" in a legal sense, but the public interest in their success or failure is very different from that of a "carrier" offering a basic service required by the public at large. 6/ This would mean, among other things, that minimum rate regulation would certainly not be appropriate. Cf. California Interstate Telephone v. F.C.C., 328 F. 2d 556, 561 (D.C. Cir. 1964).

B. Whether to Hold Comparative Hearings or Economic Exclusivity

We agree with the proposal that the Commission not hold comparative hearings between applicants regarding economic exclusivity. (Paragraphs 48-50b) As the M.C.I. case indicates, such comparative hearings are likely to involve long delays, considerable expense, and much

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6/ We recognize, however, that should a new common carrier achieve great size and near-monopoly status in any significant market, its competitive conduct and its service obligations may have to be regulated more thoroughly than those of small firms with many competitors. This might involve, for instance, requiring provision of service redundancy for national security reasons.

uncertainty. Little is likely to be gained by such hearings and, in the process, entry of new competitors will be unnecessarily delayed. Instead, the Commission should make clear to the new applicants that their future economic survival is not being guaranteed; if they cannot expect to survive in the competitive climate contemplated in the Notice of Inquiry, they should face this risk at the outset.

So far as existing carriers are concerned, there is even less reason to find mutual economic exclusivity between them and the new microwave applicants. The new applicants are seeking to serve customers with services not being offered by AT&T and Western Union. Accordingly, the Commission should avoid lengthy and costly comparative hearings between established carriers and the new applicants.

C. Avoidance of Interference and Related Problems

We agree that the Commission should clarify its rules in regard to the adjustment of conflicting frequencies or sites and that applicants should be discouraged from purposely applying for the same sites applied for by others (Paragraph 57).

We believe that the pro-competitive purposes of the whole proceeding would be aided if the Commission ruled that existing carriers should have as much obligation to accommodate to new entrants as they have to accommodate to such carriers existing or projected facilities. This may of course involve payments by the new entrant to the existing carrier to compensate it for the cost of relocating routes.

Also, we are concerned by the somewhat ambiguous references in paragraphs 54-58 of the Notice of Inquiry to the desirability of "cooperation" and "coordination" among applicants and existing carriers prior to the filing of applications. We are certain that neither the Common Carrier Bureau nor the Commission wishes to encourage, or even seem to encourage, private pre-filing meetings between microwave competitors where informal agreements are reached that may have the effect of dividing up service markets or allocating customers. The Court of Appeals for the District of Columbia Circuit has recently stressed that:

> [C]omparative proceedings before regulatory agencies are 'sensitive mechanisms for weighing the relative merits of rival . . . projects' and one of the 'main competitive arenas' of the natural gas industry since it is there that the sellers challenge one another for the favor of the Commission. This process could easily be distorted if the Commission permitted potential applicants to get together to decide how a market should be divided before submitting their

> proposals to the Commission, for then private parties rather than the Commission would be determining what means of meeting a market demand is most closely in accord with the public interest. We cannot permit such an abrogation of administrative responsibility. Northern Natural Gas Co. v. Federal Power Comm'n., F. 2d 953, 971 (D.C. Cir. 1968) [Emphasis added]

We do not suggest that the Northern Natural Gas case requires full comparative hearings in regard to microwave applicants seeking to serve overlapping territories, nor that it prohibits voluntary cooperative solution of technical problems. But we do believe that compliance with the spirit of that ruling requires that the Commission make clear (1) that prior to filing each microwave applicant should determine independently what markets and customers it will attempt to serve; and (2) that competing companies should make no agreements broader than what is necessary to eliminate the problem of interference and should certainly not make any agreements that have a substantive effect on which markets and customers will be served by the parties attempting coordination of their facilities. In addition, the Commission should consider the possibility of requiring that meetings for the coordination of conflicting microwave applications and facilities should be held publicly, in the presence of F.C.C. staff and other affected parties,

with the final agreement reduced to writing. 7/

D. Protection of Subscribers in Regard to Quality and Reliability of Service

The Department of Justice is in agreement with the recommendations of the Notice of Inquiry concerning this subject. Hopefully, competition itself should serve as an effective impetus to quality and reliability of service, without the need of detailed governmental supervision. Nor would standardization of service requirements seem appropriate at this time when development of the relevant technology is still continuing at a rapid rate. These are services tailored for sophisticated business users who should be quite capable of protecting their own economic interest in good service.

E. The Problem of Local Distribution

The applications now being considered by the Commission differ in that some of them appear to presume that local distribution will be accomplished by means of interconnection with local telephone distribution facilities while others (such as the Datran applications) promise the creation of new local distribution facilities.

7/ Of course, if prior to such a proceeding, economic pressure was employed by one or more competitors to induce another competitor to acquiesce in an agreement limiting competition among them, such conduct would certainly be subject to antitrust penalties. Georgia v. Pennsylvania R.R., 324 U.S. 439, 458-62 (1945).

The Department of Justice has no expertise to offer on the subject of the feasibility of proposed new methods of local distribution of data transmitted intercity by microwave. Thus, we will limit our comments to the issue of interconnection with existing local telephone facilities.

We pointed out in our Carterfone and Computer Inquiry submissions that when a dominant carrier engages in an unjustified refusal to interconnect in order to maintain its position, its conduct may constitute illegal monopolization under Section 2 of the Sherman Antitrust Act. See United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912); United States v. Lorain Journal Co., 342 U.S. 143 (1951). Similarly, it is illegal under the Sherman and Clayton Acts for the owner of leased equipment to prohibit the use of competitors' supplies in conjunction with the equipment. International Business Machines v. United States, 298 U.S. 131 (1936); International Salt Co. v. United States, 332 U.S. 392 (1947).

Moreover, an unreasonable refusal to interconnect would clearly be inconsistent with Section 201(b) of the Federal Communications Act. See Hush-A-Phone

Corporation v. United States, 238 F. 2d 266 (D.C. Civ. 1956). In re Matter of Carterfone, 13 F.C.C. 2d 420 (1968).

We note with regret that during the M.C.I. proceeding, both Bell and Western Union expressly threatened to refuse interconnection to M.C.I., or similar carriers. See Bell Brief at p. 28, Bell Proposed Finding #56, Western Union Brief at p. 6, Western Union Proposed Findings #94-101. Both the Hearing Examiner and the Commission commented on "the carriers' intransigence, manifested in this case." It is not clear whether that intransigence continues to the present, particularly in light of the Commission's clear statements in the Carterfone; Domestic Satellite, and M.C.I. matters supporting the [illegible] of non-discriminatory interconnection whenever feasible. It is to be hoped that the established carriers have reconsidered their position in light of these teachings by the Commission regarding their obligations under Section 201(a), and in light of the strong national antitrust policy against abuse of monopoly power. In any event, we are in full agreement with the statement of the Common Carrier Bureau that:

Office of Telecommunications Policy
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Form DJ-150
(Ed. 4-26-63)

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

CCBird:jam

TO : Donald I. Baker
Deputy Director of Policy Planning

DATE: October 13, 1970

FROM : C. Coleman Bird

SUBJECT: Possible Responses of the Department of Justice to the FCC's Overseas Communications Inquiry

By its June 10, 1970 Notice of Inquiry (Docket No. 18875), the FCC has begun an inquiry into the policy it should follow in the future licensing of cable and satellite facilities for overseas communications. In its Notice, the Commission stated (at 1):

> We think that, to the extent possible, we should formulate a policy which will govern our future licensing in the field of overseas communications and which will enable interested carriers to plan their own actions accordingly.

By its July 22, 1970 Order, the Commission extended the time for filing reply comments to October 19, 1970. There are basically two questions, one economic and one strategic. The economic question is what is the optimal allocation of investment funds between underwater cable installations and communications satellites to meet the communications needs of the 1970's. The strategic question is whether any filing by the Department of Justice within the deadline allowed could materially assist the FCC in resolving the economic question on the merits. I doubt that the Department is qualified to express an opinion on the economic question, and, in my opinion, the answer to the strategic question must be considered no.

I. The Nature of the Investment Decision

The various comments in the current Inquiry (Docket No. 18875) indicate that significant differences exist between cables and satellites in terms of such factors as:

(1) costs per circuit (both short and long-run);

(2) reliability (i.e., freedom from accidental service interruptions);

(3) security (i.e., freedom from eavesdropping or hostile jamming);

(4) suitability for high-speed data transmission;

(5) suitability for transmission of broad bandwidth signals (e.g., television);

(6) rate of technological change (and, hence, rate of obsolescence);

(7) lead time required for new capacity installation; and

(8) suitability for service to areas of varying population density.

There is little agreement upon the relative merits of satellites and cables with respect to most of the above variables. There is even less agreement on the significance that should be attached to the differences in comparative advantage which the facts may ultimately show to exist between the two communications modes. The problem is complicated by the fact that the differences in comparative advantage are rarely absolute, and often can be eliminated through the use of more costly equipment or installation methods. The Final Report of the President's Task Force on Communications Policy aptly summarized the characteristics of this complex investment decision as involving "infrequent, long life, large investment programs dependent on long-term demand projections and a variety of economic and non-economic factors[.]" Task Force Report, Ch. 2, at 37. In any case, the Commission's choice will not be an easy one.

II. Possible Response of the Department of Justice

It is not clear how the Department can assist the Commission in evaluating the technical arguments over the superiority of one mode vis-a-vis the other with

respect to the factors listed above. Nor is it clear how, once these facts are known, the Department could help the Commission make the hard choices confronting it. The Department would appear to have very little to offer when the question is, for example, how to balance the gains in increased reliability against the costs of redundant back-up capacity in either mode. (But the Department might want to encourage the Commission to decide that users of communications services who demand a higher level of reliability (such as the DOD) should have to absorb completely the higher costs necessary to achieve that reliability). The Department clearly is not in a position to resolve these complicated factual disputes and conflicts in values sufficiently by October 19 to make a sound recommendation concerning the optimal investment strategy to the FCC. We should hope to work closely with the Office of Telecommunications Policy in their more extensive inquiry into this subject, which Charles Joyce, Bruce Owens and Walter Hinchman mentioned to Barry Grossman and me at our meeting with them on October 7. The proper resolution of the competitive issues of interest to the Department must await determination of the relevant economic and engineering facts by parties more technically expert than the members of the Antitrust Division. OTP can provide this expertise, and we should help them in their inquiry in any way we can.

This is, at best, a long-run solution, however. In the short-run, the Department's options are actually quite limited--(1) a filing outlining the analytical steps which must be followed, in our view, to reach a sound investment decision (without going into detail); (2) a filing pointing out the absence of justification for the investment strategies recommended by others (notably, AT&T); (3) some combination of (1) and (2); or (4) no filing at all, at this stage. The difficulty with a filing of the first kind is that it is difficult to outline for the FCC the steps in a sound investment analysis without sounding naive, patronizing, or worse. This is true, even though the members of the OTP staff that we talked to felt there could be some value in restating the obvious for the FCC's benefit, citing such decisions as the FCC's licensing of parallel cable and satellite facilities to serve mainland to eastern Caribbean traffic. In re ITT Cable & Radio Inc.-Puerto Rico, 5 F.C.C.2d 823 (1966).

AT&T's investment strategy has little to recommend it but its simplicity. AT&T has suggested that the FCC license

both cables and satellites "so that circuit use will be approximately equal," and that "[f]acility additions should be timed to maintain the approximate balance of circuit use between cables and satellites as time progresses." AT&T Comments, at 2-3. It would not be difficult to demonstrate the weaknesses in AT&T's case for its so-called "balanced" investment strategy, which arbitrarily splits the growth in demand for overseas communications services between cable and satellites regardless of the costs involved.

AT&T's argument for a 50/50 split runs as follows. First, without benefit of citation to authority, AT&T asserts that more and more the "dominant cost of providing overseas telephone service will no longer be the line facilities needed to transmit the messages between the overseas facility terminals, e.g., submarine cables and satellites, but instead the cost of switching and terminating the calls." AT&T Comments, at 6-7. Second, for unstated reasons, "[t]he goal for overseas telephone communications must now be to handle calls placed on a demand basis without delay, with operators used for only that small percentage of calls for which assistance is required." Id. at 7. Third, this goal can best be met by customer direct dialing, which makes it "essential that adequate circuit capacity be provided to meet unexpected demands, including those caused by outages of operating facilities." Id. The reasoning is that any temporary blocking due to outages will cause customers to call the operators to handle the calls, and that "it would not be economically feasible to provide" sufficient stand-by operators to process calls when outages occur. Id. at 8. Fourth, since cables and satellites are subject to different kinds of risks, both media should be used in order to "spread[] the risks and provide[] a higher degree of service reliability and continuity." Id. at 9. In addition, it is claimed that satellites are better suited for television transmission than cable, while cable is to be preferred for high-speed data transmission and national security needs. Id. at 10.

AT&T's argument betrays a lack of awareness of cost factors which is unfortunately found all too frequently in regulated industries. It is never established that the only choice is between redundant cable capacity and vast platoons of overseas operators and idle switching equipment ready to handle calls in the case of an outage. As Bruce Owens suggested, if an outage were to occur, it would be a

simple matter to activate an intercept on dialed overseas calls to explain that all circuits were busy because of an outage, and that essential calls could be placed through an overseas operator, but only at premium rates. In other words, the use of peak load pricing and demand management could lower significantly the margin of excess capacity necessary for "adequate" capacity. The argument also makes no comparison between the costs of outages (which can be reduced as demonstrated above) and the year-in, year-out costs of redundant capacity which must be borne by the users of communication services. Similarly, there is no discussion of the cost differences which exist between adding cable circuits to get back-up capacity and adding satellite circuits. Although satellite circuits are all subject to the same kinds of outage risks (e.g., earth station failure or satellite malfunction), such events tend to be random, unrelated events. There is no more reason to think that two satellites will fail simultaneously than that two transatlantic cables will be cut simultaneously. Thus, the 50/50 investment strategy may well cost more without any appreciable diversification of risk. AT&T's final barrage of arguments is similarly unpersuasive. The fact that certain users need the security (DOD) or the rapidity (for high-speed data transmission) of cable for some of their messages hardly justifies an incremental 50/50 investment strategy when there is sufficient cable capacity to meet such users' present and anticipated demand for transcontinental circuits. AT&T simply has not produced the cost estimates, comparisons, and analysis necessary to make a case for its investment strategy.

I recommend that no filing be made by the Department to meet the FCC's October 19 deadline. COMSAT's comments indicate that it can be relied upon to expose the fallacies and flaws in AT&T's proposed investment strategy. In this situation at least, we can depend upon competition to bring most of the relevant facts and arguments to the regulator's attention. We lack the technical resources to do any more by October 19 than duplicate COMSAT's attacks upon the 50/50 strategy urged by AT&T. A filing which does no more than echo arguments better made by others, or which simply urges the Commission to make a reasoned economic choice among the alternative investment strategies, would do little to assist the Commission in making that choice, or advance the interests of competition in the proceeding.

Barry Grossman has read this memorandum and wishes to note his general concurrence. In addition, he feels that the Department's long-term influence with the Commission may be diluted if we make a practice of intervening in matters in a manner which does not materially aid the Commission. Moreover, he feels that the effectiveness of a Department filing with the Commission will probably be directly related to the following criteria: (1) the existence of a competitive issue which can clearly be identified as such; and (2) the existence of preferred solutions which we can support on economic and communications policy considerations. He does not think that a Department filing by October 19, 1970 could meet either of these criteria.

I concur.

11/1/70

Reply to request of 8/17/70

Office of Telecommunications Policy
Route Slip

26 OCT 1970

TO:

_____	Clay T. Whitehead	_____
_____	~~George F. Mansur~~ FYI	✓
_____	William Plummer	_____
_____	Wilfrid Dean	_____
_____		_____
_____	~~Steve Doyle~~	✓
_____	William Lyons	_____
_____	Eva Daughtrey	_____
_____	Timmie White	_____
_____	Judy Morton	_____

REMARKS

Ms. Whitehead would like to have the attached returned to him - (2)

Justice

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
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60-211-0

October 22, 1970

Mr. Clay T. Whitehead, Director
Office of Telecommunications Policy
1800 G. Street, N.W.
Washington, D. C.

Dear Tom,

Attached is a memorandum which responds to your inquiries of August 17, 1970. As you are aware, the questions you raised were rather broad in nature and not susceptible to short, definitive answers. We have attempted to answer each of your questions in a manner which I hope is meaningful and helpful to you.

You will find outlined those "due process" considerations which may affect your "informal" approaches to the Commission. In short, liberal legal standards apply to general policy discussion with the Commission. The informal presentation of data or policy arguments relating to such general regulatory matters are permissible within rather broad legal limits and agency discretion. [See p. 2] However, with regard to matters which have been designated for a hearing or otherwise involve the rights of identifiable parties, strict rules of conduct are binding on the Commission, and ex parte communication by any person are subject to only the most narrow exceptions. [See pp. 3-5]

With regard to the role of competition in the regulated industries we have discussed leading cases illustrating that competition and antitrust principles are essential elements of the "public interest" test which must guide all regulatory determinations. [See pp. 5-8] We have also outlined the limited role and responsibility of regulatory agencies (and other issues such as primary jurisdiction) relating to the enforcement of the antitrust laws. [See pp. 8-10]

We have also attempted to set forth some broad conclusions regarding the authority of the Communications Commission to "regulate" by merely "monitoring". In essence our survey of the relevant case law indicated that in those areas where an agency is entrusted with a broad statutory mandate it may very well monitor if it reasonably determines that that course of action is consistent with its statutory responsibilities. [See pp. 10-14]

While the attached memorandum was not drafted as an all-encompassing legal treatise, we have tried to cite enough material to give you a "feel" for the legal issues involved.

Needless to say, we would be glad to be of any further assistance to you on these questions or on similar matters as the need arises.

Sincerely,

DONALD I. BAKER
Deputy Director of Policy Planning
Antitrust Division


RECEIVED
OCT 26 1970

DEPARTMENT OF JUSTICE

MEMORANDUM IN RESPONSE TO INQUIRIES FROM THE OFFICE OF TELECOMMUNICATIONS POLICY

This memorandum attempts to answer several legal questions raised by the Director of the Office of Telecommunications Policy ("OTP") in a memorandum dated August 17, 1970. We have restated the issues raised by OTP as follows:

1. What legal constraints ("due process") are imposed upon the outsider's communications to the Federal Communications Commission ("FCC") and how would they apply to OTP?

2. To what degree are regulatory agencies required to consider antitrust or competitive principles in making statutory-required "public interest" judgments?

3. How is antitrust enforcement responsibility in the regulated industries divided between the agencies and the Department of Justice?

4. May a regulatory agency decline to engage in positive regulation within its statutory authority?

I. Legal Constraints on Communications with the FCC (Administrative Due Process)

The Federal Communications Commission, like all other administrative agencies is bound by law to comply with certain standards of procedural formality and regularity--"due process"--in the exercise of its regulatory authority. The Administrative Procedure Act ("APA"), 5 U.S.C. 551 et seq., the Communications Act, 47 U.S.C. 151 et seq., and particularly the Commission's own Rules of Practice and Procedure, 47 C.F.R. 1.1 et seq., govern Commission action with respect to rule-making and adjudicative proceedings.

The legal standards with respect to the ex parte communication of views or information of the FCC or individual Commissioners depends on the nature of the proceeding and whether the outcome thereof will affect private claims or rights. Cf. Sangamon Valley Television v. United States, 269 F.2d 221 (D.C. Cir. 1959). Therefore, "general rule-making" proceedings are treated much more liberally with regard to ex parte communication than either "restricted rule-making" or "adjudicative" proceedings. We discuss each category separately.

A. General Rule-Making. When the Commission proposes to promulgate "general" rules it is governed by the provisions of Section 4 of the APA, 5 U.S.C. 553, and Subpart C of its procedural rules, 47 C.F.R. 1.401 et seq. -- "Rule Making Proceedings". In the case of these "general" rules, the Commission is required by Section 4 to afford actual notice of the rule-making and to "give interested persons an opportunity to participate in the rule-making through the submission of written data, views, or arguments with or without opportunity for oral presentation". 5 U.S.C 553 (b), (c).

The legal standards relating to general rule-making are quite liberal regarding informal presentations. There is no legal requirement of a formal public hearing in connection with "general" rule-making. Bowles v. Willingham, 321 U.S. 503 (1944); California Citizens Band Association v. United States, 375 F.2d 43 (9th Cir. 1967), cert. denied, 389 U.S. 844 (1968). The courts have recognized the legislative nature of general agency rule-making, and have accordingly allowed the agency to obtain and act upon information not presented formally in a proceeding. Thus, an agency may seek or receive advice and information, ex parte, through interviews or conversations regarding a problem with respect to which it intends to conduct a general rule-making. Van Curler Broadcasting Corp. v. United States, 236 F.2d 727 (D.C. Cir. 1956), cert. denied, 352 U.S. 935 (1956). Once such a proceeding has actually begun individual Commissioners may continue to obtain information through informal means and to act upon such information in a general rule-making proceeding. Flying Tiger Lines, Inc. v. Boyd, 244 F. Supp. 889 (D.C. 1965). (Different rules apply to "restricted rule-making" discussed below.)

The statutory and case law relating to general rule-making supports the conclusion that the Executive Branch is generally free to attempt to "influence" the broad policies and the direction of the rule-making of a regulatory agency, not only through formal participation in rule-making proceedings, but by means of informal or ex parte approaches, submissions, and discussions. However, if the FCC can be expected to base its actions on such ex parte information, then the communications should be made in writing so that they could be made public in the event that the Commission is required to substantiate the basis for its action.

B. Restricted Rule-Making. Certain rule-making proceedings are treated differently on the ground that they affect "private rights". Such proceedings (defined as "restricted proceedings" by the Commission, 47 C.F.R. § 1.1201 (a)) include rule-making required by statute to be made upon the record after opportunity for hearing. Such rule-making proceedings relate largely to those rules having a particular applicability and include common carrier charges, classifications, regulations, practices, property valuations, and service, those similar categories covered by the Communications Satellite Act, and television channel allocations. A complete listing of restricted rule-making proceedings is contained in 47 C.F.R 1.1207. These restricted rule-making proceedings are subject to the same strict ex parte rules as adjudications discussed in the next section.

C. Adjudicative Proceedings. These proceedings (as defined in 5 U.S.C. § 554) are those for which the opportunity for hearing is either provided by the Communications Act, otherwise required by due process, or afforded by the Commission. They include FCC actions involving: (i) licensing (denial, non-renewal, modification, transfer, suspension, or revocation); (ii) radio facility construction or operation authorizations; (iii) common carrier liability for damages; (iv) interlocking directorates (common carrier); (v) certificates of convenience; (vi) telephone mergers; (vii) certain CATV signal carriage matters; and (viii) certain approvals and applications under the Communications Satellite Act (see 47 C.F.R. 1.1203 for a complete enumeration of restricted adjudicative proceedings and the procedural time at which such adjudicative proceedings become restricted.)

In adjudicative proceedings (and restricted rule-making), the FCC's rules applicable to hearings govern the procedure. These rules are far more stringent than those applicable to general rule-making and specifically reflect the "due process' requirements of "fullness", "fairness", and "openness" generally associated with circumstances in which substantial individual rights are involved. These rules provide, for example, that "when a hearing is held,

no communication will be considered in determining the merits of any matter unless it has been received into evidence." 47 C.F.R. 1.225 (c). Moreover, the Commission's procedural rules, Subpart H - Ex Parte Presentations, 47 C.F.R. 1.1201 et seq., prohibit the presentation, by any person, to "decision making Commission personnel", of any oral ex parte communications with respect to any restricted matter designated for hearing. Written ex parte communications made by persons who are not "interested persons" with respect to the particular proceeding are not prohibited by the rules nor are they expressly authorized, but provision is made for their disclosure. The Commission's Rules, 47 C.F.R. § 1.1201(c) define "interested persons" to include parties to the restricted proceeding and "any other person who might be aggrieved or adversely affected by the outcome of proceeding." While the older interpretation of the quoted language would have limited it to persons having a difect financial interest in the proceeding, recent cases involving "standing" may have broadened the category of "interested persons" to include public interest representatives such as OTP. This issue is an open one at the present time and firm guidance cannot be offered at this time. To be safe, you should assume that an Executive Agency such as OTP may be an "interested person" under the rules.

The type of ex parte communication prohibited is one going to the "merits or outcome of any aspect of a restricted proceeding designated for hearing." The rule applies to all persons outside the Commission and even to non-decision making Commission personnel. No exception is made for any agency of the Federal Govenment other than in a case involving the communication of classified security information.

Oral ex parte communications by OTP to the Commission regarding any party or issue or attempting to influence the determination in a restricted proceeding would appear to be prohibited. If OTP is not considered to be an "interested person" under the Commission's rules, written

ex parte communications by OTP would be made public in any restricted proceeding. The rules would not seem to restrict, however, the discussion of general policy problems between the Commission officials and OTP personnel even if the policy in question has application to particular cases. See MultiVision Northwest, Inc., 8 FCC2d 1151 (1967).

The exact scope of the prohibitions contained in the Ex Parte rules is by no means settled. The thrust of the rules is to prevent the exercise of unfair and improper influence by interested parties or their "agents" in restricted proceedings. In our opinion, OTP would be well-advised to construe the Commission's Rules in a conservative manner and restrict any ex parte communications in restricted proceedings to general policy issues.*/

II. The Role of Competition in the Regulated Industries

The Supreme Court has characterized antitrust principles as "a fundamental national economic policy". Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966). While the general statutory standard for determining the legality of administrative agency action is a broad "public interest" test, regulatory agencies may not ignore competitive considerations in executing their basic regulatory statutes. Cf. McLean Trucking Co. v. United States, 321 U.S. 67 (1944). In those situations in which regulatory policies and maximizing competition may be inconsistent, e.g., licensing, consolidations, acquisitions, and restrictive practices and agreements, the courts have made it clear that agencies must consider the effect upon competition as a basic element of the requisite "public interest" determination.

This requirement was clearly stated by the Supreme Court in Federal Maritime Commission v. Svenska Amerika Linien, 390 U.S. 238 (1968) where the court held 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." 390 U.S. at 246.

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*/ For a discussion of ex parte problems see Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Harv. L. Rev. 233 (1962.

The Court had made a similar point ten years earlier in United States v. Radio Corp. of America, 358 U.S. 334 (1959), holding that the FCC had to 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 the only radio and television facilities, which if granted, would give him a monopoly of that area's major media of mass communication. 358 U.S. at 359 (dictum).

The position of the Supreme Court in Svenska and RCA has been followed in two recent decisions of the Court of Appeals for the District of Columbia Circuit. In Northern Natural Gas Co. v. Federal Power Commission, 399 F.2d 953 (D.C. Cir. 1968) (involving a pipeline joint venture), the court stated:

> Although the 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. 399 F.2d at 958.

The language of the Court in Marine Space Enclosures, Inc. v. Federal Maritime Commission, 420 F.2d 577 (1969), clearly and forcefully makes the same point:

> Antitrust questions in general, and in particular contracts involving such all-encompassing restraints, present issues of the kind that should be explored sua sponte in order to discharge an agency's "active and independent duty to guard the public interest," . . . . This is responsive to the dominant consideration that anticompetitive restraints, the kind that would be illegal or of doubtful legality if used in unregulated industry, are in some ways contrary to the public interest that shapes rules governing the persons in directly regulated industry.

> The importance of adherence to the "fundamental policies" of the antitrust laws is undeniable. 420 F.2d at 585-86 (footnotes omitted). */

In a limited number of circumstances agency action may immunize from antitrust attack specific transactions or conduct within the regulated industry. Immunity from the antitrust laws is not, however, lightly implied. California, v. Federal Power Commission, 369 U.S. 482, 485 (1962). Agency approval provides immunization in two types of situations: (1) where there is a specific statutory exemption; and (2) where Congress has established a pervasive regulatory scheme and the action at issue is subject to agency review and is necessary for the effectuation of the pervasive regulatory scheme. See Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

Sections 221 and 222 of the Communications Act, 47 U.S.C. 221, 222 are examples of specific exemption authority, for they provide that if the FCC approves telephone and telegraph consolidations or acquisitions, "any Act or Acts of Congress making the proposed transaction unlawful shall not apply". However, Congress did not specifically authorize the FCC to exempt broadcasting transactions from the antitrust laws and Commission approval of a broadcast license exchange does not bar a subsequent antitrust challenge. See United States v. Radio Corp. of America, supra. The Court in RCA found no pervasive regulatory scheme with respect to broadcasting warranting implied repeal of the antitrust laws. 358 U.S. at 349. Quoting Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940), the RCA court said:

> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate

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*/ For a particularly forceful and well reasoned discussion of the application of antitrust principles in the protection of the public interest, with particular emphasis on the FCC, see the concurring opinion of Tamm, C.J., in Hale v. FCC, 425 F.2d 556, 560-66 (D.C. Cir. 1970).

> Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus, the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads . . . . 358 U.S. at 349.

As a practical matter, the weight given to antitrust considerations as a factor in administrative determinations depends upon the statutory scheme of regulation applicable to the industry and the legislative history thereof. For example, the legislative history of the Interstate Commerce Act, which is replete with evidence of Congressional intent to foster railroad consolidations, has led the Supreme Court to affirm ICC decisions which relegated competitive considerations to a subordinate position. See United States v. I.C.C., 396 U.S. 491 (1970). Conversely in the fields of broadcasting (United States v. Radio Corp. of America, supra,) and banking (United States v. Philadelphia Nat'l Bank, 347 U.S. 321 (1963)) where the legislative history manifests a Congressional concern to preserve competition, the Court has held that competitive considerations are entitled to great weight in agency determinations.

III. Antitrust Enforcement Responsibilities in the Regulated Industries

Section 11 of the Clayton Act, 15 U.S.C. 21, authorize gives the FCC direct authority to enforce Clayton Act provisions with respect to carriers engaged in wire or radio communication or radio transmission of energy. Sections 2 (price discriminations), 3 (exclusive dealing), 7 (mergers), and 8 (interlocking directorates). As a practical matter Sections 7 and 8 are the only provisions applicable to communication's common carrier, since the prohibitions on price discrimination and exclusive dealing apply only to the sale of goods. Section 11 does not of itself, however, oust the Department of Justice of enforcement jurisdiction

with respect to violations which may be attacked by regulatory agencies under the Clayton Act. So far as we know, the FCC has never exercised its enforcement authority under Section 11. Some other agencies have, but only rarely. See Transamerican Corp., 184 F.2d 319 (9th Cir. 1950), cert. denied, 340 U.S. 883 (1950).

Even in those situations where the agency is not directly involved in enforcing the antitrust laws it may have to exercise responsibility under the doctrine of "primary jurisdiction" for matters arising in antitrust cases.

The doctrine of "primary jurisdiction",

> ". . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. Western Pacific Railroad Co., 352 U.S. 59, 63-64 (1956).

For example, in Carter v. American Telephone & Telegraph Co., 356 F.2d 486 (5th Cir. 1966), an equipment supplier brought a private antitrust suit against AT&T and other telephone companies for enforcing their "foreign attachments" tariffs which effectively prevented independent suppliers from marketing equipment to telephone users. The district court stayed the action and referred the question of the validity of the tariff to the FCC. 250 F. Supp. 188 (N.D. Tex. 1966). Upholding this approach, the court of appeals stressed the Commission's statutory authority to determine "what classifications, regulation or practice is or will be just, fair, and reasonable." The court made it clear that while the administrative determination would not be conclusive of the issue for antitrust purposes, the judgment of a court on such a regulatory issue "ought not to be forced until it is inescapably necessary." 365 F.2d at 495.

Pursuant to the reference from the courts, the Commission held hearings to determine the reasonableness of the carriers' prohibition on the use of the Carterfone device. The Common Carrier Bureau participated in these hearings. The Commission determined the Carterfone device was not harmful to the general functioning of the public telephone network and that a tariff prohibition restricting the use of all customer-supplied equipment regardless of its potential harm was unreasonable under the standards of Section 201(b) of the Communications Act. In the words of the Commission, "a customer desiring to use an interconnecting device . . . should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others." 13 F.C.C. F2d 420 (1968). Following this decision, the private antitrust suit brought by Carter was settled.

IV. Administrative Agency Monitoring vs. Regulation

OTP has asked whether a regulatory agency is free "to regulate by simply 'not regulating' but merely monitoring." This question can be broken down into several parts. Some statutes confer upon parties the right to agency action. Thus a statute that provides that parties must obtain a license to engage in a particular activity requires the agency to make a decision upon the license application. Though it has discretion as to when it will consider the application, the agency cannot refuse to consider the matter. Cf. Kessler v. Federal Communications Commission, 326 F.2d 637, 684 n. 10 (D.C. Cir. 1963). Similarly, if a statute specifically instructed an agency to promulgate rules with respect to a specific subject matter, the agency could not lawfully refuse to act. Cf. Arrow Transportation Co. v. United States, 176 F. Supp. 411 (D. Ala. 1959), aff'd sub nom., State Corp. Commission of Kansas v. Arrow Transportation Co., 361 U.S. 353 (1960). Such a refusal to act, however, would be a most unusual case.

We assume that OTP is thinking of the more likely situation in which an agency may refuse to exercise its full regulatory authority. Whether an administrative agency may refrain from the direct regulation of certain classes or operations or types of conduct within the scope of a general authorizing statute does not appear to have been directly answered by the courts. Litigation has, naturally enough, generally tested positive assertions of

jurisdiction by regulatory bodies. The implication that can be gleaned from the case law on the subject, however, is that agencies having broad powers to achieve the reasonably authorized purposes of their legislative mandate may decline to exercise their full regulatory power where such is deemed consistent with the terms of their statutory responsibilities.

Two leading Supreme Court decisions relating to the authority of regulatory agencies to withhold the full reach of their authority even in fields where its jurisdiction is otherwise pervasive are the Permian Basin Area Rate Cases, 390 U.S. 747 (1969), and American Trucking Association v. United States, 344 U.S. 298 (1953).

In the Rate Cases, the Supreme Court sustained Federal Power Commission action prescribing maximum prices for gas produced in the Permian Basin for sale in interstate commerce, and excepting certain small producers from total compliance. Holding that the FPC had not exceeded its authority by creating the exemptions, the Court stated:

> We recognize that the language of §§ 5 and 7 [of the Natural Gas Act] is without exception or qualification, but it must also be noted that the Commission is empowered, for purposes of its rules and regulations, to 'classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.' §16, 15 U.S.C. § 717o. The problems and public functions of the small producers differ sufficiently to permit their separate classification, and the exemptions created by the Commission for them are fully consistent with the terms and purposes of its statutory responsibilities. 390 U.S. at 787.

In American Trucking motor carriers challenged ICC rules and the exemptions therefrom, governing the use by certificated carriers of equipment leased from exempt owners and equipment obtained through interchange with other carriers. After examining the context in which the exemptions operated, the Court found a reasonable relationship between the exemptions and the aims of the regulatory scheme, stating:

> In such a context, the exemption is not unreasonable; certainly it is not required that the Commission extend its supervisory activities under the rules into fields where the evidence before it indicates no need, merely to satisfy some standard of paper equality. 344 U.S. at 315.

Turning to the FCC's authority, it should be noted that Section 4 (i) of the Communications Act, 47 U.S.C 154(i), prescribes in very broad terms the "duties and powers" of the Commission, to be exercised in effectuating the purposes of the Act:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions. (Emphasis added).

Thus the very words of the statute authorize regulatory action where "necessary." Such language necessarily implies the converse -- that the Commission is not obliged to act (issue rules or regulations) where such action is deemed unnecessary.

Courts generally are reluctant to interfere with agency interpretation of the regulatory scheme. In Black Hills Video Corp. v. Federal Communications Commission 399 F.2d 65 (8th Cir. 1968), where the court upheld Commission rules regulating aspects of CATV, the court said:

> The growing complexity of our economy induced the Congress to place regulation of businesses like communications in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. 399 F.2d at 71 quoting, United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956).

The wide latitude allowed regulatory bodies in administering the statutory scheme is due largely to judicial deference to the legislative functions committed to the agencies by the Congress. An example of the discretion

allowed agencies in performing their responsibilities is the Commission determination upheld in Philadelphia Television Broadcasting Co. v. Federal Communications Commission, 359 F.2d 282 (D.C. Cir. 1966). In this case the court refused to find erroneous the Commission's decision that CATVs were not common carriers requiring regulation under Title II of the Communications Act. The court stated:

> In a statutory scheme in which Congress has given an agency various bases of jurisdiction and interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners. This seems to us a rational and hence a permissible choice by the agency. 359 F.2d at 284 (footnote omitted).

A similar result was reached in Rhode Island Television Corp. v. Federal Communications Commission, 320 F.2d 762 (D.C. Cir. 1963), where the court stated:

> Administrative rule making does not ordinarily comprehend any rights in private parties to compel an agency to institute [rule making] proceedings or to promulgate rules 320 F.2d at 766.

This language implies, at least an agency discretion not to act in particular matters where it deems such action unnecessary--or the extent or previous action adequate.

Finally, the Supreme Court's treatment of the Commission's jurisdiction over CATV in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), suggests that the court will give substantial weight to a Commission determination of the extent to which regulation is necessary.

In conclusion, it appears that the courts have interpreted regulatory statutes in a manner which grants regulatory agencies broad discretion in effectuating the general goals embodied in legislation. While it might be possible to successfully challenge an agency's refusal to exercise its regulatory power on the ground that monitoring or agency inaction is inconsistent with the statutory directice, any party attempting to do so would have a heavy burden of proof.

October 22, 1970

ADDENDUM

OTP has asked us for the name of a "good primer on antitrust policy and practice." Since there is no such primer, we suggest the following materials as worthy of study:

Phillip Areeda, Antitrust Analysis (Boston, Massachusetts: Little, Brown and Co., 1967).

Harlan Blake and Robert Pitofsky, Antitrust Law Cases and Materials (Brooklyn, N.Y. Foundation Press 1967).

Carl Kaysen and Donald F. Turner, Antitrust Policy (Cambridge, Harvard University Press, 1959).

A. Weale, The Antitrust Laws of the United States, (Cambridge University Press, 2 ed. 1970).

Louis B. Schwartz, Free Enterprise and Economic Organization (Brooklyn, N.Y. Foundation Press 1966).

Donald F. Turner, "Role of Antitrust Policy in the Communications Industry", 13 Antitrust Bulletin 871 (1968).

Donald F. Turner, "The Scope of Antitrust and Other Economic Regulation Policies," 82 Harvard Law Review, 1207 (1969).

Hans B. Thorelli, The Federal Antitrust Policy (Baltimore, Md.: Johns Hopkins Press, 1955).

Simon Whitney, Antitrust Policies (New York, N.Y.: Twentieth Century Fund, 1958).

Report of the Attorney General's National Committee to Study the Antitrust Laws (GPO, March 31, 1955).

Antitrust Developments, 1955-1968 (American Bar Association 1968).

Justice

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

Justice 10/29/70

COMPETITION AMONG LOCAL MEDIA

Remarks by

DONALD I. BAKER
Deputy Director of
Policy Planning
Antitrust Division
Department of Justice

Prepared for Delivery

before

Fall Meeting of the
National Newspaper Association

Sheraton Biltmore Hotel

Atlanta, Georgia

October 29, 1970

Competition is as American as apple pie. And, like apple pie, it is a good product.

But why competition? How did competition become our fundamental national economic policy? First, because Adam Smith proved right in believing that a free market would provide the greatest incentive to efficiency and innovation in business. Secondly, because Milton and Jefferson proved right in their faith that a free and active market-place in ideas was essential to a democratic society.

This national competitive policy was given legal form in 1890 with the passage of the Sherman Act. In the eighty years since then, it has been refined, amplified, and expanded by successive generations of legislators and judges. In recent years, this policy has been increasingly applied to regulated industries. 1/ These include banking, insurance, electric power, natural gas transmission, securities markets, common carriers communications and broadcasting. Fortunately for you, I shall spare you my thoughts on how antitrust principles should be applied to, say banks or securities markets. Instead, I shall stick to local mass media communications.

1/ For a general discussion see Baker, The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries, 11 B.C. Ind. & Com. L. Rev. 571 (1970).

Nowhere is competition more important from the standpoint of policy. Local media markets tend to have relatively few competitors. Two great barriers prevent more competition: one is the limited amount of radio spectrum available for broadcasting and the other is the high cost of producing and distributing a daily newspaper. The results of these barriers are striking. For example, as of 1968, only 47 cities in the country had more than one independent daily newspaper; some 1600 others were monopoly cities. 2/ Of the 47, about half were in the top 50 television markets and apparently had three or more VHF television stations. I stress these two media, daily newspapers and television, for, as Chairman Dean Burch had emphasized, they are the primary local communications media - dwarfing all others in audience impact and advertising revenues. 3/ It may be that a new competitor - CATV - will join the other two as a source of primary impact; but, of course, a CATV system tends to be local monopoly, because of the present high cost of construction.

2/ See "Why Newspapers are Making Money," Business Week, August 29, 1970, p. 36.

3/ Further Notice of Proposed Rule Making, Dkt. 18110, March 25, 1970, Separate Statement of Chairman Burch.

We recognize antitrust lawyers and competitive policies cannot create new competitors in a market where the barriers of spectrum, production and delivery prevail. Of course, these local markets are going to continue to have relatively few competitors.

But what antitrust policies can do - and should do - is prevent the further loss to competition that occurs if two primary competitors in an already monopolistic market are allowed to combine.

Our concern here is with the structure of local mass media ownership, rather than with any affirmative misconduct. Our analysis of these problems rests primarily on antitrust merger rules under Section 7 of the Clayton Act. Section 7 bars any combination of direct competitors where the Government establishes that its effect "may be substantially to lessen competition" in "any line of commerce" in "any section of the country." This prohibition has been applied by the Supreme Court in a wide range of markets - including grocery retailing, local banking, brewing, and aluminum cable manufacturing. 4/

4/ United States v. Philadelphia National Bank, 347 U.S. 321 (1963); United States v. Aluminum Company of America, 377 U.S. 271 (1964); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 547 (1966).

It has also been applied to newspaper combinations in the Tuscon case. 5/ I should emphasize that Section 7 is basically an economic statute. While there is clear social harm in a merger which removes a diverse editorial voice from its community, the antitrust analysis is esentially an economic inquiry - with its principal focus on local advertising revenues. Of course the FCC, can and does, take diversity into account under the broader "public interest" standard of the Communications Act.

Antitrust analysis requires that some definable geographic and product market be arrived at. In anti-trust terms, such "a market is any grouping of sales . . . in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included." 6/ Partial substitutes are excluded.

With local media mergers, local advertising is the key consideration - since newspapers and television stations outside the geographic market, even with some penetration, tend to be less effective and more expensive

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5/ Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

6/ Department of Justice Merger Guidelines, May 30, 1968, ¶3.

substitutes for the local advertiser (such as a grocery store and a local car dealer).

Local advertising is a field in which newspapers tend to be preeminent. Our experience indicates that a local monopoly newspaper will often account for some 60% of local advertising revenues in its market, and that the only limit on such a newspaper's monopoly power over advertising rates is the availability of other media. Competition is thus an important factor in limiting local advertising prices. This can be illustrated by looking at the experience in San Francisco - where local advertising rates are said to have jumped enormously after the two newspapers were combined in a joint operating agreement. Similarly, studies have indicated that advertising rates and revenues (on a per capita basis) are higher where the leading television station and the local newspaper are in the same hands than where they are in separate hands. This is but a straight forward application of the old-fashioned economic principle that monopoly power tends to produce monopoly pricing. It is a matter of dollars and cents to the local community that must support those advertising costs.

The broadest local advertising market is what the Supreme Court has called "the mass dissemination of news and advertising," in the Lorain Journal Co. v. United States, 342 U.S. 143 (1951). This would be an appropriate market to judge a combination between the different media - say, a newspaper and a television station. To some extent, they are substitutes for various types of local advertising not matched by outside media. Other immediate local media, such a radio and CATV, would have to be included in this broader market.

On the other hand, suppose we were dealing with a combination between two newspapers, then the focus would be on whether there were any forms of newspaper advertising for which no equally economic substitutes exist. In these circumstances, the focus would be on small classified ads and the like, where broadcast media does not tend to be a significant alternative.

This is the type of analysis which the Supreme Court has applied in a variety of cases. Such analysis recognizes that partial substitute products may exist, but insists that, in applying an anti-merger statute, the substitutes should not be included unless they are equally interchangeable in terms of price, quality and use.

The process of defining markets for antitrust purposes is not really as difficult as it sounds. It is more easily understood if seen as part of the process of determining whether the merger may cause substantial lessening of competition. When the courts wrestle with the question of including or excluding substitute products or services, what they are really doing is nothing more than trying to predict whether a combination of competitors may enhance the parties' ability to raise their prices in any degree.

Once a market is defined, then the antitrust analysis will focus on the market shares of the parties within the market thus defined. The prohibitions that have grown in this field are strict - reflecting judicial acceptance of the clear Congressional mandate to halt anticompetitive mergers. For example, in the 1965 Von's Grocery case, the Supreme Court outlawed a merger of two Los Angeles supermarket chains with only 7.5% of the local metropolitan grocery market. In another case, the Court struck down an acquisition involving less than 2% of the relevant market, where the acquisition involved a market leader which already had almost 30% of the relevant market. 7/

7/ See Alcoa-Rome, supra, 377 U.S. 271.

The Department of Justice has applied these strict rules in several ways with respect to local mass media.

First, we have brought several antitrust cases aimed at preventing combinations of the same media in the same local market 8/. These have all involved newspapers, since FCC rules prevent a broadcast licensee from controlling the stations of the same type with overlapping signals.

Secondly, we have opposed cross-media mergers which would combine a newspaper and a television station in the same market. In one such case, we proceed before the FCC in a license transfer proceeding, 9/ while in the other we brought an antitrust action. 10/ Both were successful.

Thirdly, we urged the FCC not to grant a license renewal without a hearing in an extraordinarily monopolized

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8/ See Citizen Publishing, supra, (involving the competing newspapers in Tuscon, Arizona), United States v. E. W. Scripps Co., Civ. No. 5656 (D. Ohio, 1964), consent decree, 1968 Trade Cases ¶72,586 (involving two competing newspapers in Cincinnati, Ohio).

9/ Petition of United States Department of Justice in Beaumont Broadcasting Corp., FCC File No. BTC-5553 (1968).

10/ United States v. Gannett Co., Civ. No. 68 C 48 (Blue Book No. 2029) (N.D. Ill., filed Dec. 5, 1968). This 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 Cases ¶72,644 (N.D. Ill. Jan. 6, 1969).

situation (in Cheyenne, Wyoming), where the same interests controlled the local newspaper, the TV station, the only full-time AM station, an FM station, and the CATV system. 11/

Finally, we have supported FCC rule-making efforts to deal with media concentration in local markets. Thus, in 1968, the Department supported a Commission proposal (in Dkt. 18110) to prohibit future combinations of different broadcast media in the same local market, while suggesting that the Commission might consider expanding the proposal to cover local newspapers. 12/ The Commission has since moved in this direction. 13/ In 1969, when the Commission suggested applying a similar rule to CATV, we again endorsed the principle that leading local competitors (television broadcasters and daily newspapers) should not be permitted to control this new medium in the same local market. 14/

11/ Petition of the Dep't. of Justice in Frontier Broadcasting Co., FCC File No. BRCT-318 (1968).

12/ Comments of the Dep't. of Justice, FCC Dkt. 18110, (August 1, 1968).

13/ Further Notice of Proposed Rule Making, Dkt. 18110, March 25, 1970).

14/ Comments of the Dep't. of Justice, FCC Dkt. 18397, (April 7, 1969).

The reasons for adopting this approach are clear, simple, and grounded in sound economic policy. The acquisition by a monopoly newspaper of one of say two local television stations will eliminate direct competition between the two for local advertising. It will also eliminate one of three independent competitive voices among the major media of the area - a consideration which should be considered by the FCC under the "public interest" test of the Communications Act.

In addition, there are some longer range considerations - raised principally by the emergence of CATV as an important new local medium. CATV offers the most promising means of achieving greater diversity in competition of local mass media communications. It will be able to compete directly with television for video news entertainment and advertising; it will also compete, although less directly, with newspapers and radio stations in some of these same fields. It challenges the existing barriers to new competition - by reducing the competitive significance of the limited frequency space and by offering the potential for electronic delivery of newspapers to the home. Those who benefit from the existing monopoly positions have the least incentive to push the development

of CATV to its fullest. Therefore, we have urged - and the FCC has generally accepted - the idea that a local CATV system should not be controlled by its principal local competitors. Instead, it should be preserved as an independent challenger to their position.

This is what we have done. Now let me talk about what we have not done. We have never advocated anything that looked like "forfeiture", and we have repeatedly stressed the importance of reasonable consideration to existing investment. We have never suggested that a newspaper should be prevented from owning a television station or a CATV system - we have only urged that such other media be held in different markets. This is not so unreasonable when you realize that a licensee can only hold seven television stations anyway. We have simply suggested that the Commission consider the feasibility of policies which would tend to encourage a newspaper licensee in the future to hold its seven television licenses in markets other than those in which it has newspapers. That leaves lots of choice and lots of entrepreneurial opportunities. This point may be illustrated by taking the 1968 Beaumont case, where we opposed

a license transfer of a Beaumont, Texas television station to the local monopoly newspaper; as a result this anti-competitive transaction was abandoned, and the station was thereafter sold - without objection by us - to a newspaper chain operating elsewhere in Texas.

I recognize that there has been considerable concern among local newspapers about CATV. Quite rightly, you have seen this as a possible long-term means of providing more efficient delivery of newspaper copy. We very much want newspapers to have access to such systems - but we do not think this requires control of CATV systems in the same local market. Antitrust, we believe, will insure fair access necessary to facsimile reproduction of newspaper. We stressed this point in a brief filed last week with the FCC. 15/

For the present, each CATV system is likely to be a monopoly in its own service area, regardless of the legal form of his franchise. The cost of establishing a system are likely to be too high to permit much duplication. As a monopolist, the CATV operator becomes subject to the duty--imposed by the antitrust laws--to

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15/ Comments of the United States Department of Justice, Dkt. 18891 (October 22, 1970).

deal with all comers on fair and non-discriminatory terms. This duty has been applied by the courts to a diverse collection of monopolists - including a terminal railway,16/ the Associated Press,17/ and various tobacco and other produce markets. 18/ It has also been applied to TV broadcasters in two court of appeals decisions. 19/ The reason for the access rule is to prevent the holder of a unique monopoly position from foreclosing competition in other related activities which should be competitive.

In the case of a CATV system, transmission is the only function which is presently monopolistic. Programming and other broad band services are, on the other hand, potentially competitive activities right now. It therefore becomes a concern of antitrust to assure that many competition program users are permitted to vie for the viewer's (or reader's) attention over the single transmission system.

16/ U.S. v. Terminal R.R. Assn. of St. Louis, 224 U.S. 383 (1912).

17/ Associated Press v. U.S., 326 U.S. 1 (1945).

18/ See, e.g., Gamco Inc. v. Providence Fruit & Produce Building, 194 F. 2d 484 (1st Cir. 1952).

19/ Packaged Programs v. Westinghouse Broadcasting Co., 255 F. 2d 708, 710 (3rd Cir. 1958); Six Twenty-Nine Productions Inc. v. Rollins Telecasting, Inc., 365 F 2d 478 (5th Cir. 1966).

Accordingly, we believe that the CATV operator should be required to make channel space available on fair and nondiscriminatory terms. In 1969, the FCC indicated its view that "CATV systems should be encouraged, and perhaps ultimately required, to lease cable space to others for originations of their own choice," but it deferred formal action, "since this is an area which we believe requires further study." 20/ Antitrust might well require specific action by CATV operators. For example, it might require the CATV operator to make additional channels available to independent programmers, local newspapers, and others so long at least as there was available channel space. The Department of Justice summarized this point in last week's brief in these clear words: "we believe that a CATV operator who arbitrarily refuses to provide channels for facsimile reproduction service violates the antitrust laws."

This antitrust issue will probably remain somewhat hypothetical for the immediate future. There are not yet significant numbers of independent programmers clamoring to reach the viewing public via CATV systems - let alone people offering facsimile newspapers to the public. But that day, I suspect, is not too far off - and, then the anti-trust rules on fair access will be of more immediate concern.

20/ First Report and Order, Dkt. 18397, ¶11 (October 24, 1969), 34 FED. REG. 17651, 17652.

Justice Dept.
Grossman, Barry

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

October 22, 1970

Dr. Clay T. Whitehead
Director
Office of Telecommunications Policy
1800 G. Street, N.W.
Washington, D. C.

Dear Tom:

As I promised, I enclose some material on Barry Grossman - including a resume and the last personnel memo I wrote on him.

He is an extremely intelligent fellow (as indicated by his outstanding academic record). He is a first rate lawyer with a keen eye at spotting tough issues and has a sound judgment. He was appointed Assistant Chief of the Evaluation Section by Dick McLaren shortly after he took office;in this role, I have found him to be a cooperative fellow to work with and capable supervisor of the work of others.

Up until relatively recently, Grossman had not been involved in communications matters. He has recently supervised a brief in the CATV area, and has handled the recent international construction matter (on which he came over and conferred with Charles Joyce and Walt Hinchman).

He is a registered Democrat, but so far as I know, has not been actively involved in any politics.

Needless to say, I would be extremely sorry to lose him, and yet at the same time I must regard your general counsel job as key to both your efforts and ours in the communications field.

Sincerely yours,

DONALD I. BAKER
Deputy Director of Policy Planning
Antitrust Division


RECEIVED
OCT 22 1970

RESUME OF BARRY GROSSMAN

A. Personal Information

Birth Date:	July 9, 1939
Place of Birth:	Washington, D. C.
Marital Status:	Married, with daughters aged 4 and 2.
Residential Address:	2004 Prichard Road Wheaton, Maryland 20902
Residential Phone:	933-2004
Business Address:	Department of Justice Antitrust Division Room 3208
Business Phone:	739-2526

B. Educational Background

(1) A.B. 1960, Georgetown University, Washington, D. C.
Major Field: History
Distinctions: Graduated 1st in class after completing 4 year course in 3 years; Recipient of Ryan Medal in Philosophy; Elected to Gold Key Society (Georgetown's equivalent of Phi Betta Kappa) and Phi Alpha Theta (National History Honorary).

(2) J.D. 1963, Harvard Law School, Cambridge, Mass.
Distinctions: Editor, Harvard Law Review (1961-1963); Recipient of Frank Knox Fellowship for Postgraduate Study in England.

(3) University of London, Academic year 1963-64 as Frank Knox Fellow from Harvard University.

C. Professional Experience

(1) 1964-67, associate in the Washington, D. C. law firm of Wilmer, Cutler & Pickering. Work was concentrated in fields of antitrust, regulated industries (FCC, CAB and FDA) and automobile safety and pollution.

(2) 1967 to present: Antitrust Division of the Department of Justice: August 28, 1967 to February 1969, served as an attorney in the Evaluation Section; February, 1969 to present, Assistant Chief, Evaluation Section. Work in the Evaluation Section consists principally of consideration of matters pertaining to antitrust enforcement policy and the role of competition in the regulated industries.

DIBaker:rmh

Leo M. Pellegri
Assistant Attorney General
Administrative Division

April 15, 1970

Richard W. McLaren
Assistant Attorney General
Antitrust Division

Outstanding Rating for Barry Grossman

I recommend that Mr. Grossman be given an outstanding rating for his work in the past year.

Mr. Grossman has excelled as a member of the Evaluation Section; and he has served as Assistant Chief since February 17, 1969. He shares responsibility for supervising the lawyers in that section and personally handles a variety of difficult projects for us and other members of my top staff.

Mr. Grossman is a thorough, thoughtful lawyer. He came here with an outstanding academic record and some useful experience in private practice; he has lived up to that promise during the two and a half years in the Evaluation Section.

He has made significant contributions to the development of a number of cases involving some difficult issues. One is U.S. v. Cleveland Trust wherein he wrote a long memo on the overall problem of applying Clayton Act 7 to bank mergers, drafting and contributed heavily to the briefing by the Attorney General supporting suit. Another [illegible] v. [illegible] (not yet filed) where he had worked on the novel question of applying Clayton Act Section 8 to director interlocks between banks and insurance companies. Earlier in 1969, he had contributed extensively to the analysis of and worked on the memorandum to the Attorney General in support of the complaint in the reciprocity case against U. S. Steel.

Mr. Grossman has been in charge of a variety of interagency matters. These include the rather complex PEFCO joint venture covering the financing of foreign sales of aircraft; this has required him to negotiate with the Treasury, Export-Import Bank and private attorneys for the parties as well as produce careful memoranda for our internal analysis. He has been responsible for much of our efforts in a difficult field of standards making; and for the past year and a half has represented the Department on Interagency Committee on Standards Policy. He also was in charge of our participation in the FPC competitive bidding proceeding where we wrote a brief and he argued orally before the Commission. I understand that he argued well and handled questions clearly.

Mr. Grossman has made significant contributions to a number of other important projects. One was on consumer legislation. Another was on preparing our report to Chairman Wright Patman on our 1968 investigation into prime rate .

Mr. Grossman's work is of a very high professional quality. He is intelligent, industrious, and productive in carrying out his assignments. In recognition of this, I recommend that he be given an "outstanding" rating.

12/7/70
Justice

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 RULE MAKING AND/OR LEGISLATIVE PROPOSALS	Docket No. 18397-A

COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE

RICHARD W. McLAREN,
Assistant Attorney General,

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

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 Rule Making and/or Legislative Proposals	)	Docket No. 18397-A

COMMENTS OF THE UNITED STATES
DEPARTMENT OF JUSTICE

I. INTRODUCTION AND SUMMARY

The Commission's Second Further Notice of Proposed Rule Making and Inquiry ("Second Notice") adopted June 24, 1970, invited interested persons to comment on a new approach to the "difficult and complex" problem of regulating importation of distant signals by community antenna television systems (CATVs), 35 F.R. 11045 (1970). The Commission candidly admits that it is searching for "an approach to this distant signal problem which will affimatively assist the elements of broadcasting most requiring aid--the independent UHF station and the public broadcasting

system (ETV), and will do so in a way which can be fair to the copyright owner and will not undermine the healthy operation of all other stations in these markets." (Second Notice ¶4).

In order to achieve this goal of affirmative assistance to broadcasting, the Commission proposes a complex plan involving (a) certain copyright payments by CATV operators on broadcast signals to eliminate "unfair competition" to over-the-air broadcasters; (b) direct payments by CATVs of 5% of their subscription revenues to educational television; and (c) a compulsory arrangement whereby local UHF stations would insert advertising (and obtain the revenues therefor) in place of advertising contained in the distant signal being imported. The copyright aspect of the proposal would require Congressional action.

For reasons, explained below, we recommend against the adoptin of the Commission's proposals to affirmatively assist over-the-air broadcasting by various subsidies and restrictions against CATV. So far as the copyright issue is concerned, we believe this is a separate policy question which can be left to the Congress; in these circumstances, liberalization of the existing restrictions on CATV carriage of distant signals need not await Congressional action.

The Commission has also proposed certain rules requiring CATV operators to provide channel space for

certain other public purposes -- including local government channels, local public access channels, channels for lease to third parties, and channels for instructional use. (Second Notice ¶17). On these questions of access, we endorse the Commission's proposals that leased channels be made available to those wishing to offer programming to CATV audiences; the remaining access proposals (requiring CATV operators to subsidize various other "public interest" endeavors by providing free channel space) seem to us premature and perhaps erroneous. As it is, the cable system operator has an incentive to offer his excess channel space to users who will either pay for such space or will offer programming that will attract more subscribers to the CATV system. This incentive may prove sufficient to meet many public service needs.

II. INTEREST OF THE DEPARTMENT OF JUSTICE

The Department of Justice is the executive agency charged with responsibility for enforcing the antitrust laws and protecting generally the public interest in a competitive society. In discharging this responsibility, the Department has offered comments in Docket No. 18397, the precursor of this inquiry.[1/] These comments are, therefore, presented as a further elaboration of the Department's

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1/ See Comments of United States Department of Justice, Dkt. 18397, April 7, 1969 and September 5, 1969.

views on these important matters relating to the regulation of CATV, and as an expression of its continuing interest in the competitive development of this potentially important industry.

III. THE COMMISSION'S ANALYSIS

Two premises pervade the Commission's analysis and proposals with respect to importation of distant signals, not only in this immediate proceeding, but throughout its consideration of CATV problems: The first is that television broadcasters are being subjected to "unfair competition" from CATV operators; and the second is that there is a public interest in preserving marginal television broadcasters from failure by various cross-subsidy devices and restrictions aimed at CATV. We submit that both of these are incorrect as a matter of policy.

1. Unfair Competition. The Commission's theory of "unfair competition" is relatively simple: As a result of the Supreme Court's decision in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), CATV operators do not have to pay copyright fees on broadcast signals; and this, the Commission says, results in "unfair competition" against broadcasters who do have to pay copyright fees for programming.

Certainly the Fortnightly decision frees the CATV operator from an expense which broadcasters must bear; but if the Commission is to employ an analysis based on equating lower costs with "unfair competition," then it cannot look at CATV cost savings in isolation. 2/ It has, for example, turned over to broadcasters publicly-owned spectrum at no charges, and allows them to use it at nominal charges. This publicly-owned spectrum, when combined with a broadcast transmitter, constitutes a program delivery system which CATV operators cannot duplicate at anything approaching the unit cost per viewer. Under the Commission's analysis, this constitutes "unfair competition" by broadcasters against all other media of communications including CATV.

The Commission's basic error is misapplying the concept of "unfair competition." If this concept is to have any meaning it must refer to specific acts by one competitor which are intended to harm others. See generally Callman, The Law of Unfair Competition, Trademarks And Monopolies, Ch. 2, "The Theory of Unfair Competition." By

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2/ Our position on the copyright issue is that the purpose of copyright legislation is to provide appropriate reward for the creator of the copyrighted product; and that the question of copyright liability for CATV operators should be faced by the Congress from the perspective of this goal, rather than from the perspective suggested by the Commission of eliminating "unfair competition."

treating CATV cost savings as "unfair competition," the Commission has obscured the basic public policy issues with which it is confronted, and has introduced unnecessarily emotional terminology into the making of policy for both broadcasters and CATV operators.

2. Special Protection For Broadcasters. The second Commission premise is that there is an affirmative public interest in preserving over-the-air broadcasting - particularly UHF broadcasting and educational television - through various cross-subsidy devices and restrictions aimed at CATV. There may be, as we have indicated in the past, some public interest in maintaining some minimum level of over-the-air television service; and such basic service (consisting of one, two, or perhaps even three stations) should be defined in terms of public need for some over-the-air service (e.g., for presidential messages, public information to voters, and so forth), rather than the economic interests of the broadcasters. 3/ To achieve

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3/ Comments of the United States Department of Justice, FCC Docket No. 18397, September 5, 1969, p. 16. Carroll Broadcasting Co. v. F.C.C., 258 F.2d 440 (D.C. Cir. 1958), directs the Commission to consider economic consequences only as they affect the public interest.

this limited goal in particular cases, it may be appropriate for the Commission to place some case-by-case limitation on CATV operations in particular areas. 4/ But, beyond this limited goal, we can find no justification for favoring or subsidizing over-the-air broadcasting at the expense of CATV. Both media offer vehicles for reaching the public with news, entertainment, and other programming. The Commission's responsibility for over-the-air broadcasting arises, not because such broadcasting is some form of "chosen instrument," but because radio spectrum space is so limited that Commission rationing of it is necessary to avoid interference. Accordingly, we strongly believe, except where basic minimum television service is at stake, competitive restrictions should not be placed on CATV to protect over-the-air broadcasting. So far as subsidy to public television is concerned, we believe that this goal (even if laudable) should be left to the Congress and supported out of general revenues, rather than being levied by the Commission against the CATV industry.

4/ It is particularly anomdous that the Commission's proposal would protect only broadcasters in the top 100 markets, whereas the most serious effects of distant signal importation and audience fragmentation would seem to be most naturally realized by stations in the smaller markets. See L.L. Johnson, Cable Television and the Question of Protecting Local Broadcasting, Rand Corp.,R-595-MF (1970); R.E. Park, Potential Impact of Cable Growth on Television Broadcasting. Rand Corp., R-587-FF (1970).

The position of the Commission and many broadcasters is that extensive CATV development will cause a number of marginal television broadcasters to withdraw from broadcasting. If this prediction proves to be correct, there need be no loss to the public interest if the viewing public has found a more acceptable source of video programs. 5/ If scarce spectrum is conserved in the process, an effective gain to the public interest will be achieved.

Properly understood the Commission's purpose must be twofold: to make efficient use of spectrum space considering all public interests, and to allow development of a combination of broadcast and CATV programming which will serve the public interest. Discrimination against one media because it is newer or more efficient is unjustified.

IV. THE COMMISSION'S DISTANT SIGNAL PROPOSALS

The plan proposed by the Commission to govern the importation of distant television signals would authorize CATV systems operating in the top 100 markets to carry,

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5/ This position is, we submit, consistent with the Carroll decision, note 3 supra. Hence, if CATV programming will serve the public interest as well as a marginal broadcaster, the Commission cannot concern itself with economic effects of CATV on broadcasters individually.

in addition to local signals, four distant non-network signals and an "unlimited" number of non-commercial educational stations (subject to a veto right conferred on the local educational television station). To the extent that this approach to distant signal importation represents a liberalizing step, we welcome it. The plan would still place an artificial limitation on the number of signals which may be carried to subscribers. This limitation is rationalized by a desire to protect existing and future over-the-air broadcasters. But if over-the-air broadcasting is stripped of any arbitrary preference, such a reason cannot justify such limitations. 6/

6/ Furthermore, recent studies and evaluations indicate that basic Commission assumptions regarding the impact of CATV distant signal importation and audience fragmentation on independent UHF stations in the top 100 markets are erroneous. These authorities suggest that CATV may in fact benefit these UHF stations more than enough to offset the effects of predicted audience fragmentation. L. L. Johnson, Cable Television and the Question of Protecting Local Broadcasting, Rand Corp., R-595-MF (1970); R.E. Park, Potential Impact of Cable Growth on Television Broadcasting, Rand Corp., R-587-FF (1970); cf. FCC Staff Report, The Economics of the TV-CATV Interface (1970).

copyright is a separate issue from regulation of CATV. From this standpoint the imposition of copyright payments of the type proposed by the Commission in this inquiry, for the carriage of distant television signals, would seem unobjectionable as such, if Congress judged that this was a suitable solution. 8/

The Commission would extend copyright liability also to cover carriage by CATV operators to local signals. This seems to be unnecessary. The television station gets full benefit for its advertising rates from any added coverage conferred by local CATV systems; and the copyright holder can in turn be compensated for consequential increase in the economic value of the program to the television station. In carrying local signals CATV is most clearly a receiver and not programmer of copyrighted material. Compare Fortnightly, supra, 392 U.S. at 397-402.

8/ In considering its proposed modifications in the copyright area the Commission should, perhaps, also examine the problem of long term exclusive program licensing and its effect on independent broadcasters. Restricting or eliminating long term program exclusivity may benefit UHF independents and others by affording them wider access to more desirable programming (possibly at prices they can afford and without detriment to copyright owners or a dampening of creative effort). See, e.g., L. Chazen and L. Ross, Federal Regulation of Cable Television: The Visible Hand, 83 Harv. L. Rev. 1820 (1970). Also Notice of Proposed Rule Making, FCC Docket No. 18179, 33 F.R. 7158 (1968)(non-network program territorial exclusive agreements).

2. Commercial Substitution. Requiring CATV systems to delete the commercials carried on the distant signals which they would be permitted to import and to substitute the commercials of local stations in their place, in this context amounts to a complex form of indirect subsidization. This is particularly true in light of the fact that CATV systems may be required to bear all or a substantial portion of the potentially significant costs involved. We think it is highly undesirable for one competitor to be required to subsidize another. Resort to such a drastic remedy is highly exceptional; it could only be justified when some clearly defined and overriding public interest compels such action. We seriously doubt whether the application of the measure proposed here can be warranted at all, let alone on an across-the-board basis, in view of the generally stable condition of overall basic television service. 9/

We think, also, that the successful development, implementation, and performance of the commercial substitution function will necessarily impose on CATV

9/ See TV Broadcast Financial Data--1969; cf. Television Digest, August 24, 1970, pp 2-3.

systems a burden which could have an adverse impact on the overall development of the CATV industry, as well as individual systems--particularly in the area of meaningful program origination and the development of cablecasting facilities.

Additionally, the plan would allow eligible stations, which after two years could, in many markets, include even local VHF stations, to agree on the procedures for carrying out the substitution of local commercials. The Department finds this provision objectionable in that it would present, potentially, the opportunity for anticompetitive conduct such as divisions of or agreements regarding the utilization of the volume of local advertising made available by the substitution provision.

3. The "Public Broadcasting" Payment. The Commission would further condition the authorization to import distant signals upon the payment by CATVs of 5% of their subscription revenues to "public broadcasting." While it may well be in the public interest to provide additional funds for the support and stimulation of noncommercial educational television, we think that a direct subsidy assessed against CATV alone is inappropriate, discriminatory in nature, and would fix a financial burden on

many CATV systems that could very well impair their development in the area of origination and origination facilities. This is particularly significant in view of the fact that CATV is destined, having the direct encouragement of the Commission itself, to become the vigorous competitor of educational television in offering cultural, instructional, public issue, and other minority taste services.

The First Report and Order, Docket No. 18397, 20 FCC 2d 201 (1969), obligates CATV systems with 3,500 or more subscribers to "operate as a local outlet by cablecasting" and to have available facilities for local program production. By that same order, the Commission restricted advertising in conjunction with such cablecasting--even while recognizing that many CATV cablecasting operations undertaken voluntarily were quite marginal, even with advertising support. Its decision to regulate CATV advetising rested heavily on the fact that because CATV enjoyed a base of revenue from subscriber fees, "equal treatment" vis-a-vis broadcasters was not compelled. We submit, therefore, that siphoning from subscriber revenues at this stage of CATV development may undermine the foundation necessary for more than a minimal

origination effort. Such a result would frustrate rather than further Commission goals for the promotion of greater diversity and wider media access through an effective utilization and stimulation of CATV.

* * * *

The Department of Justice has emphasized in earlier filings that broadband cable technology holds the key to a new world of beneficial communications services for all the people of the United States. And we have consistently urged that the new technology be permitted to reach its full potential as a communications medium. But for CATV to reach its full potential, it is necessary that it be permitted to compete effectively, on its merits, with the broadcast and other mass media.

At the same time, we have recognized that it might be necessary for the Commission, in fulfilling its responsibilities under the Communications Act, to employ some method of accommodating the public interest in at least a "minimum level" of broadcast television services. 10/

10/ As we stated in our April 7, 1969 filing in Docket No. 18397:

> The extent to which it is desirable to take affirmative steps to insure preservation of basic over-the-air television service as an alternative to cable remains a difficult and complex question; but it must be resolved
> [footnote continued on next page]

We have urged, and now repeat, that the public interest in the benefits and protection afforded through competition, requires that the regulatory methods chosen should restrict individual choice and competitive opportunity only to the minimum extent necessary. Cf., Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States v. Third National Bank in Nashville, 390 U.S. 171 (1968).

The distant signal plan proposed in this proceeding represents a very different approach. It constitutes in large part an effort by the Commission to meet an economic threat, which in its view, CATV poses to over-the-air television services--particularly those of UHF stations. The Department would conclude that this plan entails far more than is necessary to protect the public interest in some over-the-air television broadcast services. A less restrictive and burdensome method of meeting actual threats to the public interest in the preservation of a minimum level of television service can be effective in achieving the over-all aims of the Communications Act. Affording

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10/ [continued]
on the basis of the public interest in an efficient over-all communications system, rather than the economic difficulties (actual or imagined) of those with vested interests in established communications technology.
Comments of the United States Department of Justice, FCC Docket No. 18397, April 7, 1969, p. 10.

relief in individual market situations upon a showing that distant signal importation threatens the maintenance of minimum television service, for example, would not be unreasonable, and would assure, further, that the right of the public to have freedom of choice would not be sacrificed needlessly where over-the-air service is healthy.

V. ACCESS AND CHANNEL UTILIZATION

The Commission has made important and potentially far reaching proposals regarding the allocation, construction, and utilization of origination channels and facilities. 11/ The Department has already expressed its view as to the importance of affirmative action to insure access by independent programmers to CATV origination channels in its September 5, 1969 filing in Docket No. 18397. 12/

11/ The Department of Justice expresses no view as to the authority of the Commission over these aspects of program origination. We merely assert that if the Commission has such authority, its exercise in the manner suggested in these comments would be desirable from a competitive point of view.

12/ See Comments of the United States Department of Justice, Docket No. 18397, September 5, 1969, pp. 5-11.

CATV systems have usually developed as "monopolies in fact" within the local areas they serve. Technological and practical considerations governing the efficacy and social utility of duplicating transmission facilities have in part been responsible for this development. 13/ As we pointed out in our earlier filing, it is only to the provision of the distribution facility itself that the monopolistic considerations apply; but those considerations, however, need be applied no further. Programming can be carried on over any channels available for origination by any person having cablecasting equipment or access to such facilities--provided that they are permitted access to the distribution system.

It is an established principle of antitrust law that the fundamental national economic policy of competition enforced by the Sherman Act requires that a lawful monopolist controlling a unique resource must grant access to that resource on equal and non-discriminatory terms.

13/ It has also been influenced by the utilization of exclusive franchises and the desire of franchising authorities to reap monopoly profits. See Comments of the United States Department of Justice, Docket No. 18892.

See, Gamco, Inc. v. Providence Fruit & Produce Building, 194 F. 2d 484 (1st Cir. 1952), cert. den. 344 U.S. 817 (1952); also Associated Press v. United States, 326 U.S. 1 (1945); and United States v. Terminal Railroad Association, 224 U.S. 383 (1912). The thrust of this principle is equally applicable in the analogous context of the CATV industry--especially in view of the great public interest in having access to diverse viewpoints and ideas.

Insuring access to CATV facilities on a per program or per channel basis will promote the achievement of several important policy goals: it would create the opportunity for competition for audience and advertisers among independent program producers; it would promote needed program diversity in all areas; it would guarantee a free access to the communications media for individuals and groups with diverse and conflicting viewpoints; and it would create more selective (and hence economical) outlets for small local advertisers. The overall effect would be to alleviate the media control problem so far as CATV was concerned.

Experience suggests that mere encouragement is generally insufficient to prompt a monopolist to relinquish

any degree of power over a monopoly resource, especially when such action may adversely affect the monopolist's financial interests. Additional steps may be necessary to insure the benefits to be derived from the competitive utilization of origination channels. Accordingly, the Department of Justice recommends that the Commission act on its general proposal to make available to third parties, either on a regular or a one-time basis, channels for commercial and non-commercial programming. 14/ We believe that such access obligations will, in the long run, promote the over-all development and effective utilization of the broadband wired communications technology. 15/

14/ Second Further Notice of Proposed Rule Making and Inquiry, Docket No. 18397-A, 35 F.R. 11045, 11048, ¶¶16-17, (1970). This recommendation of course assumes that the Commission determines that it has necessary jurisdiction.

15/ We suggest, however, that a re-evaluation of some Commission policies may also be necessary to fully effectuate the widest and most competitive utilization of origination channels. For example, the rule applicable to "pay-cablecasting" (47 CFR §74.1121) bars from such service: (1) feature films more than two years old (subject to a minor exception); (2) sports events televised in the community during the preceding two years; (3) series type programs; (4) more than 90 percent feature films and sports events combined; and (5) commercial advertising. This rule appears so restrictive that applied to leased channel operations it may eliminate a commercially feasible basis for meaningful program origination by potential local channel lessors.

The question of whether the Commission should go further and allocate a specific number of channels for such purposes as free use by local government and political candidates, and free use by local citizens or their groups, involves other considerations which may be better served by additional experience and study. This early stage of CATV cablecasting development, especially the area of independent channel programming, demands flexibility for experimentation and learning. Definite channel allocations for specific purposes may prove an unnecessarily burdensome restriction giving rise to problems of effective channel capacity utilization. There is no reason to believe, given broad general access obligations and a reasonable cablecasting channel capacity requirement, that the development of channel utilization on a demand basis will not adequately serve the public interest by providing an adequate opportunity for the presentation of programming by all those who choose to do so. It is not unreasonable to posit that the basic diversity goals established by the Commission can be achieved, with a minimum of regulatory action, through

the availability of channel time from system and leased channel operators. 16/ Certainly the low competitive rates which can be expected for such transmission time will not constitute a burden on the type of expression sought by the Commission. In fact an important consequence of requiring free channels for candidates, local individuals and groups may be to divert a potentially important source of revenue from local channel cablecasters--a result which could be especially significant for independent commercial channel lessees, at least in the initial stage of their development. Furthermore, it is very likely that local public issues will receive substantial news and program coverage, not only on the system operator's origination channel, but on those of independent programmers as well - this is certain to be the case if the Commission should impose "local programming" requirements.

The question of access may be related to our earlier point that the Commission not restrict absolutely the number of distant signals which a CATV system may carry.

16/ We assume of course that CATV operators would not be permitted to restrict in any way channel lessors from "sub-leasing" their channel space or otherwise commercially operating their channel, and thus competing with the system operator in providing channel space.

In theory, a policy allowing "unlimited" importation of distant signals may preempt available CATV channel capacity and thereby foreclose independent local programmers desiring access to CATV channel space. In practice, however, the free operation of economic forces is likely to resolve such a problem effectively, at least initially, with a minimum of potentially disruptive regulatory experimentation. Imported distant signals are not a free good. The importation process costs the CATV operator money--for equipment and carriage. Furthermore, increasing the number of signals from additional areas probably involves progressively increasing expense cost for each additional distant signal added. Since there is a positive cost for each distant signal (even excluding a consideration of possible copyright liability), we can expect that a system operator would not be inclined, generally, to prefer a distant signal to a local programmer willing to pay for channel space and whose programming might attract more minority taste subscribers to the system. A system operator, therefore, would be more likely to replace distant signals with leased origination channels as the demand for such space arose. If this should not ultimately occur, the Commission might eventually have to

require that a system operator not preempt with distant signals space desired by an independent programmer willing to pay for it. However, since complete elimination of distant signals might disrupt viewer habits and adversely affect the ability of a CATV system to retain subscribers, any such rule requiring access or demand might have to be qualified to provide that the system operator may retain at least some limited number of distant signals even if he has unsatisfied demand for channel space. Such excess demand would then result in an increase in the price for channel space, and those with less ability to pay or less attractive programs being excluded 17/ (but an increased incentive to voluntarily replace even the remaining distant signals with local originators will also be created). At that point a number of difficult issues are presented. Such a situation is a long way off, and it may develop that new capacity is

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17/ This is a complicated problem since a low paying programmer who attracts to the system a number of subscribers who would not otherwise subscribe is more valuable to the operator than is a programmer who duplicates the programs of other existing programmers. Of course, to the degree that local programming offers programs like those on the distant signals, the operator will have an incentive to eliminate those signals which cost him money and replace them with the locally originated programs.

added faster than demand for it grows. Hence the Department urges that the Commission not try to resolve any of these issues until it has had more experience with the realities of local origination.

CONCLUSION

The Commission has made proposals in this proceeding which could have a substantial impact on the future growth and direction of broadband cable systems. We believe that in general the development of CATV, and the public interest, would be best served by the Commission allowing the industry to achieve its full competitive potential in an atmosphere free of over-burdening obligations, conditions and restrictions of the type proposed in this proceeding.

Respectfully submitted,

RICHARD W. McLAREN
Assistant Attorney General

DONALD I. BAKER

PETER C. CARSTENSEN

ALAN A. PASON

December 7, 1970

Justice

December 11, 1970

To: Don Baker
Dept. of Justice

From: Tom Whitehead

No objection from OTP.

Office of Telecommunications Policy
Route Slip

23 NOV 1970

To

~~Clay T. Whitehead~~
~~George F. Mansur~~ (1)
William Plummer
Wilfrid Dean
~~Steve Doyle~~
WRH ~~Walt Hinchman~~ (3)
Charles Joyce
William Lyons
~~Carl Olsen~~ (2) WRH

Eva Daughtrey
Timmie White
Judy Morton

REMARKS

Steve - Any staff comment?

Steve: I agree fully with Justice's analysis + suggestions
WRH

Nino? - Accord. The next problem is how you go about getting FCC to change its policy. By statute too? And if so, may not worse be better? E.g. i.e. may it not be better to leave the entire problem unresolved + festering so the complete cure can eventually be obtained rather than to accept a half that only goes half way.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

RWMcL:DIB
60-416-0

November 19, 1970

Honorable Clay T. Whitehead
Director
Office of Telecommunications Policy
Room 749
1800 G. Street, N.W.
Washington, D. C.

Dear Tom:

You will recall that many months ago, we prepared a response to a letter from Senator Mike Gravel requesting our views on a proposed statute to eliminate common carrier stockholding and directorships in Comsat.

Your comment at the time was that, while you did not disagree with the conclusions, you felt that the analysis was a little too detailed. Finally, I have gotten around to paring it down along these lines. I now enclose a copy of this more modern version.

The FCC also objected to the paragraphs at the end on their regulatory activities. I intend to stick to my guns on these provisions, since I feel that if we do not include them, comments are not meaningful.

No doubt you will get this letter in due course through the normal Budget clearing process. I hope that it is satisfactory for your purposes. I don't think that it would be possible to simplify the matter much further.

Best wishes.

Sincerely yours,

DONALD I. BAKER
Deputy Director of Policy Planning
Antitrust Division

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 enhances Comsat's competitive potential.

The 1962 Act was a compromise. It ignored traditional policies that restrict the common ownership and control of competing modes or 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

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.

From the outset, this arrangement has been criticized as being inconsistent with the stated Congressional mandate "that the corporation created [i.e., Comsat] . . . 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)). (See, e.g., Legislation Note, The Comsat Act of 1962, 76 Harv. L. Rev. 388, 398 (1962). This criticism has been reinforced by experience. (See, e.g., Schwartz, Comsat the Carriers, and the Earth Stations - Some Problems with "Holding Variegated Interests," 76 Yale L. J. 441 (1967); Report of the President's Task Force on Communication Policy (1968), Chap. 2, p. 15).

Moreover, the carriers' stockholding and directorship arrangements in Comsat are contrary to the normal antitrust prohibitions against anticompetitive stock acquisition and director interlocks contained in Clayton §§ 7, 8 (15 U.S.C. § 18, 19). The prohibition of Clayton §7 applies where minority ownership results in the probability of anticompetitive consequences, U.S. v. duPont duNemours & Co., 353 U.S. 586, 592 (1957); and, because of the "opportunity thereby afforded to . . . compel a relaxation of the full vigor of . . . competitive effort," the prohibition applies with equal force to directors appointed by such minority owner. Hamilton Watch Co., v. Benrus Watch Co., 114 F. Supp. 307, 317 (D. Conn. 1952), aff'd 206 F.2d 738 (2d Cir. 1953), under §8 of the Clayton Act, interlocking directorates among competitors are per se violations. U.S. v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D. N.Y. 1953).

In these circumstances, we believe that a good case can be made for eliminating the direct carrier influence over Comsat flowing from their shareholding and directorships. This approach is consistent with the Department's original position in 1962 when the Attorney General 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. 10133 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess., pt. 2 at 365 (1962) (testimony of Attorney General Kennedy)). Moreover, it is consistent with the policy of this Administration of placing "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 103-109 (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 direct to users (including the Government), except under "unique or exceptional circumstances" to be determined by the Commission. However, 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). Here 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.

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

BOB for clearance

Files
Corres.
[illegible]
Saunders-[illegible]:JJS:DIB
Baker 60-416-0
Robinson
Chron-Evaluation

KCRobinson/JJSaunders:obj

Held 5-6-70
to [illegible]

"This letter should be forwarded to DAG's office for review and mailing after Mr. McLaren signs.

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. 471; 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. 59 (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, 318 (D. Conn. 1953), aff'd 206 F. 2d 738 (2d Cir. 1953); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177, 181 (D. Mich. 1960), 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 524 (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. 10139 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess., pt. 2 at 363 (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 622-23 (1956) (testimony of Assistance 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, 6 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 direct 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. 1174 (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 engineering 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 appreciably 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. Moreover, because the FCC at this time is reconsidering its 1966 Earth Station decision in Docket 16495, it may not 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

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

JAN 5 1971

JAN 6 9 37 AM '71

OFFICE OF
SENATOR
MIKE GRAVEL

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 from 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 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.

From the outset, this arrangement has been criticized as being inconsistent with the stated Congressional mandate "that the corporation created [i.e., Comsat] . . . 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)). (See, e.g., Legislation Note, The Comsat Act of 1962, 76 Harv. L. Rev. 388, 398 (1962)). This criticism has been reinforced by experience. (See, e.g., Schwarz, Comsat the Carriers, and the Earth Stations - Some Problems with "Melding Variegated Interests," 76 Yale L. J. 441 (1967); Report of the President's Task Force on Communication Policy (1968), Chap. 2, p. 15).

Moreover, the carriers' stockholding and directorship arrangements in Comsat are contrary to the normal antitrust prohibitions against anticompetitive stock acquisition and director interlocks contained in Clayton §§7, 8 (15 U.S.C. §§18, 19). The prohibition of Clayton §7 applies where minority ownership results in the probability of anticompetitive consequences, U.S. v. duPont, 353 U.S. 586, 592 (1957); and, because of the "opportunity thereby afforded to . . . compel a relaxation of the full vigor of . . . competitive effort," the prohibition applies with equal force to directors appointed by such minority owner. Hamilton Watch Co., v. Benrus Watch Co., 114 F. Supp. 307, 317 (D. Conn. 1952), aff'd 206 F. 2d 738 (2d Cir. 1953). Under §8 of the Clayton Act, interlocking directorates among competitors are per se violations. U.S. v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D. N.Y. 1953).

In these circumstances, we believe that a good case can be made for eliminating the direct carrier influence over Comsat flowing from their shareholding and directorships. This approach is consistent with the Department's original position in 1962 when the Attorney General 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)). Moreover, it is consistent with the policy of this Administration of placing "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 direct to users (including the Government), except under "unique or exceptional circumstances" to be determined by the Commission. However, because the Commission declared that it would authorize direct Comsat service absent a reduction in the carriers' 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). Here 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 of the earth stations are thus made by a joint operating committee made up of Comsat and the carriers.

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

AT&T

Wednesday 1/6/71

3:00 Coyt hand-delivered to Herb Stein, CEA, copies of pages 3, 4, and 5 of the AT&T Transmittal No. 10989 on Inflation before the FCC.

12/7/70 LTR-1

Inflation → P. 3, 4, 5

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Revisions of Tariff FCC No. 263, Revised Pages as Indicated on Check Sheet Revision 300th. LONG DISTANCE TELECOMMUNICATIONS SERVICE	AT&T Transmittal No. 10989 Docket No.

PETITION OF THE SECRETARY OF DEFENSE
ON BEHALF OF
ALL EXECUTIVE AGENCIES OF THE UNITED STATES
FOR SUSPENSION AND INVESTIGATION
AND FOR AN ACCOUNTING ORDER

CURTIS L. WAGNER, JR.
Chief, Regulatory Law Office
Office of The Judge Advocate General
Department of the Army
Washington, D. C. 20310
For
The Secretary of Defense

MAURICE J. STREET
Assistant General Counsel
General Services Administration
Of Counsel

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Revisions of Tariff FCC No. 263, Revised Pages as Indicated on Check Sheet Revision 300th. LONG DISTANCE TELECOMMUNICATIONS SERVICE	AT&T Transmittal No. 10989 Docket No.

PETITION OF THE SECRETARY OF DEFENSE
ON BEHALF OF
ALL EXECUTIVE AGENCIES OF THE UNITED STATES
FOR SUSPENSION AND INVESTIGATION
AND FOR AN ACCOUNTING ORDER

Comes now the Secretary of Defense through duly authorized counsel, on behalf of the Department of Defense and all other Executive Agencies of the United States, and, pursuant to Section 204 of the Communications Act, Title 47 U.S.C. Section 204, and Section 1.773 of the Federal Communications Commission's Rules and Regulations, files this Petition for Suspension and Investigation of those portions of American Telephone and Telegraph Company's Tariff FCC No. 263, filed on 20 November 1970, to become effective on 19 January 1971, which establish revised rates for

Long Distance Message Telecommunications Service, (The revised pages are set forth on Check Sheet Revision No. 300th) and for an order directing the carrier to keep accurate account of all amounts received by reason of the involved tariff, should the investigation not be concluded within the suspension period, and providing for refunds to the Executive Agencies of the United States Government and any other injured persons should charges under the tariff be found not justified. As grounds therefor, the following is shown:

I

That he is duly authorized by law to make and file this petition.

II

That on 20 November 1970, the American Telephone and Telegraph Company filed the above tariff to become effective on 19 January 1971. As indicated by the tariff, these items were filed to establish revised increased rates for Long Distance Message Telecommunications Service between locations in the Continental United States (except Alaska). The Executive Agencies of the United States are by far the largest users of AT&T's telecommunications service and facilities in the United States, purchasing in excess of $400,000,000 annually. The current annual cost to the Executive Agencies for Long Distance Telecommunications service is approximately $40,000,000 per year, of which amount approximately $18,000,000 is interstate.

III

That there is nothing in the involved tariff provisions, the letter of transmittal, nor the supporting statements that in anyway justify the involved tariff or show that the proposed increased rates are proper, just, and reasonable, or that the basis upon which the rates are predicated is the proper basis to use.

IV

That the rates and charges under the involved tariff for Long Distance Telecommunications service are unreasonable, unjust and therefore unlawful and place an undue burden on the customer or ratepayer since they result in tremendous increases in rates , $385,000,000 annually, over those presently charged for the service without any change in service or change in the conditions of service, other than bookkeeping shifts resulting from the recent changes in methods of separations between interstate and intrastate traffic, and without any justification whatsoever. For example, the proposed increases will raise the cost to the Executive Agencies for Long Distance Telecommunications service by an estimated $1,080,000.00 annually over the current rates. An increase of the magnitude of $384,000,000 is clearly inflationary and unreasonable on its face, particularly where there has been absolutely no showing of a need to increase Long Distance rates to any extent. The Executive Agencies believe that an investigation of the proposed increased rates will demonstrate that they are unjust, unreasonable, and otherwise unlawful.

V

That to allow the proposed increases in Long Distance Telecommunications rates to become effective would be directly contrary to the public and national interests. AT&T alleges that the proposed increased rates are necessary to (1) offset the new separations methods shifting $130,000,000 of annual revenue requirements from intrastate to interstate operations; (2) to recoup the $150,000,000 reduction in revenues resulting from inaccurate estimates of economic and financial conditions; and (3) to improve earnings to a level that will sustain the financial integrity of the Bell system. Even the most casual look at AT&T's reasons for the proposed increases reveal that they are clearly faulty and without merit. To begin with, there has been no showing that the bookkeeping loss on interstate service resulting from new separations procedures will not be more than offset by gains on intrastate service from the shifts. Second, even if it were true that AT&T's estimated income were short $150,000,000 its income still meets or exceeds the lawful rate of return allowed by this Commission in Docket 16258. Third, the statements concerning AT&T's financial integrity are everything but convincing. It is submitted that a rate increase in the amount of $385,000,000 based solely on AT&T's self-serving declarations, which are far from convincing, is not only an undue burden on the consuming public, but is clearly inflation producing and directly contrary to the public interest.

VI

That an escalating of AT&T's overall rate of return on investment to 9.5% is so extreme that it can only be classed as unconscionable. This proposed exorbitant increase in the rate of return is the classic example of galloping inflation. It should be noted that AT&T's proposed increase in rate of return to 9.5% is not limited to interstate business, but is a system wide move as Bell System Associated Companies are already beginning to make requests to state regulatory commissions for increases in their rate of return to 9.5%. Such an inflationary earnings level (Bell System trend) should not be approved until the Commission has assured itself that it is absolutely necessary in the public interest. Such a showing has not been made by AT&T in connection with the instant proposed increases in rates for Long Distance Telecommunications Service and, the Executive Agencies of the Federal Government sincerely believe that such a showing cannot be made. It is submitted that a full hearing and investigation will show beyond doubt that AT&T's current approved rate of return is more than adequate to fulfill all of its needs and attract necessary capital in the market place.

WHEREFORE, petitioner prays that the proposed tariff provisions increasing the rates for Long Distance Telecommunications Service be suspended and not permitted to go into effect, that the Commission enter into an investigation of the tariff to

determine just and reasonable charges for Long Distance Telecommunications Service, that a thorough and complete investigation of AT&T's request for an increase in its overall rate of return be made, and that the Commission further direct the carrier to keep accurate account of all amounts received by reason of the involved tariff, should the investigation not be concluded during the suspension period, and to make refunds to the Executive Agencies of the United States and any other injured persons should the charges under the tariff be found not justified.

Respectfully submitted,

MAURICE J. STREET
Assistant General Counsel
General Services
Administration

Of Counsel

CURTIS L. WAGNER, JR.
Chief, Regulatory Law Office
Office of The Judge Advocate General
Department of the Army
Washington, D. C. 20310

FOR

THE SECRETARY OF DEFENSE

C E R T I F I C A T E O F S E R V I C E

I hereby certify that I have this day served copies of the foregoing Petition for Suspension and Investigation and for an Accounting Order upon American Telephone and Telegraph Company by mailing the same by first-class mail, or air mail where required, postage prepaid, to each at the addresses shown:

Bernard Strassburg
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D. C. 20554

W. E. Albert
Administrator, Rates and Tariffs
American Telephone and Telegraph Company
Long Lines Department
32 Avenue of Americas
New York, New York 10013

F. Mark Garlinghouse, Esquire
Vice-President
American Telephone and Telegraph Company
195 Broadway
New York, New York 10007

Dated at Washington, D. C., this 17th day of December 1970.

CURTIS L. WAGNER, JR.

Press Release #266
January 7, 1971

NEWS

from U.S. Sen. MIKE GRAVEL, ALASKA

For Release Upon Receipt

Contact: Marty Wolf
(202) 225-6665

WASHINGTON, D. C. -- The Nixon Administration has endorsed Senator Mike Gravel's (D-Alaska) contention that communications carriers should be "eliminated" from the Board of Directors of the Communications Satellite Corporation (COMSAT).

Senator Gravel today released a White House-cleared letter from Assistant U.S. Attorney General Richard W. McLaren in which the antitrust chief said, "a good case can be made for eliminating the direct carrier influence over Comsat."

The Justice Department letter was in reply to a Gravel letter of February 12, 1970, requesting the Administration's views on the Senator's proposed legislation to remove carrier representatives from COMSAT's board and forcing the carriers to divest themselves of some $140,000,000 of Comsat's stock.

Last February 12, Senator Gravel had written McLaren that "There is little doubt that directors gain access to inside information and to intimate cost factors of any organization of whose board they serve."

The Assistant Attorney General agreed. He wrote Gravel that the Communications Satellite Act of 1962 "ignored traditional policies that restrict common ownership and control" of competitors.

(Carriers own over 35% of COMSAT stock. AT&T alone has 29%.)

Senator Gravel has been critical of Comsat's inherent weaknesses to provide needed public services at low cost and lack of aggressive management against competitors.

Criticism of Comsat's weaknesses "has been reinforced by experience," said McLaren and he went on to cite several antitrust provisions against situations similar to those wherein the carriers obviously overpower Comsat management.

In a statement on the floor of the Senate last September 10, Senator Gravel had again attacked AT&T's role in Comsat's management while AT&T was announcing its intention to lay another underwater trans-Atlantic cable in competition to satellite communications.

At that time, Senator Gravel attacked influence over "Comsat's financial life-and-death" and said the whole communications issue was not one of free competition but a game played with "a set of loaded dice."

(continued)

"Since 1962 we have learned a great deal about satellite communications that we did not know during the debates preceding enactment of the COMSAT Act," said Senator Gravel. "I believe it will be far easier now to correct mistakes of the past," he added.

Senator Gravel said his new legislation would remove the carriers from Comsat's board by January 1, 1972, and force them to divest themselves of Comsat stock by January 1, 1973.

McLaren also informed Senator Gravel that changes might be required in past positions taken by the Federal Communications Commission. Senator Gravel agreed but added that, "The FCC has taken several encouraging new steps recently on this issue."

Senator Gravel added, "This is a complex subject and the position taken by the Justice Department is an important benchmark as regards a serious antitrust warning and a cry for corrective legislative action."

"The whole area of social and public applications and the improvement and quantity of all services, including educational television and public broadcasting, are very much involved," he said.

On September 18, 1969, Senator Gravel had introduced a bill to break the FCC earth station policy at that time of split ownership between Comsat and the carriers. The White House position paper on telecommunications on January 23, 1970, generally supported the Senator's thesis and the legislation was allowed to die in committee. Senator Gravel felt that the FCC under a new chairman should have time to adjust to the new White House guidelines.

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

January 7, 1971

PRESS RELEASE

Clay T. Whitehead, Director of Telecommunications Policy, when informed of a press release today by Senator Mike Gravel concerning correspondence with the Department of Justice on changes in ownership of the Communications Satellite Corporation, issued the following statement:

"The ownership and organization of U. S. communications carriers for the provision of international communications services to and from the U.S. is one of many important policy areas for which the OTP has responsibility within the Executive Branch. The Administration has formulated no specific views regarding this policy area and has no plans for the submission of legislation on this subject.

"This is a particularly important and complex area of communications policy that goes beyond antitrust concerns alone. The OTP will take into account all pertinent considerations before deciding what, if any, policy recommendations and legislative proposals will best serve the national interests.

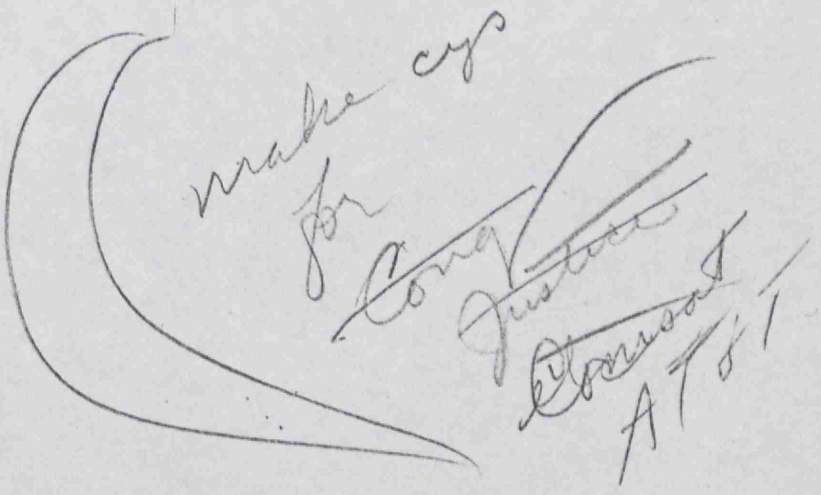
"The Justice Department letter was in response to Senator Gravel's request for comments on specific draft legislation prepared by Senator Gravel. While individual departments respond to queries from Members of Congress regarding particular legislative proposals in the ordinary discharge of their responsibilities, such department comments should not be interpreted as an Administration recommendation of such proposals.

"The Justice Department letter, therefore, should not be interpreted as an Administration endorsement of Senator Gravel's proposal."

Friday 1/8/71

ATTY

4:00 Mr. John Morton, WUI, called to ask for a copy of the original letter from Sen. Gravel to the Justice Dept. in February. After checking with Mr. Doyle, I told him he would have to get a copy from the Senator's office.



Split AT&T From Comsat, Justice Asks

By STEPHEN M. AUG
Star Staff Writer

The Justice Department—presumably with White House backing — has called for legislation that would force American Telephone & Telegraph Co. and other major communications firms out of ownership and management of Communications Satellite Corp., it was learned today.

The department's far-reaching recommendations are expected to be opposed strongly not only by AT&T—which still owns 29 percent of Comsat stock—but also by such other giants of the communications industry as International Telephone & Telegraph Corp., Western Union, General Telephone & Eelctronics and RCA Global Communications Inc.

The department's recommendations also would have the effect of overturning several major Federal Communications Commission policy decisions. These include:

- The so-called "authorized user" decision under which the FCC ordered that, generally, Comsat may sell its services only to other communications firms—such as AT&T, ITT—and not directly to customers.
- The earth station ownership decision under which the FCC decided that Comsat should own only half of each earth station built, and that the communications firms should share ownership of the other half. Comsat usually is the manager of these stations, which receive and transmit signals between the satellites and terrestrial equipment such as telephone lines.

COMSAT

U.S. Seeking to End Ties to Major Firms

Continued From Page A-1

The Justice Department's recommendations are contained in a letter sent two days ago to Sen. Mike Gravel, D-Alaska, who, it was understood, planned to make them public late today. Gravel asked some time ago that the department's antitrust division investigate the links between Comsat and the other communications firms. Justice's answer came from Assistant Atty. Gen. Richard W. McLaren, in charge of antitrust matters.

McLaren believes that the Communications Act of 1962, which set up Comsat, and later FCC decisions have resulted in activities that are contrary to long-standing antitrust law—principally those regulations that forbid a company from having ownership and management interests over a competitor.

Gravel originally had asked the Justice Department to study AT&T ownership and its placement of company officials on the Comsat board. AT&T owns 2.9 million Comsat shares. Other communications firms own another 200,000. The second largest owner is ITT, with about 100,000 shares.

ITT and other firms have sold most of their Comsat shares. Under the 1962 act that set up the corporation, communications firms could own 50 percent of Comsat stock, and the public the remainder.

Under the original plan, there were 15 directors—six publicly elected, six from communications firms and three appointed by the President. At present, however, there are only four directors representing communications firms; three are from AT&T. The number of communications firm directors has declined as the firms have sold their Comsat stock.

Aside from selling its services to the other communications firms, Comsat competes with them. Thus there are continuing scraps at the FCC over whether international communications should be transmitted via cable—owned largely by AT&T—or by satellite.

The Justice Department believes that true competition between the competing modes of communication can be accomplished only by divorcing Comsat entirely from the other companies.

Although the Justice Department viewpoint is expressed in a letter signed by McLaren, informed observers suggested it would not have been sent had there been strenuous objections elsewhere in the administration.

AT&T purchased its 2.9 million shares of Comsat for $38 million in 1963. At present market prices its holdings are worth about $145 million.

Officials at AT&T had no immediate comment.

Comsat officials have maintained silence apparently because AT&T not only is a major owner and is represented on the board, but also is Comsat's biggest customer. Comsat has, however, urged the FCC to re-

THE EVENING STAR
Washington, D. C., Thursday, January 7, 1971

THE SUNDAY STAR
Washington, D. C.
January 10, 1971

White House Denies Plan For Comsat

An administration official has denied reports that the White House is backing proposed legislation that would force major communications firms out of ownership and management of the Communications Satellite Corp.

In a prepared statement, Clay T. Whitehead, director of telecommunications policy within the executive office of the President, said:

"The Administration has formulated no specific views regarding this policy area and has no plans for the submission of legislation on this subject."

Whitehead's statement follows the earlier release of a Justice Department letter to Sen. Mike Gravel, D-Alaska, which recommended far-reaching legislation that would divorce American Telephone & Telegraph Co. and other communications giants from ownership and active participation in Comsat policies.

"The Justice Department letter was in response to Sen. Gravel's request for comments on specific draft legislation prepared by Sen. Gravel . . . The letter, therefore should not be interpreted as an administration endorsement of Sen. Gravel's proposal," the Whitehead statement said.

Justice Department sources said earlier that if the White House had strongly objected to the department's recommendations it would not have allowed the letter to be released to Sen. Gravel.

Alaska

25 JAN 1971

Mr. Fred J. Ruge
2420 First Avenue
Box 517
Seattle, Washington 98121

Dear Mr. Ruge:

The President has asked me to reply to your telegram of January 9 concerning transfer of the Alaska Communications System to RCA Alaska Communications, Incorporated.

As you are no doubt aware, the Alaska Communications Disposal Act, 81 Stat. 441 (1967), provided for transfer of the System by the Secretary of Defense, with the approval of the President. The President gave his requisite approval to the transfer on June 25, 1970, after thorough consideration of all factors involved. Subsequently, approval was also obtained from the Alaska Public Utilities Commission and the Federal Communications Commission.

Since the long-pending transfer has now been completed in accordance with applicable laws, we think no further action on our part can be taken.

Sincerely,

Signed

Clay T. Whitehead

cc: Mr. Whitehead
Mr. Doyle

SEDoyle/ec/21Jan71

THE WHITE HOUSE OFFICE

REFERRAL

To: Director
Office of Telecommunications Policy

Date: January 11, 1971

ACTION REQUESTED

_____ Draft reply for:
_____ President's signature.
_____ Undersigned's signature.

_____ Memorandum for use as enclosure to reply.

_____ Direct reply.
_____ Furnish information copy.

__X__ Suitable acknowledgment or other appropriate handling.
_____ Furnish copy of reply, if any.

_____ For your information.

_____ For comment.

NOTE

Prompt action is essential.

If more than 48 hours' delay is encountered, please telephone the undersigned immediately, Code 1450.

Basic correspondence should be returned when draft reply, memorandum, or comment is requested.

REMARKS:

Description:

_____ Letter: __X__ Telegram: Other:

To: The President
From: Fred J. Ruge, 2420 First Avenue, Box 517, Seattle, Washington
Date: 1/9/71
Subject: Says the public interest requires a new call for bids in the case of Alaska Communications System to be transferred on Jan 10 to RCA Alaska Communications, Inc.

By direction of the President:

Noble M. Melencamp
Staff Assistant
to the President

rah

Scalia

The White House
Washington

WHA334 1030P EST JAN 9 71 (49)CTA367
PRA356 PR SEC192 LB PDC SEATTLE WASH 9 459P PST 1971 JAN 9 PM 10 31
PRESIDENT RICHARD M NIXON
THE WHITE HOUSE
1600 PENN AVE NORTHWEST WASHDC 20500
IT IS PUBLICLY REPORTED THAT ALASKA COMMUNICATIONS SYSTEM
IS TO BE TRANSFERRED ON 10 JAN 1971 TO RCA ALASKA COMMUNICATIONS,
INC THE PROCESSING OF ALL BIDS FOR ACS, INCLUDING RCA'S BID,
VIOLATED 40 U.S.C. SEC. 484 (E) -(2) (B)
, AND OUR GROUPS HIGH BID FOR ACS HAS STILL NOT BEEN CONSIDERED
BY THE GOVERNMENT. UNTIL NEW AND LEGAL BIDING ON ACS TAKES PLACE,
ALL PERSONS FACILITATING ANY TRANSFER OF ANY PART OF ACS WILL
BE HELD RESPONSIBLE FOR UNLAWFUL TRANSFER OF FEDERAL PROPERTY.
THE PUBLIC INTEREST REQUIRES A NEW CALL FOR BIDS, AND COMPLIANCE
WITH THE LAW FOR DISPOSITION OF THE SYSTEM
FRED J RUGE 2420 FIRST AVE BOX 517 SEATTLE WASH 98121

TIONAL FORM NO. 10
AY 1962 EDITION
GSA GEN. REG. NO. 27

5010-107

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Doyle

DATE: 13 January 1971

FROM : Kenneth Robinson

SUBJECT: Telegram from Fred J. Ruge complaining that the sale of the Alaska Communications System to RCAC was unlawful.

I have checked with these persons so far:

(a) Justice- the "approving" agency there was Mr. Joseph Saunders, Chief, Public Counsel Section, Antitrust Division [(187)2515]; by delegation the Antitrust Division passes on these surplus property sales. Mr. Saunders has not returned the call. However, I doubt whether the Antitrust Division ever considered something as basically mechanistic as evaluating the steps of the bidding process.

(b) FCC- The Commission's General Counsel's Office has no knowledge about the matter apparently; they had no idea who passed on the matter, or when. I was referred to a Mr. Bill Jensen, Chief of their Enforcement Bureau. He knew nothing but promised to return the call with the necessary information.

(c) Air Force - The Air Force handled the sale of the system under a delegation from GSA, which normally handles these things. I talked with Mr. Richard Bonney in their General Counsel's Office [(11) 75608]. He supplied the following chronology:

(1) the original request for offers was sent to 33 interested parties, including Mr. Ruge on 28 October 68. It set March 1, 1969 as the due date for offers.

(2) on January 1, 1969, the terms of the original request for offers was slightly amended; these changes were mailed to all parties, including Mr. Ruge on 17 January. The change order stated that the original due date was still 1 March.

(3) on February 28, 1969 letters were sent to all parties, including Mr. Ruge stating that the due date was still 1 March.

(4) on 1 March six offers for the system were submitted; Mr. Ruge did not submit a bid.

(5) on 3 March the Air Force received a letter from Mr. Ruge complaining about the bids in some nondescript fashion, the putative upshot of the letter being that he claimed that when the request for offers was amended back in January, the due date for offers should have been extended beyond March 1. The Air Force wrote back asking him to be more specific about the matter. He has not responded so far.

(6) Of the six offers, one was rejected as nonresponsive; one of the offers was for only one of the exchanges in the system[by the Matanuska Cooperative Teleph. Co.]. Four of the bids were for the entire system. RCAC was awarded the system. On 25 June the President signed the necessary authorizations. On July 1 the award was made formal.

(7) Secretary Laird's Office received a telegram similar to the one the White House received on January 9.

The law

Mr. Ruge's telegram states that the sale is in contravention of 40 U.S.C. Sec. 484 (e)(2)(B), a provision in the act governing disposal of surplus property by the Administrator of GSA. It should be noted that GSA delegated their interest in the whole ACS sale to the Air Force.

Sec. 484(e)(2)(B) requires that when surplusage is disposed of by the Administrator, and the sale is of a type that requires "public advertising for bids," then"all bids shall be publicly disclosed at the time and place stated in the advertisement."

Sec. 484(e)(3), however, exempts from the routine mechanics -- advertising, opening, and the like -- disposals of a variety of public-interest types, including disposals

" otherwise authorized by this Act or other law."
Sec. 484(e)(3)(I)

It is my understanding that the ACS sale was pursuant to a specific act [our library does not have a copy]. Hence from a strictly legal standpoint, the Air Force has done far more than they would have had to do otherwise; if they had wanted to insist on the law, they apparently could have negotiated the sale privately, and not violated Sec. 484(e) at all.

I believe that the appropriate thing to do in this instance would be to adapt Mr. Hall's proposed letter, and send it. I would recommend against setting forth in a letter any variety of legal argument or defense, for not only is it technically unlawful for a federal lawyer to do so vis a vis a private citizen -- a convenience the Justice Department utilizes frequently-- but if we were to get specific, we could prejudice or unduly stricture the Government should this fellow decide to exercise his rights in a court.

cmj

Tuesday 1/26/71

2:45 After talking with Mr. Zapple, Mr. Doyle said all mail to go to Sen. Pastore should be sent to Mr. Zapple first. Otherwise, it bypasses him completely.

CMJ

January 26, 1971

To: Don Baker

From: Tom Whitehead

Per our conversation.

Copy of Pastor Letter

1/26/71 Pastore

2/12/70 - ltr to Justice Dept. from Sen. Gravel requesting comments from Antitrust Division on a proposed draft amendment to Communications Satellite Act.

5/6/70 - Copy of draft reply putting a hold on the letter -- to be forwarded to DAG's office for review and mailing after Mr. McLaren signs.

5/19/70 - Letter to Director Robert Mayo (BOB) from Richard Kleindienst (Deputy Atty. Gen., Justice) enclosing a copy of a draft reply to Sen. Gravel re his proposed draft amendment to Comsat act of 1962.

6/22/70 - BOB Legislative Referral of draft reply of Justice to the Sen. Gravel letter. (recd. 6/30)

7/7/70 - Wm. Plummer draft reply to referral of 6/22/70 suggesting Mr. Whitehead release it if he agrees.

7/8/70 - At Mr. Whitehead's request, Steve Doyle reviewed. Called Mr. Plummer's office and suggested that DTM response should be that they would defer any comment until the new Director is sworn in (as Mr. Whitehead would be in a position of approving DTM and the White House approval).

7/9/70 - Mr. Plummer memo to Bill Fischer, Asst. Dir. for Legislative Reference in response to the 6/22/70 referral -- suggesting that inasmuch as the Director of Telecommunications Policy has not yet been qualified and commissioned, there is no one in a position to make authoritative comment.

7/15/70 - Bill Fischer called about the draft letter to Sen. Gravel; we suggested he call Don Baker as he and Mr. Whitehead discussed it and Justice is going to rewrite the letter to Sen. Gravel.

(7/18?) 9/18/70 - Note to the file from Plummer advising that he had phoned Mr. Fische to the effect that Mr. Whitehead had told Justice (McLaren) of his difficulty with the Justice letter to Sen. Gravel and that Justice had agreed to rewrite the letter. Fischer said the information was sufficient and he does not need a memo.

11/19/70 - Letter to Mr. Whitehead from Don Baker, Justice, enclosing a redraft of the letter to Sen. Gravel.

12/11/70 - Letter to Don Baker indicating there is no objection from OTP.

1/5/71 - Letter to Sen. Gravel from Richard McLaren, Justice (replying to his letter of 2/12/70 requesting comments on proposed draft amendment to the Communications Satellite Act of 1962).

1/7/71 - Press Release from Sen. Mike Gravel -- stating he is "releasing a White House- cleared letter from Asst. U.S. Atty. Gen. Richard McLaren in which the antitrust chief said a good case can be made for eliminating the direct carrier influence over Comsat.

1/7/71 - Press Release from Clay T. Whitehead, Director, BOB, stating "the Justice Dept. letter should not be interpreted as an Administration endorsement of Sen. Gravel's proposal."

1/14/71 - Letter to Mr. Whitehead from Sen. Pastore re an apparent conflict in the exchange of letters between Justice and Sen. Gravel.

1/26/71 - Mr. Whitehead's reply to Sen. Pastore's letter of 1/14/71.

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

DIRECTOR

January 26, 1971

Honorable John O. Pastore
United States Senate
Washington, D. C. 20515

Dear Senator Pastore:

Thank you for your letter of January 14th. I shall try to answer in some detail the questions which it raises.

Your letter was prompted by a series of events initiated by the letter to Senator Gravel from the Antitrust Division of the Department of Justice. That letter stated that the Department would favor enactment of legislation to eliminate direct common carrier control or influence over Comsat, although pointing out that this step alone would not be likely to result in a significant increase of competition unless combined with other action. This was the response of one agency of the executive branch to a legislator's inquiry concerning one of the many possible effects of his proposed legislation -- namely, its effect upon the maintenance of healthy competition, which is the primary concern of the Antitrust Division.

It is most appropriate and desirable that the legislative branch be able to obtain from the executive branch such a narrowly focused response. I have not interpreted the OTP responsibility of coordinating the telecommunications activities of the executive branch as a commission to suppress the expression by the various executive branch agencies of their views with respect to the impact of communications matters upon their respective areas of peculiar competence. To provide another concrete illustration, I expect that the General Services Administration and the Department of Defense will continue to appear in State and Federal communications rate proceedings in their capacities as representatives of the government as consumer. Such narrowly focused expressions of view by the

various agencies may or may not agree with the conclusions of this Office; it is our function to evaluate communications policy proposals not only from the standpoint of their effectiveness in furthering individuals objectives, but also on the basis of their net desirability when all aspects of national concern are taken into account.

This distinction between my Office's statement of the Administration's position on communications matters and the expression of views by other executive agencies is, I think, generally understood. In the case of the Antitrust Division's letter to Senator Gravel, however, I felt that the press accounts had presented the Division's views concerning antitrust effects as the Administration's position concerning overall desirability. It was for this reason that I issued my clarifying statement of January 7th.

Let me now turn to your specific request that I inform the Committee of the Administration's overall policy with respect to international communications. In implying that such a policy has already been formulated, the press report of January 7th was simply erroneous. The Office of Telecommunications Policy has established as one of its priority projects the entire question of international communications -- the optimum industry structure for the future, the role of Comsat, and the economic, operational, and political implications of such matters as you refer to in your letter. As you are aware, this is a particularly complex and important field, never before comprehensively addressed by the government as a whole. In spite of severe staff and budgetary limitations, we are well into the study. We will submit recommendations for consideration by your Committee as soon as possible -- hopefully by midyear. These recommendations will seek to take account of the views of all governmental agencies concerned, all segments of the industry, and the public.

I personally appreciate the concern which your letter demonstrates, that this Office realize the high hopes which Congress had in authorizing its creation -- that it serve as the vehicle for the formulation and development of a truly broad and coordinated national communications policy. I assure you and the other members of your Committee that we are bending every effort to that end.

Sincerely,

Clay T. Whitehead

United States Senate
COMMITTEE ON COMMERCE
WASHINGTON, D.C. 20510

January 14, 1971

Honorable Clay T. Whitehead
Director
Office of Telecommunications Policy
Washington, D.C.

Dear Mr. Whitehead:

As you will recall, when you appeared before the Committee in July of last year I set out in considerable detail the history of the Committee's attempts to urge the interested agencies of Government to adopt an overall telecommunications policy. My reasons for doing so were twofold.

For some years now many people in Government and industry have maintained that our failure to have such a policy, particularly with regard to international telecommunications, has contributed significantly to the problems and uncertainties we face in the field of telecommunications.

Secondly, the new Office of Telecommunications Policy which you now head would, by the terms of Reorganization Plan No. 1 creating it, "be the President's principal adviser on all telecommunications policy," and "help coordinate and formulate Government policies concerning a wide range of domestic and international telecommunications issues."

As early as 1964, the Intra-Governmental Committee on International Telecommunications was formed in response to the concern of business and Government leaders about the present structure of companies forming our Nation's commercial overseas telecommunications system. The report and recommendations of that Committee were submitted to the Congress in 1966. That report stated legislation would be necessary to implement the recommendations contained therein, and specific proposals would be forthcoming. For whatever reasons, they never were.

Then, in 1967, President Johnson appointed a task force of distinguished officials to make a comprehensive study of communications policy. The report and recommendations of that Task Force were submitted to President Johnson, but Administrations changed before it was released. When it was released, we were told it was being studied.

Most recently came Reorganization Plan No. 1 of 1970, and Executive Order 11556 implementing it. In view of the stated purposes of the Office of Telecommunications Policy, and the broad authority given the Director of that Office, it seemed to me we might be on the threshold of achieving what had eluded us for so long--an overall telecommunications policy.

I am therefore perplexed by the recent letter of the Anti-trust Division of the Department of Justice, as well as an article which appeared in the January 10 edition of The Washington Star.

In his letter, the Assistant Attorney General, Mr. McLaren, said the Department would favor enactment of legislation eliminating direct common carrier control or influence over COMSAT, and that such a step would hopefully be combined with some modification of regulatory constraints placed on COMSAT's activity by the FCC's Authorized User and Earth Station decisions. Such actions would, according to the Department's letter, "significantly enhance COMSAT's competitive potential."

In commenting on that letter in a statement issued on January 7 you stated, "The ownership and organization of U.S. communication services to and from the U.S. is one of many important policy areas for which the O.T.P. has responsibility within the Executive Branch. The Administration has formulated no specific views regarding this policy area and has no plans for the submission of legislation on this subject."

However, the article appearing in the January 10 edition of The Washington Star stated that Justice Department sources said that if the White House had strongly objected to the Department's recommendations it would not have allowed the letter to be released.

Added to these recent events is the fact that the Communications Satellite Act of 1962 requires the President to transmit to the Congress an annual report to include any recommendations for additional legislative or other action which the President may consider necessary or desirable for the attainment of the objectives of the Satellite Act. So far the Congress has received seven such annual reports including one in 1970 and not one of them has recommended a legislative modification on the subject of the Department's letter.

In view of the apparent conflict on this most urgent matter which can only portend further delay, I am requesting that you as chief coordinator and spokesman for the Administration on telecommunications matters inform the Committee of the Administration's

If the United States is to maintain its leadership in the dynamic field of communications both domestically and internationally, a sound, effective overall policy with appropriate guidelines must be evolved.

For your information I have forwarded a copy of this letter to the Attorney General of the United States, the Secretary of Defense, the Secretary of State, and the Chairman of the Federal Communications Commission.

Sincerely,

John O. Pastore
Chairman
Subcommittee on Communications

JOP:nzj

Enclosures

White House Denies Plan For Comsat

An administration official has denied reports that the White House is backing proposed legislation that would force major communications firms out of ownership and management of the Communications Satellite Corp.

In a prepared statement, Clay T. Whitehead, director of telecommunications policy within the executive office of the President, said:

"The Administration has formulated no specific views regarding this policy area and has no plans for the submission of legislation on this subject."

Whitehead's statement follows the earlier release of a Justice Department letter to Sen. Mike Gravel, D-Alaska, which recommended far-reaching legislation that would divorce American Telephone & Telegraph Co. and other communications giants from ownership and active participation in Comsat policies.

"The Justice Department letter was in response to Sen. Gravel's request for comments on specific draft legislation prepared by Sen. Gravel ... The letter, therefore should not be interpreted as an administration endorsement of Sen. Gravel's proposal," the Whitehead statement said.

Justice Department sources said earlier that if the White House had strongly objected to the department's recommendations it would not have allowed the letter to be released to Sen. Gravel.

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

January 7, 1971

PRESS RELEASE

Clay T. Whitehead, Director of Telecommunications Policy, when informed of a press release today by Senator Mike Gravel concerning correspondence with the Department of Justice on changes in ownership of the Communications Satellite Corporation, issued the following statement:

"The ownership and organization of U. S. communications carriers for the provision of international communications services to and from the U.S. is one of many important policy areas for which the OTP has responsibility within the Executive Branch. The Administration has formulated no specific views regarding this policy area and has no plans for the submission of legislation on this subject.

"This is a particularly important and complex area of communications policy that goes beyond antitrust concerns alone. The OTP will take into account all pertinent considerations before deciding what, if any, policy recommendations and legislative proposals will best serve the national interests.

"The Justice Department letter was in response to Senator Gravel's request for comments on specific draft legislation prepared by Senator Gravel. While individual departments respond to queries from Members of Congress regarding particular legislative proposals in the ordinary discharge of their responsibilities, such department comments should not be interpreted as an Administration recommendation of such proposals.

"The Justice Department letter, therefore, should not be interpreted as an Administration endorsement of Senator Gravel's proposal."

COMSAT

Split AT&T From Comsat, Justice Asks

By STEPHEN M. AUG
Star Staff Writer

The Justice Department—presumably with White House backing — has called for legislation that would force American Telephone & Telegraph Co. and other major communications firms out of ownership and management of Communications Satellite Corp., it was learned today.

The department's far-reaching recommendations are expected to be opposed strongly not only by AT&T—which still owns 29 percent of Comsat stock—but also by such other giants of the communications industry as International Telephone & Telegraph Corp., Western Union, General Telephone & Eelctronics and RCA Global Communications Inc.

The department's recommendations also would have the effect of overturning several major Federal Communications Commission policy decisions. These include:

- The so-called "authorized user" decision under which the FCC ordered that, generally, Comsat may sell its services only to other communications firms—such as AT&T, ITT—and not directly to customers.
- The earth station ownership decision under which the FCC decided that Comsat should own only half of each earth station built, and that the communications firms should share ownership of the other half. Comsat

COMSAT

U.S. Seeking to End Ties to Major Firms

Continued From Page A-1

usually is the manager of these stations, which receive and transmit signals between the satellites and terrestrial equipment such as telephone lines.

The Justice Department's recommendations are contained in a letter sent two days ago to Sen. Mike Gravel, D-Alaska, who, it was understood, planned to make them public late today. Gravel asked some time ago that the department's antitrust division investigate the links between Comsat and the other communications firms. Justice's answer came from Assistant Atty. Gen. Richard W. McLaren, in charge of antitrust matters.

McLaren believes that the Communications Act of 1962, which set up Comsat, and later FCC decisions have resulted in activities that are contrary to long-standing antitrust law—principally those regulations that forbid a company from having ownership and management interests over a competitor.

Gravel originally had asked the Justice Department to study AT&T ownership and its placement of company officials on the Comsat board. AT&T owns 2.9 million Comsat shares. Other communications firms own another 200,000. The second largest owner is ITT, with about 100,000 shares.

ITT and other firms have sold most of their Comsat shares. Under the 1962 act that set up the corporation, communications firms could own 50 percent of Comsat stock, and the public the remainder.

Under the original plan, there were 15 directors—six publicly elected, six from communications firms and three appointed by the President. At present, however, there are only four directors representing communications firms; three are from AT&T. The number of communications firm directors has declined as the firms have sold their Comsat stock.

Aside from selling its services to the other communications firms, Comsat competes with them. Thus there are continuing scraps at the FCC over whether international communications should be transmitted via cable—owned largely by AT&T—or by satellite.

The Justice Department believes that true competition between the competing modes of communication can be accomplished only by divorcing Comsat entirely from the other companies.

Although the Justice Department viewpoint is expressed in a letter signed by McLaren, informed observers suggested it would not have been sent had there been strenuous objections elsewhere in the administration.

AT&T purchased its 2.9 million shares of Comsat for $38 million in 1963. At present market prices its holdings are worth about $145 million.

Officials at AT&T had no immediate comment.

Comsat officials have maintained silence apparently because AT&T not only is a major owner and is represented on the board, but also is Comsat's biggest customer. Comsat has, however, urged the FCC to re-

THE EVENING STAR
Washington, D. C., Thursday, January 7, 1971

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

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ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

JAN 5 1971

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OFFICE OF
SENATOR
MIKE GRAVEL

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 from 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 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.

From the outset, this arrangement has been criticized as being inconsistent with the stated Congressional mandate "that the corporation created [i.e., Comsat] . . . 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)). (See, e.g., Legislation Note, The Comsat Act of 1962, 76 Harv. L. Rev. 388, 398 (1962)). This criticism has been reinforced by experience. (See, e.g., Schwarz, Comsat the Carriers, and the Earth Stations - Some Problems with "Melding Variegated Interests," 76 Yale L. J. 441 (1967); Report of the President's Task Force on Communication Policy (1968), Chap. 2, p. 15).

Moreover, the carriers' stockholding and directorship arrangements in Comsat are contrary to the normal antitrust prohibitions against anticompetitive stock acquisition and director interlocks contained in Clayton §§7, 8 (15 U.S.C. §§18, 19). The prohibition of Clayton §7 applies where minority ownership results in the probability of anticompetitive consequences, U.S. v. duPont, 353 U.S. 586, 592 (1957); and, because of the "opportunity thereby afforded to . . . compel a relaxation of the full vigor of . . . competitive effort," the prohibition applies with equal force to directors appointed by such minority owner. Hamilton Watch Co., v. Benrus Watch Co., 114 F. Supp. 307, 317 (D. Conn. 1952), aff'd 206 F. 2d 738 (2d Cir. 1953). Under §8 of the Clayton Act, interlocking directorates among competitors are per se violations. U.S. v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D. N.Y. 1953).

In these circumstances, we believe that a good case can be made for eliminating the direct carrier influence over Comsat flowing from their shareholding and directorships. This approach is consistent with the Department's original position in 1962 when the Attorney General 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)). Moreover, it is consistent with the policy of this Administration of placing "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 direct to users (including the Government), except under "unique or exceptional circumstances" to be determined by the Commission. However, because the Commission declared that it would authorize direct Comsat service absent a reduction in the carriers' 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). Here 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 of the earth stations are thus made by a joint operating committee made up of Comsat and the carriers.

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

Justice

December 11, 1970

To: Don Baker
Dept. of Justice

From: Tom Whitehead

No objection from OTP.

Office of Telecommunications Policy
Route Slip

23 NOV 1970

To

~~Clay T. Whitehead~~
~~George F. Mansur~~ (1)
William Plummer
Wilfrid Dean
~~Steve Doyle~~ ✓
WRH ~~Walt Hinchman~~ (3)
Charles Joyce
William Lyons
~~Carl Olsen~~ (2) NNO

Eva Daughtrey
Timmie White
Judy Morton

REMARKS

Steve - Any staff comment??

Steve: I agree fully with Justice's analysis + suggestions.
WRH

NNO? - Accord. The next problem Tom: is how you go about getting FCC to change it policy. By statute too? And if so, may not worse be better? I.e. may it not be better to leave the entire problem unresolved + festering so that complete cure can eventually be obtained rather than to accept a bill that only goes half way.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

RWMcL:DIB
60-416-0

November 19, 1970

Honorable Clay T. Whitehead
Director
Office of Telecommunications Policy
Room 749
1800 G. Street, N.W.
Washington, D. C.

Dear Tom:

You will recall that many months ago, we prepared a response to a letter from Senator Mike Gravel requesting our views on a proposed statute to eliminate common carrier stockholding and directorships in Comsat.

Your comment at the time was that, while you did not disagree with the conclusions, you felt that the analysis was a little too detailed. Finally, I have gotten around to paring it down along these lines. I now enclose a copy of this more modern version.

The FCC also objected to the paragraphs at the end on their regulatory activities. I intend to stick to my guns on these provisions, since I feel that if we do not include them, comments are not meaningful.

No doubt you will get this letter in due course through the normal Budget clearing process. I hope that it is satisfactory for your purposes. I don't think that it would be possible to simplify the matter much further.

Best wishes.

Sincerely yours,

/s/

DONALD I. BAKER
Deputy Director of Policy Planning
Antitrust Division

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 enhances Comsat's competitive potential.

The 1962 Act was a compromise. It ignored traditional policies that restrict the common ownership and control of competing modes or 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

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.

From the outset, this arrangement has been criticized as being inconsistent with the stated Congressional mandate "that the corporation created [i.e., Comsat] . . . 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)). (See, e.g., Legislation Note, The Comsat Act of 1962, 76 Harv. L. Rev. 388, 398 (1962). This criticism has been reinforced by experience. (See, e.g., Schwartz, Comsat the Carriers, and the Earth Stations - Some Problems with "Holding Variegated Interests," 76 Yale L. J. 441 (1967); Report of the President's Task Force on Communication Policy (1968), Chap. 2, p. 15).

Moreover, the carriers' stockholding and directorship arrangements in Comsat are contrary to the normal antitrust prohibitions against anticompetitive stock acquisition and director interlocks contained in Clayton §§ 7, 8 (15 U.S.C. § 18, 19). The prohibition of Clayton §7 applies where minority ownership results in the probability of anticompetitive consequences, U.S. v. duPont duNemours & Co., 353 U.S. 586, 592 (1957); and, because of the "opportunity thereby afforded to . . . compel a relaxation of the full vigor of . . . competitive effort," the prohibition applies with equal force to directors appointed by such minority owner. Hamilton Watch Co., v. Benrus Watch Co., 114 F. Supp. 307, 317 (D. Conn. 1952), aff'd 206 F.2d 738 (2d Cir. 1953), under §8 of the Clayton Act, interlocking directorates among competitors are per se violations. U.S. v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D. N.Y. 1953).

In these circumstances, we believe that a good case can be made for eliminating the direct carrier influence over Comsat flowing from their shareholding and directorships. This approach is consistent with the Department's original position in 1962 when the Attorney General 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 365 (1962) (testimony of Attorney General Kennedy)). Moreover, it is consistent with the policy of this Administration of placing "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 direct to users (including the Government), except under "unique or exceptional circumstances" to be determined by the Commission. However, 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). There, 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.

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

OFFICE OF TELECOM. UNICATIONS POLICY

ROUTE SLIP

ACTION	☐
Concurrence	☐
Signature	☐
Comments	☐
For reply	☐
Information	☐
Per conversation	☐
Discuss with me	☐

TO File

FROM W E Levinson DATE 9-18-70

REMARKS per CTW instruction telephoned Mr. C. Wm. Fischer to effect that Mr. Whitehead had told Justice (Mr. McLAREN) of his difficulty with the Justice letter to Senator Gravel and that Justice had agreed to rewrite the letter. Mr. Fischer said the information was sufficient - he does not need a memo. Told Exec. D.

WEL.

Comsat

Wednesday 7/15/70

10:10 Bill Fischer called to say that there was a Justice response to Senator Gravel's letter re a bill he has drafted to eliminate common carrier control of the Comsat corporation. That OTM policy letter was apparently on Tom's desk. Bill Fischer said the letter had been circulated for comment, which comments have come back and Bill needs to talk with Tom about it.

for Bill Fischer

11:25 Tom said/to call Don Baker at Justice -- that he had been in discussion with Don about it and they are going to rewrite the letter.

Bill will call Don Baker.

7/9/70

Eva -

Per our telecon.

timmie

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

OFFICE OF THE DIRECTOR

July 9, 1970

MEMORANDUM TO: Assistant Director for Legislative Reference
Bureau of the Budget
Attention: Mr. C. William Fischer

Subject: Department of Justice proposed draft amendment to Communications Satellite Act of 1962 as amended ("1962 Act"), 47 §§ 701-704

This is in response to your memorandum dated June 22, 1970, requesting comments by July 1, 1970, on the subject draft legislation which we did not receive until June 30.

Inasmuch as a Director of Telecommunications Policy has not yet been qualified and commissioned, there is no one in a position to make authoritative comments. The new director may wish to do so when he takes office.

W. E. Plummer
Acting

THE WHITE HOUSE
WASHINGTON

July 8, 1970

To: Timmy

From: Eva

Returned as requested.

DTM

Wednesday 7/8/70

5:00 Tom asked us to call Mr. Plummer's office and tell Timmy that he thinks the DTM's response should be that they would defer any comment until the new Director is sworn in.

(Tell Mr. Plummer that the reason is that Tom is on both ends -- as approving DTM and the White House approval -- kind of a silly relationship -- but he's been in touch with Justice so it's all kind of academic about what DTM response should be.)

Wednesday 7/8/70

4:30 As to the attached draft amendment to Communications Satellite Act, Steve Doyle advises as follows:

"The end purpose of the proposed legislation is to remove carrier directors. The thrust of the Justice letter is to remove FCC regulatory restrictions on Comsat. In my opinion, the letter is only minimally related to the legislation in terms of the objective desired. And, in my knowledge, I have serious reservations about some of the factual statements in the Justice letter."

(Steve said: FOR YOUR INFORMATION ONLY -- "DOD and State and FCC have notified BOB of no objection to the legislation but all three agencies have expressed reservations with regard to the substance of the Justice letter."

Steve said he thinks it would be useful for you to consider the relationship between the substance of the letter (which is remove regulatory constraints) and the legislation (which is intended to remove carrier directors from Comsat Board). He thinks you will find them essentially unrelated objectives.

Timmy in Mr. Plummer's office said they had had a call from Dave Lawhead in BOB asking where their comments were; she advised them it was still being reviewed.

THE WHITE HOUSE
WASHINGTON

July 7, 1970

To: Steve

From: Eva

Tom would like you to
look this over and
discuss with him.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF EMERGENCY PREPAREDNESS
OFFICE OF TELECOMMUNICATIONS MANAGEMENT

Date: July 7, 1970

Subject: Proposed Amendment of Comsat Act of 1962

To: Dr. Whitehead

Please release if you agree

From: W. E. Plummer
Acting

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

OFFICE OF THE DIRECTOR

July 7, 1970

MEMORANDUM TO: Assistant Director for Legislative Reference
Bureau of the Budget
Attention: Mr. C. William Fischer

Subject: Department of Justice proposed draft amendment to the Communications Satellite Act of 1962 as amended ("1962 Act"), 47 §§ 701-704

This is in response to your memorandum dated June 22, 1970, requesting comments by July 1, 1970, on the subject draft legislation which we did not receive until June 30.

The Department of Justice favors enactment of legislation which would eliminate any direct control over the Communications Satellite Corporation ("Comsat") by the terrestrial common carriers ("carriers"). It would do so, first, by barring representatives of the carriers from the Board of Directors after January 1, 1971; and, second, by prohibiting carrier ownership of Comsat stock after January 1, 1972. It is the view of the Department of Justice that enactment of the draft legislation, together with modification of regulatory restraints on Comsat's activities, would significantly enhance Comsat's competitive potential.

Assuming that the development of Comsat's competitive potential is a feasible or a valid objective, we agree with Justice that the proposed amendment to the 1962 Act would not significantly affect that potential unless there are accompanying changes in FCC policy decisions regarding Comsat.

While there is no doubt that the 1962 Act was a compromise, and that in the light of experience the Act could have been written with fewer ambiguities, nevertheless the development of commercial communication-satellite service has been quite spectacular. INTELSAT, the international telecommunications satellite consortium, will be launching early next year, its fourth generation of communication satellites, each with a capacity of at least 6,000 telephone circuits. Despite the potential conflicts of interest alluded to by Justice, the carriers, and particularly AT&T, have made substantial use of satellite

circuits. We are advised that by the end of 1970 about half of the international circuits used by AT&T will be by satellite: 1,200 half-circuits, with a payment to Comsat of $42 million.

While the Justice recommendation may have considerable merit because it might tend to make regulatory problems less complex, the policy changes alluded to by Justice might be difficult to achieve. Even if the FCC were to change its policy regarding earth station ownership, any change in its "authorized user" decision would have to reckon with possible objections by some foreign administrations. These administrations, correspondents of American international carriers, could be concerned with a change of policy which would increase the number of American entities with whom they would be required to deal. Also, some foreign administrations have an ownership interest in cables and favor their use over satellites. This combination of circumstances could create a difficult international problem. In addition, a domestic policy requiring U. S. domestic carriers to furnish Comsat with terrestrial connecting facilities so that it could serve customers directly would be difficult to develop and perhaps even more difficult for the Government to administer. Finally, even if changes are made in earth station ownership and control of the corporation, and the "authorized user" decision is amended, AT&T would continue to be a large Comsat customer and thus would continue to have a substantial impact on Comsat.

To summarize our position, amending the 1962 Act in the manner proposed will solve very few, if any, basic problems. However, if it would make the Comsat organization less cumbersome and if the legislation could be enacted without substantial controversy, we would have no objection to its enactment.

W. E. Plummer
Acting

O'Malley et al

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

WASHINGTON, D.C. 20503

June 22, 1970

LEGISLATIVE REFERRAL MEMORANDUM

To: Legislative Liaison Officer

Federal Communications Commission
Council of Economic Advisers
Department of Commerce
Department of Defense
General Services Administration
Federal Trade Commission
Department of State
Office of Telecommunication Policy

Subject: Department of Justice proposed draft amendment to the Communications Satellite Act of 1962 as amended ("1962" Act) 47 U.S.C. SS 701-744.

The Bureau would appreciate receiving the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Budget Circular A-19.

( ) To permit expeditious handling, it is requested that your reply be made within 30 days.

(X) Special circumstances require priority treatment and accordingly your views are requested by

Wednesday, July 1, 1970

Questions should be referred to David Lawhead (103 X 4874), the legislative analyst in this Office. (103 X 3875) or to Jefferson D. Burrus

C. William Fischer

C. William Fischer, for
Assistant Director for
Legislative Reference

Enclosures

Justice draft

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MAY 19 1970

Honorable Robert P. Mayo
Director, Bureau of the Budget
Washington, D.C. 20503

Dear Mr. Mayo:

In compliance with the provisions of Bureau of the Budget Circular No. A-19, there are enclosed copies of a proposed communication to be transmitted to the Congress relative to: proposed draft amendment to the Communications Satellite Act of 1962 as amended ("1962 Act") 47 U.S.C. §§701-744.

It will be appreciated if you will advise this office as to the relationship of the proposed communication to the Program of the President.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

Congressional inquiry --- please expedite.

ANTITRUST DIVISION

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 1952, 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

A BILL

To amend the Communications Satellite Act of 1962, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That effective with the first election of directors of the corporation authorized by title III of the Communications Satellite Act of 1962 (47 U.S.C. 731-735) held after January 1, 1971, the last three sentences of section 303 (a) of such Act are amended to read as follows: "Twelve members of the board shall be elected annually by the stockholders of the corporation. The articles of incorporation to be filed by the incorporators designated under section 302 shall provide for cumulative voting under section 27 (d) of the District of Columbia Business Corporation Act (D.C. Code, sec. 29-911 (d))."

Sec. 2. Section 304 (b) of the Communications Satellite Act of 1962 is amended by adding at the end thereof the following new paragraph:

"(4) Effective after January 1, 1972, no communications common carrier shall own shares of stock in the corporation authorized by subsection (a) of this section."

BOB for clearance

KCRobinson/JJSaunders:obj

Files
Corres.
McLaren
Saunders-Comegys:JJS:DIB
Baker 60-416-0
Robinson
Chron-Evaluation

Held 5-6-70
to Dennen - Comegys - McLaren

"This letter should be forwarded to DAG's office for review and mailing after Mr. McLaren signs.

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. 477; 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. 330, 339 (1962). See generally, Karpatkin, Antitrust in Orbit, 33 Geo. Wash. L. Rev. 37 (1964); Levin, Organization and Control of Communications Satellites, 113 U. Pa. L. Rev. 315 (1965); Lancaster, Conflicts of Interest Confronted Directors in a Private Corp. - The Communications Satellite Act of 1962, 77 Harv. L. Rev. 338 (1963); Servante, Comsat and the Carriers, and the Earth Stations - Some Problems with Statutory Interpretation and Impact, 72 Yale L. J. 441 (1963).) 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. 13, 1968).

In addition, such stockholding and interlocking arrangements involving communications and suppliers are contrary to the general antitrust rules contained in Clayton Act §7, 3 (15 U.S.C. §18, 19). Most of the judicial decisions under these provisions have imposed 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. 1953), aff'd 206 F. 2d 738 (2d Cir. 1953); Bendix Mfg. Co. v. Crane Co., 185 F. Supp. 177, 181 (D. Mich. 1960), pointing instead to the minority director's opportunity to persuade or compel reclamation of competitive vigor, and to learn competitive secrets, American Crystal Sugar Co. v. Cuban-American Sugar Co. 152 Supp. 347, 376, aff'd, 259 F. 2d 524 (2d Cir. 1958), and noting that it would be very difficult to show that a director had been temporarily 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. 10136 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess., pt. 2 at 360 (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 429-23 (1956) (testimony of Assistance Attorney General Hansen). Moreover, it is consistent with the policy of this Administration to place "more reliance on economic incentives and market mechanism 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 direct 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," more potential competition remained and was reflected in more 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 operate vigorously with the carriers. 5 F.C.C. 2d 512, 516 (1966). The Commission decided (reversing an earlier decision, 38 F.C.C. 1174 (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 Fourth 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 1964 Fourth Carrier decision in Docket 15725, it may not be that further amendment of the 1962 Act is now 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

CRS

Wednesday 1/27/71

10:00 MR. SCALIA:

Tom asked if you would call Don Baker and tell him that we are hand delivering a copy of the Pastore letter to him this morning.

Asked that you ascertain that there is no strong ill-will on the part of the Antitrust Division and give Baker the feeling that we're not out to be their enemy.

Justice

Antitrust Chief Lashes ICC, Urges an End Of Regulation Over Most Transportation

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON — The Nixon Administration's antitrust chief, in the most scathing attack on the Interstate Commerce Commission made by a Government official in a decade, urged an end to Federal regulation of railroads, trucking and other surface transportation.

Richard W. McLaren, head of the Justice Department's Antitrust Division, declared that the quality of transportation services has declined, "almost all" of the nation's railroads face difficulties and all surface carriers are experiencing overcapacity, while at the same time "shippers and consumers pay high rates for deteriorating services."

He laid these troubles on "self-perpetuating" regulation, accusing the ICC of fostering a "protective environment" in which rates "are allowed to rise to the level of the highest cost carrier in the market . . . inefficiency is rewarded and, in the long run, the nation's resources are seriously misallocated."

Mr. McLaren recommended that, "after a suitable period in which regulations are phased out, surface transportation should operate like any other business. Competition should be allowed to determine the price, quality and availability of transportation services."

In addition, a "reevaluation" of regulatory laws should consider the repeal of antitrust exemptions enjoyed by regulated transport companies in rate-fixing and certain other areas, Mr. McLaren said.

The antitrust chief's attack on the 84-year old ICC was the most vigorous since 1962 when President Kennedy sent Congress a special transportation message in which he charged the industry's problems to "a chaotic patchwork of inconsistent and often obsolete legislation and regulation." Mr. Kennedy asked Congress to repeal the ICC's control over transportation of bulk and agricultural commodities that accounted for about two-thirds of total railroad freight traffic.

Congress, of course, refused to accept the Kennedy recommendation, although in subsequently creating the Transportation Department it did take away some of the ICC's authority to regulate safety matters.

Whether Congress will accept Mr. McLaren's new invitation isn't clear, but his speech, delivered before a group of antitrust lawyers in New York, adds to the pressures that have been building in recent months for reform, or even abolition, of the ICC.

Mr. McLaren told the New York lawyers he was speaking for the Antitrust Division and wasn't representing "any existing Administration position." But he left the door open for the Nixon Administration to take a position.

← NB

The so-called Ash Commission, which has been studying Government reorganization generally for President Nixon, has investigated the ICC and other regulatory agencies and will make a report within two or three weeks. It's expected to be just as harsh on the ICC as was Mr. McLaren.

In addition, the McLaren views have in general been supported by the President's Council of Economic Advisers. Indeed, the antitrust chief, in his speech, quoted the council's statement that "regulation should be narrowed, or halted, when it has outlived its original purpose."

Advocates of radical surgery on the ICC also are growing in Congress. Senate Democratic Leader Mansfield last year introduced a bill to abolish the ICC, and several Republican Senators introduced resolutions looking toward a merger of the ICC with the Civil Aeronautics Board and the Federal Maritime Commission.

Such ICC critics didn't get very far in the last session of Congress, but they are hopeful for at least hearings in the current session.

Although there wasn't any official explanation of the timing of Mr. McLaren's attack on the ICC, he wasn't unaware of these other developments in and out of the Administration.

Noting that the ICC was created in 1887 when the railroads enjoyed monopoly power, Mr. McLaren asserted that the commission became self-perpetuating when the competitive truck and barge industries were "brought under the regulatory umbrella" during the Depression. "But today," he said, "there seems to be a growing belief that regulation hasn't served the nation well."

He charged that regulation has led to "high freight rates" that are based on the value of the commodity transported and bear "little relationship to the lowest cost available in transporting a given commodity." Under ICC procedures, "rates generally are allowed to rise to the level of the highest cost carrier. For the most part, only inefficiency is rewarded in this protective atmosphere," he asserted.

In addition to raising rates, regulation limits the entry of new competitors into surface transportation, Mr. McLaren said. "Again, the stress of regulation is toward the protection of established carriers," he said.