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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Federal Communications Commission
Office of the Secretary

In the Matter of Tariff Filing Requirements for Interstate Common Carriers	CC Docket No. 92-13

Comments Of International Business Machines Corporation

J. Roger Wollenberg
William T. Lake
Jonathan Jacob Nadler

Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for International
Business Machines Corporation

Of Counsel:

Timothy B. Hackman
International Business
Machines Corporation
2000 Purchase Street
Purchase, New York 10577

March 30, 1992

SUMMARY

The question whether the Communications Act authorizes the Commission to allow nondominant interstate interexchange service providers not to file tariffs has implications beyond the facilities-based service providers discussed in the Notice. The Commission's answer to that question may also determine whether resellers may continue to be nonregulated.

As the Commission found in the Competitive Carrier proceeding, it has broad authority under Section 4(i) of the Act to forbear from imposing Title II requirements on communications service providers that lack market power, even if the providers are classified as common carriers under Title II of the Act. The Commission's interpretation of its statutory authority is entitled to deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). The deference due is especially great here, because Congress showed that it was aware of the Commission's interpretation when it imposed special tariff requirements on Alternate Operator Service providers that presume the existence of the Commission's power to forbear.

Exercise of forbearance authority is consistent with the decisions of the D.C. Circuit in MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), and of the Supreme Court in Maislin Industries v. Primary Steel, 110 S.Ct. 2759 (1990). Taken together, these cases impose two requirements. First, if the Commission classifies entities providing communications services as common

carriers, it must permit those entities to file tariffs. Second, if those communications service providers choose to file tariffs, they must charge the rates contained in the tariffs. However, neither MCI nor Maislin dictates that the Commission must require all entities classified as common carriers to file tariffs.

Independent of its forbearance authority, the Commission has the authority to determine that competitive communications service providers are not common carriers within the meaning of the Communications Act and, therefore, are not subject to Title II regulation. The term "common carrier" was borrowed from the common law, where it had two distinct meanings: an entity that possessed monopoly power, or an entity that "held out" to serve all members of the public indifferently. Historical evidence demonstrates that, in the context of the Communications Act, the term should be applied only to those entities that have market power. In any case, it is clear that in today's marketplace few if any interexchange service providers are common carriers under either standard.

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COMMENTS OF INTERNATIONAL BUSINESS MACHINES CORPORATION

INTRODUCTION

The Notice in this proceeding invites comments as to whether the Communications Act authorizes the Commission to allow nondominant interstate interexchange service providers not to file tariffs. That question has implications beyond the facilities-based service providers discussed in the Notice. The answer that the Commission gives to the question may determine whether the Commission has power to continue its longstanding, successful, and procompetitive policy of nonregulation of resellers.

As we demonstrate below, these procompetitive policies can be sustained on two alternate grounds. First, the Commission has broad authority under Section 4(i) of the Act[1/] to forbear from imposing tariff and entry/exit regulation when such forbearance will best serve the purposes of the Communications Act. Second, the Commission has the authority to determine that

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1/ 47 U.S.C. § 154(i).

competitive communications service providers are not "common carriers" within the meaning of the Act and, therefore, are not subject to Title II regulation.

I. THE COMMISSION HAS THE AUTHORITY TO FORBEAR FROM REQUIRING COMPETITIVE COMMUNICATIONS SERVICE PROVIDERS TO FILE TARIFFS.

A. The Commission's Conclusions in the Competitive Carrier Proceeding Regarding Its Forbearance Authority Were Correct.

The Communications Act gives the Commission broad authority to take actions necessary to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."[2] In the Competitive Carrier proceeding,[3] the Commission concluded that the imposition of tariff and entry/exit regulation on communications service providers that lack market power (such as nondominant interexchange carriers and resellers)

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[2] 47 U.S.C. § 151.

[3] See Policy and Rules Concerning Rates for Competitive Common Carrier Services ("Competitive Carrier"), First Report & Order, 85 F.C.C.2d 1 (1980); Second Report & Order, 91 F.C.C.2d 59 (1982), recon. denied, 93 F.C.C.2d 54 (1983); Third Report & Order, 48 Fed. Reg. 46791 (1983); Fourth Report & Order, 95 F.C.C.2d 554 (1983); Fifth Report & Order, 98 F.C.C.2d 1191 (1984); Sixth Report & Order, 99 F.C.C.2d 1020, vacated and remanded sub nom. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

would impede -- rather than promote -- those goals.[4] The Commission further concluded that, in light of this finding, it has authority under Section 4(i) of the Communications Act to forbear from requiring such entities to file tariffs or to obtain authorization before beginning or ceasing to provide service.[5] This assessment of the Commission's forbearance authority is correct and should be reaffirmed.

The decision of the Supreme Court in Chevron v. Natural Resources Defense Council[6] makes clear that, where Congress has not specifically addressed an issue, an administrative agency has broad discretion to interpret its governing statute.[7] The only constraint is that the interpretation must be "a reasonable one."[8] The Communications Act has no provision expressly governing the extent of the Commission's authority in situations in which the agency has found that imposition of tariff and entry/exit regulation would impede achievement of the statutorily

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[4] Competitive Carrier, Second Report & Order, 91 F.C.C.2d at 69; see also Competitive Carrier, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 471-72 (1981).

[5] Competitive Carrier, Second Report & Order, 91 F.C.C.2d at 65-69; see also Competitive Carrier, Further Notice of Proposed Rulemaking, 84 F.C.C.2d at 472-91.

[6] 467 U.S. 837 (1984).

[7] Id. at 842-845.

[8] Id. at 845.

mandated goals.[9] Because Congress did not provide for this situation, the Commission is free, under Chevron, to adopt any "reasonable" interpretation of its authority. There is no question that -- absent an express congressional command to the contrary -- it is reasonable to construe the Commission's broad authority under Section 4(i) as authorizing the agency to forbear from imposing tariff or entry/exit regulation, where the imposition of such regulation would undercut the goals of the Act.[10]

An agency's authority to adhere to its existing interpretation of its governing statute is especially great where the "agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it amended the

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[9] Congress' failure to address this situation is understandable. The provisions in the Communications Act that identify particular means of ensuring that the rates charged by common carriers are just, reasonable, and nondiscriminatory were adopted long before the onset of competition in communications services. See National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976) ("NARUC I") ("Congress could neither foresee nor easily comprehend the fast-moving developments in this field.").

[10] Indeed, an agency's obligation to abandon outdated and counterproductive regulations requires it to consider removing existing regulations if allegations are made that "alert the Commission to the possibility that the regulations . . . lack[] a nexus with the public interest." Geller v. FCC, 610 F.2d 973, 979-80 (D.C. Cir. 1979).

statute in other respects."[11] In this instance, Congress indicated that it was aware of the Commission's forbearance policy at the time it considered the Telephone Operator Consumers Services Improvement Act of 1990,[12] which increased regulation of alternative operator service (AOS) providers.[13] The House Committee Report expressly noted that, while the Commission had classified AOS providers as common carriers, the agency did not require AOS providers to file tariffs because it considered them to be "nondominant."[14]

If the lawmakers had disapproved of the Commission's forbearance policy, Congress would have instructed the agency that it was obligated to apply tariff and entry/exit regulation under Title II. Congress did not do so. Rather, Congress required that the Commission direct AOS providers to file streamlined, after-the-fact "informational" tariffs describing their existing rates.[15] Congress authorized the Commission to

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[11] United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (quoting Apex Hosiery Company v. Leader, 310 U.S. 469, 487-89 (1940)).

[12] P.L. 101-435.

[13] The Committee Reports from both houses refer repeatedly to the Commission's forbearance policy. See, e.g., H. Rept. 101-213, 101st Cong., 1st Sess., at 6 (noting "the Commission's long-standing policy of regulating only those companies with market power"); S. Rept. 101-439, 101st Cong., 2d Sess., at 23 (noting that the Commission's tariff filing requirements are applicable only to "the dominant carriers").

[14] H. Rept. 101-213, at 3.

[15] See 47 U.S.C. § 226.

waive even this limited requirement if it concludes that "market forces are securing just and reasonable rates and practices for consumers."[16] Those new legislative provisions presume that the Commission has the power to forbear from imposing traditional tariff and entry/exit regulation on common carriers and take as their starting point that the Commission had validly exercised that power with respect to AOS providers. In Congress' repeated references to the forbearance policy, there is not a hint of disapproval of that policy. Significantly, this congressional action was after the Supreme Court's Maislin decision, discussed in Part I.B below.

The Commission's conclusion, in the Competitive Carrier proceeding, that it can forbear from imposing tariff regulation on competitive communications service providers is further supported by repeated decisions of the Supreme Court and the U.S. Courts of Appeals, which have held that the Commission has broad discretion to adapt its regulatory approach to meet changing circumstances.[17] As the D.C. Circuit observed in Philadelphia Television Broadcasting Co. v. FCC:

> Congress in passing the Communications Act of 1934 could not, of course, anticipate the variety and nature of methods of communications by wire and radio that would come into existence in the decades to come. In such a situation, the expert agency

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[16] H. Rept. 101-213, at 14.

[17] See, e.g., NBC v. United States, 319 U.S. 190, 225 (1943); Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 138 (1940).

> entrusted with administration of a dynamic industry . . . is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the congressional objectives.[18]

Recognizing the agency's broad discretion, the court upheld the Commission's decision not to apply Title II regulation to community antenna television services.

The Commission's discretion to adapt its regulatory approach clearly extends also to basic communications services. For example, in New England Telephone v. FCC,[19] the D.C. Circuit held that Section 4(i) of the Act empowers the Commission to adopt ratemaking procedures for basic services that diverge significantly from those described in Sections 204 and 205 of the Act.[20]

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[18] Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966).

[19] New England Telephone & Telegraph Company v. FCC, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 109 S. Ct. 1942 (1989).

[20] The decision of the Second Circuit in AT&T v. FCC (Resale), 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978), contains language that can be read to embrace the Commission's earlier view that it could not forbear from requiring a common carrier to file some form of tariffs. However, the Commission promptly repudiated that position in opposing a petition for certiorari. See Brief for Federal Communications Commission in Opposition to Petition for Writ of Certiorari, International Business Machines Corporation v. FCC, No. 77-1570 (July 1978). As the Commission has recognized, "[l]imited to its holding, [the AT&T (Resale)] case compels only the conclusion that [the Commission] has the authority to apply Title II regulation to resale." The decision does not require the Commission to use this power where to do so would disserve

Finally, it must be noted that, in using its forbearance power, the Commission has not abandoned its obligation to ensure that rates are just, reasonable, and nondiscriminatory. Numerous cases have recognized that "the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances."[21] Such an "appropriate circumstance" plainly exists where the Commission concludes that marketplace competition is vigorous and that such competition is likely to result in just, reasonable, and nondiscriminatory prices. Moreover, as the Commission made clear in the Competitive Carrier proceeding, the Act's complaint procedures remain available if -- for some reason -- market forces do not result in just, reasonable, and nondiscriminatory rates.[22]

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the goals of the Act. Competitive Carrier, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 443, 472 n.55 (1981).

The fact that the Commission's views on forbearance have evolved over time does not diminish its authority to interpret the Act. An agency's interpretation of its governing statute must be given deference even if it represents an explained change from its prior interpretation. See Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991).

[21] Wold Communications v. FCC, 735 F.2d 1465, 1475 (D.C. Cir. 1984). See generally New York State Commission on Cable Television v. FCC, 749 F.2d 804, 811 (D.C. Cir. 1984) (collecting cases).

[22] Competitive Carrier, Second Report & Order, 91 F.C.C.2d at 70.

B. The Commission's Forbearance Policy Is Consistent With the MCI and Maislin Decisions.

In the twelve years since the Commission initiated the Competitive Carrier proceeding, two court cases have been decided that bear directly on the Commission's forbearance power. In the first case, MCI v. FCC,[23] the D.C. Circuit held that the Commission does not have the authority to prevent a common carrier from filing a tariff. In the second case, Maislin Industries v. Primary Steel,[24] the Supreme Court held that, under the ratemaking provisions of Interstate Commerce Act, the Interstate Commerce Commission ("ICC") could not find it to be an "unreasonable practice" for a common carrier to collect the tariffed rates from a customer simply because the carrier and the customer had entered into a contract providing for a lower rate.[25] Rather, the Court held, the carrier had the right (and duty) to collect the rate contained in the tariff filed with the ICC.[26]

Taken together, MCI and Maislin impose two requirements. First, as long as the Commission classifies a

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[23] 765 F.2d 1186 (D.C. Cir. 1985).

[24] 110 S. Ct. 2759 (1990).

[25] Id. at 2768.

[26] While Maislin construed the ratemaking provisions of the ICC Act, it is well settled that the corresponding ratemaking provisions of the Communications Act should be construed consistently. See, e.g., Las Cruces TV Cable v. FCC, 645 F.2d 1041, 1047 (D.C. Cir. 1981).

communications service provider (such as an interexchange carrier or a reseller) as a common carrier, it must permit that entity to file tariffs. Second, if the service provider chooses to file a tariff, the filed rates govern over inconsistent contracts. However, neither MCI nor Maislin dictates that the Commission must require all entities classified as common carriers to file tariffs. To the contrary, the Commission has the authority to permit competitive communications service providers not to file tariffs if this will further the Act's goals. If such entities choose not to file tariffs, they may provide service on a contract basis free from tariff regulation.

II. THE COMMISSION HAS INDEPENDENT AUTHORITY TO DETERMINE THAT COMPETITIVE COMMUNICATIONS SERVICE PROVIDERS ARE NOT "COMMON CARRIERS" WITHIN THE MEANING OF THE COMMUNICATIONS ACT AND, THEREFORE, ARE NOT SUBJECT TO TITLE II REGULATION.

The provisions of Title II of the Communications Act that deal with the filing of tariffs and entry/exit regulation are applicable, by their terms, only to "common carriers." Thus, if the Commission finds that certain communications service providers are not "common carriers" within the meaning of the Act, Title II does not apply and, therefore, those service providers need not file tariffs or obtain authorization to begin or cease providing service.

In the Competitive Carrier proceeding, the Commission tentatively concluded that it has the power to determine that interexchange service providers and resellers that lack market

power are not common carriers as that term is used in Title II of the Act and, therefore, are not subject to the requirements of that title.[27] However, the Commission chose to rely exclusively on its forbearance power to relieve these service providers of tariff and entry/exit requirements.[28] The Commission expressly left the "definitional" issue open for future resolution.[29] We believe the Commission's tentative conclusion that it has independent authority to remove counterproductive regulatory requirements through a definitional approach was correct.

The term "common carrier" is not defined in the Communications Act. Rather, the term was borrowed from the Interstate Commerce Act, which, in turn, borrowed the concept from the common law. At common law, the term had two distinct meanings. First, it was applied to business enterprises that enjoyed special privileges or exercised monopoly power. In this area, the common carrier designation provided a basis for the imposition of regulatory obligations, which were deemed necessary in order to control the ability of the monopoly enterprise to abuse its special position. Second, the common carrier designation was applied to enterprises, such as bailees, that

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[27] See Competitive Carrier, Further Notice of Proposed Rulemaking, 84 F.C.C.2d at 463-70 (The "statutory framework indicates strongly Congress' intent to regulate under Title II entities with market power.").

[28] See Competitive Carrier, Second Report and Order, 91 F.C.C.2d at 61-2 & n.7.

[29] Id.

"held out" to serve all members of the public indifferently. In that context, the common carrier designation was used to impose a heightened standard of liability on enterprises that, by "holding out" to serve the public indifferently, were deemed to have implicitly consented to act as an insurer for the safe delivery of goods entrusted to their care. In some judicial opinions, these two doctrinal strains have been intermixed confusingly, but their origins are quite distinct.

Professor William K. Jones of Columbia Law School, a noted scholar in this area, has prepared a historical analysis of the common law and statutory antecedents of the common carrier provisions in the Communications Act.[30/] Professor Jones demonstrates that the presence of monopoly power is not only relevant, but should be controlling in determining whether a communications service provider is a common carrier within the meaning of Title II. Professor Jones shows that common carrier obligations were imposed on communications service providers early in the history of U.S. telecommunications because they enjoyed monopoly status -- not because they "held out" to serve the public indifferently. Indeed, one of the principal concerns motivating the imposition of regulation was that the

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[30/] See Jones, "The Common Carrier Concept as Applied to Telecommunications: An Historical Perspective" (1980). For the convenience of the Commission, we include that analysis as an appendix to these comments. Professor Jones' paper was placed in the record in the Competitive Carrier proceeding. See Reply Comments of International Business Machines Corporation (Apr. 4, 1980).

communications monopolists might not serve the public indifferently -- that is, that they might use their economic power to discriminate against certain customers, by charging higher prices or refusing to provide service. In light of this history, Professor Jones correctly concludes, a communications service provider should be deemed to be a common carrier within the meaning of the Communications Act only if it possesses market power.

In contrast to the situation that existed many years ago, it is clear that in today's marketplace few if any interexchange service providers have market power. It is well within the Commission's authority to determine that providers that have no market power are not common carriers within the meaning of the Act. Moreover, if weight is given to whether these entities "hold out" to serve the public indifferently, the result is the same. Interexchange service providers increasingly offer highly customized service options designed to meet the needs of individual users. The courts have repeatedly recognized that the Commission has the authority to classify communications service providers that "make individualized decisions, in particular cases, whether and on what terms to deal"[31] as non-common-carriers.[32] By determining that such entities are not

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[31] NARUC I, 525 F.2d at 641.

[32] See, e.g., Wold Communications, 735 F.2d at 1471-73 (Transponder sales are not a common carrier activity because "[e]ach sales contract is individually negotiated."); Computer and Communications Industry Association v. FCC, 693 F.2d 198,

common carriers, the Commission can eliminate any question about its authority to permit them to serve their customers free from tariff or entry/exit regulation.

209-10 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) (Provision of enhanced services is not a common carrier activity because of "the ability of vendors to tailor their services to meet the particularized needs of individual customers."); NARUC I, 525 F.2d at 643 (Specialized Mobile Radio service providers are not common carriers because they "negotiate with and select . . . clients on a highly individualized basis.").

CONCLUSION

For these reasons, the Commission has the authority under Section 4(i) of the Communications Act to forbear from imposing Title II tariff or entry/exit regulation on competitive communications service providers where the Commission finds that such forbearance will serve the goals of the Act. Alternatively, the Commission may lawfully find that competitive service providers that do not have market power are not "common carriers" within the meaning of the Act and, therefore, are not subject to Title II regulation.

Respectfully submitted,

J. Roger Wollenberg
William T. Lake
Jonathan Jacob Nadler

Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for International
Business Machines Corporation

Of Counsel:

Timothy B. Hackman
International Business
Machines Corporation
2000 Purchase Street
Purchase, New York 10577

March 30, 1992

CERTIFICATE OF SERVICE

I, Jonathan Jacob Nadler, hereby certify that I have this 30th day of March, 1992 caused to be delivered by first-class mail (except as noted) the foregoing Comments of International Business Machines Corporation to the persons named on the attached service list.

Jonathan Jacob Nadler

Service List

Federal Communications Commission *

Chairman Alfred C. Sikes
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Sherrie P. Marshall
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Richard K. Firestone, Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

James D. Schlichting, Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

* Indicates hand delivery

Gary Phillips, Esq.
Policy and Program Planning
Division
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

Donna Lambert, Esq.
Policy and Program Planning
Division
Common Carrier Division
Federal Communications Commission
Room 544
2025 M Street, N.W.
Washington, D.C. 20554

Downtown Copy Center *

Downtown Copy Center
1919 M Street, N.W.
Room 246
Washington, D.C. 20554

APPENDIX

The Common Carrier Concept as Applied to Telecommunications: An Historical Perspective

by

William K. Jones

WILLIAM K. JONES

William K. Jones is the Milton Handler Professor of Trade Regulation at Columbia University School of Law. A member of the Law Faculty since 1959, he has devoted his entire academic career to problems of competition, monopoly, and regulation. His courses encompass both antitrust and regulated industries (including telecommunications and other instances of common carrier regulation as well as radio, television, and cable). He is presently Chairman of the Steering Committee of the Law School's Center on Law and Economics.

From 1970 to 1974, Professor Jones was a member and (from 1972) Deputy Chairman of the New York State Public Service Commission, directly engaged in the regulation of telephone, gas, electric, and water companies. For the first ten months of his term, the New York Commission was also charged with the regulation of railroads, trucks, and buses. At the request of the Governor, Professor Jones prepared a report on Regulation of Cable Television by the State of New York (1970), which served as the basis for New York legislation on the subject.

During prior government service, Professor Jones prepared reports for the initial Administration Conference of the United States on Licensing of Truck Operations by the

Interstate Commerce Commission, Licensing of Domestic Air Transportation by the Civil Aeronautics Board, and Licensing of Major Broadcast Facilities by the Federal Communications Commission (1961-62). He was a member of the White House Task Force on Antitrust Policy (1967-68) and a consultant to the White House Task Force on Telecommunications Policy (1968). He has also served as a consultant to the Ford Foundation (on electronic communications, 1967-68); to the Federal Communications Commission (on cable television, 1968; on the network inquiry, 1979-80); to the Massachusetts Legislature (on public utility regulation, 1974); to the Department of Justice (on revision of the Robinson-Patman Act, 1975); to the Columbia Legislative Drafting Research Fund (on international telecommunications, 1976); to the Department of Energy (on regulation of oil pipelines, 1978); and to the National Science Foundation (on social science research, 1978-79).

Professor Jones published a leading casebook and text on Regulated Industries in 1967, and in 1976 published a second edition and a supplemental volume on Electronic Mass Media: Radio, Television and Cable. The latter is now in a second edition (1979). The industries encompassed in the basic volume include telecommunications, electric power, natural gas transmission and distribution, railroads, trucking, and airlines. His other publications include: