

SPACE SATELLITE COMMUNICATIONS

HEARINGS BEFORE THE SUBCOMMITTEE ON MONOPOLY OF THE SELECT COMMITTEE ON SMALL BUSINESS UNITED STATES SENATE EIGHTY-SEVENTH CONGRESS FIRST SESSION

PUBLIC POLICY QUESTIONS ON THE OWNERSHIP AND
CONTROL OF A SPACE SATELLITE COMMUNICATIONS
SYSTEM

AUGUST 2, 3, 4, 9, 10, AND 11, 1961

Printed for the use of the Select Committee on Small Business



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SPACE SATELLITE COMMUNICATIONS

THURSDAY, AUGUST 3, 1961

U.S. SENATE,
SUBCOMMITTEE ON MONOPOLY
OF THE SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in the Caucus Room, Old Senate Office Building, Senator Russell B. Long (chairman of the subcommittee) presiding.

Present: Senators Long and Javits.

Also present: Benjamin Gordon, staff economist; Manley Irwin, assistant staff economist; Neal Peterson, counsel; William Leonard, legislative assistant to Senator Long; and Allen Lesser, legislative assistant to Senator Javits.

Senator Long (presiding). The first witness that I will call this morning will be the witness for the Rand Corp. Please step forward and take the witness chair, sir.

I see that the statement of the Rand Corp. is fairly long—do I have a copy of your statement?

I am going to invite Mr. Johnson to read his prepared statement, and after that we will ask some questions. Let me say that I will preside here until about 10:20, that is, the next 15 minutes.

I must be absent for about an hour thereafter. If Senator Javits can preside, he will preside at that time. Otherwise, I will recess until 11:20, and after Mr. Johnson we will call Dr. Smythe. I believe those are all the witnesses we will be able to hear at this morning's session.

We will come back at 2 o'clock, and if the other witnesses are busy this morning, they can return this afternoon.

Will you please proceed, Mr. Johnson?

STATEMENT OF LELAND L. JOHNSON, ECONOMIST, THE RAND CORP., SANTA MONICA, CALIF.

Mr. JOHNSON. The following remarks are my personal views and do not necessarily reflect the official views or policies of the Rand Corp. or of its sponsoring agencies.

Senator LONG. I am pleased to hear you say that, Mr. Johnson, because you might be a little more frank about this subject matter than if you felt you were bound by somebody else's policy.

Please proceed.

Mr. JOHNSON. The economic importance of communications satellites: The primary economic role for which communications satellites

years of operation. The large capacity of even a single system relative to projected demand and the high initial cost render most unlikely our being able to rely on competition among satellite operators to maintain socially desirable business behavior. Whoever owns and operates the first satellite system will probably have, for at least a few years, a monopoly in the sense that he will be the sole seller of satellite communication services. The crucial question—one that has given rise to no little controversy here in Washington—is “who shall be allowed to exercise this monopoly privilege?”

Senator LONG. Let us just see how we stand at the moment. Insofar as the U.S. Government has any information or know-how to get into outer space, if that was achieved through NASA—perhaps there are a few exceptions, but, for the most part, you can say insofar as that objective is achieved through NASA, the United States has complete freedom of action to license anybody to produce that system; do they not?

Mr. JOHNSON. Presumably this is the case.

Senator LONG. Both the satellite and the components?

Mr. JOHNSON. Yes.

Senator LONG. Now, insofar as that was produced under an Air Force or Navy contract or an Army contract, then the United States has the power to license a contractor, but he could produce parts only for the Army, Navy, and Air Force; is that not correct?

Mr. JOHNSON. This is presumably the case; however, there may be legal issues involved.

Senator LONG. But the U.S. Government under those Department of Defense contracts no longer has the freedom of licensing anybody to provide services to the general public under those research contracts.

Mr. JOHNSON. Under military contracts.

Senator LONG. Under military contracts.

Mr. JOHNSON. This is presumably the case.

Senator LONG. Yes.

But insofar as the Government has arrived at this position with NASA contracts, it is, for the most part, correct to say the Government has complete freedom to license everybody, big and little alike, to manufacture component parts in competition?

Mr. JOHNSON. Yes.

It is merely the question of which system of ownership appears most desirable.

Senator LONG. Yes.

Mr. JOHNSON. Again, there may be legal issues involved.

Senator LONG. Please proceed, sir.

Mr. JOHNSON. In treating the question of membership it is important to bear in mind certain frequently voiced objectives:

First, the objective that the satellite firm set prices that do not generate “excessive” profits but prices which, in some sense, reflect the costs incurred in the enterprise.

Second, the objective that all common carriers be allowed non-discriminatory access to satellite transmission services.

Third, the objective that the firm operate efficiently insofar as striving to minimize costs for a given quality and quantity of output. In this connection, some have advocated that satellite equipment

COMMUNICATIONS SATELLITES

HEARINGS
BEFORE THE
COMMITTEE ON
SCIENCE AND ASTRONAUTICS
U.S. HOUSE OF REPRESENTATIVES
EIGHTY-SEVENTH CONGRESS
FIRST SESSION

MAY 8, 9, 10, AND JULY 12, 1961

[No. 19]
PART 1

Printed for the use of the Committee on Science and Astronautics



U.S. GOVERNMENT PRINTING OFFICE

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WASHINGTON : 1961

Mr. BROPHY. My statement will take about 20 minutes, if you will permit me to take that long at this time of the day.

Mr. KARTH. You may proceed.

STATEMENT OF THEODORE F. BROPHY, VICE PRESIDENT AND GENERAL COUNSEL, GENERAL TELEPHONE & ELECTRONICS CORP.; ACCOMPANIED BY DR. HERBERT TROTTER, JR., PRESIDENT, GENERAL TELEPHONE & ELECTRONICS LABORATORIES, INC.

Mr. BROPHY. I am the vice president and general counsel of General Telephone & Electronics Corp. Dr. Herbert Trotter, Jr., president of General Telephone & Electronics Laboratories Inc., is with me to assist in answering any questions that you may have with respect to my testimony.

The General system operates telephone companies in 31 States and in three foreign countries. A total of more than 4,675,000 telephones are operated by companies in the General system, the largest independent U.S. telephone system. General's subsidiaries also include Automatic Electric Co., a manufacturer of telephone and other communications equipment; Sylvania Electric Products, Inc., a major producer of electronic, electrical, and other products; Lenkurt Electric Co., Inc., a manufacturer of carrier and microwave equipment; and General Telephone & Electronics Laboratories, Inc.

The General system has long been engaged in the vitally important research and development of sophisticated communications systems. It has a history of development and production activities which include the automatic electronic defense system for the Air Force B-58 Hustler bomber, the data processing portion of the Air Force ballistic missile early warning system, communications systems for the Navy's Polaris missile-launching submarines and the Air Force Minuteman squadrons, Army Signal Corps weapons-locating radar equipment, and equipment for other major programs. The first automatic message switching center was developed by the Automatic Electric Co. for the Army Signal Corps. In addition, the General system has participated in more than 30 missile projects.

The General system has been carrying out a number of studies of space problems and has participated in a number of missile and radar programs which involved the detection and tracking of objects in space. Experience in this field has been gained through the Army Project Plato, a prime contract with Sylvania Electric Products, Inc., for design and development of a missile system to intercept ballistic missiles, and through major participation in the Air Force ballistic missile early warning system.

In association with the Boeing Airplane Co., the General system has studied the communication problems of a military manned space system. The effects on a communications system of the ion sheath generated upon reentry of space vehicles into the atmosphere have been studied, and laboratory experiments on the propagation of radio waves through ionized gas have been made in connection with these programs. Direct measurements of transmission through ion sheaths have also been carried out for the Army using hyperspeed projectiles. For the Air Force, the General system is developing an ultrareliable

O'Connell believes it important that one agency have the primary authority and responsibility for licensing of common carrier satellite communication systems and establishing necessary rules and regulations applicable to such a system. The appropriate regulatory body would clearly seem to be the Federal Communications Commission.

GENERAL'S PLAN

General O'Connell believes that only a single commercial satellite communications system is feasible within the foreseeable future. The costs involved in research and development as well as in construction and operation are so substantial that it seems unlikely that a second system would be established, especially since a single system could handle a huge amount of traffic and its capacity could be expanded at a cost much less than that of creating a second system.

The limited portion of the frequency spectrum available and interference problems also operate as a severe restraint upon the number of satellite systems which are feasible.

On the basis of its assumption and belief that only one commercial satellite system is feasible, General recommended in its comments filed last week with the Federal Communications Commission in docket No. 14024 that any satellite company should be open to ownership by all existing and future domestic and international U.S. communications common carriers, both telegraph and telephone, including at least the major companies in the field. If the satellites themselves are owned by the U.S. satellite company, General believes that they should be available for use by all authorized existing and future U.S. and foreign communications common carriers without regard to their ownership of an interest in the U.S. satellite company.

General believes that the open end or joint plan which it advocates is the best means of pooling the technical resources of U.S. communications common carriers, as well as providing for nondiscriminatory access to and use of the satellite company's communications facilities. General has recommended other specific measures to insure such access and use, including first-come first-served operating rules and non-discriminatory location of ground stations.

General believes that participation in a satellite company should not be limited to existing or future international communications common carriers inasmuch as domestic communications common carriers have a major role in international traffic because they transmit and originate such traffic and carry it in part over their own facilities. The millions of users of the General system's telephones hold it responsible for the quality, availability and cost of international telephone service.

ANTITRUST CONSIDERATIONS

General believes that its open-end proposal with respect to the ownership and use of a common carrier satellite company complies with the antitrust laws and is the best method for preserving existing competition in the international communications field. No traffic would be originated or controlled by the satellite company, but it would serve as a common link for communications common carriers which would be its customers. The satellite company is thus analo-

gous to a common terminal facility owned and operated by competing trucking companies or railroads and kept available for use by any future competing communications common carrier.

GOVERNMENT CONTROL AND REGULATION

General believes that the standard of "public interest, convenience, and necessity" under the Communications Act of 1934 gives the Federal Communications Commission sufficient authority to prescribe in a rulemaking proceeding that a U.S. satellite communications company should provide for joint ownership and use, as described earlier in my remarks. Such a company would be subject to regulation as a common carrier under title II of the Communications Act with respect to services, rates, and other matters in addition to the licensing requirements of title III of that act.

INTERNATIONAL IMPLICATIONS

We recognize that the development of a worldwide satellite communications system will require the resolution of many questions involving other countries. To the extent that those problems are similar or identical to the ones that exist in present international communications between the United States and foreign countries, they could presumably be resolved in the same way in which they are presently resolved. So far as the solution to international problems of first impression are concerned, General strongly believes that certain of these problems can only be resolved after a determination has been made, first, with respect to the ownership of the satellite communications system so far as the United States is concerned, and, second, as to the type of satellite communications system which will be used. We do not believe that either of these important determinations should be delayed until all the international problems have been resolved. On the contrary, any delay in the resolution of the question of the ownership or the U.S. satellite communications system will substantially delay the establishment by this country of a common carrier satellite communications system and prejudice its leadership in this field.

INTERFERENCE

Presently available theoretical and experimental knowledge indicates that frequencies between 1,000 and 10,000 megacycles appear to be most desirable to space communications. Lower frequencies are already in extensive use for other purposes and are not as desirable for space communications because of solar and galactic radio noise. Frequencies above 10,000 megacycles do not appear to be desirable because of absorption of radio energy by rainfall.

Existing ground installations for radar and tropospheric scatter systems are believed incapable of sharing frequencies with space systems without causing serious interference. Experimental tests are required to determine the amount of physical separation necessary to prevent undue interference between the receiving and transmitting sites of microwave point-to-point communications systems and space systems using the same frequencies. Among the factors which require further study are the effect of various terrain features and of various

Memberships and affiliations: Fellow, American Institute of Electrical Engineers; member, Armed Forces Communications and Electronics Association; Newcomen Society; director, Bell Telephone Laboratories; director, Bell Telephone Co. of Canada.

STATEMENT OF JAMES DINGMAN, VICE PRESIDENT AND CHIEF ENGINEER, AMERICAN TELEPHONE & TELEGRAPH CO.; ACCOMPANIED BY JOHN F. PRESTON, JR., A.T. & T. COUNSEL

Mr. DINGMAN. My name is James E. Dingman. I am vice president and chief engineer of American Telephone & Telegraph Co. I greatly appreciate your invitation to present testimony to this committee, and this opportunity to appear personally and present a summary of that testimony.

I shall briefly discuss some of my company's ideas for employing satellites to relay microwave communications across the oceans. This is of utmost importance to us. We are responsible for all international oversea telephone service between the United States and foreign countries. Today every telephone in this country can be connected with virtually every telephone in the rest of the world through our facilities. Satellites offer us another way to discharge this responsibility.

The Congress has declared that it is the policy of the United States that activities in space should be conducted in cooperation with other nations and devoted to peaceful purposes for the benefit of all mankind.

The use of satellites to relay communications between the peoples of the world promises early fulfillment of that high purpose. This is one area of space technology in which we believe the United States is no well in the forefront. The capability exists to build and launch an experimental communications satellite within 9 or 10 months from go-ahead, and to have a commercial system in operation with 3 to 4 years. This is essential if we are to keep America in the lead.

Placing a satellite system in operation would add another important group of oversea communications channels, with greatly increased flexibility and capacity, through what amounts to microwave towers in the sky.

Such a system would also be uniquely suited to expanding service to the developing areas of the world. It would provide added security and reliability, both by making available alternate routes and by affording direct access to areas now reached only by means either of radio, which is subject to sunspot interference, or by intermediate land links through other countries. The satellite system would even be flexible enough to permit use of portable ground stations to give access on short notice to trouble spots around the world.

The demand for additional, more versatile oversea communications facilities is growing tremendously. The volume of oversea telephone calls is expected to increase from 4 million in 1960 to 20 million in 1970 and nearly 100 million by 1980. This means that oversea telephone circuits will have to be increased from the some 550 we have today to about 12,000 in 1980. The international telegraph business is also growing rapidly.

In addition, military requirements for all forms of communications are increasing and we must provide communications systems that

BEFORE THE

Federal Communications Commission

WASHINGTON 25, D. C.

IN THE MATTER

of

An Inquiry Into the Administrative
and Regulatory Problems Relating
to the Authorization of Commer-
cially Operable Space Communica-
tions Systems.

Docket
No. 14024

**REPLY OF AMERICAN TELEPHONE AND
TELEGRAPH COMPANY.**

The comments filed in response to the Commission's Notice of Inquiry in this proceeding indicate general agreement among the parties on most of the issues.

The only substantial difference in point of view stems from the proposal by several parties to establish a separate company to own and operate the satellite links in an overseas communications system, and the proposal by some to include in the ownership and management of such a company the suppliers of satellite and missile hardware.*

* General Electric and Lockheed have been the principal proponents of including in the ownership of a newly organized satellite company the suppliers of satellite and missile equipment. In its testimony before the Committee on Science and Astronautics of the United States House of Representatives on May 10, 1961, Mr. L. Eugene Root testified for Lockheed as follows:

"We have not suggested here, as we have in the past and as a number of other interests have suggested, that the ownership and

would seriously delay and hamper the establishment of a satellite communications system and jeopardize its development in the public interest.

The avowed purpose of a satellite company such as proposed by Lockheed and General Electric is to enable satellite hardware suppliers, who have no responsibility to the public for the quality or scope of service, to participate in management and operation of a common carrier undertaking. Thus, for example, Lockheed's reply sets out an outline of the functions which a satellite company would perform (pp. 6-7). These include operating functions such as switching channels, monitoring frequencies and strength of signals, and metering the use—functions which directly affect the quality and reliability of service and which should be the responsibility of the communications carriers.

Thus, the establishment of a new company to own and operate the satellite links would have the effect of depriving the international common carriers of direct ownership and control of the facilities which they use to discharge their obligation to serve the public. To do this would seriously dilute the carriers' ability to discharge their responsibility to render service of the highest quality, since a fundamental link in the communications network would have been placed outside the control of the carriers responsible to the public for communications services.

Such an intermediate "carriers' carrier" entity, unprecedented in international communications, has never been found necessary or desirable in working out cooperative arrangements for use of facilities and provision of overseas communications services. Nor has the introduction of new technology such as the underseas

COMMUNICATIONS SATELLITE ACT OF 1962

APRIL 2, 1962.—Ordered to be printed

Mr. KERR, from the Committee on Aeronautical and Space Sciences,
submitted the following

REPORT

[To accompany S. 2814]

The Committee on Aeronautical and Space Sciences, to whom was referred the bill (S. 2814) to provide for the establishment, ownership, operation, and regulation of a commercial communications satellite system, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

PURPOSE OF THE BILL

American science and technology have made possible the establishment and operation of a communications system employing space satellites as relay stations, and linking all the nations of the earth for the ready transmission and receipt of communications among their peoples. The President, in recommending the enactment of legislation establishing a communications satellite corporation, stated that a new Communications Satellite Act is required to provide an appropriate mechanism for dealing effectively with the establishment, ownership, operation, and regulation of a commercial communications satellite system. It is the purpose of this bill to bring a system of that nature into being by means of a unique, privately owned enterprise working in cooperation with and, where appropriate, regulated by agencies of the U.S. Government. In so doing, the bill would enable the communications competence of and/or within the United States to be translated into actual performance and it is therefore a measure of immense long-range importance.

LEGISLATIVE HISTORY

On January 11, 1962, Senator Kerr introduced a bill to create a communications satellite corporation which authorized the establishment of a corporation—the ownership of which would be limited to U.S.

communications common carriers who were determined by the Federal Communications Commission to be eligible to participate in such ownership. On February 7, 1962, the President sent a proposal to the Congress providing for the establishment of a privately owned communications satellite corporation. This proposal was introduced in the Senate by Senator Kerr for himself and Senator Magnuson, and the bill (S. 2814) was referred to the Committee on Aeronautical and Space Sciences with an agreement that after being reported out by that committee it would be re-referred to the Commerce Committee for further consideration before being taken up in the Senate.

The President's proposal authorized the establishment of a corporation financed through the sale of stock to the public. The President indicated in his statement accompanying the proposal that such a corporation was by nature a Government-created monopoly and to meet the objective of widespread public ownership a formula was proposed whereby the common stock of this corporation would be divided into two classes. Class A stock, open to the public, including the carriers, would carry voting rights and could earn dividends, and class B stock, which could be purchased only by approved communications carriers, would have no voting rights or payment of dividends other than liquidating dividends. It was provided also that the amount of the investment of a carrier in class B stock would be eligible for inclusion in such carriers' rate base to the extent allowed by the FCC.

Hearings were scheduled by the committee for February 27, 28, March 1, 5, 6, and 7. On February 26, a bill (S. 2890) was introduced by Senator Kefauver for himself and Senators Morse, Yarborough, Gore, Gruening, Burdick, and Neuberger, which would establish a Government-owned communications satellite corporation. Because S. 2890 was not officially received by the committee until after the hearings were in progress, many of the witnesses addressed themselves only to S. 2650 and S. 2814. However, testimony was taken on S. 2890, a day certain was set aside for other witnesses, and upon the conclusion of the hearings a statement was filed in support of S. 2890 which was included in the printed hearings. At the hearings the committee received testimony from a Member of Congress, officials of NASA, the Department of Defense, the State Department, the Federal Communications Commission, the Department of Justice, Radio Corp. of America, Hawaiian Telephone Co., International Telephone & Telegraph, Hughes Aircraft Co., American Telephone & Telegraph, Communication Workers of America, and Americans for Democratic Action, as well as communications from other interested persons and organizations which were placed in the record.

Fourteen of the fifteen members of the committee on March 28 unanimously agreed to report favorably S. 2814 with amendments. The only abstaining member was Senator Magnuson who indicated that he did not want to participate in reporting the bill out in order to make certain that his vote would not prejudice consideration of the matter by the Commerce Committee.

SUMMARY OF THE BILL

The original proposal by the administration established an act to be known as the Communications Satellite Act of 1962. A committee amendment kept this short title, but amended S. 2814 so that

the National Aeronautics and Space Act of 1958 is amended to include a new title IV entitled "Space Communications."

Section 401, which deals with the declaration of policy and purpose, was not amended by the committee. In this section it is stated that it is the purpose of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable, a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will contribute to world peace and understanding. The section further provides that in providing for the widest possible participation by private enterprise, the U.S. participation in such a global system shall be in the form of a private corporation subject to appropriate governmental regulation, that all authorized users shall have nondiscriminatory access to the system, and that maximum competition shall be maintained in the provision of equipment and services utilized by the system. The section further provides that nothing in the new title IV should preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in the national interest.

Section 402 defines certain terms used in this title. The administration bill originally provided for "satellite terminal stations"—i.e., ground stations—to be owned and operated by the corporation. There was no mention of the additional possibility of joint or separate ownership of such stations by the corporation and authorized communication carriers. Amendments made by the committee in following portions of the bill would authorize such joint or separate ownership of these stations, and amendments in the definitions section were made to conform to this change of policy. The committee also made other changes in the interests of clarity and conciseness.

Section 403 provides for the Federal coordination, planning, and regulation essential to carry out the purposes of the legislation. Committee amendments to S. 2814 do not make any basic changes in the duties of the President, the National Aeronautics and Space Administration, and the Federal Communications Commission as set out in the President's proposal in connection with the new communications satellite corporation. The section as amended would provide that the President shall—

- (1) Aid in the development and foster the execution of a commercial communications satellite system;
- (2) Provide for continuous review of all phases of the development and operation of such a system;
- (3) Coordinate governmental activities in the field of international communication to insure full and effective compliance with the policies set forth in the legislation;
- (4) Exercise such general supervision over the relationships of the corporation with foreign governments or entities or with international bodies as would assure that such relationships would be consistent with the national interest and foreign policy of the United States;
- (5) Insure that timely arrangements would be made for foreign participation in the establishment and use of a communications satellite system. The committee eliminated as unnecessary language referring to the determination of the most constructive role

for the United Nations on the ground that this was entirely within the authority of the President;

(6) Take necessary steps to insure utilization of the commercial system for general governmental purposes whenever there is no requirement for a separate communications system to meet unique governmental needs; and

(7) Insure effective and efficient use of the electromagnetic spectrum and the technical compatibility of the system with existing communications facilities both in the United States and abroad.

The committee struck from the original bill language authorizing officials of the Government to inspect the books, etc., of the corporation and to report to the President on the activities of the corporation on the ground the changes made by the committee which permit the President to appoint three directors of the corporation make this provision unnecessary.

The National Aeronautics and Space Administration would—

(1) Advise the FCC on technical characteristics of the system;

(2) Coordinate its research and development program in space communications with the research and development program of the corporation;

(3) Assist the corporation by furnishing to it on a reimbursable basis such satellite launching and associated services as NASA deems necessary for the development of such a system;

(4) Consult with the corporation with respect to the technical characteristics of the system;

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

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

The committee left essentially intact the authority of the Federal Communications Commission with respect to the corporation. The legislation provides that the FCC shall—

(1) Prescribe appropriate rules and regulations to insure effective competition in the procurement by the corporation of apparatus, equipment, and services;

(2) Insure that present and future communications common carriers authorized by it to provide services shall have nondiscriminatory use of, and equitable access to, the system on just and reasonable terms and conditions and to regulate the manner in which available facilities of the system are allocated among such users;

(3) Be authorized to require the establishment of communication by the corporation and the appropriate common carrier or carriers whenever the Secretary of State, after obtaining the advice of NASA as to technical feasibility, has advised that commercial communication to a particular foreign point by means of the system should be established in the national interest;

(4) Insure that facilities of the communications satellite system are technically compatible with the terminal stations and with existing communications facilities;

(5) Prescribe such accounting regulations and systems and engage in such ratemaking procedures to insure that any economies made possible by the system would be appropriately reflected in rates for public communication services;

(6) Approve technical characteristics of the operational communications satellite system to be employed by the corporation and the satellite terminal stations. The committee struck language which would require the FCC to consult with the executive branch on the ground that inclusion of such expressed directions to the FCC was unnecessary.

(7) The committee added one new provision relating to the authority of the FCC to license the corporation as well as communications common carriers to establish and maintain, either jointly or separately, satellite terminal stations.

The communications common carriers testifying before the committee were unanimous in the view that they should establish and maintain the ground stations (satellite terminal stations) in the United States. They pointed out that the ground stations abroad will be owned by the foreign communications agencies and not by the corporation. They also stressed the fact that the ground stations will be a terrestrial facility which will become an integral part of the domestic communications networks and should be owned and operated by the carriers who are responsible for service to the public. Another important consideration is that, while as a practical matter there probably can be only one system of commercial satellites, there can be a number of ground stations all served by the same satellite system. Thus, competition might well be fostered if the carriers establish and operate their own ground stations. The committee believes that the carriers should be encouraged to establish ground stations, but that the corporation should not be excluded from providing such stations if circumstances should so require. The bill provides that the Federal Communications Commission shall, where the public interest, convenience, and necessity would be served thereby, license the corporation as well as the communications common carriers to establish and maintain ground stations, and that in the exercise of this authority the Commission should encourage establishment of such stations by the carriers.

The committee also required the Commission to insure that each authorized carrier shall have equitable access to, and nondiscriminatory use of, such stations on just and reasonable terms.

Section 404 provides for the creation of a communications satellite corporation. The section specifies that this corporation will be a private corporation for profit and not an agency or establishment of the U.S. Government. To the extent consistent with the title, the District of Columbia Business Corporation Act shall apply to the corporation. Thus, for example, where this legislation is silent on a matter of corporate practice, that Corporation Act will govern. The committee's only amendment to this section struck language which specified that this corporation would be called the Communications Satellite Corp. on the ground that the name should be designated by the incorporators at such time as the articles of incorporation are filed.

Section 405 provides for the initial organization of the corporation. The section provides that the President of the United States shall designate incorporators who will serve as the initial board of directors until the first annual meeting of shareholders or until their successors

stance, was prevented from filing a timely appeal.

This case does not raise any such concern. To the contrary, the record reveals a complete failure by Mrs. Clifford and her son to exercise due diligence in pursuing this claim. Mrs. Clifford, when presented a notice apprising her of her right to appeal with the Board, did nothing. Although appellant asserts that his mother spoke with a Board employee, who told her that the 1969 social security filing did not qualify as a filing for railroad benefits, no record of a conversation with the unnamed employee exists. We are hesitant to accord this rather flimsy excuse sufficient weight to qualify as good cause for a thirteen-year delay.

Our conclusion holds true even with the added weight of Mrs. Clifford's request that the Administration take some action to use her 1969 filing as a protective filing for railroad benefits. In effect, she was informed by the Administration for a second time that redress lay with the Board. Mrs. Clifford never acted on the Administration's instruction to contact the Board "as soon as possible," however. She merely accepted the annuity award granted by the Board at that point. Had she pressed her claim, chances are good that she would have learned of the regulation concerning the use of social security filings as railroad retirement benefits filings.

In short, we decline to overturn the Board's decision not to reopen the case when the exercise of due diligence would have revealed the grounds for a timely appeal. Appellant has not advanced a good cause to overcome this failure.

Affirmed.

Christine STOWELL, et al.,
Plaintiffs, Appellants,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,
Defendant, Appellee.

No. 93-1254.

United States Court of Appeals,
First Circuit.

Heard Aug. 3, 1993.

Decided Sept. 10, 1993.

Class action suit was brought alleging that the Secretary of Health and Human Services violated the maintenance-of-effort provision contained in the Medicare Catastrophic Coverage Act which directs the Secretary not to approve any state's Medicaid plan if state's AFDC program sets "payment levels" lower than those in effect on May 1, 1988. The United States District Court for the District of Maine, Gene Carter, J., 812 F.Supp. 264, entered judgment in favor of the Secretary, and plaintiffs appealed. The Court of Appeals, Selya, Circuit Judge, held that the Secretary permissibly concluded that the term "payment levels" as used in statute refers to baseline payments received under state's AFDC program, and not to total monies actually received by each AFDC family.

Affirmed.

1. Statutes ⇨188

Whenever a court is charged with statutory interpretation, text of the statute must be its starting point.

2. Social Security and Public Welfare ⇨241.60

Section of the Social Security Act providing that Secretary of Health and Human Welfare shall not approve a state's Medicaid plan if state's AFDC "payment levels" are less than those in effect on May 1, 1988 is ambiguous; term "payment levels" could refer to stipendiary amounts of basic AFDC grants, but could also refer to total income,



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Lambert v.
r.1993).

the court adopted the recommendation. See *id.* at 265-66. Plaintiffs appeal.

II. ANALYSIS

The issue is whether the Secretary's continued funding of Maine's Medicaid plan, despite the state's decision to lower its standard of need, violates the maintenance-of-effort provision.⁴ We have repeatedly urged that, when a *nisi prius* court handles a matter appropriately and articulates a sound basis for its ruling, "a reviewing tribunal should hesitate to wax longiloquent simply to hear its own words resonate." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 989 F.2d 36, 38 (1st Cir.1993). Because we are in substantial agreement with Magistrate Judge Cohen's thoughtful disquisition, see *Stowell v. Sullivan*, 812 F.Supp. at 266-71, we invoke this principle and confine ourselves to a few decurtate observations.

[1, 2] *First*: Whenever a court is charged with statutory interpretation, the text of the statute must be its starting point. See *Estate of Cowart v. Nicklos Drilling Co.*, — U.S. —, —, 112 S.Ct. 2589, 2594, 120 L.Ed.2d 379 (1992). Here, however, the statutory language does not directly answer the question posed. It provides that:

the Secretary shall not approve any State plan for medical assistance if—

(1) The State has in effect, under its [AFDC plan], payment levels that are less than the payment levels in effect under such plan on May 1, 1988.

42 U.S.C. § 1396a(c)(1). The term "payment levels," which is not defined elsewhere in the statute, could, as the Secretary claims, refer to the stipendiary amounts of basic AFDC grants; it could also, as appellants claim, refer to total income, that is, grant amounts plus supplemental income actually received. Given two plausible alternatives, and recognizing that the universe of interpretive possibilities may extend beyond them, we think the statute contains an undeniable ambiguity.

4. The Secretary also argues that, even if the term "payment levels" is given the expansive reading that appellants suggest, the federal government's obligation to intervene would not arise unless

[3, 4] Appellants resist this conclusion. Pointing out that, in certain other contexts, Congress referred to the basic AFDC grant as the "payment standard." 42 U.S.C. § 602(h) (1988), they argue that the term "payment levels" must mean something else. This argument founders. It is apodictic that Congress may choose to give a single phrase different meanings in different parts of the same statute. See *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 830 n. 10 (1st Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993). It is a natural corollary of this truism that Congress, in its wisdom, may choose to express the same idea in many different ways. *Cf., e.g., Cowart*. — U.S. at —, 112 S.Ct. at 2596 (stating that Congress's eschewal of a term of art used elsewhere in the same statute, in favor of a more descriptive term, does not necessarily mean that the two terms bear different meanings). Any other interpretive rule would defy human nature and ignore common practice. Courts should go very slowly in assigning talismanic importance to particular words or phrases absent some cogent evidence of legislative intent.

Second: Appellants' attempt to score a touchdown by a selective perusal of legislative history puts no points on the board. The centerpiece of this effort is a passage evincing a congressional purpose "to assure that the resources [for Medicaid-related coverage of certain persons] are not diverted from the [AFDC] program." House Conf. Rep. No. 661, 100th Cong., 2d Sess. 145, 256, *reprinted in* 1988 U.S.C.C.A.N. 803, 923, 1034. But this language does not help to resolve the statute's linguistic ambiguity in appellants' favor.

For one thing, the passage, like the statute itself, leaves unaddressed the question whether Congress's underlying concern lay with all payments affecting the AFDC program or only with the stipendiary amounts of basic AFDC grants—and an ambiguous stat-

and until Maine sought approval of amendments to its Medicaid plan. We need not consider this contention and, consequently, take no view of it.

cal specialists or lay witnesses. of defense counsel is far more accounted by the factfinder as and biased. Defense counsel discouraged in the first place for fear of abrogating an ability or the attorney-client e, e.g., ABA Criminal Justice Standards § 7-4.8(b), Com- luction, p. 209, and Commen- 213 (1989). By way of example t hand, it should come as little either of Medina's two attor- ng the dozens of persons testi- he six days of competency pro- case. 1 Tr. 1-5 (witness list).

psychological inquiries, compe- ons are "in the present state of nces ... at best a hazardous , conscientious." *Solesbee v. U.S.*, at 23, 70 S.Ct., at 464 ., dissenting). See also *Ake v. U.S.*, at 81, 105 S.Ct., at 1095; *Texas*, 441 U.S. 418, 430, 99 S.Ct. 11, 60 L.Ed.2d 323 (1979); S., at 176, 95 S.Ct., at 906. ole uncertainty expands the where the factfinder will con- lence is in equipoise. The .t. dismisses this concern on "[d]ue process does not re- y conceivable step be taken, at to eliminate the possibility of innocent person." *Ante*, at *Patterson*, 432 U.S., at 208, 97

Yet surely the Due Process s some conceivable steps be ate the risk of erroneous con- urch in vain for any guiding Court's analysis that deter- e risk of a wrongful conviction acceptable and when it does

on of the burden of proof re- l judgment about how the risk l be distributed between liti- *Intosky v. Kramer*, 455 U.S. Ct. 1388, 1395, 71 L.Ed.2d 599

(1982) (standard of proof). This Court has said it well before: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington v. Texas*, 441 U.S., at 427, 99 S.Ct., at 1810. The costs to the State of bearing the burden of proof of competency are not at all prohibitive. The Court acknowledges that several States already bear the burden, *ante*, at 2578, and that the allocation of the burden of proof will make a difference "only in a narrow class of cases where the evidence is in equipoise," *ante*, at 2579. In those few difficult cases, the State should bear the burden of remitting the defendant for further psychological observation to ensure that he is competent to defend himself. See, e.g., Cal.Penal Code Ann. § 1370(a)(1) (West Supp.1992) (defendant found incompetent shall be "delivered" to state hospital or treatment facility "which will promote the defendant's speedy restoration to mental competence"). See also *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972) (Due Process Clause allows State to hold incompetent defendant "for reasonable period of time necessary to determine whether there is a substantial probability" of return to competency). In the narrow class of cases where the evidence is in equipoise, the State can reasonably expect that it will speedily be able to return the defendant for trial.

IV

Just this Term the Court reaffirmed that the Due Process Clause prevents the States from taking measures that undermine the defendant's right to be tried while fully aware and able to defend himself. In *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), the Court reversed on due process grounds the conviction of a defendant subjected to the forcible administration of antipsychotic drugs during his trial. Rejecting the dissent's insistence that actual prejudice be shown, the Court found it

to be "clearly possible" that the medications affected the defendant's "ability to follow the proceedings, or the substance of his communication with counsel." *Id.*, at 137, 112 S.Ct., at 1816 (emphasis added). See also *id.*, 141, 112 S.Ct., at 1818 (KENNEDY, J., concurring in judgment) (prosecution must show "no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel") (emphasis added).

I consider it no less likely that petitioner Medina was tried and sentenced to death while effectively unable to defend himself. That is why I do not share the Court's remarkable confidence that "[n]othing in today's decision is inconsistent with our long-standing recognition that the criminal trial of an incompetent defendant violates due process." *Ante*, at 2581. I do not believe the constitutional prohibition against convicting incompetent persons remains "fundamental" if the State is at liberty to go forward with a trial when the evidence of competency is inconclusive. Accordingly, I dissent.



505 U.S. 469, 120 L.Ed.2d 379

ESTATE OF Floyd COWART, Petitioner

v.

NICKLOS DRILLING COMPANY et al.

No. 91-17.

Argued March 25, 1992.

Decided June 22, 1992.

Appeal was taken from decision of Benefits Review Board which affirmed award of Longshore and Harbor Workers' Compensation Act (LHWCA) benefits to injured employee. In second action, employer petitioned for review of Benefits Review Board

by congressional reenactment cannot overcome the plain language of a statute. *Demarest v. Manspeaker*, 498 U.S., at 190, 111 S.Ct., at 603. And the language of § 33(g) is plain.

Our interpretation of § 33(g) is reinforced by the fact that the phrase "person entitled to compensation" appears elsewhere in the statute in contexts in which it cannot bear the meaning placed on it by Cowart. For example, § 14(h) of the LHWCA, 33 U.S.C. § 914(h), requires an official to conduct an investigation upon the request of a person entitled to compensation when, *inter alia*, the claim is controverted and payments are not being made. For that provision, the interpretation¹⁷⁹ championed by Cowart would be nonsensical. Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under Cowart's reading, the reduction would not be available to employers who had not yet begun payment at the time of the third-party recovery. That result makes no sense under the LHWCA structure. Indeed, when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in §§ 33(f) and 33(g). *Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1, 4-5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 106 S.Ct. 1600, 1606, 89 L.Ed.2d 855 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB, see *supra*, at 2594.

Yet another reason why we are not convinced by the Board's position is that the Board's interpretation of "person entitled to compensation" has not been altogether consistent; and Cowart's interpretation may not be the same as the Board's in precise respects. At times the Board has said this language refers to an employee whose employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement." *Dorsey*, 18 BRBS, at 28; 23 BRBS, at 44 (case below). At other times, sometimes within the same opinion, the Board has spoken in terms of the employer either making payments or acknowledging liability. *O'Leary*, 7 BRBS, at 147-149; *Dorsey, supra*, at 29; see also *In re Wilson*, 17 BRBS 471, 480 (ALJ 1985). Cowart, on the other hand, would include within the phrase both employees receiving compensation benefits and employees who have a judicial award of compensation¹⁸⁰ but are not receiving benefits. Brief for Petitioner 6. This distinction is an important part of Cowart's response to the position of the United States. Reply Brief for Petitioner 8. It may be that the gap between the Board's and Cowart's positions can be explained by the Board's inconsistency; but that in itself weakens any argument that the Board's interpretation is entitled to some weight.

We do not believe that Congress' use of the word "employee" in subsection (g)(2), rather than the phrase "person entitled to compensation," undercuts our reading of the statute. The plain meaning of subsection (g)(1) cannot be altered by the use of a somewhat different term in another part of the statute. Subsection (g)(2) does not purport to speak to the question of who is required under subsection (g)(1) to obtain prior written approval.

Cowart's strongest argument to the Court of Appeals was that any ambiguity in the statute favors him because of the deference due the OWCP Director's statutory construction, a deference which Nicklos and Compass concede is appropriate. Brief for Private

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Respondents 7. As we have said, we are not
faced with this difficult issue because the
views of the OWCP Director have changed
since we granted certiorari. *Supra*, at 2594.
It seems apparent to us that it would be
quite inappropriate to defer to an interpreta-
tion which has been abandoned by the policy-
making agency itself. It is noteworthy,
moreover, that even prior to this case the
position of the Department of Labor has not
been altogether consistent. It is true that
the Director has twice, albeit in a somewhat
equivocal manner, endorsed the Board's rul-
ings in *O'Leary* and *Dorsey*. First, in a 1986
circular discussing the Board's *Dorsey* case a
subordinate of the Director stated: "While
the Board's position may not be totally con-
sistent with the amended language of Section
33(g), we think it is a rational approach and
have advised the Associate Solicitor that we
will support this position." United States
Dept. of Labor, LHWCA Circular No. 86-3,
p. 1 (May 30, 1986). ⁴¹Next, in a manual
published in 1989 the Director again adopted
the Board's position that written approval of
a settlement is required only from employers
who are paying compensation; but the state-
ment ends with a qualifying comment, that
"[t]he issue of consent to a settlement can be
a complex matter. Judicial interpretation
may be necessary to resolve the issue. (See
LHWCA CIRCULAR 86-03, 5-30-86)." ⁴²
U.S. Dept. of Labor, Longshore and Harbor
Workers' Compensation Act (LHWCA) Pro-
cedure Manual, ch. 3-600, ¶ 9 (Sept. 1989).
On the other hand, the Department of Labor
has issued regulations (effective in their cur-
rent form since 1986) which are explicit that
the written-approval requirement of § 33(g)
applies to a settlement for less than the
amount of compensation due under the
LHWCA, "regardless of whether the employ-
er or carrier has made payments of [sic]
acknowledged entitlement to benefits under
the Act." 20 CFR § 702.281(b) (1991). So
the Department of Labor has not been
speaking with one voice on this issue. This
further diminishes the persuasive power of

the Director's earlier decision to endorse the
BRB's questionable interpretation, a decision
he has since reconsidered.

The history of the Department of Labor
regulation goes far toward confirming our
view of the significance of the 1984 amend-
ments. The original § 702.281, proposed in
1976 and enacted in final form in 1977, re-
quired only that an employee notify his em-
ployer and the Department of any third-
party claim, settlement, or judgment. 41
Fed.Reg. 34297 (1976); 42 Fed.Reg. 45303
(1977). The sole reference to the forfeiture
provisions was a closing parenthetical: "Caution: See 33 U.S.C. § 933(g)." In 1985, in
response to the 1984 congressional amend-
ments, the Department proposed to amend
§ 702.281 by replacing the closing parenthet-
ical with a subsection (b), stating that failure
to obtain written approval of settlements for
amounts less than the compensation due un-
der the Act would lead to forfeiture of future
benefits. 50 Fed.Reg. 400 (1985). In re-
sponse to comments, the final ⁴³rulemaking
modified § 702.281(b) to clarify that the for-
feiture provision applied regardless of wheth-
er the employer was paying compensation.
51 Fed.Reg. 4284-4285 (1986). Thus the evo-
lution of § 702.281 suggests that at least
some elements within the Department of La-
bor read the 1984 statutory amendments to
adopt a rule different from the Board's previ-
ous decisions.

[7] We also reject Cowart's argument
that our interpretation of § 33(g) leaves the
notification requirements of § 33(g)(2) with-
out meaning. An employee is required to
provide notification to his employer, but is
not required to obtain written approval, in
two instances: (1) Where the employee ob-
tains a judgment, rather than a settlement,
against a third party; and (2) Where the
employee settles for an amount greater than
or equal to the employer's total liability.
Under our construction the written-approval
requirement of § 33(g)(1) is inapplicable in
those instances, but the notification require-
ment of § 33(g)(2) remains in force. That is

NATIONAL LABOR RELATIONS BOARD v. LION
OIL CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

No. 4. Argued October 8, 1956.—Decided January 22, 1957.

Section 8 (d) (4) of the National Labor Relations Act, as amended, provides that a party who desires to modify or terminate a collective bargaining contract must continue "in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after . . . notice is given or until the expiration date of such contract, whichever occurs later." Under a collective bargaining contract between an employer and a labor union, the earliest date upon which the contract was subject to amendment was October 23, 1951, and the contract became terminable after that date upon further notice by either party. The union gave notice of proposed amendments 60 days in advance of October 23, and a strike occurred long after that date, though without further notice of termination of the contract. *Held:*

1. The notice and waiting requirements of § 8 (d) were fully satisfied; the strike did not violate § 8 (d) (4); and the strikers did not lose their status as employees entitled to the protection of the Act. Pp. 283-294.

(a) In expounding a statute, courts must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy. P. 288.

(b) A construction of a statute that would produce incongruous results is to be avoided. P. 288.

(c) The substitution of collective bargaining for economic warfare, and the protection of the right of employees to engage in concerted activities for their own benefit, were dual purposes of the Taft-Hartley Act; and a construction which serves neither of these aims is to be avoided. *Mastro Plastics Corp. v. Labor Board*, 350 U. S. 270, 284. P. 289.

(d) "Expiration date" in § 8 (d) (1) of the Act relates to the date when a contract is subject to modification as well as the date when it would come to an end; and the same phrase in § 8 (d) (4) must carry the same meaning. Pp. 289-290.

(e) This construction gives meaning to the congressional language which accords with the general purpose of the Act. Pp. 290-292.

352 U. S.

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Opinion of the Court.

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tract itself contemplates such bargaining. It would be anomalous for Congress to recognize such a duty and at the same time deprive the union of the strike threat which, together with "the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements."⁹

Although a 1948 committee report is no part of the legislative history of a statute enacted in 1947, we note that the Joint Committee on Labor-Management Relations, made up of members of the Congress which passed the Taft-Hartley Act, in its final report reached the same conclusion we do:

"Reading section 8 (d) as a whole seems to lead to the conclusion that the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages. Use of the words 'or modify' and 'or modification' in the proviso, and use of 'or modification' in section 8 (d)(1), and the statement in the final paragraph of the section that the parties are not required to agree to any modification effective before the contract may be reopened under its terms, all seem to contemplate the right of either party to insist on changes in the contract if they have so provided. The right of the union would be an empty one without the right to strike after a 60-day notice."¹⁰

⁹ Subcommittee on Labor and Labor-Management Relations, *Factors in Successful Collective Bargaining*, S. Rep. under S. Res. 71, 82d Cong., 1st Sess. 7 (Committee Print).

¹⁰ S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 62. In 1949 Senator Taft, who was a member of the Joint Committee, introduced a clarifying amendment to § 8 (d). See S. Rep. No. 99, Pt. 2, 81st Cong., 1st Sess. 42 (minority report). The amendment, along with a group of others, passed the Senate, 95 Cong. Rec. 8717, but did not become law.

INTERNATIONAL MARITIME SATELLITE ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS
OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

RECEIVED
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H.R. 11209

A BILL TO PROVIDE FOR THE ESTABLISHMENT, OWNERSHIP, OPERATION, AND GOVERNMENTAL OVERSIGHT AND REGULATION OF INTERNATIONAL MARITIME SATELLITE TELECOMMUNICATIONS SERVICES

APRIL 4, 1978

Serial No. 95-101

Printed for the use of the
Committee on Interstate and Foreign Commerce



problem. We believe provision must be made for effective oversight of COMSAT before expanding its functions.

Without prejudice to our position set out above, under no circumstances should COMSAT be given sole control of the U.S. share of INMARSAT and also serve large users directly by-passing the existing carriers. There is no basis to grant COMSAT control of the essential facilities for maritime satellite communications and also give it a built-in competitive advantage by legislative fiat over the carriers which have traditionally supplied and supported the maritime service.

However, H.R. 11209 does not appear to limit COMSAT's role to that of a "carrier's carrier" and has dispensed with the concept of "authorized user". Thus, COMSAT is not prohibited from serving the public directly, provided non-COMSAT-owned facilities are employed to reach the earth station. To the contrary, H.R. 11209 allows COMSAT to interconnect directly both with domestic common carriers and private communications systems. Although the latter term was not defined in H.R. 11209, we presume it is intended to make it possible for COMSAT to serve the corporate networks of large end users, such as those of the major oil companies which operate tanker fleets.

If COMSAT is selected as the chosen instrument to serve as the designated U.S. entity, the Bill must not alter existing industry arrangements by permitting COMSAT to compete with others not so favored. To permit COMSAT to serve the domestic market either directly or by means of an interconnection with domestic carriers by satellite communications would disserve the public since RCA Globcom, and other international record carriers, which supply the bulk of the nation's high seas maritime communications via HF radio, would still be providing HF service. These carriers will be required to continue to maintain such facilities for the foreseeable future. COMSAT should not be allowed to exploit a monopoly over the latest technology to the detriment of the existing industry.

In conclusion, RCA Globcom does not believe that the present Bill, which would vest exclusive control of maritime satellites in COMSAT, represents the preferred or even an acceptable way to proceed in this area. At a minimum, we believe it would be premature to make a binding decision to place the future of maritime satellite communications in the hands of COMSAT until the study of COMSAT's organization and structure and the companion study of the public coast stations called for in the Bill are completed and the data supplied subjected to critical evaluation. A decision which could have the effect of restructuring an existing industry providing vital public services should be made only on the basis of complete data on the total industry.

We accordingly urge you to amend the Bill to provide for a partnership or new corporation to be financed by existing maritime carriers to be the U.S. designated entity in INMARSAT. Such action will better serve the interest of the using public and help assure the maintenance of a healthy, viable U.S. maritime communications industry.

Thank you very much.

Mr. VAN DEERLIN: Thank you, Mr. DeRosa.
Dr. Naleszkiewicz?

STATEMENT OF WLADIMIR NALESZKIEWICZ, REPRESENTING WILLIAM FISHMAN, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, DEPARTMENT OF COMMERCE, ACCOMPANIED BY GREG SKALL, COUNSEL

Mr. NALESZKIEWICZ: Thank you, Mr. Chairman.

My name is Wladimir Naleszkiewicz and I am appearing today as a substitute for Mr. Fishman, who is scheduled to testify. Unfortunately, the rescheduling of this hearing made it impossible for Mr. Fishman to be here due to a prior commitment to serve as the U.S. representative to an international meeting of the OECD in Paris. However, with your permission, sir, I would like to offer Mr. Fishman's written testimony for the record, and to summarize it here only briefly. Thank you, sir.

Prior to reorganization of the Office of Telecommunications Policy as the National Telecommunication and Information Administration, NTIA, I served as a senior economist with the Interna-

initially by certified common carriers in proportions to be determined by the Federal Communications Commission.

This approach avoids extending the Comsat existing statutory monopoly into a new field. It permits any carrier with a desire to do so to invest in the new service provided that the FCC can be satisfied that such investment is in the public interest. It also spreads among a number of private companies the decision whether or not to join Inmarsat, and it minimizes the conflicts of interest on the individual corporate level that any single existing corporation might have.

Under the administration's proposal, the FCC would retain plenary jurisdiction over ownership in the entity in the first instance, and could restructure such ownership as the public interest requires from time to time. We believe it to be appropriate for the legislation to lay out the basic nature of the entity, whole leaving to the FCC the details of the intercorporate and other relationships between the entity and its constituent owners.

For these reasons, we urge the subcommittee to adopt the designated entity approach set out in H.R. 9647, section 5.

Insofar as the governmental oversight is concerned, and since the U.S. Government accepts no financial and operational responsibility for provision of Inmarsat services, the entity's position as the U.S. participant in an international organization is rather delicate, but at the same time it has to reflect and to be responsive to national policy and governmental problems designed to carry out governmental responsibilities and obligations; for instance, the safety of life at sea.

While the entity will be a private corporation, there remains areas of substantial governmental interest. Accordingly, in addition to the provision of traditional full regulatory authority of the FCC, we believe that provision should be included for Presidential oversight and coordination to ensure that institutional arrangements and operation and procedures that are responsive to national interests and consistent with the foreign policy of the United States.

Mr. Chairman, I understand that the H.R. 11209 was somehow changed, and some amendments were made in that particular part of the bill. Unfortunately, the U.S. mail being what it is, we have not received it yet. The question of Presidential oversight, Mr. Chairman, is very important in our view, and I know the provisions exist in both bills. H.R. 11209, with the adjustments, as counsel explained, would probably take care of our concern.

Furthermore, we have a slight problem in the text. We would suggest that in H.R. 11209, should H.R. 11209 be the prevailing text, language appearing in section 4(a)(6) of H.R. 9647, conferring certain war powers on the President, as in section 606 of the Communications Act of 1934, be added, Mr. Chairman.

In summary, we believe the structure of the entity should be sufficiently defined by legislation to ensure an effective, unified U.S. position, be responsive to both government and non-government needs, encourage maximum private sector participation, and commercial competition, and provide effective maritime service at minimum possible cost to the user.

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INTERNATIONAL MARITIME SATELLITE TELECOMMUNICATIONS

HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2211

TO PROVIDE FOR THE ESTABLISHMENT, OWNERSHIP, OPERA-
TION, AND GOVERNMENT OVERSIGHT AND REGULATION OF
INTERNATIONAL MARITIME MOBILE SATELLITE TELECOM-
MUNICATIONS SERVICES, AND FOR OTHER PURPOSES

H.R. 11209

TO PROVIDE FOR THE ESTABLISHMENT, OWNERSHIP, OPERA-
TION, AND GOVERNMENTAL OVERSIGHT AND REGULATION OF
INTERNATIONAL MARITIME SATELLITE TELECOMMUNICA-
TIONS SERVICES

MAY 8, 1978

Serial No. 95-99

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DEPARTMENT OF JUSTICE,
ASSISTANT ATTORNEY GENERAL,
Washington, D.C., May 26, 1978.

HON. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 2211, a bill entitled the "International Maritime Mobile Satellite Telecommunications Act of 1977." This proposed legislation has been carefully reviewed.

S. 2211 has been proposed by the Office of Telecommunications Policy to provide the institutional framework for United States participation in the International Maritime Satellite Organization (Inmarsat). Inmarsat is an international consortium organized under the auspices of the Inter-Governmental Maritime Consultative Organization, a London-based, specialized UN agency responsible for promoting cooperation on technical matters affecting shipping. When deployed, the Inmarsat system will afford superior ship-to-shore and ship-to-ship communications services via space satellite evidently at distances 100 miles or more from shore; at closer ranges, existing high frequency and very high frequency radio communications systems would be employed.

This proposed legislation is modeled on the 1962 Communications Satellite Act (47 U.S.C. § 701 et seq. (1970)), which provided the legislative basis for U.S. involvement in the International Telecommunications Satellite Consortium by way of a special corporation, Comsat. Under section 5 of S. 2211, for example, a special corporation would be formed to represent U.S. interests in Inmarsat, subject to the foreign policy guidance of the President and the Department of State. Initially, this special corporation would be owned by U.S. communications common carriers, as authorized by the Federal Communications Commission. At the outset, only such carriers as invest in the corporation would be allowed direct access to the Inmarsat system. End users, therefore, would be required initially to contract for services through one or more of the carrier investors. Five years following the enactment of S. 2211, however, end users would be afforded the opportunity to invest in the special corporation at their option and thus achieve the ability to directly avail themselves of its services, under such reasonable terms and conditions as the FCC may prescribe.

S. 2211 clearly deals predominantly with foreign policy and regulatory, not competition policy topics. The Department of Justice, however, has been concerned that no unnecessary, artificial constraints on competition and customer choice be imposed in maritime communications as have been imposed with respect to general purpose international communications. Under the 1962 Communications Satellite Act, for example, the FCC has barred Comsat from retailing services directly to end users. Comsat has been relegated to the role of a "carrier's carrier," with the result that users have paid artificially inflated prices. See *Authorized Users*, 4 FCC2d 421 (1966), *reconsid. denied*, 6 FCC2d 511 (1967). In other international communications services, the range of competitive choice available to users has traditionally been constrained, with users required to deal with certain carriers and not with others. See, e.g., *ITT Worldcom, Inc. v. FCC*, 555 F. 2d 1125 (2d Cir. 1977); *Western Union International v. FCC*, 544 F. 2d 87 (2d Cir. 1976).

The threat that customers may switch their business, or vertically integrate to satisfy their requirements, clearly can have a restraining influence on the prices that suppliers charge, and provide an invaluable spur to assure supplier responsiveness to customer needs. Subscription 5(f) of S. 2211 recognizes this fact, by providing end users with the option of dealing directly with the special corporation after an initial five year start-up period.

During this initial period, users would be free to contract with any of the carriers that had invested in the special corporation; the bill does not propose to limit the ability of carriers to invest in this entity and we assume that any carrier wishing to do so would be allowed to invest subject to the overall regulation of the FCC. This appears to us to be a reasonable balance between the need to provide some incentives for private sector investment in the entity and the need to assure that the end users are afforded the benefits of competition and service choice.

Improved communications capability is important to safer and more efficient ocean shipping. S. 2211 appears to be a responsible step towards assuring that

U.S. maritime interests will have available to them the improved communications services offered via the Inmarsat system. This proposed legislation raises foreign policy and regulatory issues. In those respects, we would defer to the considered views of the Department of State and the Federal Communications Commission. Subject to those views, however, the Department of Justice has no objection to the enactment of S. 2211.

The Office of Management and Budget has advised that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WALB,
Assistant Attorney General.

Senator HOLLINGS. We are especially pleased to see our friend Charles Ferris, Chairman of the Federal Communications Commission. Welcome.

STATEMENT OF HON. CHARLES D. FERRIS, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY WALTER HINCHMAN, CHIEF, COMMON CARRIER BUREAU; AND ROBERT BRUCE, GENERAL COUNSEL

Mr. FERRIS. It's good to be here, Mr. Chairman. With me today is Mr. Walter Hinchman, Chief of our Common Carrier Bureau, and Bob Bruce, our General Counsel.

I am pleased to have this opportunity, Mr. Chairman, to comment on international maritime satellite telecommunications developments. As you know, on March 15 the Commission considered a number of options for the organizational structure and operational arrangements for a U.S. operating entity to provide maritime satellite communications services. This matter is still under review; but in my statement today, I will discuss what appear to be the significant issues impacting on the provision of maritime satellite telecommunications services.

The presently operating Marisat system constitutes the first application of satellite technology to maritime communications. Through a system of three synchronous satellites, owned and operated as a joint venture by a consortium of four U.S. common carriers, Marisat provides maritime voice and record communications services to the U.S. Navy and to commercial maritime users. The Commission authorized Marisat only as a developmental program for a period of 5 years, ending in 1981. From a commercial standpoint, its primary purpose has been to demonstrate the feasibility of maritime satellite service and to establish system and operational parameters. Commercial voice and telex services began in the summer of 1976; and there are currently over 100 commercial shipboard terminals accessing the Marisat system.

The principal question regarding maritime telecommunications is how to assure the continued availability of maritime satellite communications services beyond the design life of Marisat. This question encompasses a number of subsidiary issues: One, should the United States participate in the proposed Inmarsat system, or seek some alternative arrangements for provision of international maritime satellite telecommunications services? Two, what entity should be

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effectively compete in accordance with the mandate laid down by Congress in 1962 in the Communications Satellite Act.

Thank you.

[The statement follows:]

STATEMENT OF E. A. GALLAGHER, CHAIRMAN, WESTERN UNION
INTERNATIONAL, INC.

Good morning, Mr. Chairman, I am E. A. Gallagher. I am Chairman and Chief Executive Officer of Western Union International, Inc., and President and Chief Executive Officer of its parent, WUI, Inc. For your convenience, a summary of my testimony follows:

SUMMARY

1. Comsat is a carrier's carrier, not a carrier's competitor, and its only authorized users are the international full service carriers. This was Congress' intent when it created Comsat in 1962 for its Intelsat mission, and the FCC has followed that intent to date. This is an equitable result because of the monopoly benefits conferred upon Comsat by Congress, and the financial benefits conferred upon Comsat by both the U.S. Government and the international carriers.

2. This basic industry structure and national telecommunications policy should not be revamped in legislation for the infant maritime satellite market, which legislation is only needed for the purpose of enabling the U.S. to sign the multinational Inmarsat agreement by the third quarter of 1979.

3. The public will benefit from a continuation of the competitive offering of maritime satellite service in which WUI and any other qualified international carrier fills a meaningful role through ownership of its satellite circuits. Neither Comsat nor any other carrier should be granted sole U.S. ownership of either the earth stations or the spacecraft.

4. WUI, by virtue of its existing maritime satellite circuit ownership, was able to announce, subject to FCC approval: (i) a 33 percent rate reduction for maritime telex calls; and (ii) a new Marigram message service to enable shipboard crews and passengers to contact their friends and families via satellite at \$2.25 per Marigram message, as compared with \$30 for a telephone call via satellite. WUI's strong credentials in maritime satellite communications are outlined later in this testimony.

5. Comsat has virtually an uncontrolled stranglehold over satellite communications. Any further statutory monopoly powers for Comsat would be harmful to the consumers and would increase the many conflict-of-interest positions now occupied by Comsat.

COMSAT WAS CREATED FOR A SPECIFIC LIMITED PURPOSE, NOT TO DOMINATE
INTERNATIONAL COMMUNICATIONS NOR TO RESTRAIN COMPETITION

Under current law, international point-to-point telecommunications via the Intelsat system is provided to the consumers by international full service carriers, including WUI. These carriers obtain satellite circuits from a sole source—Comsat, who is a carrier's carrier. Comsat has not been unleashed in competition with the carriers. Indeed, fair competition would be impossible because Comsat has a statutory monopoly over Intelsat satellite circuits and has been accorded subsidies and other support by the U.S. Government and by the international carriers.

In the case of the pilot maritime mobile satellite system (Marisat), both the international carriers and Comsat have been accorded a parity of opportunity. Each of the four Marisat carriers—Comsat General, RCA Globcom, WUI and ITT Worldcom—own and operate its own discrete circuits in both the space segment and the earth stations. Accordingly, there is no carrier's carrier concept today in Marisat. However, we accepted this compromise arrangement without prejudice to our firm views regarding Comsat's more proper role as a wholesaler, because this pilot system is dedicated primarily to the U.S. Navy and there is limited commercial capacity. Moreover, we shared the FCC's expectations (since proven wrong) that Comsat and its wholly-owned subsidiary, Comsat General, would operate independently and at arm's length.

as a separate corporate entity and not as a mere division of its parent (48 FCC 2d 529).

Comsat already has a stranglehold on satellite communications, aided and abetted by its statutory monopoly under the Communications Satellite Act of 1962. Comsat's many-faceted roles, as outlined above, make it the bridge between A.T. & T. and IBM, and give it the allure abroad of a U.S. quasi-governmental entity. Consequently, Comsat is possessed of tremendous commercial leverage, domestically; and is clothed with the appearance of near-governmental power, abroad. Less advantaged U.S. companies will find it ever more difficult to compete with Comsat in its non-monopoly endeavors, and they will be absolutely foreclosed in the Comsat-monopoly sectors.

NO ELIGIBLE CARRIER SHOULD BE EXCLUDED FROM A MEANINGFUL ROLE IN MARITIME SATELLITE COMMUNICATION

WUI and the other three Marisat carriers assumed the risk and provided the seed money for the world's first commercial maritime satellite system. Each of these carriers has acquired valuable experience in maritime satellite operations, but there is no assurance that they will gain any financial profit, or even recover their investment from this developmental system. Additionally, WUI and the other Marisat carriers have expended considerable efforts in their negotiations among themselves, with A.T. & T. and TRT Telecommunications Corp., and with the European Space Agency, all concerning the second generation system. WUI has also supplied expert representation to the U.S. delegation to the many pre-Inmarsat conferences, and to the Inmarsat Agreement International Preparatory Committee.

Any legislative exclusionary policy disqualifying carriers from ownership eligibility in ultimate communications systems, after such carriers undertook the risk of funding the initial developmental system, would be highly inequitable. Not only would these pioneering carriers be deprived of their ultimate opportunities to recoup their losses from the pilot system, but also the consumers would be deprived of the expertise of these carriers and the competitive benefits that they would bring to maritime satellite services and shipboard terminals.

If WUI is to be disqualified by legislative fiat from any future meaningful role in maritime satellites, WUI will be forced to reexamine its proposed participation in the second generation system, whose planning must move forward expeditiously this year.

A new broad-based corporation should be established to become the U.S. entity for Inmarsat. Each of the four existing Marisat carriers should be deemed eligible to participate, as should any other U.S. carrier whose participation is determined by the FCC to be in the public interest. The magnitude of the ownership participation by each carrier should be determined by the FCC. However, no single carrier should be authorized to own more than 49 percent of the new corporate designated entity, unless such greater ownership is required for the purpose of reaching 100 percent.

There are various bills available to the Subcommittee which would accomplish this result. One of those bills is S. 2211 which was introduced by Senator Hollings for himself and Senator Stevens on October 17, 1977. This bill was introduced at the request of the Administration, and its companion H.R. 8647 has been supported by the State Department, the former Office of Telecommunications Policy, and the Maritime Administration.

This Subcommittee's staff working draft, dated April 28, 1978, contains the framework of an acceptable bill, and WUI's counsel has submitted some proposed revisions to your staff. WUI's counsel will be pleased to work with your staff in implementing policy decisions of the Subcommittee. Hopefully, they will provide the basis for a meaningful role for WUI and any other qualified carriers in maritime satellite communications.

Thank you for according us the opportunity to testify.

Senator HOLLINGS. Thank you, Mr. Gallagher.

Mr. Knapp, I think you are the next gentleman—Mr. George F. Knapp.

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