

tion Reports

FCC 66-677

REPLY COMMENTS

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

were filed by:

In the Matter of AUTHORIZED ENTITIES AND AUTHORIZED USERS UNDER THE COMMUNICATIONS SATELLITE ACT OF 1962 } Docket No. 16058

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MEMORANDUM OPINION AND STATEMENT OF POLICY

(Adopted July 20, 1966)

nc. ncil s of the American Petroleum

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

PRELIMINARY STATEMENT

ers, Inc.

1. During April, May, and June 1965, the Commission received requests from several concerns (including press wire services, a newspaper, a television network, and an airline) for information regarding procedures to be followed in order that such concerns might be authorized to obtain satellite telecommunication services directly from the Communications Satellite Corp. (Comsat). On May 28, 1965, Comsat forwarded to the Commission its initial tariff, offering channels of communication via satellite to communications common carriers only. In an accompanying letter of transmittal, the corporation stated that in the event that any other entities, foreign or domestic, were to be authorized to obtain channels directly from Comsat, it would expect to supplement its tariff to provide for the offering of such channels.

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2. On June 16, 1965, the Commission issued a notice of inquiry stating that the foregoing developments presented issues concerning the extent to which, as a matter of law, entities in the United States other than communications common carriers can be authorized, under the Communications Satellite Act of 1962 (Satellite Act), to obtain telecommunication services directly from Comsat; the extent to which, as a matter of policy, such entities should be authorized to obtain services; the nature and scope of such services; the type of entities which may be deemed eligible to obtain the services; the nature and extent of the authorization required; and the policies and procedures which the Commission should establish to govern applications for such authorization.

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3. Legal briefs and comments were received on or before November 1, 1965, from Aeronautical Radio, Inc. (ARINC), and the Air Transport Association of America (ATAA), filing jointly; the American Telephone and Telegraph Co. (A.T. & T.); the Columbia Broadcasting System, Inc. (CBS); the Communications Satellite Corp. (Comsat); the Administrator of General Services (GSA); the

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us

to entities other than communications common carriers. We conclude that it was the intent of Congress that the Commission could authorize Comsat to afford access to the satellite system by noncarrier entities upon a proper finding that such access would serve the public interest and comport with the purposes and policies of the Satellite Act.

Authorization of Noncarriers To Deal With Comsat Must Be Regulated by the Commission and Be on a Specified Basis

20. Comsat can thus be authorized to serve noncarriers directly. But it does not follow, as some of the noncarriers appear to contend, that such authorization is to be left unregulated—that Comsat and the noncarriers are free to contract as they wish. Were that the case, Comsat could readily become, to a very substantial extent, a common carrier dealing directly with the public. But as stated (par. 18), and indeed acknowledged by all parties, Comsat was and is to serve primarily as a common carrier's common carrier.³ Further, under unrestricted dealings between Comsat and noncarriers, large users might tend to contract directly with Comsat, while members of the general public are left to deal with the carriers. In such circumstances, it would be clearly impossible for the Commission to carry out its responsibility under section 201(c)(5) to “* * * insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication service.” We also note here our responsibility under the Communications Act to conduct our regulatory activities in such fashion,

* * * as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges * * *

There is another basic tenet of the Satellite Act which would be violated by unrestricted dealings between Comsat and noncarriers. At least insofar as international common carrier communications services are concerned, Comsat is given a virtual statutory monopoly position with respect to the operation of the space segment of the commercial communications satellite system. See sections 102(d) and 305(a)(1) of the act. The Commission is not given authority to license any other U.S. carrier to operate the space segment of a satellite system to provide international communication service; instead, such carriers must procure the space segment facilities from Comsat. Clearly, if there were to be unrestricted dealings of Comsat with the public, it would mean that Comsat would be using its monopoly position to the detriment of the other carriers and, indeed, to deprive them of the opportunity to serve segments of the public under fair and equitable conditions.

21. Direct access by noncarriers to the satellite system must therefore be regulated in such manner as to insure consistency with the acts' purposes and with Comsat's primary role as a common carrier's common carrier. There is no question but that such regulation is a

³ Senate Committee on Commerce, Rept. No. 1584, June 11, 1962, pp. 18, 28-29; see also remarks by Senator Pastore on the floor of the Senate, 108 Cong. Rec. 16920.

F.C.C. 70-509

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ESTABLISHMENT OF REGULATORY POLICIES RE-
LATING TO THE AUTHORIZATION UNDER SEC-
TION 214 OF THE COMMUNICATIONS ACT OF
1934 OF SATELLITE FACILITIES FOR THE
HANDLING OF TRANSITING TRAFFIC

MEMORANDUM OPINION AND STATEMENT OF POLICY

(Adopted May 13, 1970)

BY THE COMMISSION:

PRELIMINARY STATEMENT

1. The Commission has under consideration a number of applications¹ and related pleadings, filed pursuant to section 214 of the Communications Act, involving requests for authority to acquire and operate communications satellite earth station facilities at overseas points, both foreign and domestic, for the intermediate—or transit—handling of traffic between the United States and either foreign countries or U.S. points beyond the intermediate transit points. Applicants include the Communications Satellite Corporation (Comsat), American Telephone & Telegraph Co. (A.T. & T.), Cable & Wireless/Western Union International, Inc. (C&W/WUI), ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA Globcom), and Western Union International, Inc. (WUI).

2. The authorizations sought by the carriers, other than Comsat, follow existing practice, whereby a U.S. carrier and its correspondent at an overseas point each provides half of the circuitry (cable, satellite, or high frequency radio). This approach is usually also applied to a through circuit which transits an intermediate point (e.g., in which a cable lands) with the two corresponding carriers each providing half the link from point of origin to the transit country or point, and each providing half of the remaining link (or links) to the point of destination. The instant applications all involve the acquisition by a U.S. carrier of a satellite half-circuit at a transit point to be connected with a complementary half-circuit to an ultimate point of communication. This circuit and another connection similarly furnished between the transit country and the other ultimate point form the entire circuit between the two points involved.

¹ See appendix for list of applications.

and 305(a) (1) of the Act. The Commission is not given authority to license any other U.S. carrier to operate the space segment of a satellite system to provide international communication service; *instead, such carriers must procure the space segment facilities from Comsat.* (Emphasis supplied by Comsat) 4 F.C.C. 2d 421, 428 (1966).

8. Section 305 of the Communications Satellite Act confers certain powers to Comsat so that it may achieve the objectives and carry out the purposes of the act. However, there are no specific words in section 305 which indicate exclusivity as to any of the powers set out therein. There is no doubt that the act provides that Comsat is the chosen instrument to provide space segment facilities to licensees of earth stations in the United States, and it was to this that our authorized user decision referred. That conclusion follows from a reading of section 305 with other sections of the act. Likewise, any interpretation of section 305 with respect to a similar exclusivity in Comsat to obtain, for use of other U.S. common carriers, space segment and earth station facilities abroad must rest on the act as a whole. We are unable, however, to conclude that such exclusivity is intended. Certainly it cannot be claimed that Congress provided that Comsat be the entity in the United States through which other carriers must obtain foreign earth station facilities, since this would be going further than intended with respect to the operation of earth stations in the United States itself. The consideration which impelled Congress to construct a statutory scheme pivoting on a chosen instrument ran only to the space segment, and not to the complementary earth stations.³ Even with respect to the space segment, though, we can discern no support in the congressional scheme for the proposition that the other U.S. carriers deal through Comsat for space segment facilities to be used with foreign earth station facilities, since such a result cannot be said to be necessary to the effectuation of the purposes of the act. We think, rather, that Congress left to the Commission the authority to determine whether, in the light of subsequent developments in a new and rapidly developing technology, the public interest would be served by adoption of a policy under which Comsat would be the U.S. entity to make arrangements for transit satellite circuits.

POLICY CONSIDERATIONS

10. Aside from its position on the law, Comsat argues that we adopt its position as a matter of policy. It points out that it is restricted to the furnishing of satellite facilities: that it is limited to a primary role as a carrier's carrier: that satellite facilities are in direct competition with cable facilities: and that it is inequitable to permit carriers having cable interests to bypass it in obtaining transit satellite facilities with an accompanying adverse effect on the economics of satellite service and the passing on of benefits to the public. It argues that

³ Sec. 201(c) (7) provides that "the Federal Communications Commission, in its administration of the provisions of the Communications Act of 1934, as amended, and as supplemented by this act, shall—grant appropriate authorizations for the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers jointly, as will best serve the public interest, convenience, and necessity. In determining the public interest, convenience, and necessity the Commission shall authorize the construction and operation of such stations by communications common carriers or the corporation, without preference to either."

F.C.C. 75-1304

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, D.C. 20554

In the Matter of
 COMMUNICATIONS SATELLITE
 CORPORATION
 Investigation into charges, practices,
 classifications, rates and regulations

Docket No. 16070

DECISION

(Adopted: November 26, 1975; Released: December 4, 1975)

BY THE COMMISSION: COMMISSIONERS REID AND ROBINSON ISSUING SEPARATE STATEMENTS; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT; COMMISSIONER QUELLO CONCURRING IN THE RESULT; COMMISSIONER WASHBURN DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER LEE JOINS.

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of the East Coast Stations with each other and the West Coast Stations with each other.

63. In addition to its redundancy in space and at earth stations, Comsat has always maintained spare satellites on the ground.

II, E. Comsat's Various INTELSAT Related Roles

64. Since Comsat was created, the growth of the international satellite communications system has been extremely rapid. Comsat, in its roles as U.S. participant in INTELSAT, Manager of INTELSAT, participant in ESOC, Manager for ESOC, and carriers' carrier leasing channels to the U.S. communications common carriers, has played a predominant part in this development.

65. As U.S. participant in INTELSAT, Comsat has the sole right to obtain capacity in the INTELSAT satellites in order to provide international communications satellite services to U.S. communications common carriers and other authorized users under published tariffs. In this connection, Comsat processes requests for service by U.S. entities, and makes the necessary administrative arrangements with INTELSAT for use of space segment capacity. In addition, as the U.S. participant in INTELSAT, Comsat has engaged in research and development (R&D).¹⁹ In 1963 Comsat came privy to the satellite technology as it then existed. Initially, most of Comsat's R&D work was handled on a contract basis. In 1966 Comsat established an R&D division, and, at the same time, created an Advisory Board to make recommendations as to future R&D programs. In 1967, consistent with the recommendations of the Advisory Board, Comsat laboratories was established as a unit of the Corporation, and by 1969 all in-house R&D efforts were conducted at the Comsat laboratories facility, Clarksburg, Maryland.

66. As the Manager of INTELSAT under the interim arrangements, Comsat was responsible for system planning. This included recommending proposals to the ICSC with respect to the nature and the performance specifications of satellites and drafting system configuration plans. In developing these recommendations, Comsat was guided by traffic projections (known as the INTELSAT Traffic Data Base) generated at annual Traffic Sub-Group Operations Representatives meetings.²⁰ Comsat has also performed certain market research and analysis to ascertain traffic potential for new services and for expansion of the system to new areas.

67. As Manager of INTELSAT, Comsat bore responsibility for establishing the global satellite system. This involved preparing performance specifications and requests for proposals (RFP's) for space segment equipment; evaluating responses to the RFP's and making procurement recommendations to the ICSC and now to the Board of Governors; negotiating the contracts for space segment equipment on behalf of INTELSAT; monitoring performance of construction contractors; and making the necessary arrangements for launch vehicles and launch services with NASA and the spacecraft contractor.

¹⁹ See, Satellite Act, Sec. 305(b)(1).

²⁰ The Traffic Data Base is an agreed five-year country-to-country forecast of INTELSAT circuit requirements. It is revised annually. INTELSAT Signatories are invited to attend the meetings of the Traffic Sub-Group, and are requested to invite interested telecommunications entities to participate with them. For example, Comsat serves as the U.S. Representative, assisted by representatives of the U.S. international carriers.

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COMSAT see also Satellite
Maritime Satellite System
Satellite Communications, International, Policy Re

Pursuant to Congressional direction, Commission reports its progress and undertakes inquiry on certain COMSAT structural and operational issues as part of a larger effort to determine if changes are needed to ensure COMSAT's capability to carry out its functions under Communications Satellite Act and Communications Act of 1934. CC 79-266

FCC 79-664

4 is

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

ry.

In the Matter of

Implementation of Section 505 of the Inter-
national Maritime Satellite Telecommunica-
tions Act

C.C. Docket No.
79-266

INTERIM REPORT AND NOTICE OF INQUIRY

(Adopted: October 18, 1979; Released: October 19, 1979)

BY THE COMMISSION:

1. The International Maritime Satellite Telecommunications Act, Pub. L. No. 95-564, 92 Stat. 2392 (1978), directs the Commission to conduct a study of the corporate structure and operating activities of the Communications Satellite Corporation (Comsat) to determine whether any changes are required to ensure that Comsat is able to effectively fulfill its obligations and carry out its functions under the Communications Satellite Act of 1962, as amended, 47 U.S.C. 751 (1962) and the Communications Act of 1934, as amended, 47 U.S.C. 151 (1971). The Commission is to transmit a report of its findings and conclusions to Congress no later than May 1, 1980. The purpose of this Interim Report and Notice of Inquiry is to advise the Congress of the direction and status of the study and to seek public comment on certain policy issues which have been raised by an initial review of Comsat's corporate structure and operational activities.

activities in which it is engaged, we will provide certain background information. This information will (1) summarize the statutory and regulatory obligations imposed on Comsat and the institutional framework within which Comsat operates, (2) identify the major activities in which Comsat and its subsidiaries are involved, and (3) describe the current corporate structure and decision-making process.

Background

A. Statutory Framework

9. The 1962 Communications Satellite Act and the 1978 International Maritime Satellite Telecommunications Act both place specific obligations and responsibilities on Comsat as the chosen instrument of the United States to participate in international cooperative ventures for the establishment of global communications satellite systems. In addition, both Acts place specific responsibilities on the U.S. Government for oversight of Comsat's fulfillment of its statutory missions.

(1) Communications Satellite Act of 1962

10. The declared purpose of the 1962 Act is to establish a global communications satellite system in conjunction and cooperation with other countries (47 U.S.C. 701(a)) and to provide for U.S. participation in such a system through a private corporation, subject to appropriate government regulation (47 U.S.C. 701(c)). To this end, Congress authorized the creation of a private corporation for profit which would not be an agency or establishment of the U.S. Government (47 U.S.C. 701(b)). It charged the Corporation with the responsibility of:

- (1) establishing as expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network;
- (2) directing care and attention toward providing such services to economically less developed countries and areas as well as those more highly developed; and
- (3) reflecting the benefits of this new technology in both quality of services and charges for such services (47 U.S.C. 701(a)(b)).

11. The Corporation was created to exploit this nation's space technology in developing the global system and was to be the U.S. representative in a joint international venture established to facilitate such development. In addition, the Corporation was to be the only U.S. entity authorized to construct and operate satellite facilities for international communications. As such, the Corporation was to provide U.S. communications common carriers and other authorized users access to satellite facilities on a nondiscriminatory basis (47 U.S.C. 701(c)).

12. In order to achieve these objectives, the Act authorizes the Corporation to:

- (1) plan, initiate, construct, own, manage, and operate itself or

Comsat
 Comsat Study
 Conflict of Interest
 Corporate Organization
 International Satellite

Final Report and Order (Comsat Study) adopted for submission to Congress (mandated by Sec. 505 of International Maritime Satellite Telecommunications Act) as the Commission's current views of issues raised in a review by Commission staff of Comsat's corporate structure and operating activities. CC 79-266

FCC 80-218

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Comsat Study—Implementation of Section
 505 of the International Maritime Satellite
 Telecommunications Act

C.C. Docket No.
 79-266

FINAL REPORT AND ORDER (COMSAT STUDY)

(Adopted: April 22, 1980; Released: May 1, 1980)

BY THE COMMISSION: CHAIRMAN FERRIS ISSUING A SEPARATE STATEMENT; COMMISSIONERS LEE, QUELLO AND FOGARTY CONCURRING AND ISSUING STATEMENTS; COMMISSIONER WASHBURN DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER JONES CONCURRING IN THE RESULT.

I. Introduction

1. The International Maritime Satellite Telecommunications Act, 47 U.S.C. 751 (1979), directs the Commission to conduct a study of the corporate structure and operating activities of the Communications Satellite Corporation (Comsat) to determine whether any changes are required to ensure that Comsat is able to effectively fulfill its obligations and carry out its functions under the Communications Satellite Act of 1962, as amended, 47 U.S.C. 701 (1962) and the Communications Act of 1934, as amended, 47 U.S.C. 151 (1971). The Commission is to transmit a report of its findings and conclusions to Congress no later than May 1, 1980. The report is to contain a detailed statement of the Commission's findings and conclusions, any action taken by the Commission related to such findings and conclusions, and any recommendations for necessary or appropriate legislative action.

tion with foreign entities, and designation of government officials to access corporate records, files and board meetings.

54. The differences between S. 2650 and S. 2814 were resolved in a compromise bill containing substantially the same provisions that now comprise the 1962 Satellite Act. For purposes of this study, it is important to note that the 1962 Act departed from established communications policies at the time it was enacted. Established policy did not consider existing communications media as instruments by which to achieve national interest and foreign policy objectives. The 1962 Act called for the utilization of satellite communications to achieve such objectives and provided for special government oversight to assure their fulfillment:

- (1) The Act's purpose can be generally described as twofold: (1) to provide for an improved global communications network through a commercial communications satellite system serving the needs of the United States and other countries and reflecting the benefits of satellite technology both in quality of and charges for communications services; and, (2) to serve the U.S. national goal of contributing to world peace and understanding by establishing such a system in conjunction and cooperation with other countries and directing care and attention toward providing services to economically less developed countries and areas as well as those more highly developed. (47 U.S.C. 701(a), (b)).
- (2) The Act creates a single entity in the form of a private corporation to carry out its objectives and purposes. (47 U.S.C. 701(c)). As we described in our Interim Report, it endows the corporation with extraordinary powers and privileges to carry out its mission, including monopoly status in the provision of services via the satellite system to authorized U.S. users (Int. Rep. para. 9-16).
- (3) The Act is a compromise between the broad ownership structure of S. 2814 and the more narrow structure of S. 2650. It basically provides for ownership to be split fifty-fifty between the international carriers and the public.¹⁷ Thus, a significant degree of public participation initially was provided for in a venture of declared national importance.
- (4) The Act recognizes the need for governmental oversight of the corporation's activities to assure that public interest

¹⁷ The opportunity of any carrier to own stock was not intended by Congress to be an absolute right. Rather, only those carriers authorized by the Commission upon a finding that their ownership would be consistent with the public interest could become stockholders. 47 U.S.C. 734(b). Moreover, the international carriers have now divested themselves of virtually all of their holdings in Comsat, either on a voluntary basis or as a result of Commission action. See Domestic Communications Satellite Facilities, 38 FCC 2d 665 at 679-680 (1972).

Syllabus

GOOD SAMARITAN HOSPITAL ET AL. v. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 91-2079. Argued March 22, 1993—Decided June 7, 1993

Title 42 U. S. C. § 1395f(b)(1) requires the Secretary of Health and Human Services to reimburse the lesser of the “customary charges” or the “reasonable cost[s]” of providers of health care services to Medicare beneficiaries, while § 1395x(v)(1)(A) empowers the Secretary to issue regulations setting forth the methods to be used in computing reasonable costs, which may include the establishment of appropriate cost limits. Regulations issued pursuant to that authority impose such limits based on a range of factors designed to approximate the cost of providing general routine patient service, but permit various exceptions, exemptions, and adjustments to the limits. After their costs during the relevant period exceeded the corresponding cost limits, petitioner providers filed an administrative appeal challenging the limits’ validity. In ruling for petitioners on expedited review, the District Court adopted their interpretation that § 1395x(v)(1)(A)(ii) (clause (ii))—which requires the regulations to “provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive”—entitled them to reimbursement of all costs they could show to be reasonable, regardless of whether the costs surpassed the amount calculated under the regulations’ cost limit schedule. In reversing, the Court of Appeals reasoned that petitioners’ request for adjustments would amount to a retroactive change in the methods used to compute costs that would be invalid under *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204. Instead, the court adopted the Secretary’s interpretation that clause (ii) permits only a year-end book balancing to reconcile the actual “reasonable” costs under the regulations with the interim, advance payments that the statute requires to be made during the year based on the provider’s approximate, anticipatory estimates of what its reimbursable costs will be.

Held: Clause (ii) does not require the Secretary to afford petitioners an opportunity to establish that they are entitled to reimbursement for costs in excess of the limits stated in the regulations. Pp. 409–420.

Opinion of the Court

alleged underpayment, the argument goes, then so, in the face of alleged underpayment, would the agency. However, in the aftermath of *Georgetown*, she notes that the agency returned to its earlier position.

The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. See *Automobile Club of Mich. v. Commissioner*, 353 U. S. 180, 180–183 (1957). Indeed, “[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.” *NLRB v. Iron Workers*, 434 U. S. 335, 351 (1978). See also *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 787 (1990); *NLRB v. J. Weingarten, Inc.*, 420 U. S. 251, 265–266 (1975). On the other hand, the consistency of an agency’s position is a factor in assessing the weight that position is due. As we have stated: “An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U. S. 421, 446, n. 30 (1987) (quoting *Watt v. Alaska*, 451 U. S. 259, 273 (1981)). How much weight should be given to the agency’s views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position from one of our own rulings, will depend on the facts of individual cases. Cf. *Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 37 (1981).

C

In the circumstances of this case, where the agency’s interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the

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In conclusion, under the circumstances of this case, the doctrine of estoppel cannot be applied to preclude Miami TCI from challenging the constitutionality of Sections 1104 or 1106. Further, because there has been no showing that these provisions were adopted to remedy the effects of identified past discrimination in the cable television or construction industry, the provisions cannot withstand constitutional scrutiny in light of the standard enunciated in *Croson*. Thus, although the city is to be commended for its attempt to ensure that minority enterprises would partake in the business opportunities generated by the grant of this license, Section 1106 must be declared unconstitutional on the ground that it violates the equal protection clause of the Fourteenth Amendment. The same result obtains as to Section 1104 at least with respect to that portion establishing a race-based classification for determining the participants in the training program. The remainder of Section 1104, however, is both constitutional and enforceable.¹³

III. Conclusion

Based on the foregoing, it is:

Ordered and adjudged that a declaratory judgment and injunctive relief is entered in favor of the plaintiff and against the defendants as follows:

- (1) Judgment is hereby entered declaring Resolution No. 90-0028 unconstitutional because it was adopted without providing the due process of law required by the Fourteenth Amendment;
- (2) Judgment is hereby entered declaring Section 1106 of the licensing ordinance unconstitutional in its entirety because it violates the equal protection clause of the Fourteenth Amendment;
- (3) Judgment is hereby entered declaring Section 1104 of the licensing ordinance unconstitutional, in part, as follows: In Section 1104(a), the word "minority," and the sentence that provides that "[t]he participants in the training programs shall be representative of the racial and ethnic composition of the city," are stricken from the ordinance because they violate the equal protection clause of the Fourteenth Amendment. The remainder of Section 1104 is declared constitutional and enforceable.
- (4) The defendants are hereby enjoined from enforcing Resolution No. 90-0028, the portions of Section 1104 that have been stricken by order of this Court, and Section 1106 of the licensing ordinance;
- (5) The defendants are hereby ordered to return, with interest, any monies taken from Miami TCI's security fund or otherwise received from Miami TCI in payment of the penalty assessed pursuant to Resolution No. 90-0028. Such monies shall be returned to plaintiff on or before July 20, 1990;
- (6) All other requests for declaratory and injunctive relief are denied.

Done and ordered in chambers at the United States District Court, Miami, FL this 13 day of July, 1990.

ALPHA LYRACOM SPACE COMMUNICATIONS, INC., a Delaware corporation, and REYNOLD V. ANSELMO, an individual, doing business as PAN AMERICAN SATELLITE, a sole proprietorship against COMMUNICATIONS SATELLITE CORP.

U.S. District Court, Southern District of New York, September 13, 1990

89 Civ. 5021 (JFK)

[12:102, 110] Comsat; antitrust laws; immunity from suit.

Comsat is immune from antitrust liability while acting in its capacity as signatory to Intelsat. The legislative history of Section 102(c) of the Communications Satellite Act of 1962, which provides that the activities of Comsat shall be consistent with federal antitrust law, reveals that it applies to the activities of Comsat and its owners as communications common carriers, not to its activities as the United States representative to Intelsat. *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 68 RR 2d 405 [SD NY, 1990].

13. The Court's ruling in this regard obviates the necessity of addressing Miami TCI's contention that Sections 1104 and 1106 are unconstitutionally vague. The contested language in Section 1104 had been severed from the ordinance and Section 1106 has been declared unconstitutional in its entirety under the equal protection clause. Furthermore, because these sections have been declared unconstitutional, the city's imposition of a penalty based on alleged violations of those sections was improper, and the Court need not consider Miami TCI's argument that the imposition of a "penalty" was improper under principles of Florida contract law.

The Complaint

In brief, plaintiffs allege that Comsat, as United States signatory to Intelsat, is responsible for conducting Article XIV(d) consultations on PAS' behalf. Compl. ¶23. Plaintiffs maintain that rather than performing this duty, Comsat has engaged in anticompetitive conduct to thwart plaintiffs' successful entry into the domestic and international telecommunications markets. Paras. 27 and 28 of the complaint contain the core allegations of conduct constituting restraint of trade and monopolization in violation of Sections 1 and 2 of the Sherman Antitrust Act.

As defendant points out with alacrity, most of the allegations assert that Comsat conspired with Intelsat and its representatives to delay plaintiffs' entry into the market. See e.g., ¶28(d), (g), (h), (i), (k-n), (p-r). Plaintiffs do, however, allege substantial unilateral anticompetitive action by Comsat. See e.g., ¶28(b), (c), (e), (f), (g), (o), (s), (w), (x-y).

DISCUSSION

A motion to dismiss for failure to state a claim may be granted only if it appears certain that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Hishon v. King & Spaulding*, 467 US 69, 73 (1984); *Lipsky v. Commonwealth United Corp.*, 551 F2d 887, 894 (2d Cir 1976); *Burger v. Health Ins. Plan of Greater New York*, 684 F Supp 46, 49 (SD NY 1988). The factual allegations set forth in the complaint of counterclaim must be accepted as true, see *Zinerman v. Burch*, 110 S Ct 975, 979 (1990), and the Court must view the allegations in the light most favorable to the pleader. See *Scheuer v. Rhodes*, 416 US 232, 237 (1974); *Yoder v. Orthomolecular Nutrition Inst., Inc.*, 751 F2d 555, 562 (2d Cir 1985). Even if it appears on the face of the pleadings that recovery is remote, the claim will withstand the motion to dismiss as long as the pleader retains a possibility of success. *Scheuer*, 416 US at 237. To this landscape must be added the caveat that "dismissals on the pleadings are especially disfavored in antitrust cases." *Schwartz v. Jamesway Corp.*, 660 F Supp 138, 141 (ED NY 1987) (citing *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 US 738, 746 (1976)).

Defendant argues forcefully that it is immune from suit by reason of the IOIA and the Intelsat Agreements. Plaintiffs respond that Section 701(c) of the CSA reflects the clear intention of Congress to subject Comsat to the antitrust law. In considering these positions, the Court bears in mind that the antitrust laws must be construed liberally and that antitrust immunity is disfavored. See *National Gerimedical Hosp. v. Blue Cross of Kansas City*, 452 US 378, 388-89 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 US 205, 231 (1979).

In order to allow Intelsat to function outside the unpredictable legal standards of some nations, the United States and the other member-nations accorded Intelsat and its constituent parts immunity from suit. Article XV(c) of the Definitive Agreement directed that a Headquarters Agreement be executed by the U.S. as host-nation with Intelsat which would grant appropriate immunities. Para. 16 of the HQ Agreement provides immunity from suit to Intelsat, "the representatives of the Parties and of the Signatories . . ." (emphasis added). Plaintiffs first seek to circumvent this straightforward grant of immunity to Comsat by embracing a strict interpretation of this language. They argue that they have sued a party and signatory itself, not its representatives. This argument is unpersuasive for two reasons. First, plaintiffs in their complaint acknowledge that Comsat is the representative of the United States Party to Intelsat. Compl. ¶¶11, 23. Second, plaintiffs ignore that para. 16 of the HQ Agreement implements the directive of Art. XV(c) of the Definitive Agreement to the United States to confer "appropriate privileges and immunities to Intelsat . . . to Parties . . . [and] to Signatories [e.g., Comsat] and representatives of Signatories."

Plaintiffs next point out that para. 16 of the HQ Agreement states that its grant of immunity "may be waived by . . . the Parties and Signatories for their representatives." They assert that Congress, on behalf of the United States Party, waived Comsat's immunity from the antitrust laws in Section 701(c) of the CSA, which provides that the activities of Comsat "shall be consistent with the antitrust laws." Defendant maintains that review of the pertinent legislative history reveals that Congressional concern with potential anticompetitive conduct was confined to the fact that communications common carriers (such as AT&T) would own large amounts of Comsat stock. Because "[r]egard for [the statutory] purposes should infuse construction of the legislation," the Court next parses Section 701(c) and its legislative history. *United States v. Dotterweich*, 320 US 277, 280 (1943).

To further the national policy of establishing a global communications network "in conjunction and in cooperation with other countries," 47 USC §701(a), Congress established Comsat as a government-created monopoly and as the official "United States participa[nt] in the global system." 47 USC §701(c). Congress created detailed supervision and regulation of Comsat's activities, with particular emphasis on the Executive Branch's responsibility to ensure that Comsat's relationships with foreign governments and international organizations "shall be consistent with the national interest and foreign policy of the United States." 47 USC §721(a)(4). Executive Order No. 12,046, 3 CFR §5-201 (1978) invests the Secretary of State with the responsibility "for instructing [Comsat] in its role" as the United States representative to Intelsat. That Order also directs the Secretary of Commerce to conduct a "continuous review" of the satellite communications system, including Comsat's activities, and to ensure "effective compliance at all times with the" CSA. *Id.* §2-301(b), (c).

Despite the intricate legal framework and supervision governing Comsat to ensure a course of action consistent with the objectives of Intelsat, plaintiffs seek to expose Comsat to antitrust liability whenever Comsat votes on

resolutions at Intelsat meetings, participates in Article XIV consultations as the representative of the United States government or participates in Intelsat pricing or procurement decisions. Those actions, however, are plainly within the Congressional grant of authority to Comsat to "plan, initiate, construct, own, manage, and operate" a communications satellite system "in conjunction with foreign governments or business entities . . ." 47 USC §735(a)(1). Congress could not have intended to require Comsat to participate in Intelsat subject to Executive Branch directives and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role.

The legislative history of the CSA confirms that Congress did not intend to subject Comsat to the antitrust laws with respect to its activities as Signatory to Intelsat. Rather, Congress envisioned a far narrower scope for the "antitrust consistency" language in Section 701(c) than plaintiffs suggest. First, the Senate report confirms that Congress intended to establish, through a global system, a single provider of international satellite services to and from the United States. S. Rep. No. 1584, 87th Cong., 2d Sess. 28 (1962) ("such a system is by nature a Government-created monopoly"); *id.* at 30 ("establishment of a communications satellite system involves the creation of such a monopoly"). There was agreement with the need to create a monopoly to achieve the Act's policy objectives,² but significant debate focused on the nature of that monopoly.

While the view prevailed that the sole United States participant in the global system should be a government-created but privately-owned corporation subject to stringent regulation, there were antitrust concerns about whether and to what extent communications common carriers should be permitted to participate in the ownership of the corporation. Congress displayed concern that the newly-created corporation would be dominated by common carriers such as AT&T, and that such ownership would permit them to collude or subvert Comsat for private gain.³ In particular, there was concern that large common carrier shareholders could control Comsat's procurement of goods and services or access to Comsat's international satellite services to the disadvantage of competing common carriers. In short, Congress's antitrust concerns related to the activities of Comsat and its owners as communications common carriers and not to Comsat's activities as United States representative to the global satellite system subject to Executive Branch regulation.⁴

Seeking to allay Congressional concern, the Department of Justice explained to Congress how it could fashion a plan that would be consistent with the antitrust laws.

"[T]he Department of Justice believes that to be *consistent with the antitrust laws* any plan adopted must meet certain conditions. These conditions are:

- (1) All interested communication common carriers be given an opportunity to participate in the ownership of the system;
- (2) All interested communication common carriers be given unrestricted use on nondiscriminatory terms of the facilities of the system whether or not they elect to participate in ownership;
- (3) All interested parties engaged in the production and sale of communication and related equipment be given an opportunity to participate in ownership of the system; and
- (4) All interested parties engaged in the production and sale of communication and related equipment be given unrestricted opportunity to furnish such equipment to the system whether or not they elect to participate in ownership."

Space Satellite Communications: Hearings Before the Subcomm. on Monopoly of the Select Comm. on Small Business, 29 (Aug. 2, 1961) (statement of Lee Loevinger, Assistant Attorney General, Antitrust Division) (emphasis added).

Having been advised by the Justice Department of the safeguards needed to ensure that Comsat and its owners operate in a manner "consistent with the [Federal] antitrust laws," Congress later added that phrase to the statute.

2. The legislative history contains many indications that the existence of more than one public satellite system was not contemplated or even regarded as feasible. For example, the Assistant Attorney General, Antitrust Division, testified at the Congressional hearings that, for numerous technical reasons we are not going to permit [competing satellite systems], we are going to permit one system and we are going to say who can put it up and under what circumstances; anyone who later wants to come along and engage in that long-distance communication must use the established facility.

Communications Satellites: Hearings Before the House Comm. on Interstate and Foreign Commerce, 146 (July 26, 1961) (statement of Lee Loevinger) (emphasis added).

Similarly, Nicholas Katzenbach, Assistant Attorney General, Office of Legal Counsel, testified that "the capacity of a single satellite system would be adequate to handle all of the communication possibilities that one can foresee." *Communications Satellites: Hearings Before the House Comm. on Science and Astronautics*, 722 (Aug. 1, 1961).

3. Section 734(b)(2) of the CSA contains detailed provisions governing the extent to which communications common carriers may own Comsat's shares. Indeed, as originally enacted, this section reserved 50% of Comsat's shares for purchase by communications common carriers. P.L. No. 87-624, §304(b)(2), 76 Stat 419, 424 (1962), amended by P.L. No. 97-410, 96 Stat 2043, 2045 (1983).

4. The Senate report commented on these specific antitrust concerns. S. Rep. No. 1584, 87th Cong., 2d Sess. 11 (1962) (provisions enacted to "prevent any single interest or group of interests from dominating the activities of the corporation"; statute's competitive objectives were to ensure (1) competition in the procurement of equipment and services and (2) non-discriminatory access to international satellite system for communications common carriers); *id.* at 13.

because he did not commit the acts in question voluntarily. Uricoechea cannot both have his cake and eat it by disclaiming responsibility for what he did and simultaneously expressing remorse for his acts. Even if he could, the trial judge made it clear that he did not believe Uricoechea's claim of coercion.

Briefly stated, Uricoechea failed to establish that he was entitled to a reduction in his offense level for acceptance of responsibility and is fortunate that the District Judge did not increase the offense level for obstruction of justice based on the false statements he made. *See* U.S.S.G. § 3C1.1, comment. (nn. 3(b)-3(c), 3(f)-3(h)).

CONCLUSION

For all of the foregoing reasons, we hold that the District Court did not err in denying Uricoechea's motion to suppress the cocaine found in his garment bag and wallet. We also hold that the District Court properly applied the Sentencing Guidelines in calculating Uricoechea's sentence. Therefore, both the judgment of conviction and the defendant's sentence are affirmed.

JUDGMENT AFFIRMED.



ALPHA LYRACOM SPACE COMMUNICATIONS, INC., a Delaware Corporation; Reynold V. Anselmo, an individual, doing business as Pan American Satellite, a sole proprietorship, Plaintiffs-Appellants,

v.

COMMUNICATIONS SATELLITE CORPORATION, Defendant-Appellee.

No. 977, Docket 90-7893.

United States Court of Appeals,
Second Circuit.

Argued April 22, 1991.

Decided Sept. 30, 1991.

Satellite communications company brought antitrust action against the Com-

munications Satellite Corporation (COMSAT). The United States District Court for the Southern District of New York, John F. Keenan, J., dismissed the complaint on the grounds of COMSAT's statutory immunity from antitrust liability. Appeal was taken. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) COMSAT was entitled to statutory immunity from antitrust liability for actions taken in its capacity as United States representative to the International Telecommunications Satellite Organization (INTELSAT); (2) the "antitrust consistency clause" of the Communications Satellite Act applies to COMSAT's activities as common carrier; and (3) remand was necessary to allow the competitor to amend its complaint to attempt to assert that it was challenging actions taken by COMSAT as a common carrier.

Affirmed in part and reversed and remanded in part.

1. Monopolies ⇐12(15.5)

Communications Satellite Corporation (COMSAT), in its capacity as United States signatory to International Telecommunications Satellite Organization (INTELSAT), was entitled to statutory immunity from antitrust liability; having created COMSAT to wield monopoly power along with other participants in global satellite system, Congress did not expect COMSAT to face antitrust liability in deciding, as member of INTELSAT, whether and to what extent to permit competition. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Communications Satellite Act of 1962, §§ 102(a, c), 301, 304(a, c), 305(a)(1-3), 403(a), 47 U.S.C.A. §§ 701(a, c), 731, 734(a, c), 735(a)(1-3), 743(a).

2. Monopolies ⇐12(2)

"Antitrust consistency clause" in Communications Satellite Act applies only to role of Communications Satellite Corporation (COMSAT) as common carrier, and not its role as United States representative to International Telecommunications Satellite

ries," its primary significance lies in its explicit direction to immunize "Signatories." It is true that the Definitive Agreement directs extension of immunity "to the extent and in the cases to be provided for in the Headquarters Agreement," thereby leaving the scope of immunity to the subsequent document, but that qualification does not suggest that the Headquarters Agreement should be understood to exclude signatories entirely from the category receiving whatever degree of immunity is to be conferred. Indeed, one strong reason for reading the Headquarters Agreement to include signatories in its grant of immunity is the absence of any indication that the odd arrangement resulting from a contrary interpretation was intended: since the parties themselves will enjoy sovereign immunity, appellant's reading would extend immunity to the parties, to INTELSAT, and to the individual representatives of the parties and the signatories, but not to the signatories themselves, at least not to those signatories, like COMSAT, that are not themselves member nations.

Moreover, it places no strain on the phrase "representatives of the Parties" to place signatories within that category. COMSAT is "the designated United States representative to" INTELSAT, see Executive Order No. 12,046. Though the ultimate issue is what the drafters of the Headquarters Agreement meant, not how others regard COMSAT, it is not insignificant that appellant's complaint repeatedly characterizes COMSAT as "the United States representative." Complaint ¶¶ 11, 28(a), 28(b), 28(c).

Finally, as Judge Keenan recognized, exposure of COMSAT to antitrust liability in its role as United States signatory to INTELSAT is entirely inconsistent with the responsibilities Congress entrusted to COMSAT under the CSA. "Congress could not have intended to require Comsat to participate in Intelsat subject to Executive Branch directives and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role." *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 1990-2 Trade Cases

¶ 69,188, at 64,583, 1990 WL 135637 (S.D.N.Y. Sept. 13, 1990), cf. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57, 105 S.Ct. 1721, 1726-1727, 85 L.Ed.2d 36 (1985) (private parties acting at direction of state officials or agencies are entitled to same "state action" antitrust immunity that applies to those officials or agencies); *Cine 42nd St. Theater Corp. v. Nederlander Organization*, 790 F.2d 1032, 1048 (2d Cir. 1986) (same). COMSAT, as United States signatory to INTELSAT, must participate in the consultations that determine to what extent competing satellite systems will be permitted under Article XIV(d) of the Definitive Agreement. Having created COMSAT to wield monopoly power, along with the other participants in a global satellite system, Congress did not expect that corporation to face antitrust liability in deciding, as a member of INTELSAT, whether and to what extent to permit competition.

[2] We also agree with Judge Keenan that the "antitrust consistency clause" in section 701(c) of the CSA applies only to COMSAT's role (and that of its owners) as common carrier and not to its role as United States representative to INTELSAT. The principal antitrust concern voiced within Congress during the consideration of the CSA, once the fundamental decision was made to create a private corporation with monopoly powers, was that the common carriers participating in ownership of COMSAT would use their ownership position for private anti-competitive purposes. See, e.g., S.Rep. No. 1584, 87th Cong., 2d Sess. 11 (1962), U.S. Code Cong. & Admin. News 1962, p. 2269. The focus of the "antitrust consistency clause" is evident from the listing of concerns in section 701(c) in the very sentence that concludes with the clause:

It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this chapter be so organized and operated as to maintain and strengthen competition in the provision

of communications services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

There is no hint in this catalogue of concerns that COMSAT's role as participant in INTELSAT must conform to antitrust limitations. Congress was so advised by the Department of Justice. *See Antitrust Problems of the Space Satellite Communication System: Hearings Before The Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 58 (1962) (testimony of Asst. Atty. Gen. Katzenbach) ("[T]he mere doing of what [COMSAT is] permitted to do under this bill is not itself going to result in an offense against the Sherman Act.").

[3] We disagree with Judge Keenan only in his unstated premise that Alpha Lyracom's complaint alleges only activities by COMSAT in its capacity as United States representative to INTELSAT, as distinct from its capacity as a common carrier. Though the complaint is directed primarily to actions taken by COMSAT acting as a signatory to INTELSAT, lurking within it are allegations of anticompetitive conduct by COMSAT in its "separate role," as the corporation itself describes it, "as the sole provider of access to the global satellite system to U.S. communications carriers." Brief for Appellee at 38. We do not fault the District Judge for not undertaking a precise parsing of the complaint in an effort to winnow out the few allegations that arguably concern COMSAT's role as common carrier. That task should be undertaken by the appellants. But we are persuaded that the appellants must be accorded an opportunity to amend their complaint in light of the District Court's proper dismissal of it to the extent that it challenged COMSAT's actions as representative to INTELSAT.

In remanding to afford appellant the opportunity to recast its complaint, we caution against any effort to dress up "Signatory" allegations in the language of "com-

mon carrier" allegations. If Alpha Lyracom can allege specific aspects of COMSAT's conduct as common carrier that are actionable under the antitrust laws, it is free to proceed. But the effort will require precise drafting and an avoidance of the scattershot approach evident in the current complaint. In particular, we caution Alpha Lyracom not to assume, as it appears to do in some of its argument, that an allegation against COMSAT will survive dismissal as long as it is confined to unilateral rather than concerted action. The line to be drawn is not between concerted and unilateral action, since even COMSAT's unilateral action might have been undertaken in its role as signatory to INTELSAT, but between action taken as signatory and action taken as common carrier. If the amended complaint fails to isolate actionable conduct by COMSAT as common carrier, the District Court should not hesitate to dismiss it again.

We need not consider the District Court's alternate ground for dismissal of the antitrust claims—failure to join indispensable parties under Civil Rule 19, since any allegations that Alpha Lyracom is able to replead challenging COMSAT's conduct in its role as common carrier are unlikely to encounter the indispensable party concerns Judge Keenan noted with respect to the "signatory" allegations.

Similarly, we need not assess the adequacy of appellants' state law claims for tortious interference with business opportunities since all of these allegations concern COMSAT's consultative activity within INTELSAT relating to the authorization of a competing satellite system. Those are plainly "signatory" activities. Appellants may, if so advised, replead state law claims, confined to COMSAT's common carrier role, bearing in mind the strict pleading requirements of state law claims emphasized by the District Court. *See Optivision, Inc. v. Syracuse Shopping Center Associates*, 472 F.Supp. 665, 685 (N.D.N.Y.1979); *Susskind v. Ipco Hospital Supply Corp.*, 49 A.D.2d 915, 373 N.Y.S.2d 627, 629 (App.Div.2d Dep't 1975).

mentation] does the FCC conclude that the public interest favors the adoption of rules permitting satellite television in the 11.7-12.2 GHz band . . ." is incorrect. We call to USSB's attention the sentence quoted, *supra*, from the FCC's opinion: "[W]e believe that allowing BSS operations in this band will be in the *best interest of the general public* by enhancing the opportunities for the market place to develop BSS to the extent technically possible." *WARC-79 Implementation*, at ¶ 9 (emphasis added). In sum, USSB has failed to show that the FCC's rulemaking violated the Communications Act.

VI

For the foregoing reasons, we affirm those parts of the FCC's *GSAT Reconsideration* decision that grant GSAT's application for authority to lease transponder space on the Anik-C2 satellite and to construct a telemetry, tracking, and command earth station. We reverse the FCC's decision to the extent that it holds that USCI will not be providing broadcasting service and remand to the FCC so that it may determine which of USCI or GSAT should be responsible for complying with the Communications Act's restrictions on broadcasters. We affirm the FCC's *WARC-79 Implementation* decision to the extent that it adopts a new rule permitting broadcast satellite television service in the 11.7-12.2 GHz band.

Affirmed in part, reversed in part, and remanded.



**NATIONAL ASSOCIATION OF
BROADCASTERS, Petitioner,**

v.

**FEDERAL COMMUNICATIONS COM-
MISSION and United States of
America, Respondents,**

**National Citizens Committee for Broad-
casting, et al., Western Union Tele-**

**graph Company, Forward Communica-
tions Corporation, et al., Graphic Scan-
ning Corporation, United States Satel-
lite Broadcasting Company, Inc., Direct
Broadcast Satellite Corporation, Satel-
lite Television Corporation, Satellite
Syndicated Systems, Inc., Aerospace
and Flight Test Coordinating Council,
Manufacturers Radio Frequency Advis-
ory Committee, CBS, Inc., National
Black Media Coalition, Association of
Maximum Service Telecasters, Inc.,
California Public Safety Radio Associa-
tion, Inc., RCA American Communica-
tions, Inc., Intervenors.**

**NATIONAL ASSOCIATION OF
BROADCASTERS, Appellant,**

v.

**FEDERAL COMMUNICATIONS COM-
MISSION and United States of
America, Appellees,**

**Satellite Television Corporation, National
Citizens Committee for Broadcasting,
et al., Satellite Syndicated Systems,
Inc., Forward Communications Corpo-
ration, U.S. Satellite Broadcasting Co.,
et al., Televisa, S.A., National Black
Media Coalition, CBS, Inc., Interven-
ors.**

**COUNTY OF LOS ANGELES,
Petitioner,**

v.

**FEDERAL COMMUNICATIONS COM-
MISSION and United States of
America, Respondents,**

**Satellite Television Corporation,
Intervenor.**

Nos. 82-1926, 82-2233 and 83-1743.

United States Court of Appeals,

District of Columbia Circuit.

Argued Feb. 23, 1984.

Decided July 24, 1984.

**Federal Communications Commission
issued interim direct broadcast satellite ser-**

the *DBS Order* might pose for public safety broadcasting, the Commission issued a *Reconsideration Order* in which it acknowledged that, if specific safety problems were created by the proposed relocation, the FCC had "both the duty and the means to address and rectify them as they arise." FCC No. 83-241 at 10 (May 19, 1983). That *Reconsideration Order* is properly part of the agency decision under review. The order further indicated that specific relief would be forthcoming to protect public safety broadcasters once the specific relocation problems they faced—technical, financial or other—were known; such relief is to include acceptance of interference to DBS services in specific locations, compensation from DBS operators for relocation costs, and/or extension of the transition period. *Id.* at n. 9.

Both at oral argument and at briefing the Commission represented to this court that "[i]t would be unthinkable for the Commission to allow DBS to threaten the vital public safety radio services presently produced" on the 12 GHz band and the Commission therefore pledged to "guarantee the integrity of . . . safety and emergency services." Brief for the FCC at 44 n. 54. We agree with these interpretations of the Commission's statutory obligations and emphasize that the Commission has stated its commitment to fulfill this acknowledged duty. *See World Communications, supra*, at 1476. Because such a small percentage of FS users are local governments, and because we have not been presented with a specific case of a public safety broadcaster who has suffered any concrete harm from the *DBS Order* and from the Commission's failure to grant specific relief, we accept the Commission's statements in the *Reconsideration Order* and its representations to this court as sufficient correctives for any deficiencies that may have infected the *DBS Order* on this issue.

Finally, we reject the contention of intervenor Association of Maximum Service Telecasters that the Commission was required to set aside a portion of the 12 GHz band for terrestrial high-definition tele-

vision, which produces enhanced picture quality. The Commission expressly considered this contention and decided to prefer DBS, *see DBS Order*, 90 F.C.C.2d at 704-05. We defer to the Commission's judgment in this complex proceeding as to which service is more in the public interest. With the important caveat we have added that public safety broadcasters are not to be unduly burdened by DBS, we therefore hold that the Commission's spectrum-allocation decision was reasonable.

V. *Whether the Grant of DBS Authority to STC Comports with Applicable Statutes*

In addition to challenging the validity of the general regulatory approach to DBS taken by the FCC, NAB and several intervenors take issue with the more specific grant of a DBS license to STC. STC is a subsidiary of COMSAT, a private corporation created by Congress for the purpose of developing an international communications satellite system. *See The Communications Satellite Act of 1962, supra* (the Satellite Act). The Satellite Act contemplated a system operated by a number of nations on a cooperative basis. On August 20, 1964, an Executive Agreement signed by the United States and ten other nations created the International Telecommunications Satellite Consortium (INTELSAT), which assumed ownership of the international system from COMSAT. *See generally ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 736 n. 4 (D.C.Cir.1984). COMSAT became the U.S. representative to INTELSAT and the sole U.S. entity permitted access to the system. In 1978, COMSAT's role in the international communications field was expanded by the International Maritime Satellite Telecommunications Act, 47 U.S.C. §§ 751-757, which designated COMSAT as the U.S. participant in INMARSAT, an international organization established to develop and operate a commercial global maritime satellite system.

COMSAT's entry into DBS via its subsidiary STC is a significant departure from the specific international roles that Con-

**MCI TELECOMMUNICATIONS
CORPORATION, Petitioner,**

v.

**FEDERAL COMMUNICATIONS COM-
MISSION and United States of
America, Respondents,**

**Lexitel Corporation, American Satellite
Company, Teltec Saving Communica-
tions Co., Mountain States Telephone
and Telegraph Co., et al., Competitive
Telecommunication Association, Utili-
ties Telecommunication Council, the
Western Union Telegraph Co., GTE
Sprint Communications Corporation,
Network I, Inc., International Business
Machines Corporation, Aeronautical
Radio, Inc., Telecommunications Re-
search and Action Center, Bell Tele-
phone Company of Pennsylvania, et al.,
RCA Americom Communications, Inc.,
Southern Satellite Systems, Inc., Satel-
lite Business Systems, Ad Hoc Telecom-
munications Users Committee, Rain-
bow Satellite, Inc., Intervenors.**

No. 85-1030.

United States Court of Appeals,
District of Columbia Circuit.

Argued June 3, 1985.

Decided July 9, 1985.

As Amended July 9, 1985.

A common carrier of interstate tele-
phone service petitioned for review of an
order of the Federal Communications Com-
mission, contained in its "Sixth Report,"
abolishing tariff filing requirements. The
Court of Appeals, Ginsburg, Circuit Judge,
held that: (1) the challenge of the common
carrier was timely, and (2) under provisions
of the Communications Act of 1934, the
Commission has no statutory authority to
prohibit the filing of tariffs that, by stat-
ute, every common carrier "shall" file.

Order vacated and case remanded.

1. Telecommunications ⇐306

Where Federal Communications Com-
mission in "Sixth Report" fundamentally
altered forbearance program from permis-
sive to mandatory arrangement by requir-
ing all nondominant common carriers of
interstate telephone service to cancel tar-
iffs on file and by refusing to accept subse-
quent filings, carrier's challenge to "Sixth
Report" preceded by Commission's observ-
ance of rulemaking procedures was timely
without regard to whether "Second Re-
port" or "Fourth Report" could have been
challenged. Communications Act of 1934,
§§ 201-224, 203(a), (b)(2), 402(a), as amend-
ed, 47 U.S.C.A. §§ 201-224, 203(a), (b)(2),
402(a); 5 U.S.C.A. §§ 701(a)(2), 704.

2. Telecommunications ⇐306

Under Communications Act of 1934 [47
U.S.C.A. § 203(a)], common carriers, except
connecting carriers, were to file with Fed-
eral Communication Commission and print
and keep open for public inspections tariff
schedules, and Commission had no authori-
ty to order wholesale abandonment or elimi-
nation of the tariff filing requirement.
Communications Act of 1934, § 203(a),
(b)(2), as amended, 47 U.S.C.A. § 203(a),
(b)(2).

Petition for Review of an Order of the
Federal Communications Commission.

Kenneth A. Cox, Washington, D.C., with
whom Michael H. Bader, William J. Byrnes,
Thomas R. Gibbon, Theodore D. Kramer
and John M. Scorce, Washington, D.C.,
were on brief, for petitioner.

John E. Ingle, Deputy Associate Gen.
Counsel, F.C.C., Washington, D.C., with
whom Jack D. Smith, Gen. Counsel, Daniel
M. Armstrong, Associate Gen. Counsel,
Richard A. Askoff, Counsel, F.C.C., Robert
B. Nicholson and Frederic Freilicher, At-
tys., Dept. of Justice, Washington, D.C.,
were on brief, for respondents.

Roger M. Witten, Washington, D.C., with
whom J. Roger Wollenberg and William T.
Lake, Washington, D.C., were on brief, for
intervenor I.B.M. Corp.

Commission's finding that enhanced services and CPE [customer premises equipment] are not common carrier communications activities within Title II." 693 F.2d at 209. Similarly, *Western Union* upheld the Commission's decision to detariff terminal equipment, based on the FCC's reasonable conclusion that the sale or lease of that equipment was not a communications service. 674 F.2d at 165. *Philadelphia Television* also involved regulation—there of community antenna television (CATV)—of noncommon carrier activity:

[The Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation . . . under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to *some leeway* in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.

359 F.2d at 284 (emphasis added).

In this case, the services provided by the non-dominant carriers remain common carrier services. Indeed, at an earlier stage of the *Competitive Carrier* rulemaking the Commission apparently rejected a definitional approach. See *Second Report*, 91 F.C.C.2d at 61-62 & n. 7. Therefore, decisions that depend on classification of the service or operation in question as outside the common carrier context will not travel the distance the Commission would take them.

Finally, the Commission urges that the *Sixth Report* orders an altogether rational regulatory reduction because "competitive marketplace forces in almost all cases will be sufficient to assure just and reasonable rates." Brief for Respondents at 51.

However reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted. Significantly, the Commission's search for support leads it to decisions upholding the exemption of cer-

tain airline, railroad, and trucking services from tariff filing requirements—cases in which Congress had supplied explicit deregulatory authority.

In *Central & Southern Motor Freight Tariff Association v. United States*, 757 F.2d 301 (D.C.Cir.1985) (per curiam), for example, we upheld Interstate Commerce Commission orders exempting motor contract carriers of property from the tariff filing requirements of the Motor Carrier Act, 49 U.S.C. §§ 10,101-11,917 (1982). We relied on the

sweeping text of the statutory exemption provisions. These provisions uniformly sanction relief "when relief is consistent with the public interest and the transportation policy of section 10101 of this title." The original provisions—whose substance continues in force despite the semantic changes wrought by the 1978 recodification—stressed the breadth of the Commission's discretion by stating that "the Commission may . . . grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the [national transportation] policy." What we have, to use the Fifth Circuit's words, is a congressional charge to "go forth and do good." The delegation to the Commission is as broad as Congress could make without giving the Commission carte blanche.

Id. at 314-15 (footnotes omitted).

Similarly, *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819 (D.C.Cir.1980), upheld detariffing domestic air cargo carriers based on sweeping changes Congress made in the regulatory regime:

Section 416(b) and 418(c) grant the Board very broad discretion. The latter authorizes the Board to exempt all-cargo carriers from "any . . . section of this chapter which the Board by rule determines appropriate . . ." 49 U.S.C. § 1388(c) (Supp. I 1977) (emphasis added). The former permits the Board to exempt "any person or class of persons" from "the requirements of this title or any

