

## Chapter II: Developments in U.S. Regulation of International Common Carriers

### A. Overview of Deregulatory Policies

Almost by definition, all U.S. regulation of common carriers affects their ability to disseminate information to and receive information from entities in other countries. In some cases, U.S. authorities have made regulatory changes without regard to the international impact. In other cases, however, international effects were of central importance.

The past decade has seen dramatic changes in U.S. governmental policies as to provision of telecommunications facilities and services in the United States. The most dramatic single act, of course, was the breakup of AT&T.<sup>122</sup> But other significant actions include: the deregulation of subscriber terminal equipment; alternative long-distance companies; an »open-skies« policy allowing privately owned domestic satellites; the use of computer technology by telecommunications networks; the liberalization of international service restrictions; the opening of local-exchange service to competitive »bypassers« and the authorization of the resale of long-distance and local telephone service.<sup>123</sup>

Because of the size of the domestic U.S. carrier market and the recognition of the complexities in the international market, the United States – primarily through the FCC – has moved slowly to take actions relating to international telecommunications. In April 1985, FCC Chairman Mark Fowler announced that the FCC increasingly should turn its attention to the international arena, since the Commission's work in the area of fostering compe-

122 See generally TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 205-350 (E. Noam ed. 1983).

123 E.g., *Hush-a-Phone v. FCC*, 238 F.2d 266 (D.C. Cir. 1956); *Carterphone*, 13 F.C.C.2d 420, *recon. denied*, 14 F.C.C.2d 571 (1968); *Customer Interconnection*, 61 F.C.C.2d 766 (1976); see also *North Carolina Util's Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975); *Domestic Satellites*, 335 F.C.C.2d 844 (1972), *aff'd sub nom. Network Project; Shared Use of Common Carrier Services*, 60 F.C.C.2d 261 (1976), *recon. denied*, 62 F.C.C.2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

tion in domestic telecommunications was winding down.<sup>124</sup> Several recent FCC actions confirm this view. The FCC has stated:

We also seek comment on the extent to which differences in the international market should be reflected in the extension of our competitive carrier policies to that market. In particular, would competition among U.S. international carriers be sufficient to make the international telecommunications market competitive given the presence of foreign PTTs in the provision of all international telecommunications services?<sup>125</sup>

Since the Carter administration, the FCC's philosophy has been that a government agency has neither the resources nor the expertise to make judgments about economic developments.<sup>126</sup> This approach was a radical change from the more than forty years of making just such judgments under the Communications Act, which is viewed as almost a model statute in terms of giving flexibility to regulators. Indeed, even as the Commission was moving into uncharted deregulatory territory, the 1934 Act changed little – except perhaps for the recent cable television amendments and the Record Carrier Competition Act of 1981.<sup>127</sup> Instead of seeking new legislation, the Commission relied on the Act's broad mandates.

In moving forward on the international front, the Commission has recognized the increasingly global nature of U.S. firms' activities, the reliance on telecommunications as an integral part of both domestic and international business and the U.S. economy's increased focus on services rather than goods. In order to apply their policies internationally, U.S. regulators have had to deal with major differences between the domestic and international environments. Most importantly, the Commission has had to recognize and evaluate the role of the overseas PTT or correspondent carrier in every international telecommunications enterprise. In the United States, of course, U.S. government policies apply to both ends of the circuit. In international telecommunications, however, a foreign PTT is at the other end and generally has different regulatory goals than the FCC's – most significantly, the subsidization of domestic systems with revenues from international service.<sup>128</sup> Competition among international carriers obviously would reduce these subsidies.

124 Remarks of Hon. Mark Fowler, U.S. Global Telecommunications: The Popcorn Principle, in Washington, D.C., Feb. 26, 1985.

125 See International Competitive Carrier Policies, 100 F.C.C.2d 1270, 1271 (1985).

126 E.g., Fowler, *The Public's Interest*, 4 COMMUNICATIONS AND THE LAW 51 (1982).

127 47 U.S.C. § 222 (1982); 95 Stat. 1687 (1981).

128 R. EWALD, THE DEREGULATION OF INTERNATIONAL COMMUNICATIONS 245 *et seq.* (1985).

The rigid structure of international telecommunications also creates hurdles for U.S. deregulatory objectives. International service providers previously were separated from each other by segmentation of the international telecommunications market.<sup>129</sup> The sub-markets included: the distinction between undersea cable and satellite facilities; a separation between the provision of voice and record services; and a differentiation between domestic and international service.<sup>130</sup>

A key FCC policy in the past was its restrictive approach to international facilities, particularly undersea cables. Although it subjected AT&T to overall rate regulation, the Commission rarely questioned any domestic facility proposal by AT&T. With regard to international facilities, however, the FCC closely scrutinized applications. Its policy was based on both AT&T's fairly large investment and pressure from Comsat to protect satellite traffic. In addition, the Commission limited the firms that could provide each type of service. It generally restricted AT&T to international message telephone service (IMTS) and limited the U.S. international record carriers – ITT World Communications, RCA Global Communications, TRT Telecommunications, Western Union International and FTC Communications – to non-voice service (e.g., telegram and telex). New entry into international telecommunications was virtually impossible for years, and even the FCC's efforts to permit Western Union to provide international service required an amendment to the Communications Act.<sup>131</sup>

Not surprisingly, as its liberal domestic policies took shape, the FCC's entry and service policies for international telecommunications appeared to make less and less sense, at least from the U.S. perspective. New carriers, such as Graphnet, Telenet and International Relay, sought to enter the market; users wanted new services and options; and observers increasingly recognized that the traditional market share for certain carriers maintained rates at a fairly high level.

129 Noam, *Telecommunications Policy on the Two Sides of the Atlantic: Divergence and Outlook*, in *ECONOMIC POLICY TOWARDS TELECOMMUNICATIONS IN THE INDUSTRIALIZED COUNTRIES* (M. Snow ed. 1986).

130 Goldberg, *One-Hundred and Twenty Years of International Communications*, 37 *FED. COMM. L.J.* 131 (1985).

131 47 U.S.C. § 222 (1982); 95 Stat. 1687 (1981).

## B. *Providers of International Service*

Although foreign common carriers are free to interconnect and do business with both local and long-distance U.S. carriers, they may own only limited amounts of stock or other equity in U.S. carriers. Under the Communications Act,<sup>132</sup> a foreign individual or entity may own only 20% of a U.S. carrier or 25% of a holding company of a U.S. carrier. The FCC enforces the statute rather strictly and has looked beyond corporate structural devices – including voting trusts, preferred stock and management contracts – in order to find illegal alien ownership.<sup>133</sup>

This limitation obviously may be a bit anomalous, since it does not apply uniformly to all of the electronic media – most particularly, to cable television, which has many of the passive »conduit« aspects of a carrier.<sup>134</sup> The reason for this distinction seems to be solely the historical accident that the terms of section 301(a) apply only to broadcasting and common carriage.

AT&T continues to be the dominant provider of U.S. international message telephone service, with more than 98% of the market. This percentage is likely to drop, since the OCCs – e.g., MCI and Sprint – initiated international message telephone service. In the record-carrier, i.e., telegraph and telex, market, ITT World Communications, RCA Global Communications, TRT Telecommunications, MCI International (formerly Western Union International) and FTC Telecommunications continue to provide most telex services. With the authorization of the Record Carrier Competition Act (RCCA) of 1981, Western Union also provides international telex service.<sup>135</sup> Most of the data traffic and newer electronic mail services are carried by voice carriers, primarily AT&T.

The RCCA was enacted to permit Western Union to reenter the international record market and to eliminate the artificial barriers between domestic and international record service created by former section 222 of the Communications Act. This 1943 amendment barred Western Union from providing international record service because Congress feared that Western Union would use its domestic market power to monopolize international record service.

132 47 U.S.C. § 310(a) (1982).

133 *E.g.*, *Airsignal Corp.*, 81 F.C.C.2d 472 (1980).

134 *E.g.*, *Cable Television Citizenship Requirements*, 56 F.C.C.2d 159 (1975).

135 47 U.S.C. § 222 (1982); 95 Stat. 1687 (1981).

Within the past ten years, additional firms – including International Relay, Telenet, Graphnet and Consortium Communications International – have entered the international record market. While these companies hold authorizations to provide international service, they actually use other carriers' facilities.

Regulation of facilities ownership and use still creates significant U.S. government involvement in international telecommunications. AT&T, the international record carriers and the OCCs hold ownership interests through »indefeasible rights of use« (IRUs) in submarine cables and participate in U.S.-mandated »facility-planning« exercises.<sup>136</sup> These are a prerequisite to FCC consideration of applications for authority to invest in and construct such facilities.<sup>137</sup> Rather than consider individual applications for international facilities, the FCC created the facilities-planning process to take a comprehensive view of plans by carriers and PTTs for submarine cables and satellite circuits. One commentator has pointed out somewhat ironically that when the FCC initiated this process, »the European administrations ... learned that, no matter what arrangements they made with the carriers, the FCC had the final say in their investment decisions, so they might as well deal directly with the FCC.«<sup>138</sup>

The FCC has authorized new transoceanic cables, despite their siphoning of traffic for international satellite facilities. It also has begun approving the cables of new ventures, such as Tel-Optik, a consortium led by Cable & Wireless, as well as E.F. Hutton.<sup>139</sup> Comsat continues in its role as U.S. signatory to INTELSAT. Comsat is still a »carrier's carrier,« in that it deals solely with U.S. carriers. Several new private satellite operators appear to be well on their way to »bypassing« it, however, by establishing their own satellites and earth stations.<sup>140</sup> Comsat has also established a corporate entity to provide end-user services.

### *C. Changes in Regulation of International Telecommunications Services and International Service Providers*

As indicated above, over the past few years the FCC has removed many of

136 R. EWALD, *supra* note 128, at 145.

137 Third Notice of Inquiry, CC Docket 79-184, Aug. 3, 1984.

138 Goldberg, *supra* note 130, at 145.

139 Report and Order, 100 F.C.C.2d 1033 (1985).

140 See discussion in text at note 171 *infra*.

the historical restrictions on international telecommunications and the U.S. players. These FCC actions include the following:

### 1. *Elimination of the Voice/Record Dichotomy*

Until recently, there was a sharp distinction between voice and non-voice service. The FCC allowed AT&T to provide voice service but generally not to expand into the non-voice market. The dichotomy resulted partly from historical circumstances and partly from the FCC's interest in retaining a viable international record carrier industry. In 1982, however, the FCC ruled that any carrier could provide any service.<sup>141</sup> This followed a number of other decisions that had gradually allowed AT&T to enter the data market and the IRCs to enter the voice market.

### 2. *Entry of Western Union into International Telecommunications*

This was effected through the Record Carrier Competition Act of 1981, which repealed former section 222 of the Communications Act.<sup>142</sup> When section 222 was enacted, Western Union had a monopoly on U.S. domestic telegraph business and was required to divest its international operations in order to protect the other IRCs. Shortly before the RCCA's passage, the FCC determined that section 222 was not reciprocal – that is, that the IRCs were free to provide domestic record service even though Western Union could not offer international service.<sup>143</sup> The Justice Department had kept AT&T out of the domestic telegraphy since the famous «Kingsbury Commitment» of 1913, under which AT&T agreed to avoid that market.<sup>144</sup>

### 3. *Entry of Additional International Carriers*

In 1976 the FCC authorized Graphnet and Telenet to provide international record service, thereby allowing competitive entry into international tele-

<sup>141</sup> Overseas Communications Services, 92 F.C.C.2d 641 (1982).

<sup>142</sup> 47 U.S.C. § 222 (1982); 95 Stat. 1687 (1981).

<sup>143</sup> Western Union International, 76 F.C.C.2d 166 (1980).

<sup>144</sup> W.J. BLYTH & M.M. BLYTH, TELECOMMUNICATIONS: CONCEPTS, DEVELOPMENT AND MANAGEMENT 39-41 (1985).

communications.<sup>145</sup> More recently, the FCC routinely granted applications by MCI and Sprint to provide international service.

#### 4. *Extension of Computer II Rules to Provision of International Service*

As noted before, the FCC's *Computer II* and *Computer III* proceedings have increased substantially AT&T's ability to provide »enhanced services.«<sup>146</sup> This may have an impact on international telecommunications. Some U.S. carriers fear that deregulation of enhanced service providers would increase foreign PTTs' powers in dealing with U.S. entities and thus result in playing off U.S. companies against each other. Since service providers are not subject to FCC authorization, they could negotiate arrangements with PTTs that do not conform to the FCC's policies for allocating costs among common carriers and BOCs. At least theoretically, an enhanced service provider thus could divert traffic and revenue from certificated U.S. carriers and/or force them to reduce settlement rebates with the PTTs. A foreign company even could become a U.S. enhanced service provider; it would not own the transmission facilities, and it might be able to obtain preferential treatment on its home territory. Another issue is whether enhanced service providers would utilize private lines and divert revenues from the public switched networks. One response for the PTTs would be to eliminate flat-rate tariffs for private line service, as Germany already has done. Many U.S. users (such as IBM, Control Data and General Electric) utilize private lines not only to control costs for international data transmission but also to keep transmissions confidential.

#### 5. *Applicability of Deregulation of Common Carriers to International Communications*

During the past few years, the FCC has eliminated rate-of-return regulation for most common carriers except AT&T. In the *Competitive Carrier* proceeding, the Commission developed a doctrine of »forebearing« from

145 Graphnet Systems, Inc., 63 F.C.C.2d 402 (1977), *recon. denied*, 67 F.C.C.2d 1020 (1978), *remanded*, 595 F.2d 897 (1979). See also IIT World Communications Inc., 76 F.C.C.2d 15 (1979); International Relay, Inc., 77 F.C.C.2d 819 (1980).

146 See discussion in text at note 32 *supra*.

regulation, such as certification of carriers and their investments under section 214 of the Communications Act, as well as from rate regulation under sections 201 and 202 of the Act.<sup>147</sup> The FCC determined that only a dominant carrier needed to – or would be permitted to – file tariffs. This decision still required the filing of section 214 applications and tariffs, however, for international service.

The premise of the *Competitive Carrier* proceeding was that entry into and exit from the telecommunications services market need not be determined by the FCC and that users are adequately protected by competition as well as the FCC's complaint mechanisms. The FCC thus believes that tariffs no longer are necessary to protect the public. To this end, the FCC has increased the number of auditors in its Common Carrier Bureau from twenty-seven to eighty.<sup>148</sup> Whether this larger staff can monitor the practices of AT&T, the BOCs and the OCC, however, remains to be seen.<sup>149</sup> The effectiveness of *Computer III's* shift from structural restrictions – e.g., fully separate subsidiaries – to regulatory requirements thus may depend heavily upon the Commission's ability to implement an effective supervisory procedure.

On the international front, the FCC initiated a proceeding in 1985 to consider extending some of the deregulatory *Competitive Carrier* findings to international telecommunications service.<sup>150</sup> In the international proceeding, the FCC defined two separate product markets – international message telephone service (IMTS) and non-IMTS. The Commission also proposed to examine the question of dominance on a country-by-country basis. If only one carrier provided IMTS or non-IMTS to a certain country, it would be considered dominant and subject to rate regulation.

For example, the FCC found that AT&T and the Hawaiian Telephone Company were the only dominant IMTS providers and therefore subject to full rate regulation. The FCC tentatively concluded that no non-IMTS carriers were dominant and thus that they should be subject to »streamlined« regulation – much like the FCC's »regulatory forbearance« in the domestic *Competitive Carrier* proceeding. Thus, although the non-dominant carriers would need to file initial applications to serve new points, they would merely need to report their circuit activations twice a year. Tariffs would be presumed lawful if filed on fourteen days' notice and would not be required to include supporting data.

147 Telenet, 91 F.C.C.2d 232 (1982).

148 Remarks of Dr. Alan Pearce, in New York City, Dec. 12, 1985.

149 *Id.*

150 International Competitive Carrier Policies, CC Docket No. 85-107, FCC 85-177 (released Apr. 19, 1985).



## 6. *Uniform Settlements Docket*

The extent of U.S. government involvement in the settlement arrangements between U.S. carriers and their overseas correspondents is a critical issue for U.S. international carriers. When different entities provide international telecommunications service at each end of a circuit, they agree upon a division of the revenues between them. The entities create an »accounting rate« or »settlement rate« – that is, an amount to be paid by the carrier collecting from a customer to the other carrier – which may bear little or no relationship to the actual customer charge or »collection« rate. The FCC administers a Uniform Settlements Policy, which requires all U.S. carriers to have uniform settlement rates with all other carriers for the same routes.<sup>151</sup>

As a hypothetical example, the accounting rate for the first three minutes of a telephone call between New York and Paris might be \$3.00, the charge for the call in the U.S., \$4.50 and the charge in France, \$6.00. When U.S. customers call, they pay \$4.50 to AT&T, which credits \$3.00 to the French PTT. When French customers call, they pay \$6.00 to the French PTT, which in turn credits \$3.00 to AT&T. The Uniform Settlements Policy does not regulate U.S. carriers' rates on the U.S. end; instead, it attempts to protect U.S. companies from »whip-sawing« by foreign PTTs by requiring all U.S. carriers to pay a uniform rate. So far, the FCC has been reluctant to deviate from this policy.

The FCC recently denied a request by FTC Communications (FTCC) for a waiver of the Uniform Settlements Policy to allow FTCC to reduce accounting rates for telex service with the United Kingdom and twenty-six European countries. In denying the request, the Commission stated that FTCC had not shown that collection rates would decrease or that other benefits to the public would result.<sup>152</sup> Although the FCC has indicated interest in reexamining the Uniform Settlements Policy, a 1984 staff background paper suggested that the FCC scrutinize international accounting rates more closely in order to protect U.S. consumers and to prevent U.S. firms from unfavorable terms.<sup>153</sup>

151 47 C.F.R. Part 31 (1985)

152 Report and Order, Gen. Docket No. 85-249 (1985).

153 E. KWEREL, PROMOTING COMPETITION PIECEMEAL IN INTERNATIONAL TELECOMMUNICATIONS (OPP Working Paper Series, Federal Communications Commission, December 1984).

#### D. *Facilities-Related Regulatory Decisions*

In addition to extending its pro-competitive and deregulatory policies to international services, the FCC also has sought to increase competition between types of transmission media and service providers. Prior to the advent of communications satellites, the Commission focused on authorization for and ownership of submarine cable facilities. The FCC scrutinized applications for these facilities to decide whether their need justified an increase in a carrier's rate base. Partly because investments in international submarine cables were visibly large in comparison to investments in most domestic facility applications, the Commission reviewed them closely.

AT&T, the IRCs and other carriers used these cables and were at least theoretically subject to rate-base regulation; they thus sought to obtain ownership interests in these facilities, in the form of the previously mentioned indefeasible rights of use (IRUs). The FCC concluded that it was impossible to audit the IRCs and that no benefits would flow from rate regulation of that industry.<sup>154</sup> The carriers sought ownership interests in order to expand their rate bases and realize certain benefits under the U.S. Tax Code. These IRUs still exist. This creation of new ownership interests in the cables (in addition to the PTTs' interests) added new parties to the negotiating process.

Further complexity resulted from the activities of INTELSAT, through Comsat. Anxious to implement the Communications Satellite Act of 1962, the FCC initially made Comsat a carrier's carrier in providing international satellite service.<sup>155</sup> The Commission also required carriers to use satellites as well as cables, in order to promote the international satellite system. The carriers preferred the submarine cables, however, because of their familiar technology and the carriers' ownership of the IRUs. Moreover, satellites were under leases, which could not be included in a carrier's rate base.

As new carriers entered the international market and new services were offered domestically, the FCC found that flexibility was not common in the use of international facilities. The »fifty-fifty« balanced loading principle, in force since 1979, was modified to permit AT&T to carry up to 60%

<sup>154</sup> See Preliminary Audit and Study of the Rates of Return of the IRCs, 75 F.C.C.2d 726 (1979), appeal docketed sub nom. Western Union Telegraph Co. v. FCC, No. 79-2497 (D.C. Cir. Dec. 14, 1979).

<sup>155</sup> 47 U.S.C. § 701 *et seq.* (1982).

of its traffic on cables by 1990, with total freedom for the other carriers.<sup>156</sup> Even the remaining restriction seems fated for extinction.

Comsat's role in the use of international satellite services has come under intensive scrutiny. The mammoth *Comsat Study*<sup>157</sup> identified Comsat's possible conflicts of interest and suggested several changes in U.S. firms' procurement of international satellite service. These changes authorized entities to obtain service directly from Comsat, allowed private ownership of U.S. earth stations for accessing INTELSAT, permitted direct access to INTELSAT satellites and structured Comsat to avoid conflicts of interest in its role as U.S. signatory and monopolist.<sup>158</sup>

Perhaps somewhat ironically, one of the first issues was not the question of providing greater flexibility to carriers in accessing the international satellite system, but whether Comsat could serve end users directly. In the 1960s, the FCC implemented the *Authorized User*<sup>159</sup> decision, involving the question whether the U.S. government could purchase service from Comsat rather than an international service carrier. The Commission determined that only in »unique and exceptional« circumstances could Comsat serve end users directly. Users of international television service sought to overturn this policy.<sup>160</sup> In *Authorized User II*,<sup>161</sup> the Commission reaffirmed its position.

Ultimately, the Commission decided that INTELSAT users could be served directly and went on to consider a more liberal policy.<sup>162</sup> The D.C. Circuit remanded this decision to the Commission,<sup>163</sup> on the ground that the FCC had not fully considered questions of earth-station ownership and direct access to INTELSAT, which the U.S. international carriers viewed as a necessary prerequisite to any expansion of Comsat's ability to provide service. Comsat also recently completed a reorganization required to provide competitive end-user service.

Following enactment of the Comsat Act,<sup>164</sup> the FCC developed various policies to effectuate and protect Comsat's role as the U.S. signatory and monopoly U.S. provider of international satellite service. A key compo-

156 Report and Order, 98 F.C.C.2d 1166 (1985).

157 88 F.C.C.2d 564 (1980).

158 See *Authorized User Policy*, 90 F.C.C.2d 1394 (1982); *Communications Satellite Corp.*, 81 F.C.C.2d 287 (1980); *COMSAT*, 90 F.C.C.2d 488 (1982).

159 *Authorized Entities and Users - Comsat*, 4 F.C.C.2d 421 (1966), 6 F.C.C.2d 593 (1967).

160 *Spanish International Network*, 70 F.C.C.2d 2127 (1978).

161 Report and Order, 50 Fed. Reg. 2552 (1985).

162 *Authorized User Policy*, 90 F.C.C.2d 1394 (1982).

163 *ITT World Comm'ns Co. v. FCC*, 725 F.2d 732 (D.C. Cir. 1984).

164 47 U.S.C. § 701 *et seq.* (1982).

ment of this role was the construction and operation of earth stations to uplink to INTELSAT satellites. In 1966 the FCC outlined an »Interim Policy« for the ownership and operation of these stations. Comsat and the U.S. international service carriers – AT&T and the IRCs – would own and operate the stations jointly through a cooperative Earth Station Ownership Committee (ESOC).<sup>165</sup> This approach gave Comsat the major role in earth-station management as well as investment decisions and allowed Comsat to bundle earth-station costs with space-segment costs in setting rates.

Following pressure from various carriers and users, in 1982 the FCC proposed a more liberal international earth-station policy.<sup>166</sup> Carriers and users wanted Comsat to separate its space-segment (satellite) from its earth-segment (earth-station) charges; they also wanted the option of building their own lower-cost earth stations at sites with efficient access to INTELSAT. In 1984 the FCC authorized international carriers to construct and operate international earth stations.<sup>167</sup> The Commission endorsed »competition by permitting carriers other than Comsat to own and operate earth stations.«<sup>168</sup>

The Commission's new policy on international earth-station ownership has some restrictions. Applicants may not receive routine action on their applications unless they propose specialized new services, such as the INTELSAT Business Service (IBS). The FCC indicated that it was unlikely to grant applications for general-purpose earth stations accessing the international satellite system. The Commission also required Comsat to separate its earth- and space-segment charges in order to further competition. Finally, the Commission imposed additional requirements on the phase-out of the ESOC arrangement.<sup>169</sup>

Not surprisingly, the competitive pressures that led to modifications of the earth-station-ownership and authorized-user policies necessitated an examination of whether Comsat should continue to be the sole U.S. source of access to INTELSAT.

Even though the Commission at times has acknowledged the difficulty of extending its pro-competitive policies internationally, it has attempted to inject as much competition as possible on the U.S. side. An opportunity for

165 Interim Earth Station Ownership Policy, 5 F.C.C.2d 812 (1966).

166 U.S. Earth Stations Ownership Inquiry, 90 F.C.C.2d 1458 (1982); 97 F.C.C.2d 444 (1984).

167 Frieden, *Getting Closer to the Source: New Policies for International Satellite Access*, 37 FED. COMM'NS L.J. 293, 320-23 (1985).

168 Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 49 Fed. Reg. 50,030 (1984).

169 *Id.*

furthering competition, a development perhaps unforeseen, resulted from both applications for satellite systems to compete with INTELSAT and, most recently, applications for private submarine cables.

The applications follow the same procedure as any request for authorization to operate a radio-frequency spectrum device under title III of the Communications Act.<sup>170</sup> This procedure essentially requires an applicant to show its financial and legal, as well as technical, qualifications and to establish that its operation would not cause electrical interference with any other service. The only difference between an application for an international satellite facility and any other title III application – whether for a television station or a mobile radio – is that a geosynchronous orbital position must be available for allocation by the FCC. The total number of available orbital slots is governed by the regulations of the International Telecommunication Union.<sup>171</sup>

In 1983 Orion Telecommunications applied for a license to build a private satellite system over the North Atlantic. Orion would launch its own satellites and not make use of any INTELSAT facilities.<sup>172</sup> Its application was followed by filings from other companies: International Satellite, Inc. (backed by TRT); Cygnus (backed by the earth-station manufacturers MA/COM); RCA Americom (for modification of a U.S. domestic satellite); and PanAmerican Satellite (for service to the Caribbean, Mexico and Latin America). These applications were opposed by foreign governments and touched off a debate within the U.S. government as to whether the U.S. should endorse or permit international systems to »bypass« INTELSAT. A large part of this concern emanated from provisions in the INTELSAT agreements concerning non-INTELSAT international satellite systems.<sup>173</sup>

The intragovernmental debate kept the applications pending at the FCC, culminating in the issuance of a *White Paper* intended to provide guidance to the FCC in its deliberations.<sup>174</sup> The executive branch's involvement in the debate probably was discretionary on its part and not legally required in any fashion.<sup>175</sup> Although the president has a statutory role under the Act,

170 See discussion in text at note 39 *supra*.

171 Rice, *Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options*, 44 *et seq.*, in DEVELOPMENT AND REGULATION OF NEW COMMUNICATIONS TECHNOLOGIES 31–82 (D.M. Rice, M. Botein & E.B. Samuels eds. 1980).

172 R. EWALD, *supra* note 128, at 283 *et seq.*

173 Article XIV(d), INTELSAT Agreement, Aug. 20, 1971, 24 U.S.T. 564, T.I.A.S. No. 7532.

174 Senior Interagency Group on International Communication and Information Policy, A White Paper on New International Satellite Systems (Feb. 5, 1985).

175 *E.g.*, 47 U.S.C. § 701(a) (1982).

executive branch participation never has been held to be mandatory. The FCC thus presumably could have proceeded on its own, since it is a legally independent agency. The executive branch often uses its obvious influence, however, to break regulatory logjams – such as that involved in Orion's application.

The executive branch's *White Paper* cautiously approved the concept of separate systems, as long as they did not interconnect with public switched networks – thus restricting them to private line service. The FCC conducted a proceeding on the pending applications and eventually granted them, subject to limited conditions.<sup>176</sup> Not surprisingly, Comsat has vehemently opposed private satellite systems. Indeed, both Comsat and INTELSAT have sought legislation to preclude such systems or to restrict their operations. Moreover, INTELSAT dragged its feet in implementing »consultation« proceedings with the first private satellite system – Pan American – to secure an agreement with a foreign carrier.

Not to be outdone by the competitive satellite applicants, two companies – Tel-Optik Limited and Submarine Lightware Cable Company (SLCC) – applied for licenses to operate international submarine cables in the United States.<sup>177</sup> The submarine cable applications did not raise issues under the INTELSAT agreements. Moreover, the major U.S. owner of submarine cable systems, AT&T, did not file any substantial objections. The FCC thus moved expeditiously in granting the Tel-Optik application.<sup>178</sup> The Tel-Optik application proposed two cables to be operated in conjunction with Cable & Landing in the United Kingdom, with the first cable to be implemented in 1989, the second in 1992. Similar applications are pending for Pacific routes.<sup>179</sup> Apart from questions about the availability of capital, the competitive submarine cables generally face less regulatory opposition and will not be restricted as to the services they can provide.

176 In the Matter of Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, FCC 84-632 (Jan. 4, 1985).

177 R. EWALD, *supra* note 128, at 318 *et seq.*

178 Report and Order, 100 F.C.C.2d 1033 (1985).

179 R. EWALD, *supra* note 128, at 295 *et seq.*