tal to the benefits the three-question test conveys. If criticism is to be leveled at the Court for its decision in *Occidental,* it should be leveled not because of the decision itself, but for the long delay in reaching it.

It is submitted that the *Occidental* decision, when read with *Emerson,* provides a conclusive answer to the theoretical questions arising under section 16(b). It may be expected that considerable litigation will result from the decision, since the "possibility of speculative abuse" standard is sufficiently vague to allow different conclusions to be drawn from the same set of facts. In the future, avoidance of at least a portion of section 16(b) liability will be relatively easy for the instigator of an unsuccessful attempt at corporate takeover: he may either sell down in two steps, as in *Emerson,* or else negotiate a "call" option with the survivor of the defensive merger negotiated to block his takeover, as in *Occidental.* The choice of which of these alternatives to adopt will depend upon the defeated tender offeror's assessment of likely future market prices and his willingness to gamble on the all-or-nothing question of the possibility of speculative abuse. Since the costs of protracted securities litigation are enormous, and since extended litigation is more likely in situations similar to *Occidental* than in those similar to *Emerson,* it is to be expected that many future defeated tender offerors will elect the two-step selldown procedure of *Emerson.* For defeated tender offerors, *Occidental* provides a high-risk alternative when caught in an untenable position. From the perspective of enforcement of section 16(b), *Occidental* provides an affirmation that the intent of the legislation is far more important than is the application of the mechanical test established to carry out that intent.

JOHN K. OLSON

Federal Communications Commission—Review of Regulations Relating to Provision of Data Processing Services by Communications Common Carriers—*GTE Service Corp. v. FCC.*[1]—In 1966 the Federal Communications Commission (FCC or Commission) by formal announcement in a Notice of Inquiry[2] opened an investigation into a broad and increasingly significant area of rapid technological change in our society: the convergence of the data processing and communications industries due to increasing needs to transmit computer-stored data between data processing users in different places. The Commission was concerned lest the rapid technological changes in the communications and data processing

[1] 474 F.2d 724 (2d Cir. 1973).

[2] In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 7 F.C.C.2d 11 (1966).

fields cause the data processing industry to develop a dependence on communications common carriers that might interfere with the carriers' primary obligation to provide efficient and economic communications services to the public. Of particular concern to the FCC was the marketability of communications common carriers' excess computer capacity and the attraction this presented to such carriers which already possessed transmission lines suitable for marketing. The purpose of the Commission's investigation was to determine the nature of the relationship between communications common carriers and the data processing industry; what response, if any, should be made to that relationship; and specifically, whether the Commission ought to promulgate rules regulating that relationship. The 1966 Notice of Inquiry was followed by a Supplemental Notice of Inquiry,[3] a commissioned study by the Stanford Research Institute,[4] a Report and Further Notice of Inquiry,[5] a Tentative Decision by the Commission,[6] and on March 18, 1971, a Final Decision and Order by the Commission[7] adopting, with additions, rules which had been proposed in the Tentative Decision.[8]

In its Tentative Decision the Commission stated that:

> [T]he issues which raised basic concern in both the communications and computer industries are those which relate to the nature and extent of the regulatory jurisdiction and control which we intend to exercise over the furnishing of data processing and communications services, or some combination thereof, by non-carrier data processing organizations and the furnishing of data processing services by communications common carriers.[9]

In its Final Decision the Commission found "that there is a close and intimate relationship between data processing and communications services" and that "[w]ithout appropriate regulatory safeguards, the provision of data processing services by common carriers could adversely affect the statutory obligation of such carriers to provide adequate communication services . . . and impair effective competition in the sale of data processing services."[10]

While the rules promulgated by the FCC[11] do not prohibit

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[3] 7 F.C.C.2d 19 (1967).

[4] Stanford Research Institute, Policy Issues Presented by the Interdependence of Computer and Communication Services, Feb. 1969 (2-volume report prepared for F.C.C., Contract RC-10056, PB 183,612-13).

[5] 17 F.C.C.2d 587 (1969).

[6] 28 F.C.C.2d 291 (1970).

[7] 28 F.C.C.2d 267 (1971).

[8] See note 11 infra for a statement of the rules promulgated by the Commission.

[9] 28 F.C.C.2d at 292.

[10] 28 F.C.C.2d at 269.

[11] 47 C.F.R. § 64.702 (Supp. 1972) provides in pertinent part:

. . . (b) Except as provided herein, no common carrier subject, in whole or in part, to the Communications Act shall engage directly or indirectly in furnishing data pro-

entry of common carriers into the data processing field, they are based on a "maximum separation of activities which are subject to regulation from nonregulated activities involving data processing,"[12] and they provide in substance: (1) that common carriers with annual revenues exceeding $1,000,000 may not engage in furnishing data processing services except through a separate corporate entity having separate books, officers, personnel and equipment, and that the common carrier may not lease or sell equipment or services to the separate corporation;[13] and (2) that common carriers may not permit the separate corporation to use its name or symbol and may not purchase or lease equipment, goods or services from the separate corporation.[14]

On June 7, 1971, the Court of Appeals for the Second Circuit stayed the effective date of the regulations pending judicial review,[15] and cases brought by data processing affiliates of five

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cessing service to others except as expressly provided in paragraph (c) of this section. This prohibition shall apply to all communications common carriers, including section 2 (b)(2) carriers, where any carrier itself has annual operating revenues exceeding $1,000,000 or any such carrier is directly or indirectly controlled by, or is under common control with, another carrier or carriers, and the combined annual revenues of all such carriers exceed $1,000,000.

(c) Except for Companies of the Bell System, common carriers may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnishes data processing service to others provided the following conditions are met:

(1) Each such separate corporation must maintain its own books of account, have separate officers, utilize separate operating personnel, and utilize computing equipment and facilities separate from those of the carrier for its data processing service offerings.

(2) Each such common carrier shall file with the Commission a complete statement of the terms and conditions of every written or oral contract, agreement or other arrangement entered into between such carrier and any such separate corporation within thirty days after the contract, agreement or other arrangement is made.

(3) No such common carrier subject to the prohibition of paragraph (b) of this section shall engage in the sale or promotion of data processing services on behalf of any such separate corporation.

(4) No such common carrier, or a holding company owning or jointly owning a common carrier and any such separate corporation, shall permit the separate corporation to employ in its name any words or symbols contained in the name of the carrier, nor shall such carrier or holding company permit any such separate corporation to use the name of the carrier in the separate corporation's promotional activities or enterprises.

(5) No such common carrier shall purchase, lease, or otherwise obtain any data processing service or services from any such separate corporation.

(d) No common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall sell, lease, or otherwise make available to any other entity any capacity or computer system component on its computer system or systems which that carrier uses in any way for the provision of its common carrier communications services.

[12] 28 F.C.C.2d at 302.

[13] 47 C.F.R. §§ 64.702(b), (c)(1), (2), (3), (d) (Supp. 1972).

[14] 47 C.F.R. §§ 64.702(c)(4), (5) (Supp. 1972).

[15] 474 F.2d at 726 n.2.

telephone carriers were consolidated in the present opinion. The court HELD: (1) that the jurisdiction of the FCC over communications common carriers extends to the activities of these carriers in the field of data processing services;[16] and (2) that regulation of a separate corporate data processing entity, based on fear of monopolization of the data processing industry by communications carriers, is beyond the authority of the FCC.[17] The court found that the rules contained in 47 C.F.R. §§ 64.702(b), (c)(1), (2), (3) and (d) (hereinafter Rules (b), (c)(1), (2), (3) and (d)), requiring the formation of a separate corporate entity to sell or lease data processing services, were valid. It based this finding on the following considerations: that the primary responsibility of the FCC is to see that communications carriers provide efficient and economic service to the public;[18] that "[t]he burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices;"[19] and that the Commission's rules requiring a "maximum separation" of services are a rational means of providing regulation of communications common carriers in activities that might well conflict with the carriers' principle duty to furnish efficient and inexpensive communications services to the consumer.[20]

The court further found, however, that 47 C.F.R. §§ 64.702(c)(4) and (5) (hereinafter Rules (c)(4) and (5)), prohibiting the use by the separate corporate entity of the carrier's name or symbol and the purchase or lease by the carrier of computer services from the separate entity, were invalid.[21] In doing so the court expressed its belief that the real purpose behind these rules was not to insure that the public was provided with efficient and economic telephone service, but rather, to prevent communications common carriers from acquiring monopolistic powers in the data processing field. In this regard the court concluded:

> Its [the Commission's] concern here therefore is not for the communications market which Congress has entrusted to its care, but for data processing which is beyond its charge and which the Commission itself has announced it declines to regulate. We find the intrusion to be without authority either in the Communications Act or in the cases construing it.[22]

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[16] Id. at 731.
[17] Id. at 733.
[18] Id. at 730.
[19] Id.
[20] Id. at 732.
[21] Id. at 733.
[22] Id. The FCC's statement that it did not intend to regulate data processing is contained in its Final Decision: "Since we are not proposing, at this time, to regulate date processing, as such, a discussion of the extent of our jurisdiction with respect thereto is neither relevant nor necessary . . . ." 28 F.C.C.2d 267, 268 (1971).

GTE Service Corp. represents the first time under the Federal Communications Act[23] that the FCC has been held to have asserted jurisdiction over a technological development outside of its scope of authority. The significance of the decision lies in the fact that the court invalidated Rules (c)(4) and (5) not solely because of what the rules required but primarily because of whom they regulated.[24] The court thus delimited FCC authority on the basis of whom the exercise of authority affects as well as on the basis of what authority may be exerted.

This note will discuss and analyze the question of whether or not the rules promulgated by the Commission were a valid and a wise administrative response to the technological innovations providing remote access to data processing over common carrier lines where the carriers themselves desire to provide data processing services. The note will focus specifically on four aspects of this general issue. First, in discussing the propriety of the administrative response, it will explore the limits of the jurisdiction which the FCC has, and may exercise, over the common carriers as it relates to their provision of data processing services. Second, it will analyze the administrative agency context from which the rules under consideration arose to determine whether or not the extension of the agency's power in this case might reflect more on the nature of the agency itself than on the nature of the problem it faced. Third, with respect to the FCC's indirect assertion of control over the data processing affiliate, based mainly on antitrust considerations, it will examine the Commission's statutory and common law jurisdiction in antitrust matters, both generally and specifically as it relates to distinctions between vertical and horizontal monopolies in communications.[25] Fourth, it will examine the Commission's alternative grounds for regulation of the data processing entity—namely, that such regulation is necessary for the proper enforcement of the policy behind the Commission's rules.

I. BACKGROUND

From the time UNIVAC, the first commercially available general purpose computer, was introduced for use by the Census Bureau in 1951, the data processing industry has witnessed tre-

[23] 47 U.S.C. §§ 151 et seq. (1970).

[24] The wording of the rule prohibits the carrier from dealing with the separate corporation, but the court recognized that this in effect prohibits the data processor from dealing with the carrier. See 474 F.2d at 733.

[25] Generally a "horizontal monopoly" occurs when a seller of a commodity has a large enough share of the market to effectively limit competition. The monopolist may still lack control of supply inputs to his business. A "vertically integrated monopoly," or "vertical monopoly," occurs when a manufacturer has a horizontal monopoly over one factor used in manufacturing his product. If companies X, Y and Z all need ingredient A to make widgets and if X has a monopoly on ingredient A, then companies Y and Z will be forced to pay more than X does for ingredient A and may be forced out of the widget business not by competition but by X's degree of "vertical integration."

mendous growth in two distinct areas.[26] First, the "hardware" components, which include the actual computers themselves, input devices such as cards, tapes and discs, and output devices such as teletypewriters, tapes and cathode ray tubes, have developed tremendously high capacities. Second, the "software" components, including programming, languages and programming services, have spawned a large and diverse service industry which is devoted to putting the computer to work by applying the capacity to the needs of individual users.

In a complete data processing system three types of communications are required. Generally these are: (1) communications from the terminal, where the use originates, to the central computer; (2) communications between multiple terminals of one of several users; and (3) communications from the computer to the outside environment.[27] These communications could be completed without the use of common carrier lines if the entire data processing system were on one site. A number of factors, however, have tended to increase the use of remote terminals working from central computers. One factor is the economics of hardware which dictate that the largest capacity computers, if fully utilized, are the most economical. A second factor is the development during the mid-1960's of third generation time-sharing computers which allow multiple users to use the machines simultaneously. Third, there is the need of some users for terminals in several sites, either in one particular area or across the nation.

As the use of computers by industries expands, then, transmissions between remote terminals and central computers will greatly increase. These include transmissions from a remote terminal to a central computer and then back again, from a remote terminal to a computer which stores the information, from a terminal to a computer which processes information and passes it on to another terminal, and from a terminal to a computer which selects a recipient terminal. Depending on the functions performed, any of these transmissions may be defined as either "data processing," "message-switching" or "hybrid service."[28] An additional service for which

[26] 474 F.2d at 727.

[27] C. Barnett, The Future of the Computer Utility 43 (1967).

[28] These terms, among others, have been defined in 47 C.F.R. § 64.702(a) (Supp. 1972):

(1) "Data Processing" is the use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, inter alia, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions.

(2) "Message-switching" is the computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered.

(3) "Local Data Processing Service" is an offering of data processing wherein communications facilities are not involved in serving the customer.

(4) "Remote Access Data Processing Service" is an offering of data processing wherein communications facilities, linking a central computer to remote customer

common carriers use their own computers is "line-switching," which is a connection between two points on request.[29] The classification of these services as regulated communications or non-regulated data processing is a difficult task, and is principally a determination made on the facts of a given service.[30] All of the transmission is done over common carrier lines,[31] either wire or cable, except that which is expanding into microwave service.[32]

As communications thus became an integral part of data processing and vice versa, it became clear that the communication carriers themselves could use their expertise, systems and excess computer capacity to provide data processing software to others.[33] The provision of computer services by common carriers would present both a further integration of the communications and data processing industries and a possible threat to the continued viability of the software service industry.[34] On the other hand the services of the software companies might also be seen as infringing on the traditional realms of the common carriers.[35]

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terminals, provide a vehicle for the transmission of data between such computer and customer terminals.

(5) "Hybrid Service" is an offering of service which combines remote access data processing and message-switching to form a single integrated service.

(i) "Hybrid Data Processing Service" is a hybrid service offering wherein the message-switching capability is incidental to the data processing function or purpose.

(ii) "Hybrid Communication Service" is a hybrid service offering wherein the data processing capability is incidental to the message-switching function or purpose.

[29] See C. Barnett, supra note 27, at 44 n.17.

[30] For example: company A asks its remote computer if an item is in stock and the computer answers (data processing); company A tells the computer to order stock from inventory at a certain level (message-switching); company A tells a computer to order from inventory, correct the inventory balance and bill the buyer (hybrid service); company A's teletypewriter order to the warehouse is passed through the computer (line-switching). Message-switching, line-switching and hybrid services all involve use of communications carrier facilities.

[31] The services available from the common carriers include cable and wire leasing with a variety of capacities depending on the needs of the user. The required capacities are largely a function of the quantity of data to be transmitted and the input/output devices. For example, a relatively small quantity of data can be transmitted slowly over narrow band circuits, such as voice telephone line, while a visual display system requires the leasing of special broad band lines.

[32] The FCC first approved a new carrier service by a private carrier using microwave transmissions in In re Microwave Communications, Inc., 18 F.C.C.2d 953 (1969).

[33] The Bell System companies, including American Telephone & Telegraph Co., are already precluded from entering the data processing field by a consent judgment entered in United States v. Western Elec. Co., 1956 Trade Cas. 71,134 (D.N.J. 1956), which, with exceptions, prohibits them from engaging in businesses other than regulated common carrier activities.

[34] See Irwin, The Computer Utility: Competition or Regulation?, 76 Yale L.J. 1299, 1308 (1967).

[35] As techniques become more refined, the tendency could be for the software companies to expand the scope of their switching operations and services, perhaps to the point where they could be classified as communications carriers.

It was in this factual context that the FCC conducted its inquiry and promulgated the rules challenged in *GTE Service Corp.*

II. THE COMMISSION'S JURISDICTION

Both the Commission in its Final Decision[36] and the Second Circuit in its opinion[37] based the FCC's authority to promulgate rules and regulations on the Commission's statutory duty "to make available . . . a rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges."[38] The basic authority of the FCC is thus drawn in broad, rather than in specific, terms. In drawing up the rules which were the subject of dispute in *GTE Service Corp.*, the FCC tried to distinguish between on the one hand "attempting to assert jurisdiction over common carriers as purveyors of computer services, as such,"[39] which it is not empowered to do, and on the other hand regulating carriers under the belief that without proper regulatory safeguards, the provision of data processing services could interfere with the carriers' statutory obligation.[40] The Commission found that the involvement of communications common carriers in data processing activities might well lead to the impairment of efficient communications services to the public. This possibility, it said, stems "from the potential of common carriers to subsidize their data processing operations with revenues and resources available from their regulated services"[41] and consequently to charge unreasonable rates for common carrier service. It was on this basis that the court in *GTE Service Corp.* found that the FCC did in fact have authority to promulgate Rules (b), (c)(1), (2), (3) and (d).[42]

In so deciding, the Second Circuit noted that the courts "have uniformly and consistently interpreted the [Federal Communications] Act to give the Commission broad and comprehensive rule-making authority in the new and dynamic field of electronic communication."[43] The court pointed out that on prior occasions the extension of FCC authority without a specific statutory mandate had been upheld by the courts. Specifically, in *National Broadcasting Co. v. United States,*[44] the Supreme Court upheld FCC regulations concerning the control of station licensees by the national broadcast-

[36] 28 F.C.C.2d 267, 268 (1971).

[37] 474 F.2d at 730.

[38] 47 U.S.C. § 151 (1970).

[39] 28 F.C.C.2d at 268.

[40] Id. at 269.

[41] 28 F.C.C.2d at 299.

[42] The court so found despite the objection of Western Union that public advantages rather than disadvantages would flow from savings to the common carriers passed on to the public attributable to the sale of excess capacity, and the more general objection that some cross-subsidization is possible in whatever non-regulated business the carriers are engaged in. See 28 F.C.C.2d at 271.

[43] 474 F.2d at 730-31.

[44] 319 U.S. 190 (1943).

ing networks, promulgated on the basis that they were in the public interest, despite a lack of specific authority in the Communications Act. A similar situation was presented in *United States v. Southwestern Cable Co.*[45] In that case the FCC had banned importation of CATV signals into the 100 largest market areas of the nation,[46] and a challenge was made to the FCC's authority to regulate CATV. The Supreme Court found that the authority did exist,[47] despite the fact that it was not specifically set out in the Communications Act. It did so because of "the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[48] Similarly, in *Mount Mansfield Television, Inc. v. FCC,*[49] the Second Circuit upheld the authority of the Commission to regulate prime time access in television communication despite the absence of any explicit authority in the Act. In commenting on the decisions of the courts in these cases, the court in *GTE Service Corp.* expressed its view that:

> [t]he plain implication of these precedents is that . . . the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services . . . .[50]

Several observations can be made concerning this part of the court's holding. First, it is by no means the "plain implication" of the precedents that the FCC has authority to regulate the activities of communications common carriers in the data processing field. In no other case has a court upheld FCC regulation of a field of activity otherwise not subject to the jurisdiction of the Commission, but in which a regulated carrier has become involved, solely on the basis of an "intimate relationship" between that field and the regulated carrier. That much of the holding appears to be without basis, at least in the cited precedents.

Second, the cases of CATV and data processing are distinguishable on factual grounds. CATV operations are a combination of broadcasting and common carriage, "with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither."[51] In the CATV case, therefore, the FCC was dealing with a new type of entry into the broadcasting-communications field and not, as in the *GTE Service Corp.* case,

[45] 392 U.S. 157 (1968).

[46] 47 C.F.R. § 74.1107 (Supp. 1968). The rule allowed such service as existed on Feb. 15, 1966, and such other service as would be in the public interest.

[47] 392 U.S. at 172-73.

[48] Id., citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[49] 442 F.2d 470 (2d Cir. 1971).

[50] 474 F.2d at 731.

[51] United States v. Southwestern Cable Co., 392 U.S. 157, 172 (1968).

with the entry of regulated companies into a non-regulated field.

Third, the FCC's assertion of jurisdiction over CATV was not as certain as one might think and in fact represented a reversal of a prior narrower FCC view that CATV was not subject to regulation because it involved neither broadcasting in the sense of radiation, nor common carriage since the lines were not for public hire.[52] The Commission stated: "[W]e do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications."[53] Although this position was ultimately reversed by the Commission as respects CATV,[54] it does not appear that the Commission has always construed its authority to be of the breadth displayed in the data processing rulings.

Fourth, the rationale of the *Southwestern Cable Co.* decision is that the FCC may control a service in direct competition with regulated broadcasting facilities where the competition might "ultimately deprive the public of the various benefits of a system of local broadcasting stations."[55] The use of a similar rationale in a data processing context might lead the FCC to assert jurisdiction over software companies who sell either message-switching, hybrid service or other products determined to be primarily communications,[56] and who would in effect be acting as, and competing with, common carriers. Such a possibility, it should be noted, is distinct from the regulation of entry of common carriers into the data processing field. The latter rather than the former has consistently been the position of the Commission in the instant case.

Finally, the rationale itself may be ultimately questionable, for if competition with regulated broadcasting alone brings CATV under regulation, then a similar reasoning might call for regulation of other facilities which do not engage in broadcasting or communications, but which compete economically with television. Such facilities include symphonies, theaters and motion pictures.

The *basis* of the FCC's jurisdiction, then, is an important factor in determining the scope of that jurisdiction. Fear that the carriers' involvement in the sale of data processing services would result in derogation of the Commission's statutory duty to make efficient and economic communications services available to the public gives the FCC the authority to regulate the entry of the carriers themselves into the data processing field. On the other hand, jurisdiction based

[52] Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 428-29 (1959).

[53] Id. at 429.

[54] In re Amendment of Parts 21, 74 (Proposed Subpart J), and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters, 1 F.C.C.2d 453, 464-65 (1965).

[55] 392 U.S. at 175.

[56] 47 C.F.R. §§ 64.702(e), (f) (Supp. 1972) contains rules providing for FCC determination of whether a given "hybrid" service is primarily data processing or communications.

on an analogy to *Southwestern Cable Co.* might lead to the exercise of authority over data processing as such. The analogy between *Southwestern Cable Co.* and *GTE Service Corp.* fails, however, since data processing is distinct from both communications and broadcasting. The analogy, therefore, provides little basis for the jurisdiction which the FCC sought to exert.

III. The Administrative Response

Assuming that on the facts at hand the FCC did have jurisdiction to promulgate Rules (b), (c)(1), (2), (3), and (d), the question remains as to whether the creation of these regulations constituted the best way for the Commission to proceed.[57] Perhaps the most fundamental question is whether the scope of the administrative regulations ought to cover the type of situation presented in *GTE Service Corp.* The Commission's extension of regulation may in fact say more about the general tendencies of regulatory agencies than about the particular problem at hand.

It has been said that "[m]ost regulation came first to answer a need for protection of some sort."[58] When the first regulatory agency, the Interstate Commerce Commission (ICC), was established in 1889, it came largely in response to abuses of railroad monopolies over the national crop transportation system.[59] Similarly, it was the abuse of radio frequencies that led to the creation of the Radio Commission in 1927.[60] In the ICC example, however, it should be noted that when the original evil, the railroads' monopoly over transportation, ceased to exist due to the increasing use of automobiles, trucks, buses and airplanes, the ICC's response was more rather than less regulation.[61] At some elusive point in the administrative process, the expansion of authority ceases to be for the purpose of protecting the public and takes on the somewhat different role of " 'straightening out and stabilizing the industry, making it thereby a more efficient and responsible public servant.' "[62]

Several factors indicate that a similar type of administrative self-extension may have taken place in the FCC's inquiry into the

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[57] "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[58] R. Lorch, Democratic Process and Administrative Law 41 (1969).

[59] See Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1113-14 (1954).

[60] The fact situation requiring regulation is outlined in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[61] See Jaffe, supra note 59, at 1114. The rationale for regulations promulgated by the ICC had shifted from consumer protection to arguments for stability of the entire transportation industry and for a coordinated national transportation policy.

[62] Id., quoting ICC Commissioner Eastman's statement in Regulation of Transportation Agencies, S. Doc. No. 152, 73d Cong., 2d Sess. 52 (1934).

involvement of communication common carriers in data processing activities. First, although it commissioned, and subsequently received, a comprehensive report on this subject from the Stanford Research Institute (SRI), the Commission chose not to follow the Institute's recommendations. The SRI had concluded that although there was some possibility of cross-subsidization by carriers in the data processing field, monopolistic predatory price cutting of data processing prices with subsequent higher carrier charges would only be a major problem if carried out by the Bell companies,[63] which are prohibited from entering the field anyway.[64] The SRI recommendation was "that, for the immediate future, we should adopt a wait-and-see policy,"[65] and this the Commission was unwilling to do.

Second, there were three dissenters on the Commission who opposed the creation of Rules (c)(4) and (5), which the court of appeals subsequently found invalid. In his dissent, FCC Chairman Burch stated that "the Commission is here guilty of a classical case of regulatory over-kill."[66] He points out that under the "maximum separation" doctrine, "[c]ompetitive bidding from all supply sources including affiliates would be barred"[67] to carriers seeking data processing services for their own use. This would tend to increase the cost of data processing to carriers, and this increase in cost would in turn be passed on to the public. In this regard it should be noted that other regulated industries such as utilities and transportation carriers are under no similar disabilities in their purchase and sale of data processing services. Chairman Burch was of the opinion that the possibility of future abuse is not such as to require the extent of regulation proposed in the rules. As commentary on the institutional aspects of the regulation, Chairman Burch stated:

> the Commission has acted in the usual, orthodox, knee-jerk regulatory fashion: arbitrarily without any real showing of actual or even potential abuse, we have denied a common carrier access to computer services from its data affiliate.[68]

Third, a survey of prior FCC reactions to technological developments[69] indicates that regulatory overreaction has more

[63] The Commission's fear was that costs of the data processing entity, such as overhead or interest, might be charged to the common carrier, with resulting higher prices for carrier services to pay for these data processing costs. The SRI position is discussed in the Tentative Decision, 28 F.C.C.2d 291, 301 (1970).

[64] See note 33 supra.

[65] See 28 F.C.C.2d at 301.

[66] 28 F.C.C.2d at 290 (Chairman Burch dissenting).

[67] Id. at 290 (dissenting opinion). See text at note 12 supra for a brief explanation of the maximum separation doctrine.

[68] Id. (dissenting opinion).

[69] See LeDuc, The FCC v. CATV et al.: A Theory of Regulatory Reflex Action, 23 Fed. Com. B.J. 93 (1969).

often than not been the case in the communications field. One commentator, for example, has expressed the opinion that FCC impediments delayed commercial television by as much as twelve years.[70] He also points out that the entry of FM broadcasting into the field was met by FCC assignment of a frequency band which made AM radio receivers unable to receive FM broadcasts.[71] Further, the innovation of CATV was met by denying access to the lucrative markets. It is submitted that the FCC's tendency consistently has been to protect the status quo against all change. It is as if the Commission has always felt that technological changes to the detriment of existing interests are necessarily to the detriment of the public interest as well. In the data processing decision, however, the Commission has gone one step further. Whereas in prior cases the Commission has sought to protect its regulated industries from outside challenges, in the present case it is trying to protect regulated common carriers from their own expansion. Further, speculation as to second hand effects upon the public seems a somewhat tenuous basis for the Commission's rules. An additional reason for the FCC's position may well be that "a threat to existing technology poses the same threat of obsolescence to a bureau expert as it does to the industry."[72]

Fourth, although the Commission expressed its belief that it would have the authority to create Rules (b), (c) and (d), on a showing that involvement of communication common carriers in the data processing field would impair their common carrier responsibilities, it actually promulgated these rules on a lesser showing: namely, that such involvement *might* adversely affect the carriers' statutory obligations. In its April 1970 Tentative Decision, the Commission stated that:

> there is no specific provision which bars a common carrier from providing non-regulated services . . . . It does not follow, however, that the Commission may not exercise its jurisdiction over carriers to prescribe appropriate conditions for engaging in non-regulated services or to prohibit the furnishing of such services *where such activities burden or impair their common carrier communications obligations.*[73]

It further concluded "that we have ample jurisdiction to bar carriers from providing data processing services *upon a proper finding that it would prevent them from discharging their common carrier responsibilities* . . . ."[74] In its Final Decision, however, the Commission

[70] Id. at 93. Although the system's technology was available in the 1930's, the Commission declined to grant frequency access for commercial television until 1948.

[71] Id. at 93-94.

[72] Id. at 103.

[73] 28 F.C.C.2d at 299-300 (emphasis added).

[74] Id. at 301 (emphasis added).

merely concluded: "It is our view that . . . the provision of data processing services . . . *could* adversely affect the statutory obligation of such carriers . . . ."[75] The premise of the Commission was that jurisdiction exists where certain results *would* flow from certain actions. The finding, however, is only that certain results *could* flow from those actions. The distinction is more than semantic. Certainly the Commission would not assert jurisdiction over all activities of carriers which *could* affect their statutory duty, for that would clearly include all activities of the carriers. Further, the regulation is imposed upon no specific finding, or even the belief, that adverse effects would result from the involvement of carriers in data processing activities. The court in *GTE Service Corp.*, upon examining the Commission's Tentative and Final Decisions, interpreted them as indicating that the FCC saw the carriers' data processing activities as posing a "threat" to their statutory duties.[76] Although a "threat" analysis does not appear in the FCC Decisions, one must wonder, even if it did appear, whether a "threat" would meet the FCC's own standards for the imposition of regulations—namely, the impairment of the carriers' obligations. As previously noted, the court held that the FCC has jurisdiction to promulgate rules and regulations where the activities of the carriers "may substantially affect" their statutory duties.[77] On the one hand this adds a requirement of substantiality which Chairman Burch might have argued had not been shown. On the other hand it apparently allows regulation not only on a showing of actual abuse, but also on a mere showing of potential abuse. The Commission itself did not claim this power in its Tentative Decision.

Thus the nature of the administrative agency response is of interest both in itself and in its relation to the decision in *GTE Service Corp.* In the choice between regulating and not regulating, where perhaps the better course would have been not to act at all, the FCC chose to regulate despite the recommendation of the SRI report. The choice to regulate closely followed similar FCC reactions to prior technological developments. Also, the decision to regulate depends on a showing of facts meeting the standards which the Commission adopts, and it appears that in the present case the administrative rules were promulgated on a significantly lesser showing. It is submitted that the Commission should have paid more attention to these fundamental questions of policy in order to avoid overreaching its authority. It should be noted, however, that many of these considerations attach to the wisdom of applying the regulations rather than to the legality of the application. In the absence of a showing that the common carriers' involvement in data processing activities would adversely affect their obligation to provide efficient and economic communications service to the public, or

[75] 28 F.C.C.2d at 269 (emphasis added).

[76] 474 F.2d at 730.

[77] Id. at 731.

of a showing that if there were such an adverse effect it would be substantial in nature, Chairman Burch's opinion that the rules were unwise seems the more reasonable position.

IV. FCC CONTROL OVER DATA PROCESSING

In the first part of its decision the court found that the FCC had authority to regulate the entry of common carriers into the field of data processing through an approach of "maximum separation"[78] of services. It held that the Commission's rules requiring formation of a separate affiliate[79] were "fully within the authority of the Commission and amply supported by findings."[80] These rules, however, create the likelihood of a sale or lease of hardware by the carrier to the affiliate with a subsequent sale of data processing services by the affiliate to the carrier at below market prices. The Commission found that the existence of such a likelihood "would be conducive to the development of the very substantive ills that our concept of maximum separation is designed to inhibit."[81] For this reason it promulgated Rules (c)(4) and (5), prohibiting the carrier from allowing the affiliate to use its name or symbol and prohibiting the carrier from buying or leasing data processing services from the affiliate. The concept of forming an affiliate is not in itself repugnant to the carriers. Indeed, the FCC found that some carriers, for reasons independent of regulation, had voluntarily established separate corporations to sell data processing services,[82] and the present action itself being brought by already established data processing affiliates indicates that compliance with these rules was not a major issue for the carriers. The real teeth in the regulations were thus provided by Rules (c)(4) and (5), and it was the promulgation of these rules which the court found "to be without authority either in the Communications Act or in the cases construing it."[83]

The Commission's argument in favor of these rules was based on two separate theories. The first was that without Rules (c)(4) and (5) the telephone companies could still use their monopolist leverage to extend their power into the data processing industry.[84] The second was the possibility of cross-subsidization permitted by the rules absent the provisions of Rules (c)(4) and (5).[85] As to the first

[78] Id. at 732.

[79] 47 C.F.R. §§ 64.702(b), (c)(1), (2), (3), (d). See note 11 supra for full text of rules.

[80] 474 F.2d at 732.

[81] 28 F.C.C.2d at 273.

[82] Id. at 272.

[83] 474 F.2d at 733.

[84] 28 F.C.C.2d at 273.

[85] Id. The theory of cross-subsidization with respect to sales by the affiliate to the carrier is that even if the two are separate entities, dealings between the two might result in higher prices to users of communications services. For example, the carrier might pay the affiliate higher than market prices for services in order to help the affiliate get started in business or obtain or retain a certain share of the market. Or, in the alternative the carrier might accept

ground the court held that the FCC's "concern over data processing services is *ultra vires*."[86] On the second ground the court found that the Commission's concerns "do not sustain the Commission's intrusion into the data processing activities of the separate affiliate."[87]

A. *The Antitrust Theory*

The basis of the court's rejection of the Commission's antitrust argument was that Rules (c)(4) and (5) actually impose regulation on the affiliates and not merely on the common carriers.[88] As the court pointed out, Rules (b) and (c)(1), (2) and (3) have established the affiliate in such a manner as to be outside the regulatory jurisdiction of the FCC. The affiliate is defined in the rules as a data processing service and as such is neither a broadcaster nor a common carrier within the purview of FCC regulation.[89] Although the Commission based its authority to create Rules (c)(4) and (5) on the fact that the affiliate is a creature of the carrier, the court rejected this reasoning and stated that:

> the Commission itself has not only appointed and anointed the separate data processing affiliate but cut the umbilical cord to the parent by the "maximum separation" provisions we have previously discussed. The Commission has no basis at all to now pronounce that the carrier's progeny is really illegitimate . . . .[90]

Having decided that Rules (c)(4) and (5) actually regulate the affiliate and that the affiliate, by the terms of Rules (b), (c)(1), (2), (3) and (d), is really a data processing entity rather than a communications entity, the court nevertheless had to decide whether the FCC could on other grounds assert jurisdiction over the affiliate. In this regard it should be noted that the FCC stated in its Final Decision that it had not undertaken any regulation of the data processing industry.[91] Such a statement, of course, would not be binding if the rules themselves were otherwise valid.

In addressing itself to the FCC's antitrust argument the court recognized the general proposition that the Commission may properly make regulations which are based upon antitrust considerations.[92] Some question exists, however, as to whether this authority covers both horizontal and vertical integration involving

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less service for a fixed expenditure. In either case an inefficient use of carrier resources is made, in effect, to subsidize the affiliate, although the affiliate is a separate entity, and the costs are ultimately borne by the consumers of communications services.

[86] 474 F.2d at 734.

[87] Id. at 735.

[88] See note 24 supra.

[89] See 47 C.F.R. § 64:702(c), set forth in note 11 supra.

[90] 474 F.2d at 733.

[91] See note 22 supra.

[92] 474 F.2d at 733.

communications carriers.[93] FCC control over horizontal monopolies is clearly established by the requirement of the Communications Act that telephone and telegraph companies obtain prior FCC approval for all proposed mergers and other consolidations.[94] In asserting jurisdiction over vertical integration of the carriers, *i.e.*, the provision of services by the affiliates to the carriers, the Commission relied[95] on three sections of the Communications Act which provide that various charges and rates of the carriers must be just and reasonable.[96] The court correctly pointed out that the language of the statute specifically limits the jurisdiction of the Commission to consideration of the prices and rates charged *by the carriers themselves*.[97] The statute does not purport to authorize the FCC to regulate activities or entities other than communications common carriers. As the court noted: "[T]he unfair competition, restraint of trade or potential threat of monopoly, must be in a market in which the Commission has jurisdiction."[98]

A second potential source of statutory authority for the Commission's control over vertical integration is the Clayton Act,[99] which provides for regulation of various types of monopolies. That Act vests authority in the FCC to enforce compliance with its terms "where applicable to common carriers engaged in wire or radio communication."[100] The FCC's authority, as enunciated in the Act, is limited to situations in which the Commission has "reason to believe that any person *is violating* or *has violated* any of the provisions of sections 13, 14, 18 and 19 [of the Act]."[101] Such a limitation, it may be argued, excludes Commission action on prospective violations such as those the Commission thought might result from the integration of common carrier and data processing services. Further, the remedy provided by the Clayton Act is the issuance of a cease and desist order by the Commission and not the promulgation of rules.[102] As to prospective violations by merger the Clayton Act states that:

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[93] See note 25 supra for an explanation of horizontal and vertical integration.

[94] 47 U.S.C. §§ 221, 222 (1970).

[95] 474 F.2d at 734 n.15.

[96] 47 U.S.C. § 201(b) (1970) provides: "All charges . . . in connection with such communication service, shall be just and reasonable . . . ."

47 U.S.C. § 202(a) (1970) provides: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . in connection with like communication service . . . ."

47 U.S.C. § 205(a) (1970) provides: "Whenever . . . the Commission shall be of the opinion that any charge . . . of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . ."

[97] 474 F.2d at 734 n.15.

[98] Id. at 734.

[99] 15 U.S.C. §§ 12, 13, 14-27, 44 (1970); 29 U.S.C. §§ 52, 53 (1970).

[100] 15 U.S.C. § 21(a) (1970), which vests authority in the FCC to enforce specifically the provisions of §§ 13, 14, 18 and 19.

[101] 15 U.S.C. § 21(b) (1970) (emphasis added).

[102] Id.

> no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations . . . where . . . the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.[103]

From this section it would appear that jurisdiction over mergers generally—so long as they are not mergers of communications carriers—is in the Federal Trade Commission (FTC) rather than in the FCC.[104]

In attempting to set up a basis for assuming jurisdiction in antitrust matters, the Commission cited several cases which dealt with the formation of horizontal monopolies within the communications field. In one of these cases, *Mansfield Journal Co. v. FCC*,[105] the District of Columbia Circuit, in denying the application of a town's only newspaper for a license to acquire a radio station, did so on the ground that the resulting concentration of control over the media would not be in the public interest within the meaning of the licensing statute.[106] Significantly, it was the fact that the granting of the license would not be in the public interest which provided the statutory basis for denying the plaintiff's application. The antitrust aspect standing on its own might have been insufficient to accomplish this result.

Also cited by the Commission was *General Telephone Co. v. United States*.[107] In that case the court sustained certain rules promulgated by the FCC which prohibited telephone carriers from furnishing CATV service to the public either directly or through affiliates. The court in *GTE Service Corp.*, however, distinguished this case on two grounds. First, said the court, *United States v. Southwestern Cable Co.* had clearly established the jurisdiction of the FCC over CATV. *General Telephone*, then, involved the relationship between two FCC-regulated entities, while in *GTE Service Corp.* the rules controlled the relationship between one regulated and one non-regulated entity.[108] Second, said the court, there is a distinction between the data processing field, which is marked by low capital requirements and relatively free entry,[109] and the CATV industry, the gateway to which is controlled by the carriers' control over communications lines.[110] The distinctions raised by the court in

[103] 15 U.S.C. § 18 (1970).

[104] The FTC's enabling statute, 15 U.S.C. § 45(a)(6) (1970), states: "The Commission is empowered and directed to prevent persons . . . from using unfair methods of competition in commerce. . . ."

[105] 180 F.2d 28 (D.C. Cir. 1950).

[106] The licensing statute in question is 47 U.S.C. § 307 (1970).

[107] 449 F.2d 846 (5th Cir. 1971).

[108] 474 F.2d at 735.

[109] Id.

[110] Use of telephone companies' poles, conduits and rights of way is a necessity for CATV. Since the telephone carriers have a monopoly on these facilities, their potential for control of CATV is apparent if they are allowed to enter the field.

GTE Service Corp. are not quite as clear as they might originally appear to be. If CATV is considered a communications common carrier, then the regulation is a control over horizontal monopolies of carriers. To the extent that CATV is seen as a broadcaster,[111] however, the Commission's rule regulates the control of a broadcaster by a carrier, and this is more akin to a vertical integration than to a horizontal integration. The Court in *General Telephone,* in upholding the Commission's rules as being within the standards set down in 47 U.S.C. § 214(a),[112] found that CATV operators were common carriers.[113] The issue in that case, then, was not framed, as it was in *GTE Service Corp.,* as whether an affiliate of a carrier could be regulated, but rather, as whether one communication carrier could, in the public interest, control another communication carrier. Therefore, if the *General Telephone* case is read as approving the regulation of one carrier's control over another carrier—that is, if CATV is seen as a carrier—then the case is not analogous to *GTE Services Corp.* in which the FCC established regulation over a non-carrier entity. If, however, *General Telephone* stands for approval of FCC regulation of a non-carrier entity based on the Commission's statutory duty to provide communications service—that is, if CATV is seen as a broadcaster—then there is a better analogy to *GTE Service Corp.,* for the FCC would then be resting its jurisdiction over CATV on its obligation to provide common carrier service rather than on its obligation to regulate broadcasting. In the *GTE Service Corp.* case, the FCC purported not to regulate data processors as data processors but only in their relation to communications carriers. Under this analysis the *General Telephone* case can be viewed as a better precedent than the Court in *GTE Service Corp.* felt it to be.

Other cases indicate that the antitrust jurisdiction of the FCC, other than that which it is specifically authorized to exercise in cases of merger of common carriers,[114] is severely limited. In *FCC v. RCA Communications, Inc.,*[115] for example, the Supreme Court held that certain FCC rulings[116] purportedly based on national or congressional policies favoring free competition were invalid in that they were not based on the "public interest" standard set out in the Communications Act. Under the Court's holding the FCC may not

[111] See text at note 51 supra.

[112] 449 F.2d at 858. 47 U.S.C. § 214(a) (1970) provides:

No carrier shall undertake the construction of a new line or of an extension of any line . . . until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such additional or extended line. . . .

[113] 449 F.2d at 859.

[114] 47 U.S.C. §§ 221, 222 (1970).

[115] 346 U.S. 86 (1953).

[116] The FCC ruled that MacKay Radio & Telegraph Co. could open new radio telegraph lines to Europe, to which RCA, a holder of existing lines, objected on the grounds that the Commission's justification for its ruling was insufficient. Id.

base its regulations solely on antitrust policies. The Court did note, however, that "competition is a relevant factor in weighing the public interest."[117] It is also notable that part of the Court's reasoning is that the FCC may not assume that competition is in fact a good thing as a matter of policy, for the degree of regulation of many industries indicates that the fields in which competition is or is not good is something to be determined by Congress.[118] One implication which this case has in the data processing field is that not only is the FCC precluded from determining the methods by which free competition is to be maintained in the data processing field, but also that the FCC is essentially incompetent to determine whether or not free competition in this field ought to be maintained in the first place.

A second aspect of FCC antitrust cases involves the question of which agency has primary jurisdiction over antitrust matters. In this area also the FCC has not played an expansive antitrust role. In the leading case of *United States v. Radio Corp. of America,*[119] the Justice Department brought a Sherman Act civil action against RCA and NBC for conspiracy in restraint of trade arising out of the transfer of ownership of two television stations. RCA raised as an affirmative defense the prior FCC approval of the broadcasting license transfer in question. RCA asserted "that the regulatory scheme of the Communications Act has so displaced that of the Sherman Act that the FCC had primary jurisdiction to license the exchange transaction,"[120] and that "the only method available to the Government for redressing its antitrust grievances was to intervene in the FCC proceedings."[121] In addressing itself to the issues before it, the *RCA* Court had occasion to examine the legislative history of the Radio Act of 1927[122] in an attempt to determine the congressional intent in respect to certain relevant provisions of that Act. The Court found that the intent of Congress was that absent a prior judicial finding of antitrust violations the Commission could not deny or revoke a broadcasting license.[123] A determination by the Commission that an antitrust violation had taken place was insufficient, said the Court, to call the Commission's regulatory powers into existence.[124] In this regard the Court concluded that "it is equally clear that courts retained jurisdiction to pass on alleged

[117] Id. at 94.

[118] Id. at 91-93.

[119] 358 U.S. 334 (1959).

[120] Id. at 338.

[121] Id.

[122] Ch. 169, 44 Stat. 1162.

[123] 358 U.S. at 342.

[124] Id. For unsuccessful attempts to enact amendments specifically allowing the Commission to deny or revoke changes upon a finding of antitrust violation, see 67 Cong. Rec. 5484-85, 5501-04, 5555 (1926). Presently 47 U.S.C. § 313 (1970) allows the FCC to deny or revoke a license upon a prior judicial finding of an antitrust violation, but not upon an administrative finding of such a violation.

antitrust violations irrespective of Commission action,"[125] and that "the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such."[126]

One important aspect of the Court's decision in the *RCA* case was its reply to RCA's contention that primary jurisdiction should rest in the FCC because of its technical expertise in the broadcasting field.[127] On that point the Court raised a distinction between communications common carriers under Title II of the Communications Act, whose rates and entry into the field were regulated, and broadcasters under Title III of the Act, who operate under free entry and competitive pricing. The Court cited *FCC v. Sanders Brothers Radio Station,*[128] in which the Supreme Court stated: "[T]he Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition . . . ."[129] Thus, the conclusion of the Court in the *RCA* case was that where there was no direct regulation of prices there was no justification for primary antitrust jurisdiction in the FCC.[130] That is, there is no element of technical expertise in the FCC which would make jurisdiction of the Federal Trade Commission or of the Justice Department inappropriate. This line of reasoning has important implications for FCC regulation of data processing affiliates of common carriers. As the court pointed out in *GTE Service Corp.*, the FCC itself has found that the data processing industry is characterized by relatively free entry into the field and by open competition not requiring regulation.[131] Moreover, so long as the FCC does not attempt to regulate the computer service field, it cannot be said to have the technical expertise which would justify its exercise of primary antitrust jurisdiction vis-à-vis that industry.

It is also notable that while the Commission was willing to promulgate rules that would have a regulatory effect on the data processing industry, it has not been willing to exercise similar control over other non-regulated fields where the need for such action has appeared just as great. An example of this unwillingness is the Commission's failure to exercise any regulatory jurisdiction over Western Electric, a corporation controlled by American Telephone and Telegraph. The relationship of these two entities is a prime example of vertical integration of user and supplier to the extent that 90 percent of communications equipment is supplied by manufactur-

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[125] 358 U.S. at 343-44.
[126] Id. at 346.
[127] Id.
[128] 309 U.S. 470 (1940).
[129] Id. at 470.
[130] 358 U.S. at 350.
[131] 474 F.2d at 735.

ing affiliates of common carriers,[132] and the bulk of that amount is done by Western Electric. The FCC, however, extends no regulatory control over Western Electric other than its practice of considering the reasonableness of the prices charged by the subsidiary to the Bell Telephone companies for purposes of establishing Bell System tariffs.[133] However, the prices charged by the subsidiary to Bell may be only the tip of the iceberg as far as their interdependent relationship is concerned. The difficulties of tracing improper cost shifting between Bell Telephone and Western Electric remove most of the value in even this limited power of the FCC.

Thus, the Western Electric situation clearly presents a monopolistic vertical integration which is wholly within the scope of the Clayton Act jurisdiction of the FCC. However, it has not been the FCC that has sought regulation of component manufacturers on antitrust grounds. Rather, it has been the Department of Justice that has done so.[134] Further, where there is no special reason for FCC regulation under the criteria set out in *RCA* so as to require that the Commission have primary jurisdiction over the field, the question is properly, under 15 U.S.C. § 18 (1970), one for the FTC.

Other cases which have dealt with the entry of entities other than computer service corporations into the data processing field do not support the Commission's regulation of the data processing industry. In *United States v. IBM*,[135] a New York federal district court issued a consent decree which required IBM to establish the separate Service Bureau Corporation as an affiliate to sell computer software. This case involved the regulation of activities wholly within the data processing industry to prevent the virtual monopoly which IBM already had in the field of computer hardware from expanding into a monopoly over computer software as well.

In *Association of Data Processing Service Organizations, Inc. v. Camp*,[136] the issue before the Supreme Court was the sale of data processing services by banks. The basis of the suit was a ruling by the defendant, the Comptroller of the Currency, that banking institutions could provide computer processing services to other banks and to bank customers.[137] The case reached the Supreme Court not on the merits but on the narrower issue of the standing of ADAPSO to sue on the basis of the alleged invalidity of the rules promulgated by the Comptroller. The merits of the case were not reached in the

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[132] Irwin & McKee, Vertical Integration and the Communications Equipment Industry: Alternatives for Public Policy, 22 Fed. Com. B.J. 131 (1968).

[133] Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 152-53 (1930).

[134] See, e.g., United States v. Western Elec. Co., Civil No. 17-49 (D.N.J., filed Feb. 14, 1949); United States v. General Tel. & Electronics Corp., Civil No. 64-1912 (S.D.N.Y., filed June 19, 1964). Both of these cases were settled before a judicial decision was rendered.

[135] 1956 Trade Cas. 71,117, 71,125 (S.D.N.Y. 1956) (consent decree).

[136] 397 U.S. 150 (1970).

[137] Comptroller's Manual for National Banks ¶ 3500 (Oct. 15, 1966).

decision, but the holding of the Court that ADAPSO had standing to sue as a party with adverse economic interests[138] presents an alternative to FCC intervention.

To the extent that Rules (c)(4) and (5) are justified by the FCC as an attempt to preserve competition in the data processing field, the court held that the FCC may regulate against unfair competition only in markets over which it has jurisdiction.[139] Moreover, the FCC has not traditionally been active in the antitrust field. It appears that the court has recognized that although antitrust considerations were the primary reason for FCC regulation of the data processing affiliate, the Commission's real concern was with the communications carriers, and its antitrust argument was merely utilized to justify the disallowance of dealings between the affiliates and the carriers.

B. *The Cross-Subsidization Theory*

The second theory on which the Commission based the validity of Rules (c)(4) and (5) was that absent these rules transactions between a carrier and its affiliate are "conducive to improprieties which are difficult to detect."[140] In the Commission's opinion the rules were necessary to accomplish the end sought, namely the elimination of any possibility that regulated rates would be higher due to the carrier's subsidization of its affiliate.[141] On this question the court simply held that the evil to be prevented does not justify the means chosen since the means chosen—the promulgation of Rules (c)(4) and (5)—are beyond the scope of the FCC's authority.[142] In answering the FCC's argument that the court should not concern itself with the wisdom of the Commission's rules, nor should it substitute its judgment for that of the Commission,[143] the court in *GTE Service Corp.* pointed out that in the case before it the question of the scope of judicial review was not presented. The court did not find that Rules (c)(4) and (5) were lacking in foundation or that they constituted an abuse of discretion, but only that they were beyond the FCC's jurisdiction. The court specifically stated:

> The basis for our decision here is not that we disagree with the prudence or wisdom of the Commission but simply that the Commission had no jurisdiction under its Act or in the cases construing it, to regulate a separate affiliate's business in the data processing market. That is properly the concern of the Anti-Trust Division and the Federal Trade Commission . . . .[144]

[138] 397 U.S. at 156.

[139] 474 F.2d at 733.

[140] 28 F.C.C.2d at 273.

[141] See note 85 supra for a description of the cross-subsidization problem presented in this area.

[142] 474 F.2d at 735.

[143] Id. at 736.

[144] Id.

V. CONCLUSION

The distinction drawn by the *GTE Services Corp.* court between the permissible and impermissible regulations seems to be essentially correct. If the FCC were allowed to extend its jurisdiction over the data processing industry in this case, then by analogous extensions the scope of FCC authority would be enlarged clearly beyond legislative intentions. The significance of *GTE Service Corp.* is that in this case the court held that the FCC's stated intent to regulate only the common carriers provided insufficient grounds for rules which imposed de facto regulation on the data processing industry which itself is not subject to FCC control.

In addition to discussion of the court's view of the legality of the rules, this note has dealt with certain aspects of the wisdom of the rules. The SRI report and Chairman Burch's dissent, as well as the cited history of FCC action regarding prior technological developments, seem to indicate that the Commission may not have given adequate consideration to its option not to apply the regulations in question, particularly Rules (c)(4) and (5). In the factual context of the communications industry, the possibility of large scale monopoly over the data processing industry exists only for the Bell system companies which even without these rules are constrained from entering the field.[145] Whatever possibility of derogation of the carriers' statutory obligations exists is certainly lessened by the disability of the Bell companies, and this fact should have been weighed by the Commission in considering the wisdom of promulgating the rules. At least, the possibility of cross-subsidization between telephone companies other than Bell companies and the data processing entities would not appear to be such a significant threat in derogation of statutory obligations so as to require the degree of regulation imposed by the Commission. In this respect the *GTE Service Corp.* decision to invalidate at least a portion of the rules is a move in the right direction.

ALAN J. SCHLESINGER

Constitutional Law—Privilege Against Self-Incrimination in Tax Liability Investigations—Tax Records in Possession of Third Party—*Couch v. United States.*[1]—In 1969 the Internal Revenue Service (IRS) commenced an investigation of the business tax returns of petitioner, Mrs. Lillian V. Couch, the sole proprietress of a restaurant.[2] Pursuant to this investigation IRS agents began exam-

[145] See note 33 supra.

[1] 409 U.S. 322 (1973).

[2] The IRS investigation of petitioner was initiated in order to determine her tax liability for the years 1964-1968. Id. at 323. The investigative powers of the IRS are appraised in Miller, Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service, 6 B.C. Ind. Com. L. Rev. 657 (1965).