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# Competition versus Cooperation: The D.C. Circuit Referees the Transborder Policy

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## NOTES

### Competition versus Cooperation: The D.C. Circuit Referees the Transborder Policy

It is virtually impossible to make a phone call, watch television, listen to the radio, or even deal with business data without coming in contact with something that at some point passes through a satellite transponder.<sup>1</sup> It is no wonder then that international telecommunications is one of the fastest growing areas of the telecommunications industry and is playing an increasingly critical role in trade, foreign policy, and international investment.<sup>2</sup> The United States realized early on the importance of world satellite communications and enacted the Communications Satellite Act of 1962 (Satellite Act),<sup>3</sup> to usher in the new age in international telecommunications.<sup>4</sup> The Satellite Act provided for U.S. participation in an international network<sup>5</sup> which eventually emerged as the International Telecommunications Satellite Organization (INTELSAT),<sup>6</sup> a cooperative established to further international telecommunications and to act as the sole international satellite system for its members.

The general rule under INTELSAT is that its members must route their international telecommunications through the INTELSAT system.<sup>7</sup> Such a rule has provided INTELSAT and its U.S. affil-

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<sup>1</sup> S. BARNETT, M. BOTEIN & E. NOAM, *LAW OF INT'L TELECOMMUNICATIONS IN THE UNITED STATES* 196 (1988).

<sup>2</sup> Caplan, *The Case For and Against Private International Communications Satellite Systems*, 26 *JURIMETRICS J.* 180, 183 (1986).

<sup>3</sup> Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 419 (1962) (codified as amended at 47 U.S.C. § 701-757 (1982)) [hereinafter *Satellite Act*]. In 1985, § 701 of the Satellite Act was amended. 47 U.S.C. § 701 (Supp. IV 1986).

<sup>4</sup> See Note, *Analysis of the Legal Authority For Establishment of Private International Communications Satellite Systems*, 18 *GEO. WASH. J. INT'L L. & ECON.* 355, 355 (1984).

<sup>5</sup> See *Satellite Act*, 47 U.S.C. § 701(a) (1982) (amended by 47 U.S.C. § 701(a)-(d) (Supp. IV 1986)).

<sup>6</sup> Agreement Relating to the International Telecommunications Satellite Organization, *opened for signature* Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532 [hereinafter *INTELSAT Agreement*].

<sup>7</sup> See *INTELSAT Agreement*, *supra* note 6, art. XIV(d), 23 U.S.T. at 3854. If a party to the Treaty chooses not to route certain telecommunications through the INTELSAT system and instead uses other systems, its proposals for such use must undergo an INTELSAT consultation process.

iate, the Communications Satellite Corporation (COMSAT),<sup>8</sup> with a virtual monopoly as sole providers of international satellite communications. Nevertheless, in the 1980s several inroads were made into INTELSAT's hold on the international satellite market.<sup>9</sup> One of the most significant policies that led the way towards competition with INTELSAT and COMSAT is the U.S. transborder policy, developed by the Federal Communications Commission (FCC or Commission) in 1981.<sup>10</sup> This exception to INTELSAT's general rule states that U.S. domestic satellites may be used for telecommunications with neighboring countries when there is no current or planned INTELSAT system capable of providing the proposed services,<sup>11</sup> and the use of any INTELSAT facilities would be impractical or uneconomical.<sup>12</sup>

The transborder standards were recently interpreted by the Circuit Court of Appeals for the District of Columbia in *Communications Satellite Corp. v. Federal Communications Commission* (the *Teleport* decision).<sup>13</sup> In that decision, the court upheld the well-settled transborder policy, and permitted its application to situations where the proposed service is merely incidental to a domestic satellite<sup>14</sup> and involves two-way communication<sup>15</sup> with a noncontiguous state. Nev-

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<sup>8</sup> The Communications Satellite Corporation (COMSAT) was established under the Satellite Act, Pub. L. No. 87-624, § 301, 76 Stat. 423 (codified at 47 U.S.C. § 731 (1982)).

<sup>9</sup> The transborder policy is one such inroad. The other major exception to INTELSAT's general rule (that is not discussed in this Note) is the recently developed "separate systems" policy. It originated in 1984 after a Presidential determination that alternative separate systems were "required in the national interest." See Presidential Determination No. 85-2, 49 Fed. Reg. 46,987 (1984). The policy was formed in response to requests for non-INTELSAT systems specifically constructed for international service. The limitations set by the executive branch on the "separate systems" policy require: (1) that each system be restricted to private-line systems not interconnected with public switched message networks; and (2) that one or more foreign authorities authorize the proposed system and enter into consultation procedures with the United States under Article XIV(d) of the INTELSAT Agreement. *In re* Application of Pan American Satellite Corp., 101 F.C.C.2d 1318, 1327 (1985). For examples of applying the "separate systems" policy, see generally *id.*; *In re* Application of Orion Satellite Corp., 101 F.C.C.2d 1302 (1985).

For further discussion of the topic of "separate systems," see generally Caplan, *supra* note 2; Sarreals, *International Telecommunications Satellite Services: The Spirit of Cooperation Versus the Battle for Competition*, 26 JURIMETRICS J. 267 (1986); Comment, *Competition in International Telecommunications: Alternative Avenues*, 20 TEX. INT'L L.J. 517 (1985); Note, *supra* note 4; Godwin, *The Proposed Orion and ISI Transatlantic Satellite Systems: A Challenge to the Status Quo*, 24 JURIMETRICS J. 297 (1984).

<sup>10</sup> See *Transborder Satellite Video Services*, 88 F.C.C.2d 258 (1981).

<sup>11</sup> *Id.* at 279-80.

<sup>12</sup> *Id.* at 280-81.

<sup>13</sup> 836 F.2d 623 (D.C. Cir. 1988) [hereinafter *Teleport*].

<sup>14</sup> This is opposed to the more limiting view espoused by COMSAT that the proposed competing service must be incidental to an already existing domestic service, rather than merely a domestic satellite. See *Teleport*, 836 F.2d. at 630. Such an interpretation would have had a limiting effect on the application of the transborder policy. See *infra* note 76 and accompanying text.

<sup>15</sup> One-way, receive-only services are those that are already carried over a U.S. domestic satellite system and can be received on a peripheral or incidental basis in a transborder location with the addition of a small, receive-only earth station. Two-way services

ertheless, the D.C. Circuit defined some rather sharp requirements for the FCC's application of the transborder criteria and severely questioned whether the FCC could find the INTELSAT system "uneconomical" solely on the basis of cost disparity. This Note discusses the relevance of the *Teleport* decision in light of INTELSAT policy and FCC precedent. The Note concludes that while the transborder policy has been effectively extended to new situations, it still remains a narrow exception to the INTELSAT rule. With its decision, the D.C. Circuit upheld the flexibility the United States seeks in international telecommunications policy, and at the same time preserved the U.S. commitment to INTELSAT and a global cooperative.

The United States was the driving force behind the commercial use of international telecommunications satellites.<sup>16</sup> It accomplished its goals<sup>17</sup> of establishing an international system through the Communications Satellite Act of 1962, an act that remains the primary embodiment of U.S. policy on satellites. The Satellite Act sets forth a plan for constructing a communications satellite system with other countries, and defines the U.S. commitment to an improved global system facilitated through international cooperation and unity.<sup>18</sup> COMSAT was created as the private, for profit corporation authorized to plan and operate the U.S. portion of the international system,<sup>19</sup> to lease channels to U.S. common carriers and other domestic and foreign entities, and to own and operate earth systems.<sup>20</sup> The

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are those that can originate in the United States or another transborder location for reception in the United States, and may or may not involve the extension of an existing domestic network. *In re* GTE Spacenet Corp., F.C.C. 89-66 (Feb. 16, 1989) (LEXIS, Fedcom library, FCC file; 1989 FCC LEXIS 362, 3, 4).

<sup>16</sup> See Note, *Pirates or Pioneers in Orbit?: Private International Communications Satellite Systems and Article XIV(d) of the INTELSAT Agreements*, 9 B.C. INT'L & COMP. L. REV. 199, 201 (1986).

<sup>17</sup> The goals for the United States in establishing world commercial use of satellites were to allow developed countries to share in the benefits and costs of the new system, lure developing nations away from an anticipated Soviet system, solicit goodwill by sharing U.S. technology, and maintain the U.S. lead in satellite technology. *See id.* at 201.

<sup>18</sup> The policy behind the Satellite Act is best stated by its legislative history:

The purpose of this legislation is to provide as soon as practicable for the establishment, ownership, and regulation of a private corporation which would be the United States participant in a commercial communications satellite system. This system is to be established in cooperation and conjunction with other countries and is to be part of an improved global communications network. It would be responsive to public needs and national objectives serving the communications needs of the United States and other countries and contribute to world peace and understanding.

S. REP. NO. 1584, 87th Cong., 2d. Sess. (1962), *reprinted in* 1962 U.S. CODE AND CONG. & ADMIN. NEWS 2269, 2269.

The Satellite Act, as amended in 1985, now reads, "The Congress declares that it is the policy of the United States as a party to the International Telecommunications Satellite Organization . . . to foster and support the global commercial communications satellite system owned and operated by INTELSAT . . . ." 47 U.S.C. § 701(a) (Supp. IV 1986).

<sup>19</sup> 47 U.S.C. § 731 (1982).

<sup>20</sup> 47 U.S.C. § 735(a) (1985). An earth station is an "antenna, often saucer shaped, electronically equipped either to receive signals from satellites, to transmit signals back, or

Satellite Act made the FCC<sup>21</sup> the agency for regulating access to the international system and for making rules for the operation of the system.<sup>22</sup>

After passage of the Satellite Act, the United States immediately began negotiations with foreign countries for an international communications satellite network. These negotiations resulted in the Interim Agreements of 1964,<sup>23</sup> which established a satellite system that was finally superseded in 1971 with a permanent treaty creating INTELSAT.<sup>24</sup>

The INTELSAT network has since grown into a strong organization. INTELSAT operates thirteen satellites that carry more than half of all international telephone calls and virtually all transoceanic television.<sup>25</sup> INTELSAT is a nonprofit commercial corporation of 114 member nations and provides international telecommunications to 172 countries and territories.<sup>26</sup> COMSAT, as the U.S. signatory, owns the largest share of INTELSAT, holding down a 26.4 percent share.<sup>27</sup> COMSAT operates in the international arena as primarily a "carrier's carrier" between INTELSAT satellites and U.S. earth stations for carriers such as RCA and AT&T.<sup>28</sup>

INTELSAT is obligated according to its treaty agreements<sup>29</sup> to charge a uniform rate for the same type of service provided on any of its routes. This is despite the fact that routes experiencing heavy traffic are more profitable, and those with little traffic are less profitable and more expensive for INTELSAT to operate.<sup>30</sup> The result of

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to do both." Note, *Bypassing INTELSAT: Fair Competition or Violation of the INTELSAT Agreement?*, 8 FORDHAM INT'L L.J. 479, 483 (1984) (quoting HOUSE COMM. ON SMALL BUSINESS, THE IMPACT OF CHANGES IN THE TELECOMMUNICATIONS INDUSTRY ON SMALL BUSINESS, H.R. REP. No. 1171, 98th Cong., 2nd Sess. 46 (1984)).

<sup>21</sup> The FCC is an independent United States government agency, responsible directly to Congress. It was established by the Communications Act of 1934 (*codified as amended* at 47 U.S.C. § 151 (1982)), and is charged with regulating interstate and international communications by radio, telecommunications, wire, satellite, and cable. Note, *supra* note 20, at 480 n.4 (citing FCC, THE FCC IN BRIEF 1 (1983) (information bulletin)).

<sup>22</sup> See 47 U.S.C. § 721(c) (1982).

<sup>23</sup> Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System and Special Agreement, *opened for signature* Aug. 20, 1964, 15 U.S.T. 1705, T.I.A.S. 5646.

<sup>24</sup> INTELSAT Agreement, *supra* note 6, 23 U.S.T. at 3813.

<sup>25</sup> INTELSAT, INTELSAT ANNUAL REPORT 1987-88 1 (1988). One such example is INTELSAT's transmission of the 1988 Winter Olympics. *Id.* at 24.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 44. The U.S. share of INTELSAT has dwindled in recent years from its 1964 share of 61% to its current share of 26%. Thus, its weighted voting has correspondingly decreased and an international secretariat of INTELSAT staff rather than COMSAT manages the system. See Caplan, *supra* note 2, at 188. Nevertheless, the U.S. share is still considerable. For example, the United Kingdom is the next largest shareholder with a 14.2% investment share. INTELSAT, INTELSAT ANNUAL REPORT 1987-88 44 (1988).

<sup>28</sup> Note, *supra* note 20, at 483. COMSAT has also been given approval for participation in domestic satellite communications as a retailer of certain services directly to end-users. See Godwin, *supra* note 9, at 301; see also Caplan, *supra* note 2, at 184.

<sup>29</sup> See INTELSAT Agreement, *supra* note 6, art. V(d), 23 U.S.T. at 3823.

<sup>30</sup> This is illustrated by the fact that uniform rates exist even though transoceanic

these "globally averaged routes"<sup>31</sup> is to provide a subsidy to lesser developed countries whose routes are used less and hence less profitable for INTELSAT.<sup>32</sup> This INTELSAT policy is consistent with U.S. policy originally stated in the Satellite Act for directing certain "care and attention" to less developed countries,<sup>33</sup> but nevertheless makes it difficult for INTELSAT to compete effectively with systems free to offer service only on the busier, more profitable routes.

Despite INTELSAT's commitment to less developed countries, it has enjoyed great success as a communications network. Its success is due in part to a basic rule in Article XIV<sup>34</sup> of the INTELSAT Agreement: member countries will not utilize space segment facilities separate from INTELSAT for meeting their international telecommunications needs unless the member consults with the INTELSAT Board of Governors<sup>35</sup> to ensure the technical compatibility of the proposed facilities and to avoid significant harm to the INTELSAT system.<sup>36</sup> The restrictions of Article XIV(d) seem consistent with the goal of the Satellite Act to establish a single global cooperative.<sup>37</sup> Furthermore, the Satellite Act compels the President to make certain that the COMSAT system is the primary interna-

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traffic over the Atlantic is six times greater than over the Pacific, and is three times greater than over the Indian Ocean. Caplan, *supra* note 2, at 187.

<sup>31</sup> See *Teleport*, 836 F.2d 623, 625-26 (D.C. Cir. 1988).

<sup>32</sup> See Caplan, *supra* note 2, at 194-95. For more information on INTELSAT's commitment to lesser developed countries see Comment, *Recent Actions of INTELSAT Benefiting the Developing Countries*, 15 J. SPACE L. 64 (1987).

<sup>33</sup> See 47 U.S.C. § 701(b) (1982) (amended by 47 U.S.C. § 701(b) (Supp. IV 1986)).

<sup>34</sup> INTELSAT Agreement, *supra* note 6, art. XIV, 23 U.S.T. at 3853-55. This Article contains the rights and obligations for the members of INTELSAT and contains rules designed to preserve the viability of the organization. See generally Note, *supra* note 16, at 211-12.

<sup>35</sup> The Board of Governors is responsible for development, establishment, operation, and maintenance of the space segments. See INTELSAT Agreement, *supra* note 6, art. VI, 23 U.S.T. at 3824; art. X, 23 U.S.T. at 3840-45. It is composed of Governors representing the Signatories according to formulas set out within the Agreement.

<sup>36</sup> INTELSAT Agreement, *supra* note 6, art. XIV(d), 23 U.S.T. at 3854. The relevant part of Article XIV(d) reads:

To the extent that any Party . . . intends individually or jointly to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its international public telecommunications services requirements, such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities shall furnish all relevant information to and shall consult with the Assembly of Parties, through the Board of Governors, to ensure technical compatibility of such facilities and their operation with the use of the radio spectrum and orbital space by the existing or planned INTELSAT space segment and to avoid significant economic harm to the global system of INTELSAT.

*Id.*

The Satellite Act codifies the INTELSAT general rule into U.S. policy. "The Congress declares it is the policy of the United States . . . to authorize use and operation of any additional space segment facilities only if the obligations of the United States under Article XIV(d) of the INTELSAT Agreement have been met." 47 U.S.C. § 701(a) (Supp. IV 1986).

<sup>37</sup> See S. REP. NO. 1584, 87th Cong., 2d. Sess. (1962), reprinted in 1962 U.S. CODE CONG. & ADMIN. NEWS 2269, 2269.

tional telecommunications system in the United States unless a separate system is warranted by "unique governmental need, or is otherwise required in the national interest."<sup>38</sup> The FCC has also stated its firm commitment to carrying out the purposes of the 1962 Act.<sup>39</sup> As a result, domestic law, treaty obligations, and FCC precedent generally require that international communications be routed through the INTELSAT organization.<sup>40</sup>

Despite these general requirements, the transborder policy provides a means for operators of domestic satellites to engage in service to foreign points within the domestic satellite's footprint, or coverage area. The policy, and appropriately the policy's name, developed from the FCC's 1981 decision in *Transborder Satellite Video Services*.<sup>41</sup> The dispute presented the Commission with the issue of whether "public convenience and necessity"<sup>42</sup> required the provision of a certain transborder service over domestic satellite facilities.<sup>43</sup> The particular service was the transmission of U.S. television programming to receive-only earth stations in Canada, Central America, and the Caribbean.<sup>44</sup> To decide the issue on the merits, the FCC had to decide whether the Satellite Act, the INTELSAT Agreements, and U.S. international policy permitted the authorization of such broadcasts.<sup>45</sup>

In reaching its decision, the FCC relied largely on a State Department letter from Under Secretary of State James Buckley that made recommendations for the FCC's decision in the case.<sup>46</sup> The Buckley Letter provided that in "certain exceptional circumstances" it would be in the national interest to allow use of domestic satellites for "public international telecommunications with nearby coun-

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<sup>38</sup> 47 U.S.C. § 721(a)(6) (1982).

<sup>39</sup> *Transborder Satellite Video Services*, 88 F.C.C.2d 258, 273 (1981).

<sup>40</sup> *Teleport*, 836 F.2d 623, 624 (D.C. Cir. 1988).

<sup>41</sup> 88 F.C.C.2d 258 (1981). The FCC decided *Transborder* along with two similar cases. *See American Satellite Co.*, 88 F.C.C.2d 178 (1981) (permitting operation of a Canadian satellite system between the United States and Canada); *Satellite Bus. Sys.*, 88 F.C.C.2d 195 (1981) (permitting U.S. domestic satellites to expand service to Canada).

The FCC had not ruled on a petition for transborder service over domestic satellite facilities before the *Transborder* application because it felt it could not do so until it had received official guidance from the U.S. State Department as to the position of the Executive on the petition and the foreign policy implications of the petition. *Transborder Satellite Video Services*, 88 F.C.C.2d at 271.

<sup>42</sup> It bears mentioning that there is no provision in the Satellite Act that requires the FCC to take U.S. foreign policy or the INTELSAT Agreement into account when deciding a petition. The FCC has consistently claimed that its "public convenience and necessity" determination subsumes foreign policy. Godwin, *supra* note 9, at 311 n.4.

<sup>43</sup> *Transborder Satellite Video Services*, 88 F.C.C.2d at 271.

<sup>44</sup> The FCC considered 11 transborder applications in this case.

<sup>45</sup> *Id.* at 271.

<sup>46</sup> Letter to FCC Chairman Mark S. Fowler from Under Secretary of State James L. Buckley (July 23, 1981), *reprinted in Transborder Satellite Video Services*, 88 F.C.C.2d 258, 287-89 (1981) [hereinafter Buckley Letter].

tries."<sup>47</sup> These circumstances would occur when INTELSAT could not provide the requested service, or when the planned use would be "uneconomical or impractical" if the INTELSAT system were used.<sup>48</sup>

The FCC recognized in *Transborder* that there was no existing U.S. international communications policy precluding the use of domestic satellites for transborder services.<sup>49</sup> The Commission found that nothing in the Satellite Act precluded the granting of the petitions, and that the Satellite Act itself contemplated the creation of alternative satellite systems when necessary to meet U.S. needs.<sup>50</sup> Furthermore, the FCC held that authorization of these services was consistent with the INTELSAT Agreements because Article XIV(d) specifically provides for the use of non-INTELSAT space segments by members for international public telecommunications as long as certain requirements are met.<sup>51</sup> Finally, the Commission stated that the authorization of the proposed services was consistent with the U.S. domestic policy of taking a flexible, experience-oriented approach in dealing with new technologies and the telecommunication needs of the U.S. public.<sup>52</sup>

After establishing the legality of the proposed services, the FCC applied the two step process spelled out in the Buckley Letter and approved the requests. The FCC held that there were no current or planned INTELSAT operations capable of providing the proposed services, despite the fact that INTELSAT was technically capable of doing so. The FCC further concluded that the use of any INTELSAT facilities would be uneconomical and impractical.<sup>53</sup> This was because "on the balance, the operational difficulties, increased costs of facilities and services, and spectrum inefficiencies make the use of the global [INTELSAT] system impractical when compared to the alternative utilization of domestic satellite facilities."<sup>54</sup> The Com-

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<sup>47</sup> *Transborder Satellite Video Services*, 88 F.C.C.2d 258, 288 (1981).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 272. The FCC acknowledged the Buckley Letter, but stated that while the Commission was committed to supporting the global system, it was not precluded from authorizing domestic satellites for transborder services by any existing FCC policy. *Id.*

<sup>50</sup> *Id.* at 273. Section 102(d) of the Satellite Act originally stated, "It is not the intent of Congress by this chapter to preclude the use of the communications satellite system for domestic communications services where consistent with the provision of this chapter nor to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in the national interest." 47 U.S.C. § 701(d) (1982) (amended by 47 U.S.C. § 701(a)-(d) (Supp. IV 1986)).

<sup>51</sup> *Transborder Satellite Video Services*, 88 F.C.C.2d at 274-75. See *supra* note 36 for the relevant text of INTELSAT Agreement art. XIV(d).

<sup>52</sup> *Transborder Satellite Video Services*, 88 F.C.C.2d at 276-77.

<sup>53</sup> *Id.* at 279-82.

<sup>54</sup> *Id.* at 281. Specifically, the FCC concluded that the use of the INTELSAT system for the proposed service would have required the use of "multisatellite hops, terrestrial facilities and collocated domestic and international earth stations" which "would increase measurably the cost of providing transborder satellite service." *Id.* at 280. This was opposed to the competitor's proposal which would involve little or no cost to the carrier or

mission conditioned the implementation of the proposed services upon either the approval of INTELSAT after completion of the Article XIV(d) coordination process, or upon agreement on the proposal by the proper U.S. and foreign governmental authorities that the Article XIV(d) obligations had been met in good faith.<sup>55</sup>

Since the *Transborder* decision in 1981, the FCC has approved, on a conditional or final basis, over two hundred similar applications.<sup>56</sup> In 1986 the FCC approved in an almost routine manner an application from two U.S. companies, Teleport International (Teleport) and American Satellite Company (ASC) to use domestic satellite facilities to provide international telecommunications service between the United States and Jamaica.<sup>57</sup> COMSAT successfully petitioned the D.C. Circuit Court of Appeals for review of the FCC order granted pursuant to section 214 of the Communications Act,<sup>58</sup> and a Court of Appeals, for the first time, addressed the transborder policy in the *Teleport* case of 1988.<sup>59</sup>

Teleport and ASC petitioned the FCC to approve their proposal to extend lines of communication by satellite for the provision of nonswitched private lines between the United States and Jamaica.<sup>60</sup> Specifically, Teleport proposed to lease four hundred circuits on an ASC satellite to provide two-way high speed data, voice, and video services for U.S. businesses. The application was a scheme to permit U.S. businesses to employ the less expensive Jamaican labor force for information services such as data entry, telemarketing, and reservation services.<sup>61</sup>

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programmer, and would require only the reception and redistribution of *existing* programming. *Id.* If the service were carried on the INTELSAT satellite, however, the service would have to be *duplicated*. This duplication was not cost effective and was not an efficient use of the radio spectrum according to the FCC, and hence was "impractical" compared to the direct satellite alternative. *Id.* at 281.

<sup>55</sup> *Id.* at 284.

<sup>56</sup> *In re* GTE Spacenet Corp., FCC 89-66 (Feb. 16, 1989) (LEXIS, Fedcom library, FCC file; 1989 FCC LEXIS 362, 2).

<sup>57</sup> *Id.*

<sup>58</sup> See 47 U.S.C. § 214 (1982). Section 214 of the Communications Act provides that "no carrier shall undertake the construction of a new line or an extension of any line . . . unless and until there shall have been obtained from the Commissioner (of the FCC) a certificate that the present or future public convenience and necessity require or will require the construction . . . of such additional or extended line." 47 U.S.C. § 214(a) (1982).

<sup>59</sup> *Teleport*, 836 F.2d 623 (D.C. Cir. 1988).

<sup>60</sup> *In re* Teleport Int'l Ltd., 1 F.C.C. Rcd. 101 (1986).

<sup>61</sup> *Id.* The Teleport/ASC proposal reveals the domestic and foreign policy implications associated with a transborder application. Teleport and ASC claimed that the proposed service would:

- 1) strengthen the shared heritage and economic interests of the [Caribbean] region;
- 2) create hundreds, and eventually thousands of information services sector jobs in Jamaica, thus serving the purposes of the U.S. government's Caribbean Basin Initiative and its overall interests in the economic prosperity and political stability of the region;
- 3) make available to U.S. industry and the U.S. public lower cost, more innovative information services; and
- 4) result in an economic advantage to U.S. industry in the information services market by increasing the export of U.S. goods and services.

In their petition before the FCC, Teleport and ASC asserted that their proposal was fully consistent with the transborder policy. They argued that: (1) INTELSAT was not technically capable of serving the range of customers that their service would, and in any event, could not do so in an economically feasible manner;<sup>62</sup> and (2) the proposed traffic was not carried by INTELSAT, had not been proposed by INTELSAT, and therefore could not economically harm the organization.<sup>63</sup> The private corporations also had approval for the services from the government of Jamaica<sup>64</sup> and from the National Telecommunications and Information Administration, a branch of the U.S. Commerce Department. This administration felt that President Reagan's Caribbean Basin Initiative required the private system.<sup>65</sup>

COMSAT, however, filed a petition to deny the original application. It did so on the grounds that the FCC application was inconsistent with U.S. transborder policy. COMSAT stated that all other transborder approvals involved service incidental to an already existing domestic service,<sup>66</sup> and that the approval of two-way communications between the United States and Jamaica would be inconsistent with the policy. Previously, the only situation in which two-way communication with the United States was permitted was when it occurred with contiguous neighbors.<sup>67</sup>

Despite the assertions of COMSAT, the FCC conditionally granted the application, which went into effect upon the completion of the Article XIV(d) process required by the INTELSAT Agreement.<sup>68</sup> The Commission stated that the transborder policy gov-

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*Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 102.

<sup>64</sup> *Id.* at 102, 103. The economic development agency of Jamaica stated that it did not even begin discussions with the Teleport corporation until it decided that it was not feasible for its signatory to the INTELSAT Agreement to undertake the proposed project. Jamaica viewed the project as essential because of the new jobs and increased government revenue it represented. Also, in the government's view, new companies that would not have operations with Jamaica without the private system would still be required to transmit all other communications via the INTELSAT system. Thus, the non-INTELSAT facilities would actually create new business for INTELSAT. *Id.* at 103.

<sup>65</sup> *Id.* at 102. The National Telecommunications and Information Administration believed the proposed system fell under the separate systems policy. The FCC held the separate systems policy did not apply to the petition. The Commission reasoned that the separate systems exception dealt with the construction of separate international satellite systems, and that it did not apply because the case involved a request to use a domestic satellite for specialized international service within its footprint. The D.C. Circuit agreed holding, "The separate systems policy was developed to deal with proposals for the construction of non-INTELSAT satellite systems devoted to international service. As there is no question of such systems in the Teleport/ASC proposal, the separate systems policy has no application in this case." Teleport, 836 F.2d 623, 632 (D.C. Cir. 1988).

<sup>66</sup> *In re* Teleport Int'l Ltd., 1 F.C.C. Rcd. 101, 102 (1986).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 105. In 1987 the FCC issued final authorization for the application. See *In re* Teleport Int'l Ltd., 2 F.C.C. Rcd. 4149 (1987). In April, 1987 INTELSAT had decided

erned the application because the proposed services were within the footprint of domestic satellite services. The fact that Jamaica was not contiguous with the United States was irrelevant.<sup>69</sup> On the basis of cost disparity, the FCC decided that although INTELSAT could technically provide the proposed system, it could not do so economically.<sup>70</sup> The FCC also found that the Teleport/ASC system would ultimately provide services that INTELSAT would require a satellite hop or the use of terrestrial lines to provide. As a result, an INTELSAT system was effectively impractical.<sup>71</sup>

On appeal to the D.C. Circuit, COMSAT argued that the FCC approval of the Teleport/ASC application was an unexplained departure from the prior practice of the Commission. In dealing with COMSAT's sweeping assertion, the D.C. Circuit relied on the Buckley Letter criteria and determined that the application was properly considered under the transborder policy.<sup>72</sup>

The court dealt first with the scope of the transborder policy and its application to the Teleport/ASC proposal. The court stated that the policy had never been precisely defined, and recognized that the only limitations to the policy given by the Buckley Letter were its references to "domestic satellites" and "nearby countries."<sup>73</sup> The only other limitations were Commission decisions. The court held that the mere fact that the proposed service went beyond the factual circumstances of past approvals did not make it a departure from prior policy.<sup>74</sup> Because the court found no indication that the FCC ever rejected an application for service within the footprint of a domestic satellite service, it could not find the FCC's holding that the Teleport/ASC application was within the transborder policy to be "arbitrary and capricious."<sup>75</sup>

COMSAT also argued that the transborder policy applies only to service that is incidental to domestic services already being carried by U.S. domestic satellites. It argued this on the basis of the FCC's statement in almost all transborder cases that proposals under consideration "generally involve only the incremental expansion of domestic satellite service or networks rather than the introduction of new international services."<sup>76</sup> The court said that the term "generally," as it appeared in this standard boilerplate, allowed for the in-

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that the application was technically compatible with the INTELSAT system and would not cause the system significant economic harm. *Id.*

<sup>69</sup> *In re Teleport Int'l Ltd.*, 1 F.C.C. Rcd. at 103.

<sup>70</sup> *Id.* at 103.

<sup>71</sup> *Id.* at 104.

<sup>72</sup> *Teleport*, 836 F.2d 623, 630-32 (D.C. Cir.1988).

<sup>73</sup> "Certain exceptional circumstances may exist where it would be in the interest of the United States to use domestic satellites for public international telecommunications with nearby countries." Buckley Letter, *supra* note 46, at 288.

<sup>74</sup> *Teleport*, 836 F.2d at 630.

<sup>75</sup> *Id.* at 630-32.

<sup>76</sup> *Id.* at 631.

roduction of entirely new services in certain situations. The court added that whether the proposed service was incidental to an existing service determines only whether the proposal meets the criteria set out in the Buckley letter—it is not probative of whether the proposal was within the scope of the policy.<sup>77</sup> The court held that when the Commission used the word “incidental,” it meant that the proposed service must be incidental to a “satellite,” not incidental to a domestic “service.”<sup>78</sup> Thus, the broader view taken by the FCC was upheld, and the court refused to take the more limited view that would have rendered the context of the transborder policy meaningless.<sup>79</sup> The court therefore concluded that it was not arbitrary and capricious for the FCC to decide the case using the transborder rationale.<sup>80</sup>

Nevertheless, the court did find that the FCC was arbitrary and capricious in its application of the Buckley Letter criteria.<sup>81</sup> First, relying solely on comparative price data, the FCC concluded that the INTELSAT system was uneconomical. Second, the FCC failed to consider INTELSAT’s argument that it could provide service at a lower price than that cited by the Commission. Third, there was no clear showing by the petitioners that the INTELSAT service would be impractical on grounds other than price.

According to the court, the holdings by the FCC that any INTELSAT service would be uneconomical solely on the basis of price “seemingly would open the door to full-scale price competition between INTELSAT and domestic satellite systems.”<sup>82</sup> The court feared that the FCC holding would result in every international route being approved under the transborder policy when the route falls within a domestic satellite’s coverage and its price is lower than INTELSAT’s.<sup>83</sup> As a result, the court was “hard pressed” in understanding how the FCC’s finding could be compatible with the Buckley Letter’s objective of upholding the U.S. commitment to IN-

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The court stated that:

COMSAT’s “incidental to service” understanding of the *scope* of the transborder policy would, moreover, render the *content* of that policy meaningless. If the only proposals to be considered under the transborder policy were those that were incidental to existing domestic service, it is hard to imagine that the FCC could ever find INTELSAT service to be anything other than “uneconomical and impractical”—for if the services were already being provided domestically, extending it to another country could inevitably be done without the duplication of facilities or multiple hops that would be necessary for INTELSAT to provide the service. Only in the case of some new service would the possibility arise that INTELSAT might *not* be uneconomical or impractical by comparison to the use of a domestic satellite.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 632-36.

<sup>82</sup> *Id.* at 633.

<sup>83</sup> *Id.*

TELSAT and the Satellite Act.<sup>84</sup>

Besides merely questioning the apparent results of the holding below, the D.C. Circuit found that the FCC had clearly departed from the prior practice of addressing the qualitative component of the difference between the proposed service and the possible INTELSAT service.<sup>85</sup> Such a departure from prior practice was done without reasoned explanation and was therefore arbitrary and capricious.<sup>86</sup> In the past, an INTELSAT system was found to be "uneconomical" if it would require multisatellite hops and additional terrestrial facilities, thereby duplicating programming already available on domestic systems and posing an inefficient use of the radio spectrum.<sup>87</sup> The petition filed by Teleport and ASC differed from previous successful petitions because it was a proposal for an entirely new system that could be carried by either INTELSAT or domestic facilities without duplication.<sup>88</sup> The Court of Appeals therefore remanded the issue for further clarification by the FCC and called on the Agency to squarely address the question of whether INTELSAT's service can be considered "uneconomical" simply because its price will be higher than the proposed domestic facility.<sup>89</sup>

The Commission was also arbitrary and capricious in its total failure to consider COMSAT's argument that it could provide the proposed service at a much lower price than what the Agency had assumed for purposes of weighing the cost of INTELSAT service.<sup>90</sup> The court noted the apparent willingness of the FCC to give substantial weight to the price submitted by Teleport, while it nonetheless refused to credit COMSAT's argument that it could multiplex its circuits and effectively lower its price per channel.<sup>91</sup>

Finally, the D.C. Circuit criticized the FCC's finding that the INTELSAT system would be "impractical," stating that the evidence on the record did not support such a finding.<sup>92</sup> The court concluded

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 632.

<sup>86</sup> *See id.* at 632-34.

<sup>87</sup> *Id.* at 633. For how this interpretation was applied in the *Transborder Satellite Video Services* case, see *supra* note 54.

<sup>88</sup> Teleport, 836 F.2d 623, 634 (D.C. Cir. 1988).

<sup>89</sup> *Id.* at 634. The court, as already noted, seems to state that the FCC would have great difficulty in squaring such a position with its prior precedent. *See id.* at 635 (Silberman, J., concurring).

So far the FCC has still not dealt with the issue of whether a finding that service via INTELSAT is uneconomical can be based solely on comparative price data. *In re GTE Spacenet Corp.*, F.C.C. 89-66 (Feb. 16, 1989) (LEXIS, Fedcom library, FCC file; 1989 FCC LEXIS 362, 13 n.16).

<sup>90</sup> Teleport, 836 F.2d at 634. The Commission's behavior was contrary to the command of the Buckley Letter which directs the FCC to credit information provided by COMSAT about the conditions under which INTELSAT service can be supplied. *See* Buckley Letter, 88 F.C.C. 2d at 288.

<sup>91</sup> Teleport, 836 F.2d 623, 634 (D.C. Cir. 1988).

<sup>92</sup> *Id.* at 635.

that there was no proof for ASC's contention that its network was already in place for nationwide service, while the INTELSAT system would require a satellite hop or the use of terrestrial facilities. Instead, the court found that there was no apparent difference between what Teleport and ASC proposed and what COMSAT claimed it was in a position to offer.<sup>93</sup>

More important for the purposes of precedent, the court rejected the FCC's theory that a finding of "uneconomical and impractical" could be based on the fact that the use of the INTELSAT system would require the domestic carrier, ASC, to use other carriers, thus destroying a unified system.<sup>94</sup> Rather, the court stated that the relevant question under the Buckley Letter is not whether the domestic carrier could provide the service via INTELSAT, but whether the service could be provided by INTELSAT alone.<sup>95</sup>

Based upon the foregoing, the D.C. Circuit concluded that the FCC correctly considered the Teleport/ASC application under the transborder policy, but failed to satisfactorily apply the Buckley Letter criteria to the facts. Specifically, the Commission failed to adequately explain its decision that a finding of "uneconomical" could be based solely on comparative price data and the fact that the private petitioner had effectively outbid INTELSAT.<sup>96</sup> Because the FCC's conclusions were not supported by "reasoned analysis" the court vacated the Commission's order as arbitrary and capricious and remanded the case for further proceedings.<sup>97</sup>

The *Teleport* decision, in light of the court's conclusions, must be viewed not as a radical departure from previous transborder policy, but as a clarification of the policy and the bounds the FCC must operate within to uphold the U.S. commitment to INTELSAT and the Satellite Act. Given the FCC's history of flexibly defining when the transborder policy applies, the D.C. Circuit properly included the *Teleport* application within the penumbra of the transborder policy. Thus, the court found that the transborder exception could apply to a situation when there is a proposed service for two-way communication with a state not contiguous with the United States.<sup>98</sup> Also, the court upheld the more expansive interpretation of the FCC that the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 636.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 636. Though the Teleport/ASC application was remanded for Commission review, the applicants decided to withdraw their petition shortly after the D.C. Circuit's opinion. On April 13, 1988 the Chief of the Common Carrier Bureau of the FCC received letters requesting the Commission to dismiss the application, and in May of 1988 he dismissed it without prejudice. *In re Teleport Int'l Ltd.*, 3 F.C.C. Rcd. 3157 (1988).

<sup>98</sup> Though approved by the FCC, the D.C. Circuit, and even INTELSAT, actual two-way transborder service with a noncontiguous state has yet to come about. However, two-way transborder services with Canada and Mexico have received final authorization. All other transborder services consulted under Article XIV(d) of the INTELSAT Agreement

policy applied where the proposed service was incidental to an existing domestic satellite, and did not require that service be incidental to an already existing domestic service. A contrary interpretation could have severely limited the number of situations in which the policy would apply. These judicial holdings attest to the flexibility of the transborder policy and to the fact that the policy may extend to more situations than many, including COMSAT, had expected. The policy was thus given the potential to further encroach into INTELSAT's territory.

Though the *Teleport* decision seems to promote a more expansive reading of the transborder policy, it should also be seen as a narrowing of the criteria required to effectively meet the policy. Most significantly, the decision shows that the FCC cannot properly grant an application solely because of a price differential between INTELSAT's proposal and that of its competitors. The FCC must instead address the qualitative differences between the services. In addition, there must be some proof that the "use of the INTELSAT system would significantly raise the cost of the services to the point of being prohibitive," so that it would be doubtful that U.S. programmers would be willing to duplicate their networks over the INTELSAT system because the cost of service would be so significantly increased.<sup>99</sup>

The INTELSAT treaty and the Satellite Act both envision an international cooperative promoting world peace by providing satellite communications technology to all nations through the most effective use of the radio spectrum and the geostationary orbit.<sup>100</sup> The Buckley Letter embraced these goals while providing a limited exception to INTELSAT's general rule, and did so in the name of efficiency, practicality, and the FCC tradition for flexibly dealing with international telecommunications policy. In the *Teleport* opinion, the D.C. Circuit successfully walked the fine line defined by the transborder policy between efficient and effective transborder communications and a successful global cooperative in the international telecommunications arena.

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have been one-way, receive-only services. *In re* GTE Spacenet Corp., F.C.C. 89-66 (Feb. 16, 1989) (LEXIS, Fedcom library, FCC file; 1989 FCC LEXIS 362, 3).

<sup>99</sup> *Teleport*, 836 F.2d 623, 636 (D.C. Cir. 1988) (Silberman, J., concurring) (quoting Transborder Satellite Video Services, 88 F.C.C.2d 258, 280-81 (1981)).

<sup>100</sup> *Teleport*, 836 F.2d at 633.