

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 74-689
17820

In the Matter of)
)
AMERICAN TRUCKING ASSOCIATION, INC.)
Washington, D. C.)
Complainant)
vs.)
AMERICAN TELEPHONE AND TELEGRAPH CO.)
New York, New York)
Defendant)

DOCKET NO. 19746

Regulatory Policies Concerning
Resale and Shared Use of Common
Services and Facilities)

DOCKET NO. 20097
RM-1997
RM-2218

NOTICE OF INQUIRY AND PROPOSED RULE MAKING

Adopted: June 26, 1974

; Released: July 5, 1974

By the Commission:

I. INTRODUCTION

1. The Commission has before it a number of matters which raise in one form or another the basic question of whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use. Resolution of this question requires the Commission to define on a broad basis the role of the middleman in the provision of communications services to the using public. While the middleman has assumed an important role in nearly all aspects of commerce throughout our nation's history, in the field of communications it has been the tradition, generally, that the carriers owning and operating transmission facilities supply a complete communications service directly to the ultimate user. Only relatively recently has this tradition, exemplified in the tariffs of the established carriers, been questioned.

2. The following is a summary of the more important tariff provisions governing resale and shared use of major carrier service offerings: With certain exceptions Private Line Services obtained from the American Telephone and Telegraph Company (AT&T) or The Western Union Telegraph Company (Western Union) may not be resold nor may the customer use the service to transmit communications for others. A customer for most voice-grade and under private line services may, however, enter into an arrangement with others to share the service obtained. AT&T's Wide Area Telecommunications Service (WATS) is not available for resale, third party traffic or shared use, except when used to provide telegram service. Message Toll Service (MTS) may not be resold; however third party traffic

is permitted so long as the customer does not derive a profit from provision of transmission service. 1/

3. From the foregoing summary it is apparent that the opportunity for entities to obtain services and facilities from the established carriers to provide an augmented communications service for hire to the public is severely limited. Nevertheless a considerable number of entities have shown an interest in offering augmented communications services in such a manner. This interest has been spurred by the public's burgeoning demand for fast, efficient and low cost access to information in convenient format and the concomitant development of innovative communications technology to meet that demand. As we found in our Specialized Common Carrier Inquiry 2/, the market for non-voice communications is growing at a rapid pace, is largely undeveloped and will be satisfied only through the application of innovative communications technology. In this area of rapid technological and market development, we believe that both established carriers and the new entities which offer or propose to offer specialized services can contribute to breakthroughs in communications technology and plans for more efficient application of new and existing technology. However, entities other than the carriers who originate technological advances or propose new systems configurations may not be in the best position for a number of reasons deriving from regulatory and procedural as well as economic limitations, to undertake the construction of new lines of communication. Public enjoyment of state-of-the-art communications technology and full utilization of existing capacity may thus require that independent enterprises devoted to marketing, retailing, brokerage and related functions be given a greater role in the communications industry.

4. We are mandated by the Communications Act of 1934 to regulate interstate and foreign commerce in communications so as to make available to all the people of the United States rapid, efficient nationwide and worldwide communications services with adequate facilities at reasonable charges (47 U.S.C. § 1). As has been noted, the question of the availability of services for resale or shared use and the regulation thereof underlies various matters before us. It would be inappropriate to consider this question in the context of some particular item, such as an application for authorization of service, a tariff filing or a complaint against a particular carrier. The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been

1/ For private line services see AT&T's Tariff F.C.C. No. 260 Section 2.2.1 and 2.2.3, and WU's Tariff F.C.C. No. 254 Sections 2.2.1 and 2.2.3. For WATS see AT&T's Tariff F.C.C. No. 259, Section 2.2.1. For MTS see AT&T's Tariff F.C.C. No. 253 Section 2.2.1.

2/ Docket No. 18920, First Report and Order, 29 FCC 2d 870 (1971).

raised in the context of various discrete matters before us be considered in a broad rulemaking proceeding. We are therefore initiating this general inquiry and rulemaking proceeding to consider our policy with regard to questions concerning the resale and shared use of common carrier services and facilities. Having received the information, opinions and recommendations of all interested parties we will be in a position to take appropriate action, including the establishment of policy guidelines, by rule or otherwise, the recommendation of any desirable legislative changes or the modification of existing carrier practices.

5. Before proceeding to discuss the issues to be considered and to set forth specific questions to be addressed, we believe it would be helpful if we described some of the existing and proposed communications services provided by means of communications facilities obtained from established common carriers.

II. COMMUNICATIONS SERVICES PROVIDED THROUGH INTERMEDIARIES

a. "Value Added" Proposals.

6. A major interest in the resale of communications facilities and services has been expressed in proposals to lease wideband interexchange lines from the established communications common carriers to be utilized in the offering of nationwide computer-switched communications networks for the transmission of non-voice information. An example of this type of operation is that proposed by Packet Communications, Inc. (PCI). ^{3/} PCI intends to institute and operate a communications network providing terminal-to-computer and computer-to-computer data communications utilizing what is known as "packet-switching technology". PCI's network will involve, initially, one 50 Kilobit per second line linking each of a selected group of major population centers. The customer's computers are connected to this network by PCI-provided mini-computers or message concentrators which accept messages from computers they serve, subdivide and reformat the messages into "packets" or short bursts of information bits, store the packets as necessary and forward them to the concentrator serving the destination computer where they are reassembled into messages and sent on to the appropriate computers. ^{4/} Terminal access to the mini-computers or message concentrators may be accomplished by the subscriber via the public telephone system or, in the case of large users, via a leased line. The network is supervised by two Network Operations Centers which, with the mini-computers, determine routing, re-routing if necessary, check packets for errors, arrange for retransmission of packets until errors are eliminated, keep track of transmission facility reliability, and perform billing functions. PCI expects its service to provide enhanced

^{3/} section 214 Application granted, 43 F.C.C. 2d 922 (1973).

^{4/} PCI will offer no data processing services (i.e., storing, retrieving, sorting, merging and calculating of data) but will utilize such data processing as is necessary to perform the function of message switching.

accuracy, reliability and privacy of communication, significantly increased, more economical utilization of transmission line capacity, as well as end-to-end-responsibility and communications management services.

7. Graphnet Systems, Inc. (Graphnet) 5/ proposes to establish a similar network primarily devoted to the specialized field of terminal-to-terminal communications and capable of accomodating a great variety of terminals such as telecopiers, telex and TWX printers. The subscriber, who pays a small monthly network access charge as well as a rate based on minutes of use, may choose various methods of delivery including messenger if no terminal is available at his message's destination. Applications have also been received from the MCI Data Transfer Corporation (MDT) (FCC File No. P-C-8589) and Talenet Communications Corp. 6/ Others have indicated that they will be filing similar applications in the near future.

b. Line Sharing or Joint Use Arrangements.

8. AT&T and Western Union provide in their Private Line Service tariffs that customers who have need of voice grade and under private lines services (for their own use) may enter into arrangements with other users for the sharing of the capacity of the line or lines jointly used, the proportion being determined by agreement between the customer and joint users. The Commission has not formally investigated the extent to which the joint user provisions are utilized nor reviewed arrangements between customers and joint users except in a few isolated instances which have been brought to our attention. Sharing arrangements can range from the simple cooperative use of a single channel from one point to another, or the provision of discrete sub-channels derived from a voice grade channel, up to complex networks which the joint users may access from a number of points and which may be conditioned for the carriage of communications of a specialized nature. One of the more complex arrangements which has been brought to our attention is being organized by the RCA Corporation. Originally RCA proposed to commence operations with approximately 40 to 45 voice grade links serving approximately 35 cities. The presently proposed network is more modest, providing for service between five cities coast to coast--one voice grade circuit linking each, forming a continuous, distributed communications network. The system is to be managed by RCA Global Communications, Inc., and RCA will provide

5/ Section 214 Application granted, 44 F.C.C. 2d 800 (1974).

6/ Section 214 Application granted, 46 F.C.C. 2d _____ (1974).

the multiplexing equipment (which will not be of RCA manufacture). The users may attach any additional terminal equipment desired so long as no harm results to the system. Apart from the pro-rata share of the transmission charges, the joint user pays RCA a management fee which is computed on the basis of mileage of the network used, number of access points and speed of communication desired.

9. Another arrangement currently in operation provides the data communications user a service much the same as that proposed by PCI and others (although it is provided over low speed voicegrade lines). Tymeshare, Inc. a major data communications and processing enterprise operates a national and international data communications network called Tymnet. As of April, 1973, Tymnet connected 54 cities with 37 large scale computers utilizing over 40,000 miles of leased telephone lines. Under a joint use arrangement other companies have been allowed to access their own computers via Tymnet. In such instances Tymnet's computers are used to route data but do no processing. The user pays the common carrier for its share of the transmission line usage and then pays Tymeshare on the basis of terminal connect time, number of connections made and the volume of information transmitted. The Tymnet-type sharing operation is significant in that as the joint user is not provided with his own discrete channels the number of possible users is limited only by the aggregate use made of the available capacity by all users.

c. Facsimile Communication Networks.

10. Another identifiable class of resale operations are enterprises which organize facsimile communications networks, utilizing telecopiers and the message toll telephone system, for the use of the general public. Typically the telecopiers are placed with established businesses and the network organizer provides each agent with a directory containing the location and telephone number of all other outlets. The licensee or agent then holds himself out to the public to send communications in facsimile form to any other location on the network, charging the user a fee plus the charge for the telephone call by which transmission is effectuated. The fee is then split with the receiving agent and the network organizer. It is believed that some of these operations are extensive, involving over 300 outlets coast-to-coast.

d. Hybrid Communications and Processing Services.

11. There are also a considerable number of services available which provide a mixture of information communications and processing. An example is services which arrange for the procurement and communication of permits, documents and money orders for the trucking industry. Others serve banks, the securities industry and law firms. Transmission is

typically by means of the message toll telephone system accessed by specialized terminals such as telecopiers although WATS and other communications services may sometimes be involved. 7/

12. For purposes of defining the breadth of our examination of hybrid service offerings we refer to the guidelines set forth in our Computer Inquiry 8/ to distinguish those offering communications from those offering essentially a processing service:

If . . . the package offering is oriented essentially to satisfy the communications or message-switching requirements of the subscriber, and the data processing feature or function is an integral part of and incidental to message-switching, the entire service will be treated as a communications service for hire, whether offered by a common carrier or non-common carrier and will be subject to regulation under the Communications Act. One applicable test will be whether the service, by virtue of its message switching capability, has the attributes of point-to-point services offered by conventional communications common carriers and is, basically, a substitute therefore. 9/

While we were there considering the function of the computer in the provision of a communications service, the principle involved also extends to examination of other processing operations such as formatting, arranging service with governmental agencies, providing needed forms, etc., in determining whether the overall service should be considered communications or processing for our regulatory purposes.

e. Single Customers Tariff Provisions.

13. There are exceptions to the prohibition on the resale of private line services (known as the "single customer" provisions in the tariffs of AT&T and Western Union) which allow certain customers to obtain communications services for specified groups of users 10/ and allow the specified user groups--such as the airlines, stock exchanges, and electric power pools--to enjoy any administrative convenience that may result from buying communications services in conjunction with others, but more importantly, may allow communications services to be ordered under TELPAK discount rates which would not be available to the users taken singly.

7/ The Commission regularly receives inquiries in regard to the initiation of various services of a hybrid nature which would utilize such services as WATS, MTS, TELEX and TWX as well as private line services.

8/ Final Decision and Order, Docket No. 16979, 28 F.C.C. 2d 267 (1971).

9/ Tentative Decision, Docket No. 16979, 2d 291 (1970), para. 42.

10/ AT&T Tariff F.C.C. No. 260, Section 2.2.1 and Western Union Tariff F.C.C. No. 254, Section 2.2.1.

14. We have already initiated an investigation 11/ under section 202(a) of the Act to determine if these provisions, in that they extend special tariff treatment to specified users, involve under discrimination. We will discuss below the relationship between the issues in that investigation and those to be considered in this proceeding.

III. DISCUSSION OF ISSUES

a. Resale.

15. At the threshold in this inquiry we meet the question of whether and to what extent the services and facilities of communications common carriers ought to be available for use by intermediaries in offering augmented communications services to the public. Of principle concern is the availability of private line services which are presently offered under the following conditions set forth in AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254:

- 2.2.1 A private line service may be used. . .
 - (A) For the transmission of communications to or from the customer and relating directly to the customer's business.

* * *

- 2.2.3 Private line services shall not be used for any purpose for which a payment or other compensation shall be received by. . . the customer. . . or in the collection, transmission or delivery of any communications for others. . .

* * *

2.5 Definitions

* * *

Customer. . . No one may be a customer for a private line service who does not have a communications need of his own. 12/

11/ American Trucking Association v. AT&T, Docket No. 19746, Hearing released May 29, 1973 (FCC 73-553) 41 FCC 2d 2 (1973).

12/ Exceptions to these provisions, which are the subject of our investigation in Docket No. 19746, have been deleted.

16. The carriers have never been called upon, either formally or informally, to justify these tariff provisions. In view of the currently developing interest in securing private line services for resale we believe that it is now incumbent upon us to question whether the public interest is served by a continuation of these restrictions on the availability of common carrier facilities and services. A primary issue to be considered in this proceeding, then, is whether the above-quoted tariff provisions are just and reasonable under Section 210(b) and not unduly discriminatory under 202(a) of the Communications Act of 1934. The carriers are here given an opportunity to respond with evidence in justification of their tariffs and other participating parties have opportunity to comment on the carrier's presentations.

17. Our inquiry of course goes beyond an examination of the presently effective tariffs and we are inviting all recommendations for tariff structures which will best serve whatever public interest there may be in securing carrier services and facilities for resale purposes. We have reason to believe that the carriers themselves may wish to suggest changes to their present tariffs. For example, AT&T has requested permission ^{13/} to amend its private line tariff to allow resale and third party traffic where the customer intends to provide a "Composite Data Service", which is defined in the proposed tariff as follows:

Composite Data Service

The term "Composite Data Service" denotes an offering which combines the use of computers and terminal equipment with the use of communication services of the Telephone Company to provide a single integrated data service for data processing and data message switching, or for data message switching.

It would be premature at this time for us to comment on whether the proposed tariff changes applicable to Composite Data Service Vendors meet the standards of reasonableness under Section 201(b) and 202(a) of

^{13/} AT&T Application 931. In a separate action (Special Permission No. 6827, November 14, 1973) this request has been granted under delegated authority by the Chief, Common Carrier Bureau and the tariff changes may be filed on 60 days notice. The new tariff provisions regarding Composite Data Service were filed on June 19, 1974.

the Act. Until such tariff changes are actually filed, for the purpose of this proceeding we will consider such proposal as a recommended tariff change to be considered in the same manner as other recommendations as may be put forth by participants in this proceeding. We expect that all recommendations for desirable tariff changes will be fully justified in such manner as to permit the Commission to determine if such change would meet the standard of reasonableness contained in Section 201(b) and 202(s) of the Act.

18. While we have discussed the resale issue in terms of private line services, we want to make clear that our inquiry includes consideration of what our policy should be in regard to resale of all communications common carrier services. Proposals and inquiries received by the Commission as well as reports of services in operation lead us to believe that there is substantial interest in subscribing to MTS, WATS, Telex, and possibly other services, for resale purposes. There may also be interest in making the more specialized service of the established carriers themselves available for resale by subscribers. For example AT&T has recently filed a new tariff for a service to be known as Dataphone Digital Service 14/ which is to be provided over a discrete digital network utilizing in part a technology known as Data Under Voice (DUV). 15/ This proposed tariff does provide for utilization of the DDS network in the provision of service to the public by other common carriers under certain conditions. We believe that there may be interest in the resale of various common carrier services and will expect participants in this proceeding to carefully specify the services to which their comments are applicable.

b. Line Sharing or Joint Use Arrangements.

19. As we have noted above, a customer for private line service can effectuate a line sharing arrangement which may make available to a more or less limited number of communications users a broad range of services from discrete low speed point-to-point linked communication, up to complex computer-switched networks conditioned for specialized communications. The principle advantage of sharing arrangements is economic--both the customer and the joint users enjoy communications capacity at a lower cost than if each were being supplied directly by the carrier. In some cases, however, certain users and user groups may

14/ Tariff F.C.C. No. 267 filed March 19, 1974 in Transmittal No. 11990.

15/ DUV allows a presently unused segment of the radio frequency bandwidth on existing 4 GHz and 6 GHz microwave channel to be used to transmit information in digital form thus increasing the utilization of existing facilities as well as the microwave radio spectrum. Authority to construct facilities to connect five cities was granted on June 21, 1973, P.C. 8490, 41 F.C.C. 2d 586 (1973). Now on file is an application to connect an additional 19 cities.

also enter into sharing arrangements primarily to gain access to communications networks of a specialized nature. We believe that sharing arrangements as are now possible result in greater access to and fuller utilization of our nation's communications capacity and we believe their continuation is warranted.

20. In this inquiry we will consider four broad issues with regard to sharing arrangements. These are: 1) determination of the justness and reasonableness of tariff provision under which sharing is presently permitted, 16/ 2) examination of the public interest in allowing sharing on above-voice grade private line services and other carrier services, 17/ 3) a determination of the extent to which sharing arrangements would still be useful and desirable in the event that we find that resale of facilities should be more widely permitted, and 4) inquiry into the need for regulation of sharing arrangements themselves.

21. With respect to this latter issue, Microwave Communications, Inc. (MCI) in its Petition for Rulemaking (RM. 1997) filed June 13, 1972 requested that we adopt a rule which would spell out procedures to be followed and standards to be met by bona fide sharers of the cost of communications facilities in terms similar to those of Section 93.4 of our Rules. The referenced rules, dealing with the cooperative use of radio stations in the Land Transportation Services, basically require cooperative arrangements to be reported to the Commission so that we can insure that cooperation is on a cost-sharing, non-profit basis. 18/ In this proceeding we will consider adopting procedures and guidelines to be followed by carriers and customers wishing to share the cost of private line facilities.

16/ For example the customer who initiates a sharing arrangement must have a communications need of his own. Tariff provisions affecting sharing are found in Section 2.2.1 & 2.5, 3.1.5 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254.

17/ Sharing is not permitted on services which utilize, in whole or in part, above voice-grade channels (series 7000, 8000 or 10,000 as well services obtained under Series 5000).

18/ See next page.

18/ (Cont'd)

§ 93.4 Cooperative use of fixed radio stations.

(a) Licensees and persons eligible to become licensees of operational fixed stations under this part may make cooperative use of such licensed facilities under the conditions and subject to the limitations specified in this section.

* * *

(d) Licensed facilities may be cooperatively used under this section only (1) without charge to any of the participants in its use, or (2) on a nonprofit, cost-sharing basis pursuant to a written contract between the parties involved which provides that the licensee shall have control of the licensed facilities and that contributions to capital and operating expenses are accepted only on a cost-sharing nonprofit basis, prorated equitably, among all participants using the facilities, or (3) on a reciprocal basis (e.g., use of one licensee's facilities in exchange for the use of another licensee's facilities) without charge for either capital or operating expense, pursuant to a written contract between the licensees involved.

(e) Each licensee sharing its facilities under this section shall maintain records showing the cost of the facilities and their operation and use, the charges made to and payments made by each of those using the facilities or contributing to their capital cost or operating expense, and the information specified below, and such records shall be available for inspection by the Commission.

(f) Each licensee sharing its facilities under this section shall file a notification with the Commission 30 days prior to the use of its facilities by any other person that has not been specified in its license application or in a prior notification to the Commission containing the following information:

- (1) Name and description of the licensee;
- (2) Call sign of the station or stations;
- (3) The radio service in which the station is licensed;
- (4) The names of all prospective participants in the cooperative use of the station and a description of each participant sufficient to show its eligibility to use the frequencies assigned to the station; and
- (5) A copy of the contract between the parties for the cooperative use of the facilities.

(g) The licensee may institute the service described in the notification filed pursuant to paragraph (f) of this section 30 days after filing unless the Commission during that period notifies the licensee that the information supplied is inadequate or that the proposed service is not authorized under these regulations, and the licensee shall then have the right to amend or to file another notification to remedy the inadequacy or defect and to institute service 30 days thereafter, or at such earlier date as the Commission may set upon finding that the inadequacy or defect has been remedied.

(h) Each licensee sharing its facilities under this section on a nonprofit, cost-sharing basis shall file an annual report with the Commission, using FCC Form 402-A, within 90 days of the close of its fiscal year containing:

- (1) A financial statement of operations during the preceding fiscal year in sufficient detail to show compliance with the requirements of this section;
 - (2) The names of those who have shared the use of the facilities during the preceding fiscal year;
 - (3) A brief statement as to the use of the facilities made by each person sharing the use and an estimate of the approximate percentage of use by each participant during the preceding fiscal year; and
 - (4) Any change in the items previously reported to the Commission concerning such facilities or their use in the application for the license or in a notification under this section.
- (i) When radio facilities are shared under the provisions of this section without charge and without any other consideration from any other participants, or on a reciprocal basis, or when the facilities are shared solely by governmental entities, in lieu of the statements required to be filed by paragraph (h) of this section, the licensee shall file with the Commission within 90 days after the close of his fiscal year a statement advising the Commission of that fact.
- (j) The licensee shall inform the Commission whenever the cooperative use of any of its facilities in accordance with this section is permanently discontinued.

c. Single Customer Tariff Provisions.

22. As had been noted, the single customer tariff provisions, found at Section 2.2.1 of the private line tariffs of both AT&T and Western Union permit certain customers to order communications services for users having a specified relationship to the customer. For example, stock exchanges can order services

"for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member."

Aeronautical Radio, Inc. may order service "for the transmission of communications to, from, within and between air carriers." In effect, these provisions are exceptions to the prohibitions on resale and third party traffic and the conditions on the availability of line sharing, which are the subject matter of this proceeding. Question has been raised as to whether such exemptions for specified user groups constitute undue discrimination prohibited by Section 202(a) of the Act. We have initiated an investigation in Docket 19746 to consider this question and to determine, if such discrimination is found to exist, whether we ought to prescribe tariff changes which would be just and reasonable.

23. In view of the close interrelationships between the single customer provisions and the tariff provisions governing resale, third party traffic and line sharing, we believe that the issues set for investigation in Docket 19746 should be considered in this proceeding in conjunction with the determination of our policy with regard to resale and sharing. Accordingly we are consolidating the investigation in Docket 19746 with this proceeding.

24. We recognize that such a consolidation involves a procedural change as we set an oral hearing in Docket 19746 and in this proceeding are requesting participation in the form of written submissions. Considering the nature of the evidence to be adduced and the number of parties which can be expected to participate, however, we believe that the issues relating to the single customer provisions can be more expeditiously resolved through the submission of evidence in written form without prejudicing the rights of parties to participate in their resolution.

25. We expect to receive evidence that is "typical" of the groups that do and those that do not enjoy a single customer status. Data concerning groups that do enjoy single customer status must be weighed in light of comparable data relating to user groups that are not specified as single customers. Such descriptive type information is more conveniently received in written form rather than through oral proceedings. Also, a

considerable number of parties representing a broad range of interests have intervened in Docket 19746. The oral process declines in effectiveness as the number of participants, and especially the number of diverse viewpoints to be presented, increases. Parties with limited resources, but with real interest in the issues, may find an extended oral proceeding to be a considerable financial burden. We expect to encourage more broadly based participation by requesting information in writing rather than requiring appearance at oral hearings. Further, we note that Western Union's tariff contains, verbatim, many of AT&T's single customer provisions as well as some not contained in AT&T tariff. Yet presently Western Union is not a party respondent in that investigation and has not intervened. If issues with regard to single customer tariff provisions are to be finally resolved the Western Union tariff provisions should be included as an issue to be addressed along with those of AT&T. This addition then should bring additional participants to our investigation of single customer provisions which will further complicate the hearing proceeding. For these reasons, then, we believe that public participation in our investigation of the single customer tariff provisions will be expedited in a fully satisfactory manner by the submission of statements in written form and do not believe that parties will be prejudiced if such issues are considered in this proceeding. However, as we are providing with regard to all issues herein, we will set oral proceedings on specific issues should parties make a showing that they would be prejudiced unless oral proceedings are held.

IV. REGULATION OF SERVICE PROVIDERS

26. Entirely separate from issues relating to the availability of communications services and facilities for resale or shared use purposes is consideration of the extent to which entities proposing to resell services or arrange line sharing should be regulated by this Commission. For example, we may find that it would be inappropriate to measure performance in terms of rate of return or investment to such entities. We may find that different application procedures and reporting procedures should be developed to allow for better Commission surveillance of particular segments of the communications industry affected by resale and shared use of facilities and services. We consider issues relating to the manner in which resale entities should be regulated to be as significant to the established carriers and the public as are the basic questions concerning the availability of facilities for resale or shared use purposes.

27. PCI, Graphnet, MDT and Telenet have all filed for Section 214 certification on condition that it is required. When determining the reach of our regulatory jurisdiction under section 214 the principle question is whether or not a communications service for hire is being offered to the public and not on the operational characteristics of the provider. It is well settled that Section 214 authorization is required for the operation of, or transmission over or by means of, interstate lines derived

from another carrier's plant. 19/ We believe that it is clear, under the MacKay decision, that the proposals for computer-switched data communications networks which we have received do require Section 214 operating authority and are generally subject to regulation under the Communications Act. 20/

28. We do not at this time have sufficient information to determine if facsimile communications services and hybrid communications and processing services which are now operational or proposed are all subject to our regulatory jurisdiction. We note however that our jurisdiction is broad and extends to services the primary thrust of which is communications and also to services of non-communications nature provided by communications common carriers. We recognize however, as we did in our Computer Inquiry 21/, that the public interest may not require the full assertion of regulatory jurisdiction as is exercised over the established carriers which own and operate their own lines of communication. Therefore we believe the best approach to jurisdictional questions is to examine, without regard to the actual limits of our present jurisdiction, the extent to which this Commission ought to regulate the various forms of resale and sharing entities. At that point we can determine if we presently have sufficient legal authority to assert any regulatory jurisdiction we find to be desirable. To the extent that we find the public interest would be served by regulation that is not authorized by law, we can thereupon recommend any necessary legislative changes. 21a/

29. Western Union filed a petition on June 25, 1973 requesting that the Commission initiate a proceeding, analogous to the Specialized Common Carrier Inquiry, to examine, as a prerequisite to the consideration of any Section 214 application, the public need for services provided in a resale manner and the competitive impact of such services on the established carriers (RM. 2218). Of the five issues specifically suggested by Western Union for inclusion in a rulemaking proceeding, three are of a general nature and which we believe are implicitly within the scope of this proceeding and which must be considered as a prerequisite to establishing general policies with regard to the resale of common carrier services and facilities. These issues are:

19/ MacKay Radio and Telegraph Company, 6 FCC 562 (1938).

20/ See Computer Inquiry, Tentative Decision, 28 F.C.C. 2d 291 (1970), para. 42.

21/ Ibid, paras. 18-23.

21a/ Pending the resolution of this proceeding we will, of course, require 214 applications of entities which propose services comparable to Packet, Graphnet and Telenet or which propose other services for which we have required 214 authorizations in the past.

1. Whether as a general policy the public interest would be served by permitting the entry of "value-added" or "pseudo carriers" to compete with the specialized and general purpose carriers.
2. Whether the further fragmentation of the industry which would result from establishment of resale-type services in competition with essential primary services now available from general purpose carriers is in the public interest.
3. Whether the proliferation of "value-added" carriers which will relay on facilities obtained primarily from Bell will promote or restrict competition.

30. Western Union also suggests that we include the following issues in a general rulemaking proceeding:

4. What would the impact of competition of the nature provided by "value-added" and "pseudo carriers" be on Western Union's ability to perform its common carrier obligations under the Communications Act.
5. Whether competition of the nature provided by the "value-added" and "pseudo carriers" with the prime services of Western Union is in the public interest.

These issues are more specifically directed to the impact of new services on Western Union's operations. In view of the diversity of new services being provided and which are proposed or can reasonably be expected, we believe that a blanket determination of their competitive impact on Western Union can not be made. We do not have the situation which led to our Specialized Common Carrier Inquiry where a multitude of applications were filed in the same time frame to provide the same markets with similar type services. Here we do not have Section 214 applications before us and so may not receive sufficient information with regard to specific services to determine if there will be adverse competitive impact on Western Union. However, we will not preclude Western Union and other interested parties from addressing the above issues in this proceeding. Having received the submissions of parties relevant to these issues we will consider whether such issues can be resolved in this proceeding or should only be considered in the context of specific applications for Section 214 authority along with other issues relative to the public interest, convenience and necessity for the

particular service under consideration. We will not in the interim delay consideration of Section 214 applications as they are filed and Western Union has full opportunity to submit information in response to any such applications relative to competitive impact. Even assuming that we did believe at this time that the issues of competitive impact could be resolved in a general rulemaking proceeding, we do not believe that applications should be held up pending such resolution. An essential feature of many of the services which Western Union would have us consider in a rulemaking proceeding is that they would extend to the public the advantages of state-of-the-art communications technology. In view of the fast pace of technological developments, prompt consideration of the public interest in such services is vital. In summary, then, then, the issues raised in RM. 2218 are to be considered in this proceeding.

V. ITEMS OF INQUIRY

31. We request that parties in this proceeding specifically address the following questions:

1. What is the justification for the restrictions on resale and third party traffic in the currently effective private line service of AT&T and Western Union?

2. Would the public interest be served by a removal of all restrictions on resale of private line services? What would the effect thereof be on:

- a. AT&T and Western Union: Consider the impact on such factors as facilities fill and planning, traffic volumes, revenues, and rate of return for the company as a whole and by affected service or particular route.
- b. The Communications Industry apart from AT&T and Western Union: How would removal of resale restrictions affect the viability of other carriers with their own lines of communication, the stimulation of research and development, the market for new equipment, the development of new carriers, the stimulation of the market for wire and radio communications?

c. Communications users: Discuss possible new services, new pricing structures, effect on cost of existing services, better communications management and stimulation of the use of the most efficient type of carrier for each type of service.

3. If a total removal of restrictions on resale is not desirable what specific restrictions are recommended? Fully justify any recommended restrictions and discuss in terms of the factors listed in question two.

4. Consider restrictions on resale of other services of AT&T, Western Union and other carriers in the same manner as called for by questions one, two and three above.

5. What is the justification for limiting the sharing of private line services to, generally, voice grade and under services and for requiring those desiring to effectuate a sharing arrangement to have a communications need of their own?

6. Would the public interest be better served by removing all restrictions on the sharing of private line facilities? If that would not be desirable, recommend necessary or desirable restrictions and justify any recommendations taking into consideration the effect of each on the carriers, other elements of the communications industry and the using public.

7. What is the public need for sharing of private line facilities? Discuss any new technologies being developed which would make sharing more attractive, new user applications of sharing and the relationship between the need for sharing and the availability of facilities for resale. Specifically, what need for sharing would remain if all restrictions on the resale of private line facilities were eliminated?

8. What is the need for sharing of other services of AT&T and Western Union as well as the services of any other communications common carrier?

9. What is the justification for provisions of Section 2.2.1 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254 which accord special tariff treatment

to the airlines, corporate conglomerates, stock exchanges and their members, and others? Do such tariff provisions, constitute in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act?

10. Should the provisions under consideration in question 9 be found to involve unlawful discriminations, what action should the Commission take to remove such unlawfulness? Fully justify any recommended tariff changes and discuss their consistency with any recommended changes with regard to resale and shared use of private line facilities in general.

11. Should the Commission regulate the sharing agreement made between customers and joint users and, if so, to what extent and in what manner? What reports should be required? Specifically consider possible guidelines governing the manner in which the cost of effectuating the sharing arrangement should be shared so that there is a clear distinction between sharing and resale?

12. How should the Commission regulate the entities reselling communications services and facilities? If in some instances full regulation would not be desirable recommend the manner and extent to which regulation is desirable. Specifically consider the most desirable manner of rate regulation for the various types of resale entities. For such entities would the setting of rates on the basis of operating ratios rather than rate base-rate of return be more effective? What accounting system and financial reporting should be required? What regulation over commencement of operation, standards of service and termination of service is desirable?

PROCEDURES

32. The primary objective of this proceeding is the acquisition of information which will enable the Commission to establish policies with regard to resale and shared use of common carrier facilities and services and to take action necessary to effectuate such policies. Consistent with judicial opinion that administrative agencies should tailor their proceedings to fit the issues to be considered and the circumstances under which decisions must be made 22/, we are establishing a procedure

22/ See, Permian Basin Area Rate Cases, 390 U.S. 747 (1968); see also City of Chicago v. FPC, 458 F. 2d 731 (1971) cert. denied, 405 U.S. 1074 (1972). We have taken the initiative in the past to establish special procedures in particular cases. See, Specialized Common Carrier Inquiry, 29 F.C.C. 2d 870 (1971); Domsat Inquiry, 2 F.C.C. 2d 86 (1970), 35 F.C.C. 2d 844 (1972); In the Matter of AT&T's High Density-Low Density Structure, (procedural order), 45 F.C.C. 2d 88 (1974).

here to elicit the information we require in an efficient and expeditious manner.

33. The Administrative Procedure Act 23/, which governs proceedings before administrative agencies, sets forth two basic procedures for use in agency rulemaking and adjudicatory proceedings. These may be viewed as providing the outer boundaries of administrative procedures 24/. The procedures of Sections 556 and 557 of that Act, which represent the highest degree of administrative protection that Congress believed would be necessary to protect interested parties, are not required for proceedings initiated under any of the sections of the Communications Act which authorize this proceeding. 25/ While we believe that the procedures of Section 553, governing the so-called "notice and comment" rulemaking proceedings, are legally sufficient here to accomplish our purposes we are establishing a procedure containing elements of both section 553 and section 556 and 557 proceedings to insure that a complete and accurate record is produced.

34. Since the heart of this proceeding is to establish broad policies, we believe that it is most appropriate to invite public participation through the submission of comment, information, criticism and recommendation in written form as is generally the case in Section 553 "notice and comment" rulemakings. In addition to the comments and reply comments customarily allowed in such rulemaking proceedings, 26/ we will provide for a third round of submissions to allow those filing comments to respond to persons filing reply comments. Our decision will take into account, and be limited to, materials submitted in this proceeding by interested persons or incorporated into the record of this proceeding by the Commission. 27/ Finally, we will consider requests for further proceedings should interested persons believe that they are being prejudiced by the procedures established.

23/ Administrative Procedure Act, 5 U.S.C. §551 ff.

24/ Mobile Oil Corp. v FPC, 483 F. 2d 1238 (1973) and cases cited therein at footnotes 41-49.

25/ For Section 556 and 557 procedures to be required the statutory hearing requirement must include the phrase "on the record" or words of similar import. United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973); Phillips Petroleum Co. v. FPC, 475 F. 2d 842 (10th Cir. 1973) cert. denied, _____ U.S. _____ (January 14, 1974). For application of this judicial interpretation to sections of the Communications Act see the High Density-Low Density procedural order, supra, note 21, and In the Matter of Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, Docket No. 19896, 46 F.C.C. 2d _____ (April 23, 1974; FCC 74-457).

26/ See our Rules at 47 C.F.R. §1.411 ff.

27/ In the event that materials not submitted by participants are incorporated into the record, notice and opportunity to comment thereon will be provided.

Such requests should be specific as to the issue requiring further evidence and the reasons why prejudice will result if such further proceedings are not held. 28/

35. Parties should clearly indicate in their responses the questions addressed. Information on other relevant subjects may also be submitted as well as recommendations for additional issues which might well be addressed. In general, all studies should be in conformity to Section 1.363 of the Commission's rules (47 C.F.R. 1.363). Where allegations are made of financial harm to any carriers or any segment of the public, the studies underlying these allegations should be submitted. When no study has been done, because of unavailability of data or other reasons, an explanation of the difficulties should be appended, along with a complete discussion of the necessary study. Where loss of traffic or revenues, or an increase in cost is alleged, identify the specific services and routes in question. Revenue loss should be shown in dollar amounts and as a change in the rate of return (expressed as a percentage point change after adjusting for cost changes.)

36. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 205, 208 and 403 of the Communications Act of 1934, as amended, there is hereby instituted an inquiry and proposed rulemaking into the foregoing matters. Members of the public are put on notice that any policies which may be established in this proceeding may be embodied in rules of the Commission.

37. IT IS FURTHER ORDERED, That Docket 19746 is TERMINATED and the issues set for investigation therein are to be considered in this inquiry.

38. IT IS FURTHER ORDERED, That the Petition for Inquiry and Rulemaking filed by Western Union (RM. 2218) is hereby GRANTED, to the extent described herein.

39. IT IS FURTHER ORDERED, That all interested persons may participate in accordance with procedures set forth above within the following time period. Comments are to be filed on or before September 9, 1974; reply comments are to be filed on or before October 24, 1974; responses to reply comments are to be filed on or before November 25, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. Should participants believe that further proceedings, including oral hearings are needed to develop a sufficient record for the resolution of particular issues, they should

28/ We note that even where the APA Sections 556 and 557 procedures are required that evidence may be submitted in written form in rulemaking cases "when a party will not be prejudiced thereby". (5 U.S.C. 556(d)).

make appropriate requests as part of their final filing allowed by this paragraph. Such requests should be specific as to the issues to be considered, the nature of the proceedings required and the reason such proceedings are necessary.

40. IT IS FURTHER ORDERED, That the Commission will issue a First Report and Order and will designate therein issues to be investigated in oral hearings, if and to the extent such procedures appear necessary or appropriate. This is a restricted proceeding and any action taken by the Commission will be based on matters submitted for the record or incorporated into the record in this Docket.

41. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary