

CONCURRING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY
IN WHICH
COMMISSIONER JAMES H. QUELLO JOINS

In Re: Conditional Grant of Application of GTE to Acquire Control
of Telenet

While I believe that authorization is not required prior to GTE's acquisition of Telenet stock,^{*/} the Commission has voted otherwise, and I join in consideration of the merits of the application before us. My areas of disagreement with the Commission's grant relate to the policy precedents embodied in the conditions of the merger and the specific wording of the conditions themselves.

I am concerned that the Commission may be going too far in its finding that "arm's length" separate subsidiaries are the answer to the issue of preventing cross-subsidization of competitive services by monopoly services. To date we have never imposed such a condition on the Bell System, which by virtue of its size and market dominance has the greatest opportunity and incentive to subsidize its competitive services with MTS revenues, but we have required separate entities to be established by such carriers as RCA, ITT, Comsat and IBM for provision of their domestic services. This order, however, goes beyond these separate subsidiary requirements.

It is my belief that a parent or affiliated company should receive some of the benefits, other than merely revenues, from vertical integration. Exchange of information, dual marketing and advertising of services, and centralized research and development are advantages which such a company should have, provided they are not abused.

^{*/} See my dissent to Letter Order released January 25, 1979, 70 FCC 2d. 2249, 2254.

176

The conditions which the Commission has imposed on this grant will allow Telenet to obtain financing from the GTE parent and to use the GTE name, and will give GTE the benefits of any profits, or detriment of any losses, of its subsidiary. That, however, is the sum total of such benefits. It appears to me that GTE, in its general corporate advertising, should be allowed to mention Telenet, as a communications company within the corporate umbrella, and allocate the advertising costs in its accounting system. Likewise, if a salesman for a GTE local operating company is designing a business communications system for a local firm, he should not be precluded from telling the customer that Telenet exists and leaving a card with Telenet's telephone number. Telenet should be required to maintain its own salesmen and technical staff to design a data system, but it appears to me that requiring GTE to ignore the existence of its subsidiary is quixotic regulation.

In taking the action setting up an "arm's length" subsidiary, the Commission cannot ignore the precedential value of its actions. It occurs to me that we may be hard pressed to refuse to require another company to establish a similar subsidiary if it either purchases another carrier or seeks to initiate a new category of services, despite the Commission's disclaimer in footnote 9 of its Order. Yet we have never looked at the trade-offs. What are the costs in establishing and maintaining a completely arm's length subsidiary, and what public benefits will accrue? Could the costs be reduced without reduction of public

benefits if the subsidiary were more closely integrated into the corporate structure? These issues are addressed neither in this document nor elsewhere in Commission decisions. I feel that they must be explicitly addressed and quantified before we continue much farther along the road to requiring arm's length subsidiaries.

Looking now at the specific conditions, I assume the language in the Order that the Commission will re-examine the grant after two years will not be seen as an expiration date on the authorization. It appears to me that it would unduly hamper Telenet's ability to compete in the marketplace if the Commission were to grant the application for a finite period. The reason for the two-year review is to enable us to make certain that the conditions are being satisfied and that Telenet continues to compete vigorously in the marketplace. If Telenet and GTE abide by the Commission's requirements, they should have no reason to expect adverse action from this review.

Condition 1, relating to marketing and advertising, is, as I have discussed, too stringent. I believe that accounting can be used to separate advertising costs, and that GTE should be permitted to "assist" in attracting users to Telenet.

Condition 2 prohibits Telenet from participating in any other carrier's "public message augmented data services," as defined in paragraph 25. This condition appears to me to violate our policies favoring maximum flexibility for users and interconnection of carriers. I see no valid reason for prohibiting Telenet from interconnecting

with other carriers for the provision of end-on-end through service. Our concern should be that this interconnection should be on a non-discriminatory basis, and that we are given sufficient information to enable us to ascertain the extent to which Telenet is competing in the marketplace. I would prefer Condition 2 to read:

Telenet may not deny interconnection of its facilities or services to any other carrier wishing to participate in through services, and all such interconnections, whether with GTE affiliates or with any other carriers, shall be on non-discriminatory terms and conditions. Contracts for such interconnection must be filed with the Commission.

I agree with the second sentence of Condition 2 in the Commission's Order.

Condition 3 relates to the specific functions which Telenet must provide independently of GTE. While I agree that it is reasonable to require Telenet to maintain some in-house or contract capability for these functions, I can envision no reason why it cannot supplement its own resources with those of other GTE affiliates, provided this is done on a reimbursable and non-discriminatory basis. To ensure arm's length dealings, we can require contracts for these services to be filed with the Commission, as permitted under Section 211(b) of the Act. This should provide sufficient protection against cross-subsidization while also providing the benefits of possible economies of scale. Similarly, the second sentence of Condition 5, which prohibits GTE companies from providing the services listed in Condition 3, should be stricken.

I approve the separate accounting provisions of Condition 4. Returning to Condition 5, there is a prohibition on Telenet's obtaining

services and facilities from other carriers on a contract basis, and a requirement that Telenet must terminate any existing contracts. Since we have generally allowed carriers to sign facility and service contracts with other carriers, if filed with the Commission pursuant to Section 211(a) of the Act, we should not be more restrictive here. We should not prohibit Telenet from signing facility contracts with other carriers unless that ban is also applied to all carriers. However, unless we impose a general ban on carrier-to-carrier facility contracts, we can continue to monitor rates and conditions which appear on the contracts filed with us to ensure reasonableness and absence of discrimination or preference.

Condition 6, which prohibits sharing of personnel and facilities, is a reasonable requirement to impose on separate subsidiaries. However, I hope the Commission will look favorably on requests for sharing of physical space where GTE and Telenet demonstrate potential economies in these arrangements.

I would eliminate Condition 7 which prohibits exchange of proprietary information. The benefits of the exchange of marketing, technical, and other internal information and data outweigh any detriments to the public interest.

The last three conditions are reasonable, although clarification of Condition 9 would prevent repetitive filing of service information where technical parameters and service descriptions remain unchanged.

Finally, it could be argued that the text of the Commission's Order somewhat mollifies the harshness of the conditions. I believe that the conditions should stand unambiguously on their own, and if the Commission believes their language is too restrictive, they should be modified. The reader should not be required to examine the full 75-page text to determine the Commission's intent in conditioning the grant.

In summary, I concur in the conditional grant of GTE's application to acquire the stock of Telenet. However, I disagree with the degree of separation and the specifics of some of the conditions which are being imposed. They are unnecessarily onerous in our efforts to avoid cross-subsidization and otherwise to protect the public interest. In my view, the completely arm's length subsidiary concept which the Commission requires, establishes a precedent with little information as to the costs of such a structure as balanced against its public benefits.