DISSENTING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY
IN WHICH COMMISSIONERS MARGITA E. WHITE AND JAMES H. QUELLO JOIN

In Re: Proposed Telenet-General Telephone Merger

The narrow question before the Commission is whether Section 214 of the Act requires an application and certification prior to GTE and Telenet's effecting their proposed merger. Whether this merger will serve the public interest is not at issue here. Nor is a question raised now of whether the antitrust laws would be violated if the acquisition takes place. Whether or not an application is required, the Communications Act 1/ gives us ample authority to examine these issues and to take appropriate action. I interpret Section 214 to hold that no authorization is required prior to completion of the proposed transfer of the capital stock of Telenet. In my view this is not an issue of discretion; it is mandated by our Act.

Section 214(a) of the Act provides, in relevant part:

> "No carrier...shall acquire or operate any line, or extension thereof...unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the... operation...of such additional or extended line;"

By contrast, Section 310(b) provides, in relevant part:

> "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

1/ 47 U.S.C. §§ 154(i), 154(j), 214, 403 602(d).

Similarly, Sections 221 and 222 provide procedures for Commission approval of mergers of telephone and telegraph companies, respectively. Therefore, the Commission has an explicit obligation to determine whether the public interest is served by transfer of control of station licenses, or of mergers of telephone or telegraph companies. If Congress had meant to give the Commission similar authority regarding communications facilities, it is inconceivable to me that it would not have made its intentions explicit. And given the reasons that Congress enacted the various provisions, it is not surprising that Congress mandated different regulatory schemes, as described below.

In Title III, the Commission is charged with regulating a scarce resource, one not privately owned, i.e., the radio spectrum. Section 310 gives us control over who is entitled to utilize this resource. As to Sections 221 and 222, they were adopted to deal with specific problems. Section 221 gives the Commission authority to approve mergers between telephone companies thereby immunizing such mergers from the antitrust laws. On the other hand, Section 222 was adopted as emergency wartime legislation in 1943 to allow the two existing major domestic telegraph companies to merge without the constraints of the antitrust laws.

Section 214 speaks to none of these considerations. Rather, Congress, in enacting Section 214, was concerned that carriers and their ratepayers would be burdened by over-building of communications facilities. As Congressman Rayburn explained during the debate on Section 214,

> "Section 214, relating to the extension of lines, is based upon Section 1 (18-22) of the Interstate Commerce Act.... The Section is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of the service." 2/

Regarding the proposal before the Commission, Telenet presently holds Section 214 certificates for the lines it leases from other carriers. Operation of those lines will continue, presumably, for provision of the same services as are now being offered. If changes are made to these offerings, the Act requires tariff filings and, in the case of discontinuance, Section 214 applications. Thus, there would be no change to the lines being operated nor is there a net increase or decrease in the number of lines in operation as a result of the merger. 3/ Such continuity of line operation, I believe, takes the proposed merger out of Section 214. This is consistent with the expressed Congressional purpose in enacting Section 214.

The majority has decided, however, that a Section 214 certificate is required prior to effectuation of the proposed merger. While I differ from that determination, I join my colleagues in the desire to complete our examination of the application, when submitted, as expeditiously as possible. In a competitive environment, it is improper to delay unreasonably the entry, exit or merger of competing carriers.

2/ 78 Cong. Rec. 10314 (1934). Similarly, the House Commerce Committee, in reporting out the Interstate Commerce Act, commented that the Bill required a certificate prior to construction or operation of a line of transportation to "prevent the construction of unnecessary or parallel lines, which, without any reasonable hope of profitable operations, would become a burden on the public." H.R. Rep. No. 456, 66th Cong., 1st. Sess. 18 (1919).

3/ Additional facility applications from Telenet are pending, but there appears to be no corrolation between the proposed merger and these applications.

In the meantime, whatever the merits of the application which the Commission has required, I hope and trust that regulatory delay, in itself, will not effectively prejudge the issues by causing the merger to be abandoned.