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I

THE CORPORATION ORGANIZATION

BASIC POLICY

In August 1962, the Congress of the United States passed the Communications Satellite Act[1] (hereinafter cited as the act) which expressed this nation's policy toward a global communications satellite system. In addition, the act gave birth to a revolutionary new concept of a joint enterprise between Government and business—The Communications Satellite Corporation (hereinafter referred to as the corporation or CSC).

The United States intends to establish, in conjunction with other nations, a commercial satellite system as part of an improved global communications network. This system is to serve the communication needs of all nations and, it is hoped, will contribute to world peace and understanding. In order to accomplish this and to encourage the widest possible participation by the public, the above mentioned corporation has been established. This corporation, operating subject to appropriate federal regulations, is to maintain and strengthen competition both in the procuring of equipment and in the providing of communication services to the public. Congress also expressed the policy that all authorized users shall have nondiscriminatory access to

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[1] Pub. L. No. 624, 87th Cong., 2d Sess. (Aug. 31, 1962).

the system. In addition it was not the intent of Congress to exclude the system from utilization for domestic communication services or the creation of additional systems if required.

To achieve the goals set forth in the act, the United States is endeavoring to produce the end result through private enterprise. The problems that lie ahead will be many. Never before has a government declared such vast intentions while entrusting the mechanics of implementation to a private organization. Hence, the real problem to be discussed here is the creation, functions, and various ramifications of this unique corporation which has been entrusted with such a major task.

Perhaps some analogy can be drawn between the CSC and past state experiments. For example, state legislation since the late 1930's has attempted to set up industrial development corporations which are often capitalized by a combination of stock purchased by banking institutions and the public, and further financed by state and federal loans and grants to the corporation.[1a] Nevertheless, this is a new experiment in the long standing association between United States Government and business. In evaluating this experiment, it should be remembered that the CSC is also a political compromise. With the late Senator Robert Kerr leading the proponents of complete private ownership, and the late Senator Kefauver championing the cause of public ownership, the then Assistant Attorney General Katzenbach originated the mixed scheme which was ultimately adopted.[1b] To understand better the new relationship, the corporate structure will first be evaluated and a number of problems surrounding its formation and operation will be discussed.

Congress created this new business entity, specifically stating that it was a private corporation and not an instrumentality of the federal government.[2] This raises two problems: private vs. government ownership and public vs. private status of the directors and officers of the corporation. The act requires a substantial amount of government control in certain vital areas of the business operation, thus generating these two problems.

[1a] See, *A Summary of State Programs Designed to Encourage Industrial Development* (U.S. Area Redevelopment Administration 1963).

[1b] N.Y. Times, March 7, 1965 § 6 (Magazine) p. 28 at 82.

[2] Pub. L. No. 624, 87th Cong., 2d Sess. § 301 (Aug. 31, 1962).

DIRECTORS AND STOCK OWNERSHIP

The corporate organization is to consist of a board of directors, fifteen in number, plus officers to be appointed by the board. Six members of the board are to be elected by communications common carriers who own stock in the corporation, and six are to be elected by the other stockholders. In addition, the President of the United States, with the advice and consent of the Senate, is to appoint three members. Under this system of selection it is reasonable to assume that the balance of power will be held by the presidential appointees who, it is hoped, will be men of outstanding management ability and devoid of any political favoritism.

It is interesting to note that the ownership is divided into two classes. Common carriers, who are authorized by the Federal Communications Commission (hereafter referred to as FCC) to own stock in the corporation, may hold fifty per cent of the outstanding shares. Individuals and organizations, not authorized common carriers, may own fifty per cent of the stock subject to the limitation that only ten per cent of the outstanding shares may be owned by any one such stockholder.

As this corporation is a government-sanctioned private monopoly, certain safeguards were enacted in order to create a balance between the classes of ownership. The act requires that fifty per cent of the shares of the voting stock offered at any time by the corporation shall be reserved for purchase by authorized carriers. Further, these carriers shall at no time either directly or indirectly own in excess of fifty per cent of all issued and outstanding stock. The carriers shall elect six of the fifteen directors, but no carrier is permitted directly or indirectly to vote for more than three candidates. In addition, section 304(f) of the act provides that the FCC, after notice and hearing, may compel a transfer of shares from one carrier to another when such a transfer will advance the public interest. By these safeguards it is hoped that the corporation will not be dominated by a single carrier.

There are also certain prohibitions on the ownership of stock by individuals. The ten per cent individual ownership limitation was noted previously. In addition, alien ownership of more than twenty per cent of the voting stock is prohibited.

Congress has made a strong effort to provide for broad-based ownership through specific limitations on both classes of potential investors. However, this may be illusory as the individual carriers are not limited to the same extent (ten per cent) as the individual stockholders. Depending on the actual interest shown by the carriers, two of them could elect six board members under the cumulative voting provisions of section 303(a).

The FCC under section 201(c)(5) of the act has been charged with the responsibility of prescribing accounting regulations for the corporation. While this reflects a basis for an independent audit, there is no specific requirement that the corporation accounts be audited by a properly licensed independent accounting firm; although this was accomplished for purposes of the stock prospectus.[3]

The incorporators appointed by the President of the United States are charged with the responsibility of forming the corporation. They will serve as the board of directors until the first annual meeting of the stockholders or until their successors are elected and qualified. Mr. Leo D. Welch, formerly of the Standard Oil Company (N.J.), was appointed chairman of the board, and former Under Secretary of the Air Force, Joseph V. Charyk, was named president.[4] The corporation has been incorporated under the District of Columbia Business Corporation Act and a 5 million dollar line of credit has been established. In addition, 10 million shares of common stock were sold during June 1964 at twenty dollars per share.

One can easily see that there are many problems and questions concerning this organization. Those to be discussed will deal with control to be exercised by the federal government with a view toward the government-business relationship.

II

THE QUESTION OF FEDERAL OWNERSHIP
IS IT A PRIVATE CORPORATION?

The first general issue that can be posed is whether or not the corporation is a federal instrumentality as opposed to a private

[3] 2 U.S. Code Cong. & Ad. News 2302 (May 21, 1962); Prospectus, Communications Satellite Corporation 6 (June 1964).
[4] Business Week, Sept. 7, 1963, p. 104.

corporation. This distinction may be relevant for many purposes such as the status of its officers and employees, its relation to other federal agencies, the taxation of its income, and so on through an endless list of legal differences between federal instrumentalities and private corporations. The act specifically states in section 301 that it is not an agency or establishment of the United States Government. This should settle the matter; but it is submitted that perhaps this question is still open to debate. Certainly Congress did not intend to establish another federal corporation. However, the various federal controls yet to be discussed plus the presidential appointment of directors and obvious future interrelationship with other fedral agencies indicates, perhaps, a quasi public corporation has been created, and its status may be one for future judicial determination.

The Attorney General of the United States has rendered an opinion as to the status of the presidentially appointed incorporators and directors, indicating that they are holding private, not public, offices.[5] He based his opinion on the premise that even though these persons were appointed in accordance with article II, section 2 of the Constitution of the United States, there is no requirement that when this method is used the appointee must become, in fact, an officer of the United States. To the contrary, he points out that the fundamental issue is whether the appointees are occupants of a private rather than public status, concluding that the provisions of the act, which are determinative, create a private office.

The legislative history of the act is not very helpful on this particular point, but there is some indication that these officers were to be considered fiduciaries of the corporation.[6] This, together with the general theme of a private as opposed to a govenrment corporation, reflected throughout the act, leaves little doubt concerning the intent of Congress. However, as with the corporation itself, the entire situation may still be open to further interpretation.

Prior to discussing the various elements of federal control, which may be the basis for negating the intent of Congress, let us first examine the question of a public vs. a private corporation

[5] 42 Ops. Att'y Gen. 11 (1962).
[6] 1108 Cong. Rec. 15820 (daily ed. Aug. 17, 1962).

as it pertains to this particular organization. The act created a private monopoly which is to a large degree contrary to the economic philosophy of this nation. However, because of the nature of this undertaking, perhaps the new concept is justified.

ARGUMENTS AGAINST THE PRIVATE CORPORATION

The real argument against the private corporation concept rests on several factors. The first is that practically all the elements necessary for the very existence of an operational satellite communication system have already been financed by the taxpayer.[7] While government subsidy is commonplace in our economic environment, the benefits received by the CSC may exceed all past subsidizing programs. A government-owned corporation would not have the same profit factor to cope with and perhaps could engage in vital research in allied areas which the private corporation might find unprofitable. In addition, a government corporation might tend to insure fuller competition in the procurement of equipment than would private enterprise, which quite possibly could be geared to a system of vertical integration. Since an early date, statutes have required the letting of government contracts by formal advertising in order to give all persons an equal right to compete.[8] Under private ownership, procurement might be restricted to benefit only certain associated organizations to the exclusion of competing small businesses or even major suppliers.[9] The Federal Communications Commission is charged with the responsibility of requiring fairness in these matters; hence, it is assumed that a lack of competitive procurement will not be a problem, regardless of the type of corporation.

Section 402 of the act requires that the corporation notify the State Department whenever it enters into business negotiations with a foreign nation, and the State Department is to render such assistance as may be appropriate. The corporation has already had discussions with Canada, Great Britain, West Germany, France and Italy. If the ultimate goal is to create a truly international or global communications system, then every na-

[7] *Supra* note 3, at 2310.
[8] Rev. Stat. § 3709 (1875), 41 U.S.C. § 5 (1958).
[9] United States v. E. I. Du Pont De Nemours & Co., 353 U.S. 586 (1957).

tion must be approached on the subject, requiring the State Department to render a great deal of assistance.[10] However, it is submitted that some nations may object to discussing this matter with a private corporation when their own systems are government-owned.

The act places the State Department in merely an advisory position, allowing the corporation to determine what is a business negotiation. The Constitution empowers the President of the United States to function as the responsible officer with regard to foreign affairs. Section 402 of the act, read in conjunction with section 201(a)(4), indicates that the President will exercise supervision over the relationship of the corporation with foreign governments to insure accord with United States foreign policy. This may be sufficient, but it would seem more reasonable to require all negotiations with foreign governments to be conducted by the State Department to insure adherence to all aspects of our foreign policy. These are some of the arguments in favor of a government-owned corporation and, like other areas, the question may not be fully resolved for some time.

GOVERNMENT CONTROL

Turning now to the serious problem of government control and its effect on the question of negating congressional intent to create a private corporation, it is noted that certain federal controls on this corporation are like those to which all corporations are subjected. There are also other unique controls which lend themselves to effecting a sizeable amount of government control in the daily operation. The President, in addition to his appointive powers, has under section 302 of the act authority to approve the original articles of incorporation but no specific authority with regard to later amendments. As the original articles have been filed, it appears that the President's authority in that area has ceased to exist. However, the mere fact that such approval was once required is a basis for the enactment of legislation to require future presidential approval, thereby creating an additional cloud on the objective of a private corporation.

Section 404 of the act requires the President of the United States to report to Congress each year concerning the activities

[10] *Supra* note 4, at 110.

and accomplishments of the corporation with regard to the attainment of the national objectives set forth therein. The corporation is required to submit each year to the President and Congress a detailed report of its operations, activities and accomplishments under the act. In addition, the President has recently appointed an *ad hoc* committee to co-ordinate the activities of the various government agencies whose work affects the CSC.[11] These various requirements interjecting presidential supervision lend support to the contention that perhaps Congress has not created a private corporation.

In addition to the President and the State Department there are several other federal agencies which have some control over the corporation. The National Aeronautics and Space Administration (hereafter referred to as NASA) has the responsibility of furnishing the corporation satellite launching and associated services plus assistance in research and development, all on a reimbursable basis. NASA is also to act as a consultant with regard to technical problems. Hence NASA has a major role in the actual operational aspects of the corporation. The Securities and Exchange Commission will require the corporation to meet the standards prescribed by federal legislation in that area, just as they would any stock issuer whose operations are financed by private investment.

THE FCC—FEDERAL WATCHDOG

This then brings us to the administrative body that is actually the supervisor of the entire program, the Federal Communications Commission. Section 401 of the act specifically designates the corporation as a common carrier subject to the Communications Act of 1934. The FCC is to insure effective competition in the procurement of corporate equipment, determine which carriers are authorized to hold stock and also utilize the corporation's services, prescribe accounting regulations, set rates, authorize additional stock issues and approve corporate indebtedness.

In essence, the FCC is given broad authority over the corporation in the areas of ratemaking, operations, fiscal affairs, procurement and future progress. This is even stronger evidence

[11] *Supra* note 4, at 106.

to the effect that what Congress intended and actually authorized may not be the same.

An example of FCC intervention in operational matters took place in the summer of 1963 when the FCC critized the board of directors for failing to offer for public sale the corporate stock.[12] In addition, the FCC, while approving a bank loan of 600,000 dollars in July, 1963, restricted 500,000 dollars thereof for research and design study. The corporation contended that the FCC was invading the management function of the directors by such action.[13] Based on this example, it would appear that the facts tend to support a conclusion that the CSC is not as private a corporation as Congress intended. No other so-called private corporation is at present subjected to such government control. It is true that Congress has created a monopoly and there must be certain regulations. However, the operational control that can be exercised by the FCC in this case suggests that the independent status of the corporation is questionable.

ANOTHER QUASI PUBLIC CORPORATION

There have been other attempts to establish corporations in the gray area between total private and total government control such as the Aerospace Corporation. This organization was not created by an act of Congress but was established as a non-profit corporation under the laws of California to perform research for the United States Air Force. Here, an effort was made to avoid government red tape and eliminate the profit factor in certain research activities. However, it is submitted that the Aerospace Corporation is a government instrumentality when its purpose, function and organization is given proper evaluation.[14] Of course, the actual status of the CSC or any other quasi-public corporation must be decided by the courts.

Although the CSC may be properly insulated against being a government instrumentality, the courts tend to break down such efforts when it pertains to a public liability. Hence, if the corporate status is ever challenged, it would seem that a tort

[12] Washington Post, July 26, 1963, p. B-9, col. 1; Newsweek, Aug. 19, 1963, p. 62.

[13] Washington Post, August 8, 1963, p. A-17, col. 1.

[14] Donnelly, *The Aerospace Corporation: Fish or Fowl or Government Instrumentality*, 22 Fed. B.J. 298 (1962).

suit would be the natural method. The case of *Toth v. United States*[15] indicates that if the question of federal liability is to be decided, the court will look at whether or not there is detailed supervision of the operation of the corporation by the Government through a program of management and budget approval. In addition, the question of government-controlled fiscal policy will also be determinative. Hence, as the FCC is given rather comprehensive powers in the operational and fiscal aspects of the CSC, this may destroy the intent of Congress to create a private corporation.

III

THE FUTURE

THE PROFIT FACTOR

The future of the CSC is debatable. The problems here discussed are only a few affecting its successful existence. There are some who feel that the corporation is premature because it will take over three years to produce an operational satellite communications system and much experimentation is yet to be accomplished. This, of course, necessitates an unfavorable economic environment until the system begins to produce a profit, which CSC officials predict will be about 1970-1971.[16]

As of June 3, 1964, approximately 160 telephone, telegraph and other qualified communication companies have been allotted stock in the corporation with American Telephone and Telegraph, receiving 2.9 million shares for 58 million dollars which indicates more than just a passing interest on the part of the carriers.[17] In addition, the initial public offering limited individual purchases to fifty shares and demand was so heavy the actual purchases averaged from ten to fifteen shares in spite of dim profit expectations and a very cautious prospectus.[18]

Congress, in order to preserve the private enterprise character of our communications system, has established a private corporation to sponsor the United States' entry into the field of international satellite communications. The initial legislation has endeavored to launch this nation into the Space Age via a most

[15] 107 F. Supp. 37 (E.D. Ohio 1952).
[16] *Supra* note 4.
[17] The Dayton Journal Herald, June 3, 1964, p. 21.
[18] The Wall Street Journal, June 4, 1964, p. 28, col. 2.

unique business venture combining the benefits of prior government research with the characteristics of private enterprise. This may well be the basis for other similar ventures between business and Government. It may have opened an unlimited area for such co-operation on a profitable basis. To say that this effort is unrealistic would be to critize without a solid foundation. Although a substantial amount of control over the entire venture has been placed in the hands of the FCC, it was recognized that a monopoly was being created and that certain controls were necessary. To do less would have been unjust to the American public. This entire concept may indeed be a farsighted effort on behalf of the Congress to foster a greater co-operative relationship between Government and business.

The major question is whether or not Congress actually created a private corporation for profit or merely an instrumentality of the federal government, soon to be disclosed by judicial determination. If the CSC is a private corporation, then, as stated before, this may be the basis for other such government-business ventures. However, an examination of the act and its legislative history certainly creates a doubt as to the reality of its private nature.

IV

CONCLUSION

In conclusion, the question is not whether this nation will have a communication satellite system but by what method, government or privately-owned, or a mixture of both. The vastness of the undertaking indicates the latter is the most feasible method, but is the CSC as it now stands the proper arrangement? This unique venture is certainly a worthy effort on behalf of the American Government to interject private enterprise into the realm of outer space. By so doing perhaps national governments alone will not dominate the vast new area, and if profitable ventures can be found, private enterprise may achieve a noteworthy status through this endeavor. This is a farsighted experiment of Government and business worthy of high praise. Should it prove to be a successful organization, it will surely benefit all who participate, even Wilma Soss and Louis D. Gilbert.[19]

[19] The two stockholders ejected from the annual stockholder's meeting. Time, May 21, 1965, p. 94.