IN THE

Supreme Court of the United States

October Term, 1973
No. 73-38

153

UNITED STATES OF AMERICA,
Appellant,

v.

MARINE BANCORPORATION, THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK, and JAMES E. SMITH, Comptroller of the Currency,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF APPELLEES MARINE BANCORPORATION, THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK

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STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. §18, provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the

assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. §1828(c)(5)(B), provides in pertinent part:

"The [Comptroller of the Currency] shall not approve—

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

12 U.S.C. §36 provides in pertinent part, as follows:

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point

within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *

* * *"

R.C.W. 30.40.020:[1]

"A bank or trust company having a paid-in capital of not less than five hundred thousand dollars may, with the approval of the supervisor, establish and operate branches in any city or town within the state. A bank or trust company having a paid-in capital of not less than two hundred thousand dollars may, with the approval of the supervisor, establish and operate branches within the limits of the county in which its principal place of business is located. A bank having a paid-in capital of not less than one million dollars may, with the approval of the supervisor, establish and operate branches in any foreign country. The supervisor's approval of a branch within this state shall be conditioned on a finding that the resources in the neighborhood of the proposed location and in the surrounding country offer a reasonable promise of adequate support for the proposed branch and that the proposed branch is not being formed for other than the legitimate objects covered by this title. The supervisor's approval of a branch in a foreign country shall be conditioned on a finding that the proposed location offers a reasonable promise of adequate support for the proposed branch, that the proposed branch is not being formed for other than the legitimate objects covered by this title, and that the principal purpose for establishing such branch is to aid in financing or facilitating exports and/or imports and the exchange of

1. NOTE: The above statute is quoted as amended by the 1973 legislature. The amendments are in no way pertinent to any issue in this case.

commodities with any foreign country or the agencies or nationals thereof.

"The aggregate paid-in capital stock of every bank or trust company operating branches shall at no time be less than the aggregate of the minimum capital required by law for the establishment of an equal number of banks or trust companies in the cities or towns wherein the principal office or place of business of such bank or trust company and its branches are located.

"No bank or trust company shall establish or operate any branch, except a branch in a foreign country, in any city or town outside the city or town in which its principal place of business is located in which any bank, trust company or national banking association regularly transacts a banking or trust business, except by taking over or acquiring an existing bank, trust company or national banking association or the branch of any bank, trust company or national banking association operating in such city or town."

R.C.W. 30.08.020:

"Persons desiring to incorporate a bank or trust company shall execute articles of incorporation in quadruplicate, which shall be submitted for examination to the supervisor at his office in Olympia.

"Articles of incorporation shall state:

"(1) The name of such bank or trust company.

"(2) The city, village or locality and county where such corporation is to be located.

"(3) The nature of its business, whether that of a commercial bank, a savings bank or both or a trust company.

"(4) The amount of its capital stock, which shall be divided into shares of not less than ten dollars each, nor more than one hundred dollars each, as may be provided in the articles of incorporation.

"(5) The period for which such corporation is or-

ganized, which may be for a stated number of years or perpetual.

"(6) The names and places of residence of the persons who as directors are to manage the corporation until the first annual meeting of its stockholders.

"(7) That for a stated number of years, which shall be not less than ten nor more than twenty years from the date of approval of the articles (a) no voting share of the corporation shall, without the prior written approval of the supervisor, be affirmatively voted for any proposal which would have the effect of sale, conversion, merger, or consolidation to or with, any other banking entity or affiliated financial interest, whether through transfer of stock ownership, sale of assets, or otherwise, (b) the corporation shall take no action to consummate any sale, conversion, merger, or consolidation in violation of this subdivision, (c) this provision of the articles shall not be revoked, altered, or amended by the shareholders without the prior written approval of the supervisor, and (d) all stock issued by the corporation shall be subject to this subdivision and a copy hereof shall be placed upon all certificates of stock issued by the corporation.

"Such articles shall be acknowledged before an officer authorized to take acknowledgments."

R.C.W. 30.04.230:[2]

"A corporation or association organized under the laws of this state, or licensed to transact business in the state, shall not hereafter acquire any shares of stock of any bank, trust company, or national banking association which, in the aggregate, enable it to own, hold, or control more than twenty-five percent of the capital sotck of more than one such bank, trust company, or national banking association: *Provided, however,* That the foregoing restriction shall not apply as to any legal commitments existing on February 27, 1933: *And provided, further,* That the foregoing restriction shall not apply to prevent any such corpora-

2. NOTE: The above statute is quoted as amended by the 1973 legislature. The amendments are in no way pertinent to any issue in this case.

tion or association which has its principal place of business in this state from acquiring additional shares of stock in a bank, trust company, or national banking association in which such corporation or association owned twenty-five percent or more of the capital stock on January 1, 1961.

"A person who does, or conspires with another or others in doing, an act in violation of this section shall be guilty of a gross misdemeanor. A corporation that violates this section, or a corporation whose stock is acquired in violation hereof, shall forfeit its charter if it be a domestic corporation, or its license to transact business if it be a foreign corporation; and the forfeiture shall be enforced in an action by the state brought by the attorney general."

STATEMENT

This is an appeal by the United States from a final judgment of the District Court dismissing after trial the appellant's complaint under Section 7 of the Clayton Act (15 U.S.C. §18), seeking to enjoin the merger of the Appellee Banks, whereunder Washington Trust Bank ("WTB") of Spokane, Washington would be merged into The National Bank of Commerce of Seattle ("NBC"), so that NBC, as the surviving bank, would thereafter operate all banking offices of WTB as branches of NBC.

As stated in the Government's Brief,[3] prior to trial all allegations in the complaint relating to actual competition were abandoned, and the case went to trial only on the potential competition issues.

In this connection, the principal thrust of the Government's case at trial was in support of its contention that the effect of the merger may be substantially to lessen compe-

3. Government Brief (G.Br.) p. 4, n. 1.

tition in the Spokane commercial banking market, because the entry of NBC into that market through the acquisition of WTB, rathern than by *de novo* entry, or by "foothold"[4] acquisition of a smaller bank, would eliminate NBC as a potential competitor whose future entry into Spokane other than by acquisition of a large market share could effect substantial deconcentration of that market. Although the issue was raised, little attention was directed by the Government at the trial in support of the contention that the merger would eliminate NBC as a potential entrant exerting a present procompetitive influence on banks in the Spokane market.[5]

It was also contended that WTB was one of twelve "middle sized" banks in the state, and that the merger would eliminate WTB as a potential competitor which could, at some future time, enter other local markets in Eastern Washington. However, no such local market was specified, or delineated as to location, extent, or the competitive conditions therein.

Finally, it was contended that the merger would remove WTB as one of the few middle-sized banks in the state capable of merging with other middle-sized or smaller banks, and becoming a significant statewide or regional competitor. This contention was based on alleged capability only, and not on any existing probability. The only objectionable effect asserted by the Government based on this contention was that it would adversely affect banking competition by strengthening the dominance of the state's few large banking institutions.

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4. Often referred to as "toe-hold".

5. G.Br. 27-28).

Each of these latter two contentions was based solely on future eventualities, and it was not contended that the merger would have any adverse influence on the present state of competition in any market outside the Spokane Metropolitan Area.

With respect to the charge that the merger would eliminate NBC as a potential competitor or entrant in the Spokane commercial banking market, the Banks asserted that the legal and economic barriers to any other means of entry were such that in the event the merger were not consummated, there was no reasonable probability that NBC would enter that market in the reasonably foreseeable future. The Banks further asserted that NBC's posture outside the Spokane market posed no material threat of entry by means other than the merger, and did not have any significant effect on the level of competition therein.

With respect to the charge that the merger would eliminate WTB as a potential competitor or entrant to other local markets in Eastern Washington, or as a potential component of some future combination of banks, the Banks pointed out that the Government had conceded that Eastern Washington, and the state as a whole, would not qualify as commercial banking markets,[6] and that not only had no attempt been made to establish a relevant market in which this alleged lessening of competition might occur, but, also, the eventualities suggested, and their possible consequences were of the most speculative character, far beyond the realm of reasonable probability.

Shortly after the institution of this action by the Depart-

6. But contended, nevertheless, that these areas constitute "sections of the country" within the meaning of Section 7.

ment of Justice, the Comptroller of the Currency[7] intervened as a party and joined with the Banks in defense of the action. In addition to their denial of the charge as alleged, the Banks and the Comptroller have asserted an affirmative defense under the Bank Merger Act of 1966 (12 U.S.C. §1828(c)), that anticompetitive effects of the merger, if any, are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

At the trial, the Comptroller took the lead in establishing the needs and deficiencies of the Spokane Metropolitan Area with reference to commercial bank services, and the importance of these needs to the community. He presented the testimony of a number of witnesses to that end (Tr. 622-692, 756-813, App. 804-845, 884-918). He also joined with the Banks in support of their assertion of the capability and purpose of NBC to supply these needs and deficiencies, and that there are no reasonable alternative means available (Tr. 1069-1070, App. 1066-1067).

With respect to this affirmative defense, the Government contended that it is not possible for the District Court to determine the convenience and needs issue in the same proceeding where the court has determined that there are no anticompetitive effects of the transaction which would offend Section 7 of the Clayton Act, and, further, that the benefits that the District Court found the merger would bring to the Spokane area do not qualify as convenience and needs which may be weighed against anticompetitive effects under the Bank Merger Act.

7. Since the action was instituted by Justice on behalf of the United States, we refer to the Plaintiff-Appellant as the "Government", and to the Intervenor-Appellee as the "Comptroller".

After the trial, the District Court determined that the legal and economic barriers to entry in the Spokane commercial banking market are such that in the event the merger is not consummated, there is no reasonable probability that NBC will enter the area in the reasonably foreseeable future; that the threat of entry by NBC in the Spokane market by any means other than the merger, to the extent any such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market, nor any significant effect on the level of competition therein; that neither Eastern Washington, nor the state as a whole, constitutes a commercial banking market within which the competitive effects of a transaction in that line of commerce may be judged; and that plaintiff has failed to prove that the effect of the merger may be to substantially lessen competition in commercial banking in the Spokane Metropolitan Area, or in any other section of the country, in violation of Section 7 of the Clayton Act. The District Court also determined that if, contrary to the foregoing, the merger did have some or all of the alleged anticompetitive effects, the Defendants and Intervenor had sustained their burden of establishing their affirmative defense under the Bank Merger Act of 1966, that such anticompetitive effects are clearly outweighed in the public interest by the probable effects of the merger in meeting the convenience and needs of the community to be served. Judgment was thereupon entered dismissing the complaint.

A. Commercial Banking

Commercial banking, which is the undisputed line of commerce here involved, is a highly regulated industry. As

stated by this court in *United States v. The Philadelphia National Bank,* 374 U.S. 321, 326, the proper discharge of its functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests, and it is, therefore, not surprising that commercial banking is subject to a variety of governmental controls, state and federal. The principal thrust of these controls is to guard against unsafe or unsound practices which might compromise or threaten the financial integrity of the banking community or its individual members.

As this court observed,[8] entry, branching, and acquisitions are covered by a network of state and federal statutes. A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure. 12 U.S.C. §§26, 27, 51; 12 C.F.R. §4.1(b); R.C.W. 30.08.010, 30.08.030, 30.08.080. Permission to merge, consolidate, acquire assets or assume liabilities may be refused by the agencies on the same grounds. 12 U.S.C. §215, 215(a); R.C.W. 30.49.010 *et seq.*, 30.44.240.

This is not to say that fostering healthy competition and guarding against circumstances which may substantially lessen competition is not one of the primary responsibilities of the regulatory authority, as the Bank Merger Act itself attests, but it is not *the* primary responsibility. For example, as above indicated, the granting of a charter for a new bank solely on the basis that it would increase competition in a given banking market, without reference to its pros-

8. 374 U.S. at 328.

pects for successful operation or its effect on the financial integrity of the banking market involved and the individual banks doing business there, would, we believe, constitute an obvious failure on the part of the regulatory authority to carry out its basic responsibility.

In other words, commercial banking is a unique industry in many respects, and, accordingly, its structural characteristics are peculiar to the particular industry, and are very different from the structural characteristics of industries such as the manufacturing or sale of shoes or beer.

(a) *Restrictions On Initial Entry*

One such structural characteristic of commercial banking which is at variance with most other industries is the legal restrictions imposed on the initial entry into the business.

In addition to the rigid standards imposed by the federal and state regulatory authorities on would-be entrants into a banking market, the number of entrants is also strictly limited.

It is only when the regulatory authorities are convinced that there is a need for, or that the particular market can accommodate, a new entrant, that the charter of a new bank in that market is approved. This determination is made on the basis of careful consideration of many factors, with particular reference to the conditions and needs of the market and its probable growth and development, as well as the qualifications of the applicant. As recognized by this court in *Philadelphia,* the emphasis is on maintaining and fostering the market and its participants in a sound and healthy condition. Additional competition, when ap-

propriate, is given full weight, but it is not the overriding consideration. Where the regulatory authority determines that additional banks in a given market would be undesirable on the basis of the overall welfare of the market and the banks operating there, it will refuse to grant any additional charters for banks in that market as long as that condition exists.[9] This aspect of the regulatory scheme is well developed by the testimony in this case of H. Joe Selby, the Regional Administrator of National Banks for the 13th Region (where Spokane is located), in which he explained why the Comptroller could not be expected to grant any new charters for national banks in the Spokane area in the reasonably foreseeable future.[10] (Tr. 974-975, App. 1011).

A natural consequence of this overall regulatory policy is that the number of commercial banks in each local market is limited, particularly in the medium-size and smaller markets. For example, in the Spokane market, which the regulatory authority has indicated cannot properly accommodate an additional bank, there are only six banking organizations. Under any analysis based on market shares, such as that employed by the Government, it is a mathematical absolute that three of these organizations must

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9. Selby testimony, Tr. 972-973, App. 1009-1010.

10. The criticism of Mr. Selby's testimony in the Government's Brief (G.Br. 51) and which is implied in his cross-examination (Tr. 998; 1014-1018, App. 1025; 1034-1036), to the effect that the only basis upon which the Comptroller could properly refuse to charter a new bank in Spokane would be where it would actually threaten the solvency of an existing bank, appears to demonstrate a fixation on the part of the Department of Justice in favor of procompetitive factors, without reference to other considerations which the regulatory authorities are charged with taking into account. Whatever may be the case in this regard with respect to other industries, this is not a proper point of view with respect to commercial banking.

have at least 50%, whether the index be IPC[11] demand deposits, assets, loans, or whatever. In even smaller markets, this effect is emphasized. As the Government's expert witness, Dr. Robert E. Smith, testified in this case, measured by these indicia all commercial banking markets in the entire nation are concentrated (Tr. 158-159, App. 533-534). Thus, as the testimony of Drs. Charles F. Haywood and Nevins D. Baxter demonstrated, such concentration statistics are not a reliable indication of the level of competition in a commercial banking market (Tr. 350, 358-372, 645, 650-657, App. 1035-1046, 1046-1053). If they were, most, if not all, commercial banking markets in the nation would be condemned as oligopolistic. On the contrary, in order to properly determine the level of competition in a commercial banking market, the actual behavior and performance of the market must be observed and interpreted in light of all structural characteristics peculiar to commercial banking (Tr. 1045-1046, App. 1052-1053).

(b) ***Restrictions On Branching In Washington***

A second structural characteristic which is unique to commercial banking is the restrictions on branching imposed by most states, ranging from the outright proscription of branches to more selective limitations.

Federal law (12 U.S.C. §36(c)) does not permit a national bank to establish or acquire a branch (*i.e.*, a banking office separate from its main office) in any place or in any manner that a state bank could not establish a branch in the same place and manner. *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, *The First National Bank in Plant City, Florida v. Dickinson*, 396 U.S.

11. Individual, partnership, and corporation.

122. And 12 U.S.C. §36(c)[12] expressly provides that in order to satisfy this requirement, the *statute* law of the state must authorize the branching *"by language specifically granting such authority affirmatively and not merely by implication or recognition."*

In Washington, branch banking is permitted, but subject to certain very severe limitations. The applicable statutory provision (R.C.W. 30.40.020) unequivocally provides that no bank shall establish or operate a branch in any city or town other than the city or town in which its principal place of business is located, except by taking over or acquiring an *existing* bank *operating* in such city or town.[13]

With the possibility of avoidance or evasion of this branching restriction undoubtedly in mind, the 1959 Legislature of Washington amended the statute[14] specifying the clauses required in Articles of Incorporation of banks incorporated in Washington so as to require that a clause be included whereby the new bank cannot merge with, or permit its assets to be acquired by, another bank for a period of at least ten years, without the consent of the Supervisor of Banking.[15]

Also, both state and federal law[16] provide that no bank

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12. The pertinent portion of 12 U.S.C. §36(c) is set out at page 2, *supra*.

13. Last paragraph of R.C.W. 30.40.020, set out in full at page 3, *supra*. There are also two other exceptions not relevant here; i.e., branches in foreign countries, and branches in cities or towns having no banks at all.

14. R.C.W. §30.08.020(7), set out at p. 4, *supra*.

15. See n. 60, p. 62, *infra* for a resume of the testimony of Joseph E. McMurray, former Supervisor of Banking of Washington, who assisted in drafting this legislation.

16. R.C.W. §30.08.030; 12 U.S.C. §21.

may be formed for other than legitimate objects of the law onder which it is organized, and state law[17] provides that it is a condition to the approval of the establishment of a branch that there be a finding by the Supervisor of Banking that it is not being formed for other than legitimate objects covered by the banking law of the state.

In the face of these positive statutory proscriptions barring *de novo* branching by NBC into Spokane, the Government has, in the Statement contained in its Brief herein, represented to this court *as a fact* that *de novo* entry may, nevertheless, by achieved by the "acquisition of a sponsored bank [to be] formed by NBC officers, directors, or their associates as an independent firm to be assisted by NBC until acquired and converted into a branch;" (G.Br. 16). This "method," the Government's Brief states, is a legal and a well-recognized practice used by large statewide banking organizations, and is recognized by the federal banking authorities.[18]

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17. R.C.W. §30.40.020, *supra*, p. 4.

18. As the sole basis for this assertion, the Government has advanced and persists in the bizarre notion that the acquisition during the last ten years of certain small town banks by larger city banks which had assisted them in their organization, somehow establishes this procedure as a perfectly legal "method" whereby a bank may "avoid" the absolute ban of the Washington branching law and proceed to establish a *de novo* branch in a forbidden area by this "method". The alleged fact that the Comptroller and/or members of his staff were "aware" of this practice and never "objected to it" is cited as further proof that it must be legal.

In this latter connection, it should be noted that the Comptroller, the Washington State Supervisor of Banking (and also a former Supervisor called by the Government as an expert witness) all are on record in this case as categorically denying recognition of the legality of this "method", see p. 62, *infra*.

While we do not concede that the record establishes the existence of any such practice, or the complicity of the Comptroller or his staff therein, it is the position of the Appellee Banks that violations or evasion of the law, even to the point of flaunting, does not nullify its proscription or weaken its sanction. See pp. 50 to 63, *infra*.

While this is not a proper point in this Brief for argument, we are constrained to vigorously challenge this assertion as entirely without any foundation either in fact or in law, as we will demonstrate in our Argument at pp. 50 to 63. *infra.*

(c) *Holding Company Affiliation of Banks Barred in Washington*

A third structural characteristic peculiar to commercial banking in certain jurisdictions is the restriction placed on bank holding companies. In some states banking under common control is articulated by means of bank holding companies rather than by means of branch banks. Thus, while branches may be prohibited altogether, a number of unit banks may be affiliated through a holding company.[19] This practice has been prohibited in Washington since 1933. The applicable statute (R.C.W. §30.04.230) provides that no corporation in Washington may own, hold or control more than 25% of the capital stock of more than one bank.[20] The only exception to this prohibition is its grandfather clause. Thus, the Appellee Marine Bancorporation, which owns all of the stock of NBC,[21] is forbidden to acquire control of any other bank. The ban of this statute also applies to NBC as a subsidiary of its parent corporation. Also, as a national bank, NBC is itself forbidden to invest in the stock of another bank.[22]

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19. For example, Colorado. See *U.S. v. First National Bancorporation, Inc.*, 329 F.Supp. 1003 (D. Colo. 1971), aff'd 410 U.S. 577.

20. RCW §30.04.230 is set forth in full at p. 5, *supra.* Prior to its amendment in April, 1973, this section prohibited the ownership of more than 25% of the stock of *any* bank, other than those covered by grandfather rights.

21. Other than directors' qualifying shares.

22. 12 U.S.C. §24.

In addition to being a gross misdemeanor, violation of R.C.W. §30.04.230 subjects the offending corporation's charter to forfeiture.

(d) *Commercial Banking in Washington Is Inherently Local, and Neither the State As a Whole, Nor Larger Regions Such As Eastern Washington, Constitute Commercial Banking Markets*

A fourth structural characteristic of commercial banking at variance with most other industries is its inherently local character. As appears to be the case in the United States generally,[23] individuals and corporations in Washington typically confer the bulk of their patronage on banks in their local community; they find it inconvenient to conduct their banking business at a distance. This factor of inconvenience has localized banking competition, and, consequently, convenience of location is essential to effective competition in commercial banking in the state (F. 12, App. 1934).

This inherent characteristic of commercial banking appears to obtain even in states such as California, where statewide branch banking is virtually unrestricted. *U.S. v. Crocker-Anglo National Bank*, 277 F.Supp. 133 (1967) at 173. In that case, Judge Zirpoli, speaking for the Three Judge Court, pointed out that permissive statewide branching merely extends the political boundaries in which a bank may open branches, local units, to operate in local markets. It does not bring to any particular bank or banking unit depositors or borrowers from all over the state. After reviewing the testimony of a number of eminent economists who testified in that case, including Professor Good-

23. *Philadelphia, supra*, 374 U.S. at 358.

man who had testified for the Government as to the proper composition of the relevant geographic market in *Philadelphia,* and who had made an exhaustive study of California and banking in California, including on-the-site visits to banking offices, inspecting bank loan files, interviewing loan officers, and obtaining deposit data for every bank in every area of the state, Judge Zirpoli states, with reference to Professor Goodman's testimony (277 F.Supp. at 172):

> "On the basis of that study and experience [above referred to], he reached the same conclusion as to which he testified for the Government in the *Philadelphia* case: banking markets are local, national and international. His opinion was that the state is neither a local market nor a relevant section of the country for the purpose of judging the effect of a change among competitors in the instant case. The court concurs in this view."

In this same connection, the court observed that the fact that Bank of America had over 800 branches scattered throughout the state and in every county, and that two other banks to a lesser degree had branches in many counties throughout the state, did not thereby convert the entire state into a meaningful economic market.

> "All that you actually have is three banks able to service numerous local markets throughout the state." (277 F.Supp. at 172)

As above indicated, however, branching in the State of Washington is much more restricted than in California. Of the 90 state and national banks in Washington, only two have any substantial number of branches in both Western and Eastern Washington.[24] Two others have a substantial

24. Seattle-First National Bank and NBC.

number in Western Washington only,[25] and one has a substantial number in Eastern Washington only.[26] (GX A-21) Even the two largest banks have no presence in a number of important local markets. For example, although NBC has 107 branch offices in the state, it has no banking office in three of the four largest metropolitan areas in the state,[27] and of the 154 cities in the state having a population of 1,000 or more, NBC has offices in only 54 such cities (F. 10, App. 1933). The banking business of the remaining 85 banks is each confined to form one to several local banking markets, comprising, at the most, a very small portion of the total number of local banking markets in the state (F. 14, App. 1934).

The District Court found that, in view of the inherently local character of commercial banking in the state, and the fragmented character of the presence of even the largest banks in the various regions of the state, neither the state as a whole, nor any of the larger regions thereof, such as Eastern Washington, constitutes a commerical banking market or a relevant geographic market within which the competitive effects of a transaction in the line of commerce of commercial banking may be judged (F. 14, App. 1934).

As previously noted,[28] the Government expressly con-

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25. Pacific National Bank of Washington and Peoples National Bank of Washington, both of which have a small number in Eastern Washington.

26. Old National Bank of Spokane, which had only two branches in Western Washington as of June 30, 1972.

27. The Tacoma Metropolitan Area (the second largest), the Spokane Metropolitan Area (the third largest), and the Everett Metropolitan Area (the fourth largest). NBC's principal office and 59 of its branches are located in the Seattle Metrolopitan Area, which is the largest in the state.

28. P. . . ., *supra*.

cedes that such areas are not banking markets (G.Br. 33). It insists, however, that they are, nevertheless, sections of the country within which competitive effects in the line of commerce of commercial banking may be judged under Section 7 of the Clayton Act. Our argument in opposition to this contention is at pp. 63 to 67, *infra.*

B. The Spokane Commercial Banking Market

The District Court has determined that the Spokane Metropolitan Area, consisting of the City of Spokane and the populated areas immediately adjacent thereto, including the area extending easterly through the suburb of Opportunity toward the Idaho border,[29] is the area of effective competition of commercial banks located in the city and its environs, and constitutes the commercial banking market which is the relevant geographic market within which the competitive effects of the merger are to be judged (F. 13, App. 1934). All parties agree, except insofar as the Government contends that the state as a whole and Eastern Washington are also "section[s] of the country," even though they, admittedly, cannot qualify as banking markets (P.T.O., Agreed Issues III; G.Br. 33).

Spokane is located in the extreme eastern part of the state, near the Idaho border. It is a medium-sized city, but the largest in Eastern Washington. The population of the metropolitan area is approximately 200,000, of which 170,000 are within the corporate limits of the city. While the city enjoys substantial commercial and industrial activity, the surrounding area is principally oriented toward agriculture, mining, and timber.

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29. As particularly delineated and described in P.T.O., Agreed Issues III, Ex. I.

Considerable testimony was presented at the trial as to the growth prospects of the area, and the District Judge actively participated in questioning the witnesses (Tr. 228-246, App. 575-598, Tr. 440-452, App. 697-704), and remarked in his oral ruling at the end of the case that it was his understanding that it was agreed by all that the growth of Spokane had been slow, and will continue to be slow and moderate (Tr. 1197, App. 1139). This conclusion is incorporated in the Findings of Facts and is an important consideration, among others, in the court's determination that it is not reasonably probable that a charter for a new national bank in Spokane will be granted within the reasonably foreseeable future (F. 19(b)C, App. 1938).

We submit that the attempt of the Government in its Brief (G.Br. 14-15) to re-try this purely factual issue in this court on the basis of carefully selected bits of evidence, in an attempt to induce this court to ignore or overturn the finding of the District Court based on the entire record, is improper. Fed. R. Civ. P. 52(a), *U.S. v. Yellow Cab Company,* 338 U.S. 338 at 342.

There are six banking organizations operating a total of seven banks in the Spokane Metropolitan Area. We are reproducing here the table showing the distribution of total deposits and loans set out on page 8 of the Government's Brief, modified only to show a breakdown between the two banks operated by Washington Bancshares, Inc.:

June 30, 1972[30]
[Dollar amounts in thousands]

Banking Organization	Deposits	Percent of Total	Loans	Percent of Total
Washington Bancshares, Inc.:	$		$	
Old Natl. Bank of Wash.	177,798	34.6	116,022	32.0
First Natl. Bank of Spokane	38,542	7.5	28,175	7.8
Seattle-First National Bank (Spok. Met. branches only)	162,220	31.6	123,976	34.2
Washington Trust Bank	95,464	18.6	65,159	18.0
American Commercial Bank	15,739	3.1	10,077	2.8
Farmers & Merchants Bank	12,558	2.5	7,583	2.1
Pacific Natl. Bank of Wash. (Spokane branches only)	11,152	2.2	11,246	3.1

The bank at the bottom of the above list is a branch (with two banking offices) of Pacific National Bank of Washington, which has its principal office in Seattle, Washington. That bank is, however, a subsidiary bank of Western Bancorporation, a multistate bank holding company with assets of approximately 14 billion dollars. Pacific National (then National Bank of Washington) entered Spokane in 1964 by means of the acquisition of a small state bank. GX A-44, App. 1209. In spite of the powerful resources, both financial and administrative, of its parent banking organization, Pacific National has not been able, in the eight-year period to the date of the trial, to increase its share of the Spokane market over that of its predecessor. During the trial, the District Judge inquired pointedly of the Government's expert witness, Dr. Robert

30. Derived from GX A-55 and GX A-58.

E. Smith, how this extremely poor showing on the part of Pacific National could be explained, in view of the Government's contentions. Dr. Smith replied that he did not know, and could not explain, it (Tr. 68-71, 168-169, App. 484-485, 539-540).

Near the end of the trial, the Government called as a rebuttal witness Mr. Robert K. Hurni, a senior vice president of Pacific National Bank and Manager of the region including Spokane. On direct examination, Mr. Hurni testified as follows:

"Q. What has been the experience of Pacific National Bank and its predecessor in Spokane?

"A. Well, it has been disappointing to us in that we have not been able to increase the share of the market that our predecessor bank had.

"Q. And to what do you attribute Pacific disappointment in Spokane?

"A. Well, I would say probably that it is our inability because of the state's de novo branching laws, it has been impossible for us to add additional branches in the Spokane area.

"Q. Could the Pacific National Bank of Washington put more, and more specialized, personnel into the Spokane area? Is it capable of doing that?

"A. Well, yes, we could have done that.

"Q. Why has Pacific chosen not to do that?

"A. Well, because of the cost involved and our share of the deposit and loan business and the particular mix of deposits and loans didn't warrant putting more experienced or additional personnel in our two Spokane branches.

"Q. Was the deposit base in your Spokane office inadequate to support, to justify the cost of additional personnel?

"A. Well, I would say it would all depend on how much

> additional personnel we are talking about. We feel that we have adequate personnel for our two branches until they are in a position to support additional personnel, from a cost basis." (Tr. 1133-1135, App. 1102-1105)

As the above table shows, in addition to the four larger banks operating in the Spokane Metropolitan Area, there are two relatively small state banks, American Commercial Bank and Farmers and Merchants Bank. American Commercial was organized in 1966 with its principal office in downtown Spokane, and now has four branches in the city. Its Articles of Incorporation contain the prohibition required by R.C.W. 30.08.020(7) discussed above[31] against acquisition by another bank within ten years after its organization. This period will not expire until 1975 (App. 1916). There is no evidence that this bank would, or even might, be available for acquisition when the restriction expires.

Farmers and Merchants is an older state bank having no office in the City of Spokane. Its only banking office in the metropolitan area is a single office in the suburb of Opportunity, some six miles from the city center. It is barred by the state branching laws[32] from branching into the city. Representatives of NBC made inquiries in 1970 as to the availability of this bank for acquisition but were rebuffed by an asking price approximately twice the amount they felt would be acceptable. No offer was ever made, and the bank is not now for sale, and probably never actually was (Dep. Robt. F. Buck, App. 118-119). NBC's only interest in this bank, however, was as a suburban community branch, as it would not provide an entry

31. P. 15, *supra*.

32. This bank also has a banking office in each of two small towns in rural Spokane County, outside the metropolitan area.

to the downtown area, which, as the District Judge observed in this connection, is essential to viable competition in Spokane (Tr. 1198, App. 1140).

The Government offered no evidence whatsoever as to the actual behavior of the Spokane market or the level of competition therein.[33] Nor did it offer any evidence as to whether or not NBC's position outside the Spokane market had any significant effect on the level of competition in the Spokane market.

On the other hand, the Comptroller presented his Regional Administrator for the 13th Region, Mr. Selby, as a witness. Mr. Selby testified that the Spokane banking market was one of the responsibilities of his office and that he was familiar with it; that conditions in the market, including the level of competition, were satisfactory, but that it did not need, and could not properly accommodate, any more banks, and that in view of overall conditions prevailing in the Spokane area, both present and prospective, as viewed by his office, there was no reasonable probability that the Comptroller would authorize the charter of any additional banks in Spokane in the reasonably foreseeable future (Tr. 974, 996, App. 1011, 1023-1024).

The Banks' expert witness, Dr. Nevins D. Baxter, testified that in addition to the extensive statistical studies which he had made (Tr. 1034, App. 1045-1047) and the statistical exhibits which he had prepared for the trial, he has made a thorough on-the-site examination of the Spo-

33. The Government's economist, Dr. Smith, testified that he had no familiarity with the market, other than the statistical information furnished to him by the Government, and had made no on-the-site investigation of the market except a brief visit during which he spoke to two bankers and drove around the city primarily to take a look at the branches of Washington Trust Bank. (Tr. 162-163; App. 536; Tr. 55-56; App. 476)

kane market, including visits to banking offices, interviewing both bank officers and local businessmen who were bank customers, and inspecting bank loan files. He testified that on the basis of actual performance, he found the Spokane commercial banking market to be a highly competitive market, and that it does not suffer from parallel or other anticompetitive practices attributable to undue market power (Tr. 1050, App. 1053). He also testified that he found no evidence that any threat of entry by NBC into the Spokane market by any means other than the consummation of the merger had any significant effect in the competitive practices of the commercial banks in the market, nor on the level of competition therein.

In this connection, he pointed to the complete lack of any such effect as a result of the actual entry into the Spokane market by Western Bancorporation, one of the largest banking organizations in the United States, through its subsidiary Pacific National Bank of Washington, when handicapped by the limitations and restrictions imposed on foothold entry or its equivalent, and that even after eight years of actual participation in the market, this bank had made little or no penetration, and had no perceptible influence or effect on competitive practices or the level of competition in the market.

Eastern Washington, generally, has a low density of population, and its population centers are separated by long distances (P.T.O., Admitted Facts VIII, Exs. E and F, pt. VIII). Intercourse in banking between Spokane and the other population centers in Eastern Washington, such as Yakima, Walla Walla, and Wenatchee is very limited (Tr. 1205, App. 1144).

The convenience and needs of the community, to be supplied by NBC in the event the acquisition in consummated, are outlined at p. 39, *infra*.

C. The Acquiring Bank

NBC was founded in 1889, is a national banking association, and has its principal place of business in Seattle, Washington. It is a full service bank with assets in excess of $1,800 million, deposits in excess of $1,500 million, and a loan limit of $7.5 million. In terms of assets and deposits, it is the second largest bank in the state[34] and operates 107 branch offices, of which 59 are in the Seattle Metropolitan Area. However, as above noted,[35] it has no banking offices in three of the four largest metropolitan areas of the state, including the Spokane area, and of the 154 cities of 1,000 or more in the state, NBC has offices in only 54 (F. 1, 10, 15, App. 1932-1935).

In the event the merger is consummated, NBC will be capable of providing commercial bank customers with a complete alternative in all phases of full-service commercial banking to those offered by present market leaders, Seattle-First National Bank and Old National Bank of Washington (F. 15, App. 1935).

Representation in Spokane has been a long-sought goal of NBC, and representation in Tacoma and Everett has also been a long-sought goal (P.T.O. Admitted Facts IV). However, because of the ban of the state's branching law, it has never been able to accomplish any of these goals until the opportunity to acquire WTB came along. This, in spite of NBC's obvious financial capability.

34. Seattle-First National Bank is the largest, with assets of $2.8 billion and deposits of $2.5 billion.

35. P. 20, *infra*.

Because of the restrictions imposed by the state's branching law, all of NBC's branches outside its home county have necessarily been established by the acquisition of existing banks, with the exception of three which were established in very small towns having no banks at all. However, NBC has never acquired a bank which it helped to organize[36] (Tr. 467-468, App. 712-713).

NBC has a long history in the State of Washington as a vigorous competitor in areas where it has established banking offices. The District Court found that no credible evidence to the contrary had been presented in this proceeding,[37] and that, based on its prior record in this respect, it is reasonably probable that NBC will, if the merger is consummated, compete vigorously in the Spokane Metropolitan Area in all phases of full service banking (F. 17, App. 1935).

D. The Acquired Bank

WTB was founded in 1902 as a Washington state bank and has its principal place of business in Spokane. It is a limited service bank with assets of $112 million, deposits of $96 million, and a loan limit of $1.25 million. In terms of assets and deposits, it is the ninth largest bank in the state,[38] and, on the basis of Spokane Metropolitan Area loans and deposits only, ranks third in that area (F.2, 16, App. 1932, 1935).

36. See n. 16, *supra*.

37. Here again, the Government attempts to re-try this purely factual issue on the basis of selected bits of evidence and the Government's own assessment of credibility, in an attempt to induce this Court to either redetermine the issue *de novo* or ignore the District Court's finding (G.Br. 57-60.) See p. 22, *supra*.

38. GX A-2. The statement in the Government's Brief that it is the eighth largest "banking organization with headquarters in Washington" (G. Br. 10) apparently excludes either Western Bancorporation (the parent of Pacific National Bank) or Bank of California, both of which have their headquarters outside the state.

WTB has seven branch offices, of which six are located in the City of Spokane and one is in the suburb of Opportunity. Its banking business is substantially limited to the Spokane Metropolitan Area (DX 24 to 30; App. 1861 to 1867).

WTB is financially sound and has adequate and capable management consistent with the present size and scope of its operations. However, its activities are very limited in the areas of agricultural loans, residential and commercial mortgage loans, mining loans and inventory and accounts receivable financing; its Trust Department and investment advisory services are substantially limited; it provides no services in the area of international banking; it does not participate in the local municipal bond market; its credit card service may have to be discontinued due to inadequate yield; and it has not been able to provide the full needs of some of its customers and potential customers, due to its loan limit, and this problem is growing more difficult (F. 16, App. 1935).

At no time since its organization has WTB given serious consideration to expansion outside the Spokane Metropolitan Area (Tr. 836, App. 931). Due to the branching restrictions of state law, any such expansion is limited to acquisition of "existing" banks,[39] and WTB does not have the resources, incentive or inclination to embark on such a program. Even if suitable candidates for acquisition could be found, such independent banks in Washington ordinarily are willing to sell (or merge) only on the basis of a substantial premium to their stockholders. WTB does not have the resources to pay such premiums in cash, and its stock is

39. RCW §30.40.020, see p. 3, *supra*.

not marketable, and, thus, not attractive to individuals such as the stockholders of small-to-medium sized banks. The larger part of the stock of WTB is owned by the Stanton family, and Philip Stanton, President of WTB, testified that they are not willing to dilute their equity to accomplish such acquisitions. WTB's branches are a closely-knit group of offices, tied closely to the main office, administratively and operationally. Functionally, they are more in the character of arms or extensions of the main office than semi-independent branches such as are essential to the composition of a more extensive branch system. Consequently, WTB has no real experience or know-how in the operation of a branch system, and it is not practical or economically feasible for it to develop the necessary management base for such a system, and it has no intention of doing so (Tr. 937-939, App. 931-933, F. 23, App. 1940).

No evidence whatsoever was offered by the Government which fairly indicated even a possibility of any combination of WTB with any middle-sized or smaller bank, and the testimony offfered by WTB on this point was that there were neither potential candidates nor any incentive for such a project (Tr. 937-939, App. 931-933, F. 23, App. 1940).

E. The Basic Findings of The District Court on the Clayton 7 Issue

In addition to the Findings of Fact relating to matters touching on the Clayton 7 issue which have been previously outlined, the District Court made the following basic Findings of Fact on this issue:

1. That the Government had failed to prove that there is any feasible alternate method by which NBC could

enter the Spokane Metropolitan Area commercial banking market (F. 19, App. 1936).

2. That the Banks and the Comptroller had affirmatively established, and the court finds as a fact, that the legal and economic barriers to *any other* method of entry by NBC into the Spokane Metropolitan Area are such that in the event the merger is not consummated, there is no reasonable probability that NBC will enter the area in the reasonably foreseeable future (F. 19, App. 1936).

3. That under applicable law governing branching by commercial banks in Washington, NBC cannot establish a branch *de novo* in Spokane or Spokane County, and that the *only* legal method by which it can establish a branch in Spokane is by acquiring an *existing* bank (or a branch of any such bank) *operating* in Spokane (F. 19(a), App. 1937).

4. That the Government had failed to establish that there is any existing bank or branch in the Spokane Metropolitan Area, other than WTB, which is available for acquisition by NBC or that there is any reasonable probability that any such bank or branch will be available for acquisition by NBC on any reasonably acceptable basis at any time in the foreseeable future, or at all. That on the contrary, the evidence has affirmatively established, and the court finds as a fact, that there is no bank or branch in the Spokane Metropolitan Area other than WTB which NBC could acquire at the present time, and there is no reasonable probability that any such bank or branch will be available for acquisition by NBC on any reasonably acceptable basis at any time in the reasonably foreseeable future (F. 19(a), App. 1937).

5. That any method of entry into Spokane by NBC which would be limited to a foothold, or the substantial equivalent of a *de novo* entry, would, even if it could be legally accomplished, not be economically feasible for NBC (F. 19(b), App. 1937), and that the following facts and circumstances established by the evidence support this finding:

A. It would not be compatible with prudent business practice in commercial banking for a major full service bank such as NBC to enter the Spokane Metropolitan Area, or any similar metropolitan area, on a limited service basis comparable to that of a newly-organized independent unit bank. To do so would be more of a detriment than a benefit to NBC (F. 19(b)A, App. 1937).

B. Due to the extensive development of branch banking in metropolitan areas in Washington, such as the Spokane Metropolitan Area, branch offices are essential to effective competition in such metropolitan areas. As a Seattle bank, NBC could not establish additional branches in Spokane (F. 19(b)B, App. 1937).

C. (a) In the Spokane Metropolitan Area, and in Washington State as a whole, new business is acquired by commercial banks largely as a result of the growth of the communities which they serve. Customer loyalty to his banking connection is very strong in the state, and, consequently, competition for new business is largely in the area of prospective customers resulting from growth of the banking market, rather than competition for established customers of competing banks. Growth of the Spokane Metropolitan Area has been slow during the past ten years, and it is probable that it will continue to be slow to moderate in

the reasonably foreseeable future. Consequently, the prospects for growth, or even survival, of a bank or banking office starting from scratch, or from a minimal foothold in the Spokane Metropolitan Area, are negative (F. 19(b)C, App. 1938).

(b) In view of the testimony of H. Joe Selby, Regional Administrator of National Banks for the 13th Region,[40] it is not reasonably proper that a charter for a new national bank in Spokane will be granted within the reasonably foreseeable future (F. 19(b)C, App. 1938).

D. A small office, such as would be compatible with the limited amount of deposits which could be expected for the first five to ten years, could not house or support the full services of a bank such as NBC in a metropolitan area such as Spokane. Adequate facilities and staff for this purpose could not be justified on any basis without an adequate deposit base. Actual experience of foothold entry into Spokane by The Pacific National Bank,[41] and of foothold entry by Old National Bank of Washington into Seattle[42] has been such as to discourage such projects, even where a small going bank was available. Starting from scratch would be even less likely to produce satisfactory results in a reasonable time (F. 19(b)D, App. 1938).

E. Profitable correspondent relationships enjoyed by NBC, particularly with WTB, would be jeopardized and probably lost if NBC were to enter by other means, thus offsetting any hoped-for gains (F. 19(b)E, App. 1939).

F. The commitment of cash resources necessary to

40. With respect to which the Findings state that the Court gave great weight.

41. P. 24, *supra.*

42. Tr. 694-697, App. 847-848.

establish the staff required to provide full service commercial banking to Spokane would be entirely out of line with prospective earnings and benefits which would reasonably be expected to result (F. 19(b)F, App. 1939).

G. Even if, despite the above considerations, NBC should decide to commit the necessary resources to enter a new metropolitan area in such manner, other alternatives such as Tacoma and Everett would have to be considered, and it is reasonably probable that Tacoma, rather than Spokane, would be preferable to NBC (F. 19(b)G, App. 1939).

6. That the foothold entry made by The Pacific National Bank into the Spokane Metropolitan Area in 1965 has not had any significant competitive effect due to the relatively small amount and share of deposits and other banking business which it has been able to obtain since its entry, and there is no reasonable probability that NBC would fare substantially better if limited to a foothold entry or less, or that entry by NBC in that manner would have any significant competitive impact on commercial banking in the Spokane Metropolitan Area (F. 20, App. 1939).

7. That the threat of entry by NBC into the Spokane market by any means other than the consummation of the merger, to the extent any such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market, nor any significant effect on the level of competition therein (F. 21, App. 1940).

8. That in the event the merger is consummated, NBC will be capable of providing commercial bank customers in the Spokane Metropolitan Area with a complete alternative in all phases of full service commercial banking to

those offered by the present market leaders, Seattle-First National Bank and Old National Bank of Washington, and that it is therfore reasonably probable that the merger will have the direct and immediate effect of substantially increasing competition in commercial banking in the Spokane Metropolitan Area (F. 15, 17, App. 1935).

9. That in view of the fact that there is no significant existing competiton between NBC and WTB, and the fact that it is reasonably probable that the consummation of the merger will have the effect of increasing competition in commercial banking in the Spokane Metropolitan Area, the consummation of the merger will have no inherent anticompetitive effect, and that the Government has failed to establish any reasonable probability that any anticompetitive effect will result from the merger (F. 18, App. 1936).

10. That commercial banking markets in Washington are local, and that neither the state as a whole, nor any of the larger regions thereof, such as Eastern Washington, constitutes a commercial banking market,[43] and that, in any event, the Government has failed to establish or produce any evidence whatsoever that there is any reasonable probability that WTB will expand into other banking markets, or that it has the incentive or capability to do so, or that it will combine with any other middle-sized or smaller bank for any purpose, if the merger is not consummated (F. 14, 23, App. 1934-1941).

11. That the Government has failed to establish or produce any evidence whatsoever that there is any reasonable probability that WTB will expand into other banking mar-

43. This is conceded by the Government (G.Br. 33, 65, see p. 21, *supra*).

kets in Eastern Washington, or that WTB has the incentive or capability to do so, or that there is any reasonable probability that WTB will combine with other middle-sized or smaller banks for any purpose. That on the contrary, the evidence has affirmatively established that WTB has neither the capability, resources or incentive to embark on any such schemes of expansion or consolidation, and there is no reasonable probability that WTB will take any such action in the reasonably foreseeable future (F. 23, App. 1940).

12. That there is no reasonable probability that the effect of the merger may be substantially to lessen competition in commercial banking in the Spokane Metropolitan Area, or in any other commercial banking market.

F. The Convenience and Needs of the Community

A hearing on the Banks' application to merge was called and held by the Comptroller in Portland, Oregon on July 27, 1971. In his Decision granting his permission to the merger, the Comptroller determined that the merger would have no adverse competitive effect and that its consummation would be in the public interest. In this latter connection, the Comptroller made the following statement:

> "Consummation of this proposed merger will serve the public interest of the Spokane area by bringing to the city and its environs an alternative source of sophisticated banking services and by promoting competition among the financial institutions serving the area. Evidence adduced at the hearing demonstrated that the Washington Trust Bank, because of its relatively small size, cannot adequately meet the banking needs of many Spokane borrowers who, as a result, have been forced to deal with larger commercial banks. This merger will not only bring another alternative source of larger credits to Spokane for the con-

> venience of potential borrowers, but will also provide to all in the area who have a need [for] another source of broad range banking services. These expanded services will include expertise in agricultural and mining loans. Student loans, economic opportunity loans, low income housing lending, SBA loans and turnkey low cost housing construction loans for the elderly will all become available after the merger. FHA and VA mortgage lending which Washington Trust does not now offer its customers will also be provided. The National Bank of Commerce will also bring to Spokane considerable expertise in international banking through its large international banking department with offices in Hong Kong, Singapore, London, Tokyo and New York City.
>
> "The enhanced competition that this merger will produce will contribute to the convenience and needs of bank customers in Spokane, the Spokane area, and therefore, the State of Washington." (P.T.O., Admitted Facts 1, Ex. A, p. 4)

As previously noted,[44] when this action was instituted by the Department of Justice charging that the merger would have an adverse competitive effect, the Comptroller intervened and undertook to take the lead in establishing at the trial the needs (and convenience) which he believed existed in the Spokane Metropolitan Area which the consummation of the merger would fulfill, and that even if the merger had some or all of the anticompetitive effects alleged by the Department of Justice, any such effects were clearly outweighed in the public interest by the benefit to the area which would accrue from the fulfillment of these needs.

As appears from the portion of his Decision set out above, the principal thrust of the Comptroller's opinion on the matter is that a significant need exists in the area

44. P. 9, *supra*.

for a bank capable of providing commercial bank customers with a complete alternative in all phases of full service banking to those offered by the two present market leaders. He points out that NBC would be in a position to fill this need if the merger is consummated, and that, as a full service bank, NBC would be capable of doing so, while WTB is not.

To establish this at the trial, the Comptroller presented the testimony of nine witnesses, including six Spokane area businessmen with substantial banking needs in various areas of commercial banking, the County Treasurer of Spokane County, the President of the International Credit Bank of Spokane (FICB), and the Financial Aid Advisor of Gonzaga University (Tr. 622-692, 756-814, App. 804-845; 884-918).

The testimony of these witnesses and other evidence in the case established a need that NBC can supply in a number of important phases of commercial banking, including residential and commercial mortgage loans, agricultural loans, inventory and accounts receivable financing, municipal financing, consumer loans (such as automobile financing), equipment loans and leasing, international banking, mining loans, SBA loans (agricultural, as well as commercial and industrial), interim construction and "turnkey" loans, Economic Opportunity loans, student loans, full service Trust Department and investment advisory services, and the capacity to provide a full line of credit to the larger local commercial and industrial borrowers (F. 25, App. 1941).

Each of the services just mentioned requires specialization and expertise that a limited service bank such as

WTB does not have the resources to provide, and which are ruled out by simple economics where the banking business of even the largest of banking organizations is restricted to minimal facilities and a minimal share of the market, as in the case of Pacific National Bank in Spokane (F. 25(a) and (h), App. 1941 and 1949).

As already noted, WTB is deficient in all of the areas above mentioned, and does not participate at all in a number of them (F. 16, 25, App. 1935, 1941).

In a number of these areas, Seattle-First National Bank is, as one of the Comptroller's witnesses put it, "the only store in town".[45] In the remaining areas, these services, to the extent they are available at all, are limited to Seattle-First National Bank and Old National Bank (F. 25, App. 1941).

While the legal loan limit of WTB is $1.25 million, in actual practice it is the policy of the bank not to exceed $1 million (F. 25(b)A). The loan limit of Seattle-First National Bank is $12 million, as compared with $2 million on the part of Old National Bank. Thus, with respect to any local commercial, industrial or agricultural enterprise requiring bank credit in excess of $1 million, Seattle-First National Bank and Old National Bank are the only prospects,[46] and with respect to anything over $2 million, Seattle-First National Bank is the "only store in town".

45. In one area (which Justice apparently feels is of little importance to the community), student loans, even Seattle-First National Bank does not participate, the only reliable source being Washington Mutual Savings Bank, a noncommercial bank. NBC has a policy of making such loans in areas where it has banking offices (F. 25(h) B and H, App. 1949 1950, C.Br. 69).

46. While Pacific National Bank has a loan limit somewhat larger than Old National Bank, because of its limited facilities in Spokane, it has not been able to handle this full service business, as the table on page 23, *infra*, indicates.

G. The District Court's Findings On the Convenience and Needs Issue

In his oral ruling at the conclusion of the trial, the District Court remarked with reference to the convenience and needs defense that a need had been established, but that he did not think it necessary to rule on this aspect of the case because his ruling on the Clayton 7 issue, that no anticompetitive effects resulted from the merger, disposed of the case (Tr. for Jan. 31, 1973, p. 18, App. 1930).

However, the Comptroller prepared proposed findings on this issue, including detailed proposed findings of the facts established by the testimony of the witnesses he had presented at the trial, and these were presented to the Court for its ruling. The Court thereupon agreed to rule on this issue and adopted these proposed findings as Findings of Fact Nos. 25, 26 and 27 (Tr. 1941-1951).

As already outlined above,[47] these findings enumerate the areas of commercial banking in which there is a need for an alternative to banking services provided only by Seattle-First National Bank and, to a limited extent, Old National Bank, and show that in the event the merger is consummated, NBC will be in a position to provide those alternatives and thus add a needed procompetitive force which will be of substantial benefit to commercial bank customers in the Spokane Metropolitan Area (F. 25(a) through (h), App. 1941-1949).

On the basis of these benefits that the merger will bring to the community, the Court finds that assuming, arguendo, that contrary to the Court's finding on the Clayton 7 issue, the merger would have some or all of the anticom-

47, Page 31, *supra*.

petitive effects alleged by the Government, said effects are clearly outweighed in the public interest by the probable procompetitive effects of the transaction in meeting the convenience and needs of the community to be served (F. 25, App. 1941).

The Court further finds that there are no reasonable alternative means of providing the procompetitive benefits to be supplied by NBC, if the merger is not consummated (F. 26, App. 1950).

SUMMARY OF THE ARGUMENT

I.

The Government's entire argument on the Clayton 7 issue is essentially an attack on the Findings of Fact of the District Court. This is not a proper basis for an appeal to this Court.

Measured by the test which the Government itself assets, NBC is not a potential competitor in the Spokane Metropolitan Area because the evidence has established, and the District Court has found as a fact, that any method of entry into Spokane by NBC which would be limited to a foothold or the substantial equivalent of a *de novo* entry would not, even if it could be legally accomplished, be economically feasible because of the state's restrictions on branching and the other adverse circumstances set out in Finding 19(b) A through G. The court has also found that the threat of entry by NBC into the Spokane market by any means other than the merger, to the extent such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market, nor any significant effect on the level of competition therein (F. 21, App. 1940).

The considerations upon which these findings are based are all purely factual. They are also entirely objective, since they are considerations which do not rest on declared intentions, but on basic circumstances which would influence prudent management of any bank similarly situated.

The District Court has considered and resolved these factual issues, and the Government is not entitled to seek a *de novo* review of purely factual issues in this Court.

II.

Irrespective of other considerations, NBC is not a potential competitor in the Spokane Metropolitan Area because there is no legal means available by which it may enter the area other than by consummation of the merger with WTB.

NBC is forbidden by the branch banking law of Washington to establish a branch *de novo* in Spokane. The only legal method by which NBC may establish a branch in Spokane is by *acquiring* an *existing* bank *operating* in Spokane.

The evidence has established, and the District Court has found, that there is no bank in the Spokane Metropolitan Area other than WTB which NBC could acquire at the present time, and there is no reasonable probability that any such bank will be available for acquisition by NBC on any reasonably acceptable basis at any time in the reasonably foreseeable future.

To attempt to establish a branch in a forbidden area, as the Government proposes, by the "sponsorship" of the organization of an ostensibly "independent" bank (but

which would, necessarily, be indirectly owned or controlled by the sponsor), as the first step in the project, where the "sponsored" bank has no other real purpose than to be "acquired" by the sponsor as a branch, would not only be a palpably illegal evasion of the branch banking laws of Wshington, but also a fraud on the national banking laws under which it is organized.

Further, the District Court has found, on the basis of the testimony of the Regional Administrator, that it is not reasonably probable that a charter for a new national bank in Spokane will be granted within the reasonably foreseeable future.

III.

A geographic region or area, such as Eastern Washington or the State of Washington as a whole, which admittedly does not have the attributes of a relevant market in commercial banking, cannot constitute a "section of the country" within which the competitive effects of a transaction in that line of commerce may be judged.

Whether or not Eastern Washington or the state as a whole constitutes such a "section of the country", the Government has failed to establish any reasonably probability that WTB will expand beyond Spokane County or will join in any combination with any bank other than NBC, and the District Court has found that no such reasonable probability exists.

IV.

Since the consummation of the merger will have no adverse influence on the present state of competition in any market, the possible consequences of highly speculative future contingencies do not rise to the level of

reasonable probabilities which are essential to constitute a violation of Section 7.

V.

The fact that the District Court has determined that the challenged merger would have no anticompetitive effects which would offend Section 7 of the Clayton Act does not disqualify the court to rule on the Appellee Banks' affirmative defense under the Bank Merger Act of 1966, that, assuming the merger would have some or all of the anticompetitive effects urged by the Government, said effects are clearly outweighed in the public interest by the convenience and needs which the merger will bring to the community.

If such were the case, should the Appellate Court differ with the trial court as to the antitrust issue, a second trial and a second appeal would be mandated in order to deal with the affirmative defense expressly granted by the Bank Merger Act. This would be a pernicious doctrine and a perversion of both the Bank Merger Act and Rule 1 of the Federal Rules of Civil Procedure. Nothing in *U. S. v. Third National Bank in Nashville*, 390 U.S. 171, would require such a result.

There are no "standards" by which certain benefits to the community are disqualified for consideration as needs or conveniences of the community which may be taken into account in the weighing process under the Act, and it is the province of the District Court to determine, on the basis of the particular community involved, what the needs are, to what degree a particular transaction may provide for such needs, and the relative importance of providing them to the community as against any undesirable effects of the transaction.

The need for an alternative in a number of imporant phases of full service banking in a community in which such services are available, if at all, from but one, or at the most two, other sources, is a need which is clearly entitled to consideration in determining the balance of the public interest under the Act, and the District Court's determination above stated is decisive of the issue.

ARGUMENT

I. The Government's Entire Argument on the Clayton 7 Issue Is Essentially an Attack on the Findings of Fact

As previously stated, the principal thrust of the Government's case at trial was in support of its contention that the effect of the merger may be substantially to lessen competition in the Spokane commercial banking market, because the entry of NBC into that market through the acquisition of WTB, rather than by *de novo* entry, or "foothold" acquisition of a smaller bank, would eliminate NBC as a potential competitor whose future entry into Spokane other than by acquisition of WTB could effect substantial deconcentration of that market.

The banks are not competitors, and no existing competition is involved. The Government concedes that the substitution of NBC for WTB in Spokane will not increase the level of concentration in that market (G. Br. 56). On the contrary, the District Court found that consummation of the merger will have a direct and immediate effect of substantially increasing competition in commercial banking in the Spokane Metropolitan Area (F. 17, App. 1935).

Thus, the sole basis of the charge that the merger may substantially lessen competition in the Spokane Metropolitan Area is the contention that NBC is a potential competitor in that area.

In this connection, the Government defines an actual potential competitor in its Brief[48] as a firm that, were it not for the challenged acquisition, *would be likely to enter the market independently or by foothold*, and states that the determination of whether or not such likelihood exists rests on whether, *considering all the circumstances*, independent entry in the future is a *reasonable choice* for a *prudent management* if entry by large acquisition is not available. Where a market is *growing*, the Brief continues, and *profit expectations in it are good*, an outside firm with the *legal*, technological and financial *capabilities* to enter is a potential entrant if it would be *reasonable from a business standpoint* for it to attempt actual entry.

We find no fault with this test. It is basically the test which the District Court applied, as Findings of Fact 19(a) and (b) attest (App. 1936 and 1937).

To be a potential entrant, the firm (or bank) must have the *capability* to enter, and that capability must be adequate to provide a fair chance to attain a reasonably satisfactory market penetration with reasonable profit expectations.

If there is no legal means of entry available other than the challenged transaction, it can hardly be said that the firm would be likely to enter by other means.

However, even if some other legal means of entry is available but is subject to legal restrictions, or handicaps arising from the nature of the business, or both, so that reasonable market penetration would not appear to prudent management to be attainable, and reasonable profits could not be expected, it would certainly not be a reasonable choice from a business standpoint to attempt to enter.

48. G.Br. 30.

With the exception of the disputed legality of the method by which the Government insists that outside banks can avoid the Washington State ban on *de novo* branching, these criteria are all purely factual questions. They are also purely objective considerations, in that they do not rest on the declared intentions of the management of the particular bank involved, but on the basic circumstances which would influence prudent management of any bank similarly situated in making a reasonable choice on the basis of sound business judgment.

The District Court has considered and resolved these factual issues, as stated in its Findings 19(b)A through G (App. 1937-1939),[49] and has concluded that any method of entry into Spokane by NBC which would be limited to a foothold or the substantial equivalent of a *de novo* entry would, even if it could be legally accomplished, not be economically feasible for NBC (F. 19(b)).

In this connection, the Court had before it, in addition to the other evidence presented, the actual experience of Western Bancorporation, one of the largest bank holding companies in the United States, which made just such an entry into Spokane by a small foothold acquisition in 1965, and has failed, after seven years in the market, to increase the tiny share of the market enjoyed by its predecessor.

In addition, the Court expressly found that the Government had failed to establish that there is any feasible alternate method by which NBC could enter the Spokane market (F. 19, App. 1936).

The Government's whole argument on this issue is merely an attack on the Court's Findings of Fact, and this

49. See items 1 through 12, pp. 31-37, *supra*.

is not a proper basis for an appeal to this Court.

The same thing is true with respect to the contention that NBC is a "perceived" potential entrant. Although the Government concedes that it gave little attention to this question at the trial,[50] the Banks and the District Court gave full consideration to it,[51] resulting in the finding of the Court that the threat of entry by NBC into the Spokane market by any means other than the merger with WTB, to the extent that any such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market, nor any significant effect on the level of competition therein (F. 21, App. 1940).

Consequently, the only question really presented by the Government on this aspect of its appeal is whether this Court should review the case *de novo* on the record for the purpose of determining whether or not this Court would reach the same conclusions on the facts as the District Court. As the Government must be fully aware, it is not the function of this Court to undertake such a task, and it is precluded from doing so by Fed. R. Civ. P. 52(a), 28 U.S.C., which provides:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opinion of the trial court to judge credibility of witnesses."

As this court said in *United States v. Yellow Cab Company, supra,*:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to the Court for

50. G.Br. 27-28.

51. See pages 26 and 27, *supra,* and see also the testimony of Dr. Charles F. Haywood (Tr. 340, 344-348, 352-356, App. 640, 642-644, 646-648).

which virtually amounts to a trial de novo on the record of such findings as intent, motive and design.

"While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'."

And as Mr. Justice Douglas states in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, another antitrust case, at page 495:

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent . . . [citations] . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

II. Irrespective of Other Considerations, NBC Is Not a Potential Competitor in the Spokane Market Because There Is No Legal Means Available by Which It May Enter Spokane Other Than by Consummation of the Challenged Merger

It is not disputed that under the McFadden Act of 1927, as amended in 1933 (12 U.S.C. §36), the branch banking laws of the State of Washington with respect to branching by state banks, govern branching by national banks in the State of Washington.

It is also not disputed that under the Washington branch banking law (RCW 30.40.020), with certain exceptions not relevant to this case, no bank may *establish* or operate any branch in any city or town outside the city or town in

which its principal place of business is located except by *taking over* or *acquiring* an *existing* bank *operating* in such city or town.

The McFadden Act is very precise as to the extent of the authority granted to national banks in this respect. The pertinent portion of subparagraph (c) of the Act (12 U.S.C. §36(c)) provides as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches (1) * * * (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the *statute* law of the State in question by language *specifically granting* such authority *affirmatively* and *not merely by implication or recognition*, and subject to the restrictions as to location imposed by the law of the State on state banks. * * *" [Emphasis added]

State banks organized since 1959 are required by Washington state law[52] to include in their Articles of Incorporation a clause forbidding the bank to merge with, or permit its assets to be acquired by, another bank for a period of at least ten years without the consent of the Supervisor of Banking.

The District Court has found as a fact that there is no bank in the Spokane Metropolitan Area other than WTB which NBC could acquire at the present time, and there is no reasonable probability that any such bank will be available for acquisition by NBC on any reasonably acceptable basis at any time in the reasonably foreseeable future (F. 19(b), App. 1937). NBC's principal place of business is, of course, in Seattle.

52. RCW 30.08.020(7), see p. 4, *supra*.

The Government asserts that NBC can, nevertheless, establish a branch in Spokane by having its "officers, directors, or their associates" organize a new national bank in Spokane "as an independent firm" to be assisted by NBC until acquired and converted into a branch (G. Br. 16).

As we understand this proposal, the sole purpose of the organization of the new bank would be the establishment of a branch of the sponsoring bank in the forbidden area, as, indeed, there would be no other purpose for doing so. Also, it is necessarily implicit, if this "method" is to be effective, that the "sponsor" be either the actual beneficial owner of the new bank, or at least have an enforceable right to acquire it; and it would be very risky not to be in a position to control the new bank during the five or six-year period which the Government concedes would be necessary to confirm its ostensible "independence".[53] Further, it would be necessary to have some assurance that the Comptroller would permit the bank to be acquired when the charade had run its course.

In other words, the substance of the suggested "method" is that the organization of the sponsored bank is to be nothing but a step in a preconceived plan by NBC to establish a branch in an area where it is forbidden to do so. By definition, the sponsored bank is never intended to serve any other real purpose than to be "acquired" as a branch of its sponsor. Its ostensible "independence" is a mere facade, and a very transparent facade, at that.

There would be no legitimate purpose for the sponsorship, and no legitimate purpose for the organization of the sponsored bank, as required by both federal and state law.[54]

53. Jur. St., p. 9, Tr. 573, App. 775.

54. 12 U.S.C. § 21; RCW 30.08.030.

This is a very different thing from assisting a new bank in its organization and in the conduct of its business for legitimate purposes. In this connection, it is a common practice for larger banks in Washington to assist in the organization of new banks, both state and national, in smaller communities of both Washington and Oregon, and this is encouraged by the regulatory authorities. Substantial benefits are derived on both sides—the new bank obtains the benefit of the larger bank's expertise in the intricacies of organization and getting started in the banking business, and the larger bank obtains a correspondent in the community and can ordinarily expect to handle the new bank's overlines on a participation basis. This is the only legitimate purpose of such a sponsorship—the new bank must be a *bona fide* independent bank, independently owned and controlled by its organizer-stockholders, with no string attached. It cannot be a mere creature or stand-in for another bank, posing as an independent bank, as a device to establish a branch at a forbidden location. Nor can its stockholders be mere agents or nominees of another bank, charading as independent owners.

With respect to the organization of a national bank, any agreements or commitments for the subsequent sale or purchase of the new bank's stock by the prospective stockholders who are to furnish the necessary capital required for organization must be disclosed in the application for the charter, and as the Regional Administrator, Mr. Selby, testified, disclosure of any such commitment or agreement would result in denial of the application (Tr. 975-976, App. 1011). With respect to a state bank, as above stated, the Articles of Incorporation of the new bank must con-

tain the required clause forbidding acquisition by another bank for at least ten years.

On the other hand, the fact that assistance is given by a larger bank in the organization of a *bona fide* independent bank, where the assistance has been given for a legitimate purpose with no strings attached, or the fact that there has been a close correspondent relationship subsequent to organization, does not disqualify the assisting bank from being eligible as a purchaser, should it later develop that the stockholders desire to sell.[55]

In such cases, in the absence of fraudulent misrepresentations by the stockholder-organizers in their application to the Comptroller, the acquired bank would have been initially organized as a *bona fide* independent bank for a legitimate purpose, and owned by such stockholders in their own right and at their own risk, unencumbered by any commitments or obligations to sell out or merge. This is an entirely different situation from that contemplated by the proposal asserted by Justice, where the whole intent and purpose of the organization of the new bank

55. In several instances in Washington, such a development has occurred, and it is undoubtedly the faulty analogy drawn from such instances that has led the Department of Justice to the notion that their suggested plan is a perfectly legal "method" to establish a branch in a forbidden area. In this connection, in addition to several instances where there is no showing of any circumstance other than a legitimate relationship before acquisition, Justice has unearthed certain acquisitions by Washington Bancshares, Inc., where there does appear to have been a preconceived plan to establish branches in forbidden locations, although it was admitted that the plan, and the commitments obtained from the stockholders of the new banks to implement the plan, had not been disclosed to the Comptroller (Tr. 293-295, App. 612, 613).

All that can be fairly derived from these instances is that Washington Bancshares, Inc. set out to evade the Washington branching law, and by concealing from the regulatory authorities the real purpose for the organization of these banks, managed to get away with it—in violation of both state and federal law. How such instances can establish the legality of the procedure, as Justice so insistently claims, is not explained.

is admittedly to establish a branch for another bank at a place were applicable state law forbids it.[56]

In such case the organization of the new bank, as merely the first step in organizing a branch, is subject to state branching restrictions to the same extent as if the branching were attempted directly. *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, 323 F.2d 290 (C.A.D.C.) rev'd on other grounds, 379 U.S. 411; *Whitney National Bank in Jefferson Parish v. James*, 189 So.2d 430 (La. App.).

The *Whitney* cases above cited involve an attempt by Whitney National Bank of New Orleans to extend its operations into the neighboring Jefferson Parish where it was forbidden to establish a branch by Louisiana law. Through "elaborate maneuvers", which involved the organization and reorganization of banking and nonbanking corporations, all of which were submitted to and approved by the responsible federal banking authorities (the Comptroller and the Federal Reserve Board), the project proceeded to the point where the desired new banking office in Jefferson Parish was about to open. At this point, an intricate series of litigation ensued, from the District Court for the District of Columbia, to the Circuit Court for the District of Columbia, to the Supreme Court (which dismissed for lack of jurisdiction by the District Court), and back to the Federal Reserve Board. Thereafter, a declaratory judgment was sought in the state courts of Louisiana, which (apparently with the approval of the Federal Reserve Board) proceeded to settle the matter.

56. We do not understand that Justice proposes that this purpose should be concealed or misrepresented in the application to the Comptroller for a charter.

With respect to the question here involved, the Louisiana Court, quoting with approval the analysis of the situation previously made by the Court of Appeals for the District of Columbia, states (189 So.2d at 438):

> "' ° ° ° the question is whether the elaborate and ingenious scheme of reorganization devised by Whitney-New Orleans results in what is in reality the establishment of a branch of Whitney-New Orleans in east Jefferson Parish, in violation of federal law.
>
> " 'There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in east Jefferson Parish which it would manage and control.'
>
> "The Court of Appeals further noted that the Board of Governors and the Comptroller were cognizant of the true nature of the proposed banking arrangement but deferred to the Comptroller whose duty it is to enforce the National Bank Act. In addition the Court also observed that the Comptroller was aware, when he approved the suggested procedure, that its purpose was to evade federal and state statutes forbidding branch banking in Louisiana beyond parish lines."

On the basis of the facts above stated, the Louisiana Court concludes (189 So.2d at 442):

> "The foregoing leads to consideration of the next principle which negates appellants' acquisition of allegedly vested rights under the circumstances, namely, the fact that the Comptroller intended to issue the certificate of authority notwithstanding the proposed reorganization scheme was simply a means of circumventing state and federal laws regulating branch banking. On this most important issue, we are in complete accord with the reasoning of the United States Court of Appeals for the District of Columbia Circuit as expressed in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, 116 U.S. App. D.C. 285, 323 F.2d 290, the pertinent

> portions of which are hereinabove cited. Manifestly, petitioners cannot accomplish by indirection that which by direct means is expressly prohibited by state and federal law. Vested rights cannot emanate from unlawful and unauthorized acts of public officers."

To the same effect is *Bank of Dearborn v. Saxon*, 244 F. Supp. 394 (E.D. Mich. 1965), aff'd sub. nom. *Bank of Dearborn v. Manufacturers National Bank of Detroit*, 377 F.2d 496 (6th Cir. 1967), where the Comptroller and the Bank openly took the position that the applicable Michigan branching law was undesirable, and the bank's proposal was admittedly made and approved for the purpose of evading those statutes. In affirming the District Court's decision that the statute was violated, the Circuit Court remarks (377 F.2d at 498):

> " * * * it is not legally permissible for the defendants herein to amend the Michigan branch banking restrictions 'by clever devices of evasion.' "

The principle applied by these cases is fundamental and universal. *Gregory v. Helvering*, 293 U.S. 465.

This Court has left no doubt as to the application of the McFadden Act in cases of this kind. *First National Bank of Logan, Utah v. Walker Bank & Trust Company*, 385 U.S. 252 (1966). In that case, the Utah statute prohibited Utah banks (except in first class cities) from establishing branches except by taking over an existing bank which had been in operation for not less than five years. Upon application by each of two national banks in second class cities in Utah for certificates to establish *de novo* branch offices in those cities, the Comptroller of the Currency had ordered the certificates issued. Suit was commenced by the Plaintiff in each case, claiming the action of the Comptroller to be void, since the proposed branches were

not taking over established banks in those cities as required by Utah law.

The Court held that the branches could not be authorized by the Comptroller in contravention of the state law. After reviewing the history of the McFadden Act, the Court states (385 U.S. at 261):

> "It appears clear from this resume of the legislative history of §36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned. ° ° °
>
> " ° ° ° Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States and laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.' Utah clearly permits it 'only to the extent' that the proposed branch takes over an existing bank."

In answer to the Comptroller's contention that state law controlled only as to "whether" and "where" branches may be established, and not the "method" by which they are established, the Court said (385 U.S. at 262):

> "We believe that where a State allows branching only by taking over an existing bank, it expresses as much 'whether' and 'where' a branch may be located as does a prohibition or a limitation to the home office municipality. As to the restriction being a 'method,' we have concluded that since it is part and parcel of Utah's *policy*, it was absorbed by the provisions of §36(c)(1) and (2), regardless of the tag placed upon it." (Emphasis added.)

This Court reaffirmed this holding in 1969 in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, where the Comptroller had authorized a Florida national bank to establish an armored car service and

a stationary off-premises receptable for deposits of cash and checks. Florida law prohibited all branch banking by state chartered banks and provided that a Florida bank may "have only one place of doing business". The principal issue of the case was whether or not the armored car and off-premises receptacle constituted a branch, and as to that question the Court held that federal law controlled. However, if these facilities did constitute a "branch" (as the Court held they did), the Florida law governed, and the Comptroller had no authority to authorize them. The Court said (396 U.S. at 130):

> "The conditions under which national banks may establish branches are embodied in §7 of the McFadden Act 44 Stat. 1228, as amended, codified in 12 U.S.C. §36. One such condition is that a 'branch' may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch, 12 U.S.C. §36(c). *First National Bank of Logan v. Walker Bank & Trust Co*,. 385 U.S. 252, 17 L.Ed.2d 343, 87 S.Ct. 492 (1966)."

and—

> " * * * while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks."

In holding that the "Contract"[57] printed on the bank customer's transmittal slip did not save this off-premises operation from constituting a branch, the Court said (396 U.S. at 138):

> "Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks."

57. This "Contract" provided that in this off-premises transaction the bank was the "agent" of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at said banking house." (396 U.S. at 127)

The full sweep of the principle established by the McFadden Act was further emphasized two years later by the affirmance per curiam by the Fourth Circuit Court of Appeals[58] of the decision of the District Court in *First National Bank of Catawba County v. Wachovia Bank & Trust Company, N.A.*, 325 F. Supp. 523 (1971). In that case, the North Carolina branching law required the State Commissioner of Banks, before approving a branch application by a state bank, to find that the branch "'" ° ° ° will meet the needs and promote the convenience of the community ° ° °," and that " ° ° ° the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch ° ° ° "'".

In considering the application of Wachovia Bank & Trust, a national bank, to establish a branch in Hickory, North Carolina, the Comptroller asserted that the above requirement of North Carolina law had no application to the authorization of a branch of a national bank, and, in approving the application, flatly refused to make the required findings.[59] With respect to this determination by the Comptroller, the Court said (325 F.Supp. at 525):

> "In light of the many authoritative decisions on the subject, it is difficult to understand why the Comptroller contends that, in considering applications for the establishment of branch banks by national banks, he is not bound by all state statutes, and continues to argue that he is only bound by 'capital' and 'location' restrictions of state laws."

After reviewing *Walker Bank, Dickinson,* and other

58. 448 F.2d 637 (1971).

59. He also indicated that such findings would probably be inconsistent with the circumstances developed at his hearing on the application.

cases, the Court points out that with respect to branching, the Comptroller must look to, and is bound by, all state law on branch banking, not just part of it, and that he is not permitted to "pick and choose what portion of the law binds him," and concludes (325 F.Supp. at 526):

> "Having arbitrarily and capriciously elected to ignore clearly defined principles of law, it follows that the opinion of the Comptroller approving the application of Wachovia *is a nullity* and that he should be permanently enjoined from issuing a certificate to Wachovia authorizing the establishment of a branch bank in Hickory, North Carolina." (Emphasis added.)

As the above authorities clearly show, even if the Comptroller could be persuaded to go along with such a scheme as the Government proposes, his action would be a nullity. There have undoubtedly been cases, as the Government suggests, where such action by the regulatory authorities has gone unchallenged, and a forbidden transaction thus consummated; but this does not confer legality on the procedure, whatever it may have been.

In the face of the authorities just discussed and the express requirements of the McFadden Act, that branching by national banks must be authorized by *statute law* of the state by language *specifically* granting such authority *affirmatively* and not merely *by implication or recognition,* it is difficult to understand the persistence of the Government in asserting this contention. The sole basis upon which the contention rests is the implication which is asserted to arise from the asserted recognition of the method by the Comptroller and/or his staff and certain other individuals. Such a basis for establishing the necessary authority for a national bank to branch is expressly rejected by

the McFadden Act, even where the "recognition" may have been by state agencies.

In addition, the Comptroller denies any such recognition, and so does the State Supervisor of Banking and one of his predecessors, who was called as a witness by the Government itself.[60]

The Comptroller, as Intervenor in this case, has unequivocally stated his position on the matter in his formal statement of his contentions herein (P.T.O., Intervenor's Contentions X; App. 391-392), as follows:

> "Plaintiff contends entry can be made through a scheme to circumvent state law by 'sponsoring' a new bank and merging it. As to this plan, Intervenor contends it would not charter a new bank in the Spokane Metropolitan Area in the reasonably foreseeable future. Intervenor, furthermore, would not participate in a plan or scheme to unlawfully circumvent and evade the prohibitive branching laws of the State of Washington."

At the trial, the Comptroller presented his Regional Administrator for the 13th Region as a witness, who confirmed this position on the part of his office.[61]

60. Joseph E. McMurray, a former Supervisor of Banking of the State of Washington, called by the Government as an expert witness, testified on crossexamination that if the purpose of the organization of a bank was to establish a branch [for another bank], he would not regard that to be a proper object, and that the formation of the bank would not be for a legitimate purpose under the law of the state. With respect to RCW 30.08.020(7), requiring new banks to provide a prohibition in their articles of incorporation against sale to, or merger with, another bank for a period of not less than ten years, he testified that he had assisted in drafting this legislation and was in favor of it, because he felt that the public interest would not be served by such formations solely for the purpose of business transactions (Tr. 561-565, App. 768-770).

61. The Regional Administrator testified as follows (Tr. 975, App. 1011):

> ". . . we do not allow the organizers or the shareholders of a new charter bank to enter into any oral or written agreements providing for the sale or disposition of the new bank."

The Supervisor of Banking of the state has stated his position in a letter-opinion presented in evidence at the Comptroller's hearing on the Banks' application to merge, which is that his office would regard such a procedure as in contravention of state law (App. 1916-1917).

III. Eastern Washington and the State as a Whole Admittedly Are Not Commercial Banking Markets and Therefore Cannot Constitute "Section[s] of the Country" Within Which the Competitive Effects of a Transaction in That Line of Commerce May Be Judged

In addition to the charge that the merger will eliminate NBC as a potential competitor in the Spokane Metropolitan Area, the Government has also charged that WTB will be eliminated as a potential competitor which could, at some future time, enter other local markets in Eastern Washington. However, no such local market was specified or delineated as to location, extent, or the competitive conditions therein.

It was also charged that the merger would remove WTB as one of the few middle-sized banks in the state capable of merging with other middle-sized or smaller banks, which the Government suggests would then become a significant statewide or regional competitor. The only objectionable effect asserted by the Government based on this contention was that it would adversely affect banking competition in the state as a whole by strengthening the dominance of the state's few large banking institutions.

He was then asked, and answered, the following question (Tr. 975):

"Q. What would you do Mr. Selby, if a group of people came to you and asked for a charter for the sole purpose of branching into Spokane?

"A. Well, that would be in effect *de novo* entry into Spokane which is not permitted by state law and we wouldn't accept the application."

In view of the history, resources, capability and character of WTB, as previously outlined,[62] and the vague generality of these contentions, the highly speculative character of any predicted consequences of the merger along those lines becomes apparent.

In addition, the Government concedes that neither Eastern Washington or the state as a whole is a commercial banking market (G.Br. 33).

The District Court not only found that neither Eastern Washington nor the state were commercial banking markets, but also that WTB has neither the capability, resources, nor incentive to embark on any such schemes of expansion or consolidation, and that there was no reasonable probability that it would take any such action in the reasonably foreseeable future (F. 14 and 23, App. 1934-1935, 1940).

The Government, nevertheless, persists in these charges, claiming that Eastern Washington and the state as a whole are sections of the country with respect to the line of commerce of commercial banking, notwithstanding the fact that they admittedly are not areas within which most customers may conveniently find sellers of banking services, and, therefore, do not constitute commercial banking markets (G.Br. 33).[63]

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62. P. 29, *supra*.

63. 'The only justification given for delineation of these areas as sections of the country, notwithstanding the fact that they are admittedly not banking markets, is that they are said to be "economically differentiated", and that the state boundaries insulate the banks of the state from competition by banks located outside the state. What the economic differentiation entails, or its relation to banking, is not explained. While it is true that outside banks cannot establish branches in the state, this neither makes the state a banking market nor confines local banking markets to the state. There are many instances where local banking mar-

United States v. Pabst Brewing Co., 384 U.S. 546 (1966) is cited in support of this contention. That case involved a Section 7 challenge to the merger of two very large brewing companies, Pabst and Blatz, which were competing against each other in 40 states, with particular intensity in the State of Wisconsin, and in the three-state area of Wisconsin, Illinois and Michigan. The line of commerce was, of course, the manufacture and sale of beer.

There can be no question that at least one, and undoubtedly more than one, relevant geographic market in the manufacture and sale of beer had been established in this case. Whatever may be derived from certain language in the principal opinion when separated from the facts involved in the case, there is no basis for contending that it has overturned the long established principle that the determination of a relevant market is a necessary predicate to a finding of a violation of the Clayton Act.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court points out (at p. 324) that Section 7 of the Clayton Act forbids only those arrangements whose effect may be substantially to lessen competition, or to tend to create a monopoly, "in any line of commerce in any section of the country". The Court then states (370 U.S. at 324):

> "Thus, as we have previously noted,
>
> > '[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition".

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kets straddle state lines, as, for example, the banking market involved in *United States v. Phillipsburg National Bank and Trust Company*, 399 U.S. 350, which included the twin cities of Phillipsburg, New Jersey and Easton, Pennsylvania. Washington has several border areas where local banking markets would extend into Oregon or Idaho.

> Substantiality can be determined only in terms of the market affected.'[64]
>
> "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."

and (370 U.S. at 336):

> "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."

The geographic market which is the "area of effective competition" in commercial banking is well defined in *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 as follows:

> "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, *within the area of competitive overlap*, the effect of the merger on competition *will be direct and immediate.*" (Emphasis added)

The Court explains that this is because the business of banking (as distinguished from most other businesses) is inherently local in character, and (374 U.S. at 359):

> "Therefore, since, as we recently said in a related context, the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies,*' Tampa Electric Co. v. Nashville Coal Co. 365 US. 320, 327 ° ° ° (emphasis supplied);"

Principles such as these, developed over the last 75

64. *United States v. E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 593.

years in regard to these statutes, are not lightly cast aside, cf *United States v. Third National Bank in Nashville,* 390 U.S. 171, 182, and unless the doctrine of *DuPont, Brown Shoe* and *Philadelphia,* above stated, has in fact been overturned, neither Eastern Washington nor the state as a whole can, by the Government's own admission qualify as a section of the country under Section 7.

IV. Since the Consummation of the Merger Will Have No Adverse Influence on the Present State of Competition in Any Manner, the Possible Consequences of Highly Speculative Future Contingencies Do Not Rise to the Level of Reasonable Probabilities Which Are Essential to Constitute a Violation of Section 7

With the sole exception of the claim that NBC is a perceived potential entrant exerting a procompetitive influence on the banks in the Spokane market from a position outside that market, no claim is made by the Government that the consummation of the merger will have any adverse influence on the present state of competition in the Spokane Metropolitan Area market or elsewhere.

All other asserted anticompetitive effects of the merger depend on future contingencies which may or may not occur. For example, the Government's principal contention in this case is based on its projection that if NBC is not permitted to consummate the challenged merger, it *may,* sometime in the future, enter by some other means, which, at such indeterminate future date, *could* then effect a substantial deconcentration of the Spokane market. This contention does not postulate any present adverse effect on competition in the Spokane market. Indeed, it was the finding of the District Court that the direct and immediate effect would be to increase competition in that market.

The remaining adverse consequences of the merger asserted by the Government, based on the elimination of WTB, rise even higher in the atmosphere of pure speculation, both with respect to the contingencies upon which they are based and the consequences to commercial banking which it is said may result, should these contingencies occur. WTB, which has never displayed any disposition to expand beyond the immediate environs of Spokane, is to acquire banks in outside communities—how many banks? one? —two? —half a dozen? —where? —what will be the competitive condition of these unknown localities at that time? —would the effect of entry by WTB be substantial? —adverse? —beneficial?

In order to offend Section 7, there must at least be a *reasonable probability* that the effect of the acquisition may *substantially* to lessen competition. As stated in *Brown Shoe Co. v. United States,* 370 U.S. 294, 323:

> "° ° ° Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities."

There is a fundamental difference between that which is probable and that which is merely possible. This is well stated in Webster's *Seventh New Collegiate Dictionary* under the definition of "probable", as follows:

> "*Probable* applies to what is supported by evidence that is strong but not conclusive; *Possible* applies to what lies within the known limits of performance, attainment, nature, or mode of existence of a thing or person regardless of the chances for or against its actuality."

The probability that certain effects or consequences may

result from a transaction such as a merger of two banks often may be readily assessed, even though such consequences may not manifest themselves for some time. On the other hand, if the merger is enjoined, there are no effects or consequences to assess unless at some indeterminate future time the outside bank does in fact enter the market. In such case, all factors necessary to a determination of probability are ordinarily so diluted as to render them entirely insufficient if a *real* probability is required. Furthermore, the substantiality of the asserted adverse consequences must necessarily be severely discounted because of their contingent character.[65] Does Section 7 reach this far? Certainly not, if *real* probability and *real* substantiality are required in order for a transaction to offend the section.

As stated in *United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1973), this Court has not yet squarely faced this question for the reason that in each case so far decided, the acquiring firm was found to either have a current influence on the market in question, *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. El Paso Gas Co.*, 376 U.S. 651 (1964), or to be a dominant force in the market, *Ford Motor Co. v. United States*, 405 U.S. 562 (1973); *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

The character of the charges made in this case, on the

65. There may be as much truth as humor in the comment of Judge Lee Lovenger in an article in the "Arizona Law Review" in which he states that the "potentiality" theory is a kind of legal ESP—Extra-Sensory Proof—It relies on potentiality instead of reality, substitutes the ectoplasm of hypothesis for the protoplasm of fact, and offers faith instead of proof. *United States v. United Virginia Bankshares, Inc.*, 347 F. Supp. 891, 894 n. 5.

basis of which the merger of the Appellee Banks has been enjoined since October 22, 1972, highlights the need to make it clear that in order for a transaction to offend Section 7, there must be a real probability that its effect will be substantially to lessen competition. Where the effect, if any, is limited to nothing more than a possible consequence which may result sometime in the future from a contingency that may never happen, the test of reasonable probability simply cannot be met. As the dictionary comparison quoted above shows, once a showing of real probability is no longer required, possibilities with suitable anticompetitive attributes can be conjured with ease.

There is a further aspect of the case at bar which bears on this question. As previously noted, the District Court found that the merger would have the direct and immediate effect of substantially increasing competition in commercial banking in the Spokane Metropolitan Area (F. 18, App. 1936). The Court also found that the procompetitive effect of any entry into the area by NBC which would be limited to a foothold or the substantial equivalent of a *de novo* entry, would not be significant and would be far outweighed by the substantial, direct and immediate procompetitive effect which would result from a consummation of the merger (F. 20, App. 1939).

Thus, where a merger not only does not have any adverse influence on the present state of competition in the market, but also will have a direct and immediate procompetitive effect, an attempt to enjoin it on the basis of future contingencies can actually be counter-productive from the standpoint of Section 7, since the more substantial noncontingent procompetitive effect would be sacri-

ficed for a contingent benefit projected by Justice for the future. This would be nothing less than a travesty of the Act.

V. Appellees' Affirmative Defense Under the Bank Merger Act Is Decisive of the Case

In addition to determining that the challenged merger does not offend Section 7 of the Clayton Act, the District Court has also sutained the affirmative defense of the Banks under the Bank Merger Act of 1966, that if, contrary to the Court's finding and conclusions with respect to the Clayton 7 issue, the merger would have some or all of the anticompetitive effects urged by the Government, such effects are clearly outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served.

The significant need which the Court found to exist was for a bank capable of providing commercial bank customers in the Spokane Metropolitan Area with a complete alternative in all phases of full service banking to those offered by the two present market leaders. The Court found that if the merger is consummated, NBC will be in a position to fill this need, and that, as a full service bank, NBC would be capable of doing so, while WTB is not. The various areas of full service commercial banking where a viable alternative is needed are carefully catalogued and the need justified by the Court's Finding of Fact No. 25(a) through (h).[66]

The Court also found that there is no reasonable alternative means of providing these benefits to the community.

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66. These are summarized at p. 39, *supra*.

The applicable provision of the Bank Merger Act of 1966 (12 U.S.C. §1828(c)) provides in pertinent part as follows:

> "(5) The responsible agency [in this case the Comptroller] shall not approve—
>
> "(A) ° ° °
>
> '(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to lend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> "° ° °
>
> "(7)
>
> "(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).
>
> ° ° °"

That the Bank Merger Act has created a new affirmative defense which can justify the consummation of bank mergers, notwithstanding the fact that they might otherwise offend the antitrust laws, is no longer open to question. *United States v. Third National Bank in Nashville,* 390 U.S. 171. As the Court stated in that case (390 U.S. at page 178):

> "Last Term, in United States v. First City National Bank of Houston, 386 U.S. 361, 18 L.Ed.2d 151, 87 S.Ct. 1088 (1967) this Court interpreted the procedural provisions of the 1966 Act, holding that the

> Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but had created a new defense, with the merging banks having the burden of proving that defense. The task of the district courts was to inquire do novo into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by 'the convenience and needs of the community to be served'."

The District Court has followed this procedure precisely in the instant case. While its initial conclusion that the consummation of the merger would not offend the antitrust laws would, of course, be decisive of the case, the Court was not unmindful of the fact that district judges are not infallible in this area, and followed the sound legal practice of also determining the validity of the Banks' affirmative defense to the charges made against them, so that in the event of an appeal, the entire matter could be disposed of by this Court. There can be little doubt that this is not only a sound practice generally, but particularly appropriate in cases where there is an express policy as manifested by the Expediting Act (15 U.S.C. §29) to minimize delay in reaching the final determination of antitrust litigation instituted by the Government, which ordinarily involves onerous injunctive restraints on the defendants.

Thus, in the absence of material legal deficiency in the procedure followed by the Court, the Court's determination of this issue, is alone, decisive of the case.

There can be little question that it is the District Court, not this Court, which is charged with performing the weighing process. *United States v. First City National*

Bank of Houston, 386 U.S. 361; *United States v. Third National Bank in Nashville*, 390 U.S. 171; *United States v. Phillipsburg National Bank and Trust Company*, 399 U.S. 350. The needs (and convenience) of any particular community depend upon its particular situation and circumstances. The need of one community may be in one area of commercial banking, while the needs of other communities are in another; probably no two are exactly the same. Undoubtedly, many are very different from any other. Congress wisely did not attempt a "laundry list" of needs, but left it to the regulatory authorities, and, in cases such as this, to the District Court to determine, on the basis of the particular community involved, what the needs are, to what degree a particular transaction may provide for such needs, and the relative importance of the needs and the benefits to accrue to the community.

This court has never suggested, as the Government contends, that there are "standards" which disqualify certain benefits to the community for consideration as needs (or conveniences) to be weighed against loss of competition which may result from a transaction. This Court has, indeed, pointed out that certain benefits may have considerably more weight than others, when weighed against the less desirable results of a merger. *United States v. Third National Bank in Nashville*, (360 U.S. at 186). But the same is true with respect to the less desirable results. For example, purely potential considerations, which may not even come to pass, cannot have the weight of a direct and immediate adverse consequence. This is also a necessary element in the weighing process.

That better banking service in the community is a proper element for consideration in the weighing has been recog-

nized by this Court, *United States v. Third National Bank in Nashville,* (390 U.S. at 188). Indeed, to provide better banking service is one of the principal purposes of the federal banking law, including the Bank Merger Act.

In the case at bar, the situation in the Spokane Metropolitan Area disclosed a need for a viable alternative to the present market leaders in a broad spectrum of banking services. As the Government's statistical exhibits (GX A-54, 55 and 58) show, the two largest banking organizations in the area hold 73.7% of the total deposits, 74% of the outstanding loans, and operate 30 of the existing 46 banking offices in the area.

In several important phases of commercial banking, the largest bank, Seattle-First National Bank, is "the only store in town", as one witness puts it.

This is not a need that can be lightly brushed aside as of so little consequence to the community that the District Court's finding must be overturned, as the Government insists; and it certainly cannot be said that the benefits these additional banking services will bring to the Spokane area do not satisfy the "convenience-and-needs standard",[67] whatever that standard may be, if, indeed, there is such a thing.

In this connection, the contention of the Government that in order for convenience and needs to qualify for consideration, they must "benefit *all* seekers of banking services in the community",[68] is utterly unrealistic on its face, since the only way that possible benefits, singly or in combination, could benefit *all* seekers of banking services

67. Gr. Br. 68.

68. G. Br. 71.

is through their contribution to the overall benefit of the community as a whole.

In addition to its challenge to the sufficiency of the benefits that the District Court found the merger will bring to the Spokane area, the Government contends that it is not possible for the District Court to determine the convenience and needs issue in the same proceeding where it has determined that the merger would have no anti-competitive effects which would offend Section 7 of the Clatyon Act, citing *United States v. Third National Bank in Nashville*, 390 U.S. 171 in support of this contention.

As to this contention, it is inconceivable that it is impossible under the Bank Merger Act to dispose of all issues in a single proceeding. Under the Government's contention, wherever a District Court decides that no violation of the antitrust law is involved, it is thereby rendered incapable of assessing the relative importance of the benefits of the proposed transaction to the public as against the anticompetitive effects alleged, taken at face value as alleged.

In cases such as the case at bar, should the Appellate Court differ with the trial court as to the antitrust issue, a second trial and a second appeal would be mandated in order to deal with the affirmative defense expressly granted by the Act—there would be no other way. This would indeed be a pernicious doctrine and a perversion of both the Bank Merger Act and Rule 1 of the Federal Rules of Civil Procedure, which requires a just, speedy and inexpensive determination of every action. It would also defeat the primary purpose of the Expediting Act (15 U.S.C. §29). Certainly, nothing in *Nashville* would require such a result.

The trial and decision by the District Court in *Nashville* took place shortly after the enactment of the 1966 Bank Merger Act, when the Act had not yet received its first interpretation by this Court. Not having the benefit of that interpretation, the District Court (260 F.Supp. 869) construed the Act as merely having introduced an additional element or factor into the basic application of the antitrust standards to bank mergers. In other words, it concluded that the new element introduced by the 1966 Act—the convenience and needs of the community to be served—was simply to be added to the various other considerations pertinent to the determination of whether the merger would offend the antitrust laws in the first instance. In the District Court's view, the effect of the 1966 Act was to restore the *Columbia Steel*[69] approach to the application of the antitrust laws to bank mergers (260 F.Supp. 869 at pp. 877 and 882). Accordingly, the District Court made what might be described as a composite determination of the application of Section 7 of the Clayton Act to the merger there involved, in which various needs and conveniences[70] were taken into account, and concluded that the merger did not violate the antitrust standards of the 1966 Bank Merger Act. This process, followed by the District Court in reaching its decision, is described by this Court as having been "scrambled and confused" (390 U.S. at p. 178).

The faulty conclusion which the District Court reached is clearly stated in its opinion (260 F. Supp. at p. 883):

"As the Court . . . concludes that the merger does not

69. *U.S. v. Columbia Steel Company*, 334 U.S. 495.

70. Primarily weaknesses in the financial and management areas of the merged bank which the Court felt would be cured by the merger.

> violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community."

Having concluded, as it did, that the merger there in question did in fact violate Section 7 of the Clayton Act, this Court really had no alternative than to remand the case for a proper weighing of the asserted conveniences and needs against the anticompetitive effects of the merger. The District Court had regarded this to be unnecessary at the trial and had not done it. This Court very properly made no attempt to take over the weighing, but returned the case to the District Court so that this could be done.

To suggest that *Nashville* stands for the proposition that it is not possible for the District Court to ever perform the weighing process in a case where it has also concluded that no antitrust violation has actually occurred is a gross distortion of this Court's decision in that case, and would postulate a ruling of a most onerous and profligate character, which we are convinced this Court would never approve.

CONCLUSION

The judgment of the District Court should be affirmed, the injunction dissolved, and the case dismissed.

Respectfully submitted,

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