IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-38

UNITED STATES OF AMERICA, *Appellant*

v.

MARINE BANCORPORATION, INC., 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

BRIEF FOR COMPTROLLER OF THE CURRENCY

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QUESTIONS PRESENTED

1. Can the Supreme Court reverse Findings of Fact by the District Court which are supported by substantial evidence?

2. Are the Findings of the District Court in this case supported by substantial evidence?

3. Do federal statutes prohibit the merger of two banks which are not in actual competition and which are forbidden by law to enter each other's primary area except by merger?

4. What is potential competition? Is it merely possible competition or probable and imminent competition?

5. Is plaintiff's theory of potential competition applicable to a field like banking where entry is completely controlled by government?

6. Does a finding by the District Court that a proposed merger probably will not lessen competition preclude the District Court from making a further finding on the evidence that the merger will meet the convenience and needs of the community to be served?

STATUTES AND REGULATIONS INVOLVED

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

> The [Comptroller of the Currency] shall not approve—
>
> (5)(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.

* * * * * *

(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).[1]

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.

The National Bank Act, 44 Stat. 1228, 12 U.S.C. §36 provides in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) . . . and (2) at any point within the State in which said

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[1] This Section (7)(B) requiring the court to apply standards identical with those the Comptroller must apply under the Bank Merger Act of 1966 (BMA-66) does not appear in plaintiff's brief.

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].

RCW 30.40.020 provides in pertinent part:

> No bank or trust company shall *establish or operate* any branch 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 [Emphasis added].

RCW 30.08.020 provides in pertinent part:

> (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 super-

visor, 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.

RCW 30.04.230 provides:

> 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 stock 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 corporation 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 per cent 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.

[The above statute is quoted as amended by the 1973 legislature. These amendments did not change

Washington's restrictions on holding company banking.]

12 C.F.R. Section 4.2:

§4.2 Organization of national bank.

(a) *Application.* Persons desiring to organize a national bank should submit to the Regional Administrator of National Banks for the region in which the proposed bank is to be located, an "Application to Organize a National Bank." This application, supplementary forms, and instructions for their preparation and filing are furnished upon request submitted to the Comptroller of the Currency or to the Regional Administrator.

(b) *Investigation.* The Comptroller of the Currency may conduct such investigation as he deems necessary or proper including the gathering of information as provided in Part 5 of this chapter. Matters investigated include:

(1) The adequacy of the proposed bank's capital structure.

(2) The earning prospects of the proposed bank.

(3) The convenience and needs of the community to be served by the proposed bank.

(4) The character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

(5) The banking ability and experience of proposed officers and other employees.

If the persons referred to in subparagraph (4) of this paragraph are not ready within 30 days after filing of the application to submit to and cooperate in the investigation, the Comptroller may treat the application as abandoned.

(c) *Preliminary approval.* The Comptroller of the Currency determines whether or not preliminary approval of the application should be granted. If preliminary approval is granted, the Comptroller may, if he determines that such action is necessary or desirable for the protection of the public interest, at any time withdraw such approval or provide that final approval shall be subject to the fulfillment of conditions specified by him.

(d) *Corporate organization.* If preliminary approval is granted, the applicants are furnished with suggested forms of documents necessary for the corporate organization of a national banking association and instructions for their preparation and filing. The proposed bank does not become a body corporate until certain of these documents have been accepted for filing by the Comptroller of the Currency.

STATEMENT OF THE CASE

A. The Banks in This Case Are Widely Separated and in Distinct Geographical Areas

The two banks involved in this case, the National Bank of Commerce of Seattle ("NBC") and Washington Trust Bank ("Washington Trust" or "WTB"), are located in the State of Washington, a large, sprawling State having the scenic beauty of widely varied terrain together with differing economic and land use patterns throughout. Washington has a land area of 69,192 square miles, larger than any state east of the Mississippi, and about 13 times larger than the state of Connecticut. The State is roughly in the shape of a rectangle, extending some

365 miles east and west along the border of Canada and some 225 miles north and south along the shores of the Pacific Ocean. Of the State's some 42.6 million acres almost half (20.7 million acres) is in forest and woodland which separates settled areas. Some 24 per cent of the State is government-owned and, of the land area in private ownership, about 86 per cent is classified as farmland, much of which is grazing or arid land. Only about 7 per cent of the State's area is devoted to commercial, industrial and other such uses.

The topography of the State is a mixture of rugged mountains, heavily forested coastal lowlands, hilly highlands, lush valleys, and semi-arid plains. The main geographical feature is the formidable Cascade Range which splits the State from north to south with elevations in excess of fourteen thousand feet.

The headquarters of the two banks involved in this case are located at opposite ends of Washington State. NBC is headquartered and has its principal area of business on the State's western Pacific coast in Seattle, the State's largest city and principal financial center, with a 1970 population of roughly 530,000 people. Washington Trust on the other hand is headquartered at the eastern border of the State, in Spokane, a city of about 170,000 people, situated some 14 miles from the Idaho state line. These two cities are about 284 road miles or about six hours of automobile travel apart across plains and the Cascade Range. (See generally, App. 1701-1702, and Road Atlas, Rand McNally, United States/Canada/Mexico, 49th ed., 1973, pp. 98-99, 119).

B. The Banking Structure in the Relevant Market Is Not Becoming More Concentrated.

Nowhere does plaintiff assert that banking in the Spokane Metropolitan Area, the relevant market in this case, is becoming more concentrated or even trending toward greater concentration. The facts show just the opposite.

First, in spite of Spokane's dreary economic outlook in the past ten years, the state banking supervisor has increased the number of banking organizations competing in the market. Thus, on December 31, 1963, there were six banks competing in the Spokane market and on December 31, 1972 there were seven.

Second, by one of plaintiff's tests, the distribution of Individual, Partnership, and Corporation (IPC) demand deposits, the market shares of the two largest banks in Spokane have steadily declined since 1966 and the relative market shares of the competing banks are trending toward equilibrium rather than toward dominance by one or a minority of the competitors. (GXA-56, App. 1221).

Additionally, plaintiff has correctly asserted that in banking "market structure is reflected by the number and relative market shares of the banking organizations supplying 'the *cluster* of products and services that *full-service* banks offer.'" Pl. Br. 29 [emphasis added]. By this test not only is the market becoming less concentrated but NBC's entering the market as a full service bank, replacing the limited competitive ability of Washington Trust, will further the trend toward a more competitive market structure.

C. The Merging Banks Are Not in Actual Competition.

Prior to trial, all allegations in the complaint relating to actual competition in commercial banking and correspondent banking were abandoned. Pl. Br. 4, n. 1. There is no substantial existing competition between NBC and Washington Trust in the Spokane Metropolitan Area or anywhere else in the state. P.T.O. 4, 6, App. 367, 369.

The parties further agreed, prior to trial, that although NBC operates two branch offices in Spokane County, these branches are small, located in rural areas of the county and, while they derived some business from the Spokane Metropolitan Area, are "not a part of that commercial banking market." P.T.O. 3, App. 366.

The effects of Washington State's restrictive branching laws are visible from an overview of NBC's operations. NBC operates most of its 107 branches in Seattle and surrounding King County (P.T.O., Exh. D, App. 411) where it is permitted to branch *de novo* (Dep. Carlson, App. 138), and NBC does not compete in three of the four major metropolitan cities in Washington.[2] Moreover, NBC does not compete in 100 of the 154 Washington cities having a population of 1,000 or more. (P.T.O., Admitted Facts IV, App. 366).

An analysis of NBC's position in various areas in the State shows that NBC's banking is not conducted on a statewide basis but is in fact a highly localized business (Tr. 1050, App. 1054; Tr. 882, App. 957).

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[2] Plaintiff acknowledges (Pl. Br. 10, n. 10) that NBC is confined to only one of the four largest cities in the State.

Thus, since NBC is not in Spokane, it cannot compete there. (Tr. 1050-1051, App. 1055).

D. State Law Forbids Entry by NBC into the Spokane Metropolitan Area Except by Merger with Washington Trust.

Under the Banking Act of 1933 (Glass-Steagall Act), 48 Stat. 162, 12 U.S.C. § 36(c)(2), a national banking association is authorized, with the Comptroller of the Currency's approval, to establish and operate branches at any location within the State in which the national bank is situated, where a State bank is specifically and affirmatively permitted by the statutory law of the State in question to establish and operate branches. See generally, *First National Bank of Logan* v. *Walker Bank and Trust Co.,* 385 U.S. 252 (1966); *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969). In this manner, competitive equality is maintained between the national and state banking systems insofar as expansion through branching is concerned.

Washington State law is clear that no bank shall establish or operate any branch outside the city where its principal place of business is located and where any other bank transacts business except by acquiring an existing bank or one of its branches. RCW 30.40.020. Plaintiff concedes that this statute prohibits NBC, headquartered in Seattle, from establishing or operating a branch *de novo* in Spokane where existing banks presently operate. (Complaint, App. 12). Additionally, all parties agree that under this statute a bank which has entered a community through merger is thereafter foreclosed from competing by establishing additional branch offices there, even though prior to the acquisition the acquired bank could have legally opened *de novo* branches subject to bank regulatory approval.

Furthermore, a Washington statute governing bank chartering provides that no voting share of a state-chartered bank may be voted to effect a sale or merger of that bank with another bank or affiliated financial interest within ten years of the date following the grant of its charter, unless the state supervisor decides that the bank should be sold before the ten year period has run. See RCW 30.08.020(7). This statute makes the American Commercial Bank, a state-chartered bank in Spokane, presently unavailable for acquisition.[3] Plaintiff in its Brief attempted to argue that possible acquisition of American Commercial is relevant to this case because the ten-year limitation on American Commercial will terminate in 1975. Such a fact is irrelevant, however, since the merger with Washington Trust was contracted almost four years ago, when there were five years left to run on the state prohibition. To bar this merger on antitrust grounds because American Commercial will be free to consider merging in 1975 would be to decide this case not on its merits but because it was filed and has been protracted for a prolonged period.

Another barrier to NBC's free entry into Spokane is Washington State's restrictive bank holding company law. R.C.W. 30.04.230. Under this statute a holding company like defendant Marine Bancorporation may completely own one bank but may not "own, hold or control" more than 25 percent of the stock of another bank. Violation of this statute constitutes a "gross misdemeanor" and a domestic corporation like

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[3] In addition the Washington State Bank Supervisor has advised that no permission would be granted for the early acquisition of this bank. Intervenor's Exhibit L to Exhibit 500, App. 1916. In this document the State Supervisor also noted that the plaintiff's "procedure" for entry would contravene the intent of the law.

Marine Bancorporation would "forfeit its charter" for violation. This statute provides the State of Washington with a criminal sanction against a State chartered bank holding company, such as Marine Bancorporation, which owns a national bank which attempts to circumvent Washington's statutory restrictions. In the face of this statute the nation's chief law enforcement agency, the Department of Justice, through its public position in this case encourages Washington State bankers to have their holding companies acquire 25 percent of the stock in new national banks and to have additional stock controlled by officers, directors and other loyal allies and confreres.

Plaintiff's position in the District Court was that "it would be impossible for the Court to find that this merger was anticompetitive under the theory of potential competition, unless they [NBC] could get into Spokane by some other means." (Tr. 303, App. 618). Because Washington State's restrictive branching law eliminates NBC's alternative to entering a market through merger, i.e., *de novo* branching, plaintiff was compelled to devise a "procedure" by which NBC could nevertheless achieve *de novo* entry into Spokane, a "procedure" it describes as "legal" and "well recognized." The theory of plaintiff's expert, Professor Smith, that competition, in essence, is new entry (Tr. 72-73, App. 486), necessitated plaintiff's reliance on this three-step "procedure" by which it is asserted NBC could enter Spokane *de novo* and thus increase by one the present number of banks there.[4]

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[4] Plaintiff has relegated the "toe-hold" entry alternative to a minor role indeed, perhaps now conceding that the suburban bank is not available for sale and that the Spokane bank cannot be sold under State law. Pl. Br. 44 and 52.

The three-step "procedure" would require the Comptroller to charter a new national bank,[5] implicitly controlled by NBC's officers and their "associates," followed by an interim ostensible "independent" operation of that bank for an indefinite period of time until NBC acquired the bank as a branch. It appears that if this "procedure" for branching *de novo* were judicially determined to be legal and approved, then national banks could obtain *de novo* branches anywhere in Washington without regard to that State's restrictive branching law. Likewise, national banks in Washington with a presently restricted number of branches in cities outside their headquarters city would be free to branch at will within all such cities. For example, Seattle-First National Bank would be able to establish as many branches in Spokane as it might desire. Similarly, Washington State's restrictive holding company statute would not bar Marine Bancorporation from controlling substantially all the voting shares in a newly chartered national bank through its directors and officers, as was done by First National Bank of Logan in Logan, Utah.[6] On the other hand, if this "procedure" were held illegal, the banks which plaintiff believes have established branches in such a manner might be susceptible to legal attack and their holding companies might find their charters jeopardized under Washington law. See RCW 30.04.230.

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[5] Plaintiff would use a national bank charter because newly chartered State banks cannot, under Washington law, be acquired as branches without permission from the State Banking Supervisor until they have been in existence for 10 years. RCW 30.08.020(7).

[6] See n. 25, *infra*.

It was unnecessary for the District Court to reach these legal issues because it found as a factual matter that, even assuming NBC could lawfully enter Spokane, it was not economically feasible for NBC to do so and, in any event, such alternative entry would not be significantly procompetitive when compared to entry through the present merger. F. 7, App. 1937-1940. Furthermore, *de novo* entry was not a reasonable alternative in this instance because, as the Court found, a new national bank could not be chartered in Spokane, now or in the reasonably foreseeable future. F. 19(b)(c), App. 1938. There is direct evidence the Comptroller's Office finds no present need for a new bank in Spokane, partly because such a new bank would most likely take away deposits from the other small bank in town, and it was therefore unreasonable to assume a new national bank could be chartered in Spokane in the reasonably foreseeable future. Tr. 974-975, 996, App. 1011, 1024.

Thus, based on this and other substantial objective evidence discussed below, the District Court concluded that entry by NBC through any alternative means would not be undertaken and was not meaningful in an antitrust context.

E. Objective Economic Conditions Indicate No Practical Alternative Method of Achieving the Purposes of the Merger.

As indicated by plaintiff's economic expert at trial, the Spokane Metropolitan area is the relevant section of the country applicable in this case (Tr. 179, App. 546; P.T.O. Agreed Issues III, App. 369) and the District Court so found (F. 13, App. 1934; Tr. 1205, App. 1143-1144). The District Court found that Spokane's growth was "slow." (F. 19(b), App. 1938).

The objective evidence in support of this finding is strong and uncontroverted and establishes that the market is not attractive for alternative entry.

Out of the ten largest cities in Washington State, the City of Spokane ranks last in population growth from 1960 to 1970, having declined by 6.1 percent. As one of the 34 towns and cities in Washington with populations of 10,000 or more, Spokane ranks next to last (33rd out of 34) in population growth during this same period of time. An analysis of the population growth of the 72 SMSA's in the United States with populations from 200,000 to 400,000 as measured by the change from 1960 to 1970 reveals that Spokane places 64th. No trend toward vigorous growth or rapid population shifts is present in Spokane County either. Spokane County gained only 3.3 per cent in population from 1960 to 1970. Two neighboring counties declined during that period, Lincoln by 12.3 per cent and Pend Orielle by 12.9 per cent. All of the nine counties in Washington to lose population from 1960 to 1970 are east of the Cascade Mountains. DX 32, App. 1870, DX 33, App. 1871, DX 34, App. 1873, DX 1, App. 1832, DX 31, App. 1868.

Spokane area employment in seven out of ten major employment sectors declined from 1970 to 1971, including the agriculture, mining, construction, and manufacturing industries. From 1963 to 1971, employment in Spokane County increased 26 per cent slower than for the State as a whole. Employment for the State increased 24.9 per cent while Spokane County's increase was only 18.5 per cent. For the same time period, the total payroll lagged 20 per cent behind the entire state. The State's payroll increased

62.4 per cent. Spokane County's increase was 49.8 per cent. The average unemployment rate in the Spokane SMSA for 1961 to 1971 was almost 42 per cent greater than the average for the United States, 6.9 per cent for the Spokane SMSA compared to 4.8 per cent for the United States as a whole. In 1971, the Spokane SMSA's unemployment rate was 8.7 per cent, which in actual terms means over 10,000 Spokane residents were out of work. DX 3, App. 1834, DX 37, App. 1879, DX 51, App. 1914.

Spokane County's effective buying income increased little from 1965 to 1970 with the County ranking 37th out of the 39 counties in the State. As a percentage of the effective buying income for the entire country, Spokane County suffered a decline between 1960 and 1970 (DX 35, App. 1875, DX 6, App. 1837). The increase in commercial bank deposits in Spokane County from 1966 to 1970 was 13.8 per cent below the average increase for the United States and 33 per cent below the remainder of Washington excluding King County (DX 38, App. 1881). In terms of constant purchasing power, commercial bank deposits in Spokane County increased only 4.3 per cent from 1966 to 1970 and declined significantly by 8.3 per cent from 1968 to 1970 (DX 41, App. 1899).

Moreover, in 1960 the population per bank in Spokane was 2,937 below the average for similar cities in the nation while by 1972 this deficiency had grown to over 5,000 people per bank (DX 50, App. 1913). These figures do not include the two mutual savings banks and three savings and loan associations in Spokane (DX 22, App. 1858).

Spokane is already served by a large number of banking offices (Tr. 1046, App. 1053; DX-18, App.

1853; F. 19(b)(B), App. 1937-1938). A small office such as would be compatible with the limited amount of deposits that could be expected for the first five to ten years of a new bank could not house or support the full services of a bank such as NBC in Spokane (F. 19(b)(D), App. 1938-1939). The most significant objective evidence of the lack of economic feasibility of obtaining the procompetitive objectives of this merger through some alternative means is the debilitating effect of Washington's restrictive branching statutes on the competitive ability of the largest bank holding company west of the Mississippi, the $14 billion Western Bancorporation. Western Bancorporation entered Spokane through the acquisition in 1964 of the small, two office, Spokane National Bank by Bancorporation's subsidiary, the National Bank of Washington, Tacoma, Washington. In 1970 the name was changed to Pacific National Bank of Washington following the acquisition by Western Bancorporation of a bank with a similar name. At the end of 1972 Pacific National's two offices ranked last among the banks in Spokane, holding only 2.2 percent of the total deposits held by Spokane banks (GX A-55, App. 1220. Pacific National's net earnings in 1971 were down approximately 90 per cent from the previous year (GX A-65, App. 1230). Pacific National attributed its poor competitive performance in Spokane to its inadequate branching system in Spokane and the inability under Washington law to correct this problem by adding more branches (Tr. 1133-35, App. 1102-05).

F. The Proceedings Below Were Thorough and Proper.

1. The proceedings and decision of the Comptroller.

On March 9, 1971, appellee banks applied to the Comptroller of the Currency[7] pursuant to the Bank Merger Act of 1966, 80 Stat. 8, 12 U.S.C. 1828, et seq., for permission to merge Washington Trust Bank into the National Bank of Commerce of Seattle. As required by the Act, 12 U.S.C. §1828(c)(4), the Comptroller requested reports on the competitive factors involved in this merger from the Attorney General, the Federal Deposit Insurance Corporation (FDIC), and the Board of Governers of the Federal Reserve System.[8]

By his May 21, 1971, letter to the Comptroller, the Acting Director of Policy Planning for the Antitrust Division of the Justice Department, while noting that Spokane's population had decreased by 6.1 per cent from 1960 to 1970, concluded that NBC had "a very great incentive to enter" that city. Although acknowledging that because of Washington State's re-

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[7] The Bank Merger Act of 1966 provides that no insured bank may merge with or acquire the assets of another without the approval of the Comptroller of the Currency "if the acquiring, assuming, or resulting bank is to be a national bank or a District Bank." 12 U.S.C. § 1828(c)(2)(A).

The banks filed a comprehensive merger application with the Comptroller's Office, discussing among other things the benefits to the community's convenience and needs which would result from the merger. The Comptroller's Office assigned a National Bank Examiner to investigate the application and report to the Regional Administrator. The Regional Administrator then reviewed the entire matter and thereafter reported directly to the Comptroller in Washington.

[8] 12 U.S.C. § 1828(c)(4) requires that these competitive reports "shall be furnished within thirty calendar days."

strictive branch banking laws NBC could not enter Spokane by establishing a *de novo* branch, the Acting Director of Policy Planning advised that entry was possible nevertheless "in a manner competitively tantamount to *de novo* branching." It was suggested that such entry might be achieved by assisting in the chartering of a "new bank" in Spokane, through nominees, with which NBC might subsequently merge. This procedure, it was alleged, "is used not infrequently by the large Washington banks." Thus, the Department of Justice considered NBC as "the most significant potential entrant into the City of Spokane", and advised that its elimination as a potential competitor would adversely affect competition. The Comptroller was further advised that the merger would have other anticompetitive effects (P.T.O., Exh. B, App. 403-407).

To the contrary, the FDIC did not recognize any "procedure" for *de novo* entry and concluded that because of Washington State's branching restrictions the proposed merger "would not eliminate significant existing competition between the two banks or any significant potential for increased competition between them through *de novo* branching" (P.T.O. Exh. D, App. 411-413).

The Board of Governors of the Federal Reserve System noted the existing competition between the merger partners was minimal and found no unlawful effect upon potential competition because of the restrictive branching law in Washington State. Like the FDIC, the Federal Reserve Board in its advisory letter did not recognize any "procedure" for *de novo* entry by NBC into Spokane. The Board concluded that the competitive effect of the merger would be "adverse," which by the Board's definition means that the merger was not considered to be in violation of the antitrust laws [9] (P.T.O., Exh. C, App. 408-410).

On July 27, 1971, following the Justice Department's report, the Comptroller's Regional Office in Portland, Oregon, conducted a full investigatory hearing on the matter. The Antitrust Division was formally invited but did not attend and a transcript of the proceedings had to be mailed to it. The hearing confirmed the opinion of the Comptroller and his senior advisory staff that the acquisition would not eliminate NBC as a potential competitor and in any event would be beneficial to the convenience and needs of the Spokane area.

On September 24, 1971, the Comptroller approved the transaction, concluding that there was no adverse effect on competition and that the merger was in the public interest. His opinion stressed that Washington State's restrictive branching law precluded NBC from using the Justice Department's "procedure"

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[9] The word "adverse" when used by the Board means only that the effects of the merger on competition should be considered by the agency in analyzing the *banking* factors involved and do not rise to the level of a Clayton Act violation. Thus, in 12 C.F.R. 250.182 the Board has defined the term "adverse" as "one of the factors covered in the last sentence of paragraph (5) of § 1828(c) of 12 U.S.C." This is a reference to a sentence in the Bank Merger Act which reads: "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. § 1828(c)(5)(B). Since the Board's Opinion was written, the Court of Appeals for the Ninth Circuit has ruled that a banking agency (specifically the F.D.I.C.) has no authority to turn down on antitrust grounds mergers which do not violate the antitrust laws but are troublesome to the agency under this sentence. *Washington Mutual Savings Bank* v. *FDIC*, 482 F.2d 459 (9th Cir. 1973).

for *"de novo* branching", and that the only bank in Spokane smaller than Washington Trust could not be acquired under Washington State law. The Comptroller relied extensively on the resulting benefits to the convenience and needs of the community to be served.[10] The Comptroller found, *inter alia,* that the merger would serve the public interest of the Spokane area by bringing in a needed alternative source of superior banking services and by promoting competition among financial institutions. He found the merger would provide another source of broad range banking services to all in the area. Included in these services, most of which were unavailable from Washington Trust, were 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. Competition in mortgage lending, including FHA and VA loans, also would be provided. Through this merger, NBC would 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 Comptroller concluded that "the enhanced competition that this merger will produce will contribute to the convenience and needs of bank customers in Spokane" (P.T.O. Exh. A, App. 398-402).

[10] In their competitive reports the Department of Justice, the Federal Reserve Board and the F.D.I.C. restricted their comments to the competitive factors as they saw them and did not discuss convenience and needs. Pursuant to the Bank Merger Act, 12 U.S.C. § 1828(c)(4), these reports are confined to "competitive factors" alone.

2. The trial and the decision in the District Court.

At the time the trial of this case ended, the Department of Justice had tried and lost six consecutive potential competition bank merger cases.[11] At the end of trial, the District Judge delivered his opinion from the bench, recognizing that this case closely resembled the others, assuming *de novo* entry was possible. The Court upheld the Comptroller's determination that this acquisition was lawful and in the public interest.[12] The Court explained that in judging credibility of witnesses he had personally observed their demeanor, their manner, whether they hesitated in answering questions, and whether they did any investigative preparation for their testimony and thus found the testimony of the defendants' eco-

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[11] The trial ended on January 17, 1973. Some three months earlier, this court had heard oral argument in *United States* v. *First National Bancorporation, Inc.*, 329 F.Supp. 1003 (D. Colo. 1971), which was affirmed by an equally divided Court on February 28, 1973. 410 U.S. 577 (1973). The five other district court cases are as follows: *United States* v. *United Virginia Bankshares Inc.*, 347 F.Supp. 891 (E.D. Va. 1972); *United States* v. *Idaho First National Bank,* 315 F.Supp. 261 (D. Idaho 1970); *United States* v. *First National Bank of Maryland,* 310 F.Supp. 157 (D. Md. 1970); *United States* v. *First National Bank of Jackson,* 301 F. Supp. 1161 (S.D. Miss. 1969); *United States* v. *Crocker-Anglo National Bank,* 277 F.Supp. 133 (N.D. Cal. 1967). In none of these cases was the alternative means of entry alleged by the plaintiff so frustrated by state regulatory and legal barriers as in the instant case. This Court in *First National Bancorporation, supra*, for example, was not confronted with any collateral issues relating to branching and bank holding company law. The district court in that case did recognize the Comptroller's position on chartering to be objective evidence contraverting plaintiff's theory of alternative entry. 329 F.Supp. at 1015.

[12] The District Court remarked that both the Comptroller and the Department of Justice were equally interested in the public interest and that "no one has a monopoly on the public interest."

nomists Haywood and Baxter to be more credible than that of plaintiff's expert. Tr. 1083-1084, App. 1074; Tr. 1195-1198, App. 1138-1140. The Court concluded that NBC had no incentive to enter Spokane on a small scale because of Pacific National's ineffective performance. Tr. 1197-1198, App. 1139-1140. The District Court found no "wings effect" largely for the same reason (Tr. 1198, App. 1140). Furthermore, the court recognized the regulated nature of banking and that public policy required that banks be kept from "the ragged edge" through limitations on entry (Tr. 1199, App. 1140). The Court also recognized that the nature of the banking business makes it vastly different from grocery stores, department stores and the like. Tr. 1198-99, App. 1140, Tr. 1201-1202, App. 1142. The District Court concluded that in this case plaintiff failed to prove the facts to support its potential competition theory. Tr. 1201, App. 1141.[13]

Two weeks later, on January 31, 1973, a hearing was held and final judgment was entered.[14] At that time the District Court, having considered them in the interim (App. 1920), entered its findings of fact and conclusions of law. The Court found that market shares as measured by deposits did not establish that the Spokane banking market was not competitive. F. 22, App. 1940; Tr. 1196-1197, App. 1139. The Court also found that the prospects for a new bank in Spo-

[13] Counsel were then directed to prepare the Findings of Fact and Conclusions of Law in accordance with the District Court's oral opinion, Tr. 1206-1207, App. 1144-1145. The court noted that it might not agree with the findings as drafted and reserved entry of final judgment until "[a]fter I look at those Findings." Tr. 1209-10, App. 1146-47.

[14] App. 1920-1931.

kane were poor and in fact it was unreasonable to assume one would be chartered. F. 19(b)(C), App. 1938; Tr. 1203, App. 1143. The Court further found that even if NBC entered Spokane through plaintiff's three-step "sponsored bank procedure" such a limited entry would have no significant competitive impact on the Spokane banking market (F. 20, App. 1939; Tr. 1197-1198, App 1139-1140), and that NBC would have no incentive to enter Spokane in such a manner (F. 19(b)(C) and (D), App. 1938-1939; Tr. 1197-1198, App. 1139-1140).

SUMMARY OF ARGUMENT

I. Although this is an antitrust case which comes directly to the Supreme Court on appeal from a decision of a district court, the rule of appellate review is no different than in other matters. The function of this Court is not to decide factual issues de novo, and the findings and conclusions of the district court can be set aside only if they are clearly erroneous. Nevertheless, plaintiff, in effect, is seeking a trial de novo on the facts.

II. The findings of fact by the District Court in this case are well supported by the evidence.

(A) The District Court found that the Spokane Metropolitan Area was the relevant geographic market. The parties agreed that the Spokane Metropolitan Area was a relevant geographic market and plaintiff's economist witness considered only the stipulated Spokane Metropolitan Area as a relevant market. Plaintiff offered no testimony or proof to show any other area as a relevant market.

(B) The plaintiff and the Comptroller are agreed that commercial banking is the relevant line of commerce in this case and the District Court so found. However, the District Court might indeed have found a broader line of commerce since the existence of large mutual savings banks within the market is recognized by the bank regulator in determining whether to permit new entry and this Court should recognize that factor.

(C) NBC and Washington Trust do not presently compete in Spokane or any other revelant banking market in Washington and the parties so stipulated prior to trial. Thus, there is no vestige of actual competition between the merging banks involved as an issue in this case.

(D) Plaintiff's argument is that the merger will eliminate potential future competition between the merging banks. However, virtually insuperable barriers exist to entry by the National Bank of Commerce into Spokane, the only relevant geographical market as to which evidence was introduced. All parties are in agreement that Washington State prohibits NBC's holding company, Marine Bancorporation, from chartering a subsidiary bank in Spokane which could have more than a 25 per cent control or ownership interest, and Washington State's branching law law prohibits NBC from obtaining de novo branches in Spokane. Plaintiff argued that the law might be circumvented by NBC's agents chartering a national bank which could then be obtained by NBC. But the uncontradicted objective evidence shows that in these circumstances and under the Comptroller's chartering standards a new national bank charter would not be granted for Spokane in the foreseeable future. Plaintiff's proposed method of circumventing of state law is not recognized by the

Comptroller and is not a recognized or reasonable business practice. The District Court rejected a proposed finding that plaintiff's scheme to circumvent state law is a recognized or reasonable business practice.

(E) NBC has no incentive to enter Spokane for a small foothold acquisition since it could not under Washington law branch from such an acquired bank, and other banks which have tried this route of entry suffered extremely disappointing economic experience.

(F) Even though the Spokane market was the only market considered by the parties, the evidence shows that Washington Trust had neither the capacity nor the incentive to expand beyond the Spokane market and the District Court so found. Washington Trust is a limited service bank which has never acquired another bank.

(G) The District Court found that the entry of NBC in Spokane through the acquisition of Washington Trust Bank would have the direct and immediate effect of substantially increasing competition by replacing the limited service Washington Trust Bank with a full service bank able to compete effectively in areas requiring specialization and expertise.

(H) Substantial benefits to the public interest in meeting the needs and convenience of the public would be achieved by providing an additional source of financing for the independent small and medium sized businessmen of the area, particularly in the lumber products industry; by providing an alternative source of international banking services; by providing needed source of conventional as well as VA and

FHA home financing; by helping fill the agricultural lending needs in the Spokane area and region; by providing alternative source of financing for local and municipal governments; by providing needed student loans; and by providing needed lending capacity for installment lending, term loans on plant equipment, and SBA loans.

III. (A) Examination of the prior decisions of this Court clearly show that § 7 applies only to mergers where the anticompetitive effect is reasonably probable, and that "potential competition" means competition which is "sufficiently probable and imminent" to come within this criterion.

(B) Nevertheless, plaintiff is apparently using the term "potential competition" in the dictionary sense of the word "potential" which means "possible as opposed to actual." Plaintiff's case is based on the *possibility* rather than the *probability* of some hypothetical alternative mode of serving the purposes of the merger. This leads plaintiff into a number of fallacies, errors and inconsistencies in argument. For example, in the Washington case plaintiff argues that the provision of additional banking services is not an aspect of banking competition, whereas in the Connecticut case plaintiff argues that differences in evening hours of service are an aspect of banking competition.

(C) Plaintiff's literal absolutist view leads to the argument that any lessening of merely possible future competition is forbidden by § 7. This, in turn, leads plaintiff to the ultimate paradox that any increase in actual competition by the entry of a new competitor is forbidden because it will result in a lessening of potential competition. The paradox is illustrated in this case where plaintiff would prevent the increased competition resulting from a limited service bank in the market becoming a full service bank in order to preserve some theoretical "potential competition" which could not, in any event, conceivably provide equivalent actual competition. Plaintiff's argument is contrary to common sense and also to the intent of Congress, as stated by this Court in *Brown Shoe* (370 U.S. at 319), and to rational antitrust analysis.

(D) The reasoning by which plaintiff uses "potential" to mean "possible as opposed to actual" is the reasoning on the basis of which every authoritarian government in recent history has persecuted its "potential enemies." This leads to the situation in which accusation is tantamount to conviction and in which due process is lost and civil rights are abolished. The ultimate logic of plaintiff's theory would endanger not only the competitive system but the civil liberties of all citizens.

IV. It is well established by decisions of this Court that "section of the country" means the same as "relevant geographical market." Nevertheless, plaintiff argues that the two terms are not synonomous and that it can discern some anticompetitive effects in areas which are not relevant geographical markets. It erroneously cites the *Pabst Brewing* case (374 U.S. 546) for this. Plaintiff makes the same argument in both the Washington and the Connectitcut cases, and it leads to similarly absurd conclusions. Basically plaintiff contends that it need not specify either the geographical area or the particular possibility of anticompetitive effect if it merely mutters the incantation of "potential competition." This clearly is not the law.

V. In order to specify any possible future competition between the merging banks in either of the companion cases before the Court, plaintiff is forced to propose a procedure by which the banks might, hypothetically, circumvent the state laws in order to become competitive with each other. Plaintiff's proposals are clearly questionable and hazardous legally, at best, and therefore cannot be considered as prudent or probable courses for a banker to undertake. Furthermore, if plaintiff's schemes were successfully undertaken they would undermine and weaken the dual banking system, which is responsible for making banking in this country one of the most competitive fields. Therefore, plaintiff's proposals in these bank merger cases would ultimately be far more anticompetitive in effect than any proposed bank mergers.

VI. The proper and reasonable meaning of "potential competition" in antitrust law is "probable entry," or, more precisely, "probable and imminent entry." The economic purpose of entry is to increase competition by increasing supply. However, the potential competition theory is not logically applicable in a field like banking because both entry and supply are controlled by government, not by market forces. Entry into the field of national banking is subject to the discretionary permission of the Comptroller; and the money supply of the country is regulated by the Federal Reserve Board. Furthermore, entry into the field of banking is limited to protect the solvency and stability of banks. Therefore, entry depends upon the needs and convenience of the community. Consequently, in order to prove probable entry it is necessary to prove that the entry will serve the needs and convenience of the community. Therefore, the logic of the potential competition theory in the field of banking destroys the distinction between the analysis of competition and the analysis of convenience and needs, and shifts the burden of proving that the potential alternative to the assailed merger will better serve the convenience and needs of the community from defendants to plaintiff. The statutory plan and the economic logic of the banking system combine to show that the theory of potential competition is simply not applicable to the field of banking.

VII. It is clear that in antitrust, as in other cases, plaintiff has the burden of proof of all the elements of the statutory violation charged. In this case plaintiff has failed to produce evidence to prove any of the elements of a violation of § 7. The principal point of contention has been the competitive impact of the merger. On this point, plaintiff has failed to offer evidence either to show any anticompetitive impact from the merger or any probable alternative to achieve the same purposes. Plaintiff has offered only an abstract theory of hypothetical possibilities.

VIII. All of the objective evidence shows that the merger will have a procompetitive effect on actual competition and will provide numerous other benefits to the public. The Court found that NBC's acquisition of Washington Trust was a more procompetitive means of entry than de novo entry and the record demonstrates that a newly chartered bank, even if possible, would not be competitive for a period of ten years.

IX. Plaintiff argues that the District Court could not properly make findings on convenience and needs because it arrived at what plaintiff regards as an in-correct conclusion on the competitive issues in the case. Plaintiff relies on the *Nashville Bank* case (390 U.S. 171) for this argument. However, that case expressly states that a court can make findings on convenience and needs even though it finds no anticompetitive effects. (390 U.S. 184, n. 17) Furthermore, in a potential competition case all consideration of competition is necessarily hypothetical and assumed. The Bank Merger Act explicitly requires the courts to consider convenience and needs in *all* bank merger cases. Therefore, plaintiff is clearly wrong in arguing that the District Court was precluded from making findings on convenience and needs, regardless of the findings it made on the issue of competition.

X. This Court has said that under the Bank Merger Act the ultimate test of the validity of a bank merger is the public interest determined by weighing both the impact on competition and the convenience and needs of the public to be served by the merged bank. Where there is extinction of actual competition between two banks, substantial benefits must be shown to outweigh the disadvantages of lessening competition. However, where the alleged anticompetitive impact consists only of lessening potential competition it is obvious that the weight of the competitive element must be considerably less than when actual competition is involved. In any event, the findings of the District Court showing the many benefits to the needs and convenience of the public from the proposed merger are more than adequate to show the validity of the merger under any standard.

ARGUMENT[15]

I. THE FINDINGS OF FACT OF A DISTRICT COURT MAY NOT BE OVERTURNED UNLESS CLEARLY ERRONEOUS

This Court has made it abundantly clear that appellate courts "must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In the context of an antitrust case, the Court has declared that findings of fact cannot be set aside as "clearly erroneous" merely because the Court might give the facts another construction, resolve the ambiguities differently, or find a more sinister cast to actions which the lower court deemed innocent. *United States* v. *Nat'l. Ass'n. of Real Estate Boards,* 339 U.S. 485, 495-96 (1950). Even in antitrust cases in which the Government is

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[15] The instant case is one of two bank merger cases now pending before this Court and in which tandem argument has been ordered. The two cases are *United States* v. *Marine Bancorporation, Inc., et al.*, No. 73-38, arising in the State of Washington, and *United States* v. *The Connecticut National Bank, et al.*, No. 73-767, arising in the State of Connecticut. The Comptroller of the Currency is a party in both cases. Since the issues in the two cases are similar or identical in many respects, and since the position of the Comptroller is essentially the same in both cases, the arguments presented on behalf of the Comptroller are necessarily the same in several parts of the briefs. In addition, it has been deemed appropriate to compare or contrast the arguments of plaintiff in the two cases. Thus sections I, III, IV, V, VI and IX of the Argument in the Comptroller's briefs are essentially identical in the two briefs. Reference is made to both cases in the brief in each case. No. 73-38 is referred to as the Washington case and No. 73-767 is referred to as the Connecticut case. References to plaintiff's briefs in these cases are similarily differentiated. Plaintiff's brief in 73-38 is referred to as "Pl. Wash. Br." and plaintiff's brief in 73-767 is referred to as "Pl. Conn. Br." References to plaintiff's brief without identification as "Wash." or "Conn." are references to the brief of plaintiff in the instant case.

the appellant, reviewing courts do not have the discretion to engage in the equivalent of a trial *de novo* of disputed facts. *United States* v. *E.I. duPont de Nemours & Co.,* 351 U.S. 377, 381 (1956). As this Court stated in *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341 (1949):

> 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 this Court for what 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 the evidence is not "clearly erroneous."

The Court again reminded us of this basic rule several weeks ago when it stated in *United States* v. *General Dynamics Corp.,* slip opinion at 21 (No. 72-402, decided March 19, 1974):

> Finally, the Government contends that the factual underpinning of the District Court's opinion was not supported by the evidence contained in the record and should be reevaluated by this Court. The findings and conclusions of the District Court are, of course, governed by the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals. The record in this case contains

> thousands of pages of transcript and hundreds of exhibits. Little purpose would be served by discussing in detail each of the Government's specific factual contentions. Suffice it to say that we find the controlling findings and conclusions contained in the District Court's careful and lengthy opinion to be supported by the evidence in the record and not clearly erroneous.

The District Court below entered comprehensive and concise findings of fact. These findings were carefully considered and certain of them even reconsidered when, at the Las Vegas hearing on Plaintiff's Motion to Amend the Findings, the District Court reiterated the basis upon which its decision was founded. Plaintiff now attempts to raise some specific issues regarding certain of the District Court's findings of fact under the guise of characterizing them as errors of law. Pl. Br., p. 27. Plaintiff's obvious purpose is merely to overturn the District Court's findings of fact which cannot be achieved unless these findings are demonstrated to be "clearly erroneous."

II. THE FINDINGS OF FACT BY THE DISTRICT COURT IN THIS CASE ARE WELL SUPPORTED BY THE EVIDENCE.

A. The Spokane Metropolitan Area Is the Relevant Geographic Market.

Prior to trial, the parties agreed that the Spokane Metropolitan Area was a relevant geographic market within which the competitive effects of the merger should be assessed. (P.T.O. Agreed Issues III, p. 6, App. 369). Plaintiff's economist considered only the stipulated Spokane Metropolitan Area as the relevant market, carefully excluding all other areas from consideration.[16] (Tr. 64, 166-167, App. 481, 538). Consequently, the District Court found that the Spokane Metropolitan Area was the relevant geographic market. (F. 13, App. 1934).

At trial, plaintiff offered statistical exhibits containing figures of assets, deposits and loans for banks in other areas in Washington (See, GX A-1 through GX A-39, App. 1148-1202). However, plaintiff failed to offer any testimony or other proof to show that any of these "areas" was a relevant market. This Court has consistently required such a showing to establish any particular area as a section of the country within which to analyze competitive effects under § 7.[17] See, *e.g., United States* v. *Continental Can Co.,* 378 U.S. 441, 447 (1964). Despite the fact that plaintiff's statistical exhibits casually list together various banks without concern as to whether the banks so grouped actually compete,[18] plaintiff's economic expert used them as so-called "concentration" ratios from which he concluded banking was structurely not

[16] Despite Professor Smith's refusal to consider the State or eastern Washington to be relevant markets, plaintiff argues this acquisition will result in a lessening of competition in such areas. Pl. Br., 36. Plaintiff argues that while they may not be traditional "banking markets" under *Philadelphia National, supra,* such other areas in Washington may constitute a "section of the country" within the meaning of § 7. However, in making such an argument, plaintiff again seeks to retry its case in this Court, having stipulated prior to trial that "section of the country" is a relevant geographic market within the meaning of Section 7. P.T.O., Agreed Issues, p. 6, App. 369. See Section IV *infra.*

[17] In contrast, the Department of Justice in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), offered witnesses from 40 cities concerning the relevant markets and the merger's effects on competition within them. 370 U.S. at 340. See also, *United States* v. *Philadelphia Bank,* 374 U.S. 321, 359 (1963).

[18] See App. 650-651.

competitive in Washington State.[19] Lacking evidence of the relationship of these groupings to bank competition, the District Court properly refused to find that banking was "concentrated" in the sense that plaintiff alleged it was not competitive, and found instead that the Spokane market is competitive. F. 22, App. 1940.[20]

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[19] Although plaintiff admits that not all counties are banking markets and Professor Smith testified that the "determination of concentration" first requires a determination of a *relevant geographic market* (Tr. 64, App. 481), plaintiff nevertheless asserts that this kind of evidence reflects an anticompetitive state of affairs having some sort of bearing on this case (Pl. Br., 6, n. 4).

Plaintiff's brief on the merits attempts to link NBC and Seattle First National Bank through a statement as to the number of Washington counties where "one or the other operates," citing GX A-23, App. 1173, and GX A-25, App. 1181. What these documents really show is that in the State of Washington, with its restrictive branching laws, either NBC or Seattle-First operates without the competitive presence of the other in *at least* 15 out of the state's 39 counties. The phrase "at least" is used because the fact that two banks are located in the same county says nothing about whether those two banks actually compete. For example, NBC has branch offices in Spokane County, but plaintiff recognizes that these two banks do not compete with each other in Spokane County. Pl. Br. 4, n. 1.

[20] In its Motion for Additional Findings (District Court pleading file, p. 582), plaintiff asked the District Court to find that banking in the State, in eastern Washington, in Spokane County and the Spokane Metropolitan Area was "concentrated." At the hearing in Las Vegas, Nevada, plaintiff's counsel pointed out to the Court "that as a legal point, as a legal matter we would say that concentration is related to performance, competitive performance of banks in the market." App. 1954. The Court recognized that what plaintiff sought was a finding that banking in the alleged "sections of the country" was "not competitive" and quite properly refused to make that finding. App. 1955-1956.

B. The Relevant Line of Commerce Is Commercial Banking in This Case.

In bank merger cases involving an elimination of direct and substantial competition, this Court has previously held that the cluster of products and services denoted by the term "commercial banking" composes a distinct line of commerce. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 356; *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. at 360. The District Court below found that the relevant line of commerce here was commercial banking. F. 11, App. 1934.

The District Court might indeed have found a broader line of commerce. The Comptroller urges this Court to recognize that in a potential competition bank merger case there may be reason to consider non-commercial bank competitors in measuring the competitive nature of the market where the acquiring bank is alleged to be a potential entrant.[21] Thus, Dr. Haywood, an economic expert for the banks, testified that the two large mutual savings banks in Spokane[22] could not be ignored when assessing the nature of banking competition there. (Tr. 350, App. 645). While not relevant in considering the line of commerce in a horizontal bank merger case, the existence of large mutual savings banks within a banking market becomes a factor in a potential case be-

[21] Of course, where there is a reasonable probability that savings banks will in effect be comparable to commercial banks because of a legislative change permitting demand deposits to be offered, there can be no reason not to broaden the line of commerce accordingly, as the District Court did in the companion case from Connecticut.

[22] Fidelity Mutual Savings Bank (deposits over $304 million) and Washington Mutual Savings Bank (deposits over $1 billion).

cause such competition is very definitely recognized by the bank regulator in determining whether to permit new entry.[28] See *United States* v. *First National Bank of Maryland,* 310 F.Supp. 157, 168 (D. Md. 1970).

C. NBC and Washington Trust Bank Do Not Compete.

As stipulated by the parties prior to trial, NBC and Washington Trust do not presently compete in Spokane or any other relevant banking market in Washington. P.T.O. Agreed Issues IV, p. 6, App. 369. Plaintiff concedes that this acquisition will not increase demand deposit concentration in the Spokane banking market. Pl. Br. 30, 56. Thus, the merger would create no change in competition from which a probable substantially adverse effect on competition might be inferred. Indeed, plaintiff's entire case rests upon the bare assertion that competition in the Spokane banking market would be better served if NBC were required to enter *de novo* as an additional competitor instead of through the acquisition of Washington Trust even though the merger would create immediate and certain intensification of competition.

NBC operates two branch offices beyond the periphery of the Spokane banking market, in Medical Lake, 15 miles west of Spokane, and Deer Park, 20 miles north of Spokane (GX L-1, p. 43, App. 1739). Because of the distance of these branches from Spokane, they have negligible effect on banking competition in Spokane. *Cf. United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 358, n. 35, 360.

[28] The Comptroller of the Currency routinely considers all financial institutions in determining whether there is a need for another bank or branch of a bank in a particular market. See, for example, *Camp* v. *Pitts,* 411 U.S. 138, 139, n. 2 (1973).

The notion that these branches could exert a substantial present procompetitive effect on the Spokane banking market, as advanced by plaintiff's economist, Professor Smith,[24] is utter nonsense because banking is local in Spokane and because the branches cannot be moved into Spokane.

D. NBC Is Not a Potential Entrant into Spokane in Any Realistic Sense.

One major respect in which this case differs from such cases as *United States* v. *Falstaff Brewing Corp.* 410 U.S. 526 (1973), is that Falstaff, having carefully considered entering the New England beer market *de novo,* could have built as many breweries as it deemed necessary to compete adequately. There was no regulatory authority from which permission to enter was required, nor was there any state regulatory scheme to overcome. Here, the acquiring firm, NBC, because of Washington State's restrictive laws regulating geographic expansion of banks, cannot enter the market area of the acquired firm, Washington Trust Bank, except perhaps on an uneconomic scale at some indefinite future time. Any acquisition of a small Spokane-based bank would immediately freeze the number of branches at the existing level.

All parties are in agreement that Washington State prohibits NBC's holding company, Marine Bancorporation, from chartering a subsidiary bank in Spokane in which it could have more than a 25 percent control or ownership interest. See R.C.W. 30.04.230.[25]

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[24] Tr. 106, App. 504.

[25] In *United States* v. *First National Bancorporation, Inc.,* 410 U.S. 577 (1973), Bancorporation unquestionably could have entered Greeley, Colorado, through a wholly-owned subsidiary bank if it could have obtained a charter. Likewise, in all of the other 16

Moreover, Washington State's branching law prohibits NBC from obtaining *de novo* branches in Spokane. See R.C.W. 30.40.020. Plaintiff nevertheless contended at trial that NBC could obtain a branch in Spokane by acquiring a national bank not yet in

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states listed in the appendix to plaintiff's brief (p. 72), state law does not prohibit a bank holding company from owning or controlling more than 25 per cent of more than one bank, as is the case in Washington State. Plaintiff's reliance on this additional "evidence" is illogical as none of the transactions referred to in this appendix would be permitted under Washington law. R.C.W. 30.04.230. Federal law defers to such state statutes. See Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1846.

Similarly, history subsequent to *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), to which plaintiff makes reference (Pl. Br., 47-48) is not relevant here. In that case, the Comptroller had permitted First National Bank of Logan, Logan, Utah, to establish a *de novo* branch even though Utah State law prohibited a State bank from establishing a branch except by taking over an existing bank which had operated not less than five years. See Utah Code Ann., Tit. 7, c. 3, section 6 (1965 Supp.). Commenting that the Comptroller's "pick and choose" argument was "strange," this Court held that the Comptroller and national banks were bound by "method" restrictions imposed by State branching law. 385 U.S. at 261-262. Consequently, First National Bank of Logan's branch which had been open since 1963 had to be closed in 1968 and all of the directors of First National chartered a new national bank at the same location shortly thereafter. Five years after that time, pursuant to Utah law, First National acquired that bank, and the matter was so described in the Comptroller's opinion to avoid possible antitrust problems since the branch was quite near the main office. These circumstances are markedly different from the circumstances of the present case. A major difference obviously is that the bank branch authorized by the Comptroller was not authorized for the purpose of subsequently changing its status. Another difference is that the charter was issued to prevent an operating banking office from going out of existence. The most important distinction is that if all of NBC's directors were to become directors and own most of the stock of a newly chartered national bank in Spokane, Marine Bancorporation's charter would surely be placed in jeopardy under the provisions of RCW 30.04.230.

existence but which would be chartered by NBC's agents. Pl. Br., p. 16.[26] The banks' position is that plaintiff's branching "procedure" is a patently illegal circumvention of Washington's restrictive branching law. (Bk. Br., pp. 50-63).[27] However, this issue was not reached by the District Court. The Court assumed *arguendo* NBC could enter through plaintiff's "procedure" and, since no anticompetitive effect was found even under that assumption, there was no reason to rule on the procedure's legality. (See Tr. 19, 303-304, App. 456, 617-619, 1929). However, even if the District Court had determined the "procedure" to be lawful and that such entry has antitrust consequences, the uncontradicted objective evidence shows that under the Comptroller's chartering standards a new national bank charter would not be granted for Spokane in the reasonably foreseeable future. F. 19(b)(c), App. 1938. Compelling evidence for this conclusion was testimony by the Regional Administrator of National Banks that in his judgment there was no need for a new national bank in Spokane.[28] There is considerable objective evidence in sup-

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[26] Plaintiff has also suggested that NBC could enter Spokane by acquiring an existing bank there. However, American Commercial Bank cannot be acquired under Washington State law. Farmers and Merchants Bank is located in an eastern Spokane suburb and would not afford NBC entry into Spokane.

[27] The Comptroller would not charter a bank for NBC solely to allow NBC to obtain a branch office in Spokane. Tr. 975, App. 1011. The Comptroller of the Currency stated in an October 9, 1973, speech before the 99th Annual American Bankers Association that he would "not employ contrived and tortured interpretations of state law" to foster branch banking.

[28] See *Camp* v. *Pitts*, 411 U.S. 138 (1973), wherein the Comptroller denied a charter application because he was "unable to reach a favorable conclusion as to the need factor."

port of this testimony, most of it relating to the Spokane economy. See pp. 15-18, *supra*.

To have any validity whatsoever, plaintiff's theory of a "sponsored bank procedure" must overcome the indisputable proposition that "[e]ntry is, of course, wholly a matter of governmental grace." *United States* v. *Philadelphia National Bank, supra,* 375 U.S. at 367, n. 44. Plaintiff has attempted to carry this burden by creating a new rule of law requiring that a national bank charter be granted whenever any applicant can establish that a "market is undergoing reasonable growth and the existing banks are profitable." Pl. Br., 51. We are told further that a new national bank charter may only "properly" be refused by the Comptroller if it "might threaten the stability of existing banks." Pl. Br. 52. Thus, plaintiff seeks to prove that NBC is a potential entrant into Spokane by devising a "three-step procedure" and then postulating its own entry standards, the primary one being "more is better," regardless of all other considerations.[29]

The Comptroller's chartering standards are not susceptible to capsule summary. Congress intention-

[29] Plaintiff's economic theory as explained by Dr. Smith is: "When you have a concentrated market, the time when you get competitive performance in a most probable way is when you have *overcapacity* in that particular industry. Now, if the regulatory agencies would allow banks to come in more freely, then I would think that you would have a *chance* to get a competitive performance" [emphasis added]. Tr. 160, App. 534. The District Court remarked that the lower bank chartering standards which plaintiff advocated "would be kind of tough on the FDIC." Tr. 160, App. 535. The defendants' expert banking economist Dr. Haywood testified that any discussion of new entry into banking markets to increase the number of competitors invades the Comptroller of the Currency's area of responsibility. Tr. 345-346, App. 642-643.

ally gave the Comptroller great discretion as to what factors should be determinative in ruling on specific charter applications. See 12 U.S.C. 26 and 27. The Comptroller is specifically authorized to rely upon "appear[ances] and "suppos[itions]" (See 12 U.S.C. 27) and weighs "congeries of imponderables . . ., calling for almost intuitive special judgments." *Webster Groves Trust Co.* v. *Saxon,* 370 F.2d 381, 384-385 n. 1 (8th Cir. 1966). Furthermore, the Comptroller's chartering decisions are subject only to limited judicial review. An individual or group aggrieved by an action of the Comptroller regarding a charter application, for example, must, to obtain relief, demonstrate that the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Camp.* v. *Pitts,* 411 U.S. 138 (1973). Where the facts support the Comptroller's decision, even though another decision could also be rationally arrived at through consideration of the same facts, a court cannot reverse the Comptroller's exercise of discretion in favor of its own view of the merits. *Sterling National Bank of Davie* v. *Camp,* 431 F.2d 516, 514 (5th Cir. 1970), *cert. denied,* 401 U.S. 925 (1971).

Plaintiff's desire to limit the Comptroller's statutory authority to exercise considerable discretion in passing on national bank charter applications is understandable in the present context since without an alternative means of entry NBC cannot possibly be a potential competitor in relation to the Spokane banking market.[30] However, plaintiff's suggested lowering

[30] Counsel for the Department of Justice stated at trial:

Yes, your Honor, it is our position that it would be imof chartering standards to foster competition is without *any* statutory or judicial foundation whatsoever. *Cf. First National Bank of Catawba County* v. *Wachovia Bank & Trust Co., N.A.,* 325 F.Supp. 523 (M.D. N.C.), *aff'd per curiam,* 448 F.2d 637 (4th Cir. 1971).

The evidence establishes that plaintiff's "procedure" for branching is not a recognized or reasonable business practice. Plaintiff variously says its branching "procedure" is (1) "a well-recognized practice used by large statewide banking organizations" (Pl. Br., 15-16) or (2) "has been used by another large Washington Bank" (Pl. Br., 24). Plaintiff further contends that "[i]n the last decade, the sponsored bank procedure has become an established method by which national banks enter new markets in Washington" (Pl. Br., 16). Once again, plaintiff's assertions are not supported by the record.

There is no evidence whatsoever that the Comptroller and the other federal banking agencies recognize a three-step "procedure" by which national banks in Washington can obtain branches in areas foreclosed to *de novo* branching. None of the various documents plaintiff offered and cites as authority for this proposition refer to any such "procedure." The late board chairman and attorney for Spokane's Old National Bank of Washington, Mr. W. W. Witherspoon, testified that he would not even consider using such a scheme to enter a metropolitan area (Tr. 295, App. 614), and indeed, plaintiff has never

possible for the Court to find that this merger was anticompetitive under the theory of potential competition, unless they (NBC) could get into Spokane by some other means.
(Tr. 303, App. 618).

even suggested that its "procedure" has been used to enter a metropolitan city.[31] Significantly, the record shows that since this Court's decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966), no national bank has been chartered in Washington State and subsequently acquired by another bank. Plaintiff's own statistical exhibit indicates that a grand total of three national banks have been chartered in Washington since 1965, a fact which taken alone destroys the "sponsored bank procedure." [32] (GX A-40, App. 1203). Plaintiff apparently fails to realize, moreover, that if its "procedure" were a well recognized and useful method of expansion into areas foreclosed to *de novo* branching then there should be examples of national banks increasing the number of branches they have in cities where they are not headquartered. The record shows no such examples.

Other objective evidence shows that plaintiff's three-step "procedure" is not a reasonable business practice. The "procedure" first requires that a new national bank be chartered (and assumes that it would be chartered) in which NBC, through its parent organization, could not have more than a 25 per cent ownership interest.[33] For some undefined

[31] Plaintiff introduced no evidence whatsoever to support its position that Spokane banks feared NBC's entry there through this three-step "procedure."

[32] GX A-40 and 41, App. 1203 and 1204-1205, erroneously indicate that two national banks were chartered in Washington in 1972. The Tacoma Commercial Bank is not a national bank. See, *American Bank Directory,* Spring 1973, p. 4116.

[33] Plaintiff suggests that NBC's agents could own the remainder of the stock. We believe the principles of agency law adequately

period of time, NBC would be expected to exert some kind of controlling influence over this bank which it cannot legally control. At some future date NBC is supposed to "convert" this bank to a branch office. The legal and practical pitfalls implicit in this "procedure" are never so clearly demonstrated as in the case of a bank assisted by NBC, Columbia Center National Bank, where the Comptroller denied the first charter application because he believed there to be an undisclosed agreement to sell the bank to NBC. Only after officials from NBC and the proposed new bank stated in writing that no such agreement or understanding existed did the Comptroller grant the second charter application, more than two years after the initial application was filed (GX K-36, App. 1514-1515; GX K-37, App. 1516-1517). Columbia Center National Bank has not been acquired by NBC.[34]

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answer this contention. *Cf. Independent Bankers Association of Georgia, Inc.* v. *Dunn,* 230 Ga. 345, 197 S.E.2d 129, 139 (1973).

[34] See generally, GX K-1—K-94, App. 1431-1695. These documents alone demonstrate that plaintiff's "procedure" is not a reasonable business practice. At least one writer, an attorney with the Antitrust Division of the Department of Justice, has recognized that plaintiff's "procedure" is not a reasonable business practice, suggesting that if a bank were to be successful in overcoming problems of control, legal objections, and securing regulatory approval, there would be no guarantee that the Department of Justice would not challenge the merger under Section 7 of the Clayton Act. See, Comment, *Bank Branching in Washington: A Need for Reappraisal,* 48 Wash.L.Rev. 611, 626-628 (1973). Apparently, the Justice Department has no qualms about filing suit under Section 7 to enjoin a merger even though it characterizes the ownership relationship between the banks as comprising "a loose-knit affiliation that is inherently unstable." Jurisdictional Statement, p. 17, *United States* v. *Trans Texas Bancorporation, Inc.,* 412 U.S. 946 (1973). Thus, if one assumes a sufficient arms-length relationship between NBC and Marine Bancorporation and

Notwithstanding this strong objective evidence demonstrating that there is no "well-recognized" three-step branching "procedure" plaintiff specifically requested at the Las Vegas hearing on its Motion for Additional Findings that the District Court find the "procedure" to be an established method by which national banks in Washington have established branches in areas where *de novo* branches could not have been established. This finding was rejected. App. 1959.

E. NBC Has No Incentive To Enter Spokane Through a Small Foothold Acquisition.

NBC's past and present executive officers testified that NBC would not consider attempting entry into the Spokane metropolitan area on a limited service basis comparable to that of a newly organized bank. Tr. 699, App. 850; Tr. 871, App. 951. This testimony was in large measure based upon objective evidence of the "disappointing" experience by Pacific National Bank of Washington's small scale entry into Spokane. App. 847-848; App. 951-952. Spokane is served by a large number of banking offices, which would place a new entrant at a severe competitive disadvantage if it were limited to a single office and unable to establish additional branches. DX 18, App.

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the bank which plaintiff would have these defendants utilize to obtain a branch, the acquisition which would provide this branch still must pass muster under §7. Furthermore, the kind of dominion plaintiff argues NBC would have over a new "independent" national bank (See Pl. Br., p. 50) apparently has been the subject of a Sherman Act charge for illegal restraint of trade in violation of Section 1 of that Act (15 U.S.C. §1). See *United States* v. *Citizens and Southern National Bank*, Civ. No. 15823, Par. 74,904 CCH Trade Reg. Rep. (N.D. Ga., Jan. 25, 1974). Notice of appeal has been filed in this case.

1853; Tr. 1046, App. 1053. Unless it could have an adequate branch system, NBC would not be interested in entering Spokane (Tr. 704, App. 853) and, as stated above, Washington's law prohibits NBC's branching within Spokane from an acquired bank.

Moreover, if NBC were to enter Spokane by acquisition of a newly chartered, single-office national bank, it would not be feasible to provide the full range of banking services which would be available immediately through this acquisition.[35] Tr. 69, 352, 353, 910, 1053, 1133-1135, App. 484, 646-647, 973, 1056, 1103-1104. NBC has better alternatives than to enter Spokane on such a small scale. Tr. 880-881, App. 956-957.

The actual ten-year experience of Pacific National Bank of Washington's two branch offices in the Spokane banking market affords strong objective evidence supporting the testimony of NBC's officers. In 1964, the National Bank of Washington, Tacoma, Washington, a subsidiary of Western Bancorporation acquired the Spokane National Bank's two offices as branches. In 1970, the National Bank of Washington acquired the Pacific National Bank of Seattle, and the surviving institution was called the

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[35] NBC anticipated the considerable amount of international banking business it could serve in Spokane through the acquistion of Washington Trust's eight offices. Apparently, Pacific National Bank of Washington's two Spokane branches were unable to support a full-time "international man," who was recalled to Tacoma. See, GX D-5, which plaintiff did not print in its entirety, although this document was the subject of considerable discussion at trial. App. 889-891, 1269. "[E]vidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." *Brown Shoe, supra,* 370 U.S. at 329, n. 48.

Pacific National Bank of Washington. As of 1972 Pacific National's two offices in Spokane held only 2.2 per cent of the total deposits held by all Spokane banks. GX A-55, App. 1220. The District Court was concerned with Pacific's poor showing in Spokane, recognizing that plaintiff was advocating that NBC enter on a similar small scale, and questioned plaintiff's economic witness accordingly. Tr. 68-71, 168-169, App. 484, 539-540. This witness in answer to the District Court's concern that NBC would suffer the same fate as Pacific had in Spokane replied that it was "chancey," although he believed that since NBC was a larger bank than Pacific it would be able to avoid Pacific's mistakes. Tr. 69-70, App. 484-485.[36]

At the close of the trial, plaintiff called as a rebuttal witness Mr. Robert K. Hurni, a senior vice president of Pacific National Bank with responsibility for the two Spokane branches. Mr. Hurni attributed his bank's poor competitive performance in Spokane to having only two branches and the inability under State law to open additional branches there. He explained that his bank's small share of the market had not warranted or justified the addition of specialized personnel. Tr. 1133-1135, App. 1102-1105. Thus plaintiff's evidence strongly suggests that NBC would not make a competitive impact in Spokane if forced to enter through a small foothold ac-

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[36] As noted above, Pacific National is a subsidiary of the $14 billion Western Bancorporation. This witness, Professor Smith, was not immediately familiar with Pacific's history in Spokane. Tr. 68, App. 484. He followed up his speculations about Pacific's troubles in Spokane with the qualification that he really did "not know" why Pacific had made no competitive impact in Spokane and what the fate of NBC would be if it were to enter on a similar scale. Tr. 70, 168-169, App. 484-485, 539-540.

quisition and that the banks in Spokane are not affected by the threat of NBC's entry on such a limited scale (see Tr. 340-344, App. 640-642), and the District Court so found (F. 19, App. 1936-1939, and F. 21, App. 1940).

F. The Evidence Demonstrates That Washington Trust Bank Is Not a Potential Entrant into Any Other Banking Markets in Washington.

Plaintiff's allegation that this merger would eliminate Washington Trust as a potential entrant into other local banking markets in Washington State is not supported by the evidence. To the contrary, the evidence shows that Washington Trust has neither the capacity nor the incentive to embark on an expansion program beyond the Spokane banking market and the District Court so found. (F. 23, App. 1940).

The District Court found that, in comparison to NBC, Washington Trust was a limited service bank. (F. 16, App. 1935). While Washington Trust is not floundering, plaintiff's own statistical exhibits support the testimony of NBC's past executive officer that Washington Trust lacks the stabilizing influence of a diversified banking business and will have a difficult time in the future competing in Spokane.[37] (Dep. M. Carlsen, App. 149).

Washington Trust is unable to compete for agricultural business, offers only limited trust services, and cannot offer international banking services. Washington Trust does not offer conventional, VA or FHA home financing, student loans, and does not

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[37] See GX A-65, App. 1230, which shows that Washington Trust's profitability has been inconsistent.

bid on municipal bond issues. Plaintiff argues that these services are unimportant and are needed only by a very small percentage of Spokane's commercial bank customers (Pl. Br., 71), but there is no such evidence and the Court cannot assume a limited need for such things as student loans and home financing.

The evidence shows that Washington Trust has never acquired another bank. Tr. 836, App. 931. Other than NBC, no other bank has ever attempted to acquire Washington Trust, not even one of the other eleven "middle-sized banks in the State. Tr. 839, 933. Neither has Washington Trust ever "sponsored" a bank.[38] In commenting upon the idea of Washington Trust's alleged expansion within the state, plaintiff's counsel recognized that such as event was merely "a possibility" (Tr. 1170, App. 1124), and would not "speculate as to where or how." Tr. 1173, App. 1125. Similarly, the former Washington State Banking Supervisor stated that he had "no present knowledge" of where Washington Trust Bank might expand in the Spokane area.[39] App. 759.

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[38] After a group of businessmen had failed in an attempt to obtain a bank charter in Pullman, Washington, they contacted an officer of Washington Trust who had strong ties to the Pullman community. Tr. 850, 864, App. 939, 947. This Washington Trust officer helped the group in starting a bank in Pullman and Washington Trust loaned money to an individual for the purpose of buying stock in the new bank. Tr. 851, 865-866, App. 939, 948.

Washington Trust loaned money to two individuals who acquired stock in two (2) small banks, one in Uniontown and the other in Ephrata. To secure the loans, Washington Trust took the bank stock as collateral and also obtained a right of first refusal in the event the stock should ever be for sale to protect the value of the security. Interr. No. 48, App. 87-89.

[39] The only incorporated town or city without a bank east of the Cascade Mountains with a population exceeding 1,000 is West

G. Increased Competitive Vigor Will Result from This Merger.

The District Court found that the entry of NBC into Spokane through the acquisition of Washington Trust Bank would have the direct and immediate effect of substantially increasing competition. F. 17, App. 1935-1936.[40] This finding is amply supported by the record.

Washington Trust Bank, under severe limitations because of its lack of resources, is unable to compete effectively in Spokane, especially in the several areas requiring specialization and expertise. Tr. 821-823, App. 922-924. NBC, on the other hand, will be a stronger competitor in Spokane in the place of Washington Trust with the ability to offer the many services which Washington Trust cannot provide. Tr. 351, App. 646. There is considerable evidence in the record which establishes the procompetitive effect of this acquisition. Tr. 358, 376, 832, 844, 974, 1063, App. 650, 660, 928-929, 936, 1010-1011, 1062. The merger is more procompetitive than would be the entry of NBC into Spokane through a "foothold" acquisition or the "sponsored bank procedure." Tr. 340-341, App. 639-

Richland, which declined in population from 1960 to 1970 by 17.8 per cent. (DX-43, App. 1901). There are no small banks outside Spokane but within 100 miles which Washington Trust could acquire which had deposits exceeding $4.8 million, and only two banks with deposits in excess of $2 million. (DX 44, App. 1902).

[40] Moreover, banking competition in Spokane has increased since Washington Trust's merger agreement with NBC was announced, as shown by the actions taken by Seattle First National Bank in becoming the first commercial bank to offer a conventional mortgage lending program (Tr. 685, App. 841) and by increasing its line of credit to the Spokane Federal Intermediate Credit Bank from $8 to $12 million. Tr. 670-671, App. 832-833. These actions are direct evidence that banks in Spokane have already started to react to the new competition posed by the merger.

640; Tr. 573-574; App. 776; Tr. 1052-1053, App. 1056. *De novo* entry by NBC into Spokane, assuming it is possible, involves a very small procompetitive effect, as shown by Pacific National's disappointing experience, which becomes even smaller if NBC does not enter for another ten years. Tr. 353, App. 647.

1. This merger is procompetitive because it will provide the community with an additional source of business financing. (F. 25(b), App. 1942-1944).

If an independent businessman cannot get the financing he needs, his ability to remain competitive and survive in his business is threatened. See *Philadelphia, supra,* 374 U.S. at 370. Independent businesses of small or medium size are at a particular disadvantage in competition with large, national companies which can tap the commercial paper market and banks in the major financial centers whenever funds are needed. This is why it is in the public interest to provide an alternative source of loans for businesses in Spokane.

The merger application represented to the Comptroller that Washington State "occupies a prominent position" in the lumber products industries. (GX L-1, App. 1706-1707). The banks noted that large national companies such as Weyerhauser, Georgia Pacific and Crown Zellerbach competed in the State, and that Spokane was a regional center for the industry. (App. 1707). The forests products industry in the Spokane trade area supports a payroll of over $100 million annually employing some 22,000 workers. App. 1717-1718. Washington Trust Bank was described as having gained a particularly good reputation in loaning funds to the lumbering industry. App. 1721-1722.

The Comptroller at trial called as a witness Mr. Richard Bennett, president of the Bennett Lumber Company, one of five or six independent lumber firms left in the Spokane area which are trying to compete in an industry dominated by such giants as Georgia Pacific, Weyerhauser, and Crown Zellerbach. See GX L-1, App. 1706-1707. Mr. Bennett related the inconvenience, great expense and the consequent curtailment of operations suffered by him and his 300 employees when he was unable to obtain the financing he needed from Washington Trust, a bank which all of the other small lumbering firms must look to for their credit needs.[41] (Tr. 622-645, App. 804-818). This testimony illustrates that unless small businessmen like Mr. Bennett have available to them local sources of adequate and competitive financing, the trend towards concentration in business generally will continue. The special relationship of the banking business to the other sectors of the business world is never so plainly revealed as here.

The Comptroller also called as a witness Mr. Neil Degestrom, owner of the Degestrom Construction Company in Spokane. This firm also needs an alternative source to Seattle First National Bank for loans to make competitive bids on the many public projects it builds, such as highways, dams, and Spokane's airport runway. Having a competitive alternative source of financing would allow this company to pass on its

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[41] Plaintiff criticizes the testimony by this witness because his sawmill was located where the trees were rather than within metropolitan Spokane, even though the importance of lumbering to the Spokane area was conceded in the complaint. See para. 11, App. 12. However, commercial realities should not be ignored merely because they are not helpful for the purposes of plaintiff's case.

financing savings to the general public in the form of lower bids. Tr. 774-779, App. 894-897.

Another witness for the Comptroller, Mr. R. A. Hanson, head of the R. A. Hanson Company, testified that when his firm exceeds Old National Bank's lending limit he is forced to deal with the "one store left in town"—Seattle First National Bank. The R. A. Hanson Company sells earth excavators and trimmer machines used in construction of canals throughout the world and has received awards from the federal government for excellence in exporting. Tr. 773, App. 893-894. Providing this firm with a needed second alternative source of business loans, immediately as opposed to some indefinite future time, is a procompetitive effect resulting from this acquisition.

2. This merger is procompetitive because it makes available in Spokane a needed alternative source of international banking services. (F. 25(c), App. 1944-1945).

The appellee banks told the Comptroller in their merger application that NBC would offer its vast international banking services in Spokane, whereas Washington Trust presently does not offer this service (GX L-1, App. 1743-1744), and the Comptroller relied on this representation in approving the merger. At trial the Comptroller called several witnesses to illustrate the need for an additional source of international banking services in Spokane. Presently only one bank offers such a service fulltime—Seattle First National Bank.

Mr. R. A. Hanson testified that his company has had unsatisfactory experience in obtaining international banking services through a correspondent of Old National Bank of Washington. Whether or not

Mr. Hanson used NBC's international banking services, he would benefit indirectly from the merger since his own bank, Old National, would have to offer better service to compete with NBC. Tr. 760, App. 886.

Mr. Arden Jacklin, whose company raises and sells turf grass seeds produced in the Spokane area, testified that a bank with a strong international department would be a benefit as he tries to expand his company's sales in international markets. Presently his company must depend on a large competitor to handle exports. Tr. 791, App. 904.

Mr. Leonard Maxey, head of Hollister-Stier Laboratories, which produces biological products, testified that his company sells products throughout the United States and overseas and that in the past he has been inconvenienced because of the inadequacy of international banking services in Spokane. Tr. 804, App. 912.

3. The merger is procompetitive because it will introduce to Spokane another source of conventional as well as VA and FHA home financing. (F. 25(e), App. 1946).

Washington Trust is not active in residential mortgage lending for which there is a need in Spokane, as only one other bank offers conventional loans, again Seattle First National Bank which only since the announcement of this merger has begun to compete in such loans. Mr. Leroy Johnson, owner of a real estate firm, testified that there was a need for NBC to enter Spokane immediately and offer conventional mortgage lending at a competitive rate. Tr. 686-687, App. 842.

4. This merger will help fill the agricultural lending needs of the Spokane area and region. (F. 25(f), App. 1946-1948).

At trial the Comptroller called as a witness the President of the Federal Intermediate Credit Bank of Spokane. This bank is the "mother bank" supplying "wholesale money for some 30 production credit associations" throughout "four Northwest states and Alaska." The bank was located in Spokane because Spokane was "the geographical center" of the area. Presently there are 15,772 active borrower member-stockholders of the Spokane Federal Intermediate Credit Bank. (Tr. 665-666, App. 830). Seven per cent of this bank's total funds are "provided through commercial bank borrowings" and the bank's commercial bank needs will double in ten years. In November of 1972 the Spokane Federal Intermediate Credit Bank needed $27 million in commercial bank borrowings to meet prior loan commitments to area farmers. Because the bank only had an $8 million line of credit "with the one [Seattle First National Bank] and only large source of available credit in Spokane," it was necessary to borrow the remaining amount of money from banks outside the area. It would be more competitive and convenient to have NBC in Spokane so that the Intermediate Credit Bank's obligations to farmers would be met with less uncertainty, as the agricultural business is rather erratic in its credit requirements and the other banks in Spokane simply cannot do business with the Federal Intermediate Credit Bank. Thus NBC's entry into Spokane through acquisition of Washington Trust will immediately benefit the Spokane Intermediate Credit Bank and its member-borrower farmers in a five-state region and this alone will be highly procompetitive as well as responsive to community needs. Tr. 663-683, App. 828-840.

5. This merger will benefit the taxpayers in Spokane by providing a competitive, alternative source of financing for local and municipal governments. (F. 25(g), App. 1948-1949).

The many governmental service and taxing districts in Spokane have financing needs which can be met only by local financial institutions, and NBC has a reputation for bidding on every local bond issue where it is located. The Spokane County Treasurer, Mr. Merton Howard, testified that presently only two Spokane banks bid on the County's repurchase agreements and that additional competition in this area would directly benefit the taxpayers and public in Spokane. Tr. 810-811, App. 916-917.

6. This merger will provide an alternative source for many specialized banking services in Spokane. (F. 25(h), App. 1949-1950).

This merger will result in the offering of better trust services in Spokane. Furthermore, NBC has considerable expertise and lending capacity in installment lending, term loans on plant and equipment, vehicle leasing, SBA loans, and agricultural loans. GX L-1, p. 44-47, App. 1741, 1744. The many college students in Spokane would be immediately benefited by this merger because it would introduce a commercial bank which makes student loans, making 2514 of them in 1972 in other places in the State. These students cannot wait ten years.[42] Tr. 953, App. 998; Tr. 662, App. 828.

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[42] Plaintiff's economist suggested that 10 years is a reasonable period to allow potential competition to develop into actual competition. Tr. 63, App. 480-481. NBC has, of course, wished to enter Spokane since prior to 1953. See GX F-31, App. 1278.

H. This Merger Will Serve the Convenience and Needs of the Community.

The District Court found that assuming plaintiff had proved the alleged anticompetitive effects of this acquisition such "effects would be clearly outweighed in the public interest by the probable procompetitive benefits of the transaction in meeting the convenience and needs of the community to be served."[43] F. 25, App. 1941-1950. This finding is both legally correct and well supported by the record.

As required by the Bank Merger Act of 1966, the Comptroller considered the benefits to the convenience and needs of the Spokane area, concluding that the effect of the merger would be procompetitive. (P.T.O., Exh. A, App. 398-402). In contrast, the competitive reports from the Department of Justice, the Board of Governors of the Federal Reserve System, and the FDIC did not consider the convenience and needs of the Spokane area. The Comptroller found, *inter alia,* that the merger would be in the public interest because it would bring to the Spokane banking market an alternative and competitive source of sophisticated banking services. He found specifically that the merger would provide a source of larger credits in Spokane benefiting potential borrowers and an-

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[43] At the close of plaintiff's case-in-chief, the defendants and intervenor jointly moved to dismiss the case. Tr. 614-621, App. 800-804. The District Court informed counsel that the case was "very thin," "really thin," "extremely thin" (Tr. 620, App. 803) and recited virtually verbatim the testimony of plaintiff's witness Dr. Smith (Tr. 617-619, App. 801-803), concluding that Dr. Smith's opinions and the documentary exhibits were "some evidence" to support plaintiff's case. (Tr. 620, App. 803). The Court denied the motion to hear the convenience and needs affirmative defense under the Bank Merger Act of 1966. Tr. 621, App. 803.

other source of full service banking services. Included in these services were agricultural and mining loans, student loans, economic opportunity loans, low income housing lending, SBA, FHA, and VA lending programs, "turnkey" low cost housing construction loans for the elderly, and a highly sophisticated international banking department with offices in Hong Kong, Singapore, London, Tokyo and New York City. It was found that Washington Trust does not offer banking customers a competitive alternative for these services. The Comptroller concluded that "the enhanced competition that this merger will produce will contribute to the convenience and needs of bank customers in Spokane." P.T.O., Exh. A, App. 398-402.

At trial the Comptroller called as witnesses twelve Spokane area people to illustrate and support his finding that the merger was procompetitive and in the public interest. The testimony of these witnesses demonstrates that, while not reducing the number of banking alternatives in Spokane, a result which could cause businessmen to be denied credit, *Cf., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 372 (1963), the effect of this merger will be to increase the number of banking alternatives for several important banking services. Some of these witnesses illustrated that this is very definitely a case in which a lack of adequate alternatives for some banking services has caused and, absent this merger, will continue to cause hardships to individuals or businesses in the community. *E.g.,* Tr. 622-647, App. 804-819. See *Philadelphia, supra,* 374 U.S. at 371.

This merger will benefit the convenience and needs of the entire Spokane community (Tr. 1066-1067, App. 1064) and none of the alternative means of entry would provide a reasonable alternative way of achieving these convenience and needs benefits (Tr. 978, App. 1013).

III. PLAINTIFF'S THEORY OF POTENTIAL COMPETITION AND ITS ECONOMIC ANALYSIS ARE ERRONEOUS.

A. Potential Competition Means Competition Which Is Probable and Imminent, Not Merely Possible.

Plaintiff's arguments in both companion antitrust bank cases before the Court rest upon the assertion that each of the mergers will eliminate "potential competition" and thereby violate § 7. The meaning of the concept of "potential competition" is fundamental to plaintiff's cases. However, when plaintiff's usage of this term is analyzed in the light of the meaning given to it by the opinions of this Court it is apparent that plaintiff is attempting to use "potential competition" in an entirely different sense than the Court has used the concept and in a way that this Court has said does not come within the scope of § 7.

There are only about half a dozen cases decided by this Court in which the potential competition concept has been referred to (Pl. Br. 29). These cases have vastly different factual backgrounds and therefore require individual examination.

Apparently the first case in which this idea appeared in an opinion of this Court was *U. S.* v. *El Paso Natural Gas Co.,* 376 U.S. 651. This was a suit in which El Paso was charged with violation of § 7 by acquisition of Pacific Northwest Pipeline Co. El Paso was the sole out-of-state supplier of natural gas to southern California. Pacific Northwest attempted to enter the market over a period of years. First it attempted to make arrangements to distribute gas in southern California through Pacific Gas & Electric. This effort was aborted when El Paso made arrangements to take the Pacific Northwest gas. Pacific Northwest then reported to its stockholders that the agreement with El Paso "means that El Paso's California market will be protected against future competition. . ." Later Pacific Northwest reached an agreement to supply gas to Southern California Edison Co. Thereafter El Paso lowered its price to Edison and Edison terminated its agreement with Pacific Northwest and made an agreement with El Paso. Later Pacific Northwest renewed its effort to sell gas in the southern California market until this effort was terminated by its acquisition by El Paso. In these circumstances, the Court held the acquisition violated § 7. The opinion said that the relation of Pacific Northwest with Edison "illustrates what effect Pacific Northwest had merely as a potential competitor. . . . We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the state." 376 U.S. 659. This is the only mention of "potential" in the opinion. The Court's holding in this respect is epitomized by this sentence: "Unsuccessful bidders are no less competitors than the successful one." 376 U.S. 661. Whether one calls an unsuccessful bidder an "actual" or a "potential" competitor seems to be a matter of choice of words. In the circumstances of the El Paso case it is clear that the "potential competitor" was an actual effective operating force in the market.

The second case referring to this concept was *U. S. v. Continental Can Co.,* 378 U.S. 441. The issue presented was whether the acquisition of the nation's third largest producer of glass containers by the nation's second largest producer of metal containers violated § 7. The District Court held that there was no violation since metal containers and glass containers were separate lines of commerce. This Court reversed, saying that § 7 protects any area of "effective competition" and that there is a large area of "effective competition" between metal cans and glass containers. Citing the *El Paso* case, the Court said that "the competition with which § 7 deals includes not only existing competition but that which is sufficiently *probable and imminent."* [emphasis added.] 378 U.S. 458. After discussing the large area of effective competition between the can company and the glass company, the Court added that the can company might have concluded that it could insulate itself from competition by acquiring a major firm not presently directing its efforts toward the same end uses as the can company but having the potential to do so. This was the only reference to the concept of potentiality.

The first case in this Court in which the term "potential competition" was used appears to be *U. S.* v. *Penn-Olin Chemical Co.,* 378 U.S. 158. The Court noted, "This is the first case reaching this Court and on which we have written that directly involves the validity under § 7 of the joint participation of two corporations in the creation of a third as a new domestic producing organization." 378 U.S. 168-69. The Court said that the same considerations apply to joint ventures as to mergers, and noted the statement in Brown Shoe that § 7 deals with "probabilities, not certainties." The District Court had held that it was necessary to prove as a matter of probability that *both* companies would have entered the market as individual competitors, if the joint venture had not been formed, in order to show that potential competition between the two companies had been foreclosed. This decision was reversed, and the case was remanded, as this Court held that, "There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter." 378 U.S. 173. The Court noted that the industry was rapidly expanding and recited numerous other evidentiary facts showing that "each company had compelling reasons for entering the . . . market." 378 U.S. 175. Nevertheless, this Court remanded the case to the District Court for a determination whether, in the light of all the facts, the elimination of potential competition involved the probability of a substantial lessening of competition.

The potential competition concept was next discussed in *F. T. C.* v. *Proctor & Gamble Co.,* 386 U.S. 568. In this case, Clorox was the leading manufacturer of household liquid bleach, being the only national seller and having 48.8 per cent of national sales. Proctor was the largest seller of soaps and detergents and other household products sold and used in connection with household bleach. Proctor was also the largest national advertiser. This Court sustained the F. T. C. finding that the acquisition of Clorox by Proctor violated § 7. The opinion said that Proctor had entered a market which adjoins those in which it is already well established and which is virtually indistinguishable from them. The anticompetitive effects of this are (1) the substitution of a powerful acquiring firm for an already dominant firm, and (2) the elimination of the potential competition of the acquiring firm. The Court said that the evidence "clearly shows that Proctor was the most likely entrant." 386 U.S. 580. In addition, "It is clear that the existence of Proctor at the edge of the industry exerted considerable influence on the market." 386 U.S. 581.

The next case in which potential competition was mentioned was *Ford Motor Co.* v. *U. S.,* 405 U.S. 562. In that case, the District Court held § 7 violated by Ford's acquisition of a major independent spark plug manufacturer. There were two markets for spark plugs, the original equipment market and the aftermarket, or replacement market. General Motors made its own spark plugs, so Ford was the largest customer of OE spark plugs. The District Court held that prior to the acquisition Ford was both the major customer in the OE market and had a "pervasive impact on the aftermarket." The District Court said that, "Ford may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication. Had Ford taken the internal-expansion route, there would have been no illegality; not, however, because the result necessarily would have been commendable, but simply because that course has not been proscribed." 286 F. Supp. 441, quoted at 405 U.S. 567-568. This Court affirmed, quoting a passage from the Brown Shoe opinion relating to the vice of a vertical arrangement tying a customer to a supplier. The main controversy was over the relief to be ordered. The District Court not only ordered divestiture but enjoined Ford from manufacturing spark plugs for 10 years. The Court's opinion sustained this decree on the ground that it would restore Ford's position as the largest purchaser of spark plugs from independent manufacturers and would not significantly lessen "Ford's moderating influence as a potential entrant on the edge of the market." A partially dissenting opinion argues that the injunction wipes out for the duration of the restriction any pro-competitive influence Ford might have as a potential entrant. In any event, the discussion of potential competition is confined to references relating to this aspect of the remedy.

The one case in which this Court has given an extended discussion of potential competition is the recent one of *U. S.* v. *Falstaff Brewing Corp.,* 410 U.S. 526. The Court there held that Falstaff's acquisition of Narragansett Brewing Co. might violate § 7. Of the nation's ten largest brewers, only Falstaff, which was fourth, and the eighth and ninth largest, did not sell in New England. Of these three, Falstaff had the closest brewery. Narragansett was the largest seller of beer in New England. The District Court held that the acquisition did not violate § 7 because the evidence showed that the management of Falstaff had decided not to enter the New England market except by merger. This Court reversed. It held that § 7 bars acquisitions of a market competitor by a noncompetitor where the new entrant threatens to dominate the market or otherwise upset market conditions to the detriment of competition, and also where "the entry eliminates a potential competitor exercising present influence on the market." This

Court held the District Court erred in failing "to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market." The case was remanded to the District Court for a determination "whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition." The Court expressly left open the question whether § 7 bars a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, but that is challenged on the grounds that the entering firm could have, but did not, enter de novo or through toehold acquisition, and that, in this latter sense, potential competition was lessened. There were two separate concurring opinions and a dissenting opinion, but none challenged the analysis of potential competition set forth in the prevailing opinion.

In summary, this Court has held that potential competition must be considered under § 7 in the following circumstances:

El Paso case—the acquired company was the only likely entrant into the market, clearly influenced prices in the market and was an unsuccessful bidder in the market.

Continental Can case—the acquired company was in actual competition with the acquiring company and had the potential to enlarge the area of competition.

Penn-Olin case—in a joint venture it is necessary to consider whether the company not entering the market but having a compelling reason to do so might have remained at the edge of the market continually threatening to enter.

Proctor & Gamble case—the acquiring company entering the market was the most likely entrant, clearly exerted a considerable influence on the market, and was the overwhelmingly dominant firm in the market after entry.

Ford case—the acquiring firm was the major customer in the market, exerted a pervasive influence on the market, and was apparently the only likely entrant.

Falstaff case—where a noncompetitor enters a market by merger, § 7 applies if the entrant threatens to dominate the market or otherwise upset competitive conditions, or if the entrant was previously exercising present influence on competition in the market by virtue of its position on the edge of the market.

Thus it is clear under the holdings and opinions of this Court that the concept of potential competition does not change or enlarge the scope of § 7. As this Court said of § 7 in *Brown Shoe Co.* v. *U. S.,* 370 U.S. 294: "Mergers with a *probable* anticompetitive effect were to be proscribed by this Act." [emphasis added.] 370 U.S. 323. The use in § 7 of the words "may be" do not "apply to the mere possibility but only to the reasonable probability" of the proscribed effect. 370 U.S. 323, n. 39. The point is best summed up by the language of this Court in Continental Can, where it is said that § 7 deals not only with existing competition but also with that which is "sufficiently probable and imminent." 378 U.S. 458.

B. Plaintiff's Theory Misconceives the Concept and the Nature of Both Potential Competition and of Competition.

If the District Court in either of the companion cases now before this Court had adopted the theories and arguments set forth in plaintiff's briefs, the decisions would have to be set aside by this Court on the grounds that the results were reached by the application of erroneous principles. The evidentiary facts are discussed elsewhere in this brief. Here it is asserted that regardless of the evidentiary facts the concepts and theories urged by the plaintiff are wrong and must be rejected by this Court.

Section 7 of the Clayton Act, like all broad statutes, is necessarily couched in general language requiring exegesis and specification by the Courts. It forbids certain corporate acquisitions the effect of which "may be substantially to lessen competition". In the Brown Shoe case this Court gave extensive consideration to the meaning of this phrase and held that "may be" did not require certainty and did not include a mere possibility but meant a reasonable probability. After this meaning was established, the concept of "potential competition" developed in the line of cases discussed above, as one of the kinds of competition that might be within the scope of § 7.

The Oxford English Dictionary, Funk & Wagnalls, and Websters agree that "potential" means "possible as opposed to actual". Taken literally, this would mean that the theory of "potential" (in the sense of possible as opposed to actual) competition had rendered nugatory the Court's interpretation of § 7 in Brown Shoe. However, the opinions of this Court are unmistakably clear that the concept of potential competition was developed within the meaning given to § 7 in Brown Shoe. Thus, as set forth in the preceding discussion, this Court used the concept of potential competition to mean competition which was not actual but which was "probable and imminent".

However, one will search plaintiff's briefs in vain for any recognition or indication that this is the meaning of potential competition. Throughout its briefs in both companion cases, plaintiff argues on the hasis of supposition and hypothesis, asserting what "could" or "may" or "might" happen. Both briefs are bottomed on arguments that if the mergers are frustrated some alternative modes of competition are possible, not that any are probable and imminent.

For example, plaintiff argues that the Seattle bank (NBC) could sponsor a new bank in Spokane and "pending its eventual acquisition, NBC could assist it in branching in the city. . ." (Pl. Wash. Br. 50.) The District Court found that this was impossible because, inter alia, the evidence showed the Comptroller would not grant a charter for a new hank in Spokane. Plaintiff responds that this finding relies heavily on testimony by the Regional Administrator of National Banks, and therefore "does not establish that NBC could not have obtained a charter for a new sponsored national bank". (Pl. Wash. Br. 51.) Plaintiff goes on to argue that, "Only if the new entry might threaten the stability of existing hanks could the Comptroller properly refuse to permit new competition." (Pl. Wash. Br. 52.) This latter argument is directly contrary to the holding of this Court in *Camp* v. *Pitts,* 411 U.S. 138, that refusal of a charter is justified on a finding that a new bank would be an uneconomic venture in light of the banking needs and services already available in the community. However, even more significant is the thrust of plaintiff's argument that if there is the slightest possibility of some hypothetical mode of entry this constitutes potential competition.

Plaintiff's argument in the Connecticut ease is similar. Plaintiff argues that, although Connecticut law prohibits entry by each bank into the home office city of the other, "Entry was financially possible because the banks are large, strong and profitable." (Pl. Conn. Br. 18.) In Connecticut, also, the District Court found that the Comptroller would not issue new banking charters, since this was announced in a written policy issued in 1965 and not revoked. (Pl. Conn. Br. 53; App. 2573-75-74.) Plaintiff dismisses this finding with the comment that the published policy is "simply . . . the present view, subject to change, of an administrator who presumably will do his statutory duty of taking into account antitrust doctrine . . ." (Pl. Conn. Br. 53.) The relationship between antitrust doctrine and banking law is discussed below and is immaterial here. The point is obvious that plaintiff is urging that the mere possibility of some future change in policy, no hint of which is given in the record or the argument, suffices to show the existence of potential competition. Again it is clear that plaintiff is arguing that potential competition within the meaning of § 7 exists if there is the mere possibility of some competitive developments. Plaintiff neither recognizes nor attempts to meet the clearly enunciated standard of this Court that the potential competition which comes within the scope of § 7 must be probable and imminent.

It appears that plaintiff does not have any coherent concept of either potential competition or competition and that its statements regarding these somewhat abstract concepts are made on an ad hoc basis to oppose any arguments urged by defendants or support any arguments plaintiff desires to urge. For example, while arguing that the remote and unlikely possibilities mentioned above show the existence of potential competition, plaintiff also argues that competition for checking accounts by savings banks in Connecticut is merely speculative despite the fact that a state law which will take effect no later than December 31, 1975 specifically authorizes savings bank checking accounts. (Pl. Conn. Br. 25.) Similarly, in its Washington brief plaintiff argues at one point that the entry of a potential competitor into the market does not change market structure, while at another point it argues that such entry does change market structure. (Pl. Wash. Br. 30, 56.)

Plaintiff is also confused and inaccurate in dealing with the effect of increased competition in the market. In the Washington brief it argues that a merger which enables a bank to compete more effectively and to provide additional services is not a factor to be considered in assessing the competitive impact but is to be considered only under the "convenience and needs" defense. (Pl. Wash. Br. 55, n. 51.)

In Connecticut plaintiff attacks a court finding that the merger "would mean more competitive choices for the people of Connecticut and a more healthy and balanced banking structure of five or six strong and relatively equal competitors". (Pl. Conn. Br. 60.) This was based on the fact that there are in Connecticut two competitive statewide banks and, at most, eight banks with the capability to become statewide banks. (Pl. Conn. Br. 61.) The Connecticut merger would result in three competitive statewide banks and reduce the number of potential statewide competitors to six. Plaintiff opposes the consolidation of small competitors into larger, more powerful competitors arguing that, "This approval of 'countervailing power' is the cornerstone of the district court's analysis of competitive effects, and it is contrary to the decisions of this Court and to the purpose of Section 7 . . ." (Pl. Conn. Br. 60-62.) Since plaintiff regards this part of the analysis as a "cornerstone" it requires some explanation to straighten matters out.

Countervailing power has nothing to do with the relative size or power of competitors. Competition and "countervailing power" are not similar, but, in effect, polar economic concepts. Competition means rivalry among firms on the same side of the market. Countervailing power means bargaining by firms on the opposite side of the market.

Perhaps the best exposition of the concept of competition from the legal viewpoint is in the Report of the Attorney General's Committee to Study the Antitrust Laws. It explains that the word "competition" is used in two senses. In the first sense it "denotes only the presence of more than one seller in a market, and identifies a condition of rivalry among them. . ." (p. 318.) In the second generic sense, the idea of competition "is contrasted with 'monopoly' with respect to the degree of market power possessed by a seller, or a group of sellers acting in concert. This second meaning of competition can be summed up as identifying a market condition in which the rivalry of sellers, of itself, prevents the existence of the discretionary market power of monopoly over price and output." (p. 319.)

The concept of "countervailing power" was introduced by Professor Galbraith in 1952 in his book, "American Capitalism". He noted that, "It was to the same side of the market and thus to competition that economists came to look for the self-regulatory mechanism of the economy." (p. 117.) Where competition disappeared and was replaced by a small group of powerful firms, it was easy to suppose that all effective restraint on private power had disappeared. But, Galbraith says, "In fact, new restraints on private power did appear to replace competition. They were nurtured by the same process of concentration which impaired or destroyed competition. But they appeared not on the same side of the market but on the opposite side, not with competitors but with customers or suppliers. It will be convenient to have a name for this counterpart of competition and I shall call it *countervailing power.*" (p. 118.)

Plaintiff is correct in assuming that the theory of countervailing power has not replaced the theory of competition as a foundation for the antitrust laws, and that the purpose of § 7 is to prevent substantial lessening of competition. However plaintiff is quite mistaken in calling increased rivalry among vigorous competitors "countervailing power". An increase in the number of "competitive choices" and a more vigorous rivalry between stronger competitors is an increase in competition, not "countervailing power" or any other malign or illegal force. In *Brown Shoe Co.* v. *United States,* 370 U.S. 294, the Court explicitly recognized this point, saying (at p. 319):

> Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendment indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market. . . .

Plaintiff's confusion on this point leads to inconsistencies in its arguments. In Washington plaintiff argues that more effective competition and the provision of additional banking services are not factors to be considered in assessing competitive impact (Pl. Wash. Br. 55, n. 51), and that numbers of banking offices and convenience of access by customers to banking offices are not indicia of competition. (Pl. Wash. Br. 61-62.) However, in Connecticut plaintiff argues that differences in evening hours of service in branches of a banking system are "evidence of service competition". (Pl. Conn. Br. 30, n. 38.) Certainly if some variation in banking hours is "evidence of service competition", the same must be said of the far more substantial and significant efforts involved in providing more convenient branch offices, and offering such additional banking services as international service, mining, agricultural, and student loans, and the other important service offerings which were shown in the evidence and relied upon by the district courts. Furthermore this Court has said that the test of a competitive market is "whether consumers are well served." *U. S.* v. *Philadelphia National Bk.,* 374 U.S. 321, 367, n. 43.

Another error concerning the nature of competition appears in plaintiff's argument in the Connecticut case. Plaintiff's brief begins by conceding that there is no issue on this appeal concerning the elimination of actual competition between the merging banks. (Pl. Conn. Br. 4, n. 1.) However, plaintiff then argues against the District Court finding that the State is a relevant market by saying that if this is so, "then the defendants cannot be potential competitors because all banks in Connecticut are necessarily actual competitors in one statewide market". (Pl. Conn. Br. 63, also 16, 19, 65-66.) This logic is reminiscent of the movie title "If this is Tuesday it must be Belgium". The area of competitive impact determines the market, for purposes of antitrust analysis of a merger. But the definition of a market most assuredly does not change the area of competition. Furthermore, the fact that the merging banks do not have any area of competitive overlap does not tend in any way to negate the conclusion that they may both be in the same relevant market. It is simply not true that all firms in every market are necessarily in competition with one another.

Simple, commonsense, empirical observation will establish the point. In the *Von's Grocery Co.* case, 384 U.S. 270, the relevant market was the retail grocery market in the Los Angeles area. There were more than 3,500 single grocery stores and about 150 grocery store chains in that market. 384 U.S. 273. Some of the chains competed with each other in all or parts of the market. But quite obviously individual grocery stores in widely separated parts of the immense Los Angeles area were not in competition with each other —although they were within the relevant market. It may be easier to visualize the Washington, D.C. market which is familiar to most of those involved in these cases. Here there are a few large grocery chains operating throughout the metropolitan area and obviously competing with each other through advertising and by other means. There are also numerous small grocery stores scattered throughout the metropolitan area and each drawing patronage from its neighborhood. For purposes of antitrust analysis, no doubt the Washington metropolitan area, like Los Angeles, is a relevant market as to retail grocery operation. This does not mean that a grocery store in Bethesda is in competition with one in Alexandria, or Falls Church or Silver Spring.

Plaintiff's argument that if the State is a relevant geographic market for purposes of antitrust analysis, then it necessarily follows that banks not in actual competition with each other must be considered as actual competitors is just not logical, sensible or tenable under any rational legal or economic theory.

One final illustration of the confusion inherent in plaintiff's concept of competition is plaintiff's apparent assumption that competition is not simply economic rivalry but must be business enmity exhibited in personal hostility. Thus plaintiff argues that references to "personal", "cordial" and "friendly" relationships among bankers in the Spokane market are evidence of lack of vigorous competition. (Pl. Wash. Br. 57.) The suggestion that an opponent, or competitor, must necessarily be an enemy comes strangely from lawyers who are professionally enjoined to oppose each other with civility and to confine their adversary relationships to the courtroom. It should be unnecessary to urge at this point in our history that civility in all our social relations is sorely needed. Any intimation from this Court that civility in economic relations could be characterized by a zealous prosecutor as indicating "personal", "cordial" or "friendly" relations and used as evidence of anticompetitive conduct under the antitrust laws could only add to social turmoil. In fact, as we know from every other field of endeavor, ranging from athletic competition to litigation, there is no relation between the degree of civility or cordiality among the participants and the degree of their rivalry or competition. On grounds of both logic and social policy this argument of plaintiff should be not merely ignored but repudiated by this Court.

C. Plaintiff's Theory of Potential Competition Is Illogical, Unworkable, and Leads to Absurd Results.

The preceding discussion has demonstrated that plaintiff's theory of potential competition is based on a concept of potentiality defined as that which is possible rather than that which is probable and imminent. Plaintiff's theory is, therefore, contrary to the prior decisions of this Court on the subject. Plaintiff gives implicit acknowledgement of this in arguing that its theory requires the Court to adopt the rule which the Court expressly refused to adopt and left open in Falstaff (Pl. Wash. Br. 28), that § 7 bars a merger by a company whose entry into the market would have no effect whatsoever on competition merely because that company might have (possibly) entered de novo or by toehold acquisition.

The basic misconception underlying plaintiff's theory of potential competition is that it views competition as a static structure rather than as a dynamic process. Of course, plaintiff does not state the matter this explicitly, but the misconceived reliance on structure rather than process or performance permeates its argument in both cases. Thus plaintiff bluntly says, "The purpose of Section 7 is to prevent changes in the structure of industries which threaten anticompetitive consequences." (Pl. Wash. Br. 22, 28.) The relationship between structure and performance, if any, is tenuous or irrelevant in plaintiff's theory. Thus plaintiff's expert economic witness in Washington testified that banking is structurally concentrated in every city and banking market in the United States but that it is possible such markets may also be highly competitive from the standpoint of performance. (Wash. App. 534.)

Plaintiff's theory was not argued quite so bluntly in the Connecticut case, but the facts are no less striking. The District Court specifically found that "since December 31, 1955, through 1971, in the 169 towns in Connecticut, the number of banking alternatives (including savings banks) has increased in 107 towns, decreased in two towns and remained the same in 60 towns and, even according to the plaintiff's witness, this is procompetitive." (Finding 148; 362 F.Supp. 260.) Plaintiff's brief does not deign to mention this finding and, instead, repetitiously alleges that the "structure of banking in Connecticut" is growing more concentrated. (Pl. Conn. Br. 4, 7, 63-65.) The message of plaintiff's briefs is clear: Plaintiff's theory is based on static structure that can be measured by something called "concentration ratios" and not on competition. Plaintiff's theory does not take account of what actually happens in the market place, whether customers in fact have more alternative sources, or whether there is in fact a more competitive performance.

In fact, plaintiff's briefs come close to making this argument explicitly. In Washington plaintiff argues that "a merger that eliminates a substantial potential entrant from a concentrated market cannot be justified on the ground that the market in which the acquired firm operates is nevertheless currently competitive." (Pl. Wash. Br. 56.) In Connecticut plaintiff derides the court's conclusions that neither bank was permitted any significant *de novo* branch penetration into the service market of the other, and that neither bank was able to accomplish any meaningful growth on the state-wide level. (Conclusions A(2) 3, 4; 362 F.Supp. 287.) Plaintiff argues that these conclusions merely show the "district court's misunderstanding of potential competition", that "The significance of potential entry is not lost merely because the potential entrant might initially make only a small entry into a market", and, indeed, that it does not matter for § 7 purposes whether the entrant ever enlarges its market share. (Pl. Conn. Br. 57.) In other words, plaintiff argues that under § 7 the preservation of potential competition is more important than the existence or expansion of actual competition.

This leads plaintiff to make what is virtually the *reductio ad absurdum* of its own argument. In Connecticut the District Court found that to the extent there had been any increase in concentration of deposits among banks or commercial banks since 1959, "virtually all of the increase is accounted for by two savings banks and the two Hartford banks." (Finding 154; 362 F.Supp. 261.) The two Hartford banks are, of course, the two large state-wide banks which are competitors of both the merging banks. Thus plaintiff is in the position of arguing that the growing size and strength of the competitors of the merging banks is a reason for preventing these two smaller non-competitive banks from merging into a more effective competitor of the larger banks which are responsible for the increase in concentration which plaintiff decries. This conclusion of plaintiff's is not only condemned by common sense but is also contrary to sophisticated antitrust analysis. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 319. The *Report of the Attorney General's Committee to Study the Antitrust Laws* analyzing the factors necessary to the existence of effective competition gives first place and greatest importance to the number and relative strength of firms. The Report says: "Effective competition may be affected not only by the total number of sellers; their relative size and strength must also be considered." (p. 326.)

It is plaintiff's theory of potential competition, not the merger movement, which is most likely to result in an increasing concentration of economic power, at least in banking. As the economy grows, banks tend to grow to meet expanding business needs. As § 7 has effectively proscribed the merger of competitors, non-competitive banks have combined into stronger and more competitive banking systems and new banks have been formed to keep the number of total banks constant, or slightly increasing. From 1962 to 1972 there were 1,345 mergers of commercial banks, there were 1,937 new commercial banks formed, and the total number of commercial banks in operation in the nation increased from 13,426 to 13,936. *Statistical Abstract of the U. S.,* 1973, p. 446. (The slight discrepancy in numbers is accounted for by liquidations and suspensions.) However, the smaller the community, the smaller the size and the fewer the number of banks it can support. The smaller the bank the more limited it necessarily is in personnel, resources, facilities and the ability to provide a full range of banking service. This is illustrated in the Washington case, where the Seattle bank is described as a "full service bank" while the Spokane bank is found to be a "limited service bank". (Wash. App. 1935, Findings 15, 16.) However, plaintiff argues that because local banking markets can support only a limited number of banks they "inherently tend to be concentrated", and it is therefore particularly important to preserve "potential competition" by preventing mergers with larger banks outside the local markets as in the Washington case. (Pl. Wash. Br. 32.) It is apparent that regardless of the mooted virtues of *de novo* or foothold entry, these have nothing to do with strengthening the position of the small banks in local markets. Therefore, plaintiff's argument in effect asserts that the greater the need of local banks for acquiring the assistance of stronger outside banks to serve their communities and to compete more effectively, the stronger are the legal inhibitions against their being permitted to do so. Thus it is precisely where competition is weakest that plaintiff's theory will operate to prevent it from being strengthened.

This was obviously not the purpose of § 7, but this is the effect of plaintiff's construing § 7 as though it were intended to preserve some static structure from change rather than being intended to protect the process of competition as it operates in the real world.

Carrying the logic of plaintiff's position only one step further illuminates even more the fallacy of plaintiff's theory. In any market, any new actual competitive entrant will necessarily have been a potential entrant before entering the market. Unless the number of potential entrants is infinite, which is impossible, the entry of any new competitor will, accordingly, reduce the number of potential entrants. But plaintiff argues that § 7 forbids lessening potential competition by reducing the number of potential entrants. Taken literally, this would mean that § 7 forbids any new competitive entry, particularly into concentrated markets. This is obviously absurd. Plaintiff seeks to escape this dilemma by saying that entry is not barred if it is by foothold acquisition or *de novo*. However, this does not solve the logical dilemma of plaintiff's theory. If potential competition means, as plaintiff argues, that which is possible, then foothold acquisition reduces the possibilities quite as much as any other acquisition. It is certainly possible that a small competitor in a market may grow larger; and, indeed, this is more likely than it is that someone outside the market will enter and begin to compete. Therefore plaintiff's preference for entry into a market by foothold acquisition, rather than some other kind that does not change the market balance or structure, is simply a matter of preference, apparently based on plaintiff's general bias toward very small firms.

Furthermore, the situation is not essentially different with respect to *de novo* entry. As plaintiff concedes, "local banking markets can support only a limited number of banks." (Pl. Wash. Br. 32.) This is not the result of some over-protective attitude on the part of regulatory authorities but is the result of immutable economic laws as dozens (and in earlier years thousands) of bank failures have shown. This being so, whenever an identifiable potential competitor enters a market *de novo* it takes a place in that market that might possibly have been taken by some previously unidentified potential entrant. At the same time the entry reduces what plaintiff is pleased to call "potential competition". Therefore, even *de novo* entry lessens competition under plaintiff's theory, and consequently is forbidden by § 7.

This is precisely the same dilemma that confronted this Court in first construing the Sherman Act. In 1911 it was urged upon the Court that § 1 of the Sherman Act "embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibition to every case within its literal language." *Standard Oil Co.* v. *U. S.,* 221 U.S. 1, 63. The Court noted that this would lead to the conclusion that "every contract, act, or combination of any kind or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, . . ." Ibid. The solution to this problem obviously was to hold that the courts must exercise reasonable judgment in every case in order to determine whether a particular act is embraced within the Act. Thus arose the "rule of reason".

Clearly the same solution is called for here; and, indeed, the Court has already adopted it although plaintiff refuses to acknowledge this. The Court has said that § 7 does not apply to the mere possibility of lessening of competition, potential or actual, but applies only to a situation involving a reasonable probability of a substantial lessening of competition. Further, the Court has said that § 7 applies only to potential competition which is probable and imminent.

This is the only rational conclusion that can be reached if § 7 is to be workable. Plaintiff concedes, and the Court opinions state, that a potential competitor can enter even a concentrated market de novo or by foothold entry. This necessarily implies recognition of the fact that every action in a competitive market has both procompetitive and anticompetitive aspects. As the Court recognized in 1911, even a simple contract for the sale of goods involves some form of "restraint". It requires a rule of reason to conclude that such restraint is not prohibited by § 1 of the Sherman Act. Similarly every market entry, acquisition or merger has both procompetitive and anticompetitive aspects. This Court has held that, as a general rule, the merger of actual competitors substantially lessens competition to a degree forbidden by § 7 and is, therefore, prohibited. In the *Philadelphia Bank* case, 374 U.S. 321, the Court also held that anticompetitive effects in one market cannot be justified by procompetitive effects in another. 374 U.S. 370. Further, the Court held that the courts are not authorized under § 7 to go beyond the field of competition to "some ultimate reckoning of social or economic debits and credits" in order to determine whether the merger would be socially beneficial. 374 U.S. 371. However, the Court neither held nor intimated that it was possible to escape the task of weighing the competitive impact of any challenged merger in the light of all the circumstances of the market in which that merger had competitive effects.

That is precisely what this Court has done in each case which has come before it involving potential competition. Each of these cases is discussed and briefly analyzed above. Here it is necessary to note only that in every potential competition case in which this Court has held that § 7 had been or might have been violated, the potential competition eliminated was that of the only or of the leading and most probable entrant into the market, and in each case the market has been a large and growing one apparently able to support additional competitors.

If the theory urged by plaintiff in the cases now before the Court were adopted, rather than the reasonable interpretation heretofore applied, § 7 would become unworkable and would frustrate the very purposes for which it was enacted. It would prevent mergers and affiliations among the weakest and smallest firms in the smallest markets. It would be applied most rigorously against those facing the competition of larger firms which were growing so that plaintiff's calculation of market concentration was increasing, even though the increase was due to the effect of growth by the larger competitors and not by the smaller merging firms. In short, if § 7 were applied as plaintiff urges it should be applied in these cases, its effect would be to protect the largest firms with the largest market shares from competition by mergers to strengthen smaller firms, particularly in small markets. The net effect would be to deprive the public of the benefits of having potential competition ripen into actual competition. Clearly this is not the result intended by Congress nor the conclusion that this Court should adopt.

D. Plaintiff's Theory Is Unsound and Dangerous to Civil Liberties as Well as to the Competitive System.

Plaintiff's theory not only leads to results that would endanger the competitive system, but also threatens our freedom and liberties on a much broader front. It is hornbook jurisprudence that the law is a seamless web, and ideas or definitions developed in one field are more often than not used in other areas of the law whenever a similarity or analogy can be discerned.

The basic fallacy in plaintiff's theory of potential competition is that it does not distinguish between mere possibility and reasonable probability. Science tells us that anything and everything is possible. A pan of water on a hot stove may freeze. All the air in the room may suddenly collect near the ceiling, leaving the occupants to suffocate.[44] Such things are not impossible, only extremely improbable. But such possibilities are so remote they must be disregarded for all practical purposes. The law must proceed on the basis of reasonable probability.

The alternative, of permitting legal action on the basis of mere possibility, is to accuse on suspicion and to convict on surmise. Such a theory dispenses with any test of probable and imminent, or, in civil rights cases, of clear and present danger. When possibility becomes the legal standard, accusation is

[44] *See* A. Eddington, The Nature of the Physical World 75-76 (1928); G. Gamow, One Two Three . . . Infinity 213-15 (1947); K. Popper, The Logic of Scientific Discovery 203 (1959); H. Reichenbach, Atom and Cosmos 172, 275-76 (1933); H. Reichenbach, Experience and Prediction 38-39 (1938); Heisenberg, *Planck's Discovery and the Philosophical Problems of Atomic Physics*, in On Modern Physics 16 (1962).

tantamount to conviction because no one can prove that any accusation is impossible. Therefore, the basic logic of plaintiff's potentiality theory has, in fact, been used as the legal justification for the suppression of civil rights and the destruction of individual freedom and liberty by every authoritarian government in recent history. The accusation always is that the accused is a potential danger to the state. Repression is always imposed with the ostensible justification that it is necessary to prevent the possibility of subversion, or some other similar evil.

No doubt the well intentioned and honorable representatives of plaintiff will respond that whatever may have been done elsewhere under authoritarian and tyrannical governments can't happen here. The answer is simple: It already has. In 1942 over 100,000 American residents were seized and shipped to concentration camps [45] by the United States government, acting under administrative fiat, for no other offense than that of being of Japanese ancestry. See Maisie & Richard Conrat, Executive Order 9066 (Cal. Hist. Soc., 1972). The basis for this action was a report by the Commanding General of the west coast area characterizing all persons of Japanese descent as "potential enemies" [46] and referring to Japanese schools and organizations as evidence of "possible group disloyalty".[47] This Court, during the heat of a

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[45] Justice Roberts, dissenting, said the so-called relocation centers were merely an "euphemism for concentration camps." *Korematsu* v. *United States,* 323 U.S. 214, 225, at 230.

[46] *Korematsu* v. *United States,* 323 U.S. 214, 233, at 236 (Justice Murphy, dissenting).

[47] *Korematsu* v. *United States,* 323 U.S. 214, 233, at 237 (Justice Murphy, dissenting).

shooting war, upheld the action. *Korematsu* v. *U. S.*, 323 U.S. 214.[48] Justice Jackson, dissenting, noted, "All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.'"[49]

Whether and when the principle of plaintiff's theory of potentiality may "expand itself to the limit of its logic" no one can say. But it is futile and dangerous for this Court to create such a threat to our civil liberties. Even in this country the Court has, in recent decades, been called upon to set aside convictions because they were entered without proof in situations where local authorities thought they perceived the possibility of a breach of the peace.[50] Surely recent examples of unjust accusations and prosecutions are sufficiently well known to make us all aware of the necessity of maintaining reasonable standards of proof as a basic premise of our legal system. This is what is involved in plaintiff's theory of potentiality. Whether we are dealing with "potential competitors" or "potential enemies" the law must require proof of probability and imminence of the danger to be avoided or we shall lose far more than economic competition.

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[48] But cf. *Ex parte Endo*, 323 U.S. 283. Also note that in *Hirabayashi* v. *United States*, 320 U.S. 81, upholding a curfew order by the military commander of the West Coast military area, Justice Douglas, concurring, said that the decision assumes that national survival is at stake. The three decisions in this and the preceding note were rendered during 1943 and 1944 while this country was at war with Japan and Germany.

[49] *Korematsu* v. *United States*, 323 U.S. 214, 242, at 246 (Justice Jackson, dissenting).

[50] *Barr* v. *Columbia*, 378 U.S. 146 (1964); *Taylor* v. *Louisiana*, 370 U.S. 154 (1962); *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

IV. SECTION OF THE COUNTRY MEANS THE SAME THING AS RELEVANT GEOGRAPHIC MARKET.

Heretofore it has been elementary antitrust law that the phrase "section of the country" in § 7 refers to relevant geographic market. The leading text on the subject says:

> The statutory phrase 'in any line of commerce in any section of the country' refers to a relevant market which has both *product* and *geographic* boundaries. Determination of this market is the threshold issue and a 'necessary predicate' to a finding of a violation of Section 7 of the Clayton Act.
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> The relevant market generally is defined as the 'area of effective competition' within which one or both of the participating firms conduct their business. The 'area of effective competition' is determined by reference to both a product market—the 'line of commerce'—and a geographic market—the 'section of the country.'[51]

This statement is soundly based upon the clearest expressions of this Court in earlier cases. In *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, the Court said that determination of the relevant market is a necessary predicate to finding a violation of § 7 because there must be a finding that the threatened action will substantially lessen competition within an area of effective competition and substantiality can be determined only in terms of the market affected. 370 U.S. 324. The Court said: "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market

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[51] 3 von Kalinowski, Antitrust Laws and Trade Regulation, §18.01 (footnotes omitted).

(the 'section of the country')." (Id.) The Court further discussed the criteria to be used in determining what it called "the geographic market" and said that these must correspond to commercial realities and be economically significant. 370 U.S. 336-337. The terms "geographic market" and section of the country" are used synonymously and without differentiation throughout the opinion.

Similarly, in *U. S.* v. *Philadelphia National Bank,* 374 U.S. 321, this Court reversed the District Court on the issue of determination of the appropriate "section of the country". The Court said: "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." 374 U.S. 357. The Court then discussed applicable criteria and concluded that "the four-county area in which appellees' offices are located would seem to be the relevant geographical market." 374 U.S. 359.

Despite these, and numerous other clear and authoritative statements of identity between "section of the country" and "relevant geographic market" plaintiff in the cases now before the Court argues that the two terms are not synonymous and that it can search for and allegedly find some possible competitive effect in an area or section of the country which is not a relevant market. Thus, in Washington plaintiff argues, "Both Eastern Washington and the State as a whole, although not traditional banking markets nevertheless are relevant sections of the country within which to consider the competitive impact of the merger." (Pl. Wash. Br. 65.) Similarly, in Connecticut plaintiff argues that, "The whole state is a section of the country, although it is not a banking market . . ." (Pl. Conn. Br. 17, also at 28, 31.)

Plaintiff's argument on this point, insofar as it has any support, is apparently based on *U. S.* v. *Pabst Brewing Co.,* 384 U.S. 546. However, close examination of that case will show that it does not support plaintiff's position. In Pabst, plaintiff attacked the merger of two directly competing brewers under § 7 alleging a lessening of competition in the country as a whole and in various sections thereof. At the close of plaintiff's case the District Court dismissed, holding that there was no showing of a lessening of competition in the country as a whole and a failure to show that any smaller area was a relevant geographic market. The holding of the Court is set forth in the following statement from the opinion:

> The merger of Pabst and Blatz brought together two very large brewers competing against each other in 40 States. In 1957 these two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area of Wisconsin, Illinois, and Michigan, and 4.49% of the sales throughout the country. In accord with our prior cases, we hold that the evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area, and in the entire country was sufficient to show a violation of § 7 in each and all of these three areas. [384 U.S. 551-552.]

There were several concurring opinions but no dissent. Justice White concurred on the ground that there was a lessening of competition in the beer industry in the nation as a whole. Justice Harlan and Justice Stewart concurred on the grounds that there was a prima facie showing that the State of Wisconsin and the three-state areas were both relevant geographic markets. Justice Fortas concurred in the result but did not join the opinion because of the view that the specific geographical market had not been sufficiently defined in the Court's opinion. There is nothing in the Court's opinion, or in any of the concurring opinions, to show that a merger can be held to violate § 7 without the necessary preliminary finding of a relevant geographic market.

The error of plaintiff in misconceiving the requirements of § 7 is apparently based upon its erroneous view that "potential competition" refers to any vague possibility and does not require a showing of reasonable probability. Thus, in the Washington case plaintiff argues that although Eastern Washington and the State as a whole are not banking markets nevertheless one or the other of the merging banks might somehow expand into one of these areas and that in some unspecified manner this might result in the banks coming to "pursue parallel practices of mutual advantage without regard to local competitive conditions." (Pl. Wash. Br. 66.) The answer to this hypothetical possibility is that it simply has not been established by evidence in the record. Beyond this, it must be observed that if there is any deliberate agreement among the bankers to avoid competition then they face prosecution by plaintiff under § 1 of the Sherman Act. If the banks do not combine, conspire or agree to avoid competition in any respect but merely respond to market conditions in a manner which plaintiff chooses to derogate as something less than "vigorous competition" then it is clear that the banks have done nothing improper or illegal under any existing statutes. There is nothing in § 7, or any other antitrust law, that authorizes plaintiff to act as a general overseer of economic conduct and to insist upon policies not required by statute, regulation or judicial authority but somehow meeting a subjective criterion of plaintiff's approval.

Similarly, in Connecticut plaintiff's argument leads to illogical and inconsistent contentions. Thus plaintiff asserts that "a geographic area need not be a banking market to be a section of the country." (Pl. Conn. Br. 31.) It attacks the District Court's findings on the grounds that "market definition depends not on rigid legal rules but on ascertainment of the competitive realities of trade." (Pl. Conn. Br. 41.) Plaintiff then argues that if the District Court concludes that the State is the relevant section of the country "then the defendants cannot be potential competitors because all banks in Connecticut are necessarily actual competitors in one statewide market." (Pl. Conn. Br. 63.) Thus plaintiff is asserting, first, that a relevant geographic market is not the same as a section of the country, second, that a relevant geographic market must be ascertained by competitive realities, and, third, that within any section of the country all the firms in a particular line of commerce are necessarily actual competitors.

These propositions are not only mutually inconsistent but absurd on their face. As pointed out in the preceding discussion, within any geographic market there can be, and often are, firms which are not in competition with each other. Examples of retail grocery markets in metropolitan areas were given above. Another example is the recent Falstaff case, where the Court found that Falstaff was a competitor in the national beer market but not in the regional New England market, and that Narragansett was a competitor in the regional New England market but not in the national market, although it was geographically encompassed within it. As it has been observed that there may be firms within the same market that are not in competition it must also be observed that there may be firms not in the market but nevertheless competing within it. As is well known, there are three large and one small automobile manufacturers located within the United States. Clearly the country as a whole constitutes a market for the sale of automobiles. Just as clearly there are numerous firms that compete within that market but that are not located within it. It is necessary to mention only a few names, such as Volkswagen, Datsun, Toyota, Mercedes, and others.

In the Connecticut case plaintiff appears to contend that the Court should disregard the competition of New York City banks within the State of Connecticut because the market does not extend to New York City. However, the Court made detailed and specific findings as to the business done within the State of Connecticut by the New York City banks and was clearly correct in taking this competition into account even though it found that the relevant geographic market was properly limited to the State of Connecticut. Although plaintiff refers to the realities of competition, clearly it is thinking in terms of abstract and hypothetical theories rather than reality. Plaintiff's attempt to argue that there can be some possible competitive impact in an area denominated "section of the country" which is not a relevant geographic market is contrary to all of the teachings of this Court. It simply illustrates that plaintiff's theory of potential competition is based upon hypothetical supposition rather than upon any examination or evidence of reality or probability. As a matter of judicial precedent, economic principle logic and common sense "section of the country" means the same thing as "relevant geographic market". The only reason that plaintiff attempts to differentiate between them is that plaintiff alleges something which cannot be shown to be either a competitive overlap or a competitive impact but which plaintiff contends is some kind of "potential" effect which brings these cases within the scope of § 7, contrary to all principle and precedent.

V. THE ANTITRUST LAWS NEITHER REQUIRE NOR ENCOURAGE ATTEMPTS TO CIRCUMVENT STATE LAW.

A major difficulty presented by both the Washington and Connecticut bank merger cases is that plaintiff's statement of the questions presented is so broad and general that the genuine specific issues are obscured. In Washington, plaintiff's statement of the question amounts to no more than an issue whether the District Court was in error in not finding a violation of § 7 (Pl. Wash. Br. 2). In Connecticut plaintiff asserts the questions presented to be whether the merging banks might have been significant potential entrants into each other's markets, and other local markets, and whether the merger might encourage a trend toward concentration in the state as a whole. (Pl. Wash. Br. 2.) In neither case is there a clear statement of the fact that plaintiff contends that merger is illegal if there is any alternative method of entering the market, even if the alternative may involve violation, evasion or circumvention of state law, which is the situation in both these cases.

This Court has held that a branch of a national bank "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* v. *Dickinson,* 396 U.S. 122, 130. The purpose and intent of the federal statutes is to foster a climate of competitive equality between national and state banks. *First National Bank* v. *Walker Bank & Trust*, 385 U.S. 252, 261; *Seattle Trust & Savings Bk.* v. *Bank of California,* (Civ. Nos. 72-2712 and 2750) —— F.2d —— (9th Cir., Jan. 30, 1974). It is equally plain that the laws of both Washington and Connecticut prohibit the establishment or operation by either of the merging banks of a branch in the city or town where the other is located except by acquisition or merger. In the State of Washington, the law in substance prohibits the establishment or operation of any branch outside the city or town in which a bank's principal place of business is located, except by acquisition or merger. RCW 30.40.020. In Connecticut, there is a "home office protection law" which prohibits any bank from entering any city or town where another commercial bank is headquartered except by acquisition or merger. Conn. Gen. Stat. 36-59.

Despite these clear legal prohibitions against independent, or *de novo,* entry into other banking areas or markets, plaintiff argues that potential competition has been substantially lessened in each case because the acquiring banks have, in effect, eliminated the possibility of entering the area of the other bank by circumventing the law. In Washington plaintiff argues that NBC, the Seattle bank, could have entered the Spokane market "by sponsoring a new bank and ultimately acquiring it. . ." (Pl. Wash. Br. 45, et seq.) In Connecticut plaintiff argues that Connecticut National "could make an independent entry into new markets" by "organization of a holding company whose agents would obtain a charter for a new state or national bank to be acquired thereafter by the holding company." (Pl. Conn. Br. 54, et seq.)

Plaintiff's argument in both cases is founded on the premise that the Comptroller could charter "new, *bona fide* national banks to be affiliated with existing banks. . . ." (Pl. Wash. Br. 47.) However the evidence was that an application for a charter sought for the purpose of branching would not be accepted in the circumstances of these cases. Wash. App. 1011. See 12 C.F.R. § 4.2(a) (Application must be submitted to Regional Comptroller.) Cf. *Dearborn* v. *Manufacturers National Bank of Detroit,* 377 F.2d 496 (6th Cir. 1967) (Branching enjoined where intention to evade legal restriction disclosed); also see *First National Bank* v. *Walker Bank & Trust Co.,* 385 U.S. 252; *First National Bank* v. *Dickinson,* 396 U.S. 122. Therefore, the proposed method would work only if the intention to have a later acquisition were concealed at the time of application—which would certainly be improper and illegal.

The effect of the laws of Washington and Connecticut in preventing the establishment by means other than merger of new branches in the service areas involved is covered in the briefs of the banks, and we will not undertake to review or repeat the argument relating to the applicable respective state laws. However, one aspect of this seems beyond dispute. The right to proceed in the manner suggested by plaintiff would be challenged by state authorities. Regardless of how the legal issues might ultimately be determined, they are not directly presented in either of these cases, but the questions of law are unmistakably obvious. It is, therefore, a virtual certainty, that if such a method of entering either the Spokane or New Haven areas were attempted it would be met by a legal challenge. This fact alone is enough to make the method an imprudent and improbable one for a bank—on clearly objective grounds.

Indeed a prudent bank would probably be deterred from undertaking sponsorship and acquisition of another bank by the threat of suit from plaintiff itself. Plaintiff has brought suit under §7 attacking the very method of sponsorship and acquisition which it espouses in these cases. *U.S.* v. *Trans Texas Bancorporation*, 1972 Trade Cases par. 74,257, p. 93,207, affirmed 412 US 946. More recently, plaintiff has attacked the sponsorship by one bank of another as a violation of §1 of the Sherman Act, as well as of §7. In deciding against plaintiff the U.S. District Court for the Northern District of Georgia noted the inconsistency between plaintiff's argument in that case and plaintiff's argument in the Washington case, 73-38 before this Court. *U.S.* v. *Citizens and Southern National Bank* (Civ. No. 15823), —— F.Supp. ——, ATRR No. 650, p. D-1 (D.Ct., No. D.Ga., Jan. 25, 1974). In both the Trans Texas and the Citizens and Southern cases the banks involved were central city banks (in El Paso and Atlanta) which had sponsored suburban banks that later became branches. So far as the reported opinions disclose, in neither case was there any attempt to invade the service area or market of another bank in contravention or circumvention of law.

At best the argument of plaintiff that there is a potentiality for circumventing the state laws involved in these cases is an unseemly argument to come from a government agency charged with enforcing and upholding the law. At worst, plaintiff's argument may be taken as advocacy for flouting the purpose and intent of the state laws. In any event, and under any interpretation, the state laws stand as a barrier to entry by the banks into the areas they seek to serve through merger by any other legal means than merger. Regardless of ingenious schemes that may be suggested for circumventing these barriers, the indisputable and objective fact of the existence of the laws make the schemes for their circumvention at best hazardous and at worst disastrous. On a strictly logical basis, a course which must be judged to range from hazardous to disastrous cannot be judged prudent or probable for a bank. Therefore, judged quite objectively, potential competition which depends upon a bank undertaking such a course cannot be probable, and it clearly was not imminent in either case. Consequently the argument that potential competition may be lessened by the proposed mergers because they foreclose alternatives which involve challenging state laws are fallacious and without any foundation.

Furthermore the plaintiff's position in these cases is basically inconsistent with the purposes of the antitrust laws. The existence and vitality of the dual banking system in this country, unique among national banking systems, has provided far more competition in banking than in any other country or most other American industries. In banking there is no danger of the "adverse influence on local affairs of out-of-state acquisitions" feared by Justice Douglas in the *Falstaff* case. 410 U.S. 543. On the other band, if plaintiff's thesis is accepted, that the antitrust laws require or favor efforts to circumvent state laws, then the dual banking system may indeed be endangered. In that event, the result is likely to be a far less competitive banking system in this country.

VI. PLAINTIFF'S THEORY OF POTENTIAL COMPETITION IS NOT APPLICABLE TO BANKING WHERE ENTRY IS CONTROLLED BY THE GOVERNMENT.

Although antitrust cases tend to be complex and difficult at best, those involving plaintiff's theory of potential competition are particularly difficult, largely because the concept itself is abstract and ill defined. It must be remembered that potential competition is a tbeory developed by the enforcement agencies and apparently derived from a series of decision in this Court which, in effect, characterized "unsuccessful bidders" or probable and imminent participants in a market as potential competitors. The decisions of this Court reviewed above make it clear that the competition referred to by §7 is not that which is merely possible but tbat which is probable and imminent. It follows that "potential competition" which is within tbe meaning of §7 must be that which is probable and imminent rather than merely possible.

The meaning of the term "competition" in the potential competition tbeory is even easier to specify. That term clearly does not mean actual rivalry in the market, which is the usual meaning of "competition" but ratber means entry into the market. This is made clear by both implicit and explicit reference througbout the plaintiff's briefs in both companion cases. Plaintiff throughout its two briefs refers to a potential competitor as a "potential entrant" and to potential competition as "potential entry."[52]

Consequently, it is clear that the abstract and somewhat opaque term "potential competition" for purposes of antitrust analysis actually means probable entry. This is confirmed by plaintiff's arguments throughout both briefs that the mergers should be barred in order to preserve the alleged possibility of *de novo* or foothold entry into the respective banking markets. Indeed, this is the whole of plaintiff's case.

Part of plaintiff's difficulty in bank merger cases arises from its failure to follow through with an economic analysis of the purpose and conditions of market entry. The economic function of market entry is to increase competition by increasing supply which, in turn, will theoretically result in lower price and better service to customers. The antitrust laws are not designed to serve economic abstractions, such as supply and demand, but rather to serve the public interest in the allocation of economic resources, the lowest prices and the best service. *Northern Pacific Railway* v. *U.S.*, 356 U.S. 1, 4.

Thus the doctrine of potential competition is appropriate to and serves the purposes of the antitrust laws only insofar as it is effective in preserving or stimulating the economic forces which result in market entry and competition in providing greater supply and service. In many industries and markets there is a significant place for such a doctrine.

However, the area for the application of the theory of potential competition in the field of banking, if

[52] Pl. Wash. Br. 4, 22, 23, 26, 27, 29, 30, 31, 34, 36, 37, 38, 41, 42, 45, 53; Pl. Conn. Br. 18, 33, 45, 46, 55, 57, 58, 59.

any, is narrowly circumscribed by the fact that both entry and supply are closely controlled by Government. As this Court noted in the *Philadelphia Bank* case in the field of banking "entry is, of course, wholly a matter of governmental grace." 374 U.S. 367, n. 44. Before any person or firm may even begin organization of a national bank it is necessary for the applicant to submit an application to the Comptroller of the Currency, which investigates, *inter alia,* the earning prospects of the proposed bank and the convenience and needs of the public to be served. 12 C.F.R. §4.2. The determination by the Comptroller as to whether the earnings prospects of the proposed banks and the convenience and needs of the public to be served warrants the issuance of a charter is controlling unless it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and a finding that the proposed bank is an uneconomic venture in light of the banking needs and services already available in the surrounding community is an adequate reason for denying an application for a new charter. *Camp* v. *Pitts,* 411 U.S. 138.

Plaintiff's argument with respect to the application of its potential competition theory in the field of banking is not only inconsistent with these authorties but is directly contrary to them. Thus plaintiff argues that the decision of the Comptroller is bound to "reflect the national policy in favor of market extensions by internal expansion rather than by acquisition . . ." (Pl. Wash. Br. 51; Pl. Conn. Br. 53.) Consequently, plaintiff argues that "only if new entry might threaten the stability of existing banks could the Comptroller properly refuse to permit new competition." (Pl. Wash. Br. 52.) Despite the fact that both of these briefs were filed long after the decision of this Court in *Camp* v. *Pitts, supra,* they wholly ignore the plain holding of that case.

Plaintiff's argument rests upon the application to the two cases now before the Court of the rule enunciated in *U.S.* v. *First City National Bank of Houston,* 386 U.S. 361, and *U.S.* v. *Third National Bank of Nashville,* 390 U.S. 171. In those cases the Court enunciated the rule that "Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny it was to be permissible only if the merging banks could establish that the merger's benefits to the community would outweigh its anti-competitive disadvantages." 390 U.S. 182. The determination of the district court, rather than of the banking agency, is determinative under the Bank Merger Act and this avoids the "serious constitutional questions" of having the courts perform non-judicial tasks since it involves applying the antitrust laws according to the rule of reason. 386 U.S. 369. Both of these cases, as well as the other banking cases on which this Court has written, have involved a lessening of actual competition and have, therefore, permitted the courts to perform their accustomed function of applying antitrust principles.

However, when no actual competition is involved and the alleged competitive effect involves only potential competition or entry an altogether different logical situation is presented. Whether or not *de novo* entry would or will be permitted by the banking authorities depends upon congeries of subtle considerations clearly entrusted to the broad discretion delegated by Congress to the Comptroller in the complex field of national banking. *Camp* v. *Pitts,* 411 U.S. 138;

Ramapo Bank v. *Camp*, 425 F.2d 333 (3d Cir.), cert. den. 400 U.S. 828; *Seattle Trust and Savings Bank* v. *Bank of California* (9th Cir., Jan. 30, 1974); *Bank of Commerce* v. *City National Bank of Laredo*, 484 F.2d 284 (5th Cir. 1973).

Thus plaintiff's argument is impaled on the horns of a logical dilemma: in a potential competition case there is no lessening of competition within the meaning of §7 unless there is a probable *de novo* entry as an alternative to the merger; but there can be no probable entry unless the Comptroller is satisfied that such entry will serve the convenience and needs of the community. Therefore there cannot be an initial application of a conventional antitrust law test to be followed by consideration of the convenience and needs test. The rule of the *Houston Bank* and *Nashville Bank* cases is inapplicable to cases brought on a theory of potential competition not because of any implied immunity but because of an inherent logical contradiction.

It is plaintiff's theory of potential competition that necessarily rests upon a showing of probable entry. Under the statutes, regulations and decisions of this Court, probable entry, in turn, rests upon the Comptroller's judgment as to the convenience and needs of the community and other factors. Therefore, in order to show a lessening of potential competition plaintiff is logically required to establish probable *de novo* entry as an alternative which, in turn, rests upon a showing that such entry will meet the convenience and needs of the community under the standards applied by the banking authorities charged with regulation of the field. In other words, in banking cases probable entry cannot be determined without a determination as to convenience and needs, and, consequently, in banking cases based upon the theory of potential competition, or probable entry, the competitive issue cannot be decided independently of or prior to the convenience and needs issue. Therefore the plaintiff's arguments regarding the convenience and needs issue in both cases (Pl. Wash. Br. 67 et seq.; Pl. Conn. Br. 66 et seq.) are entirely irrelevant and beside the point.

In both cases the Comptroller found that *de novo* entry was legally barred and economically impractical and that each proposed merger would serve the convenience and needs of the community and would not lessen potential competition. (Wash. App. 398 et seq.; Conn. App. 2566 et seq.) In order to meet its burden on the competitive issue in these cases, plaintiff must show that these findings were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and it has not even attempted to do this. Consequently, it must be concluded that plaintiff's theory of potential competition, which means probable entry, is not applicable to bank merger cases, at least where plaintiff is unable or unwilling to assume the burden of establishing that the convenience and needs of the community require the banking authorities to permit new entry on the basis of banking, rather than merely antitrust, standards.

Consideration of the theory underlying the regulation of banking will demonstrate that this legal conclusion is consistent with and supportive of the theory upon which our banking system and its regulation is founded. The most recent edition of the most widely used and highly respected basic text book on economics, Paul A. Samuelson, Economics

(9th ed. 1973) notes that until fairly recently "the American history of bank failures and losses to depositors used to be a grievous one" (p. 292). Thus only about one-half the banks in existence in 1915 are still solvent and even in 1929 before the beginning of the depression no less than 659 banks failed. (Id.) Samuelson points out that it is a fallacy to believe that individual banks can "create money" since each bank can loan or invest only those funds which it has on deposit. However, "The banking system as a whole can do what each small bank cannot do . . ." (pp. 301, 311). Although individual banks cannot expand total money supply the system as a whole can expand through the operation of the reserve ratio, since one dollar in reserves can be passed to another bank in the system which can make loans or investments on the basis of the same amount. The limitation on the expansion in loans and investments which is permissible is determined by the reserve ratio that is set by the Federal Reserve Board. Samuelson says that the Federal Open Market Committee which exercises this function has, for this reason, been called "the most powerul group of private citizens in America" because it controls the nation's money supply (p. 293). Samuelson says that: "The main function of legal reserve requirements is *not* that of making deposits safe and liquid, payable on demand. Their vital function is to enable the Federal Reserve authorities to *control* the amount of demand deposits—or bank money—that the member banks can create. By imposing fixed legal reserve requirements the Fed can *limit* the growth of bank deposits to *its* desired target." (p. 299.)

In short, in the field of banking the commodity involved is money and the supply is not controlled by normal economic forces but by government authority. Thus the entry of a new bank into a local banking market does not have the same effect that the entry of an industrial or business firm does in an unregulated market. In an unregulated market a new entrant increases the supply and therefore increases the competitive pressures on one side of the supply-demand price equation. In contrast, in banking the supply is controlled by governmental authority and the addition of a new entrant into a local market has no substantial effect upon the total money supply. Consequently, the convenience and needs of a particular banking market may be better served by the merger of a bank in that market with an outside bank which is able to provide resources that result in the improvement of services within the banking market than by entry *de novo* or on a foothold basis. The Comptroller found this to be the situation in both of the cases now before the Court. (Wash. App. 398, 400-401; Conn. App. 2566 et seq.)

The application of both §7 and of the Bank Merger Act to the bank mergers involved in these cases is not questioned. However, the two cases now before the Court involve no allegation of any lessening of actual competition. The entire contention of plaintiff is that the mergers lessen the possibility of future *de novo* entry. But, as a matter of law, this possibility necessarily requires an administrative determination that new entry serves the convenience and needs of the community and meets the other banking standards by which applications for new entry are judged. Therefore, as a matter of established law and inexorable logic the antitrust test of §7 alone cannot be applied to these cases without first determining the question of probable entry on the basis of community convenience and needs and other relevant banking standards. Plaintiff has not even attempted to do this and this is obviously the insuperable obstacle to plaintiff's theory in the cases before the Court. Consequently, the result is inescapable that plaintiff's theory simply is not applicable to these two cases or other similar cases in the field of banking.

This conclusion explains the judicial record of plaintiff's uniform failure to date in opposing bank mergers on its potential competition theory. It is not reasonable to suppose that nearly a dozen separate district courts are so biased against the U.S. Department of Justice that none of them has been able to find any substance or merit whatever in any case brought by the plaintiff under this theory in the field of banking. It is far more reasonable to suppose that plaintiff has misconceived the application of this theory to banking and thus has been unable to convince any court before which it has appeared that its theory of potential competition should apply to the field of banking.

The logic of plaintiff's argument on the application of this theory to the field of banking is further persuasive evidence of the fallacy of such an application. Plaintiff argues that banking markets are necessarily limited to each state and tend to be local. (Pl. Wash. Br. 32-33; Pl. Conn. Br. 32.) Thus it is apparent that there are at least several hundred banking markets in the country and, as noted above, there are about 14,000 commercial banks in the United

States as of the end of 1972.[53] Despite these hundreds of markets and thousands of competitors plaintiff notes the strange fact that all "such markets inherently tend to be concentrated." (Pl. Wash. Br. 32; Pl. Conn. Br. 32.)

On the basis of common sense analysis it seems most unlikely that thousands of competitors dealing in a fungible commodity in hundreds of markets should produce a condition in which all markets are "highly concentrated." In the absence of a nationwide conspiracy among these thousands of competitive banks, which has never been charged, there must be some explanation other than chance or the normal operation of economic laws to explain this extraordinary situation. Analysis of the known facts and the record in the two cases before the Court taken together with plaintiff's argument provides an explanation. Plaintiff argues that a determination of the effectiveness of competition in banking must be based upon consideration of such indicia as the level of profits. (Pl. Wash. Br. 52-53.) The District Court in Connecticut found that the returns on invested assets in the banking industry average less than 1 percent which suggests that "prices and return on assets are being kept down through competition." 362 F.Supp. 262, Finding 164.

As pointed out above, one of the purposes of the banking laws and government regulation in the field is to protect the solvency and stability of banks in order to protect the general public. Therefore, banking authorities have limited entry into the field of banking to those situations in which it can be shown that there is a community need for a new entrant and

[53] Statistical Abstract of U. S. 1973, p. 446.

that the proposed banking entrant will have reasonable earnings prospects. This has resulted in limiting the number of banks in banking markets to that number which those markets can economically support. (Pl. Wash. Br. 32.) Plaintiff has simply postulated a definition of "concentration" by which any market with such a limited number of competitors is to be deemed concentrated. Plaintiff has then proceeded to argue that § 7, having been enacted to prevent something also referred to as "economic concentration" should be applied to prevent the condition found in all banking markets. However, § 7, by its express terms, forbids only mergers which substantially lessen competition. The testimony of plaintiff's own economic expert is that banking markets which are "highly concentrated" may also be "highly competitive." (Wash. App. 534.)

In cases such as those now before the Court which involve only an allegation of lessening potential competition in the field of banking, it would follow from plaintiff's definitions and argument that all banking mergers are prohibited by §7 since they all occur in markets which plaintiff has defined as "highly concentrated" regardless of whether or not they are actually competitive. Furthermore, since the alleged concentration arises from the judgment of the banking authorities that the banking markets have that number of competitors which the markets can economically support and which the convenience and needs of the communities to be served require,[54] it

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[54] As was established in the Connecticut case, the banking authorities are continuously confronted with more applications for new charters than their standards permit them to grant. (Conn. App. 1029-1030; 2381-2384; 2387-2390; 2573-74.)

follows that the application of the principles urged by plaintiff would not only prohibit all mergers in the field of banking but would destroy the power of the banking authorities to control entry, would supersede all of the banking laws, regulations and principles by the single test of §7, and would destroy the governmental plan of regulation which has been developed over the years to protect the solvency, stability and economic utility of the banking system.

Consequently, as a matter of logic, of established legal principle and of the pragmatic test of reasonable results, it seems compellingly clear that the plaintiff's theory of potential competition is inapplicable to bank merger cases.

VII. PLAINTIFF HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF AND HAS OFFERED ONLY AN ABSTRACT THEORY TO SHOW ANTICOMPETITIVE EFFECT.

In *United States* v. *First City National Bank of Houston*, 386 U.S. 361, this Court considered the status of antitrust suits brought by the Department of Justice against bank mergers following passage of the Bank Merger Act of 1966. The Court held that "an action challenging a bank merger on the ground of its anticompetitive effects is brought under the antitrust laws." 386 U.S. 363. The Bank Merger Act established a special defense in such actions based upon community convenience and needs. The Court held, in effect, that plaintiff has the burden of proof on the antitrust, or anticompetitive, issues, and defendants have the burden on the convenience and needs defense.

In an antitrust suit brought by the Department of Justice, as in other actions, the burden of proof is on the plaintiff to establish all the ultimate facts in order to prevail. *U.S.* v. *E. I. Du Pont de Nemours & Co.,* 351 U.S. 377, 381; *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 363.

In a suit brought under §7, plaintiff has the burden of proving all the elements showing a violation of that section, including the line of commerce, the section of the country in which the effects of the merger may be felt, and whether the merger may substantially lessen competition or tend to create a monopoly. *U.S.* v. *Bethlehem Steel Corporation,* 157 F.Supp. 877 (S.D.N.Y. 1958). See also *Brown Shoe Company* v. *U.S.,* 179 F.Supp. 721 (D.C. Mo. 1969); *aff'd. on other grounds,* 370 U.S. 294 (1962).

In the instant case, as in the seven other potential competition bank merger cases, plaintiff has failed to carry the burden of proof. See, *United States* v. *Connecticut National Bank,* 362 F.Supp. 240, 288 (D. Conn. 1973); *United States* v. *United Virginia Bancshares Inc.,* 347 F.Supp. 891, 895 (E.D. Va. 1972); *United States* v. *First National Bancorporation,* 329 F.Supp. 1003, 1016 (D. Colo. 1971), *aff'd mem.,* 410 U.S. 577 (1973); *United States* v. *Idaho First National Bank,* 315 F.Supp. 261, 270-271 (D. Idaho 1970); *United States* v. *First National Bank of Maryland,* 310 F.Supp. 157, 161, 178 (D. Md. 1970); *United States* v. *First National Bank of Jackson,* 301 F.Supp. 1161, 1195 (S.D. Miss. 1969); *United States* v. *Crocker-Anglo National Bank,* 277 F.Supp. 133, 199 (N.D. Cal. 1967).

Plaintiff's objection to NBC's acquisition of Washington Trust Bank is premised upon the belief that §7 should bar a firm's entry into a particular market by merger because it would be more procompetitive to have such an allegedly potential competitor enter a new market on a foothold or *de novo* basis as an additional competitor. The Comptroller of the Currency denies the validity of this potential competition approach in bank merger cases. However, even assuming *arguendo* its validity in regard to banks where entry is regulated, plaintiff did not offer any objective evidence in the District Court to prove any reasonable probability of alleged potential anticompetitive effects.

Professor Smith, plaintiff's economic expert,[55] was generally unfamiliar with banking, particularly banking in Spokane. He evidently spent only one day there, limiting his activities to speaking with two bankers (Tr. 55-56, App. 476-77) and looking only at Washington Trust's branch locations (Tr. 163, App. 536). Although it was not apparent what facts he learned through this limited experience and while admitting that he did not spend sufficient time in Spokane, he nevertheless testified that the visit "substantiated"

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[55] The parties agreed that Dr. Smith, formerly of the Federal Trade Commission, was an "economic expert" although his expertise was in industrial organization and labor economics. Tr. 47, App. 471. While with the Federal Trade Commission, Professor Smith analyzed competition in the milk industry as well as the baking, grocery, and fishing reel industries. Tr. 54-55, App. 475-476. This witness had no experience with the economics of banking, and his preparation for this case was limited to reading certain materials, depositions and the exhibits which had already been prepared by the Antitrust Division lawyers. The Court below was concerned with Smith's use of prepared exhibits, explaining that it gave greater weight to expert testimony when the witness has developed his own exhibits indicating the extent of his efforts to obtain a background for his opinion. Tr. 54-55, App. 475-476, Tr. 1083-84, App. 1074.

his already formed opinion as to the "nature of the competition in Spokane." (Tr. 56, App. 477, Tr. 164, App. 537). Professor Smith was even more unfamiliar with banking in other parts of the State. He visited no other areas and apparently talked with no other bankers. Nevertheless, he concluded that banking competition in Washington was characterized by "friendly rivalry." The District Court rejected his testimony as not credible.[56] (Tr. 1195-97, App. 1138-39; F. 22, App. 1940).

Professor Smith did not think it was important for his testimony whether or not banking performance in Spokane was actually competitive, and he did not evaluate the degree of competition in Spokane or anywhere else in the State. Tr. 162-63, App. 536. He considered only the stipulated Spokane Metropolitan Area as the relevant market (Tr. 64, 166-167, App. 481, 538) and carefully excluded all other areas as relevant markets, confining his testimony to Spokane. He referred to *de novo* entry into Spokane by NBC

[56] In contrast, the District Court was "more impressed and gave more credence" to the testimony of appellee banks' banking economics experts, Dr. Haywood and Dr. Baxter. Tr. 1195-1197, App. 1138-1139; F. 22, App. 1940. Both had extensive familiarity with competition in the banking industry and the Spokane banking market. For example, Dr. Baxter, in preparation for the Comptroller's hearing on this matter, made two trips to Spokane where he conducted an analysis of the convenience and needs effects of the merger and in so doing interviewed many customers of the banks there and spoke with the bankers. App. 1045-1046. He visited Spokane on many occasions subsequent to the Comptroller's hearing. To prepare for the trial, Dr. Baxter expanded considerably his previous work, prepared his own statistical exhibits, and traveled through most of the major communities and many of the smaller towns in the State, especially in eastern Washington, speaking with banks and business people to assure that he did not make judgments in a vacuum. Tr. 1034-1035, App. 1046.

without any mention of the restrictive branching laws applicable to banks in the State of Washington. Tr. 94, App. 498; Tr. 101, App. 502.

The economic analysis from which Professor Smith concluded this merger would have substantial anticompetitive effect was premised upon an oversimplified model of theoretical perfect competition, which he felt applied to banking as he understood it.[57] Smith could find little difference between banking in Washington and the agricultural commodities with which he was more familiar.[58] Indeed, he implied that if banks were as many in number as corn farmers, banking would then be competitive. Tr. 75, App. 487. Consistent with his conclusion that no banking market in the United States is competitive (Tr. 159, App. 534), Dr. Smith stated that competition in banking might develop "if there were significant overbanking" (Tr. 160, App. 534).[59]

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[57] Appellee banks' economist, Dr. Haywood, explained that this approach required the use of a concept "which likely doesn't exist except in theory." Tr. 356-357, App. 649. This is confirmed by other economic authority. "This simple model . . . does not purport to describe any real market. . . ." Areeda, *Antitrust Analysis,* 1967, §326, p. 218.

[58] Smith thought that banking competition was "rather similar" to the grape and wine industry upon which he wrote his doctoral thesis, and believed that interviews he conducted in analyzing this agricultural commodity helped him draw conclusions as to banking competition in Spokane. Tr. 57, App. 477, Tr. 164, App. 537.

[59] Public policy since the 1930s has been to regulate the number of banks to avoid instability and bank failures, while at the same time meeting the public needs and convenience. Tr. 346, App. 643. Chartering banks solely for the purpose of business competition, rather than for the purpose of providing banking services to a community would create instability, (Tr. 563, App. 770) which Smith apparently favored. (Tr. 76-77, App. 488).

Plaintiff cites in its brief the second edition of Joe S. Bain's textbook *Industrial Organization* (1968), apparently choosing to disregard the author's clear disclaimer that the book "exclude[s] banking or other financial firms." Despite Bain's warning that his theories do not apply to banking and financial instituitions, Professor Smith nevertheless rather glibly espoused them. Consequently, plaintiff's reliance on Professor Smith's perfect competition analysis troubled the District Judge and he questioned the banks' economic expert, Dr. Haywood, in that regard. Dr. Haywood explained that implicit in plaintiff's perfect competition theory was a notion that some firms must necessarily "go broke." Tr. 386-388, App. 666-667. The Comptroller of the Currency strongly urges this Court to reject the application of this or any similar economic analysis to the National Banking System.

An additional unsupported facet of plaintiff's economic theory in this case involves a vague idea that banks with sizable market shares are not as competitive as banks with smaller market shares. This is its so-called "friendly rivalry" theory which plaintiff uses in support of its argument that "concentration" in and of itself is anticompetitive. Plaintiff claims that its "evidence" includes "extensive references" to "'friendly' relationships among bankers in Spokane with respect to the possibility of new entry by NBC," and elsewhere. The District Court rejected the testimony of plaintiff's economist on this point as being "mere theoretical speculation not in accord with realities of the commercial banking business in Spokane." (F. 22, App. 140).

The "evidence" to which plaintiff refers is made up basically of six documents, written at six different times during a period of over 20 years, authored by unidentified persons (labeled by plaintiff as "an NBC official" in each case). One reference in plaintiff's brief presents a shocking example of the inaccurate impression which can be created by using statements taken out of context. Plaintiff quotes the two sentences it printed for the appendix from document GX F-26, App. 1275. (Pl. Br., 57, n. 53). As printed and argued by plaintiff, this document seemingly indicates that in 1961 Fred Stanton, then president of Washington Trust, told "an official" of NBC that he expected NBC to enter Spokane as a friendly competitor and that he said this to someone from NBC "before he [Stanton] approached his directors." As a matter of fact, GX F-26 is the second page of GX F-25, also printed in an abbreviated manner by plaintiff (See App. 1274). GX F-25 contains the explanation for the two sentences quoted by plaintiff by stating "Fred [Stanton] told me very privately and confidentially that he intended to arrange for his son, Phil, to become President of the Washington Trust Bank at the next annual meeting in January whereupon he would become Chairman of the Board." Mr. Stanton also commented, in response to suggestions from the NBC man as to a future merger of the two banks, that it would be a great mistake for his son to give up what he is inheriting because as President of the Washington Trust Bank, he would be his own boss and there was no reason why he should give up his independence." (GX F-25). The Court might note that this discussion involved officers from two banks not in competition, so that this could not be an example of *any* kind of rivalry. Since one matter on the author's mind was a suggested merger of the two banks, any statement of Mr. Stanton's regarding the entry was merely a polite method of avoiding discussion of the suggestion of possible merger.

A further example of plaintiff's lack of an evidentiary case is plaintiff's reference to the Buck Deposition[60] as evidencing an elaborate social structure for discussion of rates and business problems. (Pl. Br., p. 59). Mr. Buck testified that bank officials attended gatherings to entertain visiting dignitaries, Chamber of Commerce functions and meetings of other organizations. He was then asked:

> Q. And normally at such gatherings there would be some discussion in some casual fashion?
>
> A. No. You are putting words in my mouth. I never said that at all. *Normally there would not be,* but occasionally there might be. We are extremely competitive in our rates, and I know that on occasion people from the Seattle First have said, "When are you guys going to drop your savings rate instead of making it tough for us" and things like that, and that's a discussion about rates and that's the kind of discussion that we have.
>
> Q. Mr. Buck, what would they mean when they say, "instead of making it tough for us," what is the context of that, Will you explain?
>
> A. It means we are tough competitors.
>
> Q. But does that mean because your rates are high, that they have to maintain theirs at a comparable level?
>
> A. I don't know what they mean, but that's what I would guess. *They didn't, as a matter of fact,* and that's why we are making it tough for

[60] Dep. R. Buck, App. 93-136.

> them, I suppose. [Emphasis added.] App. 127-128.

Thus, the Buck deposition actually demonstrates that (1) it is unusual when the casual "bantering" at social occasions involves management of other banks or business topics; (2) NBC is a tough competitor; and (3) NBC has made a competitive move on rates which was not followed by Seattle First, despite the fact it was "tough for them." In sum, this is totally contrary to the plaintiff's economic theory on interdependent friendly rivalry and shows, the Comptroller believes, the kind of vigorous price competition entirely consistent with the antitrust laws and a highly competitive industry.

Plaintiff believes that NBC's entry into Spokane should be channeled into de novo entry or entry by foothold acquisition, as this would introduce a vigorous new competitive force to challenge entrenched positions of large banks already in the market. (Pl. Br. 35). The objective evidence in this case, however, is that Western Bancorporation's entry into Spokane through an acquisition of a small two-office bank nearly ten years ago has not had the procompetitive effects and benefits which plaintiff hypothesizes would result if NBC were required to enter in a similar manner. When confronted with this objective evidence, plaintiff's economist Smith could offer no plausible explanation and admitted that he did not know whether such small scale entry by NBC would have any more procompetitive or deconcentrating effect than did Western Bancorporation's disappointing efforts. (Tr. 68-71, App. 483-85). The fact that plaintiff's economist did not know what would be the result of NBC's small scale entry into Spokane made it impossible for the District Court to conclude that the effect would be more procompetitive than would be the merger as plaintiff argues.

Professor Smith readily conceded "[t]here is little doubt that the doctrine of potential competition is quote controversial, and the most controversial part of it is the wings effect." (Tr. 104, App. 503-504). Nevertheless, plaintiff contended that NBC presently exerts a procompetitive influence on the Spokane banking market. (Pl. Br., p. 27, 53-54). However, the testimony was that the threat of NBC's entry into Spokane other than through the acquisition of WTB was illusory precisely because of the devious means which NBC would have to use to be a potential entrant. (Tr. 343, App. 641). These devious means make NBC's entry so improbable and hypothetical as to make it extremely doubtful that NBC influenced the behavior of Spokane bankers (Tr. 344, App. 641-642). Bankers who testified on this point expressed considerable doubt on any wings effect. (Tr. 711-713), App. 857-859, Tr. 841-842, App. 934. See also, Tr. 1053-54, App. 1056-57). The existence of any wings effect is further made unlikely since the Spokane banking market was competitive. (Tr. 706, App. 854, Tr. 348-351, App. 644-646, Tr. 1053-1054, App. 1056-1057, Tr. 842-843, App. 935). The only wings effect is the fear of entry through this merger, an effect which was proven by direct evidence.[61] Furthermore, plaintiff's interpretation of a document in an effort to establish that Spokane bankers feared NBC's entry is completely erroneous as this document, whose author was never identified, refers only to direct competition between NBC and Old National

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[61] See n. 40, *supra*.

Bank of Washington in other parts of the State, not in Spokane. (See, GX B-4, App. 1240-1241).

Plaintiff is very vague about what effects NBC's entry into Spokane by some other manner would have. On the one hand, plaintiff would bar this merger to channel NBC's entry into a more procompetitive alternative. (Pl. Br. 43). Later, plaintiff apparently concedes that new entry will not have any lasting impact. (Pl. Br. 56, n. 52). Also, plaintiff's friendly rivalry theory under which bankers do not worry much about competition flies in the face of plaintiff's simultaneous assertion that bankers in Spokane are competively influenced by the threat of NBC's *de novo* or foothold entry. The Comptroller believes that in the face of plaintiff's ephemeral, conflicting and unsubstantiated *ad hoc* economic theorizing the District Court had no objective evidence from which it could have correctly concluded that the merger had an anticompetitive effect violative of § 7.

VIII. THE RESULT OF THIS MERGER WILL BE TO INCREASE EFFECTIVE COMPETITION.

As discussed above, plaintiff's objection to NBC's acquisition of Washington Trust Bank is premised mostly upon its belief that the addition of a new competitor into the Spokane banking market would be more procompetitive than the chosen means of entry. The question before the District Court was whether it was more procompetitive for NBC to enter Spokane immediately by acquiring Washington Trust or possibly at some indefinite future time through plaintiff's branching "procedure." In a bank merger case such as this, procompetitive effects are a proper matter for consideration under the convenience and needs defense provided by the Bank Merger Act of 1966.

Therefore, the District Court very properly found the merger to be lawful because it determined that NBC's acquisition of Washington Trust was a more procompetitive means of entry than *de novo* entry. (F. 20, App. 1939-1940).[62]

Basically, forgetting the differing probabilities involved here, the only procompetitive aspect of plaintiff's recommended *de novo* entry is whatever benefits might be derived from a completely new and additional competitor bank in Spokane. In this regard the record demonstrates that a newly chartered bank might not even be profitable for a period of ten years.[63] Even if NBC could enter the market through a hypothetical acquisition of an "independent" national bank in Spokane, it would not be able to offer the full range of banking services which could be made immediately available through the acquisition of Washington Trust. In contrast, NBC's entry into Spokane through this acquisition would have a direct and immediate positive effect on competition in the Spokane banking market, as demonstrated above.

[62] One of the considerations that cannot be ignored in making this comparison is that plaintiff's proposed alternative means of entry—its "sponsored bank procedure"—is frustrated by several problems which, when taken together, make it very doubtful that NBC would or even could enter Spokane other than through the instant acquisition.

[63] Plaintiff's witness MacMurray, a former supervisor of banking in Washington, testified that a newly chartered bank might not be profitable for ten years. (Tr. 556, 573, App. 765, 775.) This witness also indicated that a bank regulator could not charter a bank for the purpose of establishing a branch of an existing bank. (Tr. 561, App. 768.)

IX. A FINDING BY THE DISTRICT COURT ADVERSE TO PLAINTIFF ON THE ISSUE OF COMPETITION DOES NOT PRECLUDE OR INVALIDATE A FINDING ON SERVING THE CONVENIENCE AND NEEDS OF THE COMMUNITY.

In both bank merger cases now before the Court the District Courts weighed the evidence of procompetitive and other problable convenience and needs benefits against anticompetitive effects alleged by plaintiff. Plaintiff argues the District Court was not entitled to evaluate the convenience and needs defense "on an abstract basis" by assuming *arguendo* that plaintiff had proven its case, citing *United States v. Third National Bank in Nashville,* 390 U.S. 171, 183. Pl. Wash. Br. 68-69; Pl. Conn. Br. 67-68. Plaintiff's reliance on Nashville is misplaced. The District Court in Nashville concluded in its opinion (260 F. Supp. at 883): "As the Court . . . concludes that the merger does not 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." This Court therefore had no alternative on these facts but to remand the case for a weighing of the convenience and needs defense as the District Court had not previously made any determination of that matter. To suggest, as plaintiff does, that Nashville precludes a District Court from weighing assumed anticompetitive effects against benefits to the community convenience and needs resulting from a bank merger would be to mandate two separate trials in every case in which the District Court found against plaintiff on the issue of competition. This might suit plaintiff's purpose, but it would result in placing an unreasonable and oppressive burden on banking which exists in no other industry and which is clearly contrary to the legislative intent of the Bank Merger Act of 1966, which was to lower, not raise, the barriers to bank mergers.

This Court apparently had that point in view in Nashville, as this Court's opinion in Nashville specifically negatives plaintiff's argument and states that a district court's improper assessment of a bank merger's anticompetitive impact does not automatically invalidate a finding that the merger is nevertheless lawful because of its convenience and needs benefits. 390 U.S. at 184, n. 17.

Further, plaintiff's interpretation is inconsistent with its own argument of potential anticompetitive effects. Since plaintiff's theory admittedly involves only potential rather than actual competitive effects, some assumption about the nature of the alleged effects must be made for the purpose of evaluating the convenience and needs definition. Under plaintiff's analysis, the affirmative defense of convenience and needs could never be weighed against actual anticompetitive effects since plaintiff need prove only potential anticompetitive effects. Thus, in potential competition cases the District Courts can weigh only presumed anticompetitive effects against convenience and needs benefits in any event, so plaintiff's objection to the courts' assuming the alleged anticompetitive effects only for the purpose of weighing convenience and needs is completely without merit.

Moreover, the Bank Merger Act of 1966 requires that "[i]n *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. 1828(c)

(5)(B) [Emphasis added.] The Act further provides that "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)." 12 U.S.C. § 1828(c)(7)(B). Thus, the Comptroller and the other banking agencies *must* consider the convenience and needs of the community in *every* case, whether or not it is determined the merger in question violates § 7 of the Clayton Act.[64] Likewise, in a judicial challenge to a merger approval, the courts must also consider the matter of convenience and needs, whether or not the Department of Justice proves a probable anti-competitive effect.

The district courts clearly followed this statutory scheme. To weigh the convenience and needs, it was necessary for the courts below to assume that plaintiff's alleged potential anticompetitive effects had been proved. The courts then found that the convenience and needs benefits outweighed the alleged potential anticompetitive effects. Wash. App. 1941-1950, F. 26; Conn, 362 F. Supp. 270-278, F. 231-293, 362 F. Supp. 288, Concl. E 1-7. These findings and conclusions were fully warranted by the evidence and proper under both statutory provisions and the views previously expressed by this Court.

X. SINCE THE ULTIMATE TEST OF A BANK MERGER IS THE PUBLIC INTEREST, THE DISTRICT COURT FINDING OF SERVICE TO COMMUNITY NEEDS AND CONVENIENCE VALIDATES THE MERGER.

Although the discussion of bank merger cases is conventionally in terms of § 7 since that embodies the

[64] The Act says "in every case", not "in every case where an antitrust violation occurs."

antitrust standard for mergers, bank mergers unlike those in other fields, are subject to a special balancing test. Following the decision of this Court in the Philadelphia bank case Congress enacted the Bank Merger Act of 1966, which establishes the statutory standards for all bank mergers. The effect of the Bank Merger Act can be most succinctly and authoritatively stated in the words of this Court itself. In *U.S. v. Third National Bank in Nashville,* 390 U.S. 171 this Court said (at 184-185):

> The purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market. Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger even though the merger lessened competition. The public interest was the ultimate test imposed.
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> It is plain that Congress considered both competition in commercial banking and satisfaction of "the convenience and needs of the community" to be in the public interest. It concluded that a merger should be judged in terms of its overall effect upon the public interest. If a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.

This Court went on to say that such things as a greater lending capacity, and hence the ability better to serve the financial needs of the community, was a relevant consideration under the test established by the Bank Merger Act although this element had been rejected as irrelevant in the Philadelphia bank case prior to enactment of the Bank Merger Act.

As pointed out in the preceding section the Bank Merger Act requires the banking agency and the reviewing court to balance the competitive effects against the convenience and needs of the community in every case. In the instant case the Court performed this function with meticulous care and its findings are entitled to the same weight upon review as all other findings of fact by the District Court which sits in the community involved, hears the witnesses, examines and weighs the evidence, has discussions with counsel, and gives the case the time, effort, and detailed analysis which is impossible for this Court acting in its appellate capacity.

Another element that is present in the two companion bank merger cases now before this Court, which has not been present in the cases previously decided by this Court, is that the balancing of competitive considerations against community convenience and needs is necessarily different in a potential competition case. In the bank merger cases which this Court has previously considered and decided by opinion the mergers have involved banks in actual competition with each other. Consequently in each of these cases actual competition was being extinguished and the benefits to the community arising out of service to community convenience and needs were required to be so great as to outweigh the loss of actual competition in order to legalize the merger.

In contrast the bank merger cases now before the Court involve no loss of actual competition. The cases come to this Court only on the allegation that potential competition may be lessened. As the cases have been developed by evidence and argument it has become apparent that the potential competition referred to involves only the possibility of some hypothetical future entry into the market or service area of one of the merging banks. It can hardly be contended, even by plaintiff, that the loss of some hypothetical future possibility weighs as heavily as the loss of actual present competition. Therefore the showing of benefit through service to community convenience and needs certainly must be somewhat less in a potential competition case in order to outweigh any alleged competitive loss than it would be in a case involving the extinction of actual existing competition. See *Nashville, supra,* 390 U.S. at 193.

This Court has advised that district courts may properly consider the Comptroller's convenience and needs findings to carry such great weight as to be "well nigh conclusive." *United States* v. *First City National Bank of Houston,* 386 U.S. 361, 369 (1967). And in *U.S.* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. 350 (1970) the Court indicated that *procompetitive* gains from a bank merger—such as the fact that the other banks in the market would be faced with a stronger competitive challenge than before—are also a proper consideration in determining the benefits to the convenience and needs of the community. 390 U.S. at 367.

The District Court in the instant case found substantial benefits to the community which would result from the merger. The findings of the Court on this point, and the evidence supporting them are reviewed in some detail in § II.G. of this brief. However, it may be useful simply to summarize briefly benefits in services to the community resulting from the proposed merger.

(1) The District Court found the proposed merger would result in numerous services to the individuals in Spokane. These would include needed loans to students, (App. 998, 828) and help to individuals in need of expertise in installment lending, term loans, and vehicle leasing. GX L-1, p. 44-47, App. 1741, 1744. Taxpayers would be benefited directly by provision of alternative source of financing for local and municipal governments. App. 1948-1949.

(2) The merged bank would be of benefit to farmers and other agribusinessmen through the Federal Intermediate Credit Bank of Spokane. App. 828-840.

(3) The merged bank would particularly benefit relatively small independent firms, especially in the lumber and forest products industry. The additional source of business financing is greatly needed by those trying to compete in an industry dominated by giant integrated firms. App. 1706-1707, 1717-1718, 1721-1722. Other independent small and medium sized businesses in the construction and machinery field would also be benefited. App. 894-897, 893-894.

(4) The international banking services offered by the merged bank would greatly benefit Spokane businessmen involved in the import-export trade. App. 886, 904, 912, 1743-1744.

Thus, the Court's findings that the service to community needs and convenience validates the merger is clearly supported by the record. Since under the Bank Merger Act of 1966, the ultimate test of the the merger is the public interest, the lawfulness of the merger is plain.

CONCLUSION

The judgment of the District Court should be affirmed.

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