APPENDIX TO THE OPINION OF THE COURT

TOTAL DEPOSITS HELD BY THE 2 LARGEST, 5 LARGEST, 10 LARGEST, AND REMAINING COMMERCIAL BANKING ORGANIZATIONS OF THE STATE OF WASHINGTON IN THE STATE OF WASHINGTON—June 30, 1972

Bank Organizations	No. of Offices	Percent of Total	Deposits 000's	Percent of Total	Rank in State
Seattle-First National Bank—Seattle	144	20.96	$2,054,951	31.71	1
National Bank of Commerce—Seattle	107	15.57	1,268,132	19.57	2
TOTAL 2 LARGEST BANKING ORGANIZATIONS	251	36.54	$3,323,083	51.27	
Pacific National Bank of Washington—Seattle	64	9.32	650,342	10.03	3
Peoples National Bank of Washington—Seattle	55	8.01	468,063	7.22	4
Washington Bancshares, Inc.—Spokane	51	7.42	372,739	5.75	5
TOTAL 5 LARGEST BANKING ORGANIZATIONS	421	61.28	$4,814,227	74.28	
Puget Sound National Bank—Tacoma	29	4.22	227,429	3.51	6
Bank of California—Seattle and Tacoma	2	.29	199,878	3.08	7
Seattle Trust & Savings Bank—Seattle	26	3.78	172,801	2.67	8
Washington Trust Bank—Spokane	8	1.16	96,518	1.49	9
Everett Trust & Savings Bank	13	1.89	91,034	1.40	10
TOTAL 10 LARGEST BANKING ORGANIZATIONS	499	72.63	$5,601,887	86.43	
81 REMAINING BANKING ORGANIZATIONS	188	27.37	$879,183	13.57	
91 BANKING ORGANIZATIONS	687	100.00	$6,481,070	100.00	

Note: Due to rounding, figures may not add to totals.

proving that the NBC–WTB merger would probably cause a substantial lessening of competition in either one of two ways. First, it could be proved that NBC, with the resources and desire to enter the Spokane market, would probably have entered the market either by acquiring one of the small Spokane banks or by sponsoring a new bank and ultimately acquiring it. The merger thus deprived the Spokane market of a new competitor, and produced the requisite anticompetitive effect. Second, it could be shown that NBC's resources and interest in entering the Spokane market were so obvious to or recognized by those already in the market that, as a potential competitor waiting in the wings, NBC very probably exercised a restraining influence on anticompetitive practices in the concentrated Spokane banking market.

The majority does not quibble about the fact of NBC's resources and its incentive to extend its banking activities into Spokane. NBC is the State's second largest banking organization with total assets of $1.8 billion as of 1971. It has branched widely in the State of Washington, having a total of 107 branches, 15 of them within 100 miles of Spokane. Two other Seattle banking organizations were already operating in Spokane; and NBC itself had seriously negotiated for an acquisition in that market. Given the opportunity, NBC would obviously enter Spokane. Under Washington law, it could not branch there; but it was free to acquire another bank, given consent of banking authorities. That consent was obtained for the acquisition involved in this case, and it may fairly be assumed that it could have been obtained for the acquisition, not of a major competitor contributing to the concentration in the Spokane market, but of one of the smaller banks—a so-called "toehold" position in the market.

Another mode of entry into Spokane was also available to NBC. It could have been instrumental in forming a new bank in that market and in due course could have merged with the "sponsored" institution. It is argued that this route was all but legally unavailable to NBC,[1] but the sponsored-bank method of expansion has occurred frequently in the State of Washington. The District Court did not hold sponsorship barred by state law. This Court also refrains from so holding and proceeds on the assumption that the sponsored-bank route was available to NBC. Under state law, a merger with the new bank could not take place, without the consent of banking authorities, prior to 10 years from the date the new bank began operations; but consent to merge prior to that time has been obtained in the past.

Thus, although branching into Spokane was not legally feasible, there were other modes of entry no less

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[1] The evidence, based upon past practices, is entirely to the contrary. NBC has itself employed the procedure with regard to the Columbia Center National Bank located in a shopping center in south central Washington. The techniques it employed included finding an organizer for the bank, controlling the sublease of the land on which the new bank was to be located, through Marine Bancorporation, so as to prevent acquisition by others without its approval, and making sure the majority stock of the bank was in friendly hands. App. 246–280. The record abounds with various examples of the technique by other Washington banks; and federal authorities were aware of many of the methods, as disclosed in the applications for approval of acquisition by the sponsors. The statute also forbids a new bank from merging with or permitting its assets to be acquired by another bank for a period of 10 years but only *without* the consent of the state supervisor. Suffice it to state that earlier acquisitions have, as the majority recognizes, been made in the past. Surely the fragmentary fears of illegality are not enough to overturn what seems a perfectly well-established technique of market entry not at odds with the language of the state statute. It should be noted that the District Court, although not formally ruling on the state law matter in its findings of fact and conclusions of law, did state during trial that this was, in its view, a feasible means of entry. App. 870.

attractive or less feasible than entering by establishing a new branch. It is incredible that if branching into Spokane had been allowable NBC would not have entered in this way. It is equally unlikely that absent the understandably attractive merger with WTB, NBC would not have proceeded to acquire a smaller bank or to be instrumental in forming a new sponsored bank.

The Court apparently assumes this to be the case, but goes on to hold that the Government's proof failed because neither a small new bank nor one of the existing small banks, if acquired, had a realistic chance of deconcentrating the Spokane market to any substantial extent. Also, absent the capability of making substantial inroads on the market shares of the principal banks, it is said that those banks had nothing to fear from NBC as a potential competitor and that NBC therefore had no current influence on competitive practices in the Spokane market.

I part company with the majority at this point. The Spokane market was highly concentrated. NBC had the resources and the desire to enter the market. There were no impenetrable legal or economic barriers to its doing so; and it is sufficiently plain from the record that absent merger with WTB, NBC could and would either have made a toehold entry or been instrumental in establishing a sponsored bank in Spokane. But NBC chose to merge with a larger bank and to deprive the market of the competition it would have offered had it entered in either of two other ways. In my opinion, this made out a sufficient prima facie case under § 7, which, absent effective rebuttal, entitled the United States to judgment.

The Court's sole answer to the Government's proof is that even if NBC would have entered by acquisition or *de novo* through a sponsored bank, it would have "little realistic hope of ultimately producing deconcentration of the Spokane market." This was because under Washington law after acquiring an existing or newly formed bank, NBC could not branch from that institution but would be confined to the banking offices which it acquired at the time of the merger. In the Court's opinion, NBC, without branching, would have "no reasonable likelihood of developing a significant share of that market," and the Government's case therefore failed.

I cannot accept the *per se* view that, without branching, an able and willing newcomer to the banking market cannot be considered a sufficiently substantial competitive influence, immediately or in the foreseeable future, so that its loss to the market would warrant application of § 7. This is particularly true if the putative entrant is a large and successful banking organization with wide experience in developing new markets.

Small banks can be profitable, and they can grow rapidly. The experience of the three small banks in Spokane proves this. Each of them is a profitable bank. The profits of American Commercial Bank, for example, with headquarters in downtown Spokane, rose from $27,740 in 1966 to $132,527 in 1971. The deposits of each of the three small banks have grown. From 1966 to 1972, total bank deposits in the Spokane metropolitan area rose from $379.2 million to $513.5 million, a growth of 35% in six years. Spokane would not appear to be a stagnant banking market, and it provides opportunities for smaller banking concerns. The deposits in the three small banks during the same six years grew from $14.9 million to $39.4 million, an increase of approximately 160%. Their market share, although remaining relatively small, increased from 3.9% to 7.8%. Of course, deposits in the three large banking organizations also grew. Two of them increased their market shares very slightly, but the third lost ground from 38.3% to 31.6%, for a combined decline of the three from 96% to 92.3%. The small banks thus more than held their own in the Spokane market. This showing of the smaller banks hardly indicates such impotence on the part of small competitors that a new entrant in the market should necessarily be deemed to be without influence in the market and to be beyond recognition under § 7.[2]

If Seattle-First National Bank, with 31.6% of the deposits in 1972, or Washington Bancshares, Inc., with 42.1%, had acquired either American Commercial Bank or Farmers & Merchants Bank, with 3.1% and 2.5% respectively of Spokane bank deposits, the merger would have been anticompetitive and forbidden by § 7, unless saved by the convenience-and-needs proviso of the Bank Merger Act. *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963). Depriving the market of a *new* competitor that could achieve similar status in a rela-

[2] The banks rely on the experience of Pacific National Bank of Washington. In 1964, a large bank holding company acquired a toehold in Spokane by acquiring an existing small bank, but by 1972 had only garnered 2.2% of the total bank deposits in Spokane. A vice president of the bank testified at trial that its disappointing share of the market—its 1972 share of industrial and commercial loans was 4.6%—was probably due to its inability to branch. Although this officer also testified that his bank was not opposing the merger of NBC and WTB, he certainly was an interested party. Upon this witness' opinion, the outcome of this case cannot hinge. In light of the objective evidence, which strongly suggests that competition can exist without equality in branch capability, the testimony of this vice president should not be given great weight. It is not only a speculative statement as to the failure of the Pacific National; it is also self-serving to the extent it keeps additional competitors out of the market. As with the testimony of bank officials who profess no interest in entering a market, see *United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526, 534–535 (1973), it should only be considered along with the rest of the objective economic evidence.

tively short period of time should not be so readily placed beyond the reach of § 7 when considering the application of the doctrine of potential competition to market extension mergers.

The details on the relative size of individual bank branches in Spokane or elsewhere in metropolitan areas of the State are not in the record; but it is unbelievable that there are no branches that have started very small and grown very large. New branches must make their way, often in head-to-head competition with other banks. Some are more successful than others, and I cannot accept, as a *per se* legal rule, the notion that a new bank sponsored by NBC in downtown Spokane or elsewhere in the city must be forever deemed to be without substantial competitive impact on the banking community.[3] It is incredible to me that the presence of a major Seattle bank like NBC in downtown Spokane could or would be ignored by the entrenched banking powers or should be ignored for the purposes of applying § 7 of the Clayton Act.

NBC has 15 branches within a 100-mile radius of Spokane. Those branches have $103 million in total

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[3] Evidence introduced by the Government as to the ability of banks in the other major metropolitan banking markets of Washington—Seattle, Tacoma, and Everett—totally undercuts the Court's assumption that a bank with only one office cannot acquire a substantial enough market share to effect deconcentration. In Seattle, the Bank of California, with only one office, had $112 million in total deposits in 1970, representing 6.27% of the total deposit market. This share can be compared with that of Pacific National Bank of Washington which, with 13 offices, had a 9.38% market share. In Tacoma, the Bank of California-Tacoma had $65.4 million in total deposits which represented a 15.55% market share. Compare this with the 3.17% share of Seattle-First National Bank-Tacoma, with four offices. In Everett, Peoples National Bank of Washington-Everett, with one office, had $17.2 million in total deposits, a 10.83% market share.

deposits, including $4.4 million from Spokane customers. Two of these branches are in Spokane County and between them have $11 million in deposits. They also have loans totaling $10.2 million to Spokane interests. NBC is a major financial institution with large lending limits and offering a full line of commercial banking services. It is obviously equipped to penetrate and compete vigorously in the Spokane lending market wholly aside from how fast deposits might grow in a newly established or acquired Spokane bank. It is quite untenable to assert that the competition that might be offered in the Spokane lending market by a new bank formed by this obviously vigorous competitor is too insignificant to warrant the protections of § 7.[4]

The availability of branching is, of course, an important competitive consideration, but it should not be forgotten that American Commercial Bank, headquartered in downtown Spokane, has four branches and if acquired by NBC would give that bank a substantial operating capacity in Spokane. The majority, nevertheless, even assuming the acquisition of this bank by NBC, insists on its own view of competitive reality and holds

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[4] As the majority recognizes, the relevant product market in this case is the cluster of services offered by commercial banks. A main component of that cluster, and one which determines profits, is the ability to provide loans, and it seems to me that a prospect of competition for loans, whether based on deposits garnered in Spokane or elsewhere, has a substantial possibility of effecting deconcentration in at least one segment of the banking business. The fact that profitability and number of offices are not highly correlated is supported by comparing the experience of Washington Bancshares and Seattle-First National Bank. In 1971, the former had 23 offices and a net income of $2.2 million. The latter, with only seven offices, had a net income of $3.5 million. In that same year, although Washington Bancshares had $45.6 million more in deposits than did Seattle-First National, the latter had an edge of $7.2 million in commercial and industrial loans.

that the loss of NBC as a competitor in place of American must be deemed an insignificant loss to competition. This is true even though one of the major competitors, Seattle-First National Bank, has only seven branches and under the state law already referred to, it is confined to its existing branches.

It is also true that if NBC entered Spokane by sponsoring a new bank, the new bank itself could legally branch and create the necessary branch infrastructure for as long as it was not acquired by NBC or another outsider. The majority states that this is "probably unrealistic" and that it would "multiply the problems" of obtaining approval of sponsorship from bank regulatory agencies. But this is sheer speculation; the Court simply has no idea what the attitude of regulatory officials would be in this regard. Furthermore, NBC itself has had experience with sponsored-bank situations, and, as the majority recognizes, it asserts that it has not sponsored banks solely for the purpose of acquisition. Apparently, relationships with a sponsored institution are themselves of inherent value, and the benefits would only increase if the sponsored bank itself branched as it grew.

Viewed in this light, the Court's *per se* rule becomes threadbare indeed when applied to NBC entering by acquisition into the Spokane market. The three existing smaller banks in Spokane have been successful and profitable and have even increased their share of the market in six years. Furthermore, Seattle-First National cannot legally go beyond its present seven branches in the Spokane market, and its share of the market has declined. It is quite unreasonable to think that NBC, if it acquired American Commercial, with its four branches could not be an effective competitor at least against Seattle-First National in Spokane, with its seven branches, or against WTB with its eight.

The Court also errs in holding that NBC, an obvious potential competitor, cannot be deemed to have exercised substantial influence on the Spokane market and that its entry by merger with a major Spokane bank therefore represents no probable injury to competition in that market. To the extent that the Court's holding on this branch of the case rests on its notion that no bank, without branching, can make substantial inroads on the Spokane market, I disagree for reasons already stated. Beyond that, however, the waiting-in-the-wings approach to potential competition rests on what objective factors indicate the perception of the reasonably minded competitor in the Spokane market might be of the likelihood and impact of an entry by NBC, either *de novo* or by acquisition of a small bank. Predictions of market behavior and competitive success are just not as certain or uniformly held as the Court makes them out to be. Here, before NBC acquired WTB, NBC negotiated to acquire the much smaller Farmers & Merchants Bank—a three-office suburban bank with about $13 million in deposits and 2.5% of the market. The target bank was in the relevant geographic market accepted by the parties and Court. The President of Marine Bancorporation, Maxwell Carlson, had at various times noted that the President and Director of WTB, Philip Stanton, expected NBC to be in Spokane some day. One wonders, if the majority's branch-disability theory is correct, why these bankers even discussed potential entry into the market. The fact is that they did, and it is fair to assume that through informal contacts, and by reason of the prior acquisition discussions, bankers in the market were aware of NBC's interest. The majority would have one believe that even if NBC was interested, no one in the market would take it seriously enough to restrain anticompetitive practices. It is certainly possible, however, that even if bankers in the market doubted that NBC would actually be successful in acquiring a significant market share, if they entered the market, the *possibility* of entry and the *possibility* of competition following entry were sufficiently strong to restrain anticompetitive practices. If bankers thought that there was a probability of entry, which there surely was, but that their losses from such entry could be substantial, if NBC, once in the market, competed more effectively than anticipated, they would take countermeasures and make entry less attractive by refraining from engaging in anticompetitive practices.

In the last analysis, one's view of this case, and the rules one devises for assessing whether this merger should be barred, turns on the policy of § 7 of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business. *United States* v. *Philadelphia National Bank,* 374 U. S., at 362–363; *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158, 170–171 (1964); *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 331–332 (1962). The dangers of concentration are particularly acute in the banking business, since "if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ." *Philadelphia Bank, supra,* at 372; *United States* v. *Phillipsburg National Bank,* 399 U. S. 350, 358 (1970).

Unless an otherwise illegal merger is saved by a finding under the Bank Merger Act that it is necessary to serve the convenience and needs of the community, the law requires us in the first instance to judge bank mergers by normal § 7 standards. I simply cannot agree with the Court's narrow view of what bank mergers "may . . . substantially . . . lessen competition."

With respect to whether depriving the market of the competition offered by a new entrant violates § 7, it is not enough under the Court's view that the newcomer

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has itself found the market sufficiently attractive to enter and to assume all the start-up costs and risks attendant to a new business undertaking. The Court is willing also to assume that the new business will be profitable and long-lived, for under the approach taken today, it is not enough to show the loss of one or more profitable but small businesses. Apparently, it cannot be assumed that a small business, even when backed by a major enterprise. can or will be successful in competing against the entrenched powers in the market.

This thesis erects formidable barriers to the application of the potential-competition doctrine not only in the banking business but in other lines of commerce.[5] To show that the potential entrant, waiting in the wings, is exercising a present influence on the market, or that its loss as a *de novo* or toehold entrant may be a substantial injury to competition, it will not be enough to prove ability and willingness to enter, along with the probability, or even certainty, of entry. Nor will it suffice to prove that the potential or actual entrant would be a profitable concern and successfully prevent the major figures in the market from increasing their market shares. The courts must also examine conditions in the market and conclude for themselves that there is a realistic expectation that the new entrant will appropriate for itself a substantial part of the business of the major competitors in the market.

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[5] The Court professes to limit its *per se* rule to "an industry in which new entry is extensively regulated by the State and Federal Governments." The case, as decided, however, does not turn on barriers to entry, but "barriers" to effective competition, once entry is effected, and "barriers" to effective competition are not easily limited to regulated industries. The Court lays itself open for arguments that economic, as well as legal, barriers exist for new competitors. At least it is difficult to see why one should be more controlling than another; in fact, the Court itself blurs the two.

The Court then delivers the *coup de grace* by imposing its own visions of reality in commercial banking markets: without unlimited branching authority in the market involved, no newcomer to the market can be sufficiently successful against others, who have the authority, to be a substantial competitor and to merit recognition under doctrines of potential competition. No new entrant can attain, let us say, 15 or 20 percent of the banking business in the Spokane area unless it has branching authority. The Court apparently insists this will be true no matter where the new banking office is located and no matter who and how well equipped and financed the new entrant may be. This is claiming a prescience that I doubt the Court has and is a view of the effectiveness and worth of competition, though having modest beginnings, that I do not share. Furthermore, the conclusion the Court reaches passes beyond my comprehension when it refuses to concede that NBC, if it acquired American Commercial Bank, with its four branches, could not make substantial inroads on the market shares of any of the major banks in the market, even though one of them is forever limited to seven offices under the present law.