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Dear Mr. Chairman:

Reference is made to letter of May 27, 1963, acknowledged May 29 and June 19, from Mr. W. H. Boone of your staff, concerning the authority of the National Aeronautics and Space Administration (hereinafter referred to as NASA) to transfer funds to supplement a line item in the amount of \$8,000,000, included in the authorization for "Construction of Facilities" contained in section 1(b) of the National Aeronautics and Space Administration Authorization Act for the fiscal year 1963, approved August 14, 1962, Pub. L. 87-584, 76 Stat. 382."

Section 1(b) of this act authorized an appropriation to NASA for "Construction of Facilities" in the amount of \$786,237,250 for certain line items including the item as follows:

"(3) Facility planning and design not otherwise provided for, \$8,000,000."

The legislative history of Pub. L. 87-584^{1/2} discloses, with reference to this item, that the amount of \$10,000,000 was requested therefor by NASA and approved by the Bureau of the Budget. The statement of the managers on the part of the House relative thereto--see page 7 of House Conference Report No. 2038, 87th Cong., 2d sess., on the subject authorization act--reads as follows:

"NASA requested \$10,000,000 for 'Advanced facility planning and design.' The House bill reduced this to \$5,000,000. The Senate amendment restored the House reduction. The managers on the part of the House agreed to a restoration of \$3,000,000, inasmuch as the changing programs of NASA will undoubtedly require additional facility planning and design funding."

The House and Senate reports on the authorization act, page 99, H. Rept. No. 1674, and page 129, S. Rept. No. 1633, 87th Cong., 2d sess., respectively, both state to the effect that the provision of the separate and identifiable advance planning and design fund permits advance planning and design to be funded without the necessity of reprogramming funds provided for other projects.

To carry out the programs authorized in Pub. L. 87-584^{1/2}, the Independent Offices Appropriation Act, 1963, approved October 3, 1962,

Pub. L. 87-741, 76 Stat. 716, 730-731, made appropriations to NASA for "Research, Development, and Operation" and for "Construction of Facilities," the latter appropriation reading as follows:

"For advance planning, design and construction of facilities for the National Aeronautics and Space Administration and for the acquisition or condemnation of real property, as authorized by law, \$776,237,000, to remain available until expended."

It is stated in the letter that NASA transferred to the line item of \$8,000,000 quoted above the amount of \$4,417,500 from the appropriation "Research, Development, and Operation," citing as the authority therefor section 3 of the authorization act. The said section 3 provides as follows:

"Not to exceed 3 per centum of the funds appropriated pursuant to subsection 1(a) hereof [Research, Development, and Operation] may be transferred to the 'Construction of facilities' appropriation, and, when so transferred, together with \$30,000,000 of the funds appropriated pursuant to subsection 1(b) hereof [Construction of Facilities] shall be available for expenditure to construct, expand, or modify laboratories and other installations at any location (including locations specified in subsection 1(b)), if (1) the Administrator determines such action to be necessary because of changes in the national program of aeronautical and space activities or new scientific or engineering developments, and (2) he determines that deferral of such action until the enactment of the next authorization Act would be inconsistent with the interest of the Nation in aeronautical and space activities. The funds so made available may be expended to acquire, construct, convert, rehabilitate, or install permanent or temporary public works, including land acquisition, site preparation, appurtenances, utilities, and equipment. No portion of such sums may be obligated for expenditure or expended to construct, expand, or modify laboratories and other installations until the Administrator or his designee has transmitted to the Committee on Science and Astronautics of the House of Representatives and to the Committee on Aeronautical and Space Sciences of the Senate a written report containing a full and complete statement concerning (1) the nature of such construction, expansion, or modification, (2) the cost thereof, including the cost

of any real estate action pertaining thereto, and (3) the reason why such construction, expansion, or modification is necessary in the National interest. No such funds may be used for any construction, expansion, or modification if authorization for such construction, expansion, or modification previously has been denied by the Congress."

As indicated in our letter to you of June 19, we requested the Administrator, National Aeronautics and Space Administration, by letter of June 4, to furnish us with a report concerning this matter. On June 24, the General Counsel of the Administration replied to our letter and expressed his views thereon so far as here pertinent, as follows:

"In recognition of the fact that a high degree of flexibility is required in carrying out a program as dynamic as NASA's--especially in the construction of facilities area (inasmuch as facilities are often the pacing items)--the Congress has granted this agency reprogramming authority in certain areas. For example, section 3 of the above-cited Authorization Act provides such authority for use under particular circumstances and after specified procedural requirements have been met. As a general matter, facility planning and design, being necessary elements of construction-type projects, fall within the scope of the reprogramming authority of section 3. This is recognized in the excerpt from the Senate Report which is quoted in your letter. However, funds reprogrammed pursuant to the authority of section 3 may not be used for a project which has previously been denied by the Congress.

"No such denial by the Congress is present in the case of the reprogramming action referred to in your letter. In requesting \$10,000,000 for 'Facility planning and design not otherwise provided for', NASA did not justify that amount on the basis of specific projects; nor was the use of such funds for any specific project denied by the Congress. Rather, the requested amount was justified to and approved by the Congress as the lump-sum level of effort estimated to be required for this general purpose. The steps taken in connection with the resolution of the differences in House and Senate amounts for this line item constituted the normal Congressional action involved in establishing a compromise total in such circumstances. To conclude that

Congressional action of this nature also amounted to a denial of the use of section 3 authority for facility planning and design would be unreasonable.

"When Congress establishes a requested, or reduced, locational line item total, without specifically denying the use of funds for a particular project at that site (or the use of additional funds for any projects at that site), section 3 reprogramming authority is clearly available to fund any additional projects at that location even though they have not previously been justified to the Congress; and Congress' action of establishing the line item total cannot reasonably be interpreted as setting a limit on the total amount of funds, from any source, which can be expended at that location. A contrary interpretation would render section 3 authority practically useless. Likewise, in the case of a line item such as 'Various Locations', which includes as yet undetermined locations, the fixing of a total authorized amount (which may be less than the amount requested by NASA) does not, per se, preclude use of section 3 authority to fund any project not specifically denied by the Congress, even though this results in expenditures at such locations in excess of the amount specified in that line item. So also, in the instant case, the authorization of \$8,000,000 for the line item 'Facilities planning and design not otherwise provided for' did not constitute a bar to the use of section 3 authority to fund additional facility planning costs.

"We note the reference in your letter to the Senate Report which states that this item 'permits advance planning and design to be funded without the necessity of reprogramming funds provided for other projects.' A similar statement would be equally applicable to the other line items in the Authorization Act. They too permit the funding of the projects which are estimated to be required at the locations specified, without the necessity of reprogramming funds provided for other projects. However, it does not follow from this fact that Congress thereby intended to preclude the use of section 3 authority to fund additional projects at such locations."

As a general proposition and unless otherwise provided, appropriations made to carry out authorizing laws are made on the basis that the

authorization acts in effect constitute an adjudication or legislative determination of the subject matter thereof. It would appear, therefore, that the appropriation made to NASA for "Construction of Facilities" to carry out the programs previously authorized by the Congress in the related authorization act must be expended in strict accordance with the authorization, not only with respect to the amount to be expended for specific project items but, also, as to the nature of the work or improvement authorized.

The action taken by the legislative committees to reduce the amount requested by NASA for facility planning and design from \$10,000,000 to \$8,000,000 is a legislative practice followed very often in respect of agency estimates. This circumstance, however, reasonably may not be considered controlling application of the provisions of section 3 of the same act in the absence of any positive indication or directive of such an intent.

We are aware of nothing in the authorization and appropriation acts, nor in its printed legislative histories, which would denote that the Congress, by its action in specifically reducing the amount originally requested by NASA for facility planning and design, intended thereby to suspend or render inoperative the effect of the provisions of section 3 of the authorization act in this case. Where there is no conflict between the amount of the specific limitation provided for facility planning and design and the terms of section 3 of the authorization act, there would appear to be no valid reason why the terms of the latter provision should not be given full force and effect. Cf. 33 Comp. Gen. 214.

For the reasons stated above, we concur in the views of NASA that the use of section 3 transfer and reprogramming authority in the instant case, if otherwise in conformity with the terms and conditions thereof, is not legally objectionable.

Sincerely yours,

Joseph Gambell

Comptroller General
of the United States

The Honorable Ken Heckler, Chairman
Subcommittee on Application and
Tracking and Data Acquisition
Committee on Science and Astronautics
House of Representatives