
PUBLIC AND PRIVATE ANTITRUST DEVELOPMENTS IN THE COMMUNICATIONS INDUSTRY 1991-1992

The demands of high technology and economies of scale¹ in the communications industry have forced the formation of the largest and most powerful corporations in the country. These same demands give communications companies the ability and incentive to act in an exclusive or anticompetitive manner. The economies of scale that led to the development and preeminence of the American Telephone and Telegraph Company ("AT&T") also permitted it to use its monopoly power in local service areas to cross-subsidize and discriminate in competitive areas. Government-sanctioned monopolies such as the Communications Satellite Corporation ("Comsat") that witness extraordinarily rapid developments in international telecommunications do not have market incentives to set prices in line with costs. Additionally, the nature of a limited frequency spectrum forces the government to choose selectively among future competitors. These examples demonstrate the importance of and the conflicts in private and public antitrust actions both under the Sherman Antitrust Act and the Clayton Act.

Various sectors of the government control antitrust policy and enforcement. While Congress controls general antitrust policy through legislation, appropriations and investigative hearings, the executive branch controls the day-to-day application of the antitrust laws. Under Title II and Title III of the Communications Act of 1934, the Federal Communications Commission ("FCC" or "Commission") has regulatory authority over day-to-day operations of common carriers, as well as the jurisdiction to allocate and license radio frequencies for a wide variety of broadcast, common carrier and private uses.² The Department of Justice ("DOJ") administers the antitrust laws and brings antitrust actions for the various executive agencies.³ The Department of State

has authority to conduct international negotiations involving telecommunications and is charged with encouraging competition and cooperation in the provision of international communications services.⁴ The Federal Trade Commission regulates broadcast advertising. Those executive agencies and departments, together with private parties, use the antitrust laws to preserve competition and direct new technologies in the rapidly developing world of communications.

This Comment will review the antitrust cases, agency actions and legislative advancements that had an impact on the communications field during 1991 and 1992. There were important developments in the Bell Company Consent Decree and the PanAm-Sat/Comsat antitrust controversy. Antitrust concerns also arose in the mobile satellite service field in a controversy between American Mobile Satellite Corporation and Radio Satellite Corporation. Also, a resolution in Viacom International, Inc.'s antitrust action against Time Warner, Inc. was reached in 1992. Finally, many antitrust concerns were raised in TCI/Tempo's application to construct a direct broadcast satellite system. This Comment will outline the history and the disposition of the above controversies and then discuss the effects of 1992's events on competition and future antitrust actions.

I. CURRENT DEVELOPMENTS IN THE BELL ANTITRUST CONSENT DECREE

In 1974, the Department of Justice brought an antitrust action against AT&T. After a six-year period of discovery, numerous pretrial motions and an eleven month trial, the parties submitted a proposed resolution ("Decree," "Consent Decree," "Modification of Final Judgment" or "MFJ") to Judge Harold Greene in the District Court for the District of

¹ "Economies of scale' are present in the production process when large output volumes can be produced at a lower cost per unit than small output volumes." See Roy J. Ruffin & Paul R. Gregory, *PRINCIPLES OF ECONOMICS* 745 (1983). For example, satellite telecommunications companies require large amounts of infrastructure and financial strength before becoming efficient competitors.

² 47 U.S.C. § 201 et seq. (1988). For a breakdown of com-

munications regulation and enforcement, see Wiley, Katzen, and Knauer, *The Year Ahead, Congress, the FCC and Judge Greene's Court, TELECOMMUNICATIONS POLICY AND REGULATION* 1991, at 8 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 328, 1991).

³ 15 U.S.C. § 21 et seq. (1988).

⁴ See Executive Order No. 12,046, 3 C.F.R. 164 (1978).

Columbia.⁵ After holding Tunney Act Proceedings,⁶ the district court approved the Decree with modifications on August 24, 1982.⁷

The DOJ brought the original action to eliminate three specific forms of anticompetitive behavior associated with AT&T's predivestiture practices. First, AT&T withheld specifications and information of its exchange systems from independent manufacturers while providing this information to its Western Electric Company manufacturing arm.⁸ AT&T also discriminated in favor of Western Electric products instead of buying cheaper, better quality products from independent competitors.⁹ Second, AT&T cross-subsidized Western Electric research and development through funds derived from AT&T's monopoly in the local exchange market, passing on losses to AT&T's local captive customers.¹⁰ Third, AT&T provided inferior interconnections to its intercity competitors and superior interconnections to AT&T's own long distance lines.¹¹

The Consent Decree forced AT&T to divest itself

of its local exchange services in order to eliminate cross-subsidization.¹² Additionally, the Decree prevented the Regional Bell Operating Companies ("RBOCs"),¹³ which inherited these local exchange companies, from participating in certain lines-of-business embodied in section II(D) of the Decree.¹⁴ The Decree also provided for a Triennial Review by the DOJ and the court to review possible changed circumstances that would make these lines-of-business restrictions unnecessary.¹⁵

Since the acceptance of the Decree and the divestiture, Judge Greene has received numerous requests for waivers and interpretations of the Modification of Final Judgment. Soon after the district court approved AT&T's divestiture of its Bell Operating Companies ("BOCs"), the Court of Appeals for the District of Columbia held that the Decree and the lines-of-business restrictions applied to the seven RBOCs as well.¹⁶ The court also held that the RBOCs could provide extra-regional telecommunications services.¹⁷

⁵ *United States v. AT&T*, 552 F. Supp. 131, 135 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The Supreme Court also affirmed the district court's approval of the AT&T Plan of Reorganization in connection with the Consent Decree. The Consent Decree is commonly referred to as the Modification of Final Judgment or MFJ. *See AT&T*, 552 F. Supp. at 141 n.31.

⁶ *Antitrust Procedures and Penalties Act*, 88 Stat. 1706 (1974)(codified as amended at 15 U.S.C. § 16(b)-(h)(1988 & Supp. 1990)). Tunney Act Proceedings are hearings to determine whether a consent decree is in the "public interest." *Id.*

⁷ *AT&T*, 552 F. Supp. at 223.

⁸ *Id.* at 160-65 (citing DOJ's Competitive Impact Statement ("CIS")). To comply with the Tunney Act, the DOJ must submit a CIS whenever it proposes to settle an antitrust action. *Id.*

⁹ *Id.*

¹⁰ *Id.* at 190-91. Cross-subsidization occurs when a company uses profits derived from a governmentally-regulated monopolistic industry to support operations in a competitive industry. *See, e.g., id.* at 192.

¹¹ *See id.* at 195.

¹² *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 530-33 (D.D.C. 1987) (Triennial Review) *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied sub nom. MCI Communications Corp. v. United States*, 111 S. Ct. 283 (1990).

Section II(D)(1) of the Decree prohibits the Regional Companies from providing "interexchange telecommunications services." *AT&T*, 552 F. Supp. at 227. "Interexchange telecommunications" is defined as "telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." *AT&T*, 552 F. Supp. at 229. "Exchange areas," for purposes of the Decree, are the Lo-

cal Access Transport Areas (LATAs), established by the individual Regional Companies with the approval of the Court, *AT&T*, 552 F. Supp. at 229, each of the LATAs encompassing "one or more contiguous local exchange areas serving common social, economic, or other purposes." *Id.* Loosely speaking, interexchange service may be equated with long distance service (although some long distance service occurs within a LATA and is therefore not interexchange service within the meaning of the decree).

Western Elec., 673 F. Supp. at 540-41 (footnote omitted).

¹³ The twenty-two Bell Operating Companies ("BOCs") were integrated into seven Regional Holding Companies (also known as Regional Bell Operating Companies ("RBOCs")) pursuant to the plan of reorganization of AT&T approved by the court. *See United States v. Western Elec.*, 569 F. Supp. 1057, 1062 n.5 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983).

¹⁴ *AT&T*, 552 F. Supp. at 227 (prohibiting BOCs from "directly or through any affiliated enterprise: (1) provid[ing] interexchange telecommunications services or information services; (2) manufactur[ing] or provid[ing] telecommunications products or customer premises equipment . . . ; or (3) provid[ing] any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." *Id.* at 227-28).

¹⁵ *Western Elec.*, 673 F. Supp. at 532.

¹⁶ *United States v. Western Elec. Co.*, 797 F.2d 1082, 1092 (D.C. Cir. 1986).

¹⁷ *Id.* The decree defined two-way mobile telephone and one-way paging services as "exchange services." *United States v. Western Elec. Co.*, 578 F. Supp. 643, 645 (D.D.C. 1983). The D.C. Circuit held that the decree did not consider the possibility that the BOCs would want to provide exchange services outside of their geographic regions. *Western Elec.*, 797 F.2d at 1091.

A. The Standard of Review Applicable to Modifications of the Consent Decree

Since the Triennial Review,¹⁸ parties have contested the appropriate standard of review applicable for a modification of the Consent Decree. To determine the relevant standard, the court must first decide whether the modification is contested.¹⁹ If one of the parties to the original Consent Decree opposes the proposed modification, the court must consider the modification to be contested.²⁰ If none of the parties to the original Consent Decree contests the modification, the court will invoke a public interest standard of whether the resulting array of rights and liabilities comports with the "public interest."²¹ This standard allows the court to approve an uncontested modification without a showing of changed circumstances.²² The court of appeals in its review of the Triennial Review interpreted this standard to allow a modification of the MFJ unless there is a certainty of anticompetitive effect.²³

Compared to an uncontested modification, a modification contested by one of the parties requires a much more stringent standard of review. The test normally applied to a contested modification is whether there are "'unforeseen conditions' that indicate [] a modification [is] appropriate."²⁴ However, the Consent Decree altered this common law standard in section VIII(C) by requiring that the restric-

tion would be removed only upon a showing "that there is no substantial possibility that [the petitioning BOC] could use its monopoly power to impede competition in the market it seeks to enter."²⁵ A party requesting a contested Decree modification would find this altered test much more stringent than the test for an uncontested modification.

B. The Result of the Triennial Review

In 1987, the District Court for the District of Columbia held proceedings pursuant to DOJ's pledge to report to the court every three years on the continuing need for the lines-of-business restrictions.²⁶ Judge Greene left intact the Decree's restrictions on manufacturing, interexchange services (including cellular radio, paging and other mobile interexchange services) and information services.²⁷ He removed, however, the restriction on the transmission of information, but not on the generation of its content.²⁸ The court also removed the restriction embodied in section II(D)(3) of the Decree on the entry of the RBOCs into non-telecommunications ventures.²⁹

The Court of Appeals for the District of Columbia Circuit in a *de novo* review affirmed in part and reversed in part Judge Greene's holding.³⁰ The appellate court discussed the section VIII(C) standard of review,³¹ holding that to remove a line-of-business restriction "the BOCs must establish that something

¹⁸ See *Western Elec.*, 673 F. Supp. at 532-36. Until the Triennial Review, all requests for waivers were decided under section VIII(C) of the MFJ. See *AT&T*, 552 F. Supp. at 231 (setting forth MFJ section VIII(C)).

¹⁹ *Western Elec.*, 673 F. Supp. at 532-33.

²⁰ The parties to the consent decree were the DOJ, AT&T and the RBOCs. In a recent case, the court faced the issue of whether to define a modification contested if the prime mover and plaintiff of the original decree, the DOJ, as well as the RBOCs, supported the modification while AT&T opposed it. The court held the modification contested. *United States v. Western Elec. Co.*, 969 F.2d 1231, 1241 (D.C. Cir. 1992); but see *id.* at 1244-47 (Williams, J., dissenting).

²¹ See, e.g., *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶66,856, at 64,248 (E.D. Mich. 1985); see generally John D. Anderson, Note, *Modification of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH. L. REV. 134, 135 (1985) (discussing the standards for modifying a consent decree).

²² See *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975), *cert. denied*, 454 U.S. 1083 (1981).

²³ See *United States v. Western Elec. Co.*, 767 F. Supp. 308, 328 (D.D.C. 1991).

²⁴ *AT&T*, 552 F. Supp. at 195 n.266 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 118 (1932)).

²⁵ *Id.* at 231.

²⁶ *Western Elec.*, 673 F. Supp. 525, 532 (D.D.C. 1987).

²⁷ *Id.* at 601-603.

²⁸ *Id.* at 603 n.339. Information service is defined in the decree as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications." *AT&T*, 552 F. Supp. at 229.

²⁹ *Western Elec.*, 673 F. Supp. at 599. Section II(D)(3) reads, "no BOC shall, directly or through any affiliated enterprise: . . . (3) provide any other product or service, except exchange telecommunication and exchange access service, that is not a natural monopoly service actually regulated by tariff." *AT&T*, 552 F. Supp. at 227-28. The Decree did not permit the BOC's to manufacture telecommunications equipment; however, they could provide customer premises equipment—"meaning equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines," *Id.* at 228 (setting forth MFJ section IV(E)—and also to produce, publish, and distribute "Yellow Pages" directories. *Id.* at 231.

³⁰ *United States v. Western Elec. Co.*, 900 F.2d 283, 284 (D.C. Cir. 1990), *cert. denied sub nom. MCI Communications Corp. v. United States*, 111 S.Ct. 283 (1990).

³¹ See *supra* notes 24, 25 and accompanying text.

is different now from the time when the Decree was entered so that they can no longer use their monopoly power to impede competition."³² Using this standard, the appellate court did not disturb the lower court's ruling on either interexchange, manufacturing or non-telecommunications ventures.³³ The appellate court nonetheless reversed and remanded the lower court's holding on information services.³⁴ The appellate court noted that the parties to the Decree did not contest this issue and directed the district court to use the less stringent "public interest" standard.³⁵

On remand, the district court determined that the RBOCs possessed market power in the information services industry within the meaning of federal anti-trust laws.³⁶ The court found that the RBOCs' market power stemmed from their bottleneck control of "almost complete domination over the 'last mile' of the telephone network, i.e., their monopoly of the local wires and switches without which few, if any, competitors can reach the ultimate consumers of the telephone-based information services."³⁷ The court also pointed out that historical, structural, informational and budgetary considerations made the FCC's regulation of possible anticompetitive behavior in information services extremely difficult.³⁸

Judge Greene interpreted the appellate remand as requiring him to "remove the information services restriction unless there is certainty that entry of the regional companies . . . will lead to anticompetitive conduct."³⁹ Judge Greene reluctantly removed the

restriction on information services, despite the court's view that the RBOCs would engage in anticompetitive acts.⁴⁰ Citing its confusion over the interpretation of the appeals court decision, the district court stayed the effect of the removal of the information services restriction pending completion of appellate review.⁴¹ Subsequently, the district court denied motions to wholly or partially vacate the stay.⁴²

The RBOCs and the DOJ appealed. The court of appeals lifted the stay, holding that it was an abuse of discretion because the stay did not pass the traditional elements necessary for its imposition.⁴³ The Supreme Court refused to reimpose the stay, allowing the RBOCs to provide information services during the appellate review.⁴⁴

C. A Recent Case Related to the Consent Decree

In a case related to the MFJ, the DOJ brought criminal charges against NYNEX Corporation⁴⁵ alleging that it did "willfully disobey [the district court's] lawful and specific Order by providing information services."⁴⁶ The DOJ requested a penalty of one million dollars. NYNEX purportedly violated the court's order through its Telco Research arm. It allegedly provided these information services in 1986 and 1987 when the information services prohibition still applied as part of the MFJ. The District Court for the District of Columbia denied several of NYNEX's motions for dismissal. The trial occurred between April 6 and April 9, 1992. On February 16,

³² *Western Elec.*, 900 F.2d at 298, 299.

³³ *Id.* at 299.

³⁴ *Id.* at 308-09.

³⁵ The appellate court observed that the "public interest" test must take its meaning from the nation's antitrust laws. *Id.* (citing *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984)). The court held that the appropriate question under this standard is "whether the proposed modification would be certain to lessen competition in the relevant market." *Id.* at 308.

³⁶ *United States v. Western Elec. Co.*, 767 F. Supp. 308, 315 & n.30 (D.D.C. 1991). The district court answered this question because the appellate court held that "unless the entering BOC will have the ability to raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power to 'impede competition.'" *Western Elec.*, 900 F.2d at 296.

³⁷ *Western Elec.*, 767 F. Supp. at 314.

³⁸ *Id.* at 316-17, 319-20. The court also noted problems in the new Computer III rules. Part of these rules promote Open Network Architecture ("ONA") which would:

[U]nbundle the various features available over telephone lines, in theory providing independent information service providers with more complete information about network features and allowing them to pick and choose the specific

features they need. The proposed *Computer III* rules also call for new regulations on cost accounting designed to render it more difficult for Regional Companies to subsidize their information services with revenue from their local exchange monopoly.

Id. at 319; see also *In re Separation of Costs of Regulates Telephone Service from Costs of Nonregulated Activities, Report and Order*, 2 FCC Rcd. 1298 (1987); *In re Amendment to Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd. 1150 (1988) [hereinafter *Computer III Inquiry*].

³⁹ *AT&T*, 552 F. Supp. at 328.

⁴⁰ See *id.* at 315.

⁴¹ *Western Elec.*, 767 F. Supp. at 332-33.

⁴² See *United States v. Western Elec. Co.*, 774 F. Supp. 13, 15 (D.D.C. 1991).

⁴³ *United States v. Western Elec. Co.*, 1991-2 Trade Cas. (CCH) P69,610 (D.C. Cir. 1991), *stay denied sub nom. American Newspaper Publishers Assn. v. United States*, 112 S. Ct. 366 (1991).

⁴⁴ *American Newspaper Publishers Ass'n. v. United States*, 112 S. Ct. 366, 366 (1991).

⁴⁵ See *United States v. NYNEX Corp.*, 788 F. Supp. 16, 17 (D.D.C. 1992).

⁴⁶ *Id.* (quoting Indictment P8).

1993, Judge Greene found NYNEX guilty of violating the MFJ restriction on information services, and fined NYNEX one million dollars.⁴⁷ NYNEX is appealing the decision.

D. Common Channel Signaling

In recent years, new signaling technology termed "out-of-band" or "common channel signaling" ("CCS")⁴⁸ has been developed that would allow the BOCs to deploy centralized signal transfer points ("STPs"). Each STP has the capacity to serve several of a BOC's Local Access Transport Areas ("LATAs").⁴⁹ In utilizing this technology, the RBOCs would prefer to set up centralized switches and have the interexchange carriers connect at the central point, thereby installing less STPs.

In a 1990 decision, Judge Greene denied a request for a waiver of the Decree restriction that would have permitted the RBOCs to provide common channel signaling interconnection.⁵⁰ The Circuit Court for the District of Columbia affirmed the decision as well as the district court's use of the more stringent section VIII(C) test because AT&T opposed the modification.⁵¹

II. INTELSAT, COMSAT, AND THE PANAMSAT CONTROVERSY

In 1989, Alpha Lyracon Space Communications,

Inc. d/b/a Pan American Satellite ("PanAmSat") filed a \$1.5 billion antitrust suit against the Communications Satellite Corporation ("Comsat") under sections 1 and 2 of the Sherman Antitrust Act.⁵² PanAmSat sought injunctive relief and treble damages pursuant to sections 4 and 16 of the Clayton Antitrust Act.⁵³ The district court granted Comsat's motion to dismiss,⁵⁴ and the appellate court affirmed the dismissal but reversed and remanded to entitle PanAmSat to amend its complaint.⁵⁵

A. A Brief History of Comsat and INTELSAT

Congress enacted the Communications Satellite Act of 1962 ("CSA" or "Act")⁵⁶ to implement "in conjunction and in cooperation with other countries, as expeditiously as practicable, a commercial communications satellite system."⁵⁷ The Act made Comsat—a publicly held, private United States corporation—responsible for planning, constructing and operating the satellite system, including satellite terminal stations, and for leasing space satellite telecommunications channels to communications common carriers.⁵⁸ A section of the Act known as the antitrust consistency clause states: "[T]he activities of [Comsat] . . . and of the persons or companies participating in the ownership of the corporation shall be consistent with the federal antitrust laws."⁵⁹

In 1964, eleven nations entered into an interim executive agreement creating INTELSAT.⁶⁰ Subse-

⁴⁷ Criminal case #90—238(HHG).

⁴⁸ Conceptually, "out of band" technology separates the information responsible for transferring and connecting a telephone call from the actual voice or data being carried over the line. This allows new services such as "Caller ID" to be implemented. "Common channel signaling" is an advance computer program that continuously monitors and inventories circuits in order to allow virtually immediate connection in interexchange telecommunications. Telephone Interview with David Irwin, Partner, Irwin, Campbell & Crowe (April 4, 1993).

⁴⁹ A LATA is a local exchange area encompassing "one or more contiguous local exchange areas serving common social, economic, or other purposes." *AT&T*, 552 F. Supp. at 229; see also *United States v. Western Elec. Co.*, 969 F.2d 1231, 1234-35 (D.C. Cir. 1992); *supra* note 11 and accompanying text.

⁵⁰ *United States v. Western Elec. Co.*, 131 F.R.D. 647, 652 (D.D.C. 1990). The decree requires the RBOCs to deliver exchange access traffic (local customers) to the interexchange carriers (long distance providers) at points of presence in every LATA (from the local area). See *Western Elec.*, 569 F. Supp. at 994 & n.13. The RBOCs argued that new technology (common channel signaling and Signaling System 7 (SS7-CCS)) would allow them to provide network control in just a few central points at cheaper rates. *Western Elec.*, 131 F.R.D. at 650. However, the Court held that this would bring the RBOCs into the interexchange telecommunications prohibited by the decree. *Id.* at

650-51.

⁵¹ *Western Elec.*, 969 F.2d at 1241 ("[A]lthough it is true that [the appellate court] cannot be said to have held that AT&T's opposition makes a requested modification contested—because the point was not directly controverted."). See *id. supra* note 21 and accompanying text.

⁵² 15 U.S.C. §§ 1-2 (1988 & Supp. 1990).

⁵³ 15 U.S.C. §§ 15, 26 (1988 & Supp. 1990).

⁵⁴ *Alpha Lyracon Space Communications, Inc. v. Communications Satellite Corp.*, 1990-2 Trade Cas. (CCH) ¶69,188 (S.D.N.Y. 1990).

⁵⁵ *Alpha Lyracon Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168, 169 (2d Cir. 1991).

⁵⁶ 47 U.S.C. § 701(a) (1988 & Supp. 1990).

⁵⁷ *Id.*

⁵⁸ See 47 U.S.C. §§ 731, 734(a), 735(a)(1)-(3).

⁵⁹ 47 U.S.C. § 701(c). "Congress sought to ensure that: all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system . . ." *Alpha Lyracon*, 1990-2 Trade Cas. (CCH) at ¶64,579 (quoting 47 U.S.C. § 721(A)(4)).

⁶⁰ See *Agreement Establishing Interim Arrangements for a Global Communications Satellite System*, Aug. 20, 1964, 15 U.S.T. 1705, 514 U.N.T.S. 25 [hereinafter *Intelsat Agreement* or *Executive Agreement*].

quently, these signatories executed two additional agreements delineating the control and management structure for the international satellite network and its related facilities.⁶¹ These agreements forced an applicant for a separate satellite system providing international satellite service to engage in "consultations" with INTELSAT to ensure technical compatibility with the system and to protect INTELSAT from competition resulting in significant economic harm to INTELSAT.⁶² In 1976, the United States entered into an agreement with INTELSAT that included a provision making "officers and employees of INTELSAT, the representatives of the Parties and of the Signatories . . . [] immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions . . ."⁶³

In 1984, after several satellite service providers filed applications with the FCC to develop separate international telecommunications satellite systems,⁶⁴ the Reagan Administration responded with a Presidential Determination concluding that "separate international communications satellite systems were required in the national interest."⁶⁵ In accordance with this determination, the Secretary of State and the Secretary of Commerce jointly prescribed that separate satellite systems should be restricted to the sale or long-term lease of transponders with communica-

tions not interconnected with public-switched networks ("PSNs"), and that the alternative systems must receive authorization from affected INTELSAT signatories.⁶⁶ Congress encoded these prescriptions into law in 1985,⁶⁷ and the FCC conditioned the issuance of alternate licenses on the applicant's successful consultations with INTELSAT signatories in compliance with Article XIV(d) of the Definitive Agreement.⁶⁸

PanAmSat first applied to the FCC in 1984 to provide international service between North, Central, and South America, the Iberian peninsula and the Caribbean.⁶⁹ PanAmSat launched its first satellite (PAS-1) in June 1988, and has since received conditional approval from the FCC to build, launch and operate three more satellites (PAS-2, PAS-4, and PAS-7).⁷⁰

PanAmSat's complaint against Comsat alleged that Comsat acted in an anticompetitive manner "by passing a resolution to boycott competing systems, delaying Article XIV(c) and Article XIV(d) consultations, pricing satellite telecommunications service without regard to cost, and purchasing excess satellite capacity."⁷¹ PanAmSat also alleged that Comsat filed a sham opposition to the application for tax deferral submitted by Rene Anselmo, sole-proprietor of Alpha Lyracom, relating to the development, purchase and launch of PAS-1; made false represen-

⁶¹ See *Agreement Relating to the International Telecommunications Satellite Organization*, Feb. 12, 1973, 23 U.S.T. 3813 [hereinafter *Definitive Agreement*] (establishing an organizational structure for Intelsat); see also *Operating Agreement Relating to the International Telecommunications Satellite Organization Intelsat*, Feb. 12, 1973, 23 U.S.T. 3813, 10 I.L.M. 1909 [hereinafter *Operating Agreement*]; *International Telecommunications Convention*, Apr 7, 1976, 14 I.L.M. 706 [hereinafter *Headquarters Agreement*]. These agreements gave the Organization:

[a]uthority to set rates for use of Intelsat satellite capacity, Definitive Agreement arts. V(d), VIII(b)(v)(C), X(a)(viii); Operating Agreement art. 8(a); to approve Intelsat's purchase of goods and services, Definitive Agreement arts. X(a)(ii), XIII; Operating Agreement art. 16; and to approve proposals to establish international and domestic telecommunications satellite system separate from Intelsat.

Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 946 F.2d 168, 169-170 (2d Cir. 1991).

⁶² See *Definitive Agreement*, *supra* note 61, arts. XIV(c)-(d).

⁶³ *Alpha Lyracom*, 946 F. 2d at 171 (quoting *Headquarters Agreement* P.16).

⁶⁴ Orion Satellite Corporation was the first on March 11, 1983, followed by International Satellite, Inc., RCA American Communications, Inc., Cygnus Satellite Corporation, Pan American Satellite Corporation and Financial Satellite Corporation.

See Sigrid Arlene Mendel, Note, *Authorization of Private International Satellite Systems in Competition with Comsat: An Analysis of the Underlying Legal Justifications and Policy Factors*, 18 LAW & POL'Y INT'L BUS. 279, 292-96 (1986).

⁶⁵ Presidential Determination No. 85-2, 49 Fed. Reg. 46,987 (1984).

⁶⁶ See *Alpha Lyracom*, 946 F.2d at 170 (analyzing letter from Secretary of State George Schultz and Secretary of Commerce Malcolm Baldrige to Chairman Mark S. Fowler of the Federal Communications Commission (Nov. 28, 1984)).

⁶⁷ See The Foreign Relations Authorization Act (FRAA), Fiscal Years 1986 and 1987, Pub. L. No. 99-93, section 146, 99 Stat. 405, 425-26 (1985). "The FRAA also make [sic] compliance with the requirements set forth in Presidential Determination No. 85-2 and the requirement that one or more foreign authorities have authorized the use of such system consistent with such conditions a precondition of consultation with Intelsat." *Alpha Lyracom*, 946 F.2d at 172.

⁶⁸ See *In re Establishment of Satellite Systems Providing International Communications*, 101 F.C.C. 2d 1046, para. 267 (1985); see also *supra* notes 61-63 and accompanying text.

⁶⁹ See *In re Alpha Lyracom Application for Authority to Construct, Launch and Operate a Hybrid International Communications Satellite System*, *Memorandum Opinion, Order and Authorization*, 6 FCC Rcd. 5132, paras. 2-4 (1991).

⁷⁰ See *In re Alpha Lyracom*, *Memorandum Opinion, Order and Authorization*, 7 FCC Rcd. 4277, para. 2 (1992).

⁷¹ See *Alpha Lyracom*, 946 F.2d at 172-73.

tations of PanAmSat's inability to complete Article XIV(c) and Article XIV(d) consultations to potential customers; and refused to do business with PanAmSat.⁷²

B. District Court Dismissal

Comsat moved for dismissal of PanAmSat's complaint in district court for lack of subject matter jurisdiction, failure to state a claim, and failure to join a necessary and indispensable party.⁷³ District court Judge John F. Keenan dismissed the complaint.⁷⁴ In considering the motion to dismiss for failure to state a claim where relief may be granted, the court "bore in mind that the antitrust laws must be construed liberally and that antitrust immunity is disfavored."⁷⁵ PanAmSat attempted to circumvent the immunity provisions under the INTELSAT agreements by arguing that Comsat is a signatory and a party and not a representative of INTELSAT.⁷⁶ Judge Keenan rejected this argument because PanAmSat acknowledged in its complaint that Comsat is the United States representative to INTELSAT, and because Article XV(c) of the Definitive Agreement confers "appropriate privileges and immunities to INTELSAT . . . to Parties . . . [and] to Signatories [e.g., Comsat] and representatives of Signatories."⁷⁷

PanAmSat also argued that Congress had waived Comsat's grant of immunity in the Communications Satellite Act of 1962 by saying that the activities of Comsat shall be consistent with the antitrust laws.⁷⁸ Judge Keenan reviewed the legislative history of the Act and determined that "Congress did not intend to subject Comsat to the antitrust laws with respect to

its activities as Signatory to INTELSAT."⁷⁹ Judge Keenan did, however, rule that Congress had intended the antitrust laws to apply to Comsat in its capacity as a common carrier.⁸⁰

While dismissing the above motion, the court went on to discuss alternative motions for dismissal. On the failure to join necessary and indispensable parties, the court decided that INTELSAT and its member-nations are necessary and indispensable parties under Federal Rule 19(a) and (b).⁸¹ On the failure to state a claim on which relief could be granted, the court maintained that injunctive relief could not be granted because an injunction would have to be directed at both Comsat as well as the individual nations which have responsibility for the alleged unlawful activities.⁸²

C. Appellate Review of the District Court Dismissal

The primary issue that the appellate court faced was whether Comsat "is immune from antitrust liability for activity undertaken in its role as the United States representative [to INTELSAT]."⁸³ The appellate court followed the district court's holding that the antitrust consistency clause in the Communications Satellite Act⁸⁴ applies only to Comsat as a common carrier, and not to actions of Comsat as signatory to INTELSAT.⁸⁵ In deciphering the immunity provisions of the Definitive Agreement and the Headquarters Agreement,⁸⁶ the court held that these provisions and congressional intent in the CSA could only be read to grant Comsat immunity in its official function as signatory.⁸⁷

The appellate court, however, disagreed with

⁷² *Id.* at 173.

⁷³ See *Alpha Lyracom*, 1990-2 Trade Cas. (CCH) P69188, 64,579 (S.D.N.Y. Sept. 13, 1990).

⁷⁴ *Id.*

⁷⁵ *Id.* at 64,582 (citing *National Gerimedical Hosp. v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979)).

⁷⁶ See *supra* note 64 and accompanying text.

⁷⁷ *Alpha Lyracom*, 1990-2 Trade Cas. (CCH) at 64,583 (quoting Headquarters Agreement P16).

⁷⁸ See *supra* notes 57-60 and accompanying text.

⁷⁹ See *Alpha Lyracom*, 1990-2 Trade Cas. (CCH) at 64,583. Judge Keenan concluded that Comsat should not be exposed to antitrust liability when participating in Article XIV consultations as representative of the United States government, voting on resolutions at Intelsat meetings, or when participating in Intelsat pricing or procurement decisions. *Id.*

⁸⁰ See *id.* at 64,583-88. Because communications common carriers would be permitted to participate in the ownership of

Comsat, "Congress displayed concern that the newly-created corporation would be dominated by common carriers such as AT&T, and that such ownership would permit them to collude or subvert Comsat for private gain." *Id.*

⁸¹ "The lion's share of the complaint's allegations depict concerted action between Comsat and Intelsat's member-nations to restrain trade and monopolize the international telecommunications market." *Id.* at 64,585.

⁸² *Id.*

⁸³ *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168, 169 (2d Cir. 1991). 47 U.S.C. § 701(c).

⁸⁴ *Alpha Lyracom*, 946 F.2d at 174.

⁸⁵ See *supra* note 62 and accompanying text.

⁸⁶ *Alpha Lyracom*, 946 F.2d at 174. "Congress could not have intended to require Comsat to participate in Intelsat subject to Executive Branch directives and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role." *Id.*

Judge Keenan that PanAmSat's complaint only alleged activities by Comsat in its capacity as signatory and not in its capacity as a common carrier.⁸⁸ The appellate court found in PanAmSat's complaint "allegations of anticompetitive conduct by COMSAT in its 'separate role' as the sole provider of access to the global satellite system to United States communications carriers."⁸⁹ The appellate court reversed and remanded to allow PanAmSat to recast its complaint. However, the court cautioned PanAmSat to clearly isolate actionable conduct by Comsat as common carrier.⁹⁰ The court held that it did not have to rule on Comsat's motion to dismiss on grounds of not joining indispensable parties because the revised complaint would not include Comsat as signatory to INTELSAT. The court did allow PanAmSat to replead its state law claims while reminding PanAmSat of New York's strict pleading requirements.⁹¹

PanAmSat has revised and refiled an amended complaint alleging that Comsat monopolized or conspired to monopolize the international satellite market.⁹² In this repleading, PanAmSat has focused on Comsat's behavior as a common carrier. The case is in the motions and discovery process. Thus far, the U.S. District Court for the Southern District of New York ruled that PanAmSat has standing to challenge Comsat's alleged monopolistic acts and has denied Comsat's motion to dismiss.⁹³ PanAmSat also petitioned the Supreme Court for a writ of certiorari concerning the appellate court decision. The Supreme Court denied PanAmSat's petition in 1992.⁹⁴

D. Independent Satellite System Interconnected with the PSN

On November 28, 1984, the Reagan Administration determined that the national interest required the creation of independent United States satellite systems in the international telecommunications field.⁹⁵ Following an intergovernmental task force review, the FCC allowed separate satellite systems,

which are restricted to the sale or long-term lease of space segment capacity for communications not interconnected with PSNs.⁹⁶ The government instituted these restrictions to protect INTELSAT from economic harm in accordance with INTELSAT's original treaties and negotiations.

In 1991, PanAmSat asked the FCC to allow independent satellite systems to interconnect with the PSN. The FCC deferred action on PanAmSat's request pending a recommendation from an intergovernmental task force.⁹⁷ On November 27, 1991, the State Department and the NTIA endorsed completely the proposal of eliminating restrictions on interconnection of separate systems by 1997. The FCC ruled in March 1992 that separate satellite systems can interconnect with the PSN as of January 1997.⁹⁸ The delay in altering the regulations would allow INTELSAT a chance to adjust to new competition. Even before the FCC lifts the PSN restriction in 1997, the FCC, under the interagency position adopted by the Bush Administration, will allow separate satellite systems to interconnect with the public-switched network on a long-term contract basis as long as the systems limit their services to private line services.⁹⁹

III. MOBILE SATELLITE SERVICE AND DIGITAL AUDIO BROADCASTING

Mobile Satellite Service ("MSS") is one of the fastest growing areas of consumer-oriented communications services. MSS includes any communications (i.e., voice or data, one-way, two-way or multidirectional) that involve a mobile or non-stationary receiver or transmitter.

A. History of the American Mobile Satellite Consortium

In 1986 and 1987, the FCC reallocated a portion

⁸⁸ *Id.* at 175.

⁸⁹ *Id.* (quoting Brief for Appellee at 38).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., No. 88 Civ. 5021 (S.D.N.Y. filed Nov. 13, 1991).

⁹³ *4 Year-Old-Case; Court Denies Comsat Motion to Dismiss Panamsat Antitrust Suit*, COMM. DAILY, 6 (April 2, 1993).

⁹⁴ Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 112 S. Ct. 1174, 1174 (1992).

⁹⁵ See *supra* notes 67-68 and accompanying text.

⁹⁶ See generally Guy Krogh, *The Satellite Competition De-*

bate: An Analysis of FCC Policy and an Argument in Support of Open Competition, 40 SYRACUSE L. REV. 867 (1989).

⁹⁷ *The Year Ahead, Congress, the FCC and Judge Greene's Court*, in TELECOMMUNICATIONS POLICY AND REGULATION 1991, at 5 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 328, 1991).

⁹⁸ *FCC Says Separate Satellite Systems Can Interconnect with PSN*, COMM. DAILY, March 13, 1992, at 5.

⁹⁹ See *In re Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization*, Order, 7 FCC Rcd. 2313, para. 5 (1992).

of the upper L-band spectrum for MSS which previously had been allocated to Aeronautical Mobile Satellite Service ("AMSS"). In reallocating this portion of the frequency, the FCC intended to provide the nascent MSS industry with maximum flexibility. Recognizing the extraordinary costs in launching a new satellite system, the FCC decided that the MSS license would be granted to a consortium of financially qualified applicant corporations.¹⁰⁰ The FCC defined "qualified" as the ability to make a five million dollar cash contribution which would be used for expenses associated with the start-up costs of the MSS system.¹⁰¹ Eight applicants satisfied the eligibility requirements and formed the consortium now called the American Mobile Satellite Corporation ("AMSC").

Three corporations which were denied eligibility by the FCC, as well as Aeronautical Radio, Inc. ("ARINC"), an applicant for a license to provide AMSS services, appealed the FCC's decision.¹⁰² The Circuit Court of Appeals for the District of Columbia reversed the FCC's decision to deny the three corporation's applications, "finding no reasoned justifications for the agency's decisions requiring applicants to demonstrate financial ability through a \$5 million cash deposit. . . ." ¹⁰³ The court also reversed the FCC's imposition of consortium-licensing in lieu of comparative hearings.¹⁰⁴

In its final decision, the FCC concluded that the consortium licensing approach "would best serve the interest in this instance,"¹⁰⁵ due to the unique as-

pects of satellite licensing.¹⁰⁶ In this case, the FCC imposed a mandatory consortium because "active and immediate participation by an authorized licensee is imperative for the United States to secure necessary spectrum through the international frequency coordination process."¹⁰⁷ The FCC allowed the three appellants to participate in the consortium without the mandatory financial contribution.¹⁰⁸ Finally, the FCC affirmed AMSC as the authorized licensee to construct, launch and operate an MSS system.¹⁰⁹

B. The AMSC/Radio Satellite Controversy

California-based Radio Satellite Corporation ("RSC") hopes to offer Radiosat service beginning in 1994.¹¹⁰ RSC defines its Radiosat service to include digital audio broadcasting ("DAB"), positioning and interactive data service for automobiles and ships.¹¹¹ RSC would need to utilize geostationary ("GEO") or low-earth-orbiting ("LEO") satellites to implement its service. RSC planned to buy capacity on the AMSC satellite in order to deliver MSS communications services to end-users.¹¹²

In early 1992, RSC filed an action against AMSC for three hundred million dollars in trebled damages for violations of the Sherman Antitrust Act and the Communications Act of 1934.¹¹³ RSC claimed that AMSC abused its marketplace position while negotiating circuit pricing on its satellite to be launched in 1984.¹¹⁴ In its complaint, RSC alleged violations of the Communications Act—sections 201(a), 201(b),

¹⁰⁰ See *In re Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order*, 2 FCC Rcd. 1825 (1986), *recon. denied*, 2 FCC Rcd. 6830 (1987), *further recon. denied*, 4 FCC Rcd. 6029 (1989).

¹⁰¹ See *In re Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for Use in a Land Mobile Satellite Service, Final Decision on Remand*, 7 FCC Rcd. 266, 267 para. 2 (1992) [hereinafter LMSS Remand].

¹⁰² See *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 432-33 (D.C. Cir. 1991).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ LMSS Remand, *supra* note 101, at 267 para. 8 (interpreting *United States v. Storer Broadcasting*, 351 U.S. 192 (1956)). While section 309(e) of the Communications Act of 1934 provides that the FCC may not deny an application without affording an opportunity for hearing, the right to a comparative hearing may not be absolute. See, e.g., *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 339 (1945) (Frankfurter, J., dissenting).

¹⁰⁶ LMSS Remand, *supra* note 101, at 267 para. 8.

¹⁰⁷ *Id.* at 270 para. 26. "The Commission emphasized that the international negotiations were at a critical juncture, and explained that the delay caused by conducting time-consuming

comparative hearings would severely weaken the U.S. negotiating position and disserve the public interest." *Id.* (discussing *Tentative Decision*, 6 FCC Rcd. 4906-11, paras. 33-53 (1991)).

¹⁰⁸ LMSS Remand, *supra* note 101, at para. 62.

¹⁰⁹ *Id.* para. 61.

¹¹⁰ *Radio Satellite Corp. Moving Ahead Despite AMSC's Troubles*, SATELLITE NEWS, October 7, 1991, at 5.

¹¹¹ Digital audio broadcasting would deliver at least ten national CD-quality audio programs, positioning would offer consumers information about traffic events in real time or effectively get emergency help, and interactive data service may allow a consumer to purchase a product advertised over the radio by pressing a button. *Id.*

¹¹² See Amended Complaint at 50-56, *Radio Satellite Corp. v. American Mobile Satellite Corp.*, (D.D.C. 1992) (No. 92-0405). RSC wanted to buy or lease capacity on the AMSC satellite to broadcast to units it would sell directly to the public. These units would provide the end-user—the mobile customer—with the services that RSC provided. *Id.*

¹¹³ *Radio Satellite Corp. Sues AMSC for \$ 200 Million in D.C. Court*, SATELLITE NEWS, February 17, 1992, at 1.

¹¹⁴ *Id.* The satellite provider leases or sells space segment capacity on its satellite. Basically, the satellite is divided into circuits that can each be leased or sold to individual customers. RSC alleges AMSC refused to offer a fair price differential for

and 202(a)—for violating its duty as a common carrier engaged in interstate communications by radio to furnish such communication service upon reasonable request; for imposing unjust and unreasonable charges upon RSC; and for discriminating among customers as a common carrier.¹¹⁵ Additionally, RSC alleged five antitrust counts for violations of the Sherman Antitrust Act Section 1 and 2 against AMSC and co-conspirators McCaw Cellular Communications Company, Inc., Hughes Communications, Inc. and Mtel, Inc.¹¹⁶ RSC alleged that AMSC's conduct, arrangements and agreements constituted an unlawful contract, combination and/or conspiracy in restraint of trade and commerce in the MSS resale market; AMSC's action constituted an attempt to monopolize the MSS resale market by significantly reducing or eliminating effective competition; AMSC abused its monopoly power granted by virtue of its exclusive FCC license for primary MSS to gain competitive advantage in the MSS resale market by refusing to provide reasonable access to MSS resale competitors such as RSC; and AMSC has denied reasonable access to an essential facility that it controls by virtue of its FCC exclusive license to provide MSS.¹¹⁷

RSC filed for bankruptcy in the beginning of 1992, and alleged in its complaint that AMSC was directly responsible for the bankruptcy. Included in its list of injuries allegedly resulting from AMSC's conduct were the "complete loss of equity that RSC has raised and [an] inability to repay debt incurred in the course of conduct of its business; by inability to attract investors due to AMSC's denial of access; . . . and other damages."¹¹⁸

the large number of circuits that it needed to offer its "Radiosat" service. *Id.*

¹¹⁵ See Amended Complaint at 50-56, *Radio Satellite Corp. v. American Mobile Satellite Corp.*, (D.D.C. 1992) (No. 92-0405).

¹¹⁶ *Id.* at 63.

¹¹⁷ See generally *id.* at 56-66.

¹¹⁸ *Id.* at 60.

¹¹⁹ *Viacom Int'l Inc. v. Time Inc.*, 785 F. Supp. 371, 373 (S.D.N.Y. 1992).

¹²⁰ *Id.* at 373-74 & n.4. Subscribers to cable receive programming in exchange for the payment of subscription fees to cable system operators who function as local distributors in the areas they serve. *Id.*

¹²¹ *Id.* at 373-74 & n.1 (alleging violations of section 1 and 2 of the Sherman Antitrust Act and section 7 of the Clayton Act).

¹²² *Id.* at 373. "Plaintiffs' claim . . . alleges monopolization of certain local markets for cable television in the United States . . . and an abuse and misuse of monopoly power in those markets

IV. VIACOM INTERNATIONAL INC. v. TIME WARNER INC.

In 1989, Viacom International Inc. ("Viacom") and Showtime Networks Inc. ("Showtime") brought an antitrust action against Time Warner Inc. ("Time"), Home Box Office, Inc. ("HBO"), American Television & Communications Corporation ("ATC") and Manhattan Cable Television, Inc. ("MCTV").¹¹⁹ Viacom operates Showtime and The Movie Channel ("TMC"), two pay television programming services.¹²⁰ HBO and Cinemax, also pay television services, and ATC, the owner of MCTV, are all wholly-owned subsidiaries of Time.

Viacom's complaint alleged that Time, through its HBO and ATC subsidiaries, violated the federal antitrust laws through monopolistic and anticompetitive behavior.¹²¹ Generally, Viacom alleged that Time's cable television subsidiaries were monopolizing the pay television business.¹²² The District Court for the Southern District of New York responded to Time's motions for dismissal, partial summary judgment and/or partial judgment on the pleadings.¹²³ Plaintiffs Viacom and Showtime claimed that defendants Time and HBO used their monopoly leveraging power through ATC and MCTV to exclude Showtime and TMC in the local markets.¹²⁴ Plaintiffs further claimed that this exclusionary activity also had an effect on the national market by denying Plaintiffs economies of scale.¹²⁵

After a detailed analysis, the court refused the defendant's motion to dismiss. Judge McKenna did dismiss the Plaintiffs' Sherman Act section 1 claim that the Defendants, through contract, combination and/or conspiracy, unreasonably restrained trade.¹²⁶ This holding, however, did not affect the Plaintiffs'

to gain a competitive advantage and restrain trade unreasonably in the market for pay television programming services in the United States" *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

According to Plaintiffs, the leveraging claim stands . . . on the percentage of the programming services market over which defendant Time, Inc., through its subsidiary, HBO, Inc., allegedly exerts control, and on the interplay between that power in the national market and the allegedly exclusionary activities of ATC and MCTV in the local markets.

Id. at 377. See also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)(discussing violations of section 2 of the Sherman Act where a firm uses monopoly power in one market to gain a competitive advantage in another).

¹²⁶ *Viacom Int'l*, 785 F. Supp. at 384-85.

state law antitrust claim.

In August, 1992, the two parties reached an out-of-court settlement ending the antitrust action.¹²⁷ Under the settlement, neither party admitted to any liability in resolving the suit. The settlement included the following provisions: (1) Time will pay Viacom \$75 million and will buy Viacom's Milwaukee cable system for \$95 million; (2) Time will give Showtime and TMC wider distribution on Time's cable systems; (3) Time will extend affiliation agreements between the MTV Network and Time's cable systems; and (4) Time will increase advertising purchases on the MTV Network.¹²⁸ In addition, HBO and Viacom cable systems have amended their affiliation agreements.

V. TELE-COMMUNICATIONS, INC., TEMPO, AND DIRECT BROADCAST SATELLITE

Tele-Communications, Inc. ("TCI"), the largest multiple system operator in the United States, controls cable systems serving sixteen percent of the nation's 53.9 million subscribers.¹²⁹ Tempo Enterprises, Inc. (Tempo) is a wholly-owned subsidiary of TCI. Direct broadcast satellite ("DBS") is a one-way satellite down-link that can transmit television signals. Because of the technology surrounding a satellite's footprint, DBS can be received in rural areas not already connected to standard cable.

A. Competition Between Direct Broadcast Satellite and Cable Television

The FCC has long anticipated that DBS service will provide an effective competitive alternative to

cable television.¹³⁰ The FCC has stressed the applicability of traditional antitrust principles to promote the emergence of alternative, effectively competitive, multi-channel distributors.¹³¹ Along with principles of competition, the FCC conditions a DBS permit on the applicants meeting requisite character qualifications.¹³²

In 1988, Tempo applied to the FCC to construct a DBS system. Tempo intends to provide DBS service to homes that have no access to cable television and to those households that have access but decline to subscribe.¹³³ Tempo also proposes to offer DBS to homes with existing cable that want ancillary services.¹³⁴

B. The FCC's Response to the Tempo Application

The FCC deferred its decision on Tempo's DBS application pending the resolution of a complaint filed by the National Association for Better Broadcasting and the Telecommunications Research and Action Center ("NABB/TRAC").¹³⁵ The NABB/TRAC complaint raised concerns related to a Missouri case "in which a jury rendered a \$35.6 million verdict against TCI on alternative damage awards for violation of federal antitrust law and tortious interference with business under Missouri law."¹³⁶

In its 1992 review of Tempo's pending DBS application, the FCC concluded that the NABB/TRAC complaint raised *prima facie* questions regarding TCI's character qualifications, but that the antitrust adjudication raised "no substantial and material questions of fact regarding TEMPO's basic qualifications."¹³⁷ The FCC did express concern over National Rural Telecommunications Cooperative's ("NRTC") complaint alleging unlawful dis-

¹²⁷ See Wayne Walley, *Time Warner, Viacom Settle*, ELECTRONIC MEDIA, August 24, 1992, at 2.

¹²⁸ *Id.*

¹²⁹ *In Re Application of Tempo Satellite, Inc., Memorandum Opinion and Order*, 7 FCC Rcd. 2728, 2731 n.20, (1992) [hereinafter *In Re Tempo*] (quoting *Cable and Station Coverage Atlas* at 4-5 (Warren Publishing, Inc. 1992), BROADCASTING, Oct. 14, 1991, at 53).

¹³⁰ See *In re Competition, Rate Deregulation and the Commission's Policies Relating to Cable Television Systems, Report*, 5 FCC Rcd. 4962, 5017-18 (1990).

¹³¹ *Id.*

¹³² See *In re Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order and Policy Statement*, 102 F.C.C.2d 1179 (1986), *on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Ass'n for Better Broadcasting v. FCC*, no. 86-1179 (D.C. Cir. June 11, 1987).

¹³³ *In Re Tempo*, 7 FCC Rcd. at para. 11.

¹³⁴ *Id.*

¹³⁵ See *In re Application of Continental Satellite Corporation, Memorandum Opinion and Order*, 4 FCC Rcd. 6292, 6299 (1989).

¹³⁶ *FCC grants interim DBS License to TCI's Tempo Satellite Inc.*, SATELLITE NEWS, May 11, 1992, at 3. See *Central Telecommunications, Inc. v. TCI Cablevision*, 610 F. Supp. 891, 894-95 (W.D. Mo. 1985) (where an employee of TCI threatened to destroy a city consultant's career, and also to saturate the market with home satellite dishes if the city did not renew TCI's franchise), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

¹³⁷ *In Re Tempo*, 7 FCC Rcd. at para. 7. The FCC looked at the misconduct in terms of willfulness, frequency, time elapsed, seriousness, nature of the participation, efforts to remedy, and the applicant's record of compliance with the FCC's rules and policies. *Id.* para. 3.

crimination by two home dish satellite carriers that were owned in whole or part by TCI.¹³⁸ The FCC also expressed concern over the prior affiliation of two TCI principals with Capcom Financial Services, Inc. during the period for which Capcom was indicted on money laundering charges along with the Bank of Credit and Commerce International ("BCCI").¹³⁹

Despite these concerns, the FCC granted Tempo's DBS application. The FCC's grant allowed Tempo to deliver eleven channels to each half of the United States with the following conditions: (1) Tempo may not provide ancillary service in areas with TCI-affiliated cable systems; (2) Tempo must offer its service on a non-discriminatory basis; and (3) the grant is conditioned on the outcome of formal complaint proceedings, criminal or civil, regarding TCI, its principals or related entities.¹⁴⁰

Barely two months after the FCC released this review, Data Broadcasting, Inc. brought a \$26.5 million suit against TCI for monopolistic tactics in interfering with the sale of The Learning Channel ("TLC").¹⁴¹ The suit, filed in federal court in New York, alleged that TCI told a buyer interested in TLC that TCI would drop TLC from its cable systems. When that buyer pulled out, TCI's affiliate, the Discovery Channel, bought TLC for a twenty million dollar discount.¹⁴² Data Broadcasting's action is pending.

VI. THE IMPACT OF 1992'S ANTITRUST ACTIONS

A. The Bell Consent Decree

The full impact of the latest cases connected to the Bell Consent Decree will not be known for some time, in part because the DOJ has reversed course

during the last ten years. When it first brought the antitrust action that led to the Consent Decree, the DOJ firmly opposed the RBOC's entrance into manufacturing, information services and inter-exchange services.¹⁴³ During and after the Triennial Review, the DOJ actively advocated the lifting of some of these restrictions. Because the DOJ has not contested lifting the restrictions, the district court must use a less stringent "public interest" standard of review in deciding most of the cases.¹⁴⁴ Currently, only two of the lines-of-business restrictions restraining the RBOCs still apply—manufacturing and interexchange—and presumably the RBOCs will continue to battle against these restrictions.

1. Judge Greene's Warnings

On remand from the appellate court's review of the 1987 Triennial Review, Judge Greene warned that FCC regulatory and DOJ enforcement actions would not constrain the RBOC's anticompetitive activities.¹⁴⁵ As a prerequisite to antitrust evaluations, Judge Greene found that the RBOC's "possess market power in the information services market."¹⁴⁶ The court asserted that the RBOCs could use their market power to discriminate against competitors and subsidize competitive enterprises with income derived from regulated monopolies.¹⁴⁷ The RBOCs responded that the information services market is national in scope and that the local BOCs do not have power in the national market.¹⁴⁸

Judge Greene contended that the FCC does not possess the regulatory power to constrain the RBOCs' anticompetitive conduct.¹⁴⁹ The court argued that FCC regulation will be impaired due to the complex structure resulting from the diversification of the RBOCs, as well as the certainty that ad-

¹³⁸ *Id.* para. 13. Southern Satellite Systems, Inc. and Netlink USA were alleged to have violated section 202 of the Communications Act, 28 U.S.C. § 208. *Id.*

¹³⁹ *Id.* n.33.

¹⁴⁰ *Id.* para. 19.

¹⁴¹ Rich Brown & Randall M. Sukow, *TCI Sued for \$26.5 Million over Learning Channel Sale*, BROADCASTING, July 6, 1992, at 5.

¹⁴² *See id.*

¹⁴³ *See supra* notes 20-33 and accompanying text.

¹⁴⁴ *See supra* notes 20-26 and accompanying text.

¹⁴⁵ *See* United States v. Western Elec., 767 F. Supp. 308, 317 (D.D.C. 1991).

¹⁴⁶ *Id.* at 314-17. In this case, Judge Greene found that the RBOC's market power came from their bottleneck control of "indispensable and ubiquitous local wires and switches" for which there were no close substitutes. *Id.* These essential facili-

ties, which could not feasibly be duplicated, gave the RBOCs the ability to raise prices or restrict output. *Id.*

¹⁴⁷ *Id.* at 324.

¹⁴⁸ *Id.* at 312-13. Judge Greene intimated that Bellcore, the joint research and development arm of the RBOCs, could facilitate collusion and market power. Bell Communications Research ("Bellcore") served to develop and coordinate technical standards and perform testing of equipment and facilities for the BOCs. *Id.* at 313 n.16.

¹⁴⁹ *Id.* at 320. The court looked to AT&T's past ability to switch from one anticompetitive activity to another to evade regulators, and AT&T's endless dilatory maneuvers to evade antitrust enforcement actions as evidence of the RBOC's ability to do the same thing. The Court also pointed to the structural, budgetary and financial deficiencies within the FCC that might limit regulatory strength. *Id.* at 320-21 & n.58.

vancing technology will overwhelm regulatory efforts.¹⁵⁰ Additionally, the court argued that the FCC's new Computer III and Open Network Architecture ("ONA")¹⁵¹ rules had suffered a defeat in a Ninth Circuit Court decision,¹⁵² and that even if reinstated, these rules have no track record of overcoming the regulatory difficulties raised above.

2. *The FCC and DOJ Response to Judge Greene's Concerns*

Since the Ninth Circuit vacated the FCC's Computer III and ONA rules, the FCC has reviewed and reinstated their most important regulatory aspects.¹⁵³ The Computer III rules lift the structural safeguards and impose non-structural safeguards on

the provision of enhanced services.¹⁵⁴ These safeguards were designed to "[p]rotect against both discrimination against competing enhanced service providers (ESPs) and cross-subsidization of BOC enhanced services by basic service offerings."¹⁵⁵ The BOCs complained that structural separation imposed significant interest costs because the BOCs were forced to maintain separate organizations and facilities for operating and repairing basic and enhanced services, thereby preventing economies of scope.¹⁵⁶

In order to reduce the risk of cross-subsidization, Computer III imposed joint cost and affiliate transaction rules.¹⁵⁷ The FCC noted that these rules have been in place for three years and have proven effective in limiting excess rates in regulated activities available for cross-subsidization in non-regulated activities.¹⁵⁸

¹⁵⁰ *Id.* at 320. Judge Greene, in this instance, impugned regulatory enforcement in stating "[r]egulatory enforcement proceedings often take years to complete and that, even then, the decisions that emerge are by and large only prospective in application." *Id.*

¹⁵¹ See *infra* note 154.

¹⁵² *Western Elec.*, 767 F. Supp. at 319. See California v. FCC, 905 F.2d 1217, 1246 (9th Cir. 1990). The Computer III decisions before the Ninth Circuit were the *Phase I Order*, the *Phase I Reconsideration Order*, and the *Phase II Order*. In Amendment of Sections 64.702 of the Commission's Rules and Regulations, in CC Docket No. 85-229; *Phase I Order*, 104 F.C.C.2d 958, para 16 (1986); *Phase I Reconsideration Order*, 2 FCC Rcd. 3035, paras. 1-2 (1987); *Phase II Order* 2 FCC Rcd. 3072, paras. 7-10 (1987).

¹⁵³ See *In re Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rule Making and Order*, 6 FCC Rcd. 174, para. 2-3 (1990) [hereinafter *In re Computer III*].

¹⁵⁴ "Basic services" are defined as the provision of a "transmission pipeline" to "move voice, data, or video communications from one point to another." Corporate persons who offer these services are deemed "common carriers." "Enhanced services" provide something more than a communications pipeline and utilize computer processing to alter the format, content, code or protocol of a subscribers transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services providers are not considered common carriers. Richard E. Wiley, *The Media and the Communications Revolution: An Overview of the Regulatory Framework and Developing Trends*, in COMMUNICATIONS LAW 1991, at 82-83 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 325, 1991).

Structural safeguards required in Computer II regulations allow the BOCs to provide enhanced services only through corporate affiliates fully separated from their basic regulatory service operations. This was a way to stop the BOCs from cross-subsidizing, misallocating joint and common costs, and discriminating against competitors through control of the local exchange. Non-structural safeguards allowed in the Computer III regulations

utilize strict cost accounting and Open Network Architecture rules to prevent common carriers from anticompetitive activities in the provision of enhanced services. ONA rules require the BOCs to unbundle their network service offerings so that other enhanced service providers can select and pay for only those features and facilities needed to create their enhanced service offerings. The rules also prohibit the BOCs from price discrimination, forcing them to offer the unbundled services at the same cost to all customers. See *id.* at 85-86.

¹⁵⁵ *In re Computer III*, 6 FCC Rcd. at para. 1.

¹⁵⁶ The California court and the FCC agreed with these arguments. See *id.* at paras. 8-9; see also California v. FCC, 905 F.2d at 1231. The FCC has also promulgated rules that require the largest LECs to offer expanded interconnection by allowing competitors to connect directly in LEC central facilities. *In re Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rule Making*, 7 FCC Rcd. 7369 (1992). This *Order* allows Competitive Access Providers ("CAPs"), who have entered the access market to serve the needs of communications-intensive companies mostly in metropolitan areas, to directly offer competitive services to customers without those customers paying duplicate charges for the CAP provider and LEC access charges. *Id.* paras. 4-7. The FCC believes that this *Order* will increase competition in the interstate special access market, increase LEC incentive for efficiency, encourage the development and deployment of new technologies, increase LEC responsiveness to customers, and increase choices to customers who may value redundancy and route diversity. *Id.* para. 14.

¹⁵⁷ *In re Computer III*, 6 FCC Rcd. at para. 15; see also *id.* para. 17 ("[U]nder the Commission's cost allocation rules, costs are directly assigned to regulated or non regulated activities whenever possible."). Additionally, these joint cost rules require the BOCs to file cost allocation manuals and obtain and file audits by independent accounting firms and utilize generally accepted accounting principals. *Id.* paras. 17-18. The FCC also implemented an Automated Reporting and Management Information System to gain benchmark comparisons of costs among large local exchange carriers ("LECs") across time. *Id.* para. 20.

¹⁵⁸ See *id.* paras. 21-24 (listing various rule-making and enforcement actions taken by the FCC).

To deter discrimination against a BOC's competitors, the FCC implemented rules that required the BOC to provide "ESP competitors with 'equal access' interconnections to basic network services at the same rates that the BOCs themselves paid."¹⁵⁹ ONA rules require the BOCs to unbundle basic service building blocks in order to offer competitors only those services needed. The BOCs must file quarterly nondiscrimination reports describing installation, maintenance, quality and reliability of the unbundled services provided to competitors. The FCC's rules also require the BOCs to disclose, in a timely manner, network information relating to new or modified network services affecting the interconnection of enhanced services.¹⁶⁰

Although the Computer III regulations are new, the FCC argues that they will perform a preventative role and enable the FCC to discover and impose sanctions against anticompetitive activity. The Commission points to disallowing rate increases, an action it brought against NYNEX for improper affiliate transactions with a non-regulated affiliate, and other corrective activities against violations of cost accounting rules as proof of its ability to prevent anticompetitive activities.¹⁶¹ Congress has also recently increased the FCC's statutory authority to assess forfeitures for accounting rule violations.¹⁶²

3. *Balancing the Competing Arguments*

Even though they are regulated under the strong arm of the Consent Decree, the RBOCs have continued to behave anticompetitively. An evaluation of the FCC's successful enforcement actions only reinforces Judge Greene's argument that the RBOCs have an economic incentive to violate and evade regulatory and enforcement efforts. For example, DOJ recently announced a \$10 million settlement with U.S. West

because of violations of the Consent Decree.¹⁶³ Also, the DOJ is continuing a criminal prosecution of NYNEX for alleged violations of the information services restrictions of the Decree.¹⁶⁴ Judge Greene listed additional anticompetitive activities that the RBOCs successfully attempted even while under the power of the Decree.¹⁶⁵

These arguments demonstrate that regulation and enforcement against the RBOCs will continue to be a difficult and unwieldy problem. Additionally, in light of the removal of the restrictions on information services, the end of structural enforcement regulations, and continuing technical advancement, the FCC and the DOJ face a mammoth enforcement effort even as budget constraints continue to mount. While the new Computer III and ONA rules and regulations appear promising, history demonstrates that common carrier monopolies have a vast arsenal of tools that may allow them to escape the regulator's grasp.

4. *Legislative Action Against the BOCs*

Congress may nullify the lifting of the Consent Decree restrictions and the new FCC regulations. A bill authored by House Judiciary Chairman Jack Brooks (D-Tex) and supported by newspaper, broadcasting and cable television associations would supersede the Consent Decree and place similar restrictions on RBOC entry into those lines-of-business originally restricted by the Consent Decree.¹⁶⁶ While this bill did not pass during the 1992 session, other congressional action may attempt to prevent the RBOCs from engaging in anticompetitive behavior.

A bill introduced by Senator Hollings (D-SC) would allow the RBOCs to enter into the research and manufacture of telecommunications equipment. However, the bill requires the RBOCs to maintain

¹⁵⁹ *Id.* at para. 33.

As a result, the basic services used by the BOC enhanced service operations has to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics such as installation and maintenance times, equal to those provided to the carrier's enhanced services.

Id.

¹⁶⁰ *Id.* para. 35; see also 47 C.F.R. § 64.903 (1992).

¹⁶¹ See *In re Computer III*, 6 FCC Rcd. at 188 n.60 (listing numerous FCC enforcement actions against New York Telephone Company, New England Telephone Company, Pacific Bell and Southwestern Bell Telephone Company for violations of FCC rules).

¹⁶² See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2131.

¹⁶³ See Kevin R. Sullivan, *Developments in Computer III and the Modification of Final Judgment*, in TELECOMMUNICATIONS POLICY AND REGULATION 1991, at 373-74 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 328, 1991). U.S. West admitted to discrimination in the provision of switching services, violations of the information services prohibitions, and violation of the manufacturing restrictions. *Id.*

¹⁶⁴ *Id.* See *United States v. NYNEX Corp.*, 788 F. Supp. 16, 17 (D.D.C. 1992).

¹⁶⁵ See *United States v. Western Elec. Co.*, 767 F. Supp. 308, 320-23 (D.D.C. 1991).

¹⁶⁶ *Antitrust Reform Act of 1992*, H.R. 5096, 102d Cong., 2d Sess. (1992) (pending bill would amend the Clayton Act and force the BOCs to apply for restriction changes to the Attorney General).

strict structural separation between the local monopoly and the research and manufacturing centers.¹⁶⁷ Similarly, a bill introduced by Representative Cooper (D-TN) forces the RBOCs to retain strict structural separation when providing information services, and imposes an extremely strict standard that must be met before the RBOCs may provide electronic publishing services.¹⁶⁸ While these bills failed to pass during the 1992 session, legislation reimposing some of the restrictions on RBOC behavior will likely be reintroduced during the current session.

While these bills may have a better chance of passage into law under the Clinton Administration, they do raise some constitutional questions. A First Amendment expert retained by the Bell Companies to assess and publicly address these legislative initiatives has argued that these bills "directly burden Bell Company speech and by their terms apply only to the Bell Companies. Any bill imposing such conditions on the Bell Companies would be open to challenge on First Amendment and separation-of-powers principles. . . ."¹⁶⁹

5. *Conclusions Concerning the BOCs and Future Consent Decree Contests*

In the most recent Consent Decree case involving common channel signaling, the appellate court raised the standard of review in cases where AT&T opposed the modification. Because AT&T is likely to protect its interests in manufacturing and inter-exchange services, the RBOCs will face a much more stringent standard in future modification requests.

The new Clinton Administration will also affect future contests. While President Clinton appears to take a moderate stand on business, his appointments to the DOJ and FCC may reverse the last administration's support for the RBOCs' entry into previously restricted lines-of-business.

B. The Impact on PanAmSat

The appellate court held that Comsat's immunity did not extend to anticompetitive conduct in its separate role as the sole provider of access between the global satellite system and United States communications common carriers.¹⁷⁰ The court warned PanAmSat to restrict its amended complaint to actionable conduct by Comsat as a common carrier.¹⁷¹ Alpha Lyracom has filed an amended complaint in its action against Comsat. PanAmSat charged Comsat with restricting competition to the international satellite consortium.¹⁷² Specifically, the amended complaint accuses Comsat of attempting or conspiring to monopolize the commercial satellite transmission of telecommunications signals to and from the United States.¹⁷³

However, PanAmSat's need to bring this antitrust suit is becoming moot. PanAmSat has now become the first independent international satellite telecommunications provider. Its aggressive chairman and sole proprietor, Rene Anselmo, has launched one satellite and currently has three more approved for launch in 1994 and 1995. PanAmSat is now providing telecommunications services internationally among three continents and is poised to give Comsat its first real competition. PanAmSat has paved the way for other independent satellite companies to start up. Orion Satellite Corporation and Columbia Communications Corporation should be on line by 1994 or 1995. One private satellite corporation executive estimates that by 1995, twenty percent of the international satellite communications may be carried by independent satellite carriers.¹⁷⁴ In the face of an impending explosion of competition in the provision of international satellite services and capacity, PanAmSat is poised to become an industry innovator and leader.

But PanAmSat refuses to pause in its attack on Comsat. PanAmSat has recently asked the FCC to remove Comsat's competitive services from antitrust protection.¹⁷⁵ PanAmSat wants the FCC to sharpen

¹⁶⁷ *Telecommunications Research and Manufacturing Competition Act*, S. 173, 102d Cong., 1st Sess. (1991); see also *Telecommunications Equip. Research & Manufacturing Competition*, H.R. 1523, 102d Cong., 1st Sess. (1991).

¹⁶⁸ *Telecommunications Act of 1991*, H.R. 3515, 102d Cong., 1st Sess. (1991).

¹⁶⁹ Lawrence H. Tribe, *The Constitutional Constraints on Congressional Action in Response to the Lifting of the Ban on Bell Company Provision of Information Services*, in *TELEPHONE COMPANY PROVISION OF CABLE TELEVISION SERVICE 1991*, at 73 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 331, 1991).

¹⁷⁰ See *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168, 175 (2d Cir. 1991).

¹⁷¹ *Id.*

¹⁷² *PanAmSat Continues Legal Assault on Comsat: Files Amended Appeal*, *SATELLITE NEWS*, Nov. 18, 1991, at 1-2.

¹⁷³ See *id.*

¹⁷⁴ Dawn Hayes & Karen Lynch, *International Satellite Providers Look Inward to Fend Off New Competitors*, *COMMUNICATIONS WEEK INTERNATIONAL*, Sept. 21, 1992, at 22.

¹⁷⁵ See *Pan American Satellite Last Week Asked the FCC to Remove Comsat's Competitive Services from Antitrust Protec-*

the distinction between Comsat's common carrier services and its INTELSAT signatory functions in order to eliminate the possibility of cross-subsidization and discrimination. Structural separation would make the regulation less difficult in the same way that it has been used in other industries where technology and complexity dominate.¹⁷⁶

Additionally, the FCC ruled in 1992 that independent satellite systems such as PanAmSat will be able to interconnect with the PSN beginning January 1, 1997.¹⁷⁷ In the same ruling, the FCC allowed separate satellite systems to provide private line circuits interconnected to the PSN.¹⁷⁸ These new rules will enable independent satellite systems such as PanAmSat to truly compete with Comsat. The broadcast networks and Turner Broadcasting have supported PanAmSat in this application because PanAmSat is uniquely qualified to coordinate international satellite transmissions associated with television voice and data circuits.¹⁷⁹ INTELSAT agreed in 1992 to increase the number of circuits that independent satellite operators may interconnect to the PSN from 100 to 1250.¹⁸⁰ This increase is per satellite rather than per system, and thus amounts to a very large expansion. Additionally, INTELSAT will no longer consider economic harm before allowing separate satellite systems to interconnect with the PSN.

This rapid development in competitive international satellite communications promises many benefits for the consumer. PanAmSat already plans to offer its customers packet-switched data, store-and-forward applications and database-access services. It also promises to offer private network services to those entities who before were not able to afford them by allowing customers to receive traffic with shared earth stations connected to the PSN.¹⁸¹

C. The Effect of the Viacom/Time Warner Settlement

Cable operators applauded the settlement of Viacom and Time Warner because of the time-con-

suming process of responding to subpoenas. HBO and Showtime have agreed to help reinvigorate pay television services through a joint multi-premium marketing campaign. Economic realities forced these two giants of the pay television segment to resolve their disputes. While Congress mandated private antitrust suits as a remedy for anticompetitive acts, these suits consume vast amounts of a company's time and energy. Future competition in the cable industry will be fierce. DBS, Bell Company entry into cable, and foreign cable offerings ensure that competition in the pay television arena will stiffen. Working together, these companies may survive and flourish. Fighting against each other in costly private antitrust actions could prove fatal to both.

D. TCI and Tempo's Direct Broadcast Satellite Grant

The FCC originally postponed Tempo's DBS grant for four years pending the resolution of the Missouri case involving antitrust and tortious interference claims. The FCC finally granted Tempo a conditional DBS license in 1992 and mandated non-discrimination in areas served by TCI or its affiliates. The license was conditioned on a positive outcome of the Commission's formal complaint in the Southern Satellite and Netlinks USA dispute,¹⁸² and a positive outcome of civil or criminal actions involving TCI, its principals or related entities that call into question Tempo's qualifications to hold a DBS authorization.

Whether the pending actions regarding TLC or BCCI violate Tempo's DBS grant, the FCC and the cable industry will watch TCI and Tempo closely. The FCC listed the development of DBS service as an important goal.¹⁸³ It also noted that TCI's size and experience could accelerate the initiation of DBS service.¹⁸⁴ The FCC also determined that "TCI has enacted an extensive antitrust compliance policy and established specific guidelines for employee behavior."¹⁸⁵ The Commission trusts that "existing antitrust law and commission oversight are sufficient to

tion, BROADCASTING, May 18, 1992, at 65.

¹⁷⁶ See *Others Join PanAmSat's Latest Salvo Against Comsat*, COMM. DAILY, July 20, 1992, at 6.

¹⁷⁷ *In re Permissible Services of U.S. Licensed International Communications Satellite Systems*, Order, 7 FCC Rcd. 2313, para. 5 (1992).

¹⁷⁸ *Id.*

¹⁷⁹ *Broadcast Networks and Turner Broadcasting*, COMM. DAILY, Feb. 25, 1992, at 9.

¹⁸⁰ See *Wireless plc and Hutchison Wampoon Ltd., Has*

Opened for Service, COMMUNICATIONS WEEK INT'L, Sept. 21, 1992.

¹⁸¹ See *U.S. Government Boost for Private International Satellite Systems*, THE FINANCIAL TIMES, Dec. 12, 1991.

¹⁸² See *supra* notes 130-34 and accompanying text.

¹⁸³ *In re Application of Tempo Satellite Inc., Memorandum Opinion and Order*, 7 FCC Rcd. 2728, para. 15 (1992).

¹⁸⁴ *Id.* at 2731 n.20.

¹⁸⁵ *Id.* para. 6.

prevent any conduct that is illegal or deleterious to the DBS industry."¹⁸⁶

The FCC's reliance on the regulatory and prophylactic measures may be misplaced. Regulation in such a new, highly technical, rapidly advancing area is difficult, and the FCC's own budgetary and personnel constraints add to that burden. Additionally, TCI has not demonstrated its own restraint. Not only did its affiliate lose a \$36.5 million antitrust and tortious interference suit in 1988, but several anticompetitive complaints and accusations remain. TCI's character detracts from Tempo's credibility in its ability to abstain from anticompetitive behavior. Finally, TCI's sixteen percent share of the entire national cable market, and its monopolies in many local markets, force one to question how healthy the market for information will become with Tempo as a large participant.

¹⁸⁶ *In re Application of Continental Satellite Corp., Memorandum Opinion and Order*, 4 FCC Rcd. 6293, 6298 para. 51

VII. CONCLUSION

In general, public and private antitrust actions continue to be a leading indicator of the direction of the communications industry. Because of the advanced technology, tremendous capital investment and economies of scale in the communications industry, antitrust actions and the prophylactic threat of antitrust actions help to maintain healthy competition. As technology advances, government-created monopolies such as the local cable industry and IN-TELSAT may become obsolete. However, with the increase in global competition, government-created consortia which escape antitrust liability such as AMSC may become commonplace.

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