The demands of high technology and economies of scale\(^1\) 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 PanAmSat/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

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\(^1\) "'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.


\(^4\) See Executive Order No. 12,046, 3 C.F.R. 164 (1978).
Columbia. After holding Tunney Act Proceedings, the district court approved the Decree with modifications on August 24, 1982.

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. AT&T also discriminated in favor of Western Electric products instead of buying cheaper, better quality products from independent competitors. 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. Third, AT&T provided inferior interconnections to its intercity competitors and superior interconnections to AT&T's own long distance lines.

The Consent Decree forced AT&T to divest itself of its local exchange services in order to eliminate cross-subsidization. Additionally, the Decree prevented the Regional Bell Operating Companies ("RBOCs"), which inherited these local exchange companies, from participating in certain lines-of-business embodied in section II(D) of the Decree. 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.

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. The court also held that the RBOCs could provide extra-regional telecommunications services.
A. The Standard of Review Applicable to Modifications of the Consent Decree

Since the Triennial Review, 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. If one of the parties to the original Consent Decree opposes the proposed modification, the court must consider the modification to be contested. 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.” This standard allows the court to approve an uncontested modification without a showing of changed circumstances. 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.

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. However, the Consent Decree altered this common law standard in section VIII(C) by requiring that the restriction 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.” 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. Judge Greene left intact the Decree’s restrictions on manufacturing, interexchange services (including cellular radio, paging and other mobile interexchange services) and information services. He removed, however, the restriction on the transmission of information, but not on the generation of its content. 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.

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. The appellate court discussed the section VIII(C) standard of review, holding that to remove a line-of-business restriction “the BOCs must establish that something...”

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20 Id. at 231.
22 Id. at 601-603.
23 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.
24 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.
26 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.\textsuperscript{39} Using this standard, the appellate court did not disturb the lower court's ruling on either interexchange, manufacturing or non-telecommunications ventures.\textsuperscript{35} The appellate court nonetheless reversed and remanded the lower court's holding on information services.\textsuperscript{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.\textsuperscript{35}

On remand, the district court determined that the RBOCs possessed market power in the information services industry within the meaning of federal antitrust laws.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{39} Judge Greene reluctantly removed the restriction on information services, despite the court's view that the RBOCs would engage in anticompetitive acts.\textsuperscript{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.\textsuperscript{41} Subsequently, the district court denied motions to wholly or partially vacate the stay.\textsuperscript{42}

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

C. A Recent Case Related to the Consent Decree

In a case related to the MFJ, the DOJ brought criminal charges against NYNEX Corporation\textsuperscript{45} alleging that it did "willfully disobey [the district court's] lawful and specific Order by providing information services."\textsuperscript{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,

\textsuperscript{39} \textit{Western Elec.}, 900 F.2d at 298, 299.
\textsuperscript{35} Id. at 299.
\textsuperscript{34} Id. at 308-09.
\textsuperscript{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), \textit{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." \textit{Id.} at 308.
\textsuperscript{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.'" \textit{Western Elec.}, 900 F.2d at 296.
\textsuperscript{37} \textit{Western Elec.}, 767 F. Supp. at 314.
\textsuperscript{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.

\textit{Id.} at 319; \textit{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].

\textsuperscript{39} AT&T, 552 F. Supp. at 328.
\textsuperscript{40} \textit{See id.} at 315.
\textsuperscript{41} \textit{Western Elec.}, 767 F. Supp. at 332-33.
\textsuperscript{46} \textit{Id.} (quoting Indictment P8).
1993, Judge Greene found NYNEX guilty of violating the MFJ restriction on information services, and fined NYNEX one million dollars.\(^4\) NYNEX is appealing the decision.

D. Common Channel Signaling

In recent years, new signaling technology termed “out-of-band” or “common channel signaling” (“CCS”)\(^4\) 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”).\(^5\) 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.\(^6\) 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.\(^7\)

II. INTELSAT, COMSAT, AND THE PANAMSAT CONTROVERSY

In 1989, Alpha Lyracom 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.\(^8\) PanAmSat sought injunctive relief and treble damages pursuant to sections 4 and 16 of the Clayton Antitrust Act.\(^9\) The district court granted Comsat’s motion to dismiss,\(^10\) and the appellate court affirmed the dismissal but reversed and remanded to entitle PanAmSat to amend its complaint.\(^11\)

A. A Brief History of Comsat and INTELSAT

Congress enacted the Communications Satellite Act of 1962 (“CSA” or “Act”)\(^12\) to implement “in conjunction and in cooperation with other countries, as expeditiously as practicable, a commercial communications satellite system.”\(^13\) 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.\(^14\) 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.”\(^15\)

In 1964, eleven nations entered into an interim executive agreement creating INTELSAT.\(^16\) Subse-
sequently, these signatories executed two additional agreements delineating the control and management structure for the international satellite network and its related facilities. 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. 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 . . . [i]mmune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions . . .”

In 1984, after several satellite service providers filed applications with the FCC to develop separate international telecommunications satellite systems, the Reagan Administration responded with a Presidential Determination concluding that “separate international communications satellite systems were required in the national interest.” 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 communications not interconnected with public-switched networks ("PSNs"), and that the alternative systems must receive authorization from affected INTELSAT signatories. Congress encoded these prescriptions into law in 1985, 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.

PanAmSat first applied to the FCC in 1984 to provide international service between North, Central, and South America, the Iberian peninsula and the Caribbean. 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).

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.” 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-

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[a]uthority to set rates for use of Intelsat satellite capacity, Definitive Agreement arts. V(d), VIII(b)(v)(C), X(a)(vii); 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.


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

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

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.78

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.79 District court Judge John F. Keenan dismissed the complaint.80 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.”81 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.82 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.”83

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.84 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.”85 Judge Keenan did, however, rule that Congress had intended the antitrust laws to apply to Comsat in its capacity as a common carrier.86

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).87 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.88

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].”89 The appellate court followed the district court’s holding that the antitrust consistency clause in the Communications Satellite Act90 applies only to Comsat as a common carrier, and not to actions of Comsat as signatory to INTELSAT.91 In deciphering the immunity provisions of the Definitive Agreement and the Headquarters Agreement,92 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.93

The appellate court, however, disagreed with 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.
83 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. 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.” 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. 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.

PanAmSat has revised and refiled an amended complaint alleging that Comsat monopolized or conspired to monopolize the international satellite market. 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. 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.

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. 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. 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. 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. 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.

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

* Id. at 175.
* Id. (quoting Brief for Appellee at 38).
* Id.
* Id.
* 4 Year-Old-Case; Court Denies Comsat Motion to Dismiss PanamSat Antitrust Suit, COMM. DAILY, 6 (April 2, 1993).
* See supra notes 67-68 and accompanying text.
* See generally Guy Krogh, The Satellite Competition De-
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. 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. 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. 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. . ." The court also reversed the FCC's imposition of consortium-licensing in lieu of comparative hearings.

In its final decision, the FCC concluded that the consortium licensing approach "would best serve the interest in this instance," due to the unique aspects of satellite licensing. 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." The FCC allowed the three appellants to participate in the consortium without the mandatory financial contribution. Finally, the FCC affirmed AMSC as the authorized licensee to construct, launch and operate an MSS system.

B. The AMSC/Radio Satellite Controversy

California-based Radio Satellite Corporation ("RSC") hopes to offer Radiosat service beginning in 1994. RSC defines its Radiosat service to include digital audio broadcasting ("DAB"), positioning and interactive data service for automobiles and ships. 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.

In early 1992, RSC filed an action against AMSC for three hundred million dollars in treble damages for violations of the Sherman Antitrust Act and the Communications Act of 1934. RSC claimed that AMSC abused its marketplace position while negotiating circuit pricing on its satellite to be launched in 1984. In its complaint, RSC alleged violations of the Communications Act—sections 201(a), 201(b), comparative hearings would severely weaken the U.S. negotiating position and preserve the public interest." Id. (discussing Tentative Decision, 6 FCC Rcd. 4906-11, paras. 33-53 (1991)).


Id.

Id.

Id.

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).

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

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
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 Metel, 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.


116 Id. at 63.

117 See generally id. at 56-66.

118 Id. at 60.


120 Id. at 373-74 & n.4. Subscribers to cable receive programming in exchange for 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.

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-

128 Id.
131 Id. 3
133 In Re Tempo, 7 FCC Rcd. at para. 11.
134 Id.
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.
of the RBOCs' market power came from their bottleneck control of "indispensable and ubiquitous local wires and switches" for which there were no close substitutes.

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.

 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"). 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. 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. 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. 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. As a prerequisite to antitrust evaluations, Judge Greene found that the RBOC's "possess market power in the information services market." 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. 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.

Judge Greene contended that the FCC does not possess the regulatory power to constrain the RBOCs' anticompetitive conduct. 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 activities, which could not feasibly be duplicated, gave the RBOCs the ability to raise prices or restrict output. Id.
vancing technology will overwhelm regulatory efforts. Additionally, the court argued that the FCC's new Computer III and Open Network Architecture ("ONA")\textsuperscript{151} rules had suffered a defeat in a Ninth Circuit Court decision,\textsuperscript{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.\textsuperscript{153} The Computer III rules lift the structural safeguards and impose non-structural safeguards on the provision of enhanced services.\textsuperscript{154} These safeguards were designed to "protect against both discrimination against competing enhanced service providers (ESPs) and cross-subsidization of BOC enhanced services by basic service offerings."\textsuperscript{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.\textsuperscript{156}

In order to reduce the risk of cross-subsidization, Computer III imposed joint cost and affiliate transaction rules.\textsuperscript{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.\textsuperscript{158}

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\textsuperscript{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."  
\textsuperscript{151} See infra note 154.  
\textsuperscript{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 re Amendment of Sections 64.702 of the Commission's Rules and Regulations, in CC Docket No. 85-229; Phase I Order, 104 F.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).
\textsuperscript{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).
\textsuperscript{155} These safeguards were designed to "protect against both discrimination against competing enhanced service providers (ESPs) and cross-subsidization of BOC enhanced services by basic service offerings.
\textsuperscript{156} 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.
\textsuperscript{157} 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 values redundancy and route diversity. Id. para. 14.
\textsuperscript{158} Id. at 958, para 16. See 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.
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." 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. 

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. Congress has also recently increased the FCC's statutory authority to assess forfeitures for accounting rule violations.

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

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. 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

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160 Id. at para. 35; see also 47 C.F.R. § 64.903 (1992).
strict structural separation between the local monopoly and the research and manufacturing centers.\textsuperscript{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.\textsuperscript{168} While these bills failed to pass during the 1992 session, legislation re-imposing 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. . . ."\textsuperscript{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.\textsuperscript{170} The court warned PanAmSat to restrict its amended complaint to actionable conduct by Comsat as a common carrier.\textsuperscript{171} Alpha Lyram has filed an amended complaint in its action against Comsat. PanAmSat charged Comsat with restricting competition to the international satellite consortium.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{175} PanAmSat wants the FCC to sharpen

\textsuperscript{170} See Alpha Lyram Space Communications, Inc. v. Communications Satellite Corp., 946 F.2d 168, 175 (2d Cir. 1991).

\textsuperscript{171} Id.

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

\textsuperscript{173} See id.


\textsuperscript{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.\textsuperscript{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.\textsuperscript{177} In the same ruling, the FCC allowed separate satellite systems to provide private line circuits interconnected to the PSN.\textsuperscript{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.\textsuperscript{179} INTELSAT agreed in 1992 to increase the number of circuits that independent satellite operators may interconnect to the PSN from 100 to 1250.\textsuperscript{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.\textsuperscript{181}

C. The Effect of the Viacom/Time Warner Settlement

Cable operators applauded the settlement of Viacom and Time Warner because of the time-consuming 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 nondiscrimination 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,\textsuperscript{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.\textsuperscript{183} It also noted that TCI's size and experience could accelerate the initiation of DBS service.\textsuperscript{184} The FCC also determined that "TCI has enacted an extensive antitrust compliance policy and established specific guidelines for employee behavior."\textsuperscript{185} The Commission trusts that "existing antitrust law and commission oversight are sufficient to


\textsuperscript{178} Id.


\textsuperscript{180} See Wireless pic and Hutchison Wampoon Ltd., Has
prevent any conduct that is illegal or deleterious to the DBS industry.”  

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.

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 INTELSAT may become obsolete. However, with the increase in global competition, government-created consortia which escape antitrust liability such as AMSC may become commonplace.

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