THE Party Line
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Plugged In

The Latest Developments

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National Updates

Supreme Court Opinions

Nixon v. Missouri Municipal League, 124 S.Ct. 1555 (2004)

The Supreme Court's decision in *Nixon* allows states to ban cities from providing local telephone services, despite the preemption provision of the Telecommunications Act of 1996. Section 253 of the Act of 1996 preempts any state or local law that prohibits "any entity" from providing telecommunications services, thereby supporting the statute's general public policy objective of promoting competition in the telecommunications market.

In 1997, Missouri enacted a statute that barred its political subdivisions (municipalities) from offering telecommunications services. On a petition for review, the FCC denied the municipalities' and public utilities' requests for an order declaring the Missouri statute preempted by the Telecommunications Act. The Eighth Circuit unanimously reversed the FCC's order, finding that section 253(a) was clearly intended to apply to both private and governmental or municipal entities providing telecommunications services *Nixon v. Missouri Municipal League*, 299 F.3d 949 (2002), directly contrasting the holding of the D.C. Circuit three years earlier in *Abilene v. FCC*, 164 F.3d 49 (1999).

The Supreme Court resolved the Circuit split by reversing the Eighth Circuit decision. It held that section 253 preempts state and local laws prohibiting *private* entities from providing telecommunications services, but does not preempt state legislative power to prohibit its own political subdivisions from providing such services.

Rather than turning on the merits of whether municipalities should be providing local telecommunications services, the Supreme Court's majority holding was based on the reasoning that one needed to recognize that a municipality's desire to enter the telecommunications services market could not be completely separated from the "will" of the state government to financially support that entry.

Lone dissenter Justice Stevens noted that the Act was designed to foster competition in the local telephone market. He then discussed the competitive pros and cons of municipalities participating in this market. Stevens concluded that since Congress was expressly aware of municipal participation in the provision of local telephone services one could only conclude that the language employed in the Act — "any entity" — truly meant any entity, including municipalities.

"... one could only conclude that the language employed in the Act ... truly meant any entity, including municipalities."

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 124 S.Ct. 872 (2004).

The Supreme Court, reversing a Second Circuit decision, ruled in favor of Verizon, finding that there was no viable, section 2, Sherman Act refusal-to-deal claim arising out of Verizon's breach of its statutory duty under the Telecommunications Act to share its network with competitors.

The unanimous decision significantly narrowed the availability of the essential facilities doctrine in monopolization claims against regulated incumbent firms.

For detailed analyses of the *Trinko* decision, see the January 2004 issue of *The Party Line*; Janet L. McDavid and Mary Anne Mason, The *'Trinko' Decision*, National Law Journal Online, at *www.nlj.com*; Eleanor M. Fox, The Trouble with Trinko, ABA Antitrust Section Spring Meeting 2004, at *www.aba.org*. and Matthew Cantor, *Is Trinko the Last Word on a Telephone Monopolist's Duty to Deal?*, *New York Law Journal*, May 19, 2004 at 8.

Circuit Court Opinions

Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Commission, 359 F.3d 493 (7th Cir. 2004)

The Seventh Circuit addresses another preemption issue that arises as a result of the "unusual — and unequal — blending of federal and state authority" in the Federal Telecommunications Act of 1996. 359 F.3d at 494. The issue is whether a state regulatory commission has the power to enact an order designed to ensure that a local telephone service provider continues to meet its

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obligations in the local service market, if granted an application to also enter the long-distance market. Upholding the District Court's grant of injunctive relief to Plaintiff Indiana Bell Telephone Company, now known as SBC Indiana ("SBC"), Judge Terence T. Evans held that the order of the state regulatory commission, Indiana Utility Regulatory Commission ("IURC"), was preempted by federal statute.

In order to enter the long-distance telephone market, SBC, an incumbent local telephone carrier and a Bell Operating Company ("BOC"), had to file a § 271 application to the FCC. *See* 47 U.S.C. § 271. The FCC then consulted with the state regulatory agency, IURC to ensure that the applicant was facilitating competition in the market for local service, in compliance with §§ 251, 252 and 271 of the Act, before being allowed to enter the long-distance market. In evaluating SBC's compliance under § 271, IURC independently set up a process by which it conferred with other competing local exchange carriers. These local carriers, including AT&T (interveners in this action), then presented IURC with "performance assurance" plans that were designed to ensure SBC's performance in facilitating competition with local carriers.

The FCC has found performance monitoring to be probative evidence that a BOC will meet its § 271 obligations. 359 F.3d at 496. In fact, SBC submitted its own performance plan to IURC, as part of its application to the FCC, in the hope of a favorable recommendation from IURC. However, IURC did not approve the SBC plan, asserting instead that Indiana state law gave IURC the authority to adopt its own remedy plan and to issue orders regarding the quality of service provided by SBC. SBC filed a complaint alleging that IURC's stand-alone order was preempted by the Telecommunications Act and was granted a preliminary injunction.

"... the Court noted that while some power was reserved to the states, it was only in a limited capacity to issue recommendations under § 271."

In examining the Congressional intent of the Act, the Court noted that while some power was reserved to the states, it was only in a limited capacity to issue recommendations under § 271. Affirming the District Court's decision, and the Seventh Circuit decision of *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), Judge Evans determined that IURC had made "an end run around the [Telecommunications] Act," by entering a freestanding order that interfered with the procedures set forth in the federal regulations. *Id.* at 497.

Mainstream Marketing Services, Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004)

The Tenth Circuit upholds the national do-not-call registry established by the Federal Trade Commission, prohibiting telemarketing by sellers of goods and services, but not by charitable or political fundraisers. The registry is found to be a valid regulation of commercial speech consistent with First Amendment requirements, because it directly advances the government's interest in safeguarding personal privacy and reducing telemarketing abuse without excessively burdening free speech. 358 F.3d at 1233-4.

Applying the three-part test from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980), the Court held that (1) there is a substantial interest to be achieved by regulating the commercial speech; (2) the regulation directly advances that governmental interest; and (3) the regulation is narrowly tailored not to restrict more speech than necessary.

Emphasizing that a "man's home is his castle," the Circuit Court stressed four key aspects of the do-not-call registry that convinced it that the restriction is constitutional. First, the list restricts only core commercial speech. Second, the registry targets only speech that invades the privacy of the home. Third, the registry is an opt-in program that gives the consumer the choice to restrict commercial calls. Fourth, the registry furthers the government's interest in combating abusive telemarketing. 358 F.3d at 1233. The Court also noted that the restriction is not constitutionally underinclusive for omitting charitable and political callers, because the government is not required to regulate all aspects of a problem, so long as the restriction furthers the government's objectives.

To date, 50 million phone numbers have been registered and potentially 6.85 billion telemarketing calls per year have been avoided. This has been achieved in a narrowly tailored manner without suppressing an excessive amount of speech, by restricting only calls targeted at unwilling participants and by allowing the consumer to "erect the wall" to avoid such calls. Telemarketers are free to reach consumers by mail and consumers can opt instead to use company-specific do-not-call lists or to grant certain companies the right to solicit their homes. The government's interests are advanced because the registry reduces intrusions upon consumers' privacy, reduces the risk of fraud, and reduces the number and percentage of abusive calls.

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District Court Opinions

Nobody In Particular Presents, Inc. v. Clear Channel Communications, Inc., 2004 WL 725464 (D. Colo.), April 2, 2004.

Clear Channel Communications ("Clear Channel"), one of the world's largest media and entertainment conglomerates, along with various subsidiaries, may have violated federal and state antitrust law by abusing its market power in the Denver, Colorado rock-format radio market in an effort to exclude competition in the concert promotion market, in which Plaintiff Nobody In Particular Presents, Inc.'s ("NIPP") competes. While Clear Channel did not engage in actual monopolization, Clear Channel may have engaged in a *per se* unlawful tying arrangement with its subsidiaries under § 1 of the Sherman Act, Clear Channel may also be guilty of attempted monopolization under § 2 of the Sherman Act, and withholding access to an essential facility. Clear Channel's motion for summary judgment was therefore denied by U.S. District Court Judge Edward W. Nottingham on all but the monopolization claim.

Following the inception of the Telecommunications Act of 1996, Defendant Clear Channel rapidly acquired holdings in radio, television, concert venues and concert promotion, including ownership of 10% of all U.S. radio stations, eight of which fall in the Denver market, (the maximum number allowed by the FCC). Among Clear Channel's holdings is Defendant SFX Entertainment, Inc.(SFX), the largest concert producer and entertainment promoter in the nation.

NIPP is a Denver music/concert promotion company that controls promotion access to three particular venues in the Denver area. Plaintiff alleges that Clear Channel, owner of four of the six rock radio stations in Denver, is using its market power in the rock-format radio market to gain market power in the concert-promotion market by illegally conditioning the air-play given to an artist (tying product) based on the artist's agreement to use Clear Channel's concert promotions services (tied product). NIPP claims it was denied essential radio air-play, as well as promotional support and advertising by Defendants' radio stations which it needed to promote its clients. In addition, NIPP alleges that Clear Channel: (1) discontinued free promotional support previously offered to NIPP; (2) hired away NIPP's media director and talent buyer; (3) bid significantly more to promote an artist's concert than the artist requested in an effort to drive up costs to other promoters and ticket purchasers; and (4) excluded NIPP from certain essential venues in Denver due to Clear Channel's ownership or preferential access agreements with such venues.

> **"Specifically, Clear Channel was able to increase its market share from 27% to 43.8%."**

In finding that Clear Channel and SFX could have engaged in a *per se* unlawful tying arrangement in violation of § 1 of the Sherman Act, the Court found that all four elements of a *per se* violation existed: (1) two separate products; (2) a tie, or conditioning of the sale of one product on the sale of another, as evidenced by the fact that numerous artists, agents and record labels were pressured to use the defendants' promotional services in order to ensure air-play on defendants' radio stations for their clients; (3) sufficient economic power (66.6% market share demonstrated market power) in the tying product market (rock radio air play), and (4) a substantial volume of commerce affected the tied-product market (rock concert promotions services). 2004 WL 725464 at 41, citing *Multistate Legal Studies Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995). However, Plaintiff's tying claim that was based on a rule of reason analysis failed for failure to define one of the two alleged relevant markets.

NIPP's claim for attempted monopolization of the market for concert promotion services survived summary judgment because plaintiff demonstrated both a dangerous probability of success in monopolizing the relevant market, and specific intent to monopolize and conduct in furtherance of such attempt. Specifically, Clear Channel was able to increase its market share from 27% to 43.8%, yet raise its ticket prices high above industry average, demonstrating entry barriers and a potential ability to control prices. *Id* at 49. Clear Channel was also able to exclude competition and thereby control output by limiting other promoters' access to rock artists and rock radio promotional support: two inputs necessary for the output of rock concerts. Other factors supporting the dangerous probability of success element were Clear Channel's 50.48% market share for rock concerts, 70% share of concert ticket revenue in the U.S., and the swiftness with which Clear Channel acquired its market share. Correspondence between Clear Channel and its radio and promotion subsidiaries demonstrated a specific intent to deny radio promotional support to other promoters like NIPP. Moreover, correspondence from Clear Channel to record labels strongly indicated that there were threats of withholding air play if the label did not use defendants' promotion services.

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The Court upheld NIPP's Sherman Act § 2 claim for violation of the essential facilities doctrine, citing four factors: First, NIPP set forth sufficient evidence that Clear Channel controlled an essential facility in the form of rock radio in Denver. *Id.* at 59. Plaintiff alleged significant barriers to entry, including license requirements, high capital requirements and significant customer goodwill. *Id.* at 60. Second, duplication of the essential facility would be economically infeasible due to the cost of acquiring and operating a radio station. Third, there was evidence that Clear Channel did not provide access to the facility on reasonable, non-discriminatory terms. NIPP set forth evidence that Clear Channel had significantly raised the prices of its advertising time and rock radio promotional support and had discontinued much of its free promotional support. In so ruling, the Court distinguished the presented facts in the recent Supreme Court decision *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872 (2004) from the instant case, emphasizing that there was no governmental or regulatory oversight restricting Clear Channel from withholding access to its airwaves. Rather, Clear Channel's refusal to deal could only be policed by antitrust law. *Id.* at 63. In fact, this case more closely resembled the refusal to deal at issue in *Aspen Skiing*, 472 U.S. 585 (1985) because Clear Channel sacrificed short-term gains in the hopes of destroying other promoters and reaping long-term monopolistic profits. *Id.* Finally, NIPP demonstrated sufficient evidence that it was feasible for Clear Channel to provide rock radio advertising and promotional support to other promoters.

Levine v. Bellsouth Corporation, 302 F.Supp.2d 1358 (S.D.Fla. 2004)

The District Court for the Southern District of Florida dismissed a class action suit filed by Levine in Feb. 2003 on behalf of telephone customers against Bellsouth Corporation, an incumbent local exchange carrier (ILEC) for illegally tying its digital subscriber line (DSL) services with its local phone service in violation of the Sherman Act. Levine alleged that customers wishing to subscribe to Bellsouth's DSL service were forced to purchase its local phone service instead of the cheaper service offered by competitive local exchange carriers (CLECs). As a result of the tying, Bellsouth was able to maintain a monopoly on local phone service.

"The suit was filed after a series of CLECs filed complaints with several state public regulators over Bellsouth's refusal to provide DSL service to the CLECs voice customers."

The suit was filed after a series of CLECs filed complaints with several state public regulators over Bellsouth's refusal to provide DSL service to the CLECs voice customers. In June 2002, the Florida Public Service Commission ordered Bellsouth to offer its DSL service to voice customers of Florida Digital Network, Inc. (FDN).

The District Court granted Bellsouth's motion to dismiss in part because Levine lacked constitutional standing since his injury could not be fairly traced to Bellsouth's conduct alone, and because he lacked standing as a person since the CLECs (not parties to the action) were more direct victims of Bellsouth's misconduct.

Relying on the Supreme Court's holding in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872 (2004), the District Court held that: (1) the FCC's previous determination that no competitive benefits would result from unbundling DSL service effectively addressed antitrust concerns, thus no further antitrust scrutiny was warranted; and (2) any section 2 claims asserted against Bellsouth for its refusal to provide DSL service in conjunction with a CLEC's voice service must be premised on a "prior course of dealing" with that particular CLEC regarding a stand-alone DSL product. The complaint contained no such allegation.

In re Universal Service Fund Telephone Billing Practices Litigation, 219 F.R.D. 661 (D.Kan. 2004)

A series of putative class action lawsuits against long distance carriers AT&T Corporation, Sprint Communications Company, and MCI Worldcom were consolidated into this multidistrict litigation. Plaintiffs are business and residential customers or former customers of the defendants who allege that the carriers, which are required to contribute a percentage of their revenues to the FCC's Universal Service Fund (USF), conspired to overcharge plaintiffs for the USF surcharges, thereby creating a secret profit in violation of section 1 of the Sherman Act. Allegedly, this conduct constitutes a breach of contract and violated Kansas consumer fraud laws. Plaintiffs seek both damages and injunctive relief. Other aspects of the plaintiffs' claims had already been referred for arbitration or to the FCC for primary jurisdiction by Court order entered into Dec. 13, 2003 (see generally *In re Universal Serv. Fund Tel. Billing Practices Lit.*, 300 F.Supp.2d 1107 (D. Kan. 2003)).

In this decision, the District Court for the District of Kansas granted the

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plaintiffs' petition for class certification under Fed. R. Civ. P. 23(a) with respect to their antitrust and breach of contract claims. The court also held that the superiority requirement for Fed. R. Civ. P. 23(b)(3) maintenance of a class action was satisfied. Finally, the Court certified both a damages and injunctive class.

In certifying the class, the Court found that all four prerequisites for class certification were satisfied: (1) numerosity: publicly available records indicated an antitrust class of millions of long distance customers dispersed across the country; (2) commonality: class members shared common issues of law and fact such as whether defendants engaged in a conspiracy to overcharge and the effect of such a conspiracy on customers' USF surcharge rates; (3) typicality: the named plaintiffs were all allegedly victims of the defendants' conspiracy to artificially inflate the surcharge rates and to use that surcharge for a secret profit center; and (4) adequacy of representation: the Court found that plaintiffs had personal knowledge of the claims and their decision to abandon a common law fraud claim against defendants did not preclude them from adequately protecting the interests of the antitrust class members.

For the purposes of Fed. R. Civ. P. 23(b)(3)'s predominance requirement, the District Court found that plaintiffs could present common proof as to whether the carriers engaged in a horizontal price-fixing conspiracy. The Rule 23(b)(2) superiority requirement for class certification was similarly satisfied because the individual claims by millions of customers would involve such small amounts of money that a class action was the only feasible way to pursue the claims.

Finally, in certifying a damages class, the District Court found that common issues of horizontal price-fixing clearly predominate in the case.

In re Wireless Telephone Services Antitrust Litigation, 2004 WL 765833 (S.D.N.Y. 2004)

Purchasers of cellular or personal communications services brought several class action lawsuits in 2002 against five wireless carriers (AT&T, Sprint, Verizon, Voicestream and Cingular) for allegedly tying or bundling the sale of their respective phone services with their handsets in violation of section 1 of the Sherman Act. The actions were consolidated and transferred to the District Court for the Southern District of New York by the Multi-District Litigation (MDL) Panel in March 2003. In August 2003, the District Court granted the carriers' Fed. R. Civ. P. 12(b)(6) motion to dismiss plaintiffs' monopolization claim.

This opinion addresses defendant Voicestream's motion for summary judgement on the sole claim of tying. Noting that the plaintiffs are entitled to discovery in order to test Voicestream's assertions that its service agreements do not require handset purchases or that they do not refuse purchasers' requests for alternative handsets in lieu of those from Voicestream, the District Court denied the motion saying it was premature as it was made before the defendant had even completed its production of documents to the plaintiffs.

"Plaintiff Smith filed a class action suit for damages and injunctive relief against defendants Southern New England Telephone Company ..."

State Court Opinions

Smith v. SBC Communications Inc., 178 N.J. 265, 839 A.2d 850 (2004)

The New Jersey Supreme Court held that while the "filed rate doctrine" may bar breach of contract and consumer fraud claims against a carrier selling prepaid phone cards, it may not always apply to bar such claims against resellers of the cards.

Plaintiff Smith filed a class action suit for damages and injunctive relief against defendants Southern New England Telephone Company (SNET), a carrier providing FCC-regulated calling cards and prepaid phone-card services, and BJ's Wholesale Club, Inc. (BJ's), a discount wholesaler selling SNET cards under the BJ's brand name. The action alleged breach of contract and violation of the New Jersey Consumer Fraud Act. (Note: Defendant SBC Communications, Inc. was dropped from the suit by joint stipulation).

Smith's suit alleged that due to undisclosed surcharges, BJ's and SNET's joint point-of-sale advertising and marketing information falsely indicated a 9 cents-per-minute rate when the true rate turned out to be 40 cents-per-minute. The phone card rate that SNET filed with the FCC was 40 cents per minute.

The trial court dismissed the entire action against both defendants on the basis of the "filed rate doctrine," which provides that the rate filed by SNET with the FCC is the only rate a carrier can charge and is the only enforceable contract with a consumer (who is assumed to have knowledge of such filings). Under the doctrine, Smith would have no basis for a breach of contract claim, nor any basis for a consumer fraud claim because a carrier cannot be held to any promised rate that conflicts with the published, filed rate. The Appellate Division affirmed dismissal of all claims against SNET. However, it reinstated all of Smith's claims against BJ's.

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Although the Supreme Court granted BJ's petition for certification, it affirmed reinstatement of Smith's claims against BJ's. Smith's complaint sufficiently alleged a separate contractual relationship with BJ's that fell outside of agency and only further discovery could establish whether BJ's actually functioned as an agent of SNET and thus was protected by the "filed rate doctrine."

State of Nevada ex rel. Office of the Attorney General, Bureau of Consumer Protection et al. v. Nos Communications et al., 84 P.3d 1052 (Nev. Sup. Ct. 2004).

The Nevada Supreme Court refuses to grant a preliminary injunction to block Nos Communications ("Nos"), a provider of intrastate and interstate telecommunications, from doing business while deceptive trade practices claims are being litigated. The case arose when the Nevada Attorney General Office of Consumer Protection ("BCP") suspected that Nos was engaging in false, misleading and deceptive practices in selling its telecom services. In a race to the courthouse, Nos actually filed for a declaratory judgment that it was not engaging in deceptive trade practices under Nevada law, NRS 598.0963 and for injunctive relief. Without filing a counterclaim, BCP filed its own preliminary injunction motion to enjoin Nos from engaging in deceptive trade practices. The Supreme Court denied BCP's motion on procedural grounds, concluding that BCP was required to assert an affirmative claim to obtain injunctive relief and therefore should have filed a counterclaim in the action filed by Nos.

While concluding that the lower court did not abuse its discretion in denying BCP injunctive relief, albeit on incorrect grounds, the Supreme Court took the opportunity to clarify the standards for a preliminary injunction in a statutory enforcement action. The Court held that it is well-settled that a state or governmental agency seeking injunctive relief in an enforcement action must demonstrate a reasonable likelihood that the statutory conditions authorizing injunctive relief exist, but need not show irreparable injury or an inadequate remedy at law. 84 P.3d at 1053. Notwithstanding its loss on appeal, BCP is free to amend its pleadings and file a new motion for injunctive relief.

"The suit was files after a series of CLECs filed complaints with several state public regulators over Bellsouth's refusal to provide DSL service to the CLECs voice customers."

In the News

- **Feb. 11, 2004** The Senate Judiciary Committee's Antitrust, Competition Policy and Consumer Rights Subcommittee conducted a hearing into competition in the cable television industry following a General Accounting Office (GAO) study that showed, among other things, that cable overbuilders are struggling as a viable business model and following recent FCC reports showing that cable rates have increased far in excess of inflation rates. To the extent that either observation results from anticompetitive behavior by cable companies against overbuilders, Subcommittee members announced their plan to propose legislation modifying the program access rules to close the "terrestrial loophole." The access rules, which require vertically integrated MVPDs or cable companies to provide content to competitors on reasonable terms and conditions, exempt programming delivered by wire as opposed to signals over the air. Such a modification would alleviate concerns that the loophole impacts the ability of overbuilders to compete.

- **Feb. 11, 2004** Comcast Corporation, the largest cable company in the U.S., made an unsolicited offer to purchase The Walt Disney Company, one of the largest owners of cable and broadcast television programming services in the U.S., for approximately $60 billion.

Shortly after the offer was announced, Senator DeWine (R-Ohio), Chairman of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights and Senator Kohl (D-Wis) issued a joint statement expressing concern that this vertical merger would present potential anticompetitive effects in the marketplace of ideas and the diversity of news, information and entertainment.

Michael Powell, FCC Chairman, likewise noted that the merger would be scrutinized by the Commission. This scrutiny would likely have included an analysis of any potential market foreclosure to competitors, "program access" concerns and the risk of refusal to carry competitive programming or carriage of programming on oppressive terms (i.e. tying, supra-competitive rates etc.).

The common view was that the deal would ultimately survive antitrust scrutiny, as did News Corporation's acquisition of DirecTV with various conditions attached. Of particular concern, however, was the powerful combination of Comcast's distribution units as well as its regional

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sports programming with Disney's programming stronghold, including ESPN and ABC Network. On April 28, Comcast withdrew its offer to merge with Disney, ending temporarily the ongoing debate over the potential anticompetitive consequences of a combination of distribution and content.

International Updates

Canada

- **Jan. 8, 2004** The Canadian Radio-television and Telecommunications Commission (CRTC) found that Shaw Cablesystems' month-long, below-cost promotion to Vancouver area subscribers, designed to lure away competitors' customers, did not constitute predatory pricing practices. Competing cable provider Novus Entertainment complained that the incumbent Shaw engaged in anticompetitive pricing behavior that violated section 9 of the Broadcasting Distribution Regulations which bars undue preference by a cable provider of "any person." The CRTC found that Shaw's promotion would only have conferred an undue preference on new subscribers if it were offered for a longer period or offered more frequently. (See Broadcasting Decision CRTC 2004-3 at *www.crtc.gc.ca*)

- **Jan. 27, 2004** The CRTC found that the residential local telephone services market, 98% of which is still held by incumbent carriers, did not yet enjoy sustainable competition and accordingly the CRTC approved certain measures designed to establish a mature competitive market, including a measure which prevents incumbent carriers (ILECs) from trying to "win back" customers lost to competitive local exchange carriers (CLECs) such as Call-Net Enterprises for 12 months. (See Telecom Decision CRTC 2004-4 at *www.crtc.gc.ca*).

The C.D. Howe Institute released a study on Feb. 5, 2004 criticizing the CRTC's decision because it failed to consider the impact of emerging technologies that provide integrated local voice and data services, or the fact that competing entrants would likely not be in the form of wireline competitors like CLECs, but rather would be wireless, cable and satellite providers. (see "Dynamic Competition in Telecommunications: Implications for Regulatory Policy" at *www.cdhowe.org*)

European Union

- **Jan. 5, 2004** The European Commission approved an exclusive cooperation agreement between Norwegian carrier Telenor, its satellite television platform Canal Digital, and content provider Canal+ Nordic, for the satellite distribution of Canal+Nordic's premium pay-TV programming in the Nordic region. Although certain exclusive programming distribution agreements initially raised anticompetitive concerns, the Commission found that any restrictive effects of the agreement were outweighed by its benefits. The cooperation agreement, which is exempt from the EU competition rules for 5 years, will provide a satellite pay-TV distributor to compete with MTG/Viasat and leaves open the possibility of market entry by potential competitors.

> "... the antitrust authority is monitoring RAI's transition to ensure that RAI's acquisitions do not give it an unfair advantage over its competitors undergoing a similar transition to digital."

- **Jan. 16, 2004** Italy's antitrust authority placed RAI SpA, the state broadcasting company "under observation" to ensure that RAI complies with certain restrictions imposed by Communications Law 66/2001 relating to the transition of its three networks to digital television by December 2006. While such monitoring is normally reserved for companies who have demonstrated past anticompetitive behavior, the antitrust authority is monitoring RAI's transition to ensure that RAI's acquisitions do not give it an unfair advantage over its competitors undergoing a similar transition to digital.

- **Jan. 30, 2004** Recognizing that sports content drives pay-TV subscriptions and the rollout of new media, the European Commission launched an extensive investigation into possible anticompetitive commercial practices that unduly restrict the sale of audiovisual sports content, especially football rights to Internet companies, UMTS services and third generation (3G) mobile phone service providers in violation of European competition rules.

- **Feb. 1, 2004** U.K.'s Department of Trade and Industry (DTI) issued draft guidance on the media public interest merger provisions of the Enterprise Act 2002 (the media merger review act). The DTI's draft guidance deals with the public interest elements that must be considered by the Office of Fair Trading

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in reviewable transactions involving newspaper or broadcasting assets.

- **Feb. 6, 2004** The EU approved plans of Telenor ASA to acquire sole ownership of Sonofon, a Danish wireless provider, by purchasing the U.S. BellSouth Corp.'s interest in Sonofon. The $600 million deal passed muster under the EU simplified merger review procedure, which is used when there are no competitors or customers objecting to a deal.

Asia

- **Jan., 2004** The FCC lifted a stop payment order after U.S. telecom carriers report that their Philippine counterparts restored their circuits. Last year, the FCC suspended all payments of termination rates to several Filipino telecom firms when Philippine carriers were accused of disrupting AT&T and Worldcom's U.S. - Philippine services, in apparent retaliation for their refusal to agree to local rate hikes. In January, in an enormous embarrassment to the Philippine government, the FBI summoned 30 Philippine telecom executives attending a conference in Hawaii, including executives from Digitel, PLDT, Smart, Globe and Sun Cellular, to appear before a grand jury on charges that the companies charged excessive termination rates for calls from the United States to the Philippines. President Gloria Arroyo cautioned the U.S. that the investigation could strain international relations with an important ally.

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While a U.S. Department of Justice antitrust investigation continues, the FCC's Chairman, Michael Powell has tried to appease the Philippine government by assuring his Philippine counterpart Ronald Oliver Solis, that the DOJ investigation would not impede the progress the FCC has made to restore telecommunications services to the Philippines.

- **Mar. 1, 2004** India's Telecom Department released new rules that will permit carriers to buy local competitors within the same operating circle provided that the combined market share does not exceed 67%, raising the limit from the initial recommended limit of 50%.

- **April. 21-22, 2004** Senior antitrust officials from around the world met in Seoul, South Korea at the International Competition Network's (ICN) conference to discuss recommended practices to improve merger review processes and to reduce burdens on enforcement agencies and merging parties. Various merger notification recommendations were adopted. Topics covered included the conduct of merger investigations, procedural fairness, confidentiality and interagency coordination. For a more detailed review, *see* 4/23/04 St. Dep't Press Releases and Documents, 2004 WL 59151785. ■

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Canada's Telecom Watchdog Poised to Regulate VoIP Services

by George Addy & Charles Tingley Davies Ward Phillips & Vineberg LLP (Toronto)

On September 21-23, 2004, the Canadian Radio-television and Telecommunications Commission (the "CRTC") heard submissions from over thirty interested parties regarding a variety of issues related to the provision and regulation in Canada of voice communication services using Internet Protocol ("VoIP"). The hearings were part of a public consultation launched by the CRTC on April 7, 2004, when it released a public notice (the "Notice") setting out its preliminary views on the appropriate regulatory framework that ought to apply to VoIP services. The CRTC invited comment on its preliminary views and on "any other matters that may be pertinent" to the regulation of VoIP services. Over the course of the consultation, the CRTC heard oral submissions from over thirty interested parties and received written submissions from many more. The CRTC plans to issue a final decision on the regulatory future of VoIP services by the end of Q1 2005.

The CRTC's Initial View

According to the CRTC, the timing of its Notice was appropriate given the increasing viability of VoIP services. In this regard, the CRTC noted that recent advances in technology and the emergence of high-speed Internet have resulted in efficient and high quality transport of voice traffic over the Internet. The CRTC particularly highlighted the development of global standards that have increased network interoperability and the introduction of IP services that allow universal access to and from the Public Switched Telephone Network ("PSTN") and that use telephone numbers conforming to the North American Numbering Plan ("NANP"). The CRTC distinguished these services – for which it reserves the "VoIP" label – from traditional "peer to peer" services characterized by more limited functionality.

"... the CRTC noted that recent advances in technology and the emergence of high-speed Internet have resulted in efficient and high quality transport of voice traffic over the Internet."

In its Notice, the CRTC advanced the preliminary view that VoIP services are functionally the same as circuit-switched telecommunications services—both conform to the NANP and both allow subscribers to call or receive calls from any telephone with access to the PSTN anywhere in the world. Accordingly, the current regulatory framework governing the provision of circuit-switched telecommunications services should, in the CRTC's preliminary view, also apply to VoIP services. Thus, ILECs providing VoIP services in their incumbent territories would be required to adhere to their existing tariffs or file proposed tariffs where required, in accordance with the existing regulatory rules governing local exchange services.

The CRTC's Notice also identified a number of special considerations with respect to VoIP service providers. These included the provision of privacy safeguards, 9-1-1 service, enhanced 9-1-1 service ("E9-1-1") and message relay services ("MRS"), as well as required contribution to a central subsidy fund. As VoIP service providers may not initially be able to adequately provide 9-1-1, E9-1-1, MRS and privacy safeguards, the CRTC stated that subscribers to local VoIP services should be made aware of any limitations in this regard and of the specific nature and terms of their VoIP service. In the CRTC's view, however, it should become mandatory for all local VoIP service providers to provide such services as soon as practicable. Regarding fund contribution, the CRTC noted that VoIP service providers should be required to contribute a percentage of their revenues over a certain threshold to a central fund for the subsidization of high-cost local services in rural and remote areas, as do other telecommunications service providers.

The Reaction

Predictably, reaction to the substantive issues raised in the CRTC's Notice have been mixed. Traditional battle lines between incumbents, cable companies and new entrants are evident. Some have voiced regret at the CRTC's lack of vision and apparent reversal of its early position of forbearance from regulating the Internet. Incumbent local exchange carriers like Bell Canada commented that the CRTC's proposal to treat VoIP services on a par with conventional local phone services fails to recognize that many VoIP services are unregulated Internet applications and that a growing number of VoIP competitors are able easily to enter the market without

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restrictions. In their view, competition will only increase when cable companies and others, including software and hardware firms, enter the market or expand existing offerings.

In contrast, other stakeholders see VoIP as an area in which the CRTC must be more active and fully support the regulatory approach adopted in the Notice. For instance, cable and wireless company Rogers Communications has commented that IP telephony may not be a new service at all for incumbent phone companies but merely a change in transport technology for existing primary exchange service. In its submissions, Rogers asked the CRTC to disregard the VoIP "hype" generated by incumbent phone companies which it found to be reminiscent of previous technological prognostications (e.g., fibre to home networks) that never came to pass. Indeed, the CRTC was cautioned to focus on the task of ensuring that incumbent phone companies "do not use their monopoly power to prevent the emergence of VoIP as a competitive form of local telephone service", in particular by tying the sale of primary exchange services and high-speed Internet services.

One question that is raised from a public policy perspective is what the CRTC's Notice and VoIP consultation signal by way of regulatory approach for other IP-based service offerings. It is already being suggested that the "V" component in VoIP is too restrictive and that policy makers and regulators should be thinking in terms of XoIP – anything over the Internet.

The CRTC's public notice containing its preliminary views on the regulatory framework applicable to VoIP is available on the CRTC's website at *http://www.crtc.gc.ca/archive/ENG/Notices/2004/pt2004-2.htm*. Written comments from interested parties as well as the transcripts of the public hearing are also available from the CRTC's website at *http://www.crtc.gc.ca/PartVII/eng/2004/8663/c12_200402892.htm#4b* (comments) and *http://www.crtc.gc.ca/ENG/process/2004/sep21_t.htm* (transcripts). ■