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New Communications Technology: The Emerging Antitrust Agenda

By MICHAEL BOTEIN*

Introduction

The last few years have witnessed the emergence of several new communications technologies, such as cable television,¹ subscription television (STV),² multipoint distribution systems (MDS),³ and perhaps eventually direct broadcast satellites (DBS).⁴ All of these technologies are able to deliver a panoply of entertainment programming and other communications services—such as children's programming, sporting events, first-run movies, and data retrieval—which would have been viewed as the sheerest blue sky a decade ago.⁵ The economics of each of these technologies, however, differ.

It is impossible to predict, of course, which of these services will survive over the long term. After all, the economics of these new technologies will take time to shake down. Furthermore, development of each system is subject to the vagaries of relatively uncertain consumer and capital markets.⁶ It seems safe to assume, however, that the advent of these new technologies represents the single most significant change in the telecommunications industry since network television.

The new technologies may cause substantial changes in—and thus economic disruption to—the telecommunications industry. For the first time in several decades, there is significant competi-

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1. For a brief description of cable, see text accompanying note 5, *infra*.

2. For a brief description of STV, see text accompanying note 61, *infra*.

3. For a brief description of MDS, see text accompanying note 61, *infra*.

4. For a brief description of DBS, see text accompanying note 71, *infra*.

5. Note, *The Development of Video Technology*, 25 N.Y.L.S. L. REV. 789 (1980).

6. For example, the bottom effectively dropped out of the capital market for cable television in the early 1970's.

tion for the radio and television industry; moreover, a host of new firms may enter the industry.⁷ Since the antitrust laws are a traditional means of resolving economic warfare, the near future probably will see increased antitrust litigation in the telecommunications industry. The trend toward economic deregulation may be the most significant reason for this prediction.

Federal,⁸ state and local authorities⁹ have caught the deregulation fever. Regardless of the merit of a particular deregulatory action, it has certain inescapable consequences on the legal environment in which these new technologies exist. Regulated firms traditionally use the regulatory process as a means of working out economic conflicts. In the telecommunications industry, perhaps the most dramatic example of this strategy was the television industry's highly successful campaign to "freeze" the development of cable television.¹⁰ If deregulation prevents firms from using the administrative process to resolve economic conflicts, they presumably will turn to other means—such as the antitrust laws¹¹—to achieve the same objectives.

Second, deregulation generally facilitates new entry—such as that of the new technologies—into an industry. New entry, in turn, causes increased demand by existing firms for legal protection through regulatory, antitrust, or political processes.¹² Elimination of regulatory processes may create battles in the antitrust and political arenas.

Deregulation also removes traditional defenses to antitrust litigation created by administrative action under rubrics such as primary jurisdiction,¹³ exclusive jurisdiction,¹⁴ agency immunization,¹⁵

7. Many of the new entrants into telecommunications, such as banks, have traditionally been telecommunications users, not providers.

8. See *Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981) (affirming FCC's repeal of restrictions on cable systems' use of "distant" broadcast television signals).

9. See MASS. GEN. L. ANN. Ch. 166A (West 1976).

10. A. Pearce, *The Economic and Political Power of the Television Networks*, in NETWORK TELEVISION AND THE PUBLIC INTEREST 3 (M. Botein & D. Rice eds. 1980).

11. See Baker, *Competition and Regulation: Charles River Bridge Recrossed*, 60 CORNELL L. REV. 159 (1975).

12. See *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959).

13. The doctrine of primary jurisdiction is predicated on an attitude of judicial self-restraint and is applied when a court feels that a dispute should be handled by an administrative agency created by the legislature to deal with such problems. For example, a deregulated common carrier may lose its traditional claim to exclusive FCC jurisdiction. See Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867 (1976).

14. Exclusive jurisdiction is not jurisdiction in the traditional sense but a power which a

and the like. One of the intangible side-effects of deregulation is, therefore, to increase regulated firms' exposure to antitrust liability.

As regulatory structures wither away, antitrust litigation, particularly with regard to new technologies, will play a growing role in the telecommunications industry. It seems fair to anticipate that indeed a *primary* focus for antitrust litigation will be the new technologies. Of course, the type and extent of antitrust litigation will vary with the economic development of each new technology. It thus may be useful to briefly review present and potential issues in the context of particular technology.

I. Cable Television

Cable television operators use coaxial cables, signal processors, amplifiers and other related electronic equipment to offer a wide variety of services—such as high-quality retransmission of conventional broadcast signals, data retrieval, and shopping at home¹⁶—to both residential and commercial users. In order to operate, a cable system usually must have a franchise or similar authorization from the relevant local and/or state governmental body.¹⁷ Although most franchises tend to be non-exclusive—and in many states by statute must be¹⁸—the capital-intensive nature of the cable business generally makes it unprofitable for more than one system to operate in the same area.¹⁹ Competition among cable operators thus tends to focus upon getting franchises. Little meaningful price or service competition is feasible on a continuing basis since cable operators virtually never compete head-to-head for customers.²⁰ A number of antitrust issues thus may arise in relation to

court or agency may exercise over an action or person to the exclusion of all other adjudicatory bodies. *Id.*

15. A substantial amount of immunity has been made available to industries regulated by the Civil Aeronautics Board, 49 U.S.C. §§ 1382, 1384, (1976) Federal Communications Commission, 47 U.S.C. § 322, (1976) Interstate Commerce Commission, 49 U.S.C. §§ 5, 5b, 20, (1976) and the Federal Maritime Commission, 46 U.S.C. §§ 813a, 814 (1976).

16. *Supra* note 5, at 793-94.

17. See e.g., N.Y. EXEC. L. § 815(b) (C.L.S. 1975). See M. Hamburg, *Franchising and Local Regulation* in ALL ABOUT CABLE 237-61 (1979).

18. *Cable-Vision, Inc. v. Freeman*, 324 So. 2d 149 (Fla. App. 1976); *Capitol Cable, Inc. v. City of Topeka*, 209 Kan. 152, 495 P.2d 885 (1972).

19. R. POSNER, *CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY* 1, 8-9 (1970).

20. *Contra*, Henderson, *Municipal Ownership of Cable Television: Some Issues and Problems*, 3 COMM/ENT L.J. 667 (1982).

the franchising process.

Perhaps the most far-reaching question is whether local municipalities may limit or interfere with cable television expansion and operation in a manner that would otherwise be violative of federal antitrust law. The Supreme Court of the United States recently held in *Community Communications Co. v. City of Boulder* that cities were not automatically immune from the antitrust laws in regulation of cable television.²¹

In that case, Boulder enacted an "emergency" ordinance prohibiting the expansion of Community Communication's existing and franchised cable system for a period of three months. During this time, the City was to draft a model cable television ordinance and invite additional cable operators to enter the market under the terms of that ordinance. The City's action was in response to technological advances which made practicable the expansion of Community's operations as well as the entrance of other operators into the market. Although Community held a non-exclusive franchise and other cable operators apparently would have agreed to similar franchise terms, the City decided that despite the technological feasibility of free cable competition only one cable operator could serve Boulder; the City decided that open competition would not produce the "best" cable television operations for the area.²²

The District Court held that the city not only lacked antitrust immunity under the "state action" doctrine,²³ but also violated Section 1 of the Sherman Act by having been involved in a vaguely defined conspiracy not to do business with Community.²⁴ The Court of Appeals reversed rather summarily, holding that the City did possess antitrust immunity.²⁵

The Supreme Court reversed the Court of Appeals, holding that Boulder's moratorium ordinance was not exempt from antitrust scrutiny under the "state action" doctrine as announced in *Parker v. Brown*.²⁶ The decision was confined to a clarification of the

21. *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982).

22. *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 709 (10th Cir. 1980) (Markey, J., dissenting).

23. See Susman & Wawro, *State Action Immunity and Antitrust Issues in Cable Television Franchising*, 3 COMM/ENT L.J. 645 (1982).

24. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1039-40 (D. Colo. 1980), *rev'd*, 630 F.2d 704 (10th Cir. 1980). The district judge did not explain how he had found the requisite section 1 conspiracy.

25. *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (1980).

26. 317 U.S. 341 (1943). For explanation of the *Parker* doctrine see Susman & Wawro,

Parker doctrine as it applies to “home rule” municipalities. The Court’s decision is, therefore, a discussion of the threshold issue of immunity vis-à-vis the “state action” doctrine and not a discussion of the extent of municipalities liability.

The *Boulder* decision is founded on principles of federalism; immunity flows only to the sovereign authority of the state.²⁷ Therefore, municipal exemption from federal antitrust scrutiny arises only where the allegedly violative act constitutes an action of the state itself in its sovereign capacity or an action in furtherance or implementation of “clearly articulated and affirmatively expressed” state policy.²⁸ Since Boulder’s ordinance was neither, no immunity was found. The *Boulder* decision did not, however, address the question of antitrust liability of cities on the merits.

The meaning of the *Boulder* decision is complicated somewhat by the fact that the City rested its claim of immunity on Colorado’s very sweeping grant of “home rule” powers to cities.²⁹ Indeed, largely because of the breadth of Colorado’s constitution, more than twenty state attorney generals—including the attorney general of Colorado—filed amici curiae briefs arguing against recognition of any antitrust immunity. A very different situation would obtain if a state imposed a “clearly articulated and affirmatively expressed state policy” regarding cable regulation upon cities and cable operators. For example, New York State has created a complex regulatory scheme—as well as a State Commission on Cable Television—to supervise cities’ franchising processes and cable system operations.³⁰ A city’s action under such a regulatory scheme might be immune from antitrust scrutiny under *Boulder*.

Beyond *Boulder*, there already has been some use of antitrust litigation as a means of contesting franchise awards. For example, in Houston, Texas, an unsuccessful bidder for a cable franchise sued the City, the mayor, and the successful bidders, alleging that they had conspired to divide up the franchise territory; a jury ultimately returned a verdict for more than \$6,000,000 against the de-

supra note 23 at 645.

27. 102 S. Ct. 841.

28. 102 S. Ct. 843 (1982).

29. COLO. CONST. art. xx, § 6, quoted in pertinent part at 50 U.S.L.W. 4144 n.1 (1982). The City argued that its home rule authority was a delegation of state authority and that its ordinance was therefore “state” action. 102 S. Ct. 843.

30. N.Y. EXEC. LAW § 813 (McKinney Supp. 1980). As noted below, however, this scheme has been subject to deregulation proposals. See note 39, *infra*.

defendants.³¹ Although the trial judge granted the defendants' motion for judgment notwithstanding the verdict, the sheer size of the verdict shows the potential magnitude of antitrust liability.

Although the Supreme Court did not reach the merits in *Boulder*, the substantive antitrust issues in the case are intriguing. It is less than clear whether the City's actions were pro- or anti-competitive. On the one hand, the moratorium may have been a necessary means of encouraging new entry into a market which could support only one firm; if this were the case, restriction of franchise grants might have been the only means by which the City could receive the fair market value of its franchise or by which effective competition for the franchise could exist. On the other hand, the City may have intended to restrict the market for cable services to only one firm; this might be contrary to the nation's pro-competition policy and obviously would not give cable consumers the benefit of competition. As noted above,³² however, the capital-intensive nature of cable television seems to make head-to-head competition in the same geographic area—*i.e.*, "overwiring"—economically infeasible albeit technically practicable. Realistically, therefore, the first cable operator to wire an area, whether under either an exclusive or non-exclusive franchise, obtains a monopoly position.

In addition, if a city could not limit its franchise grants without running afoul of the antitrust laws, it presumably would be required to approve any applicant with threshold financial, technological and other qualifications. This would be equivalent to holding cities to be monopolists of "essential facilities"³³—in this case, their streets. This theory is subject to several major caveats.

First, it is unclear that the relevant geographic market for anti-trust purposes would be a single city, although cable operators generally apply for franchises on a city-by-city basis. Since most multiple systems operators (MSOs) compete for franchises on a national or regional level, the geographic market might include every city in the country engaged in initial or renewal franchising.³⁴ If this were the case, presumably no one city would have monopoly power in the relevant geographic area.

Second, the relevant product market might not be acquisition of

31. *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991 (S.D. Tex. 1981).

32. See text accompanying note 19, *supra*.

33. See *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945). See also, *Farrow*, *supra* note 20.

34. See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

municipal franchises. Viewed from a consumer's perspective, it might be provision of cable television service or even all potentially competing services—such as those discussed in the following sections.³⁵ If the product market were larger than just cable franchises or cable services, a city's monopoly power over its streets might amount to control of only a small part of the relevant product market.

Finally, as noted before,³⁶ the primary and perhaps only competition among cable operators may be for the award of franchises. In order for a city to realize the benefits of competition, it may need to award exclusive franchises. Regardless of the possibly long-term anti-competitive consequences, grant of a limited number of franchises may be justified by active competition in the franchising process. Indeed, the courts have recognized the validity of long-term exclusive dealing contracts in some situations, although recognizing their theoretically inhibiting impact on competition.³⁷

The nature of competition in the cable television industry thus may make restrictions by a city on the number of franchise grants—whether through exclusive franchises, award of single and thus *de facto* exclusive franchises, or other means—essential for the functioning of a normal competitive process. Precisely for this reason, cable operators have a real interest in reducing cities' abilities to require competitive bidding. One approach is through the antitrust laws, as discussed above. A second is through state legislation; for example, legislation recently was introduced in New York State to require cities to award franchises to any qualified applicant.³⁸ A major confrontation on this issue is obviously brewing, and its outcome is less than certain.³⁹

Since a cable operator gains some monopoly power once it has wired an area, another potential antitrust problem arises when an operator refuses to allow third parties to transmit over its system.

35. For example, in *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (the "cellophane" case), the Court applied a consumers' perspective test to find a rather broad product market—and thus little market control by a single firm.

36. See text accompanying note 19, *supra*.

37. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

38. Governor's Program Bill No. 133, N.Y.S. 5753, 1981-82 Sess. (1981). No action was taken on the bill in 1981, but similar provisions apparently will be re-introduced in 1982.

39. Along similar lines, the cable industry has attempted to secure federal legislation limiting cities' powers to set rates, require franchise fees, and obtain "access" channels. See draft of S. 898, 97th Cong., 1st Sess. § 202(h)(i) (1981). These provisions were deleted in the final Senate version of the bill but probably will re-surface in the House deliberations.

Because of its tremendous number of channels, cable is a highly attractive medium for a wide variety of broadband applications. It can simultaneously carry high-speed data transmission, "pay" programming, shopping at home or home security services, and the like. Until 1979, the Federal Communications Commission required cable systems to have one or more leased access channels for these types of needs, to be available under non-discriminatory rates and terms to all commercial users of cable.⁴⁰ But, in 1979, the FCC's regulation was held to be ultra vires by the Supreme Court.⁴¹ Some cities have responded by inserting similar leased access provisions into their franchises⁴² and at least one state agency—the New York State Commission on Cable Television⁴³—has proposed a similar requirement. But it seems safe to conclude that most cable operators are under no state or local requirement to provide leased access.

Under an antitrust analysis, exclusion of potential users might violate the traditional "essential facility" doctrine.⁴⁴ Since a cable operator often has the only available means of broadband transmission, it arguably may have market control for at least some purposes and thus be required to make at least part of its transmission facilities available.⁴⁵ Liability naturally would hinge on whether any alternative or competitive facility existed; for at least some applications, such as broadband interactive transmission, cable arguably may be the only medium available.

Another potential antitrust problem for the cable industry may be concentration of control under Section 7 of the Clayton Act, which prohibits a merger or acquisition where its effect "may be substantially to lessen competition, or to tend to create a monopoly."⁴⁶ At present there does not appear to be any difficulty on this score, for even the larger MSOs serve a relatively small percentage⁴⁷ of United States cable subscribers. The increasing number of

40. 47 C.F.R. § 76.254 (1980).

41. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). Interestingly enough, the Commission did not get around to repealing its access rules until the spring of 1981. 83 F.C.C.2d 147 (1980).

42. *WHAT TO DO WHEN CABLE COMES TO TOWN: A HANDBOOK FOR LOCAL OFFICIALS* (M. Botein & B. Park eds. 1980).

43. Notice of Inquiry and Proposed Rulemaking in Docket No. 90174 (Jan. 11, 1980).

44. See text accompanying note 33, *supra*.

45. Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L.S.L. REV. 863, 887 (1980).

46. 15 U.S.C. § 18 (1973).

47. The three largest MSO's serve approximately one million subscribers apiece of the

mergers and acquisitions in the cable industry has not caused any substantial concern for the FCC, the Justice Department, the Federal Trade Commission or private litigants.

Moreover, many mergers or acquisitions are vertical rather than horizontal in nature, *i.e.*, not among competitors. In practice, broadcasters, program producers, and equipment manufacturers have entered the market by purchasing cable systems.⁴⁸ At the same time, the FCC has relaxed its traditional cross-ownership rules⁴⁹ to allow networks to acquire at least minimal interests in cable systems.⁵⁰

If there is any long-term trend toward concentration, closer governmental scrutiny might be invoked or private litigation may arise. Indeed, the Justice Department urged the FCC to adopt ownership restrictions as long ago as the late 1960's.⁵¹ A deregulatory environment might rekindle its concern at some point in the future, although until now the Department has avoided cross-ownership examination.

Finally, new cable systems usually offer different "tiers" of service, each providing different types of programming. Commonly, reception of conventional broadcast stations is classed in "Tier I," non-pay satellite-fed programs in "Tier II," and various pay movie or sports channels in other tiers.⁵² This type of arrangement might create a tying agreement by forcing subscribers to take the first tier in order to get the others. Although cable service presumably is not a "commodity" under section 3 of the Clayton Act,⁵³ section 1 of the Sherman Act might be applicable if a cable operator had monopoly power over all tiers.⁵⁴ This type of power might exist if

total twenty million cable subscribers.

48. For example, in August 1981, the FCC approved the acquisition of Teleprompter Cable Corporation—one of the country's largest MSO's—by Westinghouse Broadcasting Company. Memorandum Opinion and Order, 87 F.C.C.2d 531 (1981).

49. 47 C.F.R. § 76.501 (1981).

50. Memorandum Opinion and Order, 87 F.C.C.2d 587 (1981). The decision allows CBS to own either one-half of one percent of the total number of United States cable subscribers or 90,000 subscribers, whichever is less.

51. Memorandum Opinion and Order, 36 F.C.C.2d 695 (1972).

52. As would be expected, each additional tier increases the total cost of service.

53. 5 U.S.C. § 4 (1980). *See*, L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 433 (1977).

54. *See* United States v. Loew's, Inc., 371 U.S. 38 (1962). In *Loew's* copyrighted movies were licensed to television stations in packages only. In order to receive broadcast rights to a specific movie, a station would have to purchase those other movies which were in the same package. This was held to violate § 1 of the Sherman Act. *Id.*

an operator controlled the only source of high quality broadcast signals and various types of pay signals as well as satellite-fed programs. As noted before,⁵⁵ this determination would depend on the availability of other competing media.

II.

Subscription Television (STV) and Multipoint Distribution Service (MDS)

Both STV and MDS stations are able to deliver pay entertainment programming. MDS can also transmit high-speed computer data instead of or in addition to entertainment programming.⁵⁶ STV stations may be able to do the same since the FCC recently indicated that low power television stations will be free to transmit virtually any type of scrambled signal.⁵⁷ The primary difference between STV and MDS is that STV operates on channels assigned by the FCC to conventional broadcast stations, while MDS operates on microwave frequencies normally used for satellite and other communications. Under present FCC rules, no more than two MDS channels are available in even the largest television markets,⁵⁸ thus creating increasingly sharp competition for MDS licenses. Because an STV station operates with much higher power than an MDS station, its signal goes two or three times as far, giving it a much larger potential audience.⁵⁹

Some of the antitrust issues applicable to cable television also are relevant to STV and MDS. First, the FCC does not prohibit local cross-ownership of arguably competing operations where either an STV and an MDS station or an MDS station and a cable system are commonly owned.⁶⁰ Since STV, MDS and cable are the most common means of delivering pay programming or data, local cross-ownership of these operations might create undue concentration of control under Section 7 of the Clayton Act, depending upon how the relevant product market is defined—*e.g.*, all television, all pay television, or all cable television. The FCC might be able to immunize existing STV/MDS or MDS/cable cross-ownership from

55. See text accompanying note 36, *supra*.

56. *Supra*, note 5, at 805.

57. Notice of Proposed Rulemaking, 82 F.C.C.2d 47 (1980).

58. 47 C.F.R. § 901 (1980).

59. *Supra*, note 5.

60. See 47 C.F.R. § 76.501 (1980). An STV/cable combination is subject to the same restrictions as a conventional broadcast/cable combination. 47 C.F.R. § 76.501 (1980).

antitrust liability if it imposed a pervasive regulatory scheme upon cable, MDS, or STV.⁶¹ At present, however, the Commission has been moving towards extensive deregulation of all three media.⁶²

By analogy to the leased access question in cable television,⁶³ another problem might be an operator's refusal to carry an STV or MDS signal. The FCC presently requires cable systems to carry only the nonscrambled portions of STV signals, and does not mandate carriage of MDS signals at all.⁶⁴ An STV or MDS station might pay a cable system to carry its signal, of course, as some STV and MDS operators have done. A cable system might refuse to carry an STV or MDS station, however, because it would compete with a cable operator's own pay programming. Although state or local leased access requirements might force a cable operator to carry an MDS or STV signal, few cable operators face such constraints.⁶⁵ As with leased access in general, a cable operator might face liability for refusing to deal with an STV or MDS station.

Cable, STV, and MDS tend to offer the same or similar entertainment fare. If one of these media acquired exclusive rights to a particular type of programming, such as a substantial number of first-run movies, others might encounter problems of refusal to deal. For example, if program producers entered into long-term exclusive dealing arrangements with a particular network of cable systems, STV stations or MDS operations, the question of refusal to deal might arise.⁶⁶

III.

Videodiscs and Videocassettes

Videodiscs and videocassettes are means of distributing programming, and perhaps some types of data,⁶⁷ on a pay basis for viewing in an individual home or business. Although videodisc and videocassette players produce roughly the same type of image on a conventional television set, they operate through radically different

61. See *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

62. K. Glen, *Report on Subscription Television*, and K. Glen, *Report on Multipoint Distribution Service*, in *Preliminary Report on Prospects for New Networks* (FCC Network Inquiry Study Staff 1980).

63. See text accompanying notes 40-44, *supra*.

64. 45 C.F.R. §§ 76.59-76.63 (1980).

65. See text accompanying notes 42-43, *supra*.

66. *United States v. Columbia Pictures Industries*, 507 F. Supp. 412 (S.D.N.Y. 1980).

67. Although a cassette or disc obviously cannot provide real-time interaction, it may contain sufficient data to give a consumer the appearance of an interactive system.

means. A videodisc uses either a mechanical stylus—somewhat like that in a phonograph—or a laser beam to render a video image from the disc; a videocassette uses magnetic tape to record and play back a video signal. Videodisc units are generally less expensive than videocassette units, but lack the recording capability of videocassette units.⁶⁸

Since videodiscs and videocassettes are comparatively new, it is difficult to predict the antitrust issues which may arise. First, there may be a trend in both fields toward some type of "industry standards" dictating, among other things, a particular type of disc, tape, or format for display. To the extent that these standards benefit some manufacturers and exclude others, they may be subject to antitrust scrutiny.⁶⁹ If nothing else, the procedures for promulgating standards probably would need to be open to all potential manufacturers.

As with cable, MDS, and STV, questions also may arise as to the availability of programming. If one videodisc or videocassette manufacturer controlled a substantial amount of potential programming through exclusive dealing arrangements, questions as to refusals to deal might arise.⁷⁰

IV. Satellites

There are basically two types of satellites: (1) domestic satellites ("domsats"), which are in operation now; and (2) direct broadcast satellites ("DBS"), which are to be widely operational in the near future. Domsats serve as common carrier links for telephone, data, and video communication. Perhaps their most dramatic role in the last few years has been to transmit pay programming nationally to cable, STV, and MDS operations.

Domsats generally transmit with comparatively little power, and thus cannot be received by individual viewers without a fairly substantial (*i.e.*, \$5,000 to \$15,000) investment in an earth station capable of receiving domsat signals for display on a conventional television set. By comparison, a DBS transmitter would have considerably higher power and thus would require inexpensive

68. See M. SPRAGUE, *NEW COMMUNICATIONS MEDIA AND PUBLIC BROADCASTING: IMPACTS AND OPPORTUNITIES* 22 (1980).

69. See *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1979).

70. See text accompanying note 66, *supra*.

(i.e., \$200-\$300) receivers.⁷¹ Aside from a few experimental applications, DBS is still on the drawing boards, with the earliest possible introduction probably coming in the mid to late 1980s.⁷²

Domsats are common carriers and must file tariffs with the FCC. Under recent Commission decisions, however, purchasers of domsat transmission time are virtually free to resell it to whomever and at whatever prices they choose.⁷³ A section 2⁷⁴ problem thus might arise if one purchaser were able to control a substantial portion of the comparatively limited number of domsat channels.⁷⁵ This type of situation might be analogized to the "essential facility" cases discussed above.⁷⁶

Potential antitrust issues as to direct broadcast satellites are less clear because DBS still is in the planning stages. Although the FCC has advocated an "open skies" or "open entry" policy as to domsats,⁷⁷ there may be significant technological, economic and treaty restrictions on the number of DBS transmitters which could operate within the United States. None of these issues can be resolved, however, until the 1983 Regional Administrative Radio Conference.⁷⁸ On the one hand, if the Commission ultimately regulates DBS operations as common carriers, their facilities would be available to all paying customers. On the other hand, if the Commission regulates DBS stations as broadcasters, they would have sole control over the content of their transmissions.⁷⁹ But the FCC adopts the broadcast model, the previously discussed problems as to refusals to deal and essential facilities might become relevant in the DBS context.

V.

71. An investment in an earth station may run from \$5,000 to \$15,000. The cost of a DBS transmitter is \$200 to \$300.

72. *Supra* note 5. The FCC recently accepted applications for DBS facilities, despite the fact that it still was in the process of drafting rules to cover DBS. BROADCASTING, July 20, 1981, at 23.

73. Memorandum Opinion and Order, 60 F.C.C.2d 261 (1976); Memorandum Report and Order, 62 F.C.C.2d 588 (1977).

74. 15 U.S.C. § 2 (1980) (Sherman Antitrust Act of 1890).

75. Several firms recently announced plans to launch new domsats, thus increasing dramatically the number of available channels. See BROADCASTING, Aug. 17, 1981, at 32.

76. See text accompanying note 33, *supra*.

77. Second Report and Order, 35 F.C.C.2d 844, 850-51 (1972). The Commission basically decided to allow any qualified applicant to operate domsats. *Id.*

78. Rice, *Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options*, 25 N.Y.L.S. L. REV. 813, 822 (1980).

79. *Id.* at 837.

Data Transmission and Other Videotext Services

During the last few years, at least half a dozen different—and technologically incompatible—videotext systems for transmitting large amounts of data to homes and businesses have developed. Although an enormous number of permutations and combinations exist, the basic distinction is between teletext and viewdata. Teletext operates in a one-way fashion and allows a home or business to subscribe to textual information transmitted over a cable system, MDS operation, or other station. By transmitting a large amount of data—*e.g.*, up to 200,000 pages on a cable or MDS channel—and giving subscribers a choice of data, one-way teletext systems simulate interactivity.

On the other hand, viewdata systems generally give subscribers a return link to a computer over telephone lines or a cable system, so that they can order particular information from a comparatively large, continuously available menu at any time. A variety of systems are currently under experimentation in the United States, Great Britain, Europe, and Japan.⁸⁰

The proliferation of different and incompatible videotext technologies has created pressure for uniform standards. The antitrust problem with any set of standards, however, is that it may benefit one set of interests and annihilate all others. As discussed above in relation to videodiscs,⁸¹ the mere establishment of industry standards does not in and of itself create antitrust liability. Proper processes in formulating standards are necessary, however, in order to avoid inferences of anti-competitive motives.

Aside from the problem of diverse and incompatible standards,⁸² the teletext and viewdata industries—particularly newspapers and news wire services—face increasing amounts of competition from a deregulated American Telephone and Telegraph Company. AT&T has developed a teletext-style offering, which not unsurprisingly provoked the ire of newspapers interested in electronic publishing. A federal district court enjoined AT&T from implementing its teletext system⁸³ on the ground that the system would violate the

80. INSTITUTE FOR THE FUTURE, REPORT (1981).

81. See text accompanying note 69, *supra*.

82. Several major firms—including CBS, AT&T, and Telidon—have announced at least tentative agreements on a set of uniform standards. TELEVISION/RADIO AGE, Sept. 22, 1980, at 33. CBS and AT&T are experimenting with jointly agreed upon standards. *Id.*

83. Texas Daily Newspaper Ass'n v. Southwestern Bell Telephone Co., ___ F. Supp. ___ (E.D. Tex. 1981).

1956 Consent Decree between AT&T and the Justice Department. This issue is, of course, just part of the far broader issues involved in deregulating AT&T, a subject which has received action from the FCC,⁸⁴ the Hill⁸⁵ and most recently the courts in dealing with the proposed AT&T Consent Decree⁸⁶

Conclusion

Many of the above issues could be resolved by the FCC; they will not be, however, because of the federal government's current deregulatory orgy. The FCC's failure or refusal to address these issues will lead to increased antitrust litigation and other private means of resolving economic disputes. When substantial economic interests are unable to receive any redress from administrative agencies, they naturally turn to other forums—most particularly Congress and the courts. Relief under the antitrust laws is particularly attractive, since it may pay its own way through treble damages and attorneys' fees. The antitrust laws thus will play an increasingly larger role in adjusting disputes in the telecommunications industries.

84. Report and Order, 77 F.C.C.2d 384 (1980) ("Computer II" proceedings).

85. S.898, 97th Cong., 1st Sess. (1981). See Schwartz, *Stacked Competition and Phony Deregulation for A.T.&T: The Proposed "Telecommunications Competition and Deregulation Act of 1981,"* 3 COMM/ENT L.J. 411 (1982).

86. Schwartz, *supra* note 85.

