

In This Issue

- *EC Imposes Largest Monetary Penalty Ever Against Microsoft - DOJ Criticizes EC's Approach*
- *FTC Sues To Block Arch Coal - Triton Acquisition In Federal Court And At The FTC*
- *Court Of Appeals Overturns FCC Rules Governing Local Telephone Competition*
- *8th Circuit Reverses \$6 Million Award For Limo Manufacturer*
- *Medical Residents Resort To Court*
- *White Collar Criminals Plead Guilty*

Recent Activities

DOJ Antitrust Highlights

FTC Antitrust Highlights

FTC Consumer Protection Highlights

International Antitrust Highlights

FCC Antitrust Highlights

EC IMPOSES LARGEST MONETARY PENALTY EVER AGAINST MICROSOFT - DOJ CRITICIZES EC'S APPROACH

After a five-year investigation by European regulators and failed negotiations between regulators and Microsoft, the European Commission ("EC") ruled that Microsoft broke European Union ("EU") law by using its near-monopoly position in the Windows operating system to harm rivals in work group server operating systems and in media players. The EC found that Microsoft abused its market power by deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers and by tying its Windows Media Player with its Windows operating system. The EC believes that Microsoft's conduct has harmed competition in both markets.

The EC's March 24th order requires Microsoft to disclose necessary information about Windows to competing server software manufacturers to allow them to design products that work as easily with Windows as Microsoft's own server software within 120 days of the order, offer for sale a version of its Windows operating system that does not contain the Windows Media Player within 90 days, and pay a fine of approximately \$613 million. The fine levied against Microsoft for abusing its market power is the largest fine ever imposed by the EC against a company for an antitrust violation.

In a press release accompanying the EC's order, Commissioner Mario Monti stated that dominant companies have a special responsibility to ensure that the way they do business does not harm consumers and competition, and that the EC's decision would establish clear principles for future conduct of companies with dominant positions.

R. Hewitt Pate, Assistant Attorney General for the United States Department of Justice's Antitrust Division, however, issued a statement questioning and criticizing the EC's enforcement action. The statement briefly outlines the Antitrust Division's settlement agreement with Microsoft as providing clear and effective protection for competition and consumers by preventing misconduct by Microsoft that would inhibit competition in "middleware" programs,

such as the web browser that was the subject of the United States' lawsuit and the media player that is the subject of the EC's action. Mr. Pate explained that the U.S. settlement agreement "prohibits the use by Microsoft of exclusive contracts or other provisions that inhibit competition, prohibits anticompetitive manipulation of icons and default settings, and requires Microsoft to provide information to allow 'interoperability' of competitors' software."

Mr. Pate claims that the EC's enforcement approach is very different from the U.S. approach because the EC imposes a "code removal" remedy to resolve its media player concerns whereas the Antitrust Division never considered such a remedy. Mr. Pate also claims that the EC's remedy might actually be harmful because it may hinder successful competitors or impose burdens on third parties. Mr. Pate also states that "imposing antitrust liability on the basis of product enhancements and imposing 'code removal' remedies may produce unintended consequences. Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies." Mr. Pate criticizes the EC's approach as he suggests that the EC's approach runs the risk of protecting competitors, not competition, which may ultimately harm innovation and the consumers that benefit from innovation.

Mr. Pate also disapproves of the EC's decision to impose its largest fine ever against Microsoft for unilateral conduct. Mr. Pate states that "while the imposition of a civil fine is a customary and accepted aspect of EC antitrust enforcement, it is unfortunate that the largest antitrust fine ever levied will now be imposed in a case of unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement." Mr. Pate suggests that the largest fines should be

imposed against notorious price fixing cartels, which, once proven, are clearly illegal. Here, the fine exceeds the monetary penalty imposed on Hoffman-La Roche AG in 2001 for being the ringleader of a vitamin cartel. Given that the legality of Microsoft's conduct is debatable, the EC should have restrained from imposing such a large fine.

With respect to the EC's "interoperability" remedy, which requires Microsoft to license technologies used by Microsoft server software to communicate with other Microsoft software on a network, Mr. Pate indicates that the U.S. and EU approaches are similar.

While Mr. Pate and the Antitrust Division found it necessary to issue a statement criticizing some aspects of the EC's order because the EC's order sends a different message to business than the DOJ's remedy, Mr. Pate emphasizes that the U.S. antitrust agencies and the EC continue to enjoy a strong and positive relationship with regards to competition policy and that they will continue to work together in the future.

Meanwhile, Microsoft has vowed to appeal the EC's ruling to European courts. Such an appeal could take as long as five years. Microsoft also plans to ask for a suspension of the Commission's penalties after it files its appeal.

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FTC SUES TO BLOCK ARCH COAL-TRITON ACQUISITION IN FEDERAL COURT AND AT THE FTC

On April 1, the FTC filed a complaint in the U.S. District Court for the District of Columbia, seeking a preliminary injunction to block Arch Coal's

("Arch") \$364 million proposed acquisition of Triton Coal Company ("Triton") from New Vulcan Holdings, L.L.C. ("New Vulcan"). Arch proposes to buy Triton's North Rochelle and Buckskin coal production mines, both located in Wyoming's Southern Power River Basin ("SPRB"). The Commission is alleging that the transaction would have an anticompetitive effect on the market for coal mined in the SPRB, which has vast reserves of low-sulfur coal that has an energy content between 8400 and 8800 British Thermal Units ("BTUs") per pound.

The SPRB Coal Market

SPRB coal is low in sulfur, which makes it one of few coals that comply with federal sulfur emissions limits on coal-fired generators. Due to the low sulfur levels as well as low sodium and ash contents in SPRB coal, its use provides a "strong economic advantage" for electric generators, according to the Commission's complaint. Moreover, to be required to switch to or from SPRB coal requires substantial costs, based on the experience of older coal generator plants that were required to switch to SPRB from higher bituminous coal subsequent to the passage of the Clean Air Act of 1990, which imposed the sulfur emissions re-quirements. Furthermore, if plants currently using SPRB coals were required to switch to other coals, they would - according to the FTC complaint - be required to install a costly "scrubber" designed to reduce sulfur emissions. Aside from these physical differences, the FTC is also alleging that transporting coal outside of the SPRB is too costly to be considered substitutes for most generators that use SPRB coal.

The 8800 BTU SPRB Market

The complaint describes the three different "tiers" of SPRB coal that correspond to the different areas

in which SPRB coal is mined and its heat content. "Tier 1" SPRB coal has a heat content of 8800 BTU and is from the southern portion of the SPRB, or the "Wright area." This Tier of SPRB coal is described in the complaint as commanding a price premium due to its "lower sulfur content, higher energy content, and easy access to competing rail transport service" in comparison to the other two tiers of SPRB coal. For these reasons, FTC staff alleges that the Tier 1 SPRB coal is functionally distinct and therefore a separate market.

Alleged Effects of the Proposed Acquisition

Staff is alleging that Arch's acquisition of the Triton assets would result in the combination of two of the four leading producers of SPRB coal, which would result in consolidation in a market that is already "susceptible to coordination," due to the high entry barriers, geographic proximity of the competitors, availability of market and competitor information, and relatively inelastic demand. According to the complaint, there is regular "signaling" of coal production plans that are followed and implemented, with Arch as a "leading proponent" of limiting production. The FTC also contends that since Triton's North Rochelle mine has been the primary source of production expansion because it is the newest SPRB mine, the acquisition may result in limited future expansion.

Role of the Kiewit Divestiture in the Analysis

According to the complaint, Arch has agreed with Peter Kiewit & Sons ("Kiewit") to sell the Buckskin mine assets to Kiewit if Arch succeeds in acquiring Triton. Staff asserts that this "fix it first" would not constrain a coordinated price increase or output limitation that would likely result from the proposed acquisition, given that the most recent source for production expansion is currently Triton's North Rochelle assets.

Interestingly, the FTC's inclusion of the proposed "fix it first" in its complaint is somewhat unusual, as most Commission complaints seeking to enjoin transactions usually discuss only the elements of a Section 7 Clayton Act case and the facts supporting the Commission's allegations. As with most merger enforcement actions, issues relating to appropriate definitions of product and geographic markets and the likely competitive effects resulting from the transaction are key to Section 7 litigation. Potential efficiencies to be gained from the transaction may also play a significant role in a Section 7 case. However, here, the adequacy of the proposed "fix" is now part of the government's substantive case. If the case goes forward, it will no doubt shape the understanding of what is required in future pre-arranged "fixes" from both the perspectives of the courts and the Commission. (Note: On April 2, the FTC issued an administrative complaint challenging the transaction, which contains allegations similar to the ones contained in the complaint seeking a preliminary injunction.)

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COURT OF APPEALS OVERTURNS FCC RULES GOVERNING LOCAL TELEPHONE COMPETITION

The United States Court of Appeals for the District of Columbia Circuit unanimously rejected Federal Communications Commission ("FCC") regulations governing local telephone competition. *U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). In a 62-page opinion issued on March 2, the court held that the FCC cannot require regional "Baby Bell" telephone companies to lease their networks to competitors, at low prices set by state regulators. The court criticized the

FCC for "punt[ing]" regulatory responsibility to the states. This decision represents a victory for the incumbent Baby Bells, and a setback for competitors such as AT&T and WorldCom who rely on low-cost network leases to provide service to their customers.

The regulations represented the FCC's most recent attempt to create local telephone regulations in accordance with the Telecommunications Act of 1996 (the "Telecommunications Act"). Congress passed the Telecommunications Act to enable new firms to enter the telecommunications market. To counteract the competitive advantages of the incumbent local exchange carriers ("ILECs"), Congress empowered the FCC to require ILECs to make "network elements" available to other tele-communications carriers, including competitive local exchange carriers ("CLECs"). Congress also allowed the FCC to determine which network elements should be "unbundled", "consider[ing] at a minimum whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

In the first interpretation of the Telecommunications Act, the FCC held that lack of unbundled access to an element would "impair" a CLEC's ability to provide telecommunications service if, absent access to the requested element, the CLEC's prices would increase or quality would decline. The Supreme Court rejected this interpretation because it failed to consider whether the CLECs could access an element by itself or through a third party. The Court also rejected the idea that any price increase, or quality decrease, no matter how small, constituted an impairment.

The FCC's second interpretation held that a new entrant would be "impaired" if taking into account the availability of CLEC access to non-incumbent networks, lack of access to an ILEC element "materially diminishes a requesting carrier's ability to provide the services it seeks to offer." The D.C. Circuit found that this interpretation was still unreasonable given the underlying purpose of the Telecommunications Act. The FCC did not distinguish between the issues that any new entrant in any market would face, and the specific characteristics of the telecommunications market. The court also rejected the FCC's decision to apply unbundling requirements in every customer class and geographic market, regardless of the actual state of competition.

In the FCC's third, and most recent, interpretation, the Commission determined that a CLEC would be impaired when lack of access to an ILEC network "poses a barrier or barriers to entry . . . that are likely to make entry into a market uneconomic." Based on the costs associated with a CLEC providing its own network switch, the FCC found that CLECs face a nationwide impairment if they do not have unbundled access to ILEC switches for the residential and small business markets.

The FCC gave state utility commissions the authority to eliminate unbundling if a market contained three competitors in addition to the ILEC, or at least two non-ILEC third parties who offered wholesale access to their own switches. The FCC also delegated significant market determination authority to the states. The Commission argued that this delegation was proper under *Chevron U.S.A. v. Natural Resources Defense Counsel*, because agencies have the presumptive power to delegate their authority, so long as the authorizing statute does not expressly prevent this delegation.

The court rejected the FCC's legal interpretation. It found that when a statute delegates authority to a federal agency or authority, subdelegation to a subordinate federal agency or officer is proper, without contradictory evidence of congressional intent. Subdelegation to a third party, such as a state utility commission, however, is presumptively improper. The court reasoned that when a federal agency delegates authority to a subordinate federal agency, responsibility and accountability remain with the superior federal agency. If an agency delegates its authority to a third party, there is less accountability and an increased risk that the third party will not share the federal agency's "national vision and perspective." The court held that, absent evidence of contrary congressional intent, a federal agency cannot subdelegate its authority to a private or sovereign-state third party.

The court then held that, even if the FCC had not delegated its power to the states, it would have overruled the regulations because they were overbroad. The FCC found that the CLECs faced nationwide impairment due to the entry barriers associated with "hot cuts." Hot cuts require an ILEC technician to physically route a CLEC customer onto the network. Alternatively, ILECs can route ILEC customers onto the network with a simple software change. The court found that the FCC's own market conclusions, and the record in general, did not support the conclusion that hot cuts are sufficiently widespread to support the finding of a nationwide impairment.

Rather than remanding the issue to the FCC for a fourth interpretation, the court ruled that it would vacate the rules after 60 days or the denial of a petition for rehearing or rehearing *en banc*, whichever comes later. "This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling

rules, and its apparent unwillingness to adhere to prior judicial rulings."

FCC Chairman Michael Powell issued a statement in support of the court's decision. Chairman Powell, who voted against the rules in a February 2003 3-2 vote, said that he "dissented from the majority's decision on local telephone competition because it was inconsistent with the law and would result in years of regulatory uncertainty and unrealized consumer promise." Chairman Powell continued, "[m]y fellow Commissioners and I need to expeditiously get to work to produce a set of judicially sound rules, once and for all. I have already directed the staff to begin preparing new rules that will provide the sorely needed clarity and guidance essential to bringing customers the benefits they were promised and deserve."

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8TH CIRCUIT REVERSES \$6 MILLION AWARD FOR LIMO MANUFACTURER

In a split decision, a three-judge panel of the U.S. Court of Appeals for the 8th Circuit on March 15 overturned a \$6 million treble damages award in favor of a limousine manufacturer by the district court. The manufacturer alleged that its larger competitors and Ford Motor Co. violated Sherman Act Section 1 by conspiring to prevent the plaintiff from advertising its limos in the industry's two trade publications and from attending trade shows. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, No. 03-1441 *et seq.*, 2004 WL 485117. The majority (two judges appointed by President Bush in 2002) accepted the jury's finding that the defendants acted in concert in pressuring the magazines (Limousine & Chauffeured Magazine and Limousine Digest) to

refuse the plaintiff's ads and trade show exhibits. However, they faulted the trial court for (1) applying "*per se*" analysis rather than the more lenient "rule of reason" to the alleged boycott, and (2) admitting the testimony of the plaintiff's expert witness as to lost profits. By contrast, the dissenting judge (a Johnson administration appointee) characterized the defendants' conduct as "bold and undisguised anticompetitive behavior," with an effect "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality - they are illegal *per se*."

The focus of the case was a quality certification program called the "Quality Vehicle Modifier" ("QVM") that Ford created for limo manufacturers that use Ford automobiles - primarily the Lincoln Town Car - to convert into limos (by cutting the vehicles in half and adding structural pieces in the middle). The majority of limo producers in the United States joined the QVM program and/or a similar program created by General Motors. However, the plaintiff refused to be certified, contending that it (1) already complied with the limo conversion techniques in the QVM manual, (2) would go out of business if it could not continue to sell limos longer than the maximum length permitted under the certification programs, and (3) did not want to have to pay to insure the automaker, as required for certification.

Plaintiff's lack of certification became a problem after an industry trade group - the Limousine Manufacturers' Organization ("LIMO") - whose voting membership included the plaintiff's largest competitors and nonvoting membership included Ford - allegedly voted to deny membership to those lacking certification or crash-test results (something that the plaintiff did not have), and pressured the trade industry magazines to refuse to allow the plaintiff to advertise in the

publications or to exhibit at the industry trade shows. The plaintiff's expert witness testified that it lost \$2.1 million from not being able to convert automobiles into limos as a result of the alleged inability to advertise and participate in trade shows.

Rule of Reason Should Apply

Under the rule of reason analysis, the fact-finder must decide if the challenged conduct imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect. By contrast, when a restraint's negative impact on competition is immediately discernable and the restraint has no redeeming virtue, the *per se* mode of analysis applies. Unlike the rule of reason, *per se* analysis does not allow inquiry into the intent behind the restraint, its pro-competitive justifications, or its actual effect on competition. Instead, the *per se* analysis applies a conclusive presumption of illegality once an agreement has been proven.

In holding that the trial court improperly failed to apply rule of reason analysis, the majority of the appeals panel emphasized that the rule of reason is the prevailing standard for determining a restraint's effect on competition in a relevant market, and that courts apply *per se* analysis only where experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it. Among the practices that courts have deemed to be unlawful *per se* are price-fixing, division of markets, group boycotts, tying arrangements, and vertical price-fixing.

The majority reasoned that rule of reason analysis should have been applied even though (1) many of

the limo manufacturers with whom Ford allegedly conspired were direct competitors of the plaintiff, and (2) there was no evidence that the plaintiff's limos failed to meet federal safety standards when the defendants allegedly pressured the trade publications to exclude non-QVM-certified limos. The over-riding factor was the possibility that Ford was motivated at least in part by safety concerns in its creation and insistence upon QVM certification (or its equivalent) for all limos made in the United States. The majority reasoned that although "Ford also may have had profit-making motives in mind when it created the QVM standards and allegedly pressured the trade publications not to advertise non-QVM vehicles, . . . safety concerns were arguably a motivating factor behind Ford's actions." The court pointed to the fact that the genesis of the QVM program was a request by the federal government for Ford to examine safety issues surrounding limos following a highly publicized accident in which newlyweds died in a limo accident. The court further stressed that exclusion by joint setting and enforcement standards is ordinarily evaluated under the rule of reason because such standards, including safety standards, often have pro-competitive effects. In the case before it, "having unsafe limousines in the market could tend to undercut consumer confidence in all limousines, and thereby decrease overall limousine sales." In sum, because "the economic impact of safety standards [was] not immediately discernable, something more than a cursory *per se* analysis [was] required to determine whether the restraint was unreasonable."

By contrast, the dissenting judge concluded that the case appeared to meet all of the characteristics of the typical *per se* case - where there were joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the

competitive struggle. For this jurist, it was a clear case of competitors placing an unnecessary safety restriction on a firm that already complied with federal safety standards. The judge opined that:

"Ford was irritated by the existence of small coachbuilders who were exploiting the profitable market for extra-long limousines. The existence of these small coachholders threatened Ford's QVM program because it essentially penalized QVM coachbuilders, who were prohibited from building extra-long limousines because of QVM restrictions. Consequently, Ford acted in concert with LIMO to quash this competition by using their combined influence to cut off all national advertising resources to these small coachbuilders. In light of these bold and undisguised anticompetitive behaviors, I believe this case fits into that category of 'agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality-they are illegal per se.'"

The judge faulted the majority for wasting "time and judicial resources" to remand the case to be retried "on the basis of [the] dubious safety rationale."

Expert Testimony on Damages Not Admissible

The majority also held that the trial court erred in admitting the testimony of the plaintiff's expert witness as to lost profits. The expert - a CPA who

had never testified before in antitrust litigation - used a "but for" method to determine the plaintiff's damages. Using the plaintiff's financial statements and tax returns, he calculated an average growth rate of 62% over a representative time period, and used that growth rate to project what the plaintiff's sales allegedly should have been but for the challenged boycott. However, in reaching the net profit figure of \$2.1 million, the expert did not consider whether general economic conditions or increased competition affected the plaintiff's growth rate. He also specifically failed to assess whether the plaintiff had been harmed by competition from one of its former employees who started a competing business during the relevant time period. The majority ruled that under the rule of reason analysis, which should have been applied to this case, consideration of the other possible causes of the plaintiff's economic laws "was required." Because the expert's opinion "failed to 'incorporate all aspects of the economic reality,' . . . it should not have been admitted."

The outcome in *Craftsmen Limousine* poses an interesting question: is it merely a coincidence that in the factual situation presented here, two judges appointed by the current Republican president would fall on one side of the per se/rule of reason debate with a judge appointed by a Democratic president on the other? The answer is not only the province of social scientists. It could have real-world significance for antitrust plaintiffs and defendants as they utilize procedural tactics to influence which court (and ultimately which judges) may end up deciding the fate of their case.

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MEDICAL RESIDENTS RESORT TO COURT

On February 11, U.S. District Court Judge Paul L. Friedman removed a number of defendants in the case of *Jung v. Ass'n of American Medical Colleges* for lack of jurisdiction or because their alleged connection to the conspiracy was too weak (*Jung v. Ass'n of American Medical Colleges*, D.D.C., No. 02-0873 (PLF), 2/11/04). Still, the class action, which alleges a conspiracy to eliminate competition in the recruitment, hiring, and employment of resident physicians in an apparent attempt to depress their wages, survived a number of other motions for dismissal and arbitration. Moreover, the decision upholds the legal sufficiency of the plaintiffs' argument, and thus marks an overall positive step for Paul Jung M.D. and other members of the putative class of previous and current medical residents in their battle against the National Resident Matching Program ("NRMP" or "Match").

For a number of years the NRMP has operated to match residency applicants with residency programs. Applicants rate their top preferences, while the residency programs rank the applicants in turn. Based on this ranking procedure, each applicant is consequently assigned a single match.

In May of 2002, however, this program was challenged under the antitrust laws. Dr. Jung along with two other former or current medical residents brought the class action suit against seven medical organizations and 29 medical centers alleging an illegal conspiracy that depresses resident salaries and benefits in violation of Section 1 of the Sherman Act. In essence, plaintiffs claim that applicants are effectively forced to apply through NRMP and are then assigned to a single residency program. Insofar as the program becomes the solitary buyer

of the applicant's skill, the result is a monopsony of sorts. After all, while programs may find other qualified applicants, the applicant herself is tied-in to the single residency program deemed her match.

Specifically, plaintiffs alleged a conspiracy by and between the residency programs and organizations and institutions connected to the NRMP that rests on three prongs. Their first claim is that graduate students are all but forced to participate in the Match program. Fourth-year medical students must participate in the NRMP in order to gain employment in a program that is accredited by the Accreditation Council for Graduate Medical Education ("ACGME"), a prerequisite for eligibility for board certification by the American Board of Medical Specialties ("ABMS").

Secondly, plaintiffs take issue with the ACGME's use of its accreditation standards, which have the effect of locking students into their matched program. Additionally, these standards necessitate participation in the Match program for accreditation, and also influence compensation and other terms of employment, with the alleged purpose of maintaining them at levels that are lower than they would be in a competitive atmosphere.

Finally, there is the coordinated exchange of residency program compensation information through surveys and databases. These include the annual survey by the Council of Teaching Hospitals and Health Systems section of the American Association of Medical Colleges ("AAMC") and the American Medical Association's Fellowship and Residency Electronic Interactive Database. Such information allegedly simplifies the policing of medical residents' compensation packages.

Thus, plaintiffs alleged that defendants are effectively able to fix resident salaries and benefits at anticompetitive levels that are too low. After being assigned to a residency program, medical students have no bargaining power and are forced to accept employment terms set by the institution at which they will work.

In his February 11 ruling, Judge Friedman granted motions to dismiss for the Council of Medical Specialty Societies ("CMSS"), the ABMS, and Washington University Medical Center for lack of personal jurisdiction. Moreover, the court ruled that the complaint failed to adequately connect particular defendants to the alleged conspiracy. Since allegations against the American Hospital Association, the American Medical Association, Yeshiva University, the ABMS, and the CMSS were vague, conclusory, and insufficient to meet plaintiffs' burden, Judge Friedman granted their motions to dismiss for failure to state a claim.

But even as the court reduced the number of defendants remaining in the matter, various other motions for dismissal were denied while the legal sufficiency of the allegations in general was upheld. In particular, the court found that the complaint does adequately allege a conspiracy whereby compensation is stabilized at depressed levels. As a result, more than anything the ruling seems to have bolstered plaintiffs' position in this matter. However the case will ultimately unfold, in dealing with the incentives and compensation of tomorrow's doctors, it promises to affect the parties and public alike.

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WHITE COLLAR CRIMINALS PLEAD GUILTY

This past month, the Antitrust Division obtained guilty pleas from a rubber chemicals manufacturer for conspiring to fix prices and a Maryland utility official and contractor in an illegal kickback scheme.

U.S. Rubber Chemicals Manufacturer Agrees To Plead Guilty For Participating In Rubber Chemicals Cartel

On March 15, the Division announced that Crompton Corporation ("Crompton"), a U.S. manufacturer of rubber chemicals based in Middlebury, Connecticut, agreed to plead guilty and pay a \$50 million fine for participating in an international conspiracy to fix prices in the rubber chemicals market.

According to the one-count felony charge filed in the U.S. District Court in San Francisco, Crompton conspired with unnamed rubber chemical producers to suppress and eliminate competition for certain rubber chemicals sold in the United States and elsewhere from 1995 to 2001. These rubber chemicals are a group of additives used to improve the elasticity, strength, and durability of rubber products, such as tires, outdoor furniture, hoses, belts, and footwear. Approximately \$1 billion of these rubber chemicals are sold annually in the United States.

According to court papers, Crompton and its co-conspirators carried out the multi-year conspiracy by: 1) participating in meetings and conversations to discuss prices of certain rubber chemicals to be sold in the United States and elsewhere; 2) agreeing, during those

conversations and meetings, to raise and maintain prices of certain rubber chemicals to be sold in the United States and elsewhere; 3) participating in conversations and attending meetings concerning implementation of and adherence to the agreements reached; 4) issuing price announcements and price quotations in accordance with the agreements reached; and 5) exchanging information on the sale of certain rubber chemicals in the United States and elsewhere.

The Crompton investigation was conducted by the Antitrust Division's San Francisco Field Office and the Federal Bureau of Investigation in San Francisco.

Maryland Utility Official and Contractor Plead Guilty To Wire Fraud

On March 25, the Antitrust Division announced that a former official from the Laurel, Maryland-based Washington Suburban Sanitary Commission ("WSSC") and a contractor who worked under his supervision pleaded guilty to separate charges of wire fraud in connection with a kickback scheme.

According to the charges, Joseph R. Jackson ("Jackson") and Arvind K. Agarwal ("Agarwal") schemed to defraud the WSSC by circumventing the competitive contracting process in Agarwal's favor and inflating invoices submitted by Agarwal

between November 1999 and October 2001. Jackson solicited and received more than \$30,000 from Agarwal or from third parties for money due to Agarwal. In return, Jackson, who supervised Agarwal, recommended that Agarwal receive additional contracts at higher hourly rates and approved for payment Agarwal's invoices which both he and Agarwal knew to be fraudulently inflated. This scheme caused the WSSC to make at least \$75,000 in excessive payments to Agarwal via interstate wire transfers.

The WSSC is a quasi-governmental agency charged with providing drinking and waste water services in the Washington suburbs of Prince George's and Montgomery Counties, Maryland. One of the 10 largest agencies of its kind in the United States, it serves an estimated 1.6 million residents with an annual operating budget of \$466 million. The Information Technology Section of the WSSC, with an annual budget of approximately \$15 million, is responsible for the installation and maintenance of the WSSC's computer equipment and software programs.

The investigation was conducted by the Antitrust Division's National Criminal Enforcement Section in conjunction with the United States Attorney's Office for the District of Maryland, and assisted by the United States Postal Inspection Service.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On March 22, the Antitrust Division released a statement regarding its Corporate Leniency Program after Stolt-Nielsen S.A. announced in a press release that the Antitrust Division voided its Conditional Leniency Agreement with the company and revoked Stolt-Nielsen's conditional acceptance into the Division's Corporate Leniency Program. The Division's statement read as follows: "All companies that apply to the Corporate Leniency Program must meet certain requirements and make accurate representations to the Division. Corporate applicants are accepted on a conditional basis. As part of its enforcement efforts, throughout the investigation, the Division verifies the representations of the corporate leniency applicant. At any time throughout the process, the Division may expel an applicant after concluding that a company has made false representations to the Division or has otherwise not fully complied with the leniency policy requirements." Apparently, the Division wanted to make clear that no policy changes to the Amnesty Program have been made despite Stolt-Nielsen becoming the first company to have its conditional acceptance to the Division's Corporate Leniency Program revoked. Stolt-Nielsen's press release noted that the company fundamentally disagrees with the Division's decision, and that it will vigorously challenge it.
- On March 11, the Antitrust Division announced that a federal grand jury in Detroit, Michigan, indicted Bobby Keith Moser, an attorney from Little Rock, on seven charges including money laundering, conspiracy to commit wire and mail fraud, mail fraud, obstruction of justice, making false statements to a grand jury, and two counts of wire fraud in connection with a kickback scheme used to defraud a Troy, Michigan, audio-visual company. According to the charges, Mr. Moser and his co-conspirators devised a scheme that permitted an executive of an audio-visual company in Troy, Michigan to solicit and obtain kickbacks from programmers seeking contracts from his company in exchange for the executive's support in contract negotiations and the award of contracts to the programmers. From May 2000 to November 2001, Mr. Moser and other co-conspirators allegedly solicited kickbacks from vendors totaling more than \$3.5 million. James M. Griffin, Deputy Assistant Attorney General in charge of the Antitrust Division's Criminal Enforcement Program noted that this type of scheme harms consumers. The ongoing investigation is being conducted by the Antitrust Division's Cleveland Field Office with the assistance of the Detroit office of the FBI and the Detroit office of the IRS, Criminal Investigation Division.
- On March 9, the Antitrust Division announced that a federal grand jury in Milwaukee indicted two Wisconsin road construction companies and four executives for conspiring to rig and allocate bids submitted for highway construction projects. Streu Construction Company of Two Rivers, Vinton Construction Company of Manitowoc, Ernest J. Streu, president of Streu Construction, John Streu of Two Rivers, secretary/treasurer of Streu Construction, James J. Maples of Manitowoc, president of Vinton Construction, and Michael J. Maples of Manitowoc, vice president of Vinton Construction, were all charged with rigging bids on road construction contracts from approximately 1997 until January 13, 2004. The ongoing investigation is being conducted jointly by the Department's Antitrust Division's Chicago Field Office, the U.S. Attorney's Office for the Eastern District of Wisconsin, the FBI, and the U.S. Department of Transportation, Office of Inspector General.

RECENT ACTIVITIES

DOJ Antitrust Highlights (Continued)

- On March 9, the Antitrust Division released a statement regarding its recent closure of its investigation of Anthem, Inc.'s proposed acquisition of WellPoint Health Networks, Inc. Anthem and WellPoint, two of the largest health insurance companies in the country merged to become the largest managed care insurance company in the United States. The Antitrust Division began investigating the deal when it was publicly announced in October 2003. The Division obtained extensive information from Anthem and WellPoint and interviewed numerous industry participants, including physicians, hospital representatives, employers, and other managed care plans. The division's investigation focused on potential effects in four separate areas: the extent to which Anthem and WellPoint compete for the sale of health insurance products; the possibility that this transaction could give a combined Anthem/WellPoint monopsony power over health care providers; whether the combination of their complementary plans might increase their incentives or ability to exercise monopsony power; and possible effects of this deal on the acquisition of Blue Cross Blue Shield plans. The Division, however, concluded that it could not predict such anticompetitive harm would result in the foreseeable future, if at all, because the combined market shares were low and little competitive overlap actually existed between the two companies. Nevertheless, the DOJ stressed that its determination on this deal did not preclude any future enforcement action.

DOJ may now be faced with reviewing another similar deal. Press accounts indicate that WellChoice, Inc. is reportedly interested in acquiring Oxford Health Plans, Inc. Both are competing health insurance providers in the northeast, with significant head-to-head competition occurring in New York and New Jersey. The combined firm would appear to be dominant in the New York City metropolitan area.

- On March 3, SAP, Oracle's top rival in the business application software business joined a number of critics regarding the Antitrust Division's lawsuit to block Oracle's proposed takeover of PeopleSoft. In an interview, SAP's executive board member, Shai Agassi said that he took issue with the Division's view of the market as outlined in its lawsuit. Agassi said that it was difficult to make a clear distinction between the software providers that serve large corporations and those that serve small companies because the lines in the business are very blurry. In addition, Agassi did not believe that Microsoft should be excluded as a competitor because he believed that SAP and Microsoft were now competing for midsize company business. The Antitrust Division, however, contends that while SAP is the largest player in the business applications software business, the combination of the second and third largest players for the provision of business application software to large companies is anticompetitive. The trial is to take place on June 7, 2004 and settlement before trial seems unlikely as no divestiture proposal would restore competition in the government's relevant product market to premerger levels.
- On March 2, IMC Global Inc. and Cargill, Inc. announced that they received a request for additional information from the Department of Justice's Antitrust Division regarding IMC's pending combination with Cargill Crop Nutrition. The companies indicated that they intend to work with the Antitrust Division and respond promptly to the request for additional information. The Antitrust Division is expected to focus its inquiry on three separate relevant product

RECENT ACTIVITIES

DOJ Antitrust Highlights (Continued)

markets for the manufacture, processing, production, storage, distribution, and sale of phosphate fertilizers, potassium fertilizers, and nitrogen fertilizers. Another focus of the inquiry will be whether a local, national or global geographic market exists for these products. Despite the issuance of the second request, the parties believe the transaction will be completed by the end of the summer.

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FTC ANTITRUST HIGHLIGHTS

- On March 30, the FTC voted to seek an injunction to block Arch Coal Inc.'s ("Arch") proposed \$364 million acquisition of Triton Coal Company, LLC's ("Triton") assets, including the North Rochelle and Buckskin mines, which are located in Wyoming's Southern Powder River Basin ("SPRB"). According to the FTC, Arch's acquisition of Triton, from its parent company New Vulcan Coal Holdings, LLC ("New Vulcan"), would be illegal and would reduce competition and increase the likelihood of coordinated interaction among the producers of SPRB coal. "The acquisition would result in the top three competitors controlling 86 percent of 2003 coal production in the SPRB and would substantially increase the possibility of, and harm from, coordinated interaction by these major players," said Susan Creighton, Director of the FTC's Bureau of Competition. "The Commission action announced today will protect electricity consumers from higher energy prices that would result from reduced competition in SPRB coal, an important low-cost energy source for electric generators." The Commission's March 30 action authorized the staff to seek a federal district court order to prevent Arch's proposed acquisition of any Triton assets from New Vulcan. The Commission has authorized the staff to file a preliminary injunction action so that the Commission may determine through an administrative proceeding the legality of the acquisition under federal antitrust laws. The Commission's vote to authorize the staff to seek a preliminary injunction was 4-1, with Commissioner Thomas B. Leary voting in the negative. The FTC filed its motion for a preliminary injunction in the U.S. District Court for the District of Columbia on April 1, 2004. An administrative complaint was issued by the FTC on or about April 2, 2004. This may be the first time that Commissioner Leary did not vote with Chairman Muris in a federal court enforcement action. However, Commissioner Leary did support the issuance of the administrative complaint. We are unaware of any detailed published dissenting statement by Commissioner Leary in this matter. Commissioner Leary did issue a short one sentence statement indicating that he believes the "administrative arena" is best suited for the issues presented by this case. For a more complete analysis of the federal court action, see this issue of *Sheppard Mullin Antitrust Review* at page 2.
- On March 30, the Commission, by a vote of 5-0, authorized publication of a notice of proposed rulemaking seeking public comments on proposed amendments to the HSR Rules (16 C.F.R. Parts 801-803). This proposed rulemaking introduces a number of changes that attempt to reconcile, as far as is practical, the current disparate treatment of corporations, partnerships, limited liability companies and other types of unincorporated entities under the HSR rules, particularly in the areas of acquisitions of interests in these entities; formations of the entities; and the application of certain exemptions, including the intraperson exemption. There are also proposed

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

ministerial changes to certain HSR rules to adapt their application to both corporations and unincorporated entities. Additionally, there are proposed minor changes to the Notification and Report Form. In addition to proposed amendments concerning unincorporated entities, there are proposed technical corrections to Section 801.13, 801.15 and 802.2. Under a 60-day public comment period, the public has until June 4 to submit comments on the proposed rule changes.

- On March 26, the Commission announced it has approved the issuance of a public notice announcing how it will conduct the Pharmacy Benefit Manager ("PBM") Conflict of Interest Study required by Section 110 of the Medicare Prescription Drug and Improvement Act. The Act requires the Commission to conduct such a study to examine whether the cost to group health plans of using mail-order pharmacies integrated with PBMs is more than the cost of using non-integrated mail-order pharmacies or over-the-counter retail pharmacies. To complete the study in a timely manner, the FTC authorized the staff to use compulsory process to collect information and data from industry members. The Commission vote authorizing the staff to use compulsory process to collect the relevant information and to issue the public notice was 5-0. The Commission identified about 20 companies that will receive the document and information requests, including PBMs, PBMs integrated with health plans, PBMs integrated with retail pharmacies, and independent retail pharmacies. Copies of the public notice and the Commission's document and information requests are available from the FTC's web site at <http://www.ftc.gov>.
- On March 19, the Commission authorized the staff to release publicly a report entitled "Federal Trade Commission Performance Report for Fiscal Year 2003." The Fiscal Year 2003 Report is the fifth performance report required under the Government Performance and Results Act of 1993. The Report supplements the Commission's five-year strategic plan for fiscal years 2000-2005, which was approved in September 2000. The agency's annual Performance Plans implement the Commission's strategic goals by establishing annual performance targets. The Performance Report compares and evaluates each year's actual performance to the established targets set forth in the Performance Plan. The Commission vote to release the report was 5-0.
- The FTC confirmed on March 11 that it is investigating sharp increases in gasoline prices in California and has been unable to identify any natural causes that could explain the price movements. The FTC routinely monitors gasoline prices throughout the United States. FTC spokesman Mitchell Katz reported on March 11 that "clearly something is going on" in California. "Gas doesn't just go to \$2.50 a gallon and people don't say anything," he commented. Gasoline prices have been rising in recent weeks throughout the United States as reported by the Energy Information Administration, an office of the Department of Energy. But increases in California have been dramatic and noteworthy. Chairman Muris and Senator Boxer (D-Calif.) met to discuss the anomalies in the California gasoline market. Spokesman Katz confirmed that the FTC's interest in California gasoline pricing "has gone to the next level" and the agency is examining the market. Senator Boxer wants a full-scale "formal investigation" to be conducted by the FTC. No public announcement has yet been made by the FTC regarding the scope of the Commission's inquiry.

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RECENT ACTIVITIES

FTC CONSUMER PROTECTION HIGHLIGHTS

- On March 23, the FTC announced final amended Rule provisions that will become effective on January 1, 2005. These amendments require telemarketers to "scrub" their lists at least every 31 days of numbers of individuals who have signed up for the "Do Not Call" Registry. The FTC requested comments via its February notice of proposed rulemaking on the proposed amendment's use of the phrase "thirty (30) days" rather than "once a month," as used in the statute. In response, 186 comments were received from consumers, consumer groups, businesses, and trade associations. The Commission chose the interval "thirty-one (31)," in order to provide sellers and telemarketers the maximum time allowable under the Appropriations Act.
- In a joint law enforcement initiative announced on March 22, the FTC and the DOJ announced two separate actions to shut down a spam operation that hijacked logos from America Online ("AOL") and Paypal in order to get consumers to provide their credit card and bank account numbers. The U.S. District Court in the Eastern District of Virginia ordered the defendant, Zachary Keith Hill of Houston, Texas to halt his identity theft scam, known as "phishing," and the DOJ obtained a criminal conviction, with the defendant currently awaiting sentencing. Consumers received e-mail that appeared to come from AOL or Paypal, which identified the sender as the "billing center," or "account department" which directed the receiver to "update" their billing information by following a hyper-link in the email. The linked page then appeared to be the billing center, but was really the defendant's webpage, which asked consumers to provide critical personal information, including the consumer's log-ins and passwords.
- The U.S. DOJ filed a complaint and consent order on March 18 on behalf of the FTC against several Utah-based defendants settling Commission charges that they allegedly deceived approximately 25,000 consumers trying to cast their votes via telephone for their favorite "American Idol" performers during the 2002 and 2003 seasons. According to the FTC's complaint, the defendants took advantage of callers who inadvertently misdialed the "American Idol" phone numbers by buying numbers that were very close to - but not the same as - the correct numbers. When callers mis-dialed and ended up calling the defendants' own toll-free lines, they were led to believe that they had to call a 900 number to place their vote, and that they had to pay a fee ranging from \$1.99 to \$2.97 per call. The callers could not place their votes via the 900 number (as the defendants were not affiliated in any way with the "American Idol" program). Under the consent order, the defendants are barred from engaging in similar deceptive conduct in the future in connection with "American Idol" or any other program, are prohibited from violating the FTC's Pay-Per-Call Rule, and will pay a civil penalty of \$40,000.
- The FTC announced on March 17 that its complaint handling system will now categorize and track complaints about media violence, including complaints about the advertising, marketing, and sale of violent movies, electronic games (including video games), and music. The expanded complaint system will help track consumer complaints about media violence and identify issues of particular concern to consumers.

RECENT ACTIVITIES

FTC Consumer Protection Highlights (*Continued*)

- In a March 16 press release, the FTC announced that it is seeking public comment on a proposed rule regarding free annual credit reports under the Fair and Accurate Credit Transactions Act ("FACTA") and the Fair Credit Reporting Act ("FCRA"). FACTA was enacted on December 4, 2003, and amends the FCRA by requiring, among other things, that nationwide consumer reporting agencies ("CRAs") provide to consumers, upon request, a free copy of their credit reports once every 12 months. The proposed rule is subject to a 30-day public comment period. The proposed rule also provides that in operating the centralized source, nationwide CRAs must be able to handle the reasonably anticipated volume of consumers making requests, collect only as much information as necessary to process requests, provide clear and easily understandable information and instructions on how to make requests, comply with the FTC safeguards for informational security, and ensure that any communications made through the centralized source does not detract from, contradict, or undermine the centralized source.

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INTERNATIONAL ANTITRUST HIGHLIGHTS

- On March 25, the Canadian Competition Bureau announced it was seeking public comment on its Merger Enforcement Guidelines (Draft for Consultation March 2004) ("MEGs"), which describe how the Canadian Bureau analyzes a merger. The revised guidelines address legal and economic developments in competition law since the MEGs were published in 1991. The new MEGs explain the Bureau's current approach to market definition; describe the Bureau's analysis of the competitive effects arising from a merger; and reflect the current law on efficiencies as provided in section 96 of the Competition Act. The Bureau is committed to developing enforcement and educational tools through an open and transparent process. Interested parties can provide comments and/or suggestions on the revised guidelines by May 25, 2004 via e-mail, fax or regular mail.
- The European Commission ("EC") concluded on March 24, after a five-year investigation, that Microsoft Corporation broke European Union ("EU") competition law by leveraging its near monopoly in the market for personal computer ("PC") operating systems (OS) onto the markets for work group servers and for media players. The EC also decided that because the illegal behavior was still ongoing, Microsoft had to disclose to competitors, within 120 days, the interfaces required for their products to be able to "talk" with Windows OS. Microsoft was also required, within 90 days, to offer a version of its Windows OS without Windows Media Player to PC manufacturers (or when selling directly to end users). In addition, the EC fined Microsoft 497 million euros (\$613 million) for abusing its market power in the EU. For additional information on this matter, see this issue of the *Sheppard Mullin Antitrust Review* at page 1.
- The Australian Competition and Consumer Commission ("ACCC") announced on March 18 that it had concerns about the proposed acquisition of Peoplesoft Inc. by Oracle Corporation. In particular, ACCC Chairman Mr.

RECENT ACTIVITIES

International Antitrust Highlights (Continued)

Graeme Samuel stated the acquisition may lead to a substantial lessening of competition in breach of the Trade Practices Act 1974. The ACCC's concerns are in line with the recent decision by the U.S. Department of Justice to oppose the acquisition. Oracle has stated that it will challenge the Department of Justice's decision. Since the matter is going to be considered by the U.S. courts, the ACCC will not be taking action at this point. The ACCC has, however, contacted many Australian public and private organizations that use enterprise application software and a significant number of them have stated that the proposed acquisition will restrict their choices significantly and lower the level of competition.

- On March 9, the Competition Authority in Italy reported distortions to competition in the taxi service. Exercising the powers vested in it by section 21 of law 287/90, the Competition Authority submitted a report to the Speakers of the Senate and the Chamber of Deputies, the Prime Minister, the Minister for Regional Affairs, the Central-Regional Governments Conference, the Regional governments, and the National Association of Italian Municipalities, pointing out distortions to competition nationwide in the provision of taxi services. The report stated that the taxi service market in Italy was generally insufficiently open to competition at the local level leading to a partially unmet demand. Most of Italy's largest towns and cities have an inadequate taxi density in terms of the population. The current legislation gives the municipal authorities powers to set the number of vehicles to be used as taxis, and hence to increase where necessary the number of licenses issued where the offering is insufficient. However, the report states that there is strong resistance to the use of these powers from the taxi industry, which wishes to retain the ceilings on their numbers.

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FCC ANTITRUST HIGHLIGHTS

- On March 11, Viacom Inc. cable programming and CBS local stations in 16 markets returned to Dish Network after Viacom and EchoStar Communications Corp. agreed on a new long-term carriage deal that includes some Viacom programming EchoStar had said it did not particularly want. Two days earlier, CBS and such Viacom-owned networks as Nickelodeon, MTV: Music Television, and Comedy Central went dark on Dish after the extension of a previously expired carriage agreement lapsed. EchoStar also said it dropped an antitrust lawsuit that accused Viacom of improperly tying retransmission of CBS broadcast signals to carriage of Viacom-owned cable networks. The new agreement restores CBS in the 16 markets where Viacom owns the local CBS stations. It provides for carriage of Comedy Central, MTV, MTV2, Nickelodeon, Noggin, Nick GAS Games and Sports for Kids, VH1, VH1 Classic, MTV Español and Black Entertainment Television. The agreement also adds to the length of carriage deals for the CBS HD (East and West) channels and for Spike TV, Country Music Television and TV Land. Dish Network will also launch Nicktoons on its "America's Top 180" package this spring.

RECENT ACTIVITIES

FCC Antitrust Highlights *(Continued)*

- The FCC acted to improve telephone service for consumers by eliminating several of the FCC's "operate independently" rules on March 11. Permitting the sharing of these limited internal functions that Bell operating companies ("BOCs") and their long distance affiliates formerly had to separately perform will provide efficiency gains and should translate to savings of millions of dollars in yearly operational costs that likely will be passed on to the BOCs' long distance consumers. The "operate independently" rules were adopted in 1996 by the FCC to implement section 272 of the Telecommunications Act's separate affiliate requirements. These rules prohibited a BOC's local service operations and its long distance affiliate from: 1) providing operating, installation, and maintenance ("OI&M") services; and 2) jointly owning switching and transmission facilities. The action eliminates the OI&M requirements, but retains the prohibition against joint ownership of switching and transmission facilities. The FCC concluded that the OI&M sharing prohibition is an overbroad means of preventing cost misallocation or discrimination by BOCs against unaffiliated rivals. Furthermore, the FCC concluded that the existing non-structural safeguards - including the cost allocation and affiliate transaction rules - are well-tailored and sufficient to provide effective protections against anti-competitive behavior. OI&M functions generally include all activity related to installing, operating, and maintaining switching and transmission facilities, such as network operations monitoring and customer trouble report management. Under the OI&M rule, BOCs and their long distance affiliates had to maintain separate work forces to perform these functions. Now, BOCs and their long distance affiliates will be able to use a single set of employees to perform OI&M services for both their local and long distance networks.
- On March 11, the FCC took another deregulatory step regarding its International Settlement policy ("ISP"). Recognizing that the U.S.-international telephone market has become more competitive, the Commission exempted a substantial number of additional routes from the ISP. This action provides U.S. carriers greater commercial flexibility to take advantage of a constantly changing global telecommunications market and will lead to more cost-based rates for consumers. The ISP was designed to ensure nondiscriminatory treatment of U.S. carriers by foreign carriers with market power and serves as a framework by which carriers negotiate commercial agreements to exchange traffic between the United States and other countries. The Report and Order lifts the ISP from benchmark-compliant routes. Since the FCC adopted its benchmarks policy in 1997, which seeks to move rates more toward costs, U.S.-international calling prices have dropped, saving U.S. consumers billions of dollars. In addition, since the FCC's 1999 examination of ISP, there have been changes in the global telecommunications market: (1) increased participation and competition in the U.S.-international marketplace; (2) decreased settlement and end-user rates; and (3) greater liberalization and privatization in foreign markets.
- FCC Chairman Michael Powell sparked a firestorm on March 10 with his suggestion that competitive local exchange carriers enter into a 30-day negotiation period with incumbent carriers for access to the incumbents' networks at market rates. "If those negotiations fail, however, I will propose to my colleagues that the FCC adopt an interim set of rules to protect against precipitous disruptions that might result after day 60 because of the

RECENT ACTIVITIES

FCC Antitrust Highlights (Continued)

court's ruling," Powell said. Powell, speaking to state regulators at a National Association of Regulatory Utility Commissioners ("NARUC") conference, said that he would work to craft an 18-month moratorium and transition period to protect existing carriers that rely on the unbundled network element platform ("UNE-P"). At issue is whether incumbent local exchange carriers, such as the regional Bell operating companies, must provide competitors access to their networks at wholesale rates. The U.S. Court of Appeals for the District of Columbia Circuit ruled March 2 that they do not, and ordered the FCC to craft new rules within 60 days. The majority of the commission directed the FCC's general counsel to appeal to the Supreme Court, a move backed by the competitive local exchange carrier industry. Thus, Powell's alternative approach drew swift and sharp reaction from officials representing competitive carriers. For additional information on this matter, see this issue of the *Sheppard Mullin Antitrust Review* at page 4.

- On March 9, the Senate Commerce Committee voted to bar the FCC from implementing its controversial media merger rules for 12 months. Attached to a bill raising fines on broadcasters that air indecent programming, the measure still requires the approval of the full Senate and the House. Yet the move was much more aggressive than expected and shows that opponents of the FCC merger rule rewrite have no plans to give up their campaign to keep the agency from loosening limits on media consolidation. The measure, which passed 13-10, also requires that the General Accounting Office examine the relationship between media consolidation and violations of indecency prohibitions during the yearlong moratorium. The FCC in June adopted a series of rules easing prohibitions on media mergers, but a federal court then ordered a delay of their implementation while it heard several challenges to the policy. The court is expected to rule by summer. While senators who support the broader indecency bill warned that House leaders would never go along with the media merger rule moratorium, other legislative observers and lawmakers expressed confidence that this measure still has a solid chance of passage despite the opposition. Consumers Union director Gene Kimmelman said the Dorgan provision expands the debate about indecency to include media consolidation, which has the support of many Republicans and Democrats in Congress. "Everybody wants the indecency bill to go to the president, so obviously it is a viable path for the media measure," he said. Observers said the order by the federal appeals court in Philadelphia to put the media rules on hold pending appeal also has the effect of softening the impact of the legislation since the court order already effectively imposes a moratorium on the regulations, at least until the court decides if the rules are legal. Congress already has succeeded in attacking the FCC decision to raise to 45% the percentage of households any single owner of television stations may reach. Lawmakers reduced the cap to 39% as part of a compromise with the White House.

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