

LATHAM & WATKINS LLP

Remedies for Monopolization

Tad Lipsky
Washington, D.C.
March 28, 2007

Essential Facilities and Mandatory Access

No Sense Pretending

- If the “essential facility” and “inability to duplicate” elements of the EFD are met, a classic declining-cost situation is likely presented
- The viability of any and every regulatory alternative becomes debatable – including “do nothing”
- Likely EFD flaw – lack of capacity could be marker for benefits of intervention
- Essential IP – where “inability to duplicate” is imposed by IP law, antitrust intervention is in tension with reward rationale

Essential Facilities and Mandatory Access

Access Remedies – Costs and Complications

- Complexities of access pricing
 - Concepts and measurements debatable – return, cost, *etc.*
- Endless evasion possibilities
 - Reluctance to build capacity and make it available
 - Reluctance to offer and transact
 - Reluctance to install, repair, *etc.*
- Sacrifices economies of integration
- Specific problems of administration through judicial/executive consent-decree enforcement
- Strategic behavior – litigate rather than innovate

Essential Facilities and Access Remedies

Nevertheless . . .

Mandatory access has benefits and deserves consideration

- Can access be dealt with through an established regulatory mechanism?

United States v. Terminal Railroad (1911) (ICC)

United States v. AT&T (1982) (FCC)

But see *United States v. Otter Tail Power* (1973) (FPC lacked authority to impose access obligation at the time)

- Is access already defined by commercial practice?

Gamco v. Providence Fruit & Produce Building (1952)

United States v. Associated Press (1945)

- Are there likely dynamic efficiencies?

United States v. AT&T – necessary for mobile/IP/broadband?

Institutional Aspects of Antitrust Remedies

The Need for Speed

- Identified sound goals are essential to success

United States v. IBM Corp.

Expanding/shifting theories and questionable procedural approach
doomed possibility of much narrower but quickly successful case

United States v. Microsoft Corp.

Per-processor license phase: complaint to decree in one year (not counting FTC phase) – provides flexibility and minimizes error cost

Broader “platform software” phase: lessons complicated by shifts in theory/remedy fit and procedural developments

United States v. Western Electric Co./AT&T Co.

Theories shifted from long-lines to equipment to local monopoly

Ultimately, coherent approach suggested workable remedy

Institutional Aspects of Antitrust Remedies

- **Legislative Role**
A perennial challenge where economic regulation is concerned
- **Administrative Regulation Role**
Reflection of the legislative challenge – unclear mandate means incoherent regulation
- **Executive Role**
Traditionally somewhat better directed in terms of policy coherence
Not immune from distractions and other agendas
- **Judicial Role**
Capacity for targeted change under specific conditions
Not immune from weaknesses of administrative regulation, distractions and other agendas

Conclusions

Successful antitrust case must have three characteristics

- Legally sound
- Based on sound economics
- Identifiable remedy that is both capable of effective administration and likely to improve consumer welfare

Identifying good candidates for structural cases

- Importance
- Long-term performance issues
- Balanced assessment of policy alternatives – do nothing, apply antitrust, “other”