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ANTITRUST: MCI v. ATT; STATE ACTION ANTITRUST IMMUNITY; AND INTRA-ENTERPRISE CONSPIRACIES

LISA ANN RUBLE*

In its 1982-83 term, the Court of Appeals for the Seventh Circuit confronted a variety of antitrust issues. This article will analyze and discuss three of the Seventh Circuit's leading antitrust decisions. First, the court's decision in *MCI v. ATT* will be examined. Following a detailed analysis of the court's lengthy opinion, this article will conclude that, although the court's analysis is sound in many respects, the court's resolution of the predatory pricing issues is unduly restrictive and will adversely affect future antitrust plaintiffs. Second, this article will examine the Seventh Circuit's decision with respect to antitrust immunity for allegedly anticompetitive activity engaged in by a municipality. This article will demonstrate that the court properly interpreted the relevant Supreme Court precedent on the subject of state action antitrust immunity and reached the correct conclusion as to how these requirements are to be satisfied in order to immunize a municipality's conduct from antitrust scrutiny. Finally, the court's decision concerning the imposition of antitrust liability for intra-enterprise conspiracies will be discussed. Although the analytical framework utilized by the court when confronting this type of issue was set forth in an earlier decision, the recent Seventh Circuit decision provides insight into the way in which the court will approach this issue in the future.

*MCI Communications Corporation and MCI Telecommunications Corporation v. American Telephone and Telegraph*

This much publicized case began on March 6, 1974, when MCI Communications Corporation and MCI Telecommunications Corporation filed suit against American Telephone and Telegraph Company seeking treble damages under Section 4 of the Clayton Act for alleged

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2. Hereinafter referred to as "MCI."
3. Hereinafter referred to as "ATT."
4. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976) provides as follows:
Any person who shall be injured in his business or property by reason of anything for-
violations of the federal antitrust laws. MCI claimed that, as a result of ATT's unlawful conduct, it had suffered damages of approximately 900 million dollars.

Following a lengthy trial, the jury found in favor of MCI on ten of the fifteen charges and awarded damages of 600 million dollars. The district court trebled this damage award, as required by Section 4 of the Clayton Act, resulting in a judgment of 1.8 billion dollars, exclusive of costs and attorneys' fees.

**Impact of Federal Regulation on ATT's Antitrust Liability**

A fundamental issue presented to the Seventh Circuit in *MCI* was the degree to which the federal regulation of ATT affected the utility's antitrust liability under Section 2 of the Sherman Act. Section 2 provides, in part, that "[e]very person who shall monopolize . . . any part of the trade or commerce among the several [s]tates . . . shall be deemed guilty of a felony . . . ." Although Section 2 does not outline the precise elements of monopolization, the Supreme Court has defined the offense of monopolization as "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Thus, a firm's status as a monopoly or its possession of monopoly power in a relevant market does not in itself render a firm guilty of illegal monopolization. In addition to possessing monopoly power, an injury may be established based on reckless disregard of antitrust laws or by showing that the defendant had a specific intent to monopolize.
it must be demonstrated that the firm embarked on a course of conduct that resulted in the maintenance of its monopoly position.\textsuperscript{11}

In its complaint, MCI charged that ATT had engaged in illegal monopolization, violative of Section 2, by misusing its monopoly power and engaging in unfair conduct designed to maintain its monopoly position in the telecommunications industry. Responding to these charges, ATT argued that its status as a regulated utility immunized it from antitrust liability.\textsuperscript{12} In denying ATT's motion to dismiss, Judge Grady rejected the proposition that ATT was entitled to antitrust immunity.\textsuperscript{13} On appeal, the Seventh Circuit approved the district court's conclusion that ATT was not immune from antitrust liability.\textsuperscript{14} The court stated that in determining whether federal regulation immunized ATT from antitrust liability the inquiry must focus on whether the activities complained of were required or approved by the FCC pursuant to its statutory authority, in a way that was incompatible with the antitrust laws;\textsuperscript{15} or whether these activities were so pervasively regulated by

\textsuperscript{11} The intent required for monopolization is general intent, rather than specific intent. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1963). General intent is defined as "the intent to perform the acts leading to the acquisition, maintenance or misuse of monopoly power." \textit{Id.} ("the completed offense of monopolization under Section 2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing'").

\textsuperscript{12} The telecommunications industry, including ATT, is regulated by the Federal Communications Commission (hereinafter "FCC"). The primary federal regulatory framework for this industry is embodied in the Federal Communications Act of 1934, 47 U.S.C. § 151 et. seq. (1976). The 1934 Act imposes upon common carriers the obligation to provide service upon request at just and reasonable rates, without unjust discrimination or undue preference. With respect to a carrier's price tariff, the Act requires that the tariff initially be generated by the carrier itself. Under Section 203(a) of the Act, the tariff must be filed with the FCC and the carrier must give the FCC ninety days notice of any proposed changes. The carrier is prohibited from charging any price or rendering any service not in accordance with a filed tariff. In addition, the FCC is authorized to conduct hearings as to the lawfulness of the rates embodied in a proposed tariff and to suspend operation of the tariff for up to five months. 47 U.S.C. § 204 (1976). If the FCC decides that the proposed tariff does not satisfy the Act's requirements, it may prescribe a "just and reasonable" substitute or establish maximum and/or minimum charges to be observed. 47 U.S.C. § 205. Any carrier which intentionally fails to obey an FCC order is liable for a fine of $1000 per violation per day. Finally, any carrier which does any act prohibited or declared unlawful by the Act is liable to all persons injured by the unlawful act for the full amount of damages plus attorney's fees. 47 U.S.C. § 206 (1976).

\textsuperscript{13} Judge Grady refused to adopt ATT's immunity on the grounds that (1) there was no indication that the Communications Act of 1934 was intended to immunize carriers from antitrust liability; (2) the FCC's regulatory scheme was not so inconsistent with the antitrust laws as to require immunity; and (3) ATT's initial decisions were motivated by business judgment and were not so heavily regulated as to remove these decisions from ATT's control. 462 F. Supp. 1072, 1086-87.

\textsuperscript{14} The Seventh Circuit recognized, as did the district court, that neither the statutory language nor the legislative history of the Communications Act indicate how the Act and the antitrust laws should be reconciled. 708 F.2d at 1102.

\textsuperscript{15} \textit{Id.} The court adhered to the well-established principle that a firm is entitled to implied antitrust immunity only in situations where the antitrust laws and regulatory scheme are plainly repugnant and "where necessary to make the regulatory scheme work." Silver v. New York Stock
the FCC "that Congress must be assumed to have forsworn the paradigm of competition." Applying these general principles, the Seventh Circuit concluded that neither ATT's interconnection decisions nor its pricing decisions were dictated or approved by the FCC. Rather, the court stated that these decisions were more the result of business judgment than regulatory coercion.

Although concluding that ATT was not entitled to immunity from antitrust liability, the Seventh Circuit found that FCC regulation was significant to an evaluation of the alleged antitrust violations by ATT. Specifically, the court stated that "the presence of a substantial degree of regulation, although not sufficient to confer antitrust immunity, may affect both the shape of monopoly power and the precise dimension of the 'willful acquisition or maintenance' of that power."

The Supreme Court has defined "monopoly power" as "the power to control prices or exclude competition" in a relevant market. In the context of an unregulated industry, courts rely on statistical data of the firm's market share to determine whether a firm maintains monopoly power. In the context of a regulated firm, however, the Seventh Circuit found such heavy reliance on statistical data misleading. Instead, the court decided to focus on the ability of a regulated firm, such as ATT, to control prices or exclude competition which, in turn required close scrutiny of the regulatory scheme in question. In this regard, the Seventh Circuit approved the district court's instructions requiring the jury to consider the federal and state regulatory constraints to which

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16. 708 F.2d at 1102 (quoting Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982)).
17. With respect to ATT's interconnection decisions, the court found that, although the FCC has the power to require interconnection, the record indicated that the FCC neither controlled nor approved ATT's actions challenged by MCI. Thus, the Seventh Circuit found ATT's reliance on Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) and Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963), misplaced, because in those cases the Civil Aeronautics Board had specifically authorized the challenged transactions thus immunizing the transactions from antitrust liability. 708 F.2d at 1103.
18. With respect to allegations of predatory pricing, the court acknowledged that ATT did not enjoy the same flexibility in making its pricing decisions as it did in making its interconnection decisions. However, the court noted that although the 1934 Act grants the FCC broad authority over rates, the FCC's practical exercise of this authority is considerably circumscribed. 708 F.2d at 1104-05.
19. Id. at 1106.
22. The court noted that many regulated firms are in a monopoly position regardless of their size. Furthermore, the court stated that "while a regulated firm's dominant share of the market typically explains why it is subject to regulation, the firm's statistical dominance may also be the result of regulation." 708 F.2d at 1107.
ATT was subject when deciding whether ATT possessed monopoly power.23

The Seventh Circuit also found that ATT’s status as a regulated utility had a bearing on the second element of the monopolization offense, i.e., the willful acquisition of monopoly power. The court firmly rejected the analysis whereby monopolistic intent is presumed if the ordinary business of a dominant firm leads to the acquisition of monopoly power.24 Declaring that ATT was entitled to a good faith defense, the Seventh Circuit approved instructions by Judge Grady requiring MCI to prove not only that ATT had committed allegedly illegal acts but also that “ATT acted with anticompetitive intent, for the purpose of maintaining a monopoly,” rather than in the good faith that to act otherwise would violate regulatory policy.

In addition to influencing the evaluation of the alleged antitrust violations, ATT’s status as a regulated utility affected the Seventh Circuit’s view of the purpose and scope of the antitrust laws in the case.25 Finding that the broader objectives of the antitrust laws had been or were being addressed by government agencies,26 the court believed it appropriate to focus upon the specific issues of economic efficiency and consumer benefit which were directly presented.27 Thus, the court’s “resolution of the allegations of predatory pricing and unlawful failure to interconnect MCI to Bell’s local distribution facilities . . . centered on the questions whether prices covered costs and whether the denied

23. The district court instructed the jury to consider the following factors in determining whether ATT possessed monopoly power in the relevant market: (1) the effect of the FCC’s regulatory authority over prices and entry, including interconnections; (2) the effect of state regulatory agencies over prices and entry in connection with provision of local services and facilities; (3) the fact that ATT may have had the largest share of the telephone business in certain areas is not sufficient to establish ATT’s monopoly power if regulation prevented ATT from having power to restrict entry or control prices. Although noting that the jury instructions could have been more detailed, the Seventh Circuit concluded that the instructions, taken as a whole, adequately apprised the jury of its duty to consider the impact of regulation on ATT’s alleged monopoly position. Id.

24. This analysis, rejected by the majority, avows that monopolistic conduct can be presumed from the possession of monopoly power unless the defendant demonstrates that its monopoly position has been “thrust upon it.” United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945). The majority argued that to apply the Alcoa presumption to the conduct of a regulated utility “would be tantamount to holding that adherence to a firm’s regulatory obligation could, by itself, constitute improper willfulness in a Section 2 monopolization case.” 708 F.2d at 1108.

25. Id. at 1110.

26. The court pointed to the consent decree entered into between the Justice Department and ATT and to the FCC’s exercise of its broad powers under the Communications Act instituting pro-competitive changes in the telecommunications industry. Id.

27. Thus, the court declined to focus upon the broader antitrust issues: “The political and social consequences of bigness or concentration of economic power.” Id.
facilities [were] essential."  

The Seventh Circuit's reliance upon the existence of parallel federal regulation, as support for its narrow approach to the antitrust questions represented in this case, seems misplaced. As noted by Judge Wood, such an argument "fails to account for the historically independent role that the antitrust laws have played in our multipolar regulatory system." Judge Wood correctly questioned the majority for relying on a seemingly simplified picture of federal regulation of the telecommunications industry and ignoring the reality that this regulatory scheme is not always cohesive. However, even accepting the majority's optimistic characterization of the government's telecommunications regulations, the existence of this regulation should not dissuade courts from "addressing the long-term problems of the market."  

The Interconnections Dispute. Denial of an Essential Facility  

Although it is true that a business is usually free to deal with whomever it pleases, a monopolist's refusal to deal with a competitor or potential competitor may, under certain circumstances, subject the monopolist to antitrust liability. One such circumstance arises when a monopolist controls an indispensable facility which cannot be duplicated easily. Under the so-called "essential facility" doctrine, "where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms." Absent valid business reasons, failure to provide access to

28. Id.  
29. Id. at 1179-80 (Wood, J., concurring in part and dissenting in part).  
30. Id. at 1180.  
31. Id.  
33. For example, a firm will be subject to antitrust liability if its refusal to deal with another business entity is motivated by a "purpose to create or maintain a monopoly." Id.  
34. Some commentators refer to the essential facilities doctrine as the "bottleneck principle." See Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv. L. Rev. 1720, 1722-25 (1974).  
35. A.D. Neale, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 67 (2d ed. 1970). See L.A. Sullivan, ANTITRUST 131 (1977). This principle of antitrust law derives from the Supreme Court's decision in United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) where the Court ruled that the owners of a railroad terminal, which represented the only feasible terminal for rail traffic, had to make the facility equally accessible to all users. The principle of Terminal R. R. Ass'n was reaffirmed by the Court in Otter Tail Power Co. v. United States, 331 F. Supp. 54, 61 (D. Minn. 1971), aff'd in relevant part, 417 U.S. 336 (1974). In Otter Tail, municipalities sought to compete with the defendant power company by building their own electric facilities. The municipalities could not afford to construct their own subtransmission lines, however, and the power company refused to "wheel" power for them over its own lines. The court found that Otter Tail's subtransmission lines were a scarce facility and that its refusal to share them violated Section 2 of
such an "essential" facility subjects the monopolist to antitrust liability in order to prevent the monopolist's control of the essential facility from further extending the firm's monopoly power.\textsuperscript{38}

On appeal, the Seventh Circuit approved the jury's finding that AT&T unlawfully denied MCI interconnection to its local distribution facilities, concluding that AT&T's refusal to provide these interconnections satisfied the test governing the denial of essential facilities. However, the court disapproved the jury's finding regarding AT&T's denial of interconnection for multipoint services. To understand fully the reasoning supporting the court's seemingly contradictory decision on the interconnection issue, it is necessary to examine briefly the circumstances and events surrounding the interconnection dispute between AT&T and MCI.

Prior to 1969, the telecommunications industry was regulated as a lawful monopoly.\textsuperscript{39} Local telephone service\textsuperscript{40} was provided exclusively by either an operating company of the Bell System or by one of approximately 1600 independent telephone companies. Long distance telephone service\textsuperscript{41} was provided by the Long Lines Department of AT&T in partnership with these operating companies.\textsuperscript{42} In 1969, how-

36. For example, the antitrust liability would not be imposed if sharing the essential facility would be too impractical or would interfere with the defendant's ability to serve its customers adequately. \textit{Hecht}, 570 F.2d at 992-93.
37. To be an essential facility, it is sufficient if the competitor is unable practically or reasonably to duplicate the facility and if denial of its use imposes a severe handicap on potential market entrants. \textit{Id.} 708 F.2d at 1132.
38. \textit{Id.} at 1093.
40. From a technical standpoint, local telephone service involves a wire connection between the telephone set and a switching machine located at a nearby telephone central office. This switching machine is connected by transmission trunks to the switching machines in other central offices located within the exchange area. When the telephone is taken off the hook, a signal is sent to the central office. The switching machine responds to this signal by sending a dial tone, enabling the calling party to dial any telephone connected to the switched network within the exchange area. \textit{Id.} at n. 8.
41. Although long distance telephone service operates in a manner similar to local service, long distance service typically involves a two-step process whereby the calling party first gains access to the local switching machine through a dial tone and then requests access to the long distance toll switching machine by dialing an area code plus the number of the person the calling person wishes to reach. If a circuit is available to handle the call, it is routed through the calling party's central office to a toll office nearby, over an intracity circuit to a toll in the city being called, and finally through the central office serving the called telephone to the telephone. \textit{Id.} at n. 9.
42. Although the network of long distance transmission facilities were owned in substantial part by Long Lines, the interexchange facilities of the local telephone companies were used, in conjunction with the Long Lines facilities, whenever required. The local exchange facilities and
ever, ATT's legally sanctioned monopoly of the telecommunications industry began to erode when the FCC approved an application, submitted by MCI,\textsuperscript{43} to construct and operate a long distance telephone system between Chicago and St. Louis.\textsuperscript{44} Following the \textit{MCI} decision, the FCC was deluged with new applications to construct and operate facilities for specialized common carrier services.\textsuperscript{45} Uncertain as to the policy implications raised by these new applications, the FCC instituted a broad rulemaking inquiry to consider these questions.\textsuperscript{46}

In June of 1971, the FCC released the results of this inquiry in the \textit{Specialized Common Carriers} decision.\textsuperscript{47} Declaring that there should be open competition in the specialized services, the FCC approved the entry of specialized carriers into the long distance telephone field.\textsuperscript{48} Unfortunately, the \textit{Specialized Common Carriers} decision "was hardly a model of clarity."\textsuperscript{49} The decision failed to define the specialized carriers to which it referred and the obligations that general carriers, such as ATT, would be required to assume to assist the new carriers.\textsuperscript{50}

The vagueness of the \textit{Specialized Common Carriers} decision led to

switching machines of the local telephone companies also were used at each end of a long distance call.

ATT used this same nationwide network to provide other intercity telephone services, such as point-to-point private lines, foreign exchange lines ("FX") and common control switching arrangements ("CCSA"). Point-to-point private lines are connections between two locations that do not require a switching machine because the lines are exclusively available to the customer on a continuing basis.

To the contrary, FX and CCSA services require interconnection with local switching machines. The distinguishing aspect of FX service is that the switching machine to which the telephone is connected is not located in a nearby telephone central office but instead located in a distant office. This type of arrangement permits the customer to make and receive calls in the distant city as though they were local calls. The FX service is used by airlines and hotel reservation agents. The CCSA service allows a customer to link distant branches via private telephone lines connected through switches in the local telephone company's office. The FTS line connecting federal government offices is an example of a CCSA type service. \textit{Id.} at 1094.

43. This application was submitted in 1963 by Microwave Communications, Inc., the predecessor corporation to MCI. In this article, as in the Seventh Circuit's opinion, Microwave Communications, Inc., and its successor corporations are referred to collectively as MCI.

44. Microwave Communications, Inc., 18 F.C.C. 2d 953, 966 (1969); 21 F.C.C. 2d 190 (1970). The FCC's decision permitted MCI to provide only point-to-point private line service that would connect two or more locations without the use of the nationwide network's switching machines. 18 F.C.C. 2d at 953-54. In addition, the FCC retained jurisdiction to order appropriate interconnection.

45. MCI filed applications to provide specialized services among more than 100 cities. Similar applications were filed by other companies. 708 F.2d at 1094.


47. 29 F.C.C.2d 870 (1970).

48. \textit{Id}. Since ATT agreed to negotiate with MCI and other new specialized carriers, the FCC deferred consideration of MCI's claim that ATT was misusing its control over local telephone service to obtain a competitive advantage over potential specialized carriers. 708 F.2d at 1095.

49. \textit{Id.}

50. \textit{Id.}
inconsistent interpretations by ATT and MCI. On the one hand, ATT interpreted the FCC's decision as authorizing only point-to-point private line services not requiring switched network connection and, therefore, requiring ATT to provide only local distribution facilities for these services.\(^{51}\) On the other hand, MCI believed that the *Specialized Common Carriers* decision authorized it to provide point-to-point private line service as well as FX and CCSA type services.\(^ {52}\) As a result, MCI contended that ATT was obliged to provide both switched network connection and local distribution facilities.\(^ {53}\)

Although MCI and ATT attempted to negotiate a permanent agreement over provision by ATT of interconnections and local distribution facilities, these negotiations proved to be unsuccessful. Failing to reach a negotiated agreement, MCI appealed to the FCC to breakdown what MCI characterized as ATT's unreasonable negotiating stance.\(^ {54}\) Responding to MCI's charges, in a letter dated October 19, 1973, the FCC stated that the *Specialized Common Carriers* decision authorized MCI to supply FX and CCSA services as well as services outside local distribution areas and multipoint services.\(^ {55}\)

Armed with express authorization from the FCC, MCI filed suit

\(^{51}\) *Id.*

\(^{52}\) See supra note 42 for a description of FX and CCSA services.

\(^{53}\) 708 F.2d at 1095. In addition, MCI asserted that ATT was required to provide the local distribution facilities at the same rate as ATT provided such services to Western Union. ATT disagreed with MCI's assertion claiming that the rate charged Western Union did not cover ATT's costs and that the price charged MCI should be set to cover ATT's current costs.

Notwithstanding their disparate interpretations of the *Specialized Common Carriers* decision, ATT and MCI agreed, in September, 1971, to interim contracts defining the type of interconnections that ATT would provide for the St. Louis-Chicago route and establishing the price for these interconnections. These contracts did not permit switched network connections nor was the price for local distribution facilities comparable to that charged Western Union. Despite these interim contracts, MCI, relying on its interpretation of *Specialized Common Carriers*, created a plan to construct and operate nationwide long distance telephone service. Beginning operation of its St. Louis-Chicago route on January 1, 1972, MCI expected its expansion program to begin by late summer of 1973. *Id.* at 1095-96.

\(^{54}\) MCI charged that ATT was unlawfully denying interconnections to switched networks for FX, CCSA and point-to-point for MCI customers located outside a local distribution area. MCI further alleged that ATT was harassing MCI in provision of local distribution facilities and charging excessive and discriminatory prices for these facilities. In response to MCI's allegations, ATT adhered to its position that MCI was authorized to provide only point-to-point services. ATT also denied MCI's charge that it was not providing local distribution facilities at a fair price. *Id.* at 1096.

Negotiations between ATT and MCI eventually broke off when MCI learned that ATT had filed interconnection tariffs with forty-nine state utility commissions that would apply equally to all carriers, including MCI and Western Union. By filing interconnection tariffs with state commissions rather than with the FCC, ATT made it more difficult for MCI to oppose the tariffs. *Id.*

\(^{55}\) In an earlier letter, dated October 4, 1973, the FCC rejected ATT's tariff filings with state utility commissions as unlawful, and asserted exclusive jurisdiction over the interconnection dispute. *Id.*
under Section 406 of the Communications Act of 1934, in the United States District Court for the Eastern District of Pennsylvania asking the court to order ATT to provide the interconnections for these services. Granting MCI’s request for a preliminary injunction, the Pennsylvania district court concluded that the Specialized Common Carriers decision required ATT to provide the necessary interconnection.\(^5\) The Third Circuit Court of Appeals reversed the decision of the district court and vacated the injunction against ATT.\(^7\) Following the Third Circuit’s decision, ATT ordered its operating companies to disconnect MCI’s customers on twenty-four hours notice.\(^5\) Seven days after ATT’s disconnection of MCI’s customers, the FCC issued a decision ordering ATT to provide the disputed interconnections.\(^5\) In its decision,\(^6\) the FCC stated that it had intended to include both FX and CCSA services within the terms “specialized” or “private line” services as those terms were used in the Specialized Common Carriers decision.\(^6\)

In MCI, the Seventh Circuit concluded that, by refusing to interconnect MCI to its local distribution facilities, ATT unlawfully had denied essential facilities to MCI. Analogizing to the Supreme Court’s decision in Otter Tail Power Co. v. United States,\(^6\) the court correctly


\(^7\) MCI Communications Corp. v. American Telephone & Telegraph Co., 496 F.2d 214 (3d Cir. 1974). The Third Circuit concluded that there was a legitimate dispute over whether certain kinds of interconnections were ordered. Thus, the court decided that, since the Specialized Common Carriers decision was sufficiently unclear, the dispute should be deferred to the FCC under the doctrine of primary jurisdiction.

\(^5\) MCI alleged that the disconnection caused turmoil among its customers and seriously damaged its reputation for reliable service. 708 F.2d at 1097. At trial, the jury found that ATT unlawfully disconnected MCI’s customers for the purpose of keeping MCI out of the market or limiting MCI’s ability to compete with ATT. On appeal, the Seventh Circuit approved the jury’s finding on the disconnection charge. Id. at 1145.

\(^5\) Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C.2d 413, aff’d sub nom Bell Telephone Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

\(^5\) 46 F.C.C.2d at 425-27.

\(^5\) Following the resolution of the interconnection dispute, MCI filed a tariff with the FCC for metered use private line service. The tariff was designed to permit MCI to provide ordinary long distance service. Refusing to permit MCI to provide ordinary long distance service, the FCC stated that its decision in Specialized Common Carriers permitted MCI to provide only private line service. MCI Telecommunications Corp., 60 F.C.C.2d 25, 35-44, 58 (1976). The Circuit Court of Appeals for the District of Columbia reversed the FCC’s decision, holding that the FCC failed to conduct sufficient hearings to justify any limitation on the operating authority of MCI or any other specialized carrier. MCI Telecommunications Corp. v. F.C.C., 561 F.2d 365, 378-80 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). The decision of the Court of Appeals effectively mooted the six-year debate between MCI and ATT over the proper interpretation of the Specialized Common Carriers decision and the services to which the decision applied.

\(^6\) 410 U.S. 366 (1973). In Otter Tail, the Supreme Court affirmed a district court decision which held that the refusal of a regulated electric utility to sell power or to transmit power,
determined that ATT’s conduct satisfied the test governing the denial of essential facilities.63 First, ATT commanded complete control over the local distribution facilities. Second, the interconnections were essential for MCI to offer FX and CCSA services because MCI could not duplicate ATT’s local distribution facilities.64 Third, there was no legitimate business or technical reason supporting ATT’s denial of the requested interconnections.65 Finally, MCI did not request preferential access to the facilities.66 In light of the foregoing circumstances, the Seventh Circuit’s approval of the finding that ATT’s conduct constituted an illegal act of monopolization was unavoidable.

Although the Seventh Circuit upheld the jury’s finding that ATT unlawfully refused to interconnect MCI with the local distribution facilities,67 the court disapproved the jury’s finding that ATT unlawfully denied MCI interconnections for multipoint service.68 First, the court found that, as a matter of law, MCI’s evidence was insufficient to support the jury’s finding that ATT denied multipoint interconnections with the intent to monopolize.69 The court concluded that the evidence presented at trial was insufficient to permit a finding that interconnection for multipoint service involved “essential services”70 or, alternatively, that ATT’s denial of interconnection was primarily motivated by purchased from other sources, to municipalities which had chosen to own their own distribution systems violated Section 2 of the Sherman Act.

63. 708 F.2d at 1133. For discussion of the essential facilities doctrine see supra note 37 and accompanying text.

64. Noting that it would not be economically feasible for MCI to duplicate ATT’s local distribution facilities, the court concluded that regulatory authorization could not be obtained for such an uneconomical duplication. Id.


66. 708 F.2d at 1133.

67. Id. at 1132-41.

68. An example of multipoint service is as follows: ATT provided a private line service to a customer between cities A and B. MCI sought an interconnection in city B between its own line and ATT’s line so that MCI’s customer in city C could have uninterrupted service between cities A and C. Id. at 1147.

MCI claimed that its ability to compete in the market for cities B and C was substantially undermined if MCI was not permitted to offer its customers service to other cities which MCI did not serve. In response, ATT charged that multipoint interconnections allowed MCI to provide service MCI could not reach itself with its existing equipment although, in fact, MCI was authorized to construct the facilities necessary to provide the service. Id. at 1147-48.

69. Id. at 1148.

70. The court pointed out that although MCI’s principle witness on interconnection testified as to the impracticability of duplicating ATT’s local distribution facilities, the witness failed to address the practicality of duplicating the private long distance service with which MCI had requested to be interconnected for multipoint service. Id.
an illegal intent to monopolize. Second, the court held that the jury could not have reasonably found, based upon the instructions it received, that ATT's refusal to provide interconnections violated the FCC's decision in *Specialized Common Carriers* and thus evidence of the intent necessary for antitrust liability. In the court's view, the jury instructions given for the multipoint service claim, unlike those given for the claims regarding interconnection to ATT's local distribution facilities, failed to instruct the jury as to the relevance of the FCC's determinations, if any, on the subject. As a result of the inadequate jury instructions and insufficient evidence, the court set aside the jury's finding of liability and held that ATT was not liable for refusing to provide multipoint interconnections.

The Seventh Circuit's treatment of the jury's finding regarding ATT's denial of multipoint interconnections is perplexing. Although the court arguably was correct in finding that multipoint interconnections do not involve "essential services," the jury's finding that ATT's denial of such interconnections was motivated primarily by an illegal intent to monopolize is neither clearly erroneous nor unsupported by the evidence. In support of its decision to set aside the jury's finding of liability, the court seems to have determined that ATT could be liable for denial of multipoint interconnections under a theory that ATT's denial was sufficient evidence of monopolistic intent only "if the FCC had authorized or mandated multipoint interconnections." This requirement of express federal regulatory instruction as a precondition to the imposition of antitrust liability is troublesome. Since federal regulations did not preclude ATT from providing multipoint interconnection and since the FCC had indicated that MCI was authorized to

71. Although acknowledging that antitrust liability may be imposed when a monopolist's refusal to deal with a competitor represents an illegal intent to destroy competition, the court concluded that, given the unsettled regulatory status of the telecommunications industry at the time of these events, insufficient evidence was presented to support a finding of liability against ATT. Instead the court found "that AT&T could only have been liable for denying multipoint interconnections under a theory that this denial was sufficient evidence of monopolist intent, if the FCC had authorized or mandated multipoint interconnections." *Id.* at 1149. (emphasis in original). The court found no such FCC authorization and, therefore, refused to impose antitrust liability.

72. 29 F.C.C.2d 870 (1970).

73. 708 F.2d at 1149-50.

74. The district court's instructions essentially stated that to impose antitrust liability, MCI must have demonstrated that ATT unreasonably denied the multipoint interconnections with the intent of maintaining a monopoly. *Id.*

75. *Id.* at 1150.

76. For a discussion of what services represent "essential services," see supra note 37 and accompanying text.

77. 708 F.2d at 1149 (emphasis in original).
provide multipoint service, the relevant inquiry properly should focus on whether ATT's refusal to provide multipoint interconnection was motivated by an intent to retain its monopoly position and whether ATT's conduct manifested an unreasonable anticompetitive impact.

**Predatory Pricing**

In addition to the interconnection dispute, a source of controversy between MCI and ATT centered on the prices charged by ATT for its long distance specialized services, Telpak and Hi-Lo. Specifically,

78. In a letter dated October 19, 1973, the FCC stated that the *Specialized Common Carriers* decision authorized MCI to provide multipoint service. *Id.* at 1097.

79. ATT's Telpak tariff offered private line service to large users under two schedules. Under the first schedule, the user could obtain up to 60 circuits between any two points for an average cost of $.50 per circuit mile per month, whereas under the second schedule, the user could obtain up to 240 circuits between any two points for an average cost of $.35 per circuit miles per month. For a detailed description of Telpak and the way in which it operates, see *American Trucking Associations, Inc. v. FCC*, 377 F.2d 121, 124-27 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

Shortly before MCI was authorized to enter the telecommunications industry, ATT was permitted to raise its Telpak rate. 708 F.2d at 1098. Similarly, during the period between 1969 and 1972, ATT obtained FCC approval for two additional rate increases. *Id.* Although MCI claimed before the FCC that ATT's Telpak tariff was predatory, the FCC firmly rejected these charges against the tariff. AT&T, Revisions of Tariff F.C.C. No. 260 Private Line Services, Series 5000 (Telpak), 64 F.C.C.2d 971, 983-89 (1977), aff'd sub. nom. Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1223 (D.C. Cir. 1980), cert. denied, 541 U.S. 920 (1981).

80. ATT's Hi-Lo tariff divided ATT's individual private line service into two principal rate categories. Under Hi-Lo, ATT intended to lower its rates on specific "high density" long distance routes, many of which MCI planned to service, and, at the same time, raise its rates on "low-density" routes, most of which MCI was not intending to serve. 708 F.2d at 1099. In February, 1973, ATT announced Hi-Lo to the public and sought permission from the FCC to file the new tariff. ATT's announcement of Hi-Lo came one month after MCI had announced its plans and prices for nationwide service. Although announcing the tariff in February, 1973, ATT did not receive permission to file the Hi-Lo tariff until November 15, 1973 and the new tariff did not become effective until June 13, 1974. *Id.*

At trial, MCI argued that ATT unlawfully preannounced its Hi-Lo service. According to MCI, if Hi-Lo was in fact predatory, ATT could maintain its monopoly without incurring any loss by simply announcing the Hi-Lo tariff and then delaying its implementation—thus discouraging ATT's customers from switching to MCI's more economical services during the fifteen month period between Hi-Lo's preannouncement and its effective date. MCI further contended that, by preannouncing Hi-Lo, ATT knowingly misled the public that the new tariff would be implemented without "undue delay" when, in fact, ATT's actions substantially contributed to the fifteen month period between the time the tariff was announced and when it was implemented.

On appeal, the Seventh Circuit disapproved the jury's finding that ATT unlawfully preannounced its Hi-Lo service. Stating that ATT's announcement of its Hi-Lo tariff could amount to an exclusionary practice only if it was found to be knowingly false or misleading, *see Berkley Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287-88 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), wherein the Seventh Circuit found that neither the tariff filed with the FCC nor ATT's conduct were deliberately deceptive or misleading. Rather, the court stressed that any delay in the tariff's implementation was due to ATT's voluntary extention at the request of the FCC. Thus, the Seventh Circuit decided that, based on the evidence presented, the trial court erred in failing to direct a verdict in favor of ATT. 708 F.2d at 1128-30.

Judge Wood disagreed with the majority's conclusion that the evidence was insufficient to establish that ATT unlawfully preannounced Hi-Lo. In Judge Wood's view, MCI's evidence of ATT's predatory intent which included internal ATT documents showing that, even before the
MCI charged that ATT illegally maintained its monopoly power by engaging in predatory pricing of its Telpak and Hi-Lo services. At trial, the jury found that Telpak was priced lawfully but that Hi-Lo’s price was predatory since its price was below its fully distributed cost. On appeal, the Seventh Circuit approved the jury’s finding with respect to Telpak, but disapproved the Hi-Lo finding of predatory pricing as well as the cost standard used in the jury instruction.

Although the Supreme Court has yet to define the term “predatory pricing,” a firm is said to engage in this type of illegal activity where it “foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits.” This type of price-cutting, to points necessary to suppress competition, has long been considered an unfair method of competition and an act of monopolization violative of the Sherman Act.

At trial, a crucial issue concerned what cost standard, if any, should be used to determine whether ATT’s prices were predatory. ATT argued that unless its prices were below the services’ long-run incremental costs, the prices were not predatory. Conversely, MCI contended that proof that prices were below the services’ fully distributed costs was sufficient to establish predation. At trial, Judge Grady refused to instruct the jury as to which cost standard, LRIC or FDC, tariff filing in February, 1973, ATT planned a voluntary extension of the effective date until March, 1974, was sufficient to create a jury question as to whether ATT’s tariff announcement was predatory. Emphasizing that the jury was correctly instructed as to the necessary elements of a predatory act, Judge Wood properly admonished the majority for replacing the jury’s findings with its own. 708 F.2d at 1130-31.

On appeal, MCI argued that even if Telpak was lawfully priced, the jury should have been instructed to consider whether ATT maintained its monopoly by marketing its Telpak service in a manner that excluded competition. Specifically, MCI contended that Telpak’s marketing, whereby ATT offered larger bundles of circuits at lower prices, encouraged customers to obtain larger bundles, even if they did not need all the circuits immediately, and thereby discouraged customers from purchasing MCI’s services. The Seventh Circuit firmly rejected MCI’s argument holding that in the absence of predatory pricing, the volume pricing of Telpak represented no violation of the antitrust laws. 708 F.2d at 1130-31.

Recently, a group of commentators has adopted the position that pricing should not be considered predatory unless the price is below cost. See Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975) (advocating the view that firms should not be held liable for predatory pricing unless its pricing is below marginal cost).

Long-run incremental cost (hereinafter “LRIC”) is defined as the average cost, including fixed costs, of adding an entire new service or product.

In the case of a multiproduct firm, fully distributed cost (hereinafter “FDC”) is defined as
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was the proper legal standard to determine predatory pricing, instead leaving this choice for the jury. 89

On appeal, the Seventh Circuit reversed the decision of the district court, stating that the selection of the proper legal cost standard is a question of law to be determined by the judge. 90 In the court's view, judicial instruction on the proper cost standard is imperative since a finding of below-cost pricing permits the presumption of anticompetitive intent. 91

In addition to not permitting the jury to select the cost standard used to measure predatory pricing, the Seventh Circuit refused to adopt the proposition that a determination of predation may be based on any type of subjective evidence. 92 Characterizing predatory pricing as an exception to general antitrust law, the court rejected the use of a subjective test because such a test: (1) is incapable of distinguishing between price costs that further competition and those cuts which do not; and (2) cannot identify which pricing decisions result from sound business judgment and those which serve no legitimate business purpose other than to reduce competition. 93 The court was further concerned that use of a subjective test would make it difficult for a firm to ascertain what price reductions may be legally undertaken. The court declared that such uncertainty would undermine economic efficiency and consumer welfare, the goals of the antitrust laws. 94 Rather, the court concluded that the goals of the antitrust laws would be furthered if a determination of predatory pricing was made by comparing the prices charged with a properly defined measure of the cost of production. 95 In adopting an objective test to determine predation, the court emphasized that price cuts by a dominant firm are lawfully competitive if prices remain above costs. 96

Having confined the determination of predation solely to the inquiry of whether ATT's prices exceeded the services' costs, the critical

the average additional total cost per unit of adding an entire new product or service, including an aliquot portion of the entire firm's embedded or historical costs.

89. 708 F.2d at 1111.
90. Id. at 1111-12. In addition to stating generally that the courts and commentators regard the selection of a cost standard as a question of law, the Seventh Circuit relied on the decision in Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 87 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982), as support for its conclusion.
91. 708 F.2d at 1111.
92. Id. at 1112-13.
93. Id.
94. Id. at 1113 (quoting Sherer, Predatory Pricing: An Evaluation of its Potential for Abuse Under Government Procurement Contracts, 6 J. CORP. L. 531, 539 (1981)).
95. 708 F.2d at 1113. See infra note 13.
96. 708 F.2d at 1114.
question was what represented the proper standard to measure ATT's cost. At trial and on appeal, ATT argued that LRIC\textsuperscript{97} was the proper cost standard to measure predation, whereas MCI contended that FDC\textsuperscript{98} was the legally relevant standard. Although characterizing LRIC and FDC as arguably different ways of defining ATC,\textsuperscript{99} the Seventh Circuit determined that FDC was not a relevant definition of ATC in an antitrust context.\textsuperscript{100} Rather, in the court's view, LRIC was the appropriate cost standard\textsuperscript{101} by which to measure predation in the context of a multi-product firm, such as ATT, because LRIC, unlike FDC, only measures costs that are casually related to the product or service in question.\textsuperscript{102}

\textsuperscript{97} For a definition of LRIC, see \textit{supra} note 87.

\textsuperscript{98} For a definition of FDC, see \textit{supra} note 88.

\textsuperscript{99} On appeal, the court stated that the district court incorrectly equated LRIC with average variable cost. Variable costs include costs for materials, fuel, maintenance, labor, etc. Average variable cost (hereinafter "AVC") equals the sum of all variable costs divided by the units of output. AVC is a short-run cost measure whereas LRIC is a long-run cost measure. Thus, LRIC measures all the costs of adding a new service (fixed as well as variable cost) whereas AVC measures only variable costs. Similarly, the Seventh Circuit found that the district court inaccurately equated FDC with average total cost (hereinafter "ATC"). ATC is the sum of all costs (fixed and variable) divided by all units of output. The court noted that, in the context of a multiproduct firm, FDC and LRIC both are ways of defining ATC. 708 F.2d at 1116.

\textsuperscript{100} The court found that, for a multiproduct firm, ATC is not an adequate measure of total cost because the total number of the units produced by such a firm include many different products each with different costs, price and sales data. Instead, in the context of a multiproduct firm, it is necessary to determine what costs are caused by which products and services and this determination requires an incremental methodology.

In the court's view, FDC cannot purport to identify which costs are caused by which product. In addition, by using historical cost rather than current cost, FDC is not relevant to a firm's decision to enter a market and price products. \textit{Id.}

\textsuperscript{101} The court chose the LRIC method because it is based on the relation of cause and effect between the product involved and the costs it produced. \textit{Id.} at 1119-23.

\textsuperscript{102} In discounting the relevancy of FDC, the court emphasized that FDC is an arbitrary allocation of costs among different services and products and is therefore incapable of identifying which costs are caused by which product. In the court's view, the inability to isolate each service's cost was fatal to the use of FDC as a cost measure because, in the context of a multiproduct firm such as ATT, it is necessary to determine what costs are caused by which products and services. \textit{Id.} at 1116.

The court also objected to the use of FDC as a measure of cost for antitrust purposes because it relies on historical or embedded costs. According to the court, current and anticipated costs, not historical costs, are relevant to a firm's decision to enter markets and price products and, therefore, these present costs must be the focus of a proper cost measure. In the court's view, historical costs are irrelevant because those costs are already "sunk" and, therefore, are unaffected by a new production decision. \textit{Id.} at 1116-17.

Finally, the court explained that, since FDC established a price floor above incremental cost, use of this cost measure would create a "price umbrella" shielding less efficient firms from full price competition. In the court's view permitting less efficient firms to remain in the market would result in a misallocation of resources "and force consumers to pay more for less production than competition would dictate." \textit{Id.} at 1117.

By selecting LRIC as the appropriate cost standard, the Seventh Circuit also rejected MCI's argument that the FDC methodology was required to prevent ATT from subsidizing its competitive services with revenues derived from services in which it retains a monopoly. MCI contended that such "cross-subsidization" injures ATT competitors as well as ATT customers because the
Despite its lengthy discussion of the legally proper cost standard, the Seventh Circuit disapproved the Hi-Lo finding of predation on the ground that MCI failed to produce sufficient evidence to create a jury question that Hi-Lo was priced below any cost standard.\textsuperscript{103} Even assuming MCI's evidence was designed to show that under the FDC method ATT's "private line telephone" was returning less than ATT's overall cost of capital, the court found that MCI's attempted demonstration was defective for lack of specificity and explanation of key elements.\textsuperscript{104} The court stated that the summary nature of MCI's proffered evidence made it very difficult for the jury to determine the basis of the evidence, concluding that the jury's finding of predatory pricing could not be sustained.\textsuperscript{105}

Judge Wood dissented from the majority's predatory pricing holding. Although agreeing with other portions of the majority's decision affirming ATT's liability, Judge Wood unequivocally rejected the majority's exclusive reliance on a cost-based standard to determine predatory pricing.\textsuperscript{106} Labelling the majority's cost-based standard as a "mechanical test" which would create "safe harbors" for monopoly firms, Judge Wood argued that a determination of predatory pricing must include an evaluation of a broad range of factors.\textsuperscript{107} Declining to}

monopoly's customers will be required to pay higher prices to subsidize the less profitable private line service. The Seventh Circuit concluded, however, that cross-subsidization is not a basis for imposing antitrust liability. Noting that different profit rates for different services reflect the realities of a competitive market, the court found that MCI's argument ignored the fact that when ATT offers a new service, its inattributable overhead costs do not increase and, therefore, any additional revenues produced by the new service exceed all additional costs and provide a contribution to the firm's common costs otherwise borne by the firm's existing customers. \textit{Id.} at 1123.

\textsuperscript{103} \textit{Id.} at 1125.

\textsuperscript{104} Specifically, the court stated that MCI's evidence failed to explain: (1) the reasons why FDC was selected as a cost method; (2) how ATT's cost studies were adjusted to produce the revenue deficiencies set forth in MCI's evidence; (3) percentage used to calculate ATT's cost of capital rate and what ATT plant items were attributed to private line services for purposes of calculating capital costs; and (4) what were ATT's normal operating business expenses. In addition, the court found MCI's evidence deficient for failing to isolate the revenues of the various private line services. \textit{Id.} at 1127.

\textsuperscript{105} \textit{Id.} at 1128.

\textsuperscript{106} \textit{Id.} at 1176 (Wood, J., concurring in part and dissenting in part). Besides refusing to adopt the majority's objective test to determine predation, Judge Wood also refused to hold that MCI failed to present sufficient evidence to sustain the jury's findings of predatory pricing. Concluding that MCI had presented sufficient evidence, Judge Wood stated that, "within the parameters of our decisions in \textit{Chillicothe} and \textit{National Dairy Products}, and with the guidance of \textit{Borden, Inc. v. FTC}, there was evidence of pricing below FDC accompanied by predatory intent sufficient to sustain a finding of predatory pricing." \textit{Id.} at 1184 (Wood, J., concurring in part and dissenting in part). Stressing that the evidence was sufficiently detailed to permit the jury to draw inferences therefrom, Judge Wood objected to the majority's "mathematical scrutiny of the evidence, a practice which, in the dissenter's view, will make recovery for antitrust violations virtually impossible in many cases." \textit{Id.} Judge Wood correctly noted that the majority's attack on the sufficiency of the evidence presented by MCI undermines the function of the trier of fact in antitrust cases.

\textsuperscript{107} In Judge Wood's view, the majority decision represented a retreat from the Seventh Cir-
adopt the majority’s limited objective approach, Judge Wood declared that “[i]f you really wanted to know what caused the unsavory flavor of the monopoly broth, you would not just audit the chef’s books of account; you would also take a look at his recipe.”

Judge Wood’s criticism of the court’s reliance on an objective test to determine predatory pricing is well taken. In adopting an objective measure of predation, the court refused to accept the position, advanced by various courts, that a price should be considered predatory if its anticipated benefits depend on the price’s tendency to eliminate competition and thereby enhance the firm’s long-term ability to reap the benefits of monopoly power. Disavowing this proposition, the Seventh Circuit found that such a rule would tend to freeze the prices of dominant firms thereby robbing consumers of the benefits of price reductions by dominant firms facing increased competition. Thus, the court’s adoption of an objective measure of predation appears to rest on the assumption that the antitrust laws are concerned primarily, if not exclusively, with advancing consumer welfare and that the focus of the predatory pricing inquiry is confined properly to whether a firm’s prices promote market efficiency.

By emphasizing the ideals of consumer welfare and market efficiency, the court appeared to ignore that antitrust laws are intended to promote competition. Indeed, the goal of promoting competition is

circuit’s decision in Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 430 (7th Cir. 1980), in which the court expressed its intention to consider a wide range of factors in determining predatory pricing. Judge Wood also pointed to decisions of the Sixth, Ninth and Tenth Circuits as supporting his position that an evaluation of predatory pricing must not be based exclusively on a comparison of cost and price. See Borden, Inc. v. FTC, 674 F.2d 498, 515 (6th Cir. 1982) cert. granted, 103 S. Ct. 2115 (1983); Williams Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1982), cert. denied, 103 S. Ct. 58 (1982); Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.) cert. denied, 434 U.S. 879 (1977).

108. 708 F.2d at 1177 (Wood, J., concurring in part and dissenting in part).
109. Although indicating that its adoption of an objective test did not intend to preclude the examination of non-economic evidence in all cases, the court nevertheless concluded that a strong presumption of legality attached when a price is shown to be above LRIC and, therefore, predatory intent may not be inferred unless the price is below LRIC cost. Notwithstanding this cursory reference to the possibility of considering non-economic evidence, Judge Wood correctly noted that a restrictive (and probably most accurate) reading of the court’s opinion suggests that proof of unlawful predatory intent could not be established solely on the basis of non-economic evidence.
111. 708 F.2d at 1114.
112. Id. at 1177-78 (Wood, J., concurring in part and dissenting in part).

However, even accepting the MCI court’s assumption that consumer welfare is the primary
particularly keen when the alleged illegal conduct is predatory pricing. As noted by the court in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, predatory pricing exists "when the justification for the price is based not on its tendency in minimizing losses, but on its tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses." By relying solely on an objective measure of predatory pricing, the *MCI* court seems to assume that competition cannot be eliminated if a monopolist prices above cost. Such an assumption is ill-founded and ignores the realities of the marketplace. There may be many situations when a monopolist may price its product or service above cost and still eliminate or deter competition. One such circumstance would arise when a monopolist initially reduces its prices when a potential competitor first enters the market and then subsequently raises its prices when the threat of competition recedes. The difficulty in emphasizing the relationship between cost and price in such a circumstance is that the threat to competition and the general welfare is not found by comparing the firm's prices and costs. Instead, predatory conduct may be found by examining "the responsiveness of pricing to changing competitive developments." Hence, by goal of the antitrust laws, it is doubtful whether this goal is served, especially in a monopoly context, by the court's narrow objective inquiry into alleged predatory conduct. As stated by Judge Wood, "it would require a leap of faith in order to conclude that such efficiency is synonymous with actual consumer benefits, the avowed goal of the majority." *See infra* notes 115-122 and accompanying text.

114. 668 F.2d 1014, 1035 (9th Cir. 1982), cert. denied, 103 S. Ct. 58 (1982).

115. For example, by lowering its price just prior to the entry of new competition, a monopoly firm could effectively threaten new competition before the potential competitor even has an opportunity to enter the market. 708 F.2d at 1177 (Wood, J., concurring in part and dissenting in part). *See* Scherer, *Predator Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 2 (1979) (hereinafter cited as Baumol); Campbell, *MCI v. AT&T—The Predatory Pricing Debate*, 64 CHGO. BAR REC. 272, 278 (1983).

The court in *Borden, Inc. v. FTC*, 674 F.2d 498 (6th Cir. 1982), cert. granted, 103 S. Ct. 2115 (1983), was presented with another example of the way in which a monopolist may price above cost and yet still engage in predatory conduct. *Borden* involved a monopolist's use of differential pricing of its product, ReaLemon, to deter competitors in selected geographic markets where competition existed. Borden initiated price changes only when competitors began to encroach successfully on Borden's business; the price reduction occurred in markets where costs were higher and, thus, where prices should have been higher. Thus, Borden was able to conclude realistically that it could draw on profits from non-competitive markets, to offset the short-term losses incurred in the markets where it reduced prices, until the threat of competition subsided and prices again were increased. *Id.* at 513-14. In *Borden*, the Sixth Circuit upheld the FTC's determination that the totality of circumstances showed that the monopolist illegally undermined competition by manipulating costs and prices between markets where competition existed and those where competition did not exist, notwithstanding the fact that all Borden's prices were above average variable cost.


117. *Id.*

118. *Id.* Professor Baumol suggests the following as a possible analysis to be used in preda-
focusing the predatory pricing inquiry solely upon whether a firm's prices exceed its costs, the MCI court diverts attention away from the fundamental issue presented when predatory pricing is alleged; namely, whether the defendant's conduct has unlawfully injured, deterred or eliminated competition.119

The proper type of analysis required to determine whether predatory pricing exists includes an examination of both objective and subjective evidence.120 As correctly noted by Judge Wood, the danger in attaching a conclusive presumption to a cost-based standard "is the resultant tendency to ignore the more subtle ways in which monopoly power can be exploited to the detriment of both competitors and consumers."121 The MCI court failed to recognize that predatory pricing intrinsically involves a monopolist's corporate strategy and, therefore, a determination of whether conduct is predatory demands an evaluation of both objective and subjective evidence.122 Consequently, although the Seventh Circuit's objective, cost-based measure of predation is a relatively simple test for courts to apply, exclusive reliance on cost statistics does not go very far to prevent the evils inherent in predatory conduct.

The Noerr-Pennington Doctrine

Under the Noerr-Pennington doctrine, activities are immune from antitrust scrutiny when the purpose of the activities is to influence go-

119. The approach of the Sixth Circuit in Borden, Inc. v. FTC 674 F.2d 498 (6th Cir. 1982), cert. granted, — U.S. — (1983), and the Ninth Circuit in William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1982), cert. denied, 459 U.S. 8 (1982), is the most effective approach to determine whether a firm has engaged in predatory conduct. In Inglis, the Ninth Circuit stated that, when evaluating an allegation of predatory pricing, the inquiry properly should focus on what a rational firm would have expected its prices to accomplish. Id. at 1034. The flaw in the Seventh Circuit's objective approach to the issue of predatory pricing is that it fails to take into account the subjective corporate strategy supporting the firm's pricing decision.

120. The following are types of subjective evidence which a court properly should consider. First, a suspicious pattern of price reduction geared only to a firm's competitive markets, combined with evidence that the firm attempted to offset the revenue loss by increasing revenues from areas. See Borden, Inc. v. FTC, 674 F.2d 498, 513-14 (6th Cir. 1982) cert. granted, 103 S. Ct. 2115 (1983). Second, evidence that a firm took great pains to discover a competitor's weaknesses and then concentrated its resources to exacerbate the weakness and inflict damage on the competitor. See National Dairy Product Corp. v. FTC, 412 F.2d 605, 618-19 (7th Cir. 1969). Third, statements made by key corporate personnel expressing a plan to inhibit or damage competition. 708 F.2d at 1183-84 (Wood, J., concurring in part and dissenting in part).

121. Id. at 1181 (Wood, J., concurring in part and dissenting in part).

122. See supra notes 115-18 and accompanying text.
ernment action.\textsuperscript{123} Since the doctrine's purpose is to reconcile the antitrust laws with the right to petition the government protected under the First Amendment, the \textit{Noerr} immunity applies only if the attempt to influence government action is made in good faith and, therefore, does not extend to "sham litigation."\textsuperscript{124} In \textit{MCI}, the Seventh Circuit was called upon to define the type of activity included under the term "sham litigation."

At trial, MCI argued that ATT filed tariffs with forty-nine state regulatory commissions in bad faith as part of a continuing effort to deny MCI interconnections for local distribution facilities. MCI further contended that these tariffs were sham proceedings since, at the time the tariffs were filed, ATT knew that the state commissions lacked jurisdiction over long distance interconnection matters. The jury agreed with MCI and found that ATT had filed these state tariffs in bad faith and as an act in willful maintenance of its monopoly position. On appeal, ATT argued that its activity merely involved the petitioning of the government which was protected under the First Amendment and it was therefore immune from antitrust liability. ATT further contended that the scope of the "sham litigation" exception was limited to a pattern of baseless, repetitive claims.\textsuperscript{125} Since no such pattern was shown in this case, ATT argued that its state tariff filings were immunized, as a matter of law, under the \textit{Noerr-Pennington} doctrine.

Rejecting ATT's narrow interpretation of the sham exception, the Seventh Circuit found that instituting even one baseless claim is devoid of constitutional significance and not entitled to immunity from antitrust scrutiny.\textsuperscript{126} Analogizing sham litigation to the common law tort of malicious prosecution and abuse of process, the court concluded that MCI had presented sufficient evidence to allow the jury to reasonably infer that ATT had filed its state tariffs solely for the purpose of undermining negotiations with MCI. Accordingly, the court held that the tariff filings were not immune from antitrust liability under the \textit{Noerr-Pennington} doctrine.\textsuperscript{127}

The Seventh Circuit's refusal to immunize ATT's state tariff filings

\textsuperscript{123} This immunity was first enunciated by the Supreme Court in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and restated by the Court in United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).


\textsuperscript{125} ATT based its argument on \textit{California Motor Transport Co.}, 404 U.S. at 513, in which the Court specifically mentioned repetitive, baseless claims as an example of sham litigation.

\textsuperscript{126} The court believed that the rationale set forth in \textit{California Motor Transport} was not so limited. 708 F.2d at 1155.

\textsuperscript{127} \textit{Id.}
from antitrust scrutiny is well-founded. First, MCI presented sufficient evidence from which the jury reasonably could infer that ATT's purpose in filing the tariffs was to maintain its monopoly position. Second, the court properly rejected ATT's attempt to confine the scope of the "sham litigation" exception to only those situations where a pattern of baseless claims is alleged. As noted by the court in *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, the sham litigation exception "reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the First Amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor." In such a circumstance, since the challenged activity does not represent genuine petitioning activity, the antitrust laws are not suspended and continue to prohibit monopolistic conduct. Since the antitrust laws remain in full force, the sham activity will be prohibited if it represents conduct violative of the antitrust laws, regardless of whether the activity consists of a single claim or a series of claims. By recognizing that the sham litigation exception properly applies regardless of the number of claims involved, the Seventh Circuit has adopted a well-reasoned approach to the issue of antitrust immunity under the *Noerr-Pennington* doctrine.

**Damages**

At trial, MCI claimed that it had been damaged in the amount of $900 million as a result of ATT's alleged unlawful conduct. MCI's proof of damage centered on a lost profits study which sought to calculate the difference between the revenues received by MCI as damaged by ATT's unlawful acts and those revenues which could have been expected if MCI had not been injured. The jury, upon finding liabil-

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128. The evidence presented by MCI, including testimony of an FCC official, ATT internal memoranda and previous positions taken by ATT before the FCC, supported the jury's finding that ATT filed its state tariffs solely for the purpose of maintaining its monopoly position. *Id.* at 1157-58.

129. 690 F.2d 1240, 1254-55 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983).

130. *Id.* at 1255.


132. The data for the "damaged" MCI was derived from the corporation's actual operating figures plus projections into the future. 708 F.2d at 1160.

133. The data for the "undamaged" MCI purportedly came from the corporation's original
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ity on ten of the fifteen alleged acts of monpolization, returned a verdict in favor of MCI in the amount of $600 million, which was trebled to produce a damage award of 1.8 billion. On appeal, ATT challenged the jury award on the ground that the lost profits study was based on unsupportable assumptions not in the record\(^\text{134}\) and failed to separate the injury caused by lawful competition from that caused by unlawful conduct. In support of its proof of damage, MCI argued that the case law does not require an antitrust plaintiff to disaggregate its injury once injury has been established. MCI further contended that the specific assumptions contained in its study were supported by the evidence.

It is well settled that in order to recover damages an antitrust plaintiff must prove that his damages were caused by the defendant’s unlawful acts.\(^\text{135}\) Once causation has been established, proof of what damages were caused by which specific unlawful act is not required.\(^\text{136}\) The case law makes clear, however, that the damages must reflect only the losses directly attributable to the unlawful conduct.\(^\text{137}\)

The Seventh Circuit rejected MCI’s proof of damage, based on its lost profits study on the ground that it improperly attributed all losses to ATT’s illegal acts, despite the presence of other significant factors.\(^\text{138}\) In the court’s view, this infirmity in the evidence prevented the jury from making a reasonable estimate of the amount of damage. Specifically, the court determined that MCI’s profit study failed to establish any variation in its result depending on which of ATT’s acts were held to be legal or illegal.\(^\text{139}\) The Seventh Circuit found that, since “a major

business plans. \textit{Id.} After the difference between the anticipated and realized revenue was calculated, the differentials in income were reduced to present value using MCI’s estimated cost of capital. The study indicated that MCI’s losses equalled $452,215,000. This figure was adjusted to $900,000,000 to produce an after-tax result to MCI equal to the alleged financial losses.\(^\text{134}\)

Specifically, ATT alleged that MCI could not have obtained a market share of 37 million circuit miles by 1975; and MCI could not have financed the communications system envisioned in the study. \textit{Id.}


\(^\text{137}\) Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975).

\(^\text{138}\) 708 F.2d at 1165-66.

\(^\text{139}\) \textit{Id.} In rejecting MCI’s lost profits study, the Seventh Circuit distinguished this case from its recent decision in Spray-Right Service Corp. v. Monsanto Corp., 684 F.2d 1226 (7th Cir. 1982), aff’d, 104 S. Ct. 1464 (1984). In \textit{Spray-Right}, although it was unclear whether the jury had founded liability on one or three of the allegedly illegal acts, the court affirmed the jury verdict and damage award because it concluded that there was substantial evidence to support the verdict on all three counts. The Seventh Circuit found \textit{MCI} distinguishable from \textit{Spray-Right} on three grounds: (1) there is insufficient evidence to support the jury verdict on Hi-Lo predatory pricing; (2) as opposed to \textit{Spray-Right}, the jury found one act (Telpak) to be lawful; and (3) in \textit{Spray-Right}, the lawful conduct was insubstantial in relation to the damages and the burden of requiring strict proof of causation was great whereas, in the instance case, Telpak was apparently a major element of the injury giving rise to the damage award. Thus, the court concluded that in \textit{Spray-}
premise of the study, the illegality of Telpak and Hi-Lo, was incorrect, the study must be rejected."\textsuperscript{140} 

In addition to concluding that MCI failed to prove that its damages were caused by ATT’s unlawful conduct, the court rejected MCI’s lost profits study on the ground that it failed “to substantiate adequately the assumptions which provide the foundation for the study.”\textsuperscript{141} Given its conclusion with respect to the legality of ATT’s pricing, the court expressed “grave doubt” concerning the accuracy of MCI pricing and revenue assumptions set forth in its study.\textsuperscript{142} However, even assuming that these figures could be obtained, the court objected to the revenue assumptions on the ground that MCI failed to explain the basis upon which the assumptions were founded.\textsuperscript{143} 

Rejecting MCI’s proof of damage, the Seventh Circuit set aside the jury verdict and remanded the case to the district court for a new trial on the issue of damages. The court concluded that a new trial on damages was “required to reflect the determinations by the jury, and by this court, that AT&T’s pricing policies were not predatory.”\textsuperscript{144} 

Judge Wood dissented from the majority’s decision to remand the case for a new trial on damages. Holding that MCI had met its burden of proof, Judge Wood found that the damage proof offered by MCI was as specific and detailed as possible “given the complexities and nature of the alleged AT&T misconduct.”\textsuperscript{145} Moreover, Judge Wood contended that once an antitrust plaintiff demonstrates that disaggregation is impracticable, “it is incumbent upon the defendant to demon-

\textsuperscript{140} Id. at 1164. The court stated that Telpak and the interconnection controversy were the “twin prongs” of MCI’s case. 
\textsuperscript{141} Id. at 1165. 
\textsuperscript{142} Specifically, the court expressed its doubts on MCI’s ability to earn $.85 per circuit mile in light of the legitimate price competition by ATT and other carriers. Id. 
\textsuperscript{143} Id. at 1165-66. 
\textsuperscript{144} Id. at 1167. 
\textsuperscript{145} Id. at 1189 (Wood, J., concurring in part and dissenting in part).
strate the contrary." In Judge Wood's view, since it was the combination of all of ATT's acts that gave rise to the damage award, not any one specific act, the jury's damage award should be left intact.

The majority's decision to remand the case for a new trial on the issue of damages is appropriate. The court correctly concluded that MCI's proof of damage was defective due to its failure to demonstrate that MCI's damages were caused by ATT's unlawful act. Although MCI's lost profits study indicates that MCI suffered financial loss as a result of ATT's presence in the market, not all of ATT's activities concerning MCI were illegal. Despite the legality of some of ATT's conduct, MCI's proof of damage was based on the totality of ATT's acts and neither accounted for nor set forth any information which would permit the jury to find any variation in damages depending on which of ATT's acts were found to be illegal. Given that MCI's proof of damage was based on both lawful and unlawful conduct, the Seventh Circuit properly concluded that MCI failed to prove that its damages were caused solely by ATT's illegal activities.

By requiring MCI to prove that its damages were incurred as a result of ATT's illegal conduct, the court has not established a rule tantamount to requiring disaggregation of damages among those acts found to be unlawful. Rather, the court is evincing its decision to construe strictly the requirement that an antitrust plaintiff prove that its damages were caused solely by the defendant's illegal conduct. Such a


147. Judge Wood also questioned the wisdom of the majority's reevaluation of the conflicting evidence concerning the assumptions upon which MCI's lost profits study was based. Noting that both ATT and MCI hotly debated the accuracy of these assumptions, Judge Wood believed it improper for the majority to substitute its judgment for that of the jury's. 708 F.2d at 1193-94 (Wood, J., concurring in part and dissenting in part).

148. Id. at 1164.

149. See supra notes 138-40 and accompanying text.

150. It is incumbent upon courts to distinguish between proof of causation of damages and proof of amount of damages. Antitrust plaintiffs are required to demonstrate some nexus between the damage suffered by the plaintiff and the illegal conduct of the defendant. See Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975) (failure of plaintiff's proof of damage to account for lawful competition rendered evidence insufficient); Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981), cert. denied, 102 S. Ct. 1713 (1982).

151. See supra notes 138-40 and accompanying text.

152. A requirement of disaggregation of damages would mandate that MCI calculate the damage sustained by virtue of each illegal act performed by ATT. The Seventh Circuit has not set forth such a requirement. Rather, the MCI court is simply requiring MCI to prove an essential element of its antitrust claim: that the damages suffered by MCI were a result of ATT's unlawful conduct.
requirement does not place an undue or unjust burden on an antitrust plaintiff and buttresses the policies underlying the treble damage award remedy.  

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION AND TOWN OF WASHINGTON v. CITY OF EAU CLAIRE

In City of Eau Claire, the Seventh Circuit was called upon to consider the extent to which the anticompetitive conduct of a municipality is exempt from the antitrust laws. The anticompetitive conduct at issue in City of Eau Claire involved the refusal of the City to provide sewage treatment services to the plaintiffs, four Wisconsin townships, adjacent to the City. Possessing a monopoly for sewage treatment services in the market available to the Towns, the City refused to provide its sewage treatment services to the Towns unless they became annexed by the City and obtained their sewage collection and transportation services from the City. By so conditioning the provision of sewage treatment services to the Towns, the City effectively prevented the Towns from competing in the markets for sewage collection and transportation since the Towns had no means of disposing of the sewage once it was collected.

Seeking to enjoin the City’s alleged anticompetitive conduct, the Towns filed suit charging that the City’s conduct violated federal antitrust laws. The Town’s complaint was dismissed, however, on the ground that the City’s conduct was exempt from liability under the antitrust laws. Affirming the dismissal of the Town’s complaint, the

154. Hereinafter referred to as “City.”
155. Town of Hallie, Town of Seymour, Town of Union and Town of Washington (hereinafter referred to as “Towns”).
156. 700 F.2d at 378.
157. Id. The district court found that the City provided sewage treatment services to individual landowners in the Towns if they agreed to become annexed by the City and thereby obtain sewage collection and transportation services from the City. Town of Hallie v. City of Eau Claire, No. 80-C-527, slip op. at 1 (W.D. Wis. April 5, 1982).
158. The Town’s complaint, under § 1 of the Sherman Act, 15 U.S.C. § 1 (1973), alleged a number of different theories. First, the Towns claimed that the City used its monopoly power over sewage treatment to gain a monopoly over sewage collection and transportation. Second, the Towns charged that requiring the consumer to obtain sewage collection and transportation services in order to gain sewage treatment services constituted an illegal tying arrangement. The Towns’ third claim was that the City’s conduct was an illegal refusal to deal with the Towns. 708 F.2d at 378 n.2.
159. In addition to alleging Sherman Act violations, the Towns’ complaint charged violations of the Federal Water Pollution Control Act and a common law duty of utility to serve. The
Seventh Circuit held that, under the principles established by the Supreme Court in *Parker v. Brown*\(^{160}\) and its progeny, the City's refusal to provide sewage treatment services to the Towns was exempt from antitrust scrutiny.

The decisions of the Supreme Court in *Parker v. Brown*,\(^{161}\) *City of Lafayette v. Louisiana Power & Light Co.*,\(^{162}\) and *Community Communications Co. v. City of Boulder*,\(^{163}\) make clear that anticompetitive conduct will be exempt from antitrust scrutiny if such conduct constitutes the action of a State itself in its sovereign capacity or municipal action in furtherance of clearly articulated and affirmatively expressed state policy. The "state action" exemption from the antitrust laws was first announced by the Supreme Court in *Parker v. Brown*.\(^{164}\) In *Parker*, the anticompetitive activity involved a program adopted by the State of California which prevented raisin producers from freely marketing their crops in interstate commerce. In holding that the California program was not subject to the antitrust laws, the *Parker* court concluded that anticompetitive conduct engaged in by a state in its sovereign capacity was exempt from the federal antitrust laws by virtue of the Sherman Act's own limitations and concepts of federalism.\(^{165}\)

Thirty-five years after its decision in *Parker*,\(^{166}\) the Supreme Court considered whether the "state action" exemption of *Parker* applied to

district court dismissed both of these claims. On appeal, the Towns did not contest the propriety of these dismissals. *Id.* at 378.

161. *Id.*
164. 317 U.S. 341 (1943).
165. The Court failed to find anything in the language or history of the Sherman Act suggesting a purpose to restrain the activities of a state, its agents or officers directed by its legislature. In addition, the Court concluded that federalism required that no such intent should be inferred. *Id.* at 350-51.
166. The Supreme Court did not address the "state action" antitrust exemption between 1943-1975. However, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court reaffirmed the *Parker* holding that the determinant of the *Parker* exemption is whether the challenged action is an act of government by the State as sovereign. *Goldfarb* presented the question "whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar" violated the Sherman Act. *Id.* at 775. Although the Virginia legislature had empowered the Virginia Supreme Court to regulate the practice of law and had assigned the State Bar the role as an administrative agency of the Virginia Supreme Court, no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of minimum fee schedules. Concluding that the anticompetitive effects of the minimum fee schedule were not directed by Virginia acting as sovereign, the *Goldfarb* Court held that the minimum fee schedule was not exempt from antitrust scrutiny under the *Parker* doctrine.

In contrast, however, is the decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* considered the applicability of the antitrust laws to a ban on attorney advertising imposed by the Arizona Supreme Court. In holding the antitrust laws inapplicable to the advertising ban, the *Bates* Court emphasized that the anticompetitive restraints were part of a comprehensive regu-
the anticompetitive conduct of municipalities. In *City of Lafayette v. Louisiana Power & Light Co.*,¹⁶⁷ a private utility company alleged that several Louisiana cities, empowered to own and operate their own electric systems, had committed various antitrust violations in their operation of their utility systems.¹⁶⁸ In response to these allegations, the cities argued that their activities were exempt from antitrust scrutiny.¹⁶⁹ A majority of the Court, however, rejected the cities' argument that "Congress never intended to subject local governments to the antitrust laws."¹⁷⁰ Furthermore, a plurality of the Court rejected the argument that the *Parker* doctrine applied to all government agencies and concluded that the *Parker* exemption is limited to official actions directed by the State.¹⁷¹ Under the plurality's standard, the *Parker* doctrine would exempt from antitrust scrutiny municipal conduct engaged in "pursuant to state policy to displace competition with regulation or monopoly public service."¹⁷² The plurality in *City of Lafayette* stressed that the "state policy" relied upon would have to be "clearly articulated and affirmatively expressed."¹⁷³

Since its decision in *City of Lafayette*, the Supreme Court has revealed its determination to construe strictly the availability of the *Parker* exemption to municipalities. In *Community Communications Co. v. City of Boulder*,¹⁷⁴ the Court considered whether the *Parker* exemption extended to a "home rule" municipality that was granted extensive power over municipal matters by the state constitution.¹⁷⁵ The Court held that the challenged anticompetitive conduct, a city morato-

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¹⁶⁸. Louisiana Power & Light Company (hereinafter "LP&L") alleged that the Louisiana cities, together with a nonparty electric cooperative, had conspired to engage in sham litigation against LP&L to prevent the financing with the purpose and effect of deterring or preventing LP&L's operation in areas served by the cities' electric systems.
¹⁶⁹. Agreeing with the cities' contention, the district court dismissed LP&L's allegations. However, the Court of Appeals for the Fifth Circuit reversed, holding that a subordinate state governmental body is not *per se* exempt from the antitrust laws and directing the district court to examine whether the state legislature "contemplated" this type of anticompetitive restraint. 532 F.2d 431, 434 (5th Cir. 1976).
¹⁷⁰. 435 U.S. at 394.
¹⁷¹. *Id.* at 412-13.
¹⁷². *Id.* at 413.
¹⁷³. *Id.* at 410. The plurality's standard was adopted by a majority of the Court in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).
¹⁷⁵. Through the Home Rule Amendment, the State of Colorado vested in the city of Boulder, "*every power theretofore possessed by the legislative . . . in local and municipal affairs.*" *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1381 (1980).
rium on the expansion of cable television, was not exempt from antitrust scrutiny. Characterizing the State of Colorado's position toward Boulder's moratorium ordinance as one of neutrality, the Court concluded that the requirement of "clear articulation and affirmative expression" is not satisfied when the state's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive.

Relying upon the principles established in Parker, City of Lafayette, and City of Boulder, the Seventh Circuit held that the City's refusal to provide sewage treatment to the Towns was authorized by a clearly articulated and affirmatively expressed state policy and, therefore, exempt from antitrust scrutiny. In reaching this decision, the first question confronted by the court was whether the City's conduct was authorized by state policy. The Seventh Circuit rejected the argument that the City must demonstrate a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopoly power in sewage collection and transportation. Rather, the court declared that "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide sewage treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization." Holding that the City was not required to show specific state authorization for the monopolistic effects, the court concluded, as did the district court, that the salient determination was whether a state policy existed authorizing the City's refusal to provide sewage treatment services.

176. The Boulder City Council enacted the three month moratorium to allow time to draft a model cable television ordinance and to invite new cable companies to enter the market. The plaintiff in the case, Community Communications Co., was the only existing cable company in Boulder and sought injunctive relief to prevent the moratorium from taking effect. 380 F.2d at 380, n. 8.
177. Id. at 380.
178. Id.
179. 317 U.S. 341 (1943).
182. 700 F.2d at 383.
183. The Towns argued that the district court erred in characterizing the anticompetitive conduct which must be pursuant to state policy as "the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation." Id. at 381.
184. Id. In reaching its conclusion, the Seventh Circuit relied on language in City of Lafayette, 435 U.S. 389, 415 (1978), for the proposition that state authorization exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of."
185. 700 F.2d at 381.
The Seventh Circuit concluded that the City's anticompetitive conduct was authorized by a clearly articulated and affirmatively expressed state policy.\textsuperscript{186} To support this conclusion, the court found that the decision of the Wisconsin Supreme Court in *Town of Hallie v. City of Chippewa Falls*\textsuperscript{187} and the Wisconsin statutes,\textsuperscript{188} interpreted by *Town of Hallie*, "show that there is a clearly articulated and affirmatively expressed state policy not to burden municipalities with providing services unless they can annex the territory that they service."\textsuperscript{189} Concluding that the City's refusal to provide sewage treatment service unless the Towns also agreed to acquire the City's collection and transportation services was consistent with state policy, the court held that the City's conduct satisfied the standards set forth in *City of Boulder*.\textsuperscript{190}

Finally, the Seventh Circuit rejected the Town's argument that the City's anticompetitive conduct must be actively supervised by the state in order for the City to gain the protection of *Parker v. Brown*.\textsuperscript{191} Although noting that state supervision may be required when the anticompetitive conduct involves private parties,\textsuperscript{192} the court concluded such supervision is neither necessary nor advisable when local governments operate pursuant to clearly articulated and affirmatively expressed state policy.\textsuperscript{193} In the court's view, if the municipal conduct is pursuant to a clearly articulated and affirmatively expressed state policy, the conduct is state action and, therefore, entitled to immunity de-

\textsuperscript{186} Id. at 383.
\textsuperscript{187} 105 Wis. 2d 533, 314 N.W.2d 321 (1982). In this case, the Town of Hallie brought suit against Chippewa Falls to provide sewage treatment facilities to the Town unless the Town agreed to obtain other municipal services from Chippewa Falls. The Town refused to agree and the City annexed a portion of the Town. Relying on the expansive home rule, provisions of the Wisconsin laws, the Wisconsin Supreme Court held that the state antitrust laws did not apply to this conduct.
\textsuperscript{188} Section 66.069(2)(c) of the Wisconsin Statutes provides that a city may fix the area in which to extend sewage services, and that a city has no obligation to serve beyond that area. In addition, Section 144.07(lm) of the Statutes provides that the Department of Natural Resources may order a city to extend its sewage system to a town, but if that town then refused to become annexed to the city, the order becomes void and the city has no obligation to extend the sewage system. The constitutionality of Section 144.07(lm) was upheld in City of Beloit v. Kallas, 76 Wis. 2d 61, 250 N.W.2d 342 (1977).
\textsuperscript{189} 700 F.2d at 383.
\textsuperscript{190} Id.
\textsuperscript{191} 317 U.S. 341 (1943). The Towns argued that the Supreme Court's decision in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), conditioned antitrust immunity upon "active state supervision" of the anticompetitive conduct. Midcal involved a California statutory scheme allowing wine suppliers to specify dealer resale prices and requiring dealers to sell at those prices. The Court held that the statutory scheme was not exempt from antitrust scrutiny since it sought to create private price-setting power, not directly supervised by the state.
\textsuperscript{193} Id. at 384-85.
spite the absence of state supervision.\textsuperscript{194} Furthermore, the court expressed concern that a requirement of active state supervision "would erode the concept of local autonomy and home rule authority which is expressed in the statutes and Constitution of Wisconsin."\textsuperscript{195}

The Seventh Circuit's decision accurately interprets the relevant case law regarding state action immunity from the antitrust laws. The court correctly recognized that the anticompetitive activities of a municipality will be immune from antitrust scrutiny if a municipality can point to a clear and affirmative expression of a state policy to displace competition with regulation or monopoly service.\textsuperscript{196} In City of Eau Claire, the City demonstrated a clear and affirmatively expressed state policy to displace competition in the area of sewage treatment services.\textsuperscript{197} As opposed to the State of Colorado's neutral position in City of Boulder, the actions of the Wisconsin legislature indicate that the state has opted a definite position regarding a municipality's obligation to provide sewage treatment services. The court properly determined that by enacting statutes which permit a municipality to condition the provision of sewage treatment services upon obtaining sewage collection and transportation services from the municipality,\textsuperscript{198} the Wisconsin legislature contemplated that one consequence of its action would be to limit competition in the area of sewage collection and transportation. Since a reasonable consequence of the City's authorized activity is the restraint of competition, the Seventh Circuit correctly inferred a
state policy to displace the antitrust laws. In immunizing the City's conduct from antitrust scrutiny, the Seventh Circuit has demonstrated a just and workable approach to the issue of municipal antitrust immunity. Although it is clear that the court does not require express legislative intent to displace the antitrust laws, the City of Eau Claire decision indicates that the court will not blindly accept the municipality's position as to the existence of a state policy displacing competition. Rather, the court will examine the state's directives closely in order to determine whether a clear and affirmatively expressed state policy exists to displace the applicability of the antitrust laws.

**INDEPENDENCE TUBE CORPORATION v. COPPERWELD CORPORATION AND REGAL TUBE COMPANY: INTRA-ENTERPRISE CONSPIRACY**

The extent to which a corporation may conspire with its wholly-owned subsidiary is an unsettled and controversial area of the antitrust laws. Every circuit court of appeals considering the question has concluded that a corporation and its subsidiary may conspire with each other in violation of Section 1 of the Sherman Act. The Seventh Cir-
cuit first held that a parent and subsidiary have the capacity to conspire illegally in *Photovest Corp. v. Fotomat.* In deciding whether such related corporations have conspired illegally, the *Photovest* court concluded that it was appropriate to focus on the practical relationship between the parent and subsidiary to determine whether there is sufficient separation between the two entities to permit treating them as two independent actors. In *Independence Tube,* the Seventh Circuit was called upon to elucidate its decision in *Photovest.*

The events leading to the *Independence Tube* litigation began in 1972 when Copperweld Corporation purchased the Regal division of Lear Siegler. Included in the purchase agreement was a provision which prohibited Lear Siegler or any of its subsidiaries from competing with Regal for five years after the completion of the sale. After the sale, Copperweld transferred all of Regal's assets to a newly formed corporation called Regal Tube Company, thus making Regal a wholly-owned subsidiary of Copperweld.

As the sale of Regal to Copperweld was being negotiated, David Grohne, the president of Lear Siegler's Regal division, began pursuing the possibility of establishing his own steel tubing business. In May

enterprise conspiracy, the courts point to various Supreme Court decisions supporting the proposition that a corporation and its wholly-owned subsidiary have the capacity to conspire in violation of Section 1 of the Sherman Act. See, e.g., United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947) ("common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman Act]"); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951) ("[t]he suggestion [that their status as a single business unit make them incapable of conspiring] runs counter to our past decisions that common control and ownership does not liberate corporations from the impact of the antitrust laws."); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968). The judicial approach to the issue of intra-enterprise conspiracy has been uniformly criticized, however, by academic writers. See, e.g., Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy,* 23 MT. L. REV. 158 (1962); Handler, *Twenty-Five Years of Antitrust,* 73 COLUM. L. REV. 415 (1973); Handler and Smith, *The Present Status of Intra Corporate Conspiracy Doctrine,* 3 CARD. L. REV. 23 n.3 (1981).

202. 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).
203. Id. at 726.
204. 691 F.2d 310 (7th Cir. 1982).
205. Hereinafter referred "Copperweld."
206. Regal began its existence in 1955 as a manufacturer of steel tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968, Regal was a wholly-owned subsidiary of C.E. Robinson Company; in 1968, Regal was sold to and became an unincorporated division of Lear Siegler, Inc., a California manufacturing corporation. Id. at 313.
207. Hereinafter referred to as "Regal."
208. Regal continued to conduct all its manufacturing obligations in Chicago but shared corporate headquarters with Copperweld in Pittsburgh. Id. at 314.
209. By the time the sale of Regal was consummated, Grohne had accepted a job as Lear Siegler's Corporate Secretary. Grohne held this position from February to July 1972; from July to September Grohne continued to work for Lear Siegler, finishing projects. Id.
of 1972, Grohne formed a corporation named Independence Tube Company and sought bids on tubing mills from manufacturers. By late October, Independence received a firm offer from the Yoder Company and in December, 1972, Independence gave Yoder a purchase order calling for the delivery of the mill by December, 1973.

Upon learning of Grohne's entrepreneurial activities, Regal's General Manager, Bedford Foster, and Copperweld's Chairman and Chief Executive Officer, Phillip Smith, contacted counsel to discover whether Grohne's activities could be prevented. In February, 1973, counsel furnished Foster and Smith a letter to be sent to anyone with whom Grohne attempted to deal. The letter stated that Copperweld was "greatly concerned if [Grohne] contemplated entering the structural tube market in competition with Regal" and was ready to take any and all steps necessary to protect its rights under the purchase agreement and to protect the trade secrets and know-how purchased from Lear Siegler. As a result of Copperweld's letter, Yoder, which had initially accepted Independence's purchase order for the tube mill revoked its acceptance, upon receipt of Copperweld's letter.

In 1976, Independence filed suit against Copperweld, Smith, Regal, and Yoder seeking treble damages and injunctive relief for alleged violations of the federal antitrust laws. At trial, the jury found

210. Hereinafter referred to as "Independence."
211. The Yoder Company (hereinafter referred to as "Yoder") was located in Cleveland, Ohio.
212. Initially, Foster and Smith thought that Grohne's activities could be prevented by the non-competition agreement signed by Lear Siegler when Regal was sold. Foster and Smith were informed by counsel, however, that the agreement did not cover Grohne's activities but that it might be possible to enjoin his activities if Grohne made use of the "know-how," technical information, designs, plans, drawings, trade secrets or inventions of Regal, all of which Copperweld had purchased from Lear Siegler. Id.
213. Id.
214. Copperweld asserted that its letter was intended to prevent third parties from acquiring reliance interests in dealings with Independence that might later be enjoined. Id.
215. Id.
216. Before trial, Independence dropped Smith as an individual defendant. Id. at 315.
217. In its complaint, Independence charged that Copperweld, Regal, Smith and Yoder had: (1) conspired to restrain trade in the market for steel tubing in violation of Section 1 of the Sherman Act; and (2) attempted to monopolize the market for steel tubing in violation of Section 2 of the Sherman Act. Before trial, Independence dismissed its monopolization claim. Appended to its federal claims, Independence alleged the following violations of state law: (1) Yoder breached its contract to supply a tube mill to Independence; (2) Copperweld and Regal interfered with Independence's contractual relationship with Yoder and business relationship with Deere, Plow & Planter Works; and (3) Copperweld and Regal had slandered and libeled Independence. Id. at 314-15. (Independence's state law claim will not be discussed in this article.)

In response to the complaint, Copperweld and Regal denied all Independence's allegations, set forth affirmative defenses and filed counterclaims against Independence and Grohne. After all the evidence was presented, Judge Will, the trial judge, directed a verdict against Regal and Cop-
that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act but that Yoder had not been involved in the conspiracy. The jury awarded damages in the amount of $2,499,009 (trebled to $7,497,027) against Copperweld and Regal on the antitrust claim.\footnote{218}

On appeal, Copperweld and Regal argued that they could not have, as a matter of law, conspired to violate Section 1 of the Sherman Act because they were not sufficiently distinct entities as outlined by the \textit{Photovest} decision.\footnote{219} In attacking the judgment entered by the district court, the defendants argued that the trial judge's jury instructions were inadequate since they failed to correspond exactly to the \textit{Photovest} language.\footnote{220} Furthermore, the defendants argued that, even assuming the instructions were substantially correct, Independence failed to produce sufficient evidence to establish a conspiracy.\footnote{221} Rejecting the proposition that the jury instructions must recite \textit{Photovest} verbatim, the court approved the trial judge's instructions since they "emphasized to the jury that they were looking for real, rather than merely formal distinctiveness."\footnote{222} In addition, the court approved the jury's finding that Regal and Copperweld possessed the capacity to conspire and, in fact, did conspire.\footnote{223} The court found that Independence presented sufficient evidence from which the jury could conclude that Regal was a distinct corporation and not a mere "service arm" of this parent.\footnote{224}

The Seventh Circuit also approved the jury's finding that Independence on all the issues raised in their counterclaim. On appeal, the Seventh Circuit affirmed the district court's decision directing a verdict against the defendants on their counterclaims. \textit{Id.} at 315.

\footnote{218} \textit{Id.} On appeal, Copperweld and Regal argued that the jury award of $2,499,000 was not supported by the evidence. Specifically, they contended that Independence's damage theory was based on the testimony of an unqualified expert and on unsubstantiated opinions and assumptions. Rejecting both of these arguments, the Seventh Circuit upheld the damage award on the ground that Independence's proof of damage was based on factual, objective, observed or verifiable data. \textit{Id.} at 329-31.

\footnote{219} \textit{Id.} at 315-16.

\footnote{220} \textit{Id.} at 318.

\footnote{221} \textit{Id.} The defendants argued that the only evidence introduced in support of Independence's claim was the warning letter sent to Yoder.

\footnote{222} \textit{Id.} at 318-19. Judge Will's instructions informed the jury to consider all the relevant factors set forth by the court in \textit{Photovest}.

\footnote{223} \textit{Id.} at 320-21.

\footnote{224} \textit{Id.} at 320 (quoting \textit{Photovest}, 606 F.2d at 727). The court stated that, from the evidence presented, the jury could have found that: (1) Regal had existed as a division of other corporations before its acquisition by Copperweld, and that Copperweld intended Regal to keep serving the market and customers it was already serving; (2) the acquisition of Regal did not enable Copperweld to handle any additional steps in its own manufacturing process, but rather, established an entirely new line; (3) Regal's management was autonomous; (4) Regal's revenues were segregated and Regal's operating manager's compensation was based primarily on Regal profitability; (5) Regal had a separate sales force and clientele which was relevant to the defendants' ability to pressure more people if Regal and Copperweld worked together than either could alone or together if Regal was a full fledged division. \textit{Id.}
dence had suffered an "antitrust injury" as a result of the defendants' illegal conspiracy. In the court's view, Independence's injury was manifested by the fact that it was precluded from entering into business as Regal's competitor by virtue of the defendant's conspiratorial conduct.

The Independence Tube decision reaffirms the Seventh Circuit's commitment to the Photovest test and its resolve to determine the existence of an intra-enterprise conspiracy by examining the relevant facts and circumstances of each case. In Photovest, the court stated that the following factors were relevant to a determination whether a corporation and its subsidiary were sufficiently distinct to engage in an illegal intra-enterprise conspiracy: (1) extent of integration of ownership; (2) whether the two corporations have separate management; (3) extent to which significant efficiencies would be sacrificed if the corporations acted as two firms; (4) the corporations' histories; (5) whether the corporations functioned separately before being partially integrated; and (6) extent to which the corporation may, acting as one, yield market power which it would not possess if viewed as a separate firm. Applying these criteria to the facts presented in Independence Tube, the court properly determined that there was sufficient evidence to support the jury's finding that Regal and Copperweld were distinct entities which were capable of engaging in an illegal conspiracy. The Independence Tube decision demonstrates that, although still developing, the Photovest test represents a workable framework with which to de-

225. Id. at 321. In Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477 (1977) the Court defined an antitrust injury as reflecting the anticompetitive effect either of the violation or anticompetitive acts made possible by the violation.

226. 691 F.2d at 322. The Seventh Circuit also rejected the defendants' argument that Independence must show anticompetitive harm by demonstrating that Regal's market share increased after the allegedly anticompetitive conduct.

227. The Seventh Circuit uses the term "intra-enterprise" conspiracy when referring to an alleged conspiracy between parent and subsidiary corporations. The court uses the term "intracorporation" conspiracy when describing an alleged conspiracy within a single corporation. Id. at 316 n.2.

228. 606 F.2d at 726 (quoting L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977)). In Photovest, the court concluded that Fotomat (the parent corporation) and Fotomat Labs (the subsidiary wholly-owned by Fotomat) should be treated as a single entity because (a) the companies were incorporated separately to minimize potential labor relations friction; (b) the corporation's management and offices overlapped; (c) profit-related compensation for personnel of both corporations was based solely on Fotomat's profits; (d) the corporations used consolidated financial statements, Fotomat and its subsidiaries were referred to as "the Company," and (f) Fotomat Labs was solely a resource for Fotomat and provided no service to Fotomat's customers. 606 F.2d at 726-27.

229. As opposed to Photovest which involved nondistrict corporations, Independence Tube presented a situation wherein the two related corporations carried on district business activities. For a discussion of the factors supporting the conclusion that Regal and Copperweld were distinct entities, see supra note 224.
termine whether two related corporate entities may be subject to liability for conspiracy under Section 1 of the Sherman Act.230

CONCLUSION

This article has examined three decisions of the Seventh Circuit dealing with a variety of antitrust issues. Revealing the court's tendency toward adhering to a restrictive interpretation of the antitrust laws, these decisions most likely will impact future antitrust plaintiffs by making it more difficult for such plaintiffs to succeed in proving their antitrust claims.

230. The significance of the Seventh Circuit's Photovest test, as interpreted by Independence Tube, is found in the fact that the court will not permit corporate form to triumph over substance. By examining the practical relationship between the two related corporations, the court properly focuses on the substance of their business relationship. If the practical relationship between the two corporations demonstrates that the two entities are sufficiently distinct, it would be anomalous to conclude that the two corporations may not engage in an illegal conspiracy simply because they are related in a removed manner.