Volume 48

1995

Antitrust Policy for the Twenty-First Century

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I. INTRODUCTION

THE new century is rushing toward us and the rate of change occurring all around us so staggers the imagination that it is literally indescribable. The result is what may be called "metaphorical exhaustion." A telecommunications revolution has led to hopes for the construction of the information highway, which quickly became the information superhighway, followed with little hesitation by countless spin-off metaphors—road kill on the superhighway, the fast lane, the slow lane, the passing lane, the off ramp, and toll booths. More quickly than these metaphors gain currency, they lose whatever descriptive power they may have. Polls indicate that, not surprisingly, most Americans have only a vague idea of what the information superhighway actually is.

Sometimes the metaphors get hopelessly confused and end up sounding positively frightening. One prominent newspaper recently noted in an editorial that "[a] single wire [may become] a highway over which a flood of . . . services will flow into customers' homes."[1] We may have to learn to dog-paddle in our living rooms. Before concluding the paragraph, the paper predicted that "[a] market now ruled by sometimes lazy monopolists would be turned into a competitive dogfight."[2] Of course, a dogfight in the middle of a highway is dangerous for drivers and for dogs, even without the added problems of lazy rulers and floods.

Amidst all of these dogfights and floods, the fundamental organizing principle of the American economy remains sound: Free and open mar-

† This essay is a modified version of Antitrust Enforcement and American Prosperity, Address Before the Antitrust Section of the New York Bar Association (Jan. 26, 1995).

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1. *Tomorrow's Interactive Home*, N.Y. TIMES, Oct. 27, 1994, at A28.
2. *Id.*

kets characterized by competition will stimulate innovation, promote prosperity, and contribute to the international success of the nation's economy and businesses. The central purpose of the antitrust laws, of course, is to promote that principle by protecting the competitive process. In this sense, vigorous, intelligent antitrust enforcement is as vital to America's economic health in the twenty-first century as it has been for the twentieth century.

II. THE HISTORICAL RECORD

The United States committed itself over a century ago to protecting fair competition in open markets. The Sherman Act, passed by Congress in 1890 with only one dissenting vote and signed by a Republican President, and the other federal antitrust laws have helped to create the environment of economic opportunity that has been essential to America's prosperity in this century. The connection between the nation's antitrust policies and its economic strength is illustrated most vividly by the fact that more and more countries are recognizing the benefits of competition on the merits protected by vigorous antitrust enforcement.

The historical record of antitrust enforcement demonstrates its contribution to American economic vitality and the benefits of sound antitrust enforcement for the American business community. One example is the dismantling of the Bell System's monopoly over long distance communications equipment.[3] The Antitrust Division of the U.S. Department of Justice (the "Division") vigorously pursued the monopolization case against the Bell System through both Republican and Democratic administrations—from the opening of the investigation in the Nixon administration through litigation during the Ford and Carter administrations to its successful conclusion in the Reagan administration.

Professor William Baxter, who headed the Division at the beginning of the Reagan administration, negotiated the 1982 settlement that resulted in the entry of the Modification of Final Judgment, or MFJ.[4] The MFJ ended the Bell System's monopoly over the long-distance telephone and communications equipment markets and provided for the creation of the Regional Bell Operating Companies (the "Bell Companies"). Although the Bell Companies retained monopolies over most local telephone service in their respective regions, the MFJ barred them from entering the long-distance and manufacturing markets, thus substantially reducing their incentive to use local monopoly power to impede competition in those markets.

The burst of competition and innovation touched off by the MFJ has benefited our economy—it has benefited American businesses and consumers—for over a decade now. As just a recent example of the divi-

3. *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

4. *See Remarks of Professor William Baxter, Former Assistant Attorney General, Antitrust Division*, 39 ANTITRUST BULL. 895, 895-97 (1994).

dends of competition, a New York Times headline recently proclaimed: "Telephone Price War Heats Up."[5] The accompanying story predicted that recent moves by Sprint could set off a "bigger price war in the long-distance telephone industry."[6] The story explained that Sprint's move was a "counterattack" to "an aggressive . . . package of discounts" that had previously been offered by AT&T.[7] The Times followed up that story with a front page article, headlined "No-Holds-Barred Battle for Long-Distance Calls."[8]

Price wars and no-holds-barred battles in the long-distance telephone market were unimaginable before the Division successfully dismantled the Bell System's vertically integrated monopoly. Now they are as common as television commercials. The result for businesses and consumers has been lower prices, better service, and more choices. Since the MFJ, long-distance prices for residential customers, as measured by the revenue per minute of the three largest long-distance providers, have dropped sixty-six percent in real terms,[9] minutes of use have increased dramatically,[10] and there are now hundreds of long distance companies from which to choose.[11] And choose Americans did in 1994: More than twenty-five million people changed long distance carriers at least once last year.[12]

The basic point is: The direct beneficiaries of antitrust enforcement in the AT&T break-up were businesses, beginning with MCI, Sprint, and the hundreds of smaller carriers that compete with AT&T in the market for long distance communications. The list of beneficiaries extends, of course, to the scores of firms, large and small, that compete with AT&T in the market for communications equipment. There were also benefits to those businesses that buy long-distance service or communications equipment, which is virtually every business in America, from Mom and Pop stores to the Fortune 500.

In addition to lower prices, the intense rivalry made possible by the break-up of AT&T caused innovation in long-distance and communications equipment to rush forward literally at the speed of light. The phrase "at the speed of light" is appropriate because increased competition in long-distance communication hastened the deployment of multiple fiber optic networks throughout the nation. It was only after the MFJ that

5. Edmund L. Andrews, *Telephone Price War Heats Up*, N.Y. TIMES, Jan. 7, 1995, at 39.

6. *Id.*

7. *Id.*

8. Edmund L. Andrews, *No-Holds-Barred Battle for Long-Distance Calls*, N.Y. TIMES, Jan. 21, 1995, at 1.

9. Robert E. Hall, *Long Distance: Public Benefits from Increased Competition* (Applied Economics Partners), Oct. 1993, at i.

10. *See* ROBERT W. CRANDALL, AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA 44 (1991) (average annual increase of 12.1% in real output of interstate switched message telephone service between 1983 and 1988).

11. Hall, *supra* note 9, at 18.

12. Andrews, *supra* note 8, at 1.

fiber optics really took off. In part, this was because AT&T, Corning, and others working on fiber optic technology brought down its costs.

The breakup itself accelerated things. New entrants into the long-distance telephone business, like Sprint, MCI, and smaller firms, turned to Corning to provide fiber optics. Eventually, AT&T was forced to install fiber optic cable itself in order to match the quality and cost of its competitors. As a Corning executive recently told Congress, "[h]ad the MFJ not been entered, optical fiber may still be in the lab."[13]

The widespread deployment of fiber optic cable will have ramifications for the lives of all Americans—indeed, people across the globe—that are beyond prediction. No predictions will be ventured. This draws to mind the story of the sage who, shortly after the invention of the telephone, boldly predicted that it would revolutionize communication: "Eventually," he said, "every single town in America would have a telephone to keep in touch with the outside world."

The benefits of antitrust policy are not unique to the Bell System case or the telecommunications industry. Last year, the Division brought and settled a case against Pilkington, the British glass manufacturer that has long had a monopoly over float glass production technology.[14] Float glass is used for windows and architectural panels by the construction industry and for windshields and windows by the automobile industry; in short, it is a huge, international market worth some $15 billion a year.[15]

The Division concluded after an extensive investigation that Pilkington was foreclosing American glass manufacturers from competing in foreign markets. The Division's complaint alleged that in the early 1960s, Pilkington entered into unreasonably restrictive licensing arrangements with its most likely competitors, then for three decades used these arrangements and threats of litigation to prevent American businesses from competing to design, build, and operate float glass plants in other countries. By the time of the suit against Pilkington in May 1994, its patents had long since expired and its technology for the most part had entered the public domain.[16]

The consent decree accepted by Pilkington to settle the case bars it from restraining American (and foreign) firms which desire to sell technology outside the United States.[17] As a result, American businesses will be able to compete for the fifty new glass plants expected to be built

13. Justice Department and Telecommunications Policy: Hearings Before the House Judiciary Comm., 104th Cong., 1st Sess. (1995) (testimony of Timothy J. Regan, Division Vice President and Director of Public Policy, Corning, Inc.), *available at* 1995 WL 269771 at *15 (May 9, 1995).

14. *United States v. Pilkington plc*, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. June 14, 1994); 59 Fed. Reg. 30,604 (1994).

15. Complaint of Petitioner at 5-6, United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. June 14, 1994) (No. 94-345) (on file with the *SMU Law Review*).

16. *Id.*

17. *See supra* note 14, at 73,669.

around the world over the next six years.[18] This competition—on a playing field made level by vigorous, intelligent antitrust enforcement—could increase U.S. export revenues by as much as $1.25 billion during that period.[19]

The bottom line is that rivalry—the opportunity to compete and succeed—serves our economy best. Professors Mike Scherer of Harvard and William Comanor of the University of California at Santa Barbara recently assessed the long-term effects of antitrust enforcement by comparing developments over the last eighty years in the American oil and steel industries.[20] The government's section 2 case against Standard Oil culminated in 1911 with the dismantling of that company's monopoly of the oil industry.[21] By contrast, a similar attempt failed with regard to the steel industry,[22] leaving that industry dominated by United States Steel (U.S. Steel), a combination of some 170 previously independent entities.[23]

Over the following years, the Standard Oil successors—such as Exxon, Mobil, ARCO, Conoco, Amoco, and Chevron (as they are now known)—confronted the challenges of a relatively competitive domestic market. Today, they are among the leaders of the international petroleum industry. On the other hand, U.S. Steel faced no serious domestic competition and, as Professors Scherer and Comanor explain, "slowly but surely lost its lead of an industry that felt impelled to seek government protection from foreign competition."[24] U.S. Steel's role in technological innovation within the steel industry steadily dropped through the middle of the century. This is in stark contrast to the contributions of American-based oil companies, whose share of innovations during the same period exceeded their share of refining capacity.[25]

In the last decade, the American steel industry has renewed itself and has greatly increased its ability to succeed in a global market. But it has done so by doing what American businesses do as well as or better than any in the world—responding to competition and innovating new and better ways of doing business.

Professors Comanor and Scherer sought through quantitative analysis to determine what role the antitrust enforcement of the early twentieth century had in the relative fortunes of the oil and steel industries. They concluded that competition brought about by antitrust enforcement in

18. *See supra* note 15, at 6. *See also* U.S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT FILES FIRST ANTITRUST SUIT AGAINST FOREIGN COMPANY SINCE 1992 POLICY CHANGE 3 (1994) (on file with the *SMU Law Review*).

19. U.S. DEP'T OF JUSTICE, *supra* note 18, at 3.

20. William S. Comanor & F.M. Scherer, *Rewriting History: The Early Sherman Act Monopolization Cases* (Nov. 1993) (unpublished manuscript, on file with the *SMU Law Review*).

21. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

22. United States v. United States Steel Corp., 251 U.S. 417 (1920).

23. Comanor & Scherer, *supra* note 20, at 18.

24. *Id.* at 4.

25. *Id.* at 11-12, 28.

the oil industry had positive consequences for the industry's subsequent development, and hence for the American economy.[26] They also suggested that successful enforcement against U.S. Steel would have increased competition in the steel industry between the two world wars and averted what they term "the tragic failures that occurred more recently."[27]

Based on their detailed analysis of the oil and steel industries and general observations of other industries that were the subject of early Sherman Act cases, Professors Comanor and Scherer confirmed what advocates of intelligent antitrust policy have long believed: "[D]ynamic efficiency and the ability to compete internationally come . . . from the disciplining force of vigorous domestic competition. Competition among numerous enterprises on a level playing field, rather than the consolidation of assets in a few hands, appears to be a more powerful engine for economic progress."[28]

This connection between competition and economic dynamism accords with the findings of Professor Michael Porter's landmark study of international competitiveness, *The Competitive Advantage of Nations*.[29] He concluded flatly that "[f]irms that do not have to compete at home rarely succeed abroad."[30] The reason? Domestic rivalry spurs innovation, which is an essential element of international economic success. Thus, antitrust policy that promotes competitive markets contributes directly to America's economic health and vitality.

The choice that faces policy makers on the threshold of the twenty-first century is whether the American economy's performance over the coming years should more closely resemble the vitality and international leadership of the American oil industry in the twentieth century, or the decline and stagnation of the American steel industry during that period. To state the alternatives is to answer the question: America must opt for an environment of vigorous competition and economic opportunity. America's prosperity depends on it. And to achieve such an environment requires alert, intelligent antitrust enforcement.

III. ANTITRUST IN THE TWENTY-FIRST CENTURY

There are those who suggest that antitrust enforcement is obsolete—of no more relevance to the twenty-first century economy than the rotary phone. Others go even further and suggest that antitrust enforcement will disadvantage American companies and will harm America's economic well-being. These suggestions are fundamentally wrong. As the role of innovation in the economy and the importance of international competitiveness grow, so does the necessity for intelligent antitrust en-

26. *Id.* at 42-43.
27. *Id.* at 43.
28. Comanor & Scherer, *supra* note 20, at 43-44.
29. MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990).
30. *Id.* at 662.

forcement. Such enforcement promotes an environment in which competitors spur each other to faster innovation. As Professor Porter has explained, "[a]ll we have learned about the innovation process suggests that a number of entities pursuing different avenues, watching each other to try to learn from the other's approach, is often the best structure. Diversity and multiple paths of innovation yield the most rapid progress."[31] Intelligent antitrust enforcement in the twenty-first century will protect and promote competitive diversity.

IV. CONCLUSION

To be sure, the dynamic economy implied by increasing globalization and accelerating technological change challenges antitrust enforcers to appreciate changing conditions in the marketplace. We must always be alert, for example, that we do not confuse protecting the competitive process with protecting a particular competitor. It is the nature of the competitive process that some competitors will fail; we cannot and should not try to prevent that outcome. What we must do—what is critical to the nation's economic health—is ensure that firms with market power do not distort the competitive process by imposing artificial restraints. What we strive for, in short, is open competition on the merits—a system that historically has benefitted consumers by prodding competing firms to develop and deliver goods and services of the highest quality, at the lowest cost and has benefitted American companies by preparing them to compete and succeed abroad.

31. *Innovation, Rivalry, and Competitive Advantage: Interview with Professor Michael E. Porter*, 6 ANTITRUST 5, 7 (1991).