

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 THE STATE OF NEW YORK
4 BY ITS ATTORNEY GENERAL
5 ROBERT ABRAMS,

6 Plaintiff,

7 v.

93 Civ. 3868 (JES)

8 PRIMESTAR PARTNERS L.P., et al.,

9 Defendants.
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10 New York, N. Y.
11 September 3, 1993

12 Before:

13 HON. JOHN E. SPRIZZO,

14 District Judge

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16
17 APPEARANCES

18 ROBERT ABRAMS

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20 Attorney for Plaintiff

21 BY: JOSEPH OPPER

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BY: LAWRENCE E. TOFEL

CYNTHIA REED

United States Department of Justice - Civil Division
amicus, Federal Communications Commission

1 THE CLERK: New York State v. Primestar.

2 THE COURT: Assume I read the briefs. I don't
3 want a lot of duplicative arguments. Who is going to argue?
4 I will give twenty minutes in support of the decree and
5 twenty minutes in opposition to it. You can divide that
6 time however you like.

7 MR. TOFEL: Your Honor, as a preliminary matter?

8 THE COURT: Yes.

9 MR. TOFEL: My name is Lawrence Tofel, of Tofel
10 Berelson & Saxl, local counsel for the United States
11 Satellite Broadcasting Company. I would introduce to your
12 Honor and move the admission of Martin Rosenbaum of the firm
13 of Fletcher, Heald & Hildreth. He is a member of the United
14 States District Court, Washington, D.C., the United States
15 Circuit Court of Appeals, and the United States Supreme
16 Court.

17 THE COURT: Are you a member of the bar of this
18 court?

19 MR. TOFEL: I am.

20 THE COURT: Your application is granted pro hac
21 vice.

22 Who wants to speak in support of this and who
23 wants to speak against it? You have twenty minutes, so I
24 suggest you pick your two best speakers and take ten minutes
25 each, because I am not going to hear duplicative arguments.

1 I have read the papers. Go ahead.

2 MR. OPPER: I understand, your Honor. My name is
3 Joseph Oppper. I am Assistant Attorney General of the State
4 of New York. I am here on behalf of the State of New York,
5 and we appear as local counsel for the 44 other states that
6 have filed actions and are parties to the proposed consent
7 decree. I am joined here today by colleagues of mine from
8 the States of Ohio and Maryland, who are sitting in the
9 audience, your Honor.

10 Your Honor, I understood the Court to say it is
11 familiar with the briefs, so I will not restate any
12 arguments made in those submissions. I would like to
13 emphasize --

14 THE COURT: I just have one question. Why are
15 there separate decrees involving Viacom and the rest of
16 them?

17 MR. OPPER: Because early on in the negotiating
18 process, Viacom, which originally was a member of Primestar,
19 which is a DBS joint venture, withdrew from the venture and
20 requested that they negotiate with us separately. Since
21 they were a separate defendant, we negotiated a separate
22 decree with Viacom.

23 THE COURT: Are there any material differences in
24 the settlement agreement?

25 MR. OPPER: I don't think there are.

1 THE COURT: I didn't see any, but I want to be
2 sure I didn't miss any.

3 MR. OPPER: There are some minor variations, but
4 essentially the same restrictions apply to Viacom as apply
5 to the other Primestar partners.

6 THE COURT: All right.

7 MR. OPPER: What I would like to emphasize,
8 though, to the Court is that the decrees in this case do not
9 in any way extinguish or eliminate the rights of any of the
10 nonparties to the decree under the 1992 Cable Act, the
11 antitrust laws, any FCC regulations, or any other federal or
12 state law.

13 Subsequent to the filing of our brief, we
14 received a copy of the comments submitted by the FCC, so I
15 would direct my comments to that brief.

16 I think it is significant to emphasize, your
17 Honor, that the Cable Act explicitly says that the 1992
18 Cable Act was not intended to preempt any state enforcement
19 under federal or state antitrust laws. In fact, with that
20 specific disclaimer, the Cable Act contemplated that state
21 attorneys general, who are the chief antitrust enforcement
22 officers in the states, would aggressively --

23 THE COURT: The only significant point made in
24 their brief, as I read it, is that, to the extent that your
25 decree distinguishes on the basis of technologies, it is not

1 consistent with the philosophy of the Cable Act.

2 MR. OPPER: As your Honor appreciates, I am sure,
3 we were approaching our settlement on the basis of
4 negotiating a settlement that addressed specific antitrust
5 violations that occurred in the past. We were seeking to
6 redress and remedy antitrust violations that occurred to
7 various technologies. As in any negotiated settlement,
8 there necessarily is a compromise. What is clear from our
9 decree is, though, it attempts to minimize any
10 discrimination that may or may not exist with respect to
11 technologies. The decree with respect to most distributors
12 requires that the programming sales be made on terms that
13 are comparable to cable operators of comparable size.

14 THE COURT: Am I correct in understanding that
15 these orbital location DBS satellites do not yet exist?

16 MR. OPPER: That's correct, your Honor. No
17 high-power DBS venture is yet operational. I think what is
18 significant in the FCC submission is that they acknowledge
19 that the current FCC regulations do not prohibit a
20 vertically controlled programmer from giving a DBS operator
21 an exclusive. That statement is on page 14 in footnote 24
22 of the brief. I think it is significant because, as the
23 Court has pointed out, that appears to be one of the most
24 controversial sections of the decree.

25 THE COURT: The statute seems to say that certain

1 types of exclusive contracts are unlawful per se unless
2 there is a specific finding that they serve the public
3 interest. This is not one of them.

4 MR. OPPER: That is exactly correct, your Honor,
5 because, as stated in their brief, the restrictions on
6 exclusives only apply to exclusives given to a cable
7 operator. They do not at all address an exclusive given to
8 a noncable distributor such as a DBS provider.

9 THE COURT: I accept your argument, which I will
10 give them a chance to respond to, that merely because your
11 decree did not achieve the optimum in terms of competition
12 does not mean I should disapprove it. I think the only
13 basis upon which I could colorably disapprove your decree is
14 if it created a situation that is less competitive in the
15 industry than existed before, because under those
16 circumstances, even under the Dairylea case, I would not be
17 required to defer to the attorney generals' judgment if in
18 fact they created a competitive scheme that was worse than
19 that which existed prior to the time that they entered into
20 the decree.

21 MR. OPPER: That is correct, your Honor.
22 However, I believe the Dairylea case can be distinguished.
23 The Dairylea case concerned an action that was brought under
24 the state's statutory parens patriae, and essentially it was
25 a damage action brought on behalf of natural persons, and

1 any settlement would extinguish the rights of those
2 individuals to seek relief under the antitrust laws.

3 THE COURT: Even under that statute, if you in
4 effect signed a consent decree which made for a less
5 competitive marketplace than that which previously existed,
6 I don't think I would be required to defer to your judgment
7 under those circumstances.

8 MR. OPPER: I am not suggesting you would, your
9 Honor.

10 THE COURT: What you really have to address is
11 that issue: Is this decree really in the public interest to
12 the extent that I ought to defer to your judgment because it
13 creates a marketplace with respect to Primestar and its
14 partners, so to speak, that is a more competitive
15 marketplace than previously existed, so that the public
16 interest is served by signing the decree even if it is not
17 optimum?

18 MR. OPPER: That is correct, your Honor. And the
19 decrees, as proposed and submitted to the Court, are in the
20 public interest, and they are in the public interest for the
21 following reasons:

22 Number one, it resolves complex antitrust
23 litigation between 45 states, the District of Columbia and
24 20 defendants. The decree that we negotiated mandates that
25 the programming services controlled by the defendants must

1 be made available to all classes of distributors on
2 reasonable business terms. The decrees further prohibit the
3 defendant cable operators from entering into exclusives with
4 any programming service, whether it is one that is
5 vertically integrated that they control or, indeed, an
6 independent programming service. In fact, in that area the
7 relief provided competitors and consumers under the state
8 decree is significantly broader than the relief required
9 under the Cable Act. That statement is acknowledged in the
10 recent letter of the WCA to your Honor that we just received
11 a copy of. In faulting the 1992 Cable Act, they point out
12 that the prohibitions on exclusives would only apply to
13 those vertically integrated programming services, whereas
14 the state's decree quite specifically prohibits a cable
15 operator from entering into an exclusive with any existing
16 programming service regardless of its ownership.

17 The consent decrees are in the public interest
18 because they prohibit retaliation against a programmer that
19 might choose to sell to a competing distributor. They are
20 in the public interest to the extent they prohibit the
21 Primestar venture, which is this DBS service that is
22 currently operational, even though it is not a high-power
23 service, they prohibit the anticompetitive aspects of
24 provisions of that venture from excluding other DBS entrants
25 from entering the market.

1 THE COURT: As I understand it, they also
2 prohibit the use of exclusive contracts with DBS orbital
3 satellites or, I will call them, orbital providers under
4 circumstances where that contract would be clearly illegal
5 under the cable statute or FCC regulations.

6 MR. OPPER: Your Honor, I think that that is not
7 the case under the Cable Act or the FCC regulations.

8 THE COURT: I thought your decree doesn't apply
9 in situations where the FCC determines it to be an
10 impermissible exclusive contract, and there are three
11 categories of exclusive contracts that are not permitted by
12 your decree which seem to track, at least in some measure,
13 the areas in which the Cable Act would make them illegal.

14 MR. OPPER: That is correct, your Honor. The
15 decrees specifically provide that if any of the conduct
16 permitted by the decrees is prohibited by the Cable Act or
17 SEC regulations, then federal law governs. So there cannot
18 be any conflict.

19 THE COURT: Then you have another provision that
20 separates out three categories in which the exclusive
21 contract shall not be permitted.

22 MR. OPPER: That's correct, your Honor.

23 THE COURT: They seem to track the situations
24 which Primestar has an interest, or where it has the effect
25 of precluding other carriers in other orbital positions,

1 etc.

2 MR. OPPER: That is correct, your Honor, and I
3 believe that those are benefits given to competitors and
4 consumers that are not provided by the Cable Act or the FCC
5 regulations, that those types of protections are unique to
6 the decree.

7 THE COURT: What do you have to say about the
8 common carriers, the phone companies? You never sued them
9 in the first place.

10 MR. OPPER: We never sued them and technically we
11 never sued on their behalf. Our investigation focused on
12 anticompetitive conduct on behalf of the cable operators
13 directed to small and fledgling competitors. These were
14 MMDS distributors, small SMATV operators, that they might
15 just operate in one apartment building in a town, and TVRO
16 distributors that are dispersed throughout the country.

17 THE COURT: Am I correct in my understanding of
18 the law that, until Judge Ellis decided about two weeks ago
19 that they could be competitors, they weren't competitors for
20 all practical purposes?

21 MR. OPPER: You are correct, your Honor. And in
22 fact there is nothing in the state decree that eliminates or
23 removes any benefits that the telephone companies are
24 entitled to under any federal law. In fact, should a
25 telephone company obtain a cable franchise, it would be

1 entitled to the benefits of the decree as a cable operator.

2 I think it is significant, your Honor, that
3 immediately after that decision, a spokesperson on behalf of
4 Bell Atlantic stated, as quoted in Multichannel News, which
5 is a trade publication, that Bell Atlantic intended to seek
6 a franchise from the City of Alexandria, which is where the
7 dispute arose. So should Bell Atlantic obtain a cable
8 franchise, it would be fully entitled to all the benefits of
9 the decree.

10 THE COURT: I think that I have your argument.
11 Who else wants to be heard? You have about ten minutes
12 left. Mr. Joffe, I take it you are not going to speak?

13 MR. JOFFE: If he leaves me a minute or two, I
14 will.

15 THE COURT: All right.

16 MR. GOLDEN: My name is Arthur Golden of Davis,
17 Polk, speaking for the defendants.

18 I think the most important point I would like to
19 emphasize in connection with what Mr. Oppen said is that
20 these decrees don't make lawful anything that would
21 otherwise be unlawful, whether it is under the Cable Act,
22 the antitrust laws, or anything else. And I think it is
23 obvious that they couldn't, even if they wanted to.
24 Everybody has to comply with the law, and the FCC basically
25 admits that in its brief when it says in various ways in

1 numerous places that it will continue to enforce the law and
2 its rules as it sees fit and that these decrees aren't going
3 to stop it. I think that is fairly obvious, because even if
4 there were no existing law, if people signed these decrees
5 and the law changed in two years, the law would govern the
6 decrees.

7 Other points that I think are crucially important
8 and also, I think, admitted --

9 THE COURT: The only question for me is whether
10 or not this makes for a more competitive marketplace than
11 previously existed. If it doesn't, then I shouldn't approve
12 the decrees.

13 MR. GOLDEN: I don't think it does, and obviously
14 it is the state's judgment, not ours.

15 THE COURT: If it winds up making the market less
16 competitive, I as a federal judge cannot approve it.

17 MR. GOLDEN: I understand that. Put in
18 perspective, these investigations were going on a long time.
19 Investigations have been lingering for about five years in
20 one form or another. When the Cable Act was passed while we
21 were in the middle of negotiating these decrees, we
22 approached the states and we approached the Antitrust
23 Division of the federal government and said to each of them:
24 Isn't the Cable Act enough? Won't you please leave us
25 alone? Why do we need anything else? They each said, in

1 slightly different ways, that they did not feel that the
2 Cable Act granted enough protection to the competitive
3 interests they were trying to protect. Because of that, we
4 have wound up, in our desire to avoid the litigation, which
5 we view as the reincarnation of the IBM litigation, we wound
6 up with the decrees in the state and the federal action,
7 each of which is designed to protect the public interest,
8 obviously not us; they are designed to give the public more
9 than they feel the Cable Act provided. That was their
10 judgment. We went along with it to avoid litigation.

11 THE COURT: I was not concerned with what the
12 Cable Act gives the public. I was concerned that the decree
13 create a more competitive marketplace with the decree than
14 it does without it.

15 MR. GOLDEN: I think it does. The decree
16 requires us to do things we are not required by law to do.

17 THE COURT: Or at least arguably not required by
18 law to do.

19 MR. GOLDEN: I think it is more than arguably.
20 But, in any event, and they obviously agree with it, which
21 is why they insisted on the decrees notwithstanding the
22 antitrust laws and the Cable Act being passed, by making us
23 do things and give up rights and opportunities that we would
24 otherwise have, it redresses what the states and the
25 Antitrust Division sought.

1 THE COURT: Public relations have something to do
2 with what attorneys general do, too.

3 MR. GOLDEN: Excuse me?

4 THE COURT: Public relations have something to do
5 with what attorneys general do. Occasionally they run for
6 the Senate and whatnot.

7 MR. GOLDEN: There are 45 of them and they are
8 not all running for the Senate.

9 THE COURT: Even assuming that the Cable Act gave
10 the citizens all the protection they needed, they would like
11 to be able to tell the voters they got them more.

12 MR. GOLDEN: I agree with that. It does not
13 explain the position of the Antitrust Division, where I
14 don't think anybody is running for the Senate. But I think
15 it is fair to assume that --

16 THE COURT: The last person who ran from the
17 Attorney General's office didn't do too well, as I recall.

18 MR. GOLDEN: I am not going to respond to that.

19 I would like to leave Mr. Joffe some time to
20 talk.

21 THE COURT: Go ahead, Mr. Joffe.

22 MR. JOFFE: Thank you, your Honor. I am Robert
23 Joffe. I am representing Primestar on the phone company
24 issues because Davis, Polk has a conflict. I would like to
25 deal very briefly with their objections and then turn to the

1 intervention issue.

2 On the objections, the central point is that this
3 complaint was not brought to protect them. They are not
4 within the scope of the parties on whose behalf the state
5 sought relief. So, unlike everybody else who says, "Oh,
6 they sought relief on our behalf but they didn't get the
7 whole apple and we don't like the half apple," they didn't
8 even seek any piece of an apple on behalf of the phone
9 companies.

10 THE COURT: If I understand you correctly, they
11 didn't have an apple to seek until about two weeks ago.

12 MR. JOFFE: They weren't there. They weren't in
13 the ball field. So their complaint is not with the
14 settlement; their complaint is really with the complaint,
15 and that is obviously something that is not before the
16 Court.

17 Before one sheds too many tears over them, I
18 would just point out that Senator Marchi, who is no friend
19 of the cable companies, just said after this Chesapeake
20 decision -- he is planning to introduce legislation to put
21 some limits on the phone companies -- is quoted on August 30
22 as saying, "The Christians had a better chance against the
23 lions than competitors and consumers will have against the
24 telephone companies."

25 In any event, this complaint doesn't have

1 anything to do with them. There are some broad references
2 to multichannel video providers. But all the specific
3 references are to TVRO, SMATV, C-Span, MMDS -- that sort of
4 thing. There is no objector, and particularly not the phone
5 companies, who is worse off after this decree is signed than
6 before. They all have the antitrust --

7 THE COURT: If I read your papers, one of the
8 reasons why they should not be allowed to intervene, among
9 others, is that there is no way anybody's rights could in
10 any way be impacted by this decree.

11 MR. JOFFE: While it is an issue of discretion in
12 the Second Circuit, the Marvel case makes clear they have to
13 in some way be prejudiced. They will not be. The AT&T case
14 which they cite is under the Tunney Act which provides
15 specifically for intervention. There were also post-
16 decree proceedings there that they wanted to participate in.
17 In any event, their objections have been heard. The only
18 purpose intervention would grant at this point would be to
19 allow them to delay this further with an appeal that they
20 should not be allowed to do. Thank you, your Honor.

21 THE COURT: Who wants to be heard? You have
22 twenty minutes. I will hear one from the phone company.
23 Who else wants to be heard?

24 MR. KELLOGG: There are the phone companies,
25 there is DBS, and there is wireless cable.

1 THE COURT: Six minutes each. I don't think you
2 need that much time, but go ahead. You heard the questions
3 I have asked. You might as well respond to them.

4 MR. SIDMAN: Very well, your Honor. My name is
5 Lawrence Sidman. We are representing DirectTV, a DBS
6 provider. To go directly to the questions that you raised
7 about the consideration of competition in the marketplace, I
8 would respectfully agree entirely with you. The issue is
9 whether the marketplace with these proposed decrees will be
10 less competitive than the marketplace pursuant to the Cable
11 Act. We would respectfully submit, and virtually all of the
12 competitors agree on this, with one singular exception, that
13 that marketplace will be less competitive and significantly
14 less competitive.

15 THE COURT: Why?

16 MR. SIDMAN: The reason, your Honor, is
17 because --

18 THE COURT: Exclusive contracts are not forbidden
19 now under the law.

20 MR. SIDMAN: Your Honor, there are several
21 categories under the Cable Act. One prohibits exclusive
22 contracts between vertically integrated cable programmers
23 and cable operators in rural areas. That is a per se rule.

24 THE COURT: But this decree doesn't permit that
25 either, as I read it.

1 MR. SIDMAN: Your Honor, this decree allows and
2 explicitly sanctions and sends a signal to the marketplace
3 that exclusive contracts between vertically integrated cable
4 programmers and a DBS operator, one DBS operator in each of
5 those slots --

6 THE COURT: Not vertically integrated. Maybe I
7 read the decree incorrectly, but in a situation where there
8 is an interest by the cable operator, this provision doesn't
9 apply.

10 MR. SIDMAN: Your Honor, this consent decree
11 permits --

12 THE COURT: Maybe I read it incorrectly.

13 MR. SIDMAN: I would respectfully request your
14 Honor to examine section IV(A)(1)(g).

15 THE COURT: First of all, the decree specifically
16 says to the extent that the FCC determines that the
17 exclusive contract is not legal, this decree does not
18 protect them. So that argument fails, because the language
19 of the decree itself makes it plain that where it would have
20 the effect of making it less competitive, the decree does
21 not protect them.

22 MR. SIDMAN: Your Honor, if I may speak precisely
23 to that, I think that the problem there is that by the time
24 that adjudication is made, the game is lost. We are moving
25 in an area of remarkably rapid technology. There should not

1 be an impediment to cable competitors that have to first
2 prove a proceeding before the FCC or a court.

3 THE COURT: It says here: "Only where the
4 following three conditions are met are the obligations of
5 paragraphs," etc., "not to apply as set forth above:

6 "(i) The Primestar Partner services shall not be
7 licensed on an exclusive basis to any high-power DBS
8 provider in which owners of cable systems accounting for
9 more than 20 percent of all cable subscribers control,
10 individually or collectively, such high-power DBS provider."
11 That is your vertical integration, right?

12 MR. SIDMAN: Your Honor, I would respectfully
13 request that you go back to the prior --

14 THE COURT: The second provision says that it
15 doesn't apply "when such exclusive has the effect of
16 precluding the availability of such programming in any other
17 orbital location."

18 Then it says: "The Primestar Partner services
19 shall not require as a condition of dealing that it be
20 licensed as exclusive distributor of the programming
21 services offered by such DBS provider." So they can't kick
22 you out if you take someone else's programming.

23 MR. SIDMAN: Your Honor, the fact is that that
24 section was designed specifically to validate exclusive
25 contracts between cable defendants, Time Warner and

1 Viacom --

2 THE COURT: Exclusive contracts are not forbidden
3 now except in those situations where the Cable Act forbids
4 them, and even then the FCC has the power to make a finding
5 of public interest which makes them legal, as I understand
6 the statutory scheme. Am I correct?

7 MR. SIDMAN: Your Honor, we would respectfully
8 submit, and we would be prepared to argue at the FCC, that
9 there are three independent grounds in the section, 628(b),
10 628(c)(2), the nonprice elimination, and the provision
11 dealing with exclusivity of rural areas, which would
12 invalidate and make unlawful --

13 THE COURT: But the decree doesn't foreclose your
14 right to go to the FCC and make those arguments. This
15 decree specifically provides that if you persuade the FCC,
16 they get no protection under the terms of this decree, as I
17 read it, so what are you complaining about?

18 MR. SIDMAN: Your Honor, we are very concerned
19 about the following situations. Number one, with the
20 presence of this decree, it sends a signal to the
21 marketplace that these kinds of contractual relationships
22 which we contend are unlawful are lawful until it is proven
23 otherwise.

24 THE COURT: But that is always true.

25 MR. SIDMAN: Your Honor --

1 THE COURT: You want me to send a signal to the
2 market that it is unlawful until proven lawful? Why should
3 I send out your signal any more than theirs, as long as we
4 are talking about communication?

5 MR. SIDMAN: Your Honor, we would not
6 respectfully --

7 THE COURT: You want a presumption of illegality
8 to attach to the exclusive contract, which Congress has not
9 done except with respect to certain types of vertically
10 integrated contracts. You want me to, in effect, amend the
11 Cable Act. I can't do that.

12 MR. SIDMAN: Your Honor, we are absolutely not
13 requesting that.

14 THE COURT: You want me to send the opposite
15 signal out to the market: that exclusive contracts are bad
16 unless the FCC says they are good, and that is not what the
17 statute says.

18 MR. SIDMAN: Your Honor, one of the most
19 hard-fought provisions of the Cable Act and one of the most
20 controverted issues dealt with the question of exclusivity.
21 We would be quite content if your Honor would send no signal
22 with regard to that. That is one of our primary --

23 THE COURT: This record is here. If I approve
24 this decree, I am indicating no opinion whatsoever in any
25 shape, manner or form with respect to whether exclusive

1 contracts do or do not conform with the Cable Act. All I am
2 saying to you is that if I approve this decree, it is on the
3 express understanding, as the decree itself says, that it is
4 all subject to what the FCC determines to be lawful or
5 unlawful with respect to exclusive contracts or any other
6 facet of this decree, as I understand it. There is nothing
7 in this decree that binds the FCC in any way or binds you in
8 any way, nor should any finding I make in approving this
9 decree be taken in any shape, manner or form as any
10 imprimatur of approval or any suggestion that the particular
11 exclusive contracts are lawful or unlawful. That is a
12 matter for the FCC and a matter as to which I would have to
13 defer to the FCC in any event were any litigation to
14 commence on that basis.

15 MR. SIDMAN: Your Honor, we appreciate that
16 statement, because one of the primary concerns we have, and
17 there is already evidence of it, is the use of this decree
18 to make an affirmative case that this Court, presumably, if
19 it approves it, and certainly the state AGs put their
20 imprimatur --

21 THE COURT: How can you make that argument in the
22 face of the language of this decree? How?

23 MR. SIDMAN: Your Honor --

24 THE COURT: If they do that, you can sue them for
25 securities fraud if they put that in there 13-D or whatever

1 prospectus they file with the SEC.

2 MR. SIDMAN: Your Honor, again, to go back to the
3 basic precept that you started this argument with, with
4 which we concurred -- more significantly, with which the FCC
5 concurred -- these decrees in almost every material aspect
6 end up resolving issues which the Cable Act has decided
7 contrary or created the situation which is less competitive.
8 If you look at the major points.

9 THE COURT: I don't think that is true. The way
10 it is right now, the consumers have none of the protections
11 which this decree is going to give them. As it is right
12 now, Warner or Primestar can say, we don't have to give you
13 anything. We can control our programming, we can limit it
14 to whom we like. Go to court and sue us. That is what you
15 have done. They could have litigated this case; they chose
16 not to. Do you really want me to send a signal out to the
17 marketplace that in refusing this decree I have made a
18 determination that exclusive contracts with orbital
19 providers are in effect presumptively unlawful? I don't
20 think I can make that finding any more than I can make the
21 other at this stage of the game. That is a matter for the
22 FCC to determine, as this decree provides.

23 MR. SIDMAN: Your Honor, let me make a suggestion
24 directly responsive to that point. We would be quite
25 content if one possibility in terms of disposition of this

1 matter is for the Court to retain jurisdiction pending an
2 FCC judgment on this issue in the cases pending before the
3 FCC.

4 THE COURT: I would have no basis to do that. I
5 have continuing jurisdiction under this decree anyway.

6 MR. SIDMAN: Correct.

7 THE COURT: But it seems to me that if and when
8 the exclusive contract is challenged at the FCC level, that
9 is a separate lawsuit with considerations of agency
10 deference, as I understand, under Chevron and whatnot, which
11 raise a host of different legal questions than those raised
12 by this decree. I even have a Tunney Act case pending
13 in front of me, which itself raises different legal
14 questions.

15 There are principles of federalism involved here.
16 You have a group of states that have decided to settle a
17 case that they have brought on a basis that they have found
18 satisfactory to themselves, and I don't think I have the
19 jurisdiction to interfere with that judgment unless I find
20 it expressly not to be in the public interest. If I were to
21 find it not to be in the public interest, it would have to
22 be on the theory that exclusive contracts with orbital
23 providers are under all circumstances unlawful, and that is
24 not what the statute says. Therefore, I don't think I could
25 make that determination without at least giving the FCC a

1 crack at it first. I wouldn't have subject matter
2 jurisdiction to do that, I don't think.

3 MR. SIDMAN: I think, your Honor, that is exactly
4 what I am suggesting, which is that this Court need not
5 enter the judgment until the question has been decided --

6 THE COURT: Why?

7 MR. SIDMAN: -- by the FCC.

8 THE COURT: Why?

9 MR. SIDMAN: Because, just as has already
10 occurred, even without the Court's entry of judgment, one of
11 the parties has gone to the FCC and waved this decree
12 around. We are very concerned that the entry of the decree
13 will be prejudicial. All we are asking for is no signal
14 from the Court with regard to --

15 THE COURT: If I refuse to sign the decree, it is
16 a signal that it is unlawful, basically; otherwise why
17 wouldn't I just go ahead and sign it?

18 MR. SIDMAN: Your Honor, essentially our basic
19 position is, we respectfully submit, that it should not be
20 signed because it will create a far less competitive
21 marketplace, and the FCC agrees with it.

22 THE COURT: That isn't true, because the way it
23 is now they are perfectly free to enter into exclusive
24 contracts with orbital providers and you have the right to
25 challenge that before the FCC. Under the law as it stands

1 now, they can do whatever they like. Under the law as it
2 stands now, they are not even limited with respect to
3 orbital providers. Obviously, the public has more
4 protection now than it had before; otherwise there is no
5 protection against what they are doing.

6 MR. SIDMAN: The public has the protection
7 afforded by the Cable Act.

8 THE COURT: Yes, but people have to implement
9 that by bringing an appropriate lawsuit or bringing an
10 appropriate FCC proceeding. Until they do that, as it
11 stands right now, Primestar and anybody else is perfectly
12 free to enter into any exclusive contract that does not
13 specifically violate the terms of the Cable Act. If they
14 were to enter into one that specifically violated the terms
15 of the Cable Act, they would be subject to a lawsuit. This
16 decree doesn't change any of that. You can still bring a
17 lawsuit.

18 MR. SIDMAN: Your Honor, again, the concern we
19 have -- and I won't repeat myself -- is, we focus on
20 exclusivity. There are issues of the pricing of these
21 contracts which is a whole other issue. The Cable Act
22 mandates --

23 THE COURT: But these are issues that have to be
24 determined by the FCC. The FCC has to determine whether or
25 not the pricing provisions of this decree violate the Cable

1 Act. I don't think that I have subject matter jurisdiction
2 to resolve that unless they go first to the Commission.

3 MR. SIDMAN: Your Honor, I think all we are
4 saying is, our concern is that entry of the final judgment
5 in this case will be prejudicial to the determinations at
6 the FCC.

7 THE COURT: You keep saying that, but you don't
8 persuade me because you haven't shown me any prejudice other
9 than people are going to misconstrue the decree. That is
10 not a reason not to sign it. By its terms it says that
11 which is unlawful under the FCC and the regulations of the
12 Cable Act are not protected by this decree. I am sending
13 out the opposite signal. I read your briefs, all hundred
14 pages of these briefs, in vain to find out what you were
15 complaining about. I could find nothing other than your
16 fear that it will be marketed adversely to you. The answer
17 to that in a free country is to market it the other way.
18 You have your First Amendment rights like everybody else.

19 MR. SIDMAN: Your Honor, our concern is that if
20 this decree is entered in this fashion, then the structure
21 of this marketplace will be shaped in such a fashion that it
22 will be markedly less competitive, with less competition for
23 consumers.

24 THE COURT: That just isn't so. With respect to
25 everybody else other than orbital providers, it is a lot

1 more competitive than it was before, and with respect to
2 orbital providers it doesn't do anything other than say they
3 can do it if the law permits it.

4 MR. SIDMAN: Your Honor, the other competitors,
5 you know, can speak and will --

6 THE COURT: I think they have the same problem,
7 because I didn't find their briefs any more persuasive than
8 yours, and the phone companies' I found least persuasive of
9 all because they are not even in the marketplace until Judge
10 Ellis's decision is affirmed by a higher court.

11 MR. SIDMAN: I would just close on one final
12 note, your Honor. All around the country, since the Cable
13 Act, the cable defendants have engaged in a very vigorous
14 attempt to undermine the Cable Act, challenge the
15 constitutionality, and undermine it every step of the way.
16 I would respectfully submit that your observation about the
17 motivation for the states' attorneys general is right on
18 point. If an optimally competitive marketplace were to be
19 created when the Cable Act was enacted, that should have
20 been the end of it. As the FCC, which is the agency of
21 primary jurisdiction, recognizes, that would have --

22 THE COURT: But you are saying the public is
23 worse off because they have agreed to 70 percent rather than
24 litigating 100 percent. It doesn't make any sense.

25 MR. SIDMAN: Your Honor, I am not saying that.

1 THE COURT: You are saying it is wasteful to
2 litigate the 30 percent but you want me to litigate the 100
3 percent.

4 MR. SIDMAN: No, I am not saying that, your
5 Honor. I am saying the very points that are being raised by
6 each of the amici in this case are points which swallow the
7 rule.

8 THE COURT: If I choose to approve this decree,
9 as I think I will, I am not suggesting in any shape, manner
10 or form that exclusive contracts with orbital providers or
11 the price determinations are lawful. I will say that for
12 the record, so that if they try to use it, you can say Judge
13 Sprizzo has said specifically that, in approving the decree,
14 he is adhering to principles of federalism and therefore
15 allowing the state attorneys general to decide what they
16 think to be appropriate, without unnecessary judicial
17 interference. I am not of the mind that the marketplace for
18 cable programming is made less competitive overall,
19 including orbital providers. I am going to approve this
20 decree. I see no reason why I should not. I think that all
21 of the issues you raised are issues that can be raised at an
22 appropriate time in other appropriate legal proceedings and
23 therefore resolved and under legal standards which might be
24 very different than those which I have to apply in approving
25 what amounts to a decree consented to by many states.

1 I have to be concerned about principles of
2 federalism. I have no right to interfere with the judgment
3 of the state attorneys general unless I think it is a
4 palpable disregard of the public interest. This decree does
5 seem to give more rights to the consumers than they had
6 before, although admittedly not all of the rights that they
7 could possibly get had the case gone to litigation. But
8 that is why cases settle in the first place. Nobody ever
9 gets a whole loaf in litigation settlement, otherwise the
10 case would never settle. The public has gotten a lot more
11 than they would have gotten had this case gone on for
12 another ten years and the attorneys general had lost the
13 case.

14 Now I will hear from the phone companies. You
15 have a very difficult question to deal with, which is that
16 you don't have any competitive standing in the marketplace
17 unless the decision of Judge Ellis is affirmed.

18 MR. KELLOGG: Michael Kellogg on behalf of the
19 telephone companies.

20 I want to take issue with your central premise,
21 which is that under the antitrust laws half a loaf is better
22 than none. These decrees do provide access for some of the
23 competitors of the cable industry but not for telephone
24 companies whatsoever.

25 THE COURT: But you had no right to be in the

1 marketplace until Judge Ellis ruled two weeks ago that you
2 did.

3 MR. KELLOGG: We did have a right to be, in a
4 number of respects. We can provide cable programs outside
5 of our region --

6 THE COURT: If you you think that their conduct
7 is illegal, sue them.

8 MR. KELLOGG: Your Honor, it is not quite that
9 easy. It is as if General Motors had a monopoly on
10 sparkplugs. The state sues them to say you have to make
11 those available --

12 THE COURT: This decree does not take away any
13 right from you vis-a-vis Primestar that you do not already
14 have under the law.

15 MR. KELLOGG: That's correct.

16 THE COURT: That is the bottom line.

17 MR. KELLOGG: That's correct.

18 THE COURT: If anything, Primestar and its
19 partners and ventures, Viacom and whatnot, have limited what
20 they can do and therefore, to that extent, made the market
21 more competitive to consumers because the decree has
22 restricted what they can do. They are not being permitted
23 under this decree to do anything which the law would forbid
24 them from doing, because the terms of the decree itself say
25 that if it is illegal or in violation of the FCC rules or

1 the Cable Act, then this decree doesn't protect them. So I
2 don't understand what you are complaining about.

3 MR. KELLOGG: It is the last point that I
4 disagree with you on, your Honor. The antitrust laws
5 protect competition, not competitors.

6 THE COURT: Correct.

7 MR. KELLOGG: These decrees single out specific
8 competitors.

9 THE COURT: No, they just say that we are not
10 going to limit ourselves with respect to orbital competitors
11 unless the law says we have to. That is all this decree
12 says.

13 MR. KELLOGG: It says we are going to provide
14 access for DBS, for --

15 THE COURT: What the decree says is that we are
16 not going to settle a claim not yet asserted against us.
17 The state has sued them for certain anticompetitive conduct
18 in the market with respect to cable systems which currently
19 exist and cable providers which currently exist, be they
20 direct satellite providers, etc. The orbital providers, the
21 orbital satellites, are not yet in operation; they were not
22 sued for that. This decree says we are not going to limit
23 ourselves with respect to allegations of anticompetitive
24 conduct which has not yet been asserted against us and could
25 not yet be asserted against us since we are not operational

1 yet.

2 MR. KELLOGG: I don't think the antitrust laws
3 work that way, your Honor. In dozens of consent decrees
4 they all provide access to all of the defendants'
5 competitors. They cannot cite a single act --

6 THE COURT: What standing do you have in this
7 case?

8 MR. KELLOGG: Because we believe that --

9 THE COURT: It would have been illegal for you to
10 be in this marketplace, and it will be illegal for you to be
11 in this marketplace if Judge Ellis's decision is reversed.

12 MR. KELLOGG: That is not correct, your Honor.

13 THE COURT: You have a limited right to be in
14 markets not serviced by your phone companies, as I
15 understand it.

16 MR. KELLOGG: We are also allotted to provide
17 video dial tone networks.

18 THE COURT: This decree doesn't deal with that at
19 all.

20 MR. KELLOGG: That's correct.

21 THE COURT: How can you object to it on that
22 ground?

23 MR. KELLOGG: It excludes those as well, your
24 Honor, from the access provisions.

25 THE COURT: What provision excludes it?

1 MR. KELLOGG: The provision is the one I cited
2 that defines cable operators.

3 THE COURT: It just excludes you from the
4 definition of a cable provider.

5 MR. KELLOGG: That's right. And the act provides
6 certain access rights to cable providers. Since we are
7 excluded and our video dial tone customers are excluded --

8 THE COURT: Then sue them. You are able to
9 protect your own rights. You are the phone company.

10 MR. KELLOGG: It would take years to prosecute a
11 suit.

12 THE COURT: It would have taken years to
13 prosecute this lawsuit, which is why they have settled it.

14 MR. KELLOGG: That is correct, your Honor.

15 THE COURT: If you don't like what they have
16 done, too bad for you.

17 MR. KELLOGG: The state does not have the option
18 to settle the suit in a way that balkanizes the market and
19 is anticompetitive.

20 THE COURT: It doesn't balkanize the market. It
21 just says that we are going to achieve protection for
22 certain types of cable systems and we were not able to
23 negotiate more than we negotiated, and certainly we weren't
24 concerned about you because you were not a prime player in
25 the market anyway. I don't have the right to second-guess a

1 state attorney general's judgment. I have a limited power
2 to decide whether what they have done is so in derogation of
3 the public interest that I should not approve it. I don't
4 sit here as a super-attorney general. Maybe you don't
5 understand the standard of review.

6 MR. KELLOGG: Your Honor, if I could just --

7 THE COURT: You haven't briefed the standard of
8 review; they have.

9 MR. KELLOGG: We did brief the standard of
10 review.

11 THE COURT: You don't take issue with what they
12 say.

13 MR. KELLOGG: We agree that the standard is
14 whether the decrees are in the public interest as determined
15 under the --

16 THE COURT: And I think that they are if they
17 have the effect of achieving a more competitive marketplace
18 than currently exists. That is my judgment. But I don't
19 have the power to substitute my judgment for theirs because
20 you don't like what they have done.

21 MR. KELLOGG: I agree, your Honor, that is the
22 standard, and if I could just explain why I think these are
23 affirmatively anticompetitive. I mentioned the example of
24 GM in the marketplace. If the state were to enter into a
25 decree which says GM has to provide sparkplugs to Chrysler

1 but not to Ford, you could, on the one hand, say, well, OK,
2 that's half a loaf, that's half of the market, that's
3 helpful to competition. But it is not, because it
4 affirmatively skews the marketplace.

5 THE COURT: Ford can protect itself by bringing a
6 lawsuit. There is a rule of law that those parties who seek
7 to vindicate their own rights obtain benefits that other
8 parties do not.

9 MR. KELLOGG: The state in acting in its parens
10 patriae capacity is supposed to represent the public
11 interest in competition, not the interest of individual
12 competitors.

13 THE COURT: Have you sued them for
14 anticompetitive conduct?

15 MR. KELLOGG: No, we have not.

16 THE COURT: If you had sued them for
17 anticompetitive conduct, they would have had to settle with
18 you. You didn't sue them; the state sued them. Now you
19 want a free ride on the pony and are saying, we didn't sue
20 them, we didn't challenge what they have done, but now that
21 the state has challenged what they have done, we want the
22 state to be restricted in the terms on which it shall settle
23 because this doesn't achieve the maximum benefit for us.
24 Sue them yourself.

25 MR. KELLOGG: We didn't particularly care about

1 riding on these consent decrees. We don't particularly care
2 if these consent decrees --

3 THE COURT: Go down to the courthouse tomorrow,
4 pay the filing fees, bring your action, and then we will see
5 whether you can work out your antitrust claim against them.

6 MR. KELLOGG: The Supreme Court said the whole
7 purpose of the consent decree --

8 THE COURT: That is in what type of case?

9 MR. KELLOGG: Under the common law the same exact
10 standards apply here. The purpose of a --

11 THE COURT: Were there principles of federalism
12 involved insofar as my need to defer to the judgment of a
13 state government in a federal union?

14 MR. KELLOGG: The states are suing under federal
15 law, your Honor.

16 THE COURT: That may be, but their judgment as to
17 what suits the public interest on a parens patriae hearing
18 is a federally protected state judgment, and I can't ignore
19 that.

20 MR. KELLOGG: Your deference is no stronger than
21 that to the United States Attorney General.

22 THE COURT: I have no federal union type of
23 deference to the United States Attorney General. That is a
24 different type of deference. It is the U.S. Government; it
25 is not the state government. It is not part of the

1 federal-state scheme of things.

2 MR. KELLOGG: The purpose of an antitrust decree
3 is to pry open market competition, not to protect individual
4 competitors that want to compete in that market. It is to
5 pry open the market.

6 THE COURT: That is the argument they are making
7 against you.

8 MR. KELLOGG: That's right, but --

9 THE COURT: You are saying the decree is no good
10 because it doesn't give you the benefits it should give you.

11 MR. KELLOGG: That is precisely our point: that
12 the decree doesn't protect competition. It protects a
13 select group of competitors chosen by the defendants.

14 THE COURT: It doesn't protect them. It protects
15 the consumers, in the sense that it is requiring Primestar
16 to make their programs available on a nondiscriminatory
17 basis, which benefits the public.

18 MR. KELLOGG: It skews competition if some
19 competitors get a benefit that is denied to others and
20 consumers are ultimately harmed.

21 THE COURT: You are not even a competitor yet,
22 except in a very limited phase of this market. I can't let
23 that little corner of the market control.

24 MR. KELLOGG: We have SEC authorization to
25 provide video dial tone networks.

1 THE COURT: What percentage do you have of the
2 total market?

3 MR. KELLOGG: It is a tiny market.

4 THE COURT: You bet your life it is a tiny
5 market.

6 MR. KELLOGG: But it is going to grow.

7 THE COURT: And therefore the impact upon you and
8 upon competition is minimal compared to the size of the
9 markets.

10 Who else wants to be heard?

11 MR. SINDERBRAND: Your Honor, Paul Sinderbrand
12 for the Wireless Cable Association. I will try to be very
13 brief.

14 Our position throughout this case has been that,
15 with respect to the decree's focus on a technology-neutral
16 approach, just as the FCC has said, the public interest is
17 served when the decree is technology neutral. We have given
18 as an example of the problem in this case the situation
19 involving access by DBS to certain programming services that
20 are being denied the wireless cable operators under the
21 decree. Specifically, we mention TNT, an especially
22 critical service for us to have access to.

23 In the brief submitted by the states and by the
24 defendants, we have been dismissed with statements like -- I
25 will read from the state attorneys general: The defendants

1 have represented to the plaintiff states and the Court,
2 however, that they have no exclusive distribution agreements
3 with TNT that apply against MMDS operators.

4 So apparently the states believe that my issue is
5 a nonissue because factually it doesn't exist. That simply
6 is not true. I have affidavits from seven wireless cable
7 operators who have recently been advised by TNT that they
8 cannot distribute TNT to their wireless cable subscribers
9 because of preexisting exclusive contracts with defendants
10 in this case.

11 THE COURT: What provision of this decree impacts
12 you adversely in that situation?

13 MR. SINDERBRAND: What it does is --

14 THE COURT: Wait, wait. Let's deal with the
15 decree. What in this decree makes your situation worse than
16 it was before?

17 MR. SINDERBRAND: The decree requires the
18 Primestar Partners to make available programming on which
19 they had an exclusive to our DBS competitors. So now one
20 more competitor has programming that we don't have. It puts
21 us in a further worse position because other people have it
22 with different technology.

23 THE COURT: I am not too clear as to whom you
24 represent. Whom do you represent?

25 MR. SINDERBRAND: We represent companies that

1 utilize terrestrial microwave signals to distribute cable
2 television programming.

3 THE COURT: You are not an orbital provider.

4 MR. SINDERBRAND: We are not orbital providers.

5 THE COURT: So how does this decree impact you?

6 The only exclusive contracts I see sanctioned here deal with
7 orbital providers. Did I misread it?

8 MR. SINDERBRAND: What this does is --

9 THE COURT: What does the decree say? They can
10 have an exclusive contract with your competitors and not
11 with you?

12 MR. SINDERBRAND: TNT has an agreement with Time
13 Warner, TCI, other defendants. Under the decree, Time
14 Warner, TCI, agree that they will not enforce those
15 exclusive provisions against another DBS provider.

16 THE COURT: What provision of the decree are you
17 referring to? What page is it on?

18 MR. SINDERBRAND: It is IV(C)(1).

19 THE COURT: What page?

20 MR. SINDERBRAND: I don't have a copy in front of
21 me.

22 MR. JOFFE: It is page 18, your Honor.

23 MR. SINDERBRAND: It is the first sentence from
24 the bottom. Primestar cannot enforce any contract terms
25 that restrict or limit the rights of such a programming

1 service to deal with any DBS provider. That is just DBS.

2 THE COURT: So?

3 MR. SINDERBRAND: So what it does is, it skews
4 the marketplace --

5 THE COURT: As I understand right now, they have
6 the right to enforce exclusive contracts against everybody
7 including you.

8 MR. SINDERBRAND: That's right. This is an
9 example of something that is endemic throughout the decree.
10 Programming is parceled out based on technology.

11 THE COURT: How would that injure competition
12 except to a particular competitor?

13 MR. SINDERBRAND: What we wind up with is a
14 situation where the program is carefully parceled out,
15 technology by technology by technology, so that nobody can
16 compete effectively against the cable industry, because
17 nobody is going to get the full package of programming that
18 consumers demand. What we have got is a situation here
19 where one competitor, USSB, has been singled out as the
20 favorite son of the cable industry. Throughout this, what
21 we see is a system that gets programming to this weak
22 sister, who has fewer channels than other competitors, and
23 dismisses the other technologies who are more likely to
24 effectively compete in the marketplace.

25 THE COURT: What percentage of the market do you

1 now control?

2 MR. SINDERBRAND: Right now, we are an emerging
3 industry, we are small. Our largest system is 40,000 to
4 50,000 subscribers in Los Angeles. We have a system of
5 40,000 in New York. We are just beginning to get into the
6 marketplace. Nationwide we probably have half a million
7 subscribers.

8 THE COURT: What market share do you have?

9 MR. SINDERBRAND: There are some markets, I will
10 give you an example, in Riverside --

11 THE COURT: I am trying to find out whether or
12 not you are complaining about an injury to competition or an
13 injury to you as a competitor.

14 MR. SINDERBRAND: In most markets, I am certain
15 we are less than 10 percent. There is no place where we are
16 more than 10 percent of the marketplace, and we are barely a
17 blip on the radar right now in most markets.

18 THE COURT: So what you are complaining about is
19 an injury to you as a competitor rather than to competition.

20 MR. SINDERBRAND: To the extent we are talking
21 about TNT and our ability to get it, we are talking about
22 its effect on us. But that is an example of how the decree
23 parcels out programming carefully so that no competitor gets
24 enough --

25 THE COURT: I will have them address that when

1 you finish any other point you want to make.

2 MR. SINDERBRAND: That's it.

3 THE COURT: Who else wants to be heard from the
4 other side?

5 Does anybody want to respond to his argument that
6 you are now conferring a benefit upon his competitors and
7 therefore the competitive situation is worse, in that you
8 have the right to enforce contracts against him and not
9 against other people? That is a point worth responding to.

10 MR. OPPER: Your Honor, I think it was clear from
11 the brief on behalf of the wireless cable operators and Mr.
12 Sinderbrand's comments that the WCA want their TNT. We
13 would have been happy to get it for them. The problem is,
14 there is a provision in that decree that prohibits the cable
15 operators from enforcing existing exclusive contracts.

16 THE COURT: Against DBS providers?

17 MR. OPPER: Except with respect to DBS providers.
18 And in fact that provision is almost identical with the FCC
19 regulations. What is significant here, though, is that it
20 is a nonissue. The wireless cable operators believe that
21 they can't get TNT based on an exclusive with the cable
22 operators, such as Mr. Joffe's client, Time Warner. We have
23 been told by Mr. Joffe, whom we certainly respect, that no
24 Time Warner cable operator has an exclusive contract that
25 prevents TNT from making its services available to Mr.

1 Sinderbrand's clients. Mr. Sinderbrand's argument is with
2 TNT; if it can't get TNT, it should go to TNT. There is
3 nothing in the decree that is before the Court that in any
4 way --

5 THE COURT: Isn't TNT one of these Primestar
6 Partners?

7 MR. JOFFE: No.

8 MR. OPPER: No, your Honor. And in fact what is
9 ironic here is that the first gentleman who appeared here, a
10 Mr. Sidman on behalf of DirectTV, his client does have TNT.

11 THE COURT: But the short answer is that, from
12 what you are telling me, the factual underpinning for his
13 objection has not been fully developed and therefore cannot
14 at this stage be a basis for my not approving the decree --

15 MR. OPPER: That's correct.

16 THE COURT: -- under the facts before the Court.
17 To the extent that he is correct in what he says, he can
18 resolve that in a separate lawsuit.

19 MR. OPPER: That's correct.

20 THE COURT: I have heard all the arguments. I
21 have read all the papers. I see no reason why I should not
22 approve this decree. It seems to me that, by the terms of
23 the decree itself, that which is illegal is not permitted.
24 The decree itself makes that clear. Also, the orbital
25 satellites are not yet fully operational. Therefore, it is,

1 in my view, a rather insubstantial reason not to approve
2 this decree merely because of what may or may not happen
3 with respect to orbital satellites that are not yet in place
4 and with which the FCC has yet to deal.

5 Under principles of federalism I am required,
6 pursuant to the rather limited power I have, to approve what
7 amounts to a settlement of a civil case and to defer to the
8 judgment of the Attorney General with respect to a decree,
9 unless I am persuaded that it is, in my view, clear and
10 convincing to me that it is not in the public interest.

11 I think the showing that has been made by the
12 objectors does not come close to demonstrating to me that
13 the effect of this decree will be to make the marketplace
14 substantially less competitive than it was before. In fact,
15 I think, weighing the benefits achieved by this decree
16 against the arguments that have been made as to the possible
17 disadvantage to some competitors as a result of the decree,
18 the only argument I have heard which is even remotely
19 persuasive is the last one I heard on behalf of the wireless
20 operators. But I don't have a fleshed-out factual record
21 upon which I could let their arguments be the basis for
22 refusing to sign this decree.

23 I will state for the record that everyone is free
24 to make their own factual record in their own lawsuit,
25 either under the antitrust laws or under the Cable Act or

1 before the FCC in an appropriate administrative proceeding.

2 Whatever I have done in approving this decree is
3 not in any way a finding by this Court that any conduct
4 challenged in the future, either in the courts or at the FCC
5 in an administrative hearing, is lawful by virtue of the
6 fact that the Court has signed this decree. In signing this
7 decree, I have only concluded that it is not irrational for
8 the state to accept this on behalf of its citizens as
9 creating perhaps more benefits to a larger section of the
10 market than would otherwise be available. The fact that it
11 has not achieved what amounts to an optimum or perfect
12 market has never been, in my view, a basis for a court to
13 refuse to approve even a class action settlement as to which
14 the court's power to approve or disapprove is much greater
15 than it is here.

16 The phone companies' arguments to me are highly
17 speculative. They have only been recently, for the most
18 part, put into a major share of this market by a decision of
19 a district judge, which has yet to be tested on appeal.
20 They have not sued in this case and therefore I find their
21 standing to be, if anything, rather remote. Therefore, I
22 cannot find that this decree violates the public interest or
23 in any way achieves a less competitive marketplace on the
24 whole than the situation as it has existed prior to this
25 time. I rely to a great extent upon the terms of the decree

1 itself, which make it very clear that exclusive contracts
2 with orbital providers, or any other conduct that is found
3 to be a violation of the Cable Act, are not going to be
4 protected by this decree.

5 I don't find persuasive the argument that it is
6 too much of a difficulty or burden for the individuals
7 aggrieved by what they may claim to be antitrust violations
8 in the marketplace to seek to vindicate those rights in
9 their own lawsuits, which I think is a normal rule, rather
10 than seek to come in the back door and try to achieve what
11 they could have achieved by a frontal assault upon what they
12 claim to be the anticompetitive nature of the cable market.

13 That being so, I think that, from my reading of
14 this decree, it does create rights in the consumers which
15 did not exist before and, on the whole, makes the market
16 more competitive than it was before, even though there may
17 be some incidental situations, as raised by the wireless
18 operators, in which perhaps the situation might be a little
19 worse than it was before. On balance, I think it clearly
20 achieves a more competitive marketplace.

21 I am not sending any signals out one way or the
22 other, so that should be very clear to anyone who tries to
23 market my approval in any improper fashion. I have just
24 determined that if 45 attorneys general, give or take a few,
25 conclude that it is in the best interest of their states to

1 sign these decrees, there is a heavy presumption in its
2 favor, which I should not lightly disregard in the absence
3 of some clear and convincing evidence of damage to the
4 marketplace, which I have not seen in the arguments
5 presented to me thus far.

6 I will sign the decrees as written, probably
7 sometime today or Monday. Those people who think that they
8 have grievances to file, file them in the appropriate way
9 against the appropriate parties under the antitrust laws, or
10 whatever, but I see no reason to delay this matter any further.

11 MR. JOFFE: Your Honor, are you ruling on the
12 phone companies' motion to intervene?

13 THE COURT: I am denying their application to
14 intervene, because I think intervention is not required as a
15 matter of law, because I do not think, even accepting all
16 the arguments that they make for intervention and assuming I
17 don't accept all the arguments you make in the briefs,
18 although very persuasive, as to why they should not be
19 allowed to intervene, I see no way in which their rights in
20 a practical way are going to be in any way impacted by this
21 decree. I have given them the opportunity to file the
22 amicus curiae briefs and argue the motion; therefore,
23 intervention is not either necessary or appropriate. If
24 they choose to challenge your conduct as being
25 anticompetitive, let them bring their own lawsuit.

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