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PERSPECTIVE:
HOW THE FCC IS OVERSTEPPING ITS MARK

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During the past several years, the U.S. Federal Communications Commission has nakedly - and indeed embarrassingly - attempted to act as the “sword and shield” of U.S. carriers in their various dealings with foreign operators.

To facilitate this policy objective, the FCC has erected numerous barriers to foreign entry, including, but not limited to, the unilateral imposition of settlement rate benchmarks, at the same time forcing foreign firms to pay into the bloated and politically corrupt U.S. universal service fund.

As frequent readers of this publication are well aware, these efforts have caused great consternation and dismay in the international telecoms community (*CWI*, 23 November 1998, p.1). But last month the telecoms battle between the United States and the international community reached a new milestone when the U.S. Circuit Court of Appeals for the District of Columbia Circuit upheld the FCC’s actions in their “entirety.” (www.fcc.gov/ogc/documents/opinions/1999/cable.html).

In doing so, the D.C. Circuit has not only placed major areas of previously settled U.S. jurisprudence in flux, but – even assuming the court got it right (which it did not) – also it has approved the FCC’s role as “cartel manager” and destroyed what little chance there was to avoid an all-out international telecoms trade war.

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Essentially, the D.C. Circuit lawfully codifies the notion that “FCC” should stand for “Facilitating Cartels and Collusion,” because the court encourages and condones U.S. firms to boycott foreign firms - conduct that competition-law jurisprudence around the globe recognizes as per se anticompetitive.

Indeed, given the huge amount of revenue U.S. traffic represents, when U.S. firms act as a cartel, they actually have significant monopsony (or bargaining) power with foreign firms and should be, and are, able to exercise this power to their advantage.

As such, the FCC’s popular “victim” defense - that is, the FCC’s actions are justified because U.S. firms are always at the mercy of foreign monopolists - is specious at best.

More importantly, however, by openly approving the fact that the whole purpose of the FCC’s actions was to “strengthen the bargaining position of domestic telecoms companies in negotiations with their foreign counterparts,” and by condoning U.S. carriers’ efforts to engage in what amounts to a group boycott, both the FCC and the D.C. Circuit have bastardized the “public interest” standard into a concept that inappropriately promotes individual competitor interests over competition and consumer welfare.

To argue that by “protecting competitors we a fortiori protect competition” just doesn’t pass the economic giggle test.

Third, this case, along with other recent U.S. Trade Representative and FCC actions, sends a clear signal to the international telecoms community that the United States now considers the 1997 WTO February Accord essentially worthless. Indeed, other WTO signatories did not commit to an arrangement where the United States would be “first among equals,” and where their own efforts would be discounted by both U.S. regulators and courts.

As such, U.S. firms should not be surprised if they find their international counterparts less cooperative, and foreign regulators and courts more hostile to their interests.

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Accordingly, despite numerous caveats to the contrary, the Clinton Administration sadly still cannot get the simple concept that Adam Smith explained more than 200 years ago: mercantilism hurts all consumers.

Indeed, it is still unclear what they hope to achieve in the long-run by burning all these bridges. Do they really want U.S. firms, when entering a foreign counterpart's or regulator's office, to be perceived immediately as the "ugly American"? If so, then we should don our collective Nehru jackets and get used to the catcalls of "Yankee Go Home," because free trade, competition and de-regulation are the last things the FCC's international policies are going to produce.