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CHALLENGING CABLE TELEVISION EXCLUSIVE FRANCHISE AGREEMENTS: HAS “STATE ACTION” IMMUNITY GONE TOO FAR?

INTRODUCTION

The rapidly rising demand for cable television in many metropolitan areas has created an inviting market for cable television providers. Yet, due to the unique nature of cable television installation, a truly competitive market is not possible. Physical scarcity and the disruptive effect of cable installation have forced municipalities to regulate the number of cable television providers within their boundaries.

These limits on the number of cable television suppliers in municipal markets are resulting in litigation challenging the legality of such regulations. In particular, in 1984, Preferred Communications, Inc. (“P.C.I.”), a cable television provider, filed an action in the United States District Court for the Central District of California, challenging the City of Los Angeles policy which awards an exclusive franchise to one cable operator in a particular geographical district.

P.C.I., a corporation organized for the purpose of operating a cable television system in an area of Los Angeles designated by the City as the South Central District, intended to install its network of transmission cables by attaching them to existing public utility facilities. To accomplish this, P.C.I. approached the Pacific Telephone and Telegraph Company and the Los Angeles Department of Water and Power. P.C.I. sought to negotiate a lease for space on those companies' poles and conduits. Both utilities, however, informed P.C.I. that such an agreement was not possible unless P.C.I. received an exclusive franchise from the

1. Currently, cable system operators place cable lines on existing public utility poles and conduits, or, where necessary, under easements owned by the utility companies running over both public and private rights of way.
2. The amount of space available on existing public utility poles and conduits is limited. Thus, utility operators limit the number of cable television providers.
3. Providing communities with cable television disrupts the use of public resources; streets and thoroughfares must be temporarily insulated from traffic while transmission cables are placed on utility poles or underground.
City. In response, P.C.I. petitioned the City to obtain such a franchise, but the City refused, stating that P.C.I. had failed to participate in an auction that was to award a single franchise in the area.

Consequently, P.C.I. filed its complaint in district court challenging the City's actions on two grounds. First, P.C.I. alleged that the City's exclusive franchise policy violated their first and fourteenth amendment right to free speech. Second, P.C.I. alleged that the City's policy violated sections 1 and 2 of the Sherman Antitrust Act ("Sherman Act"). The district court dismissed the complaint for failure to state a cause of action upon which relief could be granted. Upon appeal, the Ninth Circuit affirmed the dismissal with respect to the Sherman Act, but reversed as to the First Amendment claim. On certiorari, the Supreme Court affirmed the Ninth Circuit's holding. In its opinion, the Court addressed the First Amendment claim but did not discuss the antitrust cause of action. Instead, the Court merely affirmed the Ninth Circuit's holding that the City of Los Angeles was exempt from antitrust liability under the state action exemption established in Parker v. Brown.

This Note will examine the Ninth Circuit's analysis of City of Los Angeles' affirmative defense of state action immunity, and then examine the correctness of the decision in light of controlling and persuasive precedent. Finally, this Note will examine the public policy goals served by denying a Parker defense to local municipalities who grant exclusive franchises as a means of regulating the cable television industry.

I. STATE ACTION IMMUNITY FOR MUNICIPALITIES

Federal antitrust laws were enacted to prevent unreasonable interference with competition in interstate and foreign commerce. Within this context, the Sherman Act attempted to codify common law doctrine regulating trusts in favor of a fully competitive market.

The Sherman Act rests upon the proposition that free competition among competitors ultimately benefits consumers. Absent regulation, participants in monopoly and oligopoly markets may earn super-profits, not because their products are superior, but because substitutes are not available. Moreover, monopolists and oligopolists have little incentive...
to improve their products by engaging in research and development, since competition from other products is virtually non-existent. Finally, monopolists and oligopolists often provide less than favorable warranty and service terms because there is no competitive pressure to do so.\textsuperscript{11} While the above problems are not inherent in unregulated monopoly and oligopoly markets, the potential for such harms prompted Congress to enact the Sherman Act to prevent or, at minimum, limit such possibilities.

A. "JUSTIFIED" MONOPOLIES AND OLIGOPOLIES

Under certain circumstances, monopolies and oligopolies are justified. As such, they are exempt from the Sherman Act. In a "natural monopoly" the market is unable to support more than a single competitor. A single grocery store located in a small, isolated town with a limited population is an example of a natural monopoly. There, the market cannot support additional competitors, so the existing monopoly is considered legal and exempt from antitrust liability.\textsuperscript{12} Monopolies and oligopolies are also justified where businesses must be attracted to participate in markets they would not otherwise enter. For example, private utility companies are granted the right to a monopoly or oligopoly because of high barriers to entry\textsuperscript{13} and because the limited number of potential consumers in the market pose a risk of failure for participants who might consider entering the market.

Legal monopolies and oligopolies must be regulated to prevent abuses of power.\textsuperscript{14} But policing these markets is expensive and requires expert knowledge of the industry. Yet, even when this is possible, regulation may not always be effective. Consequently, the courts interpret the Sherman Act and other federal antitrust laws as outlawing all but a few anticompetitive arrangements.

B. "STATE ACTION" IMMUNITY

The Sherman Act has never been interpreted to override all state laws impinging on competition. In \textit{Parker v. Brown}\textsuperscript{15}, the Supreme Court examined for the first time whether a state could be held liable

\textsuperscript{11} Contract laws may regulate this problem to some degree, but they should not be relied on as the main protection for the consumer.
\textsuperscript{12} The same argument can be made for an oligopoly, where the consuming market can only support a limited number of competitors.
\textsuperscript{13} The term "barriers to entry" refers to the fixed costs associated with producing goods which consumers ultimately purchase. For example, the barriers to entry for a firm contemplating entry into the market for production of electricity would include the cost of the machinery, the building, the land, etc.
\textsuperscript{14} See \textit{supra} text accompanying note 11.
\textsuperscript{15} 317 U.S. 341 (1943).
under the Sherman Act for restraining interstate competition. The
plaintiff, a producer and packer of raisins in California, brought an ac-
tion against state officials charging them with illegally imposing a
mandatory marketing program to stabilize raisin prices. Denying plain-
tiff relief, the Court held that states as “sovereigns” are exempt from
the Sherman Act. The Court further held that state officers and
agents who exercise the state's policy are also per se exempt from anti-
trust liability.

1. Clearly Articulated and Affirmatively Expressed State Policy

State municipalities and agencies are not granted the per se exemp-
tion afforded to states. In *City of Lafayette, La. v. Louisiana Power &
Light Co.*, the Supreme Court, in a plurality opinion, held that “[c]ities
are not themselves sovereign” and thus “do not receive all the federal
deference of the States that create them.” However, since “[m]unicipal corporations are instrumentalities of the State for the con-
venient administration of government within their limits[,]’ the actions
of municipalities may reflect state policy.” Thus, under the *Parker*
“state action” doctrine a municipality’s actions are exempt only if the
anticompetitive behavior is mandated by the state. “[A]n adequate state
mandate for anticompetitive activities of cities and other subordinate
governmental units exists when it is found 'from the authority given a
governmental entity to operate in a particular area, that the legislature
contemplated the kind of action complained of.'”

In *Community Communications Co, Inc. v. City of Boulder, Colo.*, the Supreme Court further refined the *Lafayette* test to its present in-

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16. *Parker*, 317 U.S. 341; “In a dual system of government in which, under the Consti-
tution, the States are sovereign, save only as Congress may constitutionally subtract from
their authority, an unexpressed purpose to nullify a state's control over its officers and
agents is not lightly to be attributed to Congress.” *Id.* at 351.
17. 317 U.S. at 350-01.
20. 435 U.S. at 413, quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109
U.S. 285, 287 (1883).
terpretation. In its suit against the city, Community Communications, a
cable television operator, maintained that an ordinance prohibiting it
from expanding its business for three months, during which time the
city council drafted a cable television ordinance and invited other busi-
nesses to enter the market, violated the antitrust laws. The Court held
that the ordinance, which was enacted under the broad “home rule” powers of the city, did not enjoy the “state action” exemption from
Sherman Act liability. Writing for the majority, Justice Brennan rea-
soned that “[a] State that allows its municipalities to do as they please
can hardly be said to have ‘contemplated’ the specific anticompetitive
actions for which municipal liability is sought.” Thus, the Lafayette
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.

2. Active State Supervision

Prior to the Supreme Court’s decision in Town of Hallie v. City of
Eau Clair, a state entity claiming Parker “state action” immunity was
required to show not only that its challenged restraint was one “clearly
articulated and affirmatively expressed” as state policy, but also that
the policy was actively supervised by the State itself. However, the
Town of Hallie decision limits this two-prong test exclusively to those
situations where the entity claiming “state action” exemption is a pri-
vote party. As a result, a municipality claiming Parker doctrine im-
unity is not compelled to meet the “active state supervision”
requirement, but instead must only fulfill the “clearly articulated and
affirmatively expressed” test.

23. The Home Rule Amendment of the Colorado Constitution vests the City of Boul-
der with “every power theretofore possessed by the legislature . . . in local and municipal
affairs.” Four-County Metro. Capital Improvement Dist. v. Board of County Comm’rs, 149
25. Id.
27. See Parker, 317 U.S. at 352.
28. California Retail Liquor Dealers Ass’n v. Midcal Aluminum, 445 U.S. 97, 105
(1980). In Midcal, plaintiffs sued the California Department of Alcoholic Beverage Con-
trol for violating the antitrust laws by establishing a retail price maintenance system for
wine. The Court held that while the Department’s anticompetitive policy met the
“clearly articulated and affirmatively expressed” requirement, it failed the second re-
quirement of “active state supervision” because the State’s involvement in setting prices
was insufficient.
29. Town of Hallie, 471 U.S. at 43. See, e.g., California Retail Liquor Dealers Ass’n v.
II. THE ANTITRUST CHALLENGE OF P.C.I. TO THE CITY OF LOS ANGELES' MONOPOLY FRANCHISING POLICY

A. THE P.C.I. DECISION

When P.C.I. filed its complaint alleging, inter alia, violations of sections 1 and 2 of the Sherman Act, the City of Los Angeles, relying on Parker v. Brown,31 raised the affirmative defense of "state action" immunity. The district court agreed that the Parker doctrine applied, as did the Ninth Circuit32 and ultimately the Supreme Court.33

The Ninth Circuit34 based its grant of "state action" immunity to the City of Los Angeles on its interpretation of California Government Code section 53066. The court began its analysis by setting forth its own two-part test for assessing the availability of Parker immunity for municipalities: the City must not only demonstrate the existence of a state policy to displace competition with regulation, but must also show that the legislature contemplated the kind of actions alleged to be anticompetitive.36

P.C.I. argued that Parker "state action" immunity should not protect the City because the relevant state statute is entirely permissive. The California statute37 does not require or compel franchising or exclusive franchising. It only provides that cities "may" license or

31. Id.
32. 754 F.2d 1396 (9th Cir. 1985).
33. 476 U.S. 488 (1986). While upholding the district court's antitrust analysis, both the court of appeals and the Supreme Court reversed the district court's holding that P.C.I.'s First Amendment claim for relief did not state a proper cause of action upon which relief could be granted. See supra notes 4-8 and accompanying text.
34. The Supreme Court did not address its written opinion to the applicability of a Parker doctrine defense. Instead, it merely affirmed the court of appeals' analysis, choosing instead to consider P.C.I.'s constitutional claim for relief. Consequently, the Ninth Circuit's analysis of the City's antitrust liability will be considered in this Note.
35. In relevant part, section 53066 provides:
Any city or county or city and county in the State of California may . . . authorize by franchise or license the construction of a community antenna television system. . . . The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county, or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. . . . Any cable television franchise or license awarded . . . pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county.
36. 754 F.2d at 1412; see Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1433 (9th Cir. 1984); e.g., Tom Hudson & Assocs. v. City of Chula Vista, SCA, 746 F.2d 1370, 1373 (9th Cir. 1984).
franchise the construction of community antenna television systems using public property and easements. Since the provision merely permits cities to franchise cable systems and to accept consideration other than cash in awarding the franchise, the City’s determination to eliminate competition among cable operators by limiting the number of franchises it issues reflects city policy, not state policy. Thus, in one respect, the California statute is similar to the “home rule” provision at issue in Community Communications, in that California’s statute reflects mere neutrality with respect to whether cable television should be competitive. Under the California statute, the City of Los Angeles can choose to prescribe monopoly service, while another city can elect free market competition. Since the state allows for both alternatives, it cannot be said that the legislature contemplated the specific anticompetitive actions engaged in by the City of Los Angeles.

The Supreme Court disagreed, however, noting that the California statute differed from the “home rule” provision at issue in Community Communications because the California legislature affirmatively addressed the subject of cable television. Moreover, since cable television systems burden public resources, the legislature must have contemplated the possibility of some cities limiting the number of cable providers.

Thus, the statute was far more specific than that involved in Community Communications, and the City’s actions were at least a reasonable consequence of engaging in the authorized activity. In light of this, the City of Los Angeles acted “pursuant to a ‘clearly articulated and affirmatively expressed’ state policy” of replacing competition with regulation.

B. COMPARING P.C.I. WITH OTHER “STATE ACTION” CASES

Since the decision in Community Communications, courts have generally been willing to extend the Parker doctrine immunity to municipalities who act anticompetitively. The P.C.I. analysis, however, establishes a new method for interpreting when a statute “clearly articulates and affirmatively expresses” an intent for municipalities to act anticompetitively. Prior to P.C.I., courts were not nearly so bold in granting “state action” immunity to municipalities.

41. See supra text accompanying note 22.
42. Preferred Communications, 754 F.2d at 1415.
43. While the P.C.I. decision is broader than other circuit court decisions, it is at least consistent with its holdings in other “state action” cases. See, e.g., Catalina Cablevision Assocs. v. City of Tucson, 745 F.2d 1266 (9th Cir. 1984); Springs Ambulance Service, Inc. v.
For example, in *Woolen v. Surtran Taxicabs, Inc.* the court disallowed the cities of Dallas and Fort Worth, Texas a defense of "state action" immunity for their anticompetitive actions. There, the cities granted the exclusive right to pick up passengers in the Dallas-Fort Worth Regional Airport to one taxicab company. Attempting to justify their actions as "clearly articulated and affirmatively expressed" by the state legislature, the cities relied on a Texas statute granting them the power to regulate, license, and fix charges and fares made by any person operating a vehicle for hire. The cities argued that the statute contemplated the foreclosure of competition because it affirmatively addressed the issue of taxicab regulation. The court, however, denied the cities "state action" immunity, reasoning that the statute had a "home rule" character and was thus too permissive in delegating the state's powers.

In California, a federal district court reached a similar conclusion in *Grayson Electric Co. v. Sacramento Municipal Utility.* There, Grayson Electric Company brought an antitrust action against Sacramento Municipal Utility for its policy of maintaining a monopolistic public service for installing electrical distribution systems and distributing outdoor lighting systems. Sacramento Municipal Utility raised the "state action" immunity argument, but the court denied it. The court explained its decision to deny "state action" immunity: If these provisions [expressed in article 1175] are viewed as evincing a state policy to implement the type of activity complained of here, then they would afford almost blanket exemption from antitrust laws for the activities of municipalities with regard to transportation. That is precisely the result that the Supreme Court sought to avoid in *Lafayette.* While the Court there did not require specific, detailed authorization for anticompetitive activity from the state legislature, it did require greater evidence of state policy than can be gleaned from article 1175.

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City of Rancho Mirage, Cal., 745 F.2d 1270 (9th Cir. 1984); Century Federal, Inc. v. City of Palo Alto, Cal., 579 F. Supp. 1553 (N.D. Cal. 1984).


46. Art. 1175 provides, in pertinent part:

   Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers . . .

12. To prohibit the use of any street . . . of the city by any . . . character of public utility without first obtaining the consent of the governing authorities . . . To determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy the franchise . . . and to prescribe the type of service to be furnished by such person . . . .

21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire.


47. The Court explained its decision to deny "state action" immunity:

   If these provisions [expressed in article 1175] are viewed as evincing a state policy to implement the type of activity complained of here, then they would afford almost blanket exemption from antitrust laws for the activities of municipalities with regard to transportation. That is precisely the result that the Supreme Court sought to avoid in *Lafayette.* While the Court there did not require specific, detailed authorization for anticompetitive activity from the state legislature, it did require greater evidence of state policy than can be gleaned from article 1175.

461 F. Supp. at 1031-32.

action” defense, citing a statute which specifically permits a municipal utility district to engage in anticompetitive activities.\(^{49}\) Although the court agreed with Sacramento Municipal Utility that the statute affirmatively addressed the issue of utility services, it nevertheless denied Parker doctrine immunity because the “statute [did] not by its terms create a policy of preferring monopoly to competition; it [was] merely permissive.”\(^{50}\)

Where courts have granted “state action” immunity, it appears to be because defendant municipalities have cited more explicit statutes than that used in P.C.I. Thus, in *Town of Hallie*,\(^ {51} \) the Supreme Court granted a “state action” defense to the city’s challenged policy of refusing to supply sewage system treatment services to unannexed areas unless they also purchased sewage collection and transportation services. Although the Supreme Court noted that the city’s actions constituted a tying arrangement, the city was nonetheless exempt from antitrust liability because its actions were contemplated by the state legislature. Not only did the state statutes\(^ {52} \) affirmatively address the issue of sewage systems, they also specifically provided that a city “may by ordinance fix the limits of such service in unincorporated areas.”\(^ {53} \) The Supreme Court logically reasoned that the city’s anticompetitive behavior was a foreseeable result of empowering the city to refuse service to unannexed areas.

In *Gold Cross Ambulance & Transfer v. City of Kansas City*,\(^ {54} \) the Eighth Circuit also decided that the Parker doctrine protected the city’s anticompetitive activities from Sherman Act liability. There, two privately-run ambulance service operators challenged the city’s ambulance system under which the municipal trust contracted with a single private operator to provide all ambulance service within the city. The court determined that the statute\(^ {55} \) which permits a city to “contract with one or more” operators for ambulance service both affirmatively addresses the issue of ambulance service as well as plainly contemplates the complained-of action. The statute’s language clearly indicates that a city may restrict competition by awarding a single franchise or a number of franchises.

\(^ {49} \) The court in *Grayson Elec. Co.* noted that Cal. Pub. Util. Code § 12801 provides in relevant part that: “A [municipal utility] district may acquire, construct, own, operate, control, or use, . . . works or parts of works for supplying the inhabitants of the district, . . . or some of them . . . with light . . . and may do all things necessary and convenient to the full exercise of the powers herein granted.” 526 F. Supp. at 278.

\(^ {50} \) *Id.*


\(^ {53} \) *Id.* § 66.069(2)(c).

\(^ {54} \) 705 F.2d 1005 (8th Cir. 1983).

\(^ {55} \) Mo. Rev. Stat. § 67.300.
C. CONSEQUENCES OF THE P.C.I. DECISION

The Ninth Circuit's decision in *P.C.I.* unquestionably provides municipalities greater protection from antitrust liability. However, the consequences of increasing the availability of "state action" immunity for municipalities cuts both ways. On the one hand, municipalities are now better able to regulate activities as they see fit. This freedom results in increased efficiency, because cities can now be more responsive to the needs of their citizens. Moreover, fear of antitrust liability is reduced, allowing municipalities to enact aggressive anticompetitive ordinances to establish a more orderly environment.56 Finally, liberal interpretation of statutory construction reflects a realistic view as to how state legislatures create law. That is, requiring statutory language which explicitly contemplates anticompetitive actions on the part of municipalities is unrealistic because legislatures cannot possibly anticipate all the types of regulation that may be undertaken. On the other hand, granting "state action" immunity in all instances where the legislature affirmatively addresses the issue by statute ignores the economic consequences that such regulation may cause. After *P.C.I.*, it appears that a municipality may not only reduce competition, but may completely eliminate it, provided the municipality can show that the state legislature affirmatively addressed the issue.

It is for this last reason that the *P.C.I.* decision goes too far in granting "state action" immunity. The benefits gained by allowing a municipality greater latitude to act anticompetitively will justify a reduction in competition, but cannot justify the complete elimination of competition.

Replacing competition with a monopoly market eliminates all the benefits that a competitive market provides. In a perfectly competitive market, sellers theoretically attempt to increase their market share by offering consumers a superior product or by selling a comparable product at a less expensive price. Where products are fungible and similarly priced, sellers attempt to increase their sales by offering better support services and warranties.

As the number of sellers in a market is reduced, so too are the potential benefits to the consumers. In an oligopoly, for example, consumers may not benefit as they would in a perfectly competitive market because incentives for sellers to compete are not as compelling. Since all sellers in such a market recognize that they are interdependent to a substantial degree, each seller takes into account possible reactions of

56. See Century Federal, Inc. v. City of Palo Alto, Cal., 579 F. Supp. 1553 (N.D. Cal. 1984) (where the district court held that eliminating a "competitive free-for-all" in the cable television industry is necessary to limit disturbances in light of the burden cable installation places on the citizens of the municipality).
rival sellers when making output and pricing decisions. Therefore, a firm in an oligopoly market will not reduce prices to increase its market share because such action would be ineffective. This is true because resulting gains will be immediately canceled when rival sellers retaliate with similar price reductions.

As a consequence, oligopoly sellers concentrate, according to theory, on coordination and anticipation. The competition that does exist is indirect—by disguised price cuts (through improved product quality, credit terms, delivery service, or secret selective price reductions) and nonprice competition, such as the introduction of differentiated products, advertising and sales promotions. Unlike a perfectly competitive market, however, such competition is limited so that it does not invite retaliation from other sellers in the market. Thus, compared to the benefits consumers receive as a result of perfect competition, consumers are generally worse off when an oligopoly market exists.

Consumers are theoretically harmed the most, however, when a monopoly seller controls the market. In a monopoly, where a single seller supplies the entire market, the seller may restrict his output, raise prices, and thus maximize profits. This not only involves a wealth transfer from consumers to producers, it also reduces output and may dissuade the producer to innovate or otherwise be efficient. Furthermore, because there are no substitute products, consumers must choose to either consume at the inflated price or not purchase at all. In an environment where the product is indispensable or even very desirable, the decision to purchase or not to purchase becomes no choice at all.

III. STRUCTURING A SOLUTION TO MEET THE ECONOMIC REALITIES OF "STATE ACTION" IMMUNITY

This section will address the economic implications of the P.C.I. decision. Over the past decade, the cable television industry has expanded to include almost every major metropolitan area in the United States. While not yet a necessity, cable television is nevertheless an important source of news, information, and entertainment for millions of people. But, the availability, quality, and variety of cable programs depends on cable franchising policies set by the municipalities. Because these policies are either approved or limited by the "state action" doctrine, federal antitrust laws have a major impact on the availability of cable television service.

Current law regarding cable television franchising, which in essence allows municipalities to displace competition as they see fit, must be modified or abolished. While allowing municipalities the right

57. See supra text accompanying note 56.
to replace competition with a public entity is within the scope of the
Sherman Act\textsuperscript{58}, allowing municipalities the option to grant unregulated
private monopolies is repugnant to both sound economic policy (as dis-
cussed above) and Congressional intent.\textsuperscript{59} Consequently, the law as es-

tablished in \textit{P.C.I.} must be remedied so that a more competitive and
responsive cable television industry will result. The remainder of this
Note will propose solutions to the economic problems raised by the
present "state action" immunity doctrine.

A. ALLOW THE "STATE ACTION" IMMUNITY DEFENSE ONLY WHEN
MUNICIPALITIES DISPLACE COMPETITION WITH AN
OLIGOPOLY AND A REGULATORY AGENCY.

There are a number of ways to achieve a more responsive cable in-
dustry. One approach is to allow a "state action" defense only in those
situations where municipalities choose to replace competition with an
oligopoly. This approach allows municipalities the flexibility necessary
to shape a workable cable franchise policy. At the same time, however,
it will alleviate the potential economic inefficiencies present under cur-
rent law, because municipalities will not be shielded from the antitrust
laws if they displace competition with an unregulated monopoly
market.

The advantages of this approach are many. Although an oligopolis-
tic market provides fewer benefits to consumers than a perfectly com-
petitive market, the efficiencies that result from allowing a municipality
great latitude in limiting competition outweigh the harms to the con-
sumers. States and municipalities gain from a liberal interpretation be-
cause municipalities can tailor anticompetitive programs to meet their
particular needs. Moreover, state legislatures benefit because it would
be impossible to realistically predict and to explicitly authorize all the
types of programs municipalities may institute which reduce competi-
tion. Further, while consumers are disadvantaged by the absence of
perfect competition, as output and pricing considerations are made in-
terdependently among the sellers, an oligopolistic market provides con-
sumers with continuously improving and differentiated products, and a
choice of credit and delivery terms. Thus, the benefits of competition
are still present, albeit in a reduced form.

To guard against possible collusion among oligopolistic competitors,
courts should require that a regulatory agency monitor the competitors' actions.\textsuperscript{60} The duties of such an agency should include setting price ceil-

\textsuperscript{58} Phonetele Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981).
\textsuperscript{59} See supra text accompanying notes 10-11.
\textsuperscript{60} Courts should assume an activist role in alleviating the economic problems raised
by the current "state action" immunity doctrine. Although Congress is equally capable of
ings and ensuring that the competitors do not enter into agreements not to compete.\textsuperscript{61} In addition, this agency should be authorized to act in the public’s interest by prosecuting suspected illegal actions and agreements.

B. Allow the “State Action” Immunity Defense Only When Municipalities Displace Competition With A Public Entity.

Where circumstances prevent municipalities from creating even oligopolistic competition,\textsuperscript{62} an alternative approach may be to limit the “state action” immunity defense to only those municipalities which displace competition with a public entity. Not only would such a limitation be consistent with the purpose of the Sherman Act\textsuperscript{63}, it would also eliminate many of the negative economic effects associated with an unregulated private monopoly.

Allowing a “state action” immunity defense only when municipalities displace competition with a public entity is a very workable solution. State legislatures will not be burdened with creating statutes that not only must anticipate, but also explicitly authorize every type of anticompetitive behavior engaged in by its local districts. Municipalities will benefit because they will be allowed to reduce or eliminate competition provided they replace it with a publicly-operated company. Finally, consumers will be protected from the negative economic effects associated with reduced competition. A public entity acting in a monopolistic market ordinarily is not motivated by the same factors as a private monopolist. That is, while a private actor’s primary goal is to increase his profits, the same is not true for a public actor. Since a public entity is not driven by the desire to increase its profits, it has no incentive to restrict its output or to artificially inflate its prices. In fact, public entities often exist for the sole purpose of providing society with remedying this problem, the result will take far longer to attain. Moreover, due to the inevitable political concessions, a well-intended remedy may end up “watered-down,” thus resulting in an ineffective solution to the problem. It would be far more efficient for a district court to mandate the remedy, and have its decision reviewed by the court of appeals, and, if necessary, the Supreme Court.

\textsuperscript{61} While some of the potential problems inherent in an oligopoly may be monitored by a regulatory agency, an agency may not be as effective at policing an industry as the internal mechanisms of a perfectly competitive market. Nevertheless, when faced with the choice of allowing an unregulated oligopoly market, or requiring a regulated oligopoly market, courts should always insist on regulation. \textit{See infra} note 68 and accompanying text.

\textsuperscript{62} Such a situation may arise where an existing free market simply cannot support additional competitors. \textit{See supra} notes 12-14 and accompanying text.

\textsuperscript{63} \textit{See supra} note 58 and accompanying text.
a service or product which might not otherwise exist. Public entities are therefore likely to be more responsive to public pressure.

C. ALLOW THE “STATE ACTION” IMMUNITY DEFENSE ONLY IF MUNICIPALITIES SHOW THAT THEIR ACTIONS ARE THE LEAST RESTRICTIVE ALTERNATIVE AND THAT THEY WILL SUBMIT TO GOVERNMENT REGULATION.

If courts are unwilling or unable to apply either of the above proposals, a final alternative may be to allow a “state action” immunity defense only if the municipality can show that its actions are the least restrictive regulatory solution available. That is, a municipality can opt out of federal antitrust laws only if its anticompetitive policy infringes on the competitive market system as little as possible. Since a plaintiff would have the burden of proving that there is an alternative which is both workable and more competitive, a municipal policy would be presumed legal until proven otherwise. Consequently, a municipality could continue to enact aggressive anticompetitive policies, but only after giving careful thought to all other alternatives.

Even if a municipality's policy is deemed to be the least restrictive alternative, courts should not hesitate to require that a regulatory agency be established to monitor the industry's actions. A municipally-created regulatory agency would protect consumers by ensuring that the anticompetitive industry does not operate in a self-serving fashion. Moreover, because the agency would exist on a local level, it could be responsive to the particular problems faced by the industry as well as the individual needs and desires of the consumers. In theory,

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64. For example, many municipal public transportation systems exist solely to benefit the public. They continue to operate regardless of whether they are profitable.

65. Because a public entity's raison d'etre differs markedly from that a private industry, a public firm theoretically has as its primary goal serving the public. Since it is less concerned with realizing profits and more concerned with improving its service, it follows that a public firm will heed the demands of its customers.

66. Courts may be unable to fashion a remedy which requires a municipality to displace competition with an oligopoly and a regulatory agency because a consumer market simply cannot support more than a single participant. Similarly, courts may be unable to require that a municipality displace competition with a public entity because the cost to the municipality may be prohibitive. This is especially true where the municipality is relatively small.

67. For example, if the district court in P.C.I. found that the City of Los Angeles' policy of granting exclusive cable franchises was indeed the least restrictive alternative, it should have nevertheless required that the City establish a regulatory commission.

68. The agency's duties should include setting ceilings on prices or maximum profits, establishing minimum standards of service, and enforcing penalties or bringing legal action against companies who violate the regulations. See supra text accompanying note 61.
such an agency could serve the dual function of regulator and troubleshooter.

CONCLUSION

Since the Supreme Court’s decision in Parker v. Brown, municipalities have systematically acquired increasing authority to regulate industries and services within their jurisdictions. Affording municipalities antitrust exemption is both efficient and necessary to ensure that cities create policies responsive to their needs.

Whenever cities limit competition, however, consumers are harmed by the effects of the resulting non-competitive market. This is especially true in the cable television industry, where competition is the most efficient means of achieving diverse programming and efficient service. Thus, courts should limit the availability of the “state action” defense for municipalities engaged in reducing cable television competition. While strong arguments support employing a lenient antitrust liability standard for municipalities which limit competition, it is difficult to support a city’s decision to eliminate competition. Consequently, “state action” immunity from antitrust liability should be granted to municipalities only when their actions are deemed to be absolutely necessary. Furthermore, even when circumstances justify this result courts should nonetheless require that municipalities establish regulatory agencies. These agencies should have the authority to enact industry-wide minimum standards and enforce regulations. This will ensure that consumers are protected from any negative economic effects which might otherwise result from the reduced competition.

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