

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NYNEX CORPORATION, ET AL., Petitioners v.
DISCON, INC.
CASE NO: 96-1570 c-2
PLACE: Washington, D.C.
DATE: Monday, October 5, 1998
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IN THE SUPREME COURT OF THE UNITED STATES

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NYNEX CORPORATION, ET AL., :
Petitioners :
v. : No. 96-1570
DISCON, INC. :
- - - - -X

Washington, D.C.
Monday, October 5, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JAMES R. YOUNG, ESQ., Arlington, Virginia; on behalf of the Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae.

LAWRENCE C. BROWN, ESQ., Buffalo, New York; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1570, NYNEX Corporation v. Discon, Inc.

5 Mr. Young.

6 ORAL ARGUMENT OF JAMES R. YOUNG

7 ON BEHALF OF THE PETITIONERS

8 MR. YOUNG: Mr. Chief Justice, and may it please
9 the Court:

10 In explaining why the Second Circuit was wrong,
11 I'd like to focus on two legal principles. The first is
12 that an antitrust case brought by a disappointed supplier
13 must contain adequate allegations of harm to competition
14 and not just harm to the competitor, and the second is
15 that that harm-to-competition requirement is not met
16 simply by an allegation that the supplier was terminated
17 for a bad reason, even if that reason is in violation of
18 laws other than the antitrust laws.

19 The lower courts have repeatedly used these
20 principles to deal efficiently and appropriately with
21 meritless but tempting treble damage antitrust suits
22 brought by suppliers and distributors in the lower courts
23 and, in doing so, they have been consistent with the
24 principles of GTE Sylvania and Sharp, because the very
25 cost of this litigation alone -- these cases go on for

1 years. The expenses are tremendous. These costs are a
2 tremendous chill on the right to, a purchaser's right to
3 change suppliers freely, which is the essence of the
4 competitive process.

5 The Second Circuit made a substantive error. It
6 extended group boycott law to cover a vertical nonprice
7 agreement despite the clear requirement that a group
8 boycott requires a horizontal agreement.

9 Now, the second circuit made this error
10 apparently because it confused an alleged regulatory fraud
11 in the telephone services market, the aim of which was to
12 raise local telephone rates, for a competitive problem,
13 but this case has nothing to do with rivalry among
14 providers of local telephone service. Discon in its brief
15 acknowledges that.

16 Now, apparently, because of this confusion the
17 Second Circuit did not even examine whether there were
18 concrete allegations of market-wide harm to competition in
19 the removal services market, which is the only relevant
20 market here.

21 QUESTION: So if costs were passed on to the
22 consumer, that's just irrelevant?

23 MR. YOUNG: It's very relevant for regulatory
24 purposes, but the question in a rule of reason analysis in
25 the removal services market is whether or not a price now

1 put in the conditions of competition in that market were
2 changed, where --

3 QUESTION: It seems to me if you have a
4 monopolist that's the buyer and the agreement is to
5 eliminate all but one supplier, and if you assume that
6 those costs are going to be passed on to the consumer, I
7 don't know why that isn't part of the competitive
8 analysis, at least under the rule of reason.

9 MR. YOUNG: The -- I think the important portion
10 that is relevant under the rule of reason, as I say, it's
11 not whether local telephone rates were raised. There are
12 regulatory commissions to examine those issues. The
13 question is, what were the terms of rivalry in the removal
14 services market, and that's really where the Second
15 Circuit I think missed the boat. It did not even examine
16 whether or not there was harm to competition in that
17 market.

18 Now, one of the most --

19 QUESTION: On that question --

20 QUESTION: Suppose we could show the costs were
21 passed on to the consumers, and that that was the
22 necessary effect of this, and it's a rule of reason
23 analysis. In a rule of reason case, the court would not
24 admit the testimony if the costs were passed on to the
25 consumers, unnecessarily?

1 MR. YOUNG: In a rule of reason case, Justice
2 Kennedy, I think that fact, the fact that costs were
3 passed on, is irrelevant to the rule of reason antitrust
4 analysis.

5 QUESTION: But may I just interrupt with, what
6 about the costs of removal services? What if the alleged
7 conspiracy, which may or may not have existed, result in
8 higher costs of removal services?

9 MR. YOUNG: That's the core of the case, Your
10 Honor.

11 QUESTION: And don't they allege that they did,
12 that Technologies bid \$998,000, and the plaintiff was
13 bidding about half that amount any they mark it up to
14 amounts still less than --

15 MR. YOUNG: Just --

16 QUESTION: Haven't they alleged that the costs
17 of removal services were artificially enhanced?

18 MR. YOUNG: No, I don't believe they have, and
19 I'd like to explain why.

20 What happened --

21 QUESTION: May I ask just preliminarily before
22 you make that explanation, who was in the removal
23 business, other than ATT Technology and Discon?

24 One picture that I have is an agreement that
25 would leave only one supplier standing, and in that case,

1 if there were only the two in the business, it would be
2 quite a different situation than if it were just a single
3 supplier eliminated and many still standing, so what was
4 it?

5 MR. YOUNG: The complaint alleges at least four
6 people, four companies in the business. There was Discon,
7 there was AT&T, there was a company called LISN, which I
8 believe is pronounced LISN, and there was an individual
9 named McGee. All are alleged in the complaint as being in
10 the business.

11 Actually, the New York Public Service
12 Commission, which conducted a detailed inquiry into this,
13 in the public record of that proceeding is the fact that
14 there were, in fact, a very large number of people
15 competing in this business.

16 To the question about price and output, though,
17 price and output, that is, in the removal services market,
18 that is the critical factor, but the allegation here is
19 that New York Telephone voluntarily paid more than the
20 market price.

21 It's the same sort of situation as if the
22 procurement officer at NYNEX had decided to give the money
23 to his -- to give the business to his brother-in-law and
24 pay his brother-in-law an extra 20 percent. That doesn't
25 change the market price.

1 QUESTION: Oh, but why doesn't it, if that's a
2 main purchaser in the market, and if the people who made
3 the agreement -- the whole thing is kind of strange, but
4 anyway, if the people who made the agreement had for its
5 purpose higher prices for removal services, why does it
6 matter that they were willing to pay the higher prices?

7 MR. YOUNG: I think --

8 QUESTION: Because those prices then, as Justice
9 Kennedy pointed out, are passed on to the ultimate
10 consumer of telephone services.

11 MR. YOUNG: I think what matters about it is
12 that if there is no change in the terms of rivalry in the
13 removal services market, and I'd like to get to that in a
14 minute, why I think that's true, then the fact that a
15 buyer voluntarily pays more doesn't change the market
16 price, doesn't change the market output. That is
17 unchanged.

18 The question is, if New York Telephone decided
19 at one point that it didn't want to be a part of this
20 alleged scheme any more, could it go into the market and
21 get the competitive price for removal services, and it
22 could, for I think a very fundamental reason. This Court
23 in Mitsushita, in talking about what market power means
24 and the elements of market power, has indicated that
25 barriers to entry are critical, that you can't maintain

1 supracompetitive prices without market power without
2 barriers to entry.

3 QUESTION: But isn't there going to be, even as
4 you describe it, a tendency to inflate price even in the
5 event that NYNEX tomorrow morning, or tomorrow morning
6 after the complaint was filed, decided that it didn't want
7 to pay that much, because it had already demonstrated that
8 in fact it would pay an inflated price, the competitors --
9 I will assume for the sake of argument there were three --
10 knew that it would pay the inflated price, and therefore I
11 assume there would be a tendency on their part to say,
12 let's hold them to their inflated price, or something like
13 it.

14 So the very fact that NYNEX may change its mind
15 tomorrow morning doesn't necessarily suggest that it will
16 return to the competitive market that it had before it
17 showed its willingness to pay the inflated price.

18 MR. YOUNG: I think the reason that it would
19 return to the competitive price is the fact in this
20 industry, where there are no barriers to entry, the
21 complaint alleges not just that these people were in the
22 market, but that this business can and was performed by
23 telephone companies for themselves.

24 QUESTION: Well, you may -- and I realize that,
25 so in fact there's a fifth player here --

1 MR. YOUNG: Right.

2 QUESTION: -- I know, but isn't the point at
3 this stage that that is a matter for litigation under a
4 rule of reason analysis?

5 In other words, the only point that I think I'm
6 making is that it does not seem to be implausible as a
7 matter of law, on the allegations of the complaint, that
8 if NYNEX changed its mind tomorrow morning, the price
9 would necessarily return to the pre-inflation competitive
10 price. It seems to me a matter for -- at least for
11 litigation, isn't that so?

12 MR. YOUNG: No, I don't agree, and the reason I
13 don't agree is the point I'm coming back to with barriers
14 to entry. The original complaint, and this is the joint
15 appendix at page 15 to 17, indicates how easy and quick it
16 was for somebody to get into this business, which is
17 really just the first cousin of the salvage business.

18 Discon got into business in June of 1984.
19 Within 30 days it had \$500,000 worth of business. It had
20 plans to ramp up its operation here fairly dramatically.

21 So I think the important point is that if there
22 are no barriers to entry, then there is absolutely no
23 reason to suspect, and a district court faced with this
24 kind of complaint can reasonably conclude that there is no
25 adequate allegation here of harm to competition. There is

1 only an allegation that a purchaser voluntarily agreed to
2 pay more than the market price.

3 QUESTION: Sorry, I thought he didn't. I
4 thought -- I'm mixed up, perhaps, but I thought that if we
5 call -- let's call NYTel that whole series of buyers, and
6 we'll call AT&T Tech the seller. I thought they did pay a
7 competitive price. They paid a low price disguised as a
8 high price, so they not only got the low price, they got
9 an extra term, the extra term was called, the term to help
10 you chisel.

11 So they paid some money, which was cheap, and
12 that money, plus the extra benefit, the help you chisel
13 term. There's no reason to think that's any lower, or
14 higher, no higher than Discon's price, is it -- is it?

15 They paid a competitive price. It just happened
16 they paid about the same amount of money, and they also
17 got a little kick in there.

18 MR. YOUNG: Well, it is true --

19 QUESTION: So there's no doubt about that, is
20 there?

21 QUESTION: It's a different product they were
22 selling. They were making an extraordinary offer.

23 MR. YOUNG: I'm sorry, Justice Scalia.

24 QUESTION: They're selling a different product,
25 so the price could be higher.

1 QUESTION: Yes, right, a little higher --

2 QUESTION: They're selling removal services plus
3 a kickback, so the price for the removal service is quite
4 low.

5 MR. YOUNG: You could certainly analyze it --

6 QUESTION: It might have been the best price in
7 the market, actually.

8 QUESTION: So there's no doubt about that, but
9 there's also no doubt, I take it, that the consumer paid
10 more. I mean, they went and chiseled, according to the
11 complaint, all right, so -- and were they exercising
12 monopoly power? Of course. Of course.

13 So I mean I don't see there's any -- your --
14 NYTel, certainly exercising monopoly power. That's how it
15 was able to charge a higher price to the consumer, because
16 it's a monopoly, all right, so --

17 MR. YOUNG: But it was --

18 QUESTION: Yes.

19 MR. YOUNG: Excuse me, Your Honor.

20 QUESTION: Go ahead.

21 MR. YOUNG: I agree that the allegation is that
22 they were exercising monopoly power in the telephone
23 services market, but the important point is, that's not
24 the relevant market for the analysis here. The relevant
25 market is the removal services market.

1 There's understandably some confusion because
2 the -- of course, the theory of the harm in this case has
3 been very much a moving target throughout the history of
4 this litigation, but stripped to its essentials you can
5 put the monopoly, the allegation about telephone services
6 aside, because that's not the relevant market for this
7 case.

8 What is critical is the removal services market,
9 where there were no barriers to entry, where entry was
10 easy, and so there was no reason to think that the terms
11 of competition were altered at all.

12 QUESTION: What about the purchase of removal
13 services, as opposed to the sale of removal services?
14 Does -- was there monopoly power there?

15 MR. YOUNG: In the purchase of removal services?

16 QUESTION: Right.

17 MR. YOUNG: Well, certainly I think you have to
18 say the complaint fairly alleges that there were two
19 principal buyers of removal services, but the allegations
20 of the complaint are focused on the provider's side of the
21 equation and, of course, here, since this is -- we're
22 considering a motion to dismiss, we have to take the
23 allegations in the complaint.

24 QUESTION: It's alleging a conspiracy between
25 the provider and the purchaser, right, and --

1 MR. YOUNG: That's correct.

2 QUESTION: When such a conspiracy is alleged,
3 wouldn't the monopoly power on the part of the purchaser
4 be relevant?

5 MR. YOUNG: Only if there were adequate
6 allegations that the terms of market-wide competition in
7 the removal services market had changed, and here -- here
8 I come back to what I tried to explain before. Because of
9 the barriers to entry point, then there shouldn't be any
10 concern.

11 QUESTION: Actually, as I understand it
12 there's -- there were two purchasers, the exchange sub of
13 AT&T as well as the NYNEX sub, and the allegation is, they
14 agreed to create a monopoly in the purchase of removal
15 services.

16 MR. YOUNG: That was one of the allegations
17 pressed below, that you could say that, if I understand
18 the question correctly, that there was a conspiracy
19 between two separate subsidiaries of NYNEX.

20 QUESTION: Well, no, between the NYNEX MECo, or
21 whatever it is --

22 MR. YOUNG: Right.

23 QUESTION: -- and the AT&T subsidiary that
24 consumed removal services in its exchange business, in
25 the --

1 MR. YOUNG: Yes. Yes, there was an allegation
2 that there was a conspiracy between those two. The
3 allegation in the trial court -- I think this is clear
4 from the complaint, the amended complaint, paragraphs 100
5 and 104.

6 I'm sorry. Let me get directly to the point.
7 The point is that the allegation below was that there was
8 a conspiracy to make NYNEX the monopolist in that market.
9 Now, the reason that is faulty, the reason that doesn't
10 even meet the conspiracy test, is that NYNEX was not in
11 the removal services market and had no intent to be.

12 QUESTION: Isn't the complaint fairly read as
13 indicated, they wanted AT&T Technologies to have all the
14 removal business?

15 MR. YOUNG: I think the complaint is fairly
16 read, and now I refer to paragraphs 100 and 104 of the
17 amended complaint, where the allegation is that the power
18 over price was to be in NYNEX's hands, and also if you
19 look at the briefs they're filed in the court of appeals.

20 I think it's clear that what they were alleging
21 below -- it's not the theory that the Second Circuit went
22 off on, but their theory below was that it was NYNEX to be
23 the monopolist, and that's why there's a fundamental
24 problem in that theory, because NYNEX wasn't even in the
25 business.

1 That's what I meant -- this is one of the things
2 I meant when I was referring to sort of the moving target
3 that this case has been as it moved through the -- moved
4 through the --

5 QUESTION: What paragraph again is that, just so
6 I know?

7 MR. YOUNG: That's paragraph 100 and 104.

8 QUESTION: Okay, thank you.

9 QUESTION: Mr. Young, you're not treating this
10 as a pleading --

11 QUESTION: The cases that come up on a motion to
12 dismiss are more apt to be moving targets than if you'd
13 gone through and litigated the thing and there was some
14 sort of a factual record, I think. That may not be your
15 fault.

16 MR. YOUNG: Well, the -- one thing, though, I
17 think is clear, and that is, we have the final theory
18 before us. We have the allegations of the complaint
19 before us, the allegations have the problem that I think
20 I've described, so this is a case that is very appropriate
21 for dismissal, just as so many of the lower courts have
22 dealt with antitrust claims that really don't allege harm
23 to market-wide --

24 QUESTION: Mr. Young, that's the part that I
25 don't understand, because it's not clear to me whether

1 your position is, there is no claim to state, or no claim
2 was adequately stated, the insufficient statement versus,
3 given this situation, there is no possible claim to be
4 stated.

5 MR. YOUNG: I guess I'd answer that question
6 this way. It is certainly true that harm to market-wide
7 competition is not adequately alleged. It is very
8 difficult for me to see how it could have been adequately
9 alleged in this kind of a business precisely because there
10 are no barriers to entry.

11 That's not to say that there -- a plaintiff with
12 a well-pleaded complaint might not have another cause of
13 action. There might have been a breach of contract
14 action, or a fraud, or a tortious interference. There
15 could be other legal remedies for someone in Discon's
16 position, but antitrust law is really the wrong legal lens
17 to look at this problem through.

18 QUESTION: On that, you gave us a precise
19 question about the Second Circuit's theory about group
20 boycott. The Second Circuit didn't give any alternate
21 ruling in case that was wrong, and yet you're asking us to
22 dispose of the entire case, and that I don't understand
23 either.

24 If we answer your question yes, the Second
25 Circuit was wrong, shouldn't we then say, and now let it

1 go back there?

2 MR. YOUNG: No, I don't believe so, because the
3 question presented did not use the words per se, it said,
4 group boycott.

5 The Second Circuit, when it used that phrase,
6 encompassed both -- included both alternatives, either a
7 rule of reason or a per se analysis, so I think the rule
8 of reason analysis is fairly included in the question
9 presented and, as I said before, I think this Court has
10 everything before it that it needs to resolve the case.

11 The principles here I think are relatively
12 straightforward. There is no further need, I would
13 respectfully suggest, for further --

14 QUESTION: May I ask this question, Mr. Young.
15 You place great emphasis on the fact there are no barriers
16 to entry --

17 MR. YOUNG: Yes.

18 QUESTION: -- in the market and, assuming that's
19 correct, is it your position that even if the people in
20 the business do engage in a conspiracy to exclude somebody
21 entirely and drive them out of business for all sorts of
22 improper purposes, that could never be an antitrust
23 violation as long as there are no barriers to entry,
24 because always somebody will come back later because they
25 can't succeed?

1 MR. YOUNG: The -- Justice Stevens, I think the
2 right answer to that question is, as long as what we're
3 talking about is a vertical nonprice agreement, then the
4 appropriate analysis is the rule of reason analysis, and
5 it is -- as long as there genuinely are no barriers to
6 entry, it may well be that the allegation is that people
7 have acted for a bad reason in terminating the supplier,
8 but that's not --

9 QUESTION: And the bad reason in this case is,
10 to exclude this company from the market permanently and
11 entirely no matter what it takes, that's perfectly all
12 right, because other people can always get back in and
13 replace them?

14 MR. YOUNG: Because --

15 QUESTION: That would never be an antitrust
16 violation.

17 MR. YOUNG: Because the relevant question is,
18 what is the state of rivalry in the market, not whether a
19 particular supplier goes out of business.

20 QUESTION: Just getting back to the relevant
21 market one more time, let's assume a universe in which,
22 because of the regulatory scheme -- let's assume this.
23 100 percent of the removal costs are passed on to the
24 consumer, and then you have an allegation of a conspiracy
25 to raise those costs at the level that we're discussing

1 here of the suppliers of the removal services.

2 What authority do I cite for your proposition
3 that the consumer price is not part of the relevant
4 market? When I write that down, what do I cite for that,
5 just what I know about economics?

6 MR. YOUNG: The best authorities that I would
7 point to -- I could not point to any authority of this
8 Court. There are several lower court opinions. There's a
9 Judge Posner decision that's cited in the briefs. There's
10 the Blue Cross Marshfield decision, and there's a First
11 Circuit decision that Justice Breyer wrote when he was on
12 the First Circuit that explains the same point. I think
13 that's the case with the unlikely plaintiff's name of
14 Kartell.

15 (Laughter.)

16 QUESTION: Thank you.

17 MR. YOUNG: But those two cases -- I'm sure that
18 there are others, but those two cases have a particularly
19 good explanation of why it is that a monopolist who raises
20 his rates is, that is not an antitrust problem. It is, in
21 fact, as Judge Posner explains --

22 QUESTION: A regulated monopolist.

23 MR. YOUNG: Regulated monopolist, excuse me,
24 yes, why that is not an antitrust problem.

25 Let me just talk --

1 QUESTION: Could I ask -- I frankly tend to
2 agree with you about what result you get when you apply
3 the rule of reason, but I'm not sure that -- I certainly
4 didn't understand when I voted to grant the petition that
5 we were talking about anything except a group boycott in
6 violation of section 1, and that's a term of art, and the
7 term of art means the kind of thing that is a per se
8 violation. Have you ever heard of a group boycott that --
9 would you have to call it a group boycott in order to use
10 the rule of reason?

11 MR. YOUNG: Well, I think this Court in
12 Northwest Stationers certainly suggested that there could
13 be group boycotts that are not analyzed under a per se
14 approach, but in terms of the question presented, plainly
15 the Second Circuit indicated meant group boycott to
16 subsume both per se and rule of reason.

17 QUESTION: But even on that reading, and you're
18 probably right on that, why still don't we send it back
19 and see -- let them have a crack at whether there is a
20 different rule of reason and conceptualization that might
21 apply?

22 MR. YOUNG: Because -- two reasons. First, the
23 Court has everything in front of it it needs to dispose of
24 the case. It has the theory --

25 QUESTION: Well, but we'll be disposing it if we

1 do what you invite us to do and, in fact, in the first
2 instance we won't be acting as a reviewing court.

3 MR. YOUNG: The second reason, which I think is
4 probably the most --

5 QUESTION: The better reason.

6 MR. YOUNG: -- important is --

7 (Laughter.)

8 MR. YOUNG: It inevitably is.

9 The second reason is that if this Court sends
10 this back it is implicitly saying, I think, that this
11 complaint was good enough, as we've indicated in the
12 briefs. The lower courts have developed quite a practice
13 in dealing with these disappointed supplier cases. The
14 12(b)(6) motion is used, and one difficulty about
15 remanding this case is, I think it would tend to undercut
16 that, and --

17 QUESTION: Well, we wouldn't be saying the
18 complaint is good enough. We would be saying the issue of
19 whether the complaint is good enough on this other theory
20 was not before us.

21 MR. YOUNG: If I might --

22 QUESTION: I mean, that's what we would be
23 saying if we sent it back. Now, maybe we shouldn't say
24 that, but --

25 MR. YOUNG: One more -- if I could say one more

1 thing before I close, I haven't really talked about the
2 section 2 conspiracy claim at any great length. I think
3 this is covered in the briefs. The basic point is, if
4 there's no rule of reason claim there can be no conspiracy
5 claim.

6 I'd like to reserve the balance of my time.

7 QUESTION: Very well, Mr. Young.

8 Mr. Wallace, we'll hear from you.

9 ORAL ARGUMENT OF LAWRENCE G. WALLACE

10 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

11 MR. WALLACE: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 The courts have not had experience with the kind
14 of antitrust claim alleged in this case. It involves a
15 regulatory evasion scheme to harm consumers by recovering
16 inflated costs under a rate regulation system allowing
17 recovery of costs by the regulated utility, the kind of
18 system of rate regulation now rapidly being superseded by
19 competitive deregulation or by systems of rate regulation
20 such as price caps that are designed to provide greater
21 incentives for efficiency on the part of the regulated
22 utility.

23 And the allegation is of a conspiracy not just,
24 for example, with an accountant to cook the books of the
25 regulated utility, but with a supplier in an unregulated,

1 what the antitrust lawyers call upstream market, the
2 market for these removal services, and the conspiracy
3 alleged is to monopolize that market and to exclude a
4 competitor of that supplier of removal services from that
5 unregulated market because competition in that market
6 would threaten the success of the scheme that allegedly
7 involves inflated payments to that supplier, followed by
8 secret rebates.

9 Now, we agree with petitioners that this is not
10 properly regarded as a per se -- an allegation of a per se
11 violation of the antitrust laws, for reasons explained in
12 our brief. Basically, we think the court of appeals got
13 off track on that particular point by not recognizing that
14 it has to be a type of restraint that almost **always** tends
15 to restrict competition and reduce output, rather than
16 that on the facts of a particular case it might be shown
17 that the restraint has only anticompetitive effects.

18 So we agree that it's a case for rule of reason
19 analysis under section 1, but we do think that
20 petitioner's argument in, particularly in their brief, is
21 too facile in trying to make almost a virtue for purposes
22 of this case out of the regulatory evasion allegations.

23 They say that these allegations sufficiently
24 show the motive, a motive for the conduct that's alleged,
25 but that the effects on consumers in the utility's own

1 market for telephone services have to be ignored entirely
2 because the restraint alleged is in this upstream market
3 for removal services.

4 But the very authority they cite, correctly,
5 describing the rule of reason, this Court's decision in
6 Business Electronics v. Sharp Electronics, quoting its
7 decision in GTE Sylvania, says that under the rule of
8 reason -- and this is the quote from both cases -- the
9 factfinder weighs all the circumstances of a case in
10 deciding whether a restrictive practice should be
11 prohibited as imposing an unreasonable restraint on
12 competition.

13 QUESTION: Well, that's true when you have
14 identified a restraint on competition. You ask yourself,
15 you know, is it worth the benefits on the other side. But
16 what is the restraint on competition here?

17 The argument being made is that there is no
18 restraint on competition, period, that any time NYNEX
19 itself wanted to terminate this sweetheart deal it could,
20 and it would have in front of it a totally competitive
21 industry, because it takes nothing to get into it.

22 It's like demolition. As I understand it, some
23 telephone companies don't even use outside people to do
24 it. They use their employees. They say, come on, rip out
25 this switchboard. We don't need it any more.

1 MR. WALLACE: This argument may turn out to be
2 one that could be substantiated even in summary judgment
3 proceedings factually, but it seems to me to rest on
4 drawing too much out of some passing references in some of
5 the allegations of the complaint --

6 QUESTION: Well, I think he's making a further
7 argument --

8 MR. WALLACE: -- at this stage of the case.

9 QUESTION: -- Mr. Wallace. I think he's making
10 the argument that the allegations in the complaint are
11 simply insufficient, that they have not, in fact, alleged
12 sufficiently barriers to entry. What's the Government's
13 response to that?

14 MR. WALLACE: Well, we certainly would file a
15 complaint, I hope, that would be clearer in its theories
16 of what the violation is.

17 The Second Circuit has read the complaint
18 generously, although we think that is not improper at the
19 motion to dismiss stage, the logic of the complaint,
20 putting the regulatory evasion scheme together with the
21 allegations of an attempt to achieve monopoly power
22 logically from the complaint to mask those regulatory
23 evasions, because the existence of competition by a
24 participant such as Discon would threaten to unmask it.

25 It -- I mean, the petitioners like to say that

1 this is just an allegation of harm to a competitor, but it
2 was the fact of the competition in that market that was
3 the threat to the scheme.

4 QUESTION: Well, all right, assume -- I'm having
5 trouble understanding, and the part I don't understand is,
6 I'll assume any facts you want. Now, how could it be a
7 violation of the antitrust law?

8 That is to say, I'm not saying it is or isn't.
9 I am a buyer. I buy from A. When I buy from A, I haven't
10 bought from B. I'll assume there are only two firms, A
11 and B, so if I buy everything from A, I've bought nothing
12 from B. Goodbye B.

13 Now, suppose that I have a terrible motive, like
14 trying to chisel consumers. That's what they're saying
15 here. All right. Now, either they win on that terrible
16 motive, or they lose.

17 Suppose they lose, because that's a regulatory
18 problem, not an antitrust problem. At that point, what
19 facts could make out a rule of reason antitrust case?

20 MR. WALLACE: Well, in -- I think under these
21 allegations the facts that could make it out would be that
22 they could substantiate that this was a conspiracy to
23 monopolize that market --

24 QUESTION: No, no, those are conclusions.

25 MR. WALLACE: -- and show some --

1 QUESTION: I'm asking you about facts.

2 MR. WALLACE: Mm-hmm.

3 QUESTION: That's a conclusion, a legal
4 conclusion.

5 MR. WALLACE: Yes. Yes.

6 QUESTION: I want to know what facts there are
7 that, if we assume this motive, is a regulatory problem
8 and not an antitrust problem, and if we assume giant entry
9 barriers, only two firms -- as tall as the Empire State
10 Building those entry barriers.

11 Now, assume all that, and tell me what are the
12 facts that would then make out a violation of either
13 section 1 or section 2. Facts, not legal conclusions.

14 MR. WALLACE: Well, the facts are that, as
15 alleged, that they discriminated against this participant
16 in the market in order to exclude him from the market even
17 when he was offering fully adequate competitive services
18 at a more favorable price, and that there were no
19 legitimate business reasons for the decision, but it was
20 designed to mask the regulatory violation.

21 QUESTION: Does that mean something other than
22 what I said I would assume --

23 MR. WALLACE: Other than just --

24 QUESTION: -- that what they did -- I assume
25 they bought from A for this bad reason. Now, have you

1 added anything to that, my assumption, in what you just
2 said?

3 I'm willing to assume that they bought from A,
4 never bought from B --

5 MR. WALLACE: But --

6 QUESTION: -- and they did it for this bad
7 reason, to chisel the consumer.

8 Now, once I've assumed that, have you added a
9 fact to that?

10 MR. WALLACE: That --

11 QUESTION: And if so, what?

12 MR. WALLACE: That they -- it's also alleged
13 that they conspired together to take steps to see to it
14 that the plaintiff here, the respondent, was excluded from
15 that market because of the threat that his competitive
16 offers would unmask the conspiracy, the regulatory evasion
17 conspiracy.

18 The point I want to make is that once the domain
19 of the antitrust laws has been entered because a restraint
20 has been alleged in the unregulated, upstream market, it
21 seems to us that the purpose and effect of the alleged
22 restraint should be looked at in total, just as the
23 purpose and effect occurs in the real world, and that
24 includes the effect on consumers in the utilities market.

25 QUESTION: Thank you, Mr. Wallace.

1 Mr. Brown, we'll hear from you.

2 ORAL ARGUMENT OF LAWRENCE C. BROWN

3 ON BEHALF OF THE RESPONDENT

4 MR. BROWN: Mr. Chief Justice, and may it please
5 the Court:

6 We're here in a situation that is like the
7 Klor's case. This is a 12(b)(6) motion. In Klor's there
8 was an application for summary judgment.

9 In Klor's, absolutely no procompetitive
10 justification was given in a group boycott context by the
11 defendants. Rather, they said they had the right to
12 contract with whoever they pleased --

13 QUESTION: That was quite a different fact
14 situation, was it not, Mr. Brown?

15 MR. BROWN: Well, Mr. Chief Justice, as I
16 understand Klor's --

17 QUESTION: I mean, could you answer the
18 question?

19 MR. BROWN: Yes.

20 QUESTION: Don't you think that was quite
21 different, with a number of different parties involved?

22 MR. BROWN: I think that is true, Your Honor, in
23 terms of the number of parties involved, but in terms of
24 the structure, the violation that was being addressed, I
25 don't believe it differs.

1 QUESTION: Well, you need a group to make a
2 group boycott, don't you?

3 MR. BROWN: Well, Your Honor, as I read
4 Northwest Stationers, in terms of its description of what
5 a per se approach generally involving, a joint effort by a
6 firm or firms to disadvantage a competitor of one of the
7 participants in the boycott to keep them from access to a
8 market, or from certain critical components that they need
9 to compete.

10 In the present case, Your Honor, we have a
11 situation where, at the time of the AT&T breakup, MECo is
12 created. MECo is a gatekeeper, Your Honor. We've heard
13 about entry barriers here this morning. The only way that
14 you could sell to NYNEX, and I will use that in the
15 plural, is if MECo approved you as a vendor.

16 QUESTION: MECo is really an agent for NYNEX,
17 was it not?

18 MR. BROWN: I don't disagree with that, Your
19 Honor, but to sell to New York Telephone, who was actually
20 the ultimate purchaser -- MECo was just a reseller -- MECo
21 had to approve every vendor and qualify it.

22 QUESTION: Why is that any different from saying
23 that NYNEX's purchasing agent had to approve every vendor?

24 MR. BROWN: Well, Your Honor, I don't think it
25 is different. I don't think it is different, but it has

1 to -- I'm addressing myself to barriers to entry. In
2 terms of barriers to entry, Your Honor, we're dealing with
3 a situation that you could not sell to NYNEX, read
4 NYTel --

5 QUESTION: Without selling to NYNEX. I mean,
6 you could not sell to NYNEX without getting the approval
7 of NYNEX's purchasing agent.

8 MR. BROWN: That's true, Your Honor.

9 QUESTION: Which is NYNEX.

10 MR. BROWN: And in this case we did --

11 QUESTION: Why is this case any different -- let
12 me put it another way. Is it your position that you can
13 avoid a motion for summary judgment whenever you allege a
14 sole purchaser -- I'm the only purchaser in the industry
15 of widgets. Nobody else uses widgets, and I enter into a
16 requirements contract with one seller. I totally
17 eliminate all other competitors selling widgets.

18 Now, is that enough for you to allege?

19 MR. BROWN: No, Your Honor, and I think we've
20 gone beyond that.

21 QUESTION: Why have you gone beyond that?

22 MR. BROWN: First of all, Your Honor, Discon, my
23 client, and AT&T Communications, in addition to some minor
24 vendors who I will deal with if Your Honor would want me
25 to, were approved by MECo to sell to NYTel. We were both

1 selling to NYTel. The analogy to an exclusive --

2 QUESTION: I'll change my hypothetical, then.

3 There used to be three people selling to this
4 sole purchaser of widgets. I'm the only company in the
5 country that purchases widgets.

6 I used to buy it from three people. I decide I
7 am going to enter into a requirements contract with one of
8 these three, which means that I won't be buying from the
9 other two. Is that -- does that allege an antitrust
10 violation?

11 MR. BROWN: As you put it, Your Honor, no, I
12 don't think it does.

13 QUESTION: Now, what have you added to that?

14 MR. BROWN: All right, Your Honor, these things.
15 My client, Discon, and AT&T Communications were supplying
16 services, and these services were often bid. My client
17 was often winning these bids. AT&T Communications, not
18 the parent, would speak with AT&T the parent, and NYNEX
19 and NYTel, draw those awarded contracts back. That's one
20 example.

21 A second example -- and that, Your Honor, would
22 be ignoring your bidding practices and taking a higher
23 price with absolutely no procompetitive or economic
24 justification. There has never been an issue raised as
25 the quality of my client's services or its ability to

1 perform and deliver for the price bid.

2 QUESTION: Right. I'll add to my hypothetical
3 that the reason we entered into the requirements contract
4 with this one supplier is that that supplier is owned by
5 my son-in-law, okay. I don't consider that a terribly
6 good competitive justification, right?

7 Would that make it an antitrust violation?

8 MR. BROWN: I don't think that would make it an
9 antitrust violation if that was the sole, unilateral act,
10 Your Honor, but if we're dealing in a Colgate context, and
11 we're going to say --

12 QUESTION: No, it's not unilateral. I mean, you
13 can't make a requirement -- it takes two to make a
14 contract. I mean, I enter the requirements contract with
15 the supplier. I conspired with the supplier to make a
16 requirements contract. You know, I said, what if I bought
17 all my requirements from you, and he said, yes, that's a
18 good idea.

19 MR. BROWN: You haven't stated a conspiracy to
20 do anything to any third party as to that point in time,
21 Your Honor.

22 QUESTION: Yes, I have. I'm eliminating
23 everybody else from the widget-selling industry.

24 MR. BROWN: No, you're not, Your Honor, not
25 within the context of the antitrust laws, and why I say

1 what I say is, and why I use the term unilateral, if
2 you're to go forward without any intent to damage a
3 competitor of the person with whom you're dealing, with
4 whom you, as the widget purchaser, is dealing, that's one
5 thing.

6 But if you enter into that agreement, Your
7 Honor, with the intent to make sure that that competitor
8 or the person you deal with is excluded from that market
9 never to return, and by that you have effected a harm on
10 competition because you have restriction on output, you
11 have restriction on price --

12 QUESTION: Well, how have I effected a -- I
13 mean, I haven't harmed -- that may give you a cause of
14 action against me, where you add to my hypothetical not
15 just that I want to help my son-in-law, but I -- these
16 other two companies that I'm driving out are owned by
17 enemies of mine, and I really want to hurt them.

18 I guess there's a cause of action for, I don't
19 know, malicious interference with business relationships
20 or something like that, but in order for it to be an
21 antitrust cause of action you have to show that there has
22 been harm to competitiveness within that industry. How is
23 there any harm to competitiveness?

24 MR. BROWN: All right, Your Honor --

25 QUESTION: As soon as my son-in-law leaves that

1 company, I can immediately open it up for bids and people
2 will come in and, since there are no entry barriers to
3 this particular industry, I can ask for as low a price as
4 I want.

5 MR. BROWN: Your Honor, my response to that
6 would be twofold. First, the conduct in this particular
7 case concerned the manner in which a regulatory evasion
8 was effected. That's where the anticompetitive harm came.

9 In the supplier market, the supplier market had
10 to be fixed and supercompetitive prices had to be enabled
11 by the elimination of competition in the supplier market,
12 which is unregulated, and what occurred here, Your Honor,
13 was a series of events which, when put into operation,
14 eliminated my client from that market, and I will go
15 further and say this.

16 QUESTION: Mr. Brown, may I ask a rather
17 fundamental question that cuts across the whole case? You
18 say, from that market.

19 MR. BROWN: Yes.

20 QUESTION: Now, it seems to me there are at
21 least two different ways one might describe that market,
22 and I want to know which one you say.

23 As your opponent said, at 104 you say the market
24 is purchases by NYNEX. That's one way to define it.
25 There also, however, are two other purchasers of removal

1 services in New York.

2 There's AT&T-C, which you describe in paragraph
3 26, and there's also the Buffalo, or Rochester Telephone
4 Company. Now, are Rochester and AT&T-C in or out of the
5 market you say was monopolized?

6 MR. BROWN: The answer to that, Your Honor, is
7 very simply, is that Rochester Telephone is not
8 characterizable as being in the same market if we deal
9 with sales to NYNEX. This --

10 QUESTION: So you do not contend that the --
11 that the market which included Rochester Telephone was
12 monopolized or restrained? You're not saying that?

13 MR. BROWN: I am saying it can be read, Your
14 Honor, at both levels.

15 QUESTION: Well, how do you read it? You're the
16 author of the complaint.

17 MR. BROWN: How I read it, Your Honor, is that
18 this is an attempt to monopolize a market for the
19 provision of removal services --

20 QUESTION: I understand that, and I'm asking you
21 how do you define the market? What is the market? Does
22 it include or does it not include Rochester Telephone?

23 MR. BROWN: It would not include Rochester
24 Telephone.

25 QUESTION: Does it include or not include AT&T-

1 C?

2 MR. BROWN: AT&T-C is ATC Communications, Your
3 Honor, is the --

4 QUESTION: It's the interexchange network in the
5 State for AT&T.

6 MR. BROWN: Yes. Yes, Your Honor.

7 QUESTION: And they use removal services, too.

8 MR. BROWN: That's right. We treated that as a
9 separate market as well.

10 QUESTION: So it does not include that entity,
11 either.

12 MR. BROWN: That's correct. They're separately
13 regulated, Your Honor.

14 QUESTION: So the market we're talking about is
15 the single purchaser of NYNEX.

16 MR. BROWN: Yes.

17 QUESTION: Okay.

18 MR. BROWN: Yes.

19 QUESTION: In responding to Justice Scalia's
20 hypothetical, the exclusive requirements contract and the
21 son-in-law, is your answer that there is no actionable
22 antitrust violation even if the supplier is a monopolist?

23 MR. BROWN: Your Honor, if the --

24 QUESTION: The purchaser is a monopolist?

25 MR. BROWN: If the purchaser's a monopsonist,

1 has control -- Your Honor, I think that that's a more
2 difficult question. The market power --

3 QUESTION: That's not what --

4 QUESTION: That was my question.

5 MR. BROWN: I misunderstood you, then, Justice
6 Scalia. I'm sorry?

7 QUESTION: I think to make your hypothetical
8 work you have to assume that Justice Scalia's purchaser of
9 the services is a monopolist who then passes on the cost
10 to the consumer.

11 MR. BROWN: Yes. Well, I think we did assume,
12 and I assumed in my brief in this Court we were dealing
13 with a monopsonist for the purchase of services in that
14 market, which is why I was saying, in response to Justice
15 Stevens when he asked, that I was eliminating purchases by
16 NYNEX for that purpose, because it would be the
17 monopsonist in that market.

18 QUESTION: It seems to me it's a strange --

19 QUESTION: So part of the agreement with the
20 son-in-law and the purchaser is, and we'll pass this cost
21 on to the consumer?

22 MR. BROWN: That's absolutely correct, Your
23 Honor. That was --

24 QUESTION: Then is there an antitrust violation?

25 MR. BROWN: I believe so, Your Honor, because

1 the purpose there, even though the effect may be on
2 ratepayers, you can only affect that purpose by
3 eliminating competition in the supplier services market.
4 That is the only way you can make that work under the
5 facts of this case as we pled them.

6 QUESTION: The reason -- but the reason the
7 consumers are subject to the whims of a monopolist is not
8 anything that's been done in this contract. They're
9 subject to monopoly power because the State has made them
10 subject to monopoly power by awarding monopoly to the
11 provider of telephone services.

12 How can you blame the fact that they're harmed
13 by monopoly power upon this deal? This deal hasn't
14 created that monopoly power. It's a creation of the
15 State.

16 MR. BROWN: Well, Your Honor, that brings about
17 who really has the authority as between the antitrust
18 laws --

19 QUESTION: But I thought the purpose of the
20 antitrust laws was to stop individuals from creating
21 monopoly power, and the monopoly power that is hurting
22 these consumers is not a creation of this deal, it's a
23 creation of the State.

24 MR. BROWN: That monopoly power, my response
25 would be, Your Honor, cannot be abused in this case unless

1 they fix the supplier markets in a manner violative of the
2 antitrust laws.

3 QUESTION: Well, there are regulatory -- I mean,
4 in awarding monopoly the State also supervises it, so
5 there are punishments that can be meted out by the
6 appropriate regulatory authority, but I find it hard to
7 see how you can blame that monopoly power upon this
8 transaction.

9 MR. BROWN: We're not attacking -- we're not
10 attacking the purchaser for being a monopsonist. We're
11 attacking the purchaser for being engaged in activity
12 upstream beyond those areas in which he can operate as a
13 natural monopolist to fix and destroy competition in
14 supplier markets.

15 QUESTION: Can I ask you the same question that
16 I asked the Solicitor General? If through some miracle
17 you remember it, I won't repeat it.

18 MR. BROWN: No, if you would, please.

19 (Laughter.)

20 QUESTION: Right. I'm not doubting for present
21 purposes your client should have a remedy. I mean, the
22 only issue, I think, is whether it's an antitrust remedy
23 or a regulatory remedy, so assume that.

24 Also, I'm not going to doubt for present
25 purposes that you have a big buyer -- you know, put them

1 all together all three of them. I'm counting them as one
2 buyer, and we have two sellers, A and B. You're B. A is
3 AT&T, all right.

4 And I'm also not doubting that what happened is,
5 the buyer went to the seller, your competitor, and said,
6 I'm going to buy at a low price disguised as a high price,
7 for terrible reasons, to hurt the consumer. I'm assuming
8 all that.

9 As a result, your client lost the business, all
10 right.

11 I've got those facts. I'm assuming all that in
12 your favor. I'm assuming that your client's never going
13 to get the business unless you can complain to the
14 regulator and get this set aside.

15 Now, is there -- I can understand the legal
16 issue. We have to characterize this bad reason as, is it
17 a regulatory problem or an antitrust problem?

18 Any additional fact, is there any additional
19 fact that you want to show, other than what I just
20 summarized, because if not, I guess we could decide, yes
21 or no, but if so, what are they?

22 MR. BROWN: All right.

23 QUESTION: What additional facts, and as far as
24 entry barriers are concerned, I'll assume whatever entry
25 barriers you want, whatever you think you plausibly can

1 prove as to lack thereof, or not lack thereof. Is there
2 any additional fact?

3 MR. BROWN: I think, Your Honor, in response,
4 there are probably a couple.

5 First of all, there was just not a change of
6 suppliers for economic purposes at all. You've assumed
7 evil motives, but I don't know if you're assuming the evil
8 motive that creates an antitrust injury.

9 QUESTION: What evil motive -- now -- in other
10 words, there is a human being called a manager, and we're
11 looking into his mind, and I can see that that manager
12 might want to cheat the consumer, on your theory, I've got
13 that one, by raising the price above what he really paid
14 when he tells the regulator.

15 Now, is there some additional factual set of
16 things floating around in that person's brain? What?

17 MR. BROWN: Right. Your Honor, there was a two-
18 step approach in this case which is specifically pled in
19 the amended complaint. The first was that prices would be
20 charged by the competitors and they would be marked up by
21 the manager, as you've called the manager.

22 QUESTION: Mm-hmm.

23 MR. BROWN: However, in 1985, New York Telephone
24 said, we can't tolerate these markups any more. You
25 better find another way to go about this.

1 So instead -- instead, MECo, Materials
2 Enterprises, the manager, if you will, starts to mandate
3 that the competitors come in with supracompetitive prices.

4 My client would not do that. My --

5 QUESTION: No, I've got that. Haven't I assumed
6 that? I've assumed that what happened was that the buyers
7 went to your competitor and said, charge us a high price,
8 heh, heh, give us a rebate, heh, heh, that way we will, in
9 fact, cheat the consumer.

10 I'm assuming all that in your favor, and what
11 I'm looking for is some additional fact. Is there some
12 additional fact in this case that you would like to try to
13 prove, because I can deal with the legal issue as the
14 facts as I assume them. I decide one way or the other.

15 But what I'm looking for is, are there some
16 additional facts that you might prove which, I don't know
17 what they are. That's why I'm asking the question.

18 MR. BROWN: Right. I think, Your Honor, the one
19 thing -- the things I would like to prove is, first of
20 all, to compete in this market I will not have to exercise
21 those efficiencies that would ordinarily be exercised for
22 me to compete in this market and to bid.

23 In other words, competition is being suppressed.
24 Price is being increased, output is being reduced, you
25 cannot enter this market unless you enter into the scheme.

1 Now, if the issue we're talking about, Your
2 Honor, is the regulatory, as Professor Areeda calls it,
3 the regulatory remedy as opposed to an antitrust remedy, I
4 only suggest this, that when the Public Service Commission
5 of the State of New York and the Federal regulators kept
6 pressing the utilities in this case they told them -- they
7 told them to take the procurement inside the regulated
8 businesses, and I say that because the regulators were
9 acknowledging that they could not regulate the supplier
10 market, that that's within the realm of antitrust.

11 If we're talking about the remedy for my client
12 as a competitor, the public service commission, Your
13 Honor, and the FCC cannot give my client, Discon,
14 Incorporated, any remedy for anticompetitive injury at
15 all.

16 QUESTION: But your client can certainly -- but
17 NYNEX can certainly be punished by the regulatory
18 authority, can it not?

19 MR. BROWN: Yes, but not for antitrust
20 violations. Not for suppression of competition in the
21 supplier market, Your Honor.

22 QUESTION: No, but for passing on these phony
23 prices to consumers, certainly the New York regulatory
24 authority could get after it.

25 MR. BROWN: I think that's accurate, Your Honor,

1 and I think they did adjust the rate basis, and they fined
2 them, and so did the Federal Communications Commission,
3 but that again doesn't address the antitrust issues and,
4 in fact, in this industry the FCC has acknowledged that
5 this industry in terms of antitrust, from the times of the
6 AT&T breakup case forward.

7 And there are a number of circuit court of
8 appeals cases on this acknowledging that the existence of
9 regulation in and of itself is not an excuse for not
10 applying the antitrust laws, because the regulation does
11 not address antitrust violations. They're dealing with
12 natural monopolists, as I think I had said in my brief,
13 and acknowledged that point.

14 QUESTION: Mr. Brown, may I suggest something
15 that maybe you are adding to the hypothetical that Justice
16 Stevens -- that Justice Breyer proposes?

17 It seems to me it is a part of your case that
18 not only was there this scam in which I was going to give
19 all of my business to you and get a kick-back, but you
20 allege it was an essential part of the scam that everybody
21 else be driven out of the industry.

22 MR. BROWN: Ultimately, every --

23 QUESTION: If you are unsuccessful in driving
24 everybody else out, the scam would be disclosed. It would
25 be apparent that you're paying much more to the person

1 that's giving you the kick-back than you have to pay for
2 these services. I guess that's an additional allegation
3 that you make here.

4 MR. BROWN: Yes. Yes, it is, Your Honor.

5 QUESTION: Could you explain one allegation? A
6 couple of places in the complaint you say they had
7 threatened to discredit Discon with the regulatory
8 agencies. I don't quite understand that, because I didn't
9 understand that you were subject to regulation.

10 MR. BROWN: No, Your Honor, what -- where this
11 was occurring is, my client was an intervenor in hearings
12 before the New York State Public Service Commission, and
13 New York tells internal security -- and there's a mention
14 of it, to try to establish that my client was involved in
15 payment of certain personnel within the NYNEX group to
16 ensure it would get business.

17 How that ties in in terms of the allegation is,
18 there is a later allegation in the complaint, Your Honor,
19 that later MECo personnel came to the principal of my
20 client and said, if you will return all evidence of
21 discrimination, and you will agree to cooperate with this
22 scam, we'll let you provide services again to NYNEX.

23 I realize they're located in separate parts of
24 the complaint, but that is more a function of chronology
25 in time than it is a lack of a tie.

1 QUESTION: What are you going -- what do you
2 intend to show, any, again, facts -- I'm back to facts.
3 What do you intend to show, if you want to -- you're going
4 to show that the buyer bought only from the seller, who
5 had imposed this unfair condition. I understand you're
6 going to show that. Once you've shown that, what do you
7 intend to show extra to demonstrate what Justice Scalia
8 just said?

9 I mean, does your claim that, well, really what
10 the buyer was doing here is, it wanted to exclude all the
11 other competitors of the sellers. Does that come down to
12 a claim that, yes, he just bought from A all the time? Is
13 there something extra?

14 MR. BROWN: Yes. The purpose --

15 QUESTION: What?

16 MR. BROWN: The purpose is to buy from A only to
17 discipline B.

18 QUESTION: And what do -- I mean, do you have
19 any fact at all that's going to show that, other than the
20 fact that what the buyer did was always buy from A?

21 MR. BROWN: Oh, yes, Your Honor.

22 QUESTION: What, for example?

23 MR. BROWN: They're pled in the complaint?

24 QUESTION: Like what?

25 MR. BROWN: Winning on bids which then, when

1 AT&T Communications went in with a higher bid, it would --
2 the bid would be retracted and awarded to AT
3 Communications without any further notice to my client.
4 That's only one example.

5 QUESTION: Well, is the fact that they
6 disqualified your client from bidding, perhaps, an answer
7 to the question?

8 MR. BROWN: They --

9 QUESTION: In other words, they didn't just say,
10 I'm going to buy from A. They said, B, you cannot even
11 bid any more. We are excluding you from that possibility.
12 Is that enough as an additional fact?

13 MR. BROWN: Your Honor, I believe that's another
14 additional fact. I believe it would show that they did
15 not intend to comply with their own bidding procedures,
16 that they in fact were acting against their own best
17 interest.

18 QUESTION: How is that any different from the
19 hypothesis of a requirements contract? It has the same
20 effect on your client, whether we say -- whether NYNEX
21 says, I'm going to have a requirements contract and buy my
22 stuff from X, or if they say, I won't have you bidding any
23 more. The result in each case is, you get nothing.

24 MR. BROWN: Well, Your Honor, I think -- I think
25 I can answer that two ways.

1 First of all, the reason they entered into the
2 agreements with AT Communications was because AT
3 Communications would assist them in the regulatory evasion
4 scheme in the administratively controlled area, the
5 natural monopoly. They could pass through the cost and
6 damage consumers by controlling the unregulated supplier
7 market.

8 That was the motive for entering into that
9 exclusive requirements contract, if we call it that, at
10 that point in time.

11 QUESTION: But I asked you, what's the
12 difference between a requirements contract and the
13 statement to your client, we won't even have you bid?

14 MR. BROWN: All right. Your Honor, the reason
15 my client was forbidden -- assuming I'm not limited by the
16 hypothetical precisely, the reason my client was forbidden
17 to bid further was because it would not charge
18 supracompetitive prices and wanted to compete, and was in
19 direct communication with NYTel, which was found out, it
20 was forbidden, and then they decertified my client from
21 bidding.

22 QUESTION: Thank you, Mr. Brown.

23 MR. BROWN: Thank you, Your Honor.

24 QUESTION: Mr. Young, you have 2 minutes
25 remaining.

1 REBUTTAL ARGUMENT OF JAMES R. YOUNG

2 ON BEHALF OF THE PETITIONERS

3 MR. YOUNG: Mr. Chief Justice, I don't want to
4 impose on the Court. I think I've made the points I --

5 QUESTION: Well, it wouldn't impose on the Court
6 if you answered one question for me.

7 MR. YOUNG: Certainly.

8 (Laughter.)

9 QUESTION: When your opponent kept referring to
10 AT&T Communications, **was he really** referring to AT&T
11 Technologies? I get a little mixed up with the
12 subsidiaries here.

13 MR. YOUNG: AT --

14 QUESTION: AT&T Technologies is the one, the
15 AT&T sub, that was the -- that actually provided the
16 removal services, was it not?

17 MR. YOUNG: I believe that's correct.

18 QUESTION: And so when he said Communications he
19 meant Technologies.

20 MR. YOUNG: At one point I think when he was
21 talking about purchasers he referred to AT&T
22 Communications as a purchaser --

23 QUESTION: That would have been this AT&T-C that
24 I was referring to earlier.

25 MR. YOUNG: That's correct.

1 QUESTION: Right.

2 Do you also read the complaint the way he does,
3 just -- I guess you do, because you pointed out that
4 paragraph of the complaint. The only market we're
5 concerned about is the market, purchases by New York
6 Telephone.

7 MR. YOUNG: There are actually, I think, two
8 markets alleged. One is a New York State-wide market, and
9 one is New York Telephone market, but again, as I said, I
10 think the barriers to entry point is dispositive.

11 QUESTION: Right.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Young.
13 The case is submitted.

14 (Whereupon, at 11:05 a.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NYNEX CORPORATION, ET AL., Petitioners v. DISCON, INC.
CASE NO: 96-1570

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Federico

(REPORTER)