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Legal Armies, in Search of New Battles

With the Big Mergers Over, the Communications Bar Is Shrinking -- but Still Busy

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Standing in his K Street office with a headset glued to his ear, Andrew Jay Schwartzman thinks of himself as a guerrilla leader launching lightning raids against the nation's big communications companies to defend the public interest.

In a corner office three blocks down K Street, former Federal Communications Commission chairman Richard E. Wiley commands an army of lawyers on behalf of many of the country's major telephone, cable and media groups.

Operating at opposite ends of the spectrum, the two are among the thousands of lawyers, consultants, economists and lobbyists who toil in one of Washington's signature industries: communications law. They hurl legal filings at one another before the FCC and in the courts, track the shifting sands in Congress and spend millions of dollars on ad campaigns.

Long a staple of business in the nation's capital, the communications law community appears to be shrinking some because of changes in the marketplace. The classic battle between long-distance and local phone companies has ended, and many of the largest phone companies are merging into fewer -- and bigger -- players.

"I think the FCC bar is going to diminish, in large part because for 20 years it was fueled by these two big armies, one for the long-distance companies and one for the Bells, and once you merged them, it's like the end of the Cold War," said Blair Levin, an analyst at Stifel, Nicolaus and Co. and a former FCC chief of staff. "There are a lot of spies out there who don't know what to do with themselves."

The Federal Communications Bar Association's membership rose from 2,100 in 1994 to a peak of 3,386 in 2000 as the industry fought a series of battles over implementing the Telecommunications Act of 1996. Once many of those matters were settled and after the dot-com and telecom bubbles burst in 2000, its membership drifted down -- to 2,780 last year.

But Washington's telecom complex is still vibrant, as networks of lawyers, staffers and experts focus on new issues raised by changing technologies.

"You are seeing a contraction, for sure, as the statistics indicate, but also a sort of diffusion into what one might think of as immediately adjacent fields," said Philip L. Verveer, a lawyer at Willkie Farr Gallagher LLP. "While it's diminishing in a traditional regulatory sense, there are new things that are beginning to arise. You will find lawyers that have been in a traditional regulatory practice moving into

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adjacent fields -- intellectual property, privacy, data protection."

One example of traditional legal work is the \$12.7 billion bid by Comcast Corp. and Time Warner Inc. for most of the assets of Adelphia Communications Corp., a cable company that filed for Chapter 11 bankruptcy protection from its creditors nearly four years ago.

In addition to being a straight cable merger, the deal also involves the companies' efforts to move into areas of high-speed Internet, telephone and other services to better compete with phone companies for their customers.

Schwartzman and Wiley are at odds over the transaction, and their David-and-Goliath conflict illustrates the full range of the local industry.

Wiley, whose firm, Wiley Rein & Fielding LLP, has 75 communications specialists among its more than 250 lawyers, represents Comcast. Schwartzman's Media Access Project, which has three lawyers, three support staffers and two or three law student interns at any one time, represents a band of nonprofit advocacy groups.

Comcast and Time Warner argue that rescuing Adelphia from bankruptcy protection will benefit its customers and creditors and make their own companies more competitive. As part of the deal, Comcast and Time Warner, the nation's two largest cable providers, also plan to swap a number of cable systems, allowing each to amass bigger regional "clusters" of subscribers.

Critics such as News Corp.'s DirecTV fear the deal will increase Comcast's and Time Warner's leverage and make it more expensive, or impossible, for competitors to get access to regional sports networks that broadcast baseball, basketball, hockey and other games.

DirecTV, a satellite television provider, and RCN Corp. of Herndon, a smaller cable operator, have asked the FCC to bar Comcast and Time Warner from making exclusive deals with regional sports networks. Media Access Project echoes DirecTV's concerns and wants several other conditions on the merger, including barring Comcast or Time Warner from blocking subscribers' access to legal Web sites and protection for political speech and independent programmers.

Comcast and Time Warner dispute the need for any conditions. They argue that they have long-standing policies of providing unfettered Internet access to their customers. They also say that the regional sports issue is not specific to the Adelphia deal and should not be addressed in the FCC's merger review.

One of the tactics that Media Access Project's allies have used in the Adelphia merger is to flood the FCC with nearly 12,000 comments from activists arguing that the two big cable companies should not be allowed to get bigger.

"We have to pick our shots very, very carefully. . . . We are small, we use unconventional tactics, and we have limited resources, so we have to live off the land," Schwartzman said. "Sometimes it's because we can demonstrate that there is a public interest . . . to an issue that otherwise appears to be a fight between the very rich and the very wealthy."

Of the nearly 16,000 filings on the merger as of Friday afternoon, there were 479 core documents in the case, and the lawyers tracking the matter read them with the zeal of Talmudic scholars, taking

copies home at night.

Many other of the city's leading communications law firms are also working on the merger. Adelphia is represented by Willkie Farr Gallagher, Time Warner by Fleischman and Walsh LLP, and DirecTV by Harris, Wiltshire & Grannis LLP.

Groups as varied as the Communications Workers of America, Americans for Tax Reform and Marco Island Cable Inc., which runs a cable system on an island south of Naples, Fla., have all weighed in, adding to the thousands of pages written in favor of and against the merger.

While such disputes often seem as subtle and arcane as theological arguments about how many angels fit on the head of a pin, they can influence what people watch on TV, how they access the Internet and what they pay for phone calls.

"On the head of every pin rests a billion dollars," said Howard J. Symons, a communications lawyer at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC and a former adjunct professor who taught telecommunications law at George Washington University.

The vast amount of money involved and the complexity of telecom cases are factors that lead observers to conclude Washington's telecom law industry won't shrink much more.

Wiley, who declined to comment on the Adelphia deal, said he was not worried about the practice shrinking, noting the profusion of technological developments in communications.

"The technology-agile lawyer can do well," said Wiley, whose firm represented NTP Inc. in its patent infringement lawsuit against the maker of BlackBerry wireless devices and won a share of the \$612.5 million settlement. "We've got 75 communications lawyers here and I can tell you they are all busy."

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