ment was raised that "an open ended extension of the contract was, as a practical matter, a new procurement which could only be awarded on a non-competitive basis if one of the seven exceptions to full and open competition set out [in CICA] applied."[37] EOSAT disagreed, believing instead that the LPM's actions were "contrary to the express Congressional mandate of [the LRSPA], which provided explicit directions as to how LPM was to proceed" with the contract extension; namely through the negotiation process followed by Congressional notification in the event of an impasse.[38] As the Government admitted in its supporting memorandum, "[t]he report to Congress required in Section 103(b) was prepared by the LPM, but it was not transmitted by the Office of Management and Budget to Congress."[39] At its core, then, the dispute between EOSAT and the Government centered on how to interpret the language of the LRSPA—did the report to Congress constitute a simple advisement, or was it a necessary action before alternative bids could be solicited?

B. Monopolistic Power

> During the past year [1888], a system of dark and mysterious combinations, known as "Trusts," have sprung up in the industrial and commercial world. They have increased rapidly and have excited the alarm of thinking men. . . . It is the combination of a few men who wield all the powers of a mighty corporation without being subject to the limitations or responsibilities of a corporation. . . . Their power is unchecked by legal restraints or safeguards. They operate in secret and recognize no legal control or regulation. Their end is self enrichment. It is centralization of financial and commercial power without parallel or precedent. It is simply czarism in business.[40]

Two years before the adoption of the landmark Sherman Antitrust Act,[41] the passage above appeared in the American

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[37] *See* Defendant's Memorandum of Points and Authorities (Jan. 30, 1995) at 6. On file with the JOURNAL OF SPACE LAW.

[38] *See* EOSAT's Memorandum in Support of its Motion for Summary Judgment (Jan. 30, 1995) at 3. On file with the JOURNAL OF SPACE LAW.

[39] *See supra* note 6, at 5 n.2.

[40] D.M. Mickey, *Trusts*, 22 AM. L. REV. 538 (1888).

[41] 15 U.S.C. § 1 (1890).

Law Review. Although the Nineteenth Century fear of "centralization of financial and commercial power" might seem almost quaint when viewed against the backdrop of modern finance—a world in which a single bank has over $1.8 trillion in assets and corporations routinely consider themselves multinational—the dangers of unchecked commercial power are still recognized as an area of legal concern.[42] Since the founding days of the Republic, society has valued the principle that "every man shall have his [competitive] chance and that no man shall deprive him" of it.[43] Monopolistic entities were regarded as "an abnormal, unnatural, and dangerous development; a sort of financial anaconda, which crushes the life out of the small dealer by driving him into bankruptcy, and then swallows his profits."[44]

Against this unsavory view of capitalistic aggregation, it should have come as no great surprise when Congress passed by a nearly-unanimous vote Section Two of the Sherman Antitrust Act, which holds that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person [to monopolize] shall be deemed guilty of a felony."[45] In the clearest of terms, it seemed, Congress was making a political repudiation of the monopolistic form. As history has shown, however, all monopolies are not created equal. In *Air Courier Conference of America v. American Postal Workers Union*, the Supreme Court reminisced that:

> Since its establishment, the United States Postal Service has exercised a monopoly over the carriage of letters in and from the United States. The postal monopoly is codified in the [Private Express Statutes], 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606. The monopoly was created by Congress as a reve-

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[42] Citigroup Balance Sheet (Dec. 31, 2006).

[43] *See supra* note 40.

[44] *Id.*

[45] 15 U.S.C. § 2 (1890). The term "monopoly" has been interpreted by the Supreme Court to mean "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

> nue protection measure for the Postal Service to enable it to fulfill its mission.[46]

Elaborating further, the Supreme Court also ruled in *F.C.C. v. RCA Communications, Inc.* that:

> Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; . . . Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office . . . and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads.[47]

In areas of technological concern, Congress has also used its power to establish monopolies in order to protect certain critical industries from competition—even at the deliberate expense of existing companies. Quoting *N.V. Philips' Gloeilampenfabrieken v. Atomic Energy Commission*:

> The Atomic Energy Act of 1946 declared the production of fissionable materials to be a Government monopoly. To accomplish this purpose, Section 11 of the Act revoked all existing patents useful exclusively in the production of fissionable ma-

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[46] 498 U.S. 517, 519 (1991). As the American population increased and simultaneously spread out across the continent, certain postal routes inevitably became more profitable than others simply due to location and relative infrastructure. Given its mission of delivering mail throughout the *entire* country, the Postal Service and its congressional supporters were concerned that private competitors would seize the advantage on profitable routes (New York to Philadelphia, for instance) while leaving less profitable (Sioux Falls to St. Louis) or profit-negative routes to the financial detriment of the Postal Service. By granting the Postal Service a monopoly over the carriage of letters, Congress insured that smaller communities on less-profitable routes would continue receiving service. *Id.*

[47] 346 U.S. 86, 92 (1953).

> terials, and prohibited the issuance of new patents insofar as they are useful for such purposes. In addition, it authorized the Government to utilize as necessary any other patent in the process of producing fissionable materials, without liability for infringement of such patents.[48]

It is clear, then, that just because the Sherman Act makes it a felony to monopolize or attempt/conspire to monopolize, Congress has the authority to craft exemptions. As the LRSPA envisioned there being only one *Landsat* contractor,[49] EOSAT would necessarily have been a monopoly since it was the sole provider of a single resource. Since this monopoly was expressly granted by statute, however, it should not have faced liability on this point since one "does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product."[50]

C. Price Discrimination & Refusal to Deal

Having established that EOSAT would not have faced antitrust liability simply for possessing monopoly power, it is now necessary to analyze EarthSat's complaints of being the target of price discrimination by EOSAT along with EOSAT's refusal to deal with EarthSat as it had on previous terms. While these two claims are not legally synonymous, the specific facts of the case lend themselves to a combined discussion, and for the sake of analytical continuity the two issues will be presented collectively.

By virtue of its government contract, EOSAT possessed the exclusive right to market and distribute *Landsat* data.[51] While the information obtained directly from the satellites certainly possessed value, the true worth of this data was maximized only when "value-added" companies enhanced the imagery to customer specifications.[52] According to its Counterclaim, EarthSat's business was centered around: (1) distributing unen-

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[48] 316 F.2d 401, 404-05 (C.A.D.C. 1963).

[49] *See supra* note 10.

[50] Mediacom Commc'ns Corp. v. Sinclair Broadcast Group, Inc., 460 F. Supp. 2d 1012, 1027 (S.D. Iowa 2006).

[51] *See supra* note 10.

[52] *See supra* note 31, at 2.

hanced *Landsat* tapes on EOSAT's behalf, and (2) enhancing these tapes as a provider of value-added services for its own customers.[53] According to its agreement with EOSAT, EarthSat "was compensated by a commission of 10% for sales of *Landsat* tapes with aggregate value of under $50,000 and 20% for sales of *Landsat* tapes with aggregate value of over $50,000 . . . ."[54] EarthSat received no discount on data tapes purchased for its own use, but consistently sold more than the $50,000 worth of tapes each year required to receive the 20% commission.[55] As both parties recognized, "[u]ntil the termination of the Agreement, EarthSat was the largest distributor of EOSAT tapes in North America."[56]

On January 17, 1995, EarthSat received notice from EOSAT that its distributorship agreement would not be renewed.[57] EarthSat then informed EOSAT that "its decision to terminate the Agreement was discriminatory and would cause damage" to the company, and that it wished to be reinstated as an EOSAT distributor.[58] Upon its failure to achieve this desired result, EarthSat then brought suit against EOSAT seeking judicial relief.[59]

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* EarthSat "purchased and resold more than one-half million dollars worth of *Landsat* tapes in 1994." *Id.*

[57] Counterclaim Against EOSAT (Feb. 24, 1995) at 3. On file with the JOURNAL OF SPACE LAW.

[58] *Id.* Chief amongst its complaints was the protest that EarthSat's competitors would be able to continue purchasing the tapes for resale at the 20% discount, thus causing the company to be competitively disadvantaged since it would have to pay the regular price of $4,400 without being able to pass along any cost savings to the consumer. *Id.* at 4.

[59] Among its prayers for relief, EarthSat requested that EOSAT be ordered "to reinstate EarthSat as a *Landsat* distributor retroactive to January 1, 1995; . . . to adjust all invoices issued to EarthSat since January 1, 1995, to reflect its 20% distributor discount; . . . to refrain from discriminating in price against EarthSat in the future; . . . to provide the same quality level of tapes, service, and delivery to EarthSat as to its other distributors and customers; [and to pay] EarthSat['s] costs and attorney fees . . . ." *Id.* at 5-6.

1. The Robinson-Patman Act

Forty-six years after the adoption of the Sherman Act, Congress passed the Robinson-Patman Act as a means of combating the anticompetitive practice of price discrimination.[60] Holding that "[i]t shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition," this statute continued the Sherman Act's theme of imposing criminal sanctions on those found guilty of engaging in the prohibited conduct.[61] As an additional deterrent to any would-be perpetrators, Section Four of the Clayton Act—of which Robinson-Patman is a part—also allowed the injured party to recover treble damages in addition to the cost of the suit and attorneys fees since "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[62]

While the Robinson-Patman Act is certainly powerful, it does not ban "*all* price differences charged to different purchasers of commodities of like grade and quality . . . ."[63] Rather, the Act proscribes "price discrimination only to the extent that it threatens to injure competition . . . ."[64] As the Supreme Court has held:

> Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary line. Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors. . . . Secondary-line cases . . . involve price discrimination that injures competition among the dis-

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[60] 15 U.S.C. § 13 (1936).

[61] *Id.* at § 13(a).

[62] 15 U.S.C. § 15(a). Minnesota Min. & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

[63] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993) (emphasis added).

[64] *Id.*

> criminating seller's customers (here, Volvo's dealerships); cases in this category typically refer to "favored" and "disfavored" purchasers. See *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 558 n.15 (1990). Tertiary-line cases involve injury to competition at the level of the purchaser's customers.[65]

Given that EOSAT was granted a statutory monopoly over the operation of the *Landsat* system and the marketing and distribution of its data,[66] EarthSat's price discrimination claim would not fall under the primary-line category since it was not a "direct competitor" of EOSAT. Quoting the Supreme Court once again, however:

> To establish [a] secondary-line injury . . . [the claimant must] show that (1) the relevant sales were made in interstate commerce; (2) the [items] were of "like grade and quality"; (3) [the seller] discriminate[d] in price between [the claimant] and another purchaser [of the item]; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, i.e. one who "receive[d] the benefit of such discrimination."[67]

Seen against this category, EarthSat's claim becomes much more viable since it alleges price discrimination that injured competition among EOSAT's customers, particularly between "favored" and "disfavored" purchasers of *Landsat* data tapes.[68]

Separating the *Volvo Trucks* test for establishing injury under the secondary-line category into its four elements, EarthSat would have needed to prove the following in order to show a valid antitrust claim under the Robinson-Patman Act: (1) the *Landsat* tape sales were made in interstate commerce; (2) the tapes were commodities of like grade and quality; (3) EOSAT discriminated in price between EarthSat and another purchaser of *Landsat* tapes; and (4) the effect of this price discrimination

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[65] Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006).

[66] *See supra* note 10.

[67] 546 U.S. at 176-77 (2006).

[68] *See supra* note 56.

was to injure, destroy, or prevent competition in the sale of *Landsat* tapes to the advantage of a favored purchaser.[69]

Taking the elements in the order they appear, EOSAT raised a frontal attack against the first premise by arguing that the transfer of the *Landsat* tapes to EarthSat was not even a true sale.[70] Arguing that under the terms of its agreement EarthSat was a commissioned sales representative and not a distributor or purchaser for resale, EOSAT analogized the situation to the facts of *Students Book Co. v. Washington Law Book Co.* in which the "appellant sued for treble damages for injuries allegedly caused by [the] sales of student law books to . . . competitors at preferential prices and under preferential terms . . ."[71] Before the fall of 1947, the defendant had supplied the plaintiff with books at a discount of twenty percent off the list price, but later decided to substantially reduce this discount while extending even more favorable terms to other area bookstores.[72] In reviewing the trial court's decision, Judge Bazelon wrote:

> Thus there was a conflict in the evidence from which the jury could have found that the transactions with the campus book stores were either consignments or sales. To enable the jury to resolve this conflict, the court charged, in essence, that if title to the books passed to the campus book stores, they were purchasers, but that if title did not pass to them, they were merely consignment agents. Since the jury's verdict sustained the defense, it must have found that the transactions were consignments.[73]

While the difference between a sale and a consignment may appear at first to be one of mere semantics, the distinction is a critical one since "the [Robinson-Patman] Act does not apply to transactions that are not sales."[74] In its April 21, 1995 Memorandum of Points and Authorities, EarthSat responded by argu-

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[69] *See supra* note 67.

[70] EOSAT Mem. of Points and Authorities (Mar. 16, 1995) at 3. On file with the JOURNAL OF SPACE LAW.

[71] 232 F.2d 49, 50 (C.A.D.C. 1955).

[72] *Id.*

[73] *Id.* at 51.

[74] Parrish v. Cox, 586 F.2d 9, 12 (6th Cir. 1978).

ing that "Maryland law, which controls the sale issue in this case and upon which EOSAT relies, requires a factual showing respecting the passage of title; the language of the contract is not enough."[75] Looking to Maryland's enactment of § 2-202 of the Uniform Commercial Code, EarthSat posited that:

> terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing . . . may be explained or supplemented (a) By course of dealing or usage of trade (§ 1-205) or by course of performance (§ 2-208).[76]

Contending that a larger view of the facts surrounding the agreement needed to be considered, EarthSat then cited the case of *Blank v. Dubin*.[77] Discussing the potential overlap between a principal-agency relationship and a legitimate sale, the court held that:

> title remains in the principal, and the factor or agent is liable to pay, not a price, but to account for the proceeds of the goods when sold. If, however, it appears from the whole agreement that it is the intention of the parties that the title to the goods is to pass to the party receiving them, for a price to be paid by him, then the transaction is a sale.[78]

If interpreted as allowing parol evidence to be introduced to show the agreement through the "course of dealing or usage of trade . . . or by course of performance"[79] was a true sale instead of a consignment, EarthSat's position would have been greatly bolstered. If the court ruled that such evidence was impermissible, however, EarthSat's claim would have been severely injured.[80]

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[75] *See* Mem. of Points and Authorities (Apr. 21, 1995) at 2. On file with the JOURNAL OF SPACE LAW.

[76] Md. Code Ann., Com. Law § 2-202.

[77] 267 A.2d 165 (Md. 1970).

[78] *Id.* at 167.

[79] *See supra* note 76.

[80] Since preferences granted to a sales agent are not actionable because there is no sale to the agent, *see* United States v. GTE, 272 U.S. 476 (1926), any suggestion that the contract was for a consignment would defeat the claim.

Turning to the second element of the *Volvo Trucks* test, the Robinson-Patman Act requires the injured party to prove that the alleged price discrimination occurred between purchases of commodities of like grade and quality.[81] In its Counterclaim Against EOSAT,[82] EarthSat alleged that the "*Landsat* tapes sold to EarthSat and its competitors are commodities of like grade and quality" while EOSAT responded by denying this supposition.[83] Although neither party provided case law in support of their respective contentions, the debate over the tapes being "commodities of like grade and quality" is not as superficial as it might appear.[84]

In *May Dept. Store v. Graphic Process Co.*, the court held that "[i]t is necessary for an action under . . . the Robinson-Patman Act that the transactions between the parties constitute a sale of 'goods, wares, or merchandise'" and not merely the sale of intangible property rights.[85] As one court has elaborated:

> the discriminatory sales must involve "commodities." Plaintiff's complaint alleges price discrimination with respect to cable television services. . . . TVCN never made any reference to the sale of a *tangible* commodity [emphasis added]. The court is persuaded that cable television programming is not a commodity; it is a service. This cause of action is not covered [and a]ccordingly, the motions to dismiss [this] claim for relief are hereby granted.[86]

Although EarthSat could have attempted to argue that the *Landsat* tapes themselves were tangible objects and thus "commodities" within the meaning of the Act, this interpretation would likely have encountered some difficulty. In a highly-analogous case, the Supreme Court of Tennessee ruled:

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[81] *See supra* note 67.

[82] *See supra* note 57, at 4.

[83] EOSAT's Reply to Counterclaim (Mar. 16, 1995) at 4. On file with the JOURNAL OF SPACE LAW.

[84] *See supra* note 69.

[85] 637 F.2d 1211, 1214 (9th Cir. 1980).

[86] TV Communications Network, Inc. v. ESPN, Inc., 767 F. Supp. 1062, 1076 (D. Colo. 1991).

> What is created and sold here is information, and these magnetic tapes which contain this information are only a method of transmitting these intellectual creations from the originator to the user. It is merely incidental that these *intangibles* [emphasis added] are transmitted by way of a tangible reel of tape that is not even retained by the user.[87]

Even though the technological design aspects of the *Landsat* tapes might support the notion that they are of like grade and quality with one tape being just as functional as any other, recent decisions handed down by two district courts seem poised to deliver the *coup de grâce* to the argument that tapes and the data stored upon them are the same product. In *United States v. Ivanov*, the court ruled that "[stored] data is intangible property"[88] while the decision in *State Auto Prop. & Cas. Ins. Co. v. Midwest Computers & More* took this even further by holding that "[a]lone, computer data cannot be touched, held, or sensed by the human mind; it has no physical substance. It is not tangible property."[89] Referencing back to the Tennessee Court's ruling:

> tangible personal property under these circumstances is merely incidental to the purchase of the intangible knowledge and information stored on the tapes. . . . We hold that the sale of [stored computerized information] does not constitute the sale of tangible personal property . . . .[90]

Had EOSAT developed its denial of EarthSat's allegation further, there is a strong possibility that the acquisition of the *Landsat* tapes would not have been found to involve commodities of like grade and quality.[91]

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[87] Commerce Union Bank v. Tidwell, 538 S.W.2d 405, 407 (Tenn. 1976).

[88] 175 F. Supp. 2d 367, 371 (D. Conn. 2001).

[89] 147 F. Supp. 2d 1113, 1116 (W.D. Okla. 2001).

[90] *See supra* note 87.

[91] Considering the transaction as a whole, one could readily analogize it to *General Shale Prod. Corp. v. Struck Const. Co.*, 132 F.2d 425 (6th Cir. 1942) in which the sale of a load of bricks (tangible) by a builder who contracted to construct a development (intangible service) was not seen as the dominant aspect of the deal. Rather, the deal's dominant aspect concerned the acquisition of a particular service—the performance of which simply required the use of a tangible medium.

Combining the third and fourth *Volvo Trucks* secondary-line requirements into a unified discussion, EarthSat would finally have needed to show that EOSAT discriminated in price between it and another purchaser of the *Landsat* tapes with the effect of injuring, destroying, or preventing competition in the sale of those tapes.[92] Although the Supreme Court has ruled that "price discrimination within the meaning of [this] provision is merely a price difference"[93] and EOSAT did not dispute that EarthSat was no longer receiving the discount that other companies were entitled to,[94] the Supreme Court has also held that this price discrimination might not even matter. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court elaborated that:

> the statute as a practical matter could not, and does not, ban all differences charged to "different purchasers of commodities of like grade and quality." Instead, the statute contains a number of important limitations, one of which is central to evaluating [the plaintiff's] claim: By its terms, the Robinson-Patman Act condemns price discrimination *only to the extent that it injures competition*.[95]

Addressing this point in its Reply Memorandum, EOSAT argued "[t]hat EarthSat is no longer one of those 53 sales representatives has no effect on the quantity of *Landsat* data available for sale or the price of that data, which is set by EOSAT."[96] Given the sheer quantity of companies EarthSat competed with, the argument that its removal from a preferential pricing scheme constituted an injury to competition seems at first to ring a bit hollow. As the Third Circuit has interpreted the "effect" requirement of this injury, however:

> Section 2(a) specifies three possible consequences of price discrimination which will satisfy its "effects" proviso, i.e., that the

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[92] *See supra* note 67.

[93] Texaco Inc. v. Hasbrouck, 496 U.S. 543, 558 (1990).

[94] *See supra* note 70.

[95] 509 U.S. 209, 220 (1993) (emphasis added).

[96] EOSAT's Reply Memorandum in Support of its Motion for Summary Judgment (Apr. 28, 1995) at 11. On file with the JOURNAL OF SPACE LAW.

> discrimination in price had an adverse "effect" on competition. Although . . . the first two of these effects refer specifically to discriminatory practices which lessen competition or tend towards monopoly, . . . the third makes price discrimination illegal *where it adversely affects the ability of individual companies to compete.* Thus, section 2(a) makes it unlawful to discriminate in price where "the effect may be . . . to injure, destroy or prevent competition *with any person* . . . ." The language of the statute reflects concern both for the preservation of competition and for the protection of individual competitors. . . . The legislative history as well indicates that one of the factors leading to the 1936 amendment of the Clayton Act was the perception that the 1914 version, containing only the first two conditions, was concerned exclusively with injury to competition.[97]

Stated more succinctly, "[w]hat must be proven then is that [the defendant] violated the Robinson-Patman Act and that [the plaintiff] was, as a consequence, injured in *its* business."[98]

Concurring with this result seven years later, the Ninth Circuit in *Chroma Lighting v. GTE Products Corp.* elaborated on the validity of expanding the injury concept to include damages to individual competitors:

> In *FTC v. Morton Salt*, 334 U.S. 37 (1948), the [Supreme] Court held that competitive injury in a secondary-line Robinson-Patman case may be inferred from evidence of injury to an individual competitor. More specifically, *Morton Salt* permits a factfinder to infer injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of individual merchants, and thus create a "reasonable possibility" that competition itself may be harmed. . . . The question presented by Sylvania's appeal is whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy. This question was left open by *Morton*

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[97] J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1532 (3d Cir. 1990) (emphasis added).

[98] *Id.* (emphasis added).

> *Salt*, and the circuits are divided on the issue. The D.C. Circuit, for example, has held that the inference of competitive injury may be rebutted by a showing of no actual harm to competition because the Robinson-Patman Act must be construed in light of the pro-competitive purpose of all other antitrust litigation. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988). The Third Circuit, on the other hand, has held that the inference of competitive injury may not be overcome by evidence of no harm to competition because the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general. . . . We agree with Von Der Ahe and the Third Circuit, and affirm the jury verdict for Von Der Ahe on the Robinson-Patman claim.[99]

Given the Supreme Court's ruling that competitive injury may be inferred from evidence of injury to an *individual competitor* and the determination by two influential Courts of Appeal that this inference may not be overcome by evidence of relative market health,[100] EarthSat would likely have been able to prove the final *Volvo Trucks* requirement of competitive injury. While this component would likely have been met, however, EarthSat would also have needed to prove that it was *sold* the *Landsat* tapes in interstate commerce and that these tapes were *commodities* of like grade and quality.[101] Absent a showing of all four elements, its claim would have failed.

In the event EarthSat could have demonstrated each of the four elements required under *Volvo Trucks*, there is still one final hurdle that would have likely proven insurmountable. As the Supreme Court ruled in *Brooke Group Ltd.*:

> whether the claim alleges predatory pricing under § 2 of the Sherman Act or . . . price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs . . . only below-cost prices should suffice, and we have rejected

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[99] 111 F.3d 654-55 (9th Cir. 1997).

[100] *Id.*

[101] *See supra* note 67.

> elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. . . . The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.[102]

While there is no information in the filings revealing EOSAT's Cost of Goods Sold or any other "appropriate measure" of its expenses, it seems unlikely that EarthSat would have been able to prove that the fifty-three other sales representatives with whom EOSAT did business were receiving the *Landsat* data tapes at a below-cost price.[103] A discount of ten or twenty percent might have been significant given the particular product being sold, but it is doubtful that this price reduction would have been substantial enough to drive the price below an appropriate measure of cost.

Furthermore, given that EOSAT occupied a federally-supported monopoly position through its sole source contract, EarthSat could not have been considered a "rival" of the company simply because there was never any competition in the *Landsat* market. Had EarthSat operated a competing satellite system—with EOSAT offering its *Landsat* services at below some appropriate measure of cost—there is a much stronger argument that EarthSat would have been able to prove it was a "rival" of EOSAT and thus a party able to have suffered injury from predatory pricing. As it stands, however, EarthSat did not even demonstrate that the price discount received by the other

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[102] *See supra* note 95, at 222-24.

[103] *See supra* note 96. The tactical validity of this argument would also be questionable given that EarthSat was the recipient of this price discount for many years. To the extent EarthSat could have ever managed to prove that EOSAT was engaging in below-cost pricing, it would have been a willing beneficiary of this practice and would thus have become enriched at the expense of any other company which was not receiving the price discount. While it is highly doubtful that EarthSat could have ever demonstrated any below-cost pricing on EOSAT's part, in the event it was able to demonstrate this, it could have opened itself up to criticism for willingly accepting the discount for so many years and then hypocritically attacking the same discount's validity when it was no longer a recipient.

distributors was anything other than above-cost; thus this first *Brooke Group Ltd.* requirement is not met.

Turning to the decision's second requirement, EarthSat would also have needed to demonstrate that EOSAT "had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."[104] As the Supreme Court explained in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, "[f]or the investment [in below-cost pricing] to be rational, [EOSAT] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the loss suffered."[105] For EOSAT to have offered a discount that would have caused it to experience a loss on each tape sold would have been economically irrational since it *already* occupied a monopoly position and thus would never have needed to reduce prices in the first place. In light of EarthSat's failure to demonstrate that EOSAT was selling its tapes to the other distributors at below cost, this second requirement of a recoupment showing would not have even arisen. As the *Brooke Group Ltd.* decision held, "[i]f market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed."[106]

2. Refusal to Deal

Although largely subsumed by the price discrimination claim, a final issue which EarthSat could have argued concerns EOSAT's refusal to deal with it on terms similar to those offered to other companies—namely, the lack of the twenty-percent discount or commission. To the extent a court would have found the absence of this discount to be economically discriminatory, the Robinson-Patman Act would provide an avenue of redress. Section Two of the Sherman Act, however, also "prohibits a monopolist's unilateral action, like [the] refusal to deal, if that con-

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[104] *See supra* note 96, at 224.
[105] 475 U.S. 574, 588-89 (1986).
[106] *See supra* note 96, at 226.