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## UNILATERAL REFUSALS TO DEAL, VERTICAL INTEGRATION, AND THE ESSENTIAL FACILITY DOCTRINE

Herbert Hovenkamp\*

### Introduction; relation to vertical integration.

Where it applies, the essential facility doctrine requires a monopolist to share its "essential facility." Since the only qualifying exclusionary practice is the refusal to share the facility itself, the doctrine comes about as close as antitrust ever does to condemning "no fault" monopolization.<sup>1</sup>

It should be clear that the essential facility doctrine concerns vertical integration -- in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market, which we call market #1, with someone operating in an upstream or downstream market which we shall call #2. If the facility is truly "essential," then the #1 monopoly facility also establishes a #2 monopoly. For example, the plaintiff might claim that a municipal sports stadium (market #1) is the essential facility the plaintiff needs in order to run a professional basketball franchise (market #2).<sup>2</sup> Or a surgeon might claim that a hospital (market #1) is an essential facility that the plaintiff needs to engage in his surgical practice (market #2). Once again, if the hospital really is "essential," then refusal to share the #1 hospital monopoly creates the #2 surgical monopoly.<sup>3</sup> Or the claimed essential facility may be a natural gas pipeline (market #1), and the plaintiff someone wishing to sell gas (market #2) in the market for which the pipeline is an input. If the pipeline really is essential, refusal to share the pipeline (#1) entails a gas monopoly (#2) as well.<sup>4</sup> Or

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1. For the original Areeda-Turner proposal respecting "no fault" monopoly, see 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶630-638 (3d ed. 2008) (hereinafter "Antitrust Law").

2. E.g., *Fishman v. Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (finding essentiality).

3. E.g., *McKenzie v. Mercy Hosp. of Independence, Kan.*, 854 F.2d 365 (10th Cir. 1988) (hospital emergency room and obstetrical care unit not essential facility for plaintiff who performed same services in his own private office).

4. See *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (gas pipeline not an essential facility when the plaintiff could ship its gas by other means). Cf. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (defendant is vertically integrated phone service company controlling local loop; plaintiffs wish to interconnect in order to provide service in competition with the defendant).

refusal to share diagnostic software for identifying computer problems (market #1) is said to be an essential facility because it excludes the plaintiff from the service market for repairing the defendant's computers (market #2).<sup>5</sup> Or in the cases involving telephone white or yellow pages the defendant is a telephone company (market #1) and the plaintiff a competitor in the market for publishing phone books (market #2). The claim is that the customer database generated by the telephone operations (#1) is an essential input into producing the books (#2).<sup>6</sup> Or the defendant may control a computerized reservation system (market #1), alleged to be essential to the plaintiff's business of air passenger transport (market #2); once again, if the reservation system is truly "essential," then the refusal to share the reservation system monopoly would create a second monopoly in the passenger market.<sup>7</sup>

To be sure, not every owner of an "essential" input is vertically integrated. For example, perhaps the monopoly gas pipeline owner sells no gas of its own but only operates the pipeline. It then sells space to some firms in the market but not others, and the latter claim an essential facility.<sup>8</sup> But in such a case it is hard to conceive of an *antitrust* rationale for enforcing a duty to deal that does not involve some kind of integration as between the pipeline and the gas shippers with whom it is dealing. If the pipeline refuses the plaintiff for lack of space there is no antitrust problem at all. If it refuses the plaintiff merely for personal or other non-economic reasons, the refusal may be governed by tort but antitrust is not apt. If it refuses the plaintiff because it has exclusive contracts with existing customers, then antitrust may be apt<sup>9</sup> but then we have moved into the realm of vertical integration as well. Under the general rule that only

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5. See *Data General Corp. v. Grumman Systems Support Corp.*, 761 F. Supp. 185 (D. Mass. 1991), aff'd in relevant part, 36 F.d 1147 (1st Cir. 1994) (defendant's diagnostic program for analyzing its computers not an essential facility as to an independent computer repairer where latter was capable of producing its own diagnostic alternatives).

6. *Rural Tel. Serv. Co. v. Feist Publications*, 957 F.2d 765 (10th Cir. 1992), cert. denied, 506 U.S. (1992) (rural telephone company's refusal to license white pages listings to publisher of a competing directory not unlawful denial of essential facility when the information contained in the listings could have been obtained from other sources).

7. See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), cert. denied, 503 U.S. 977 (1992) (no essential facility where it was possible for the plaintiffs to do business without access to the defendant's system).

8. E.g., *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999) (defendant's processor technology was licensed to customers, not to competitors).

9. Indeed, the practice may violate Clayton §3 proscriptions on exclusive dealing without any need for a showing of essential facility. See 11 Herbert Hovenkamp, *Antitrust Law* ¶1802 (2d ed. 2005).

rivals of the defendant have standing to sue,<sup>10</sup> actionable essential facility claims always (or virtually always) involve vertical integration.

Understanding the "vertical" nature of essential facility claims helps to focus the analysis: the essential facility claim is about the duty to deal of a monopolist who is able to supply an input for itself in a fashion that is so superior than anything else available that others cannot succeed unless they can access this firm's input as well. For this reason a strict conception of objectively measured "essentiality" is critical to any rational essential facility doctrine: competition ordinarily entails that each firm supplies its own inputs or -- if they are to be procured jointly -- that this be done by voluntary agreements that are (1) not anticompetitive and (2) mutually beneficial to both parties.

### **Consistency With Antitrust's Purpose?**

The essential facility doctrine requires a defendant to share its qualifying monopoly facility with one or more rivals. Antitrust's purpose, however, is not to force firms to share their monopolies, but to prevent monopolies from occurring or to break them down when they do occur.<sup>11</sup> Forcing a firm to share its monopoly is inconsistent with antitrust basic goals for two reasons. *First*, consumers are no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone. *Second*, the right to share a monopoly discourages firms from developing their own alternative inputs.

On the first point, suppose that the defendant owns a gas pipeline which, if operated competitively would carry 100 units at a price of \$1.00. However, since the defendant is a monopolist it maximizes its profits at by carrying 80 units at a price of \$1.50. A plaintiff rival proceeding under the essential facility doctrine persuades a court to enjoin the defendant to sell 20 units of space in the pipeline to the plaintiff. In this case the defendant will comply with the injunction by selling 20 units of space to the plaintiff at a price of \$1.50, reducing its own sales to others to 60 units. That is, since the monopoly price and demand are determined by total market demand at the delivery end, it makes little difference to the defendant if it delivers the gas personally or through the agency of others.

Of course, the court might order the firm to sell the gas at a price of

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10. See 3B Antitrust Law ¶1774d and *Intergraph*, note \_.

11. See *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), cert. denied, 516 U.S. 1184 (1996) (essential facility doctrine has "nothing to do with antitrust principles," for "consumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors....").

\$1.00, which would then increase output to the competitive level, but the numbers in the illustration belie the complexity of such determinations in the real world. Such a solution is nothing less than price regulation of the kind undertaken by regulatory agencies -- something for which both the federal courts and the antitrust litigation process are extremely ill suited and which is, in any event, inconsistent with antitrust's fundamental "market" orientation to problems of lack of competition.<sup>12</sup>

The second problem with the injunction requiring the defendant to share its pipeline is that the order either removes or reduces the plaintiff's incentive to develop its own independent capacity for transporting gas to the market. To be sure, that incentive may not be removed altogether. Although receiving market access at a monopoly price is better than no access at all, it is not as good as receiving access at a competitive price. Thus at some future time the plaintiff may prefer to build its own pipeline rather than pay the defendant a monopoly rental. But nevertheless, sharing of space is what the plaintiff is requesting in the original proceeding, thus implying that for the time being it will share the monopoly pipeline rather than build its own. If the court goes the second step, ordering the defendant to provide the facility and regulating the price to competitive levels, then the plaintiffs' incentive to build an alternative facility is largely destroyed.

This problem of loss of competitor incentive may be insubstantial in the case where neither the plaintiff nor anyone else could ever duplicate the claimed input in any effective way. But it could be extremely serious to the point of undermining antitrust goals in the case where either the plaintiff or some other rival or group of rivals could enter the market by some alternative not requiring the sharing of the defendant's facility. In that case, a court injunction requiring the defendant to share actually perpetuates the monopoly by reducing the incentive for development of realistically available competitive alternatives.

### **Constraints**

The "essential facility" doctrine is both harmful and unnecessary and should be abandoned.<sup>13</sup> The doctrine is harmful for the reasons outlined briefly below. In virtually every instance where competitive problems can be effectively addressed by forcing the monopolist to deal, traditional doctrine of refusal to deal is sufficient to the task.

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12. See 3B Antitrust Law ¶1765c.

13. For Professor Areeda's views see Phillip E. Areeda, The "Essential Facility" Doctrine: an Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989).

Nevertheless, the doctrine has been accepted in principle, at least by some circuits although not the Supreme Court; so here we take the more constrained route of seeking to limit the doctrine's scope so as to make it as consistent as possible with the general goals of antitrust, which are to permit firms to enter and operate in markets *to the extent they are capable of supplying their own inputs*, and without interference from dominant firms. Under this constraint, we recognize only three situations in which an essential doctrine is even arguably appropriate:

- (a) natural monopoly, where rivals can be accommodated without duplication of a facility, and duplication itself would be socially wasteful;
- (b) price-regulated monopoly utilities, where the doctrine really operates so as to reduce the scope of the utility's statutory monopoly;<sup>14</sup> and
- (c) publicly owned facilities such as sports arenas that are supplied to private firms at subsidized rates and cannot practicably be duplicated.

Even in these cases the essential facility doctrine continues to suffer from the infirmity that sharing the monopoly does nothing to restore output and price to competitive levels. For example, suppose that rental on a municipally owned stadium has a market value of \$10,000 per night, but is given to the antitrust defendant for a subsidized rate of \$2000. If this landlord relets, the price will probably be \$10000 in any event, and it will pocket the monopoly markup. Judicially compelling a lower price once again turns the antitrust tribunal into a price regulator.

To be sure, there may be circumstances when the refusal to share increases entry barriers into duplication of the essential facility itself. For example, suppose the defendant controls a gas pipeline. If it is forced to share, the plaintiff may begin building a customer base and might eventually acquire enough customers to build its own pipeline but would not have done so if not permitted to enter the market by sharing. But such long-run effects are highly speculative. In the short-run, the plaintiff claims to be unable to build its own pipeline, else the facility would not be essential.

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<sup>14</sup>. On essential facility claims involving price regulated utilities, see 3B Antitrust Law ¶1787.

**Intuitive and Historical Rationales  
Through *Aspen Skiing*<sup>15</sup> and *Trinko*<sup>16</sup>**

The best way to introduce a possible "essential facility" doctrine is to state its intuitive appeal and note the Supreme Court precedents that have been called upon to support it. The core concern of the doctrine is that a monopolist possesses a resource that is "essential" in some sense for the business of someone else, but that the monopolist refuses to share. The monopoly may rest on a legal license (such as a patent or public utility franchise), natural monopoly (market that can support only one efficient producer), public subsidy (e.g., market will not support a stadium but local government subsidizes its construction), a very thin market (a small town cannot support two movie houses), natural fortuity (only one mine supplies an important mineral), or any substantial cost advantage possessed by a single firm. The monopoly might be a "bottleneck" in that fully competitive markets exist on both sides of it. Suppose, for example, that many competing mines lie in a certain mountain range, that the only practical way to transport the mineral lies across the defendant's land, and that the mineral, once across the defendant's land, is sold to many competing firms, which refine and sell it. Through the mere happenstance of location, the defendant can set a price for crossing its land that captures the entire monopoly returns available for that mineral, just as if it owned a monopoly in the mineral itself.<sup>17</sup>

The plaintiff may theoretically be in varying relationships to the monopolist<sup>18</sup> -- perhaps an ultimate consumer (would-be movie patron denied access to a town's only cinema); a business that, though not a competitor of the monopolist, is injured in competition with its rivals (an airline's flights are not listed or are listed less favorably than its rivals' in a monopolist's popular list of flights); or a would-be competitor of the monopolist (fabricator seeks ingot from integrated monopolist; or new supplier of long distance service seeks interconnection with local telephone monopolist who also supplies long distance service). As noted previously, however, at bottom the essential facility doctrine is a problem in vertical integration.<sup>19</sup>

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15. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)

16. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

17. That is, a monopolist over any link in a production chain can obtain the entire monopoly markup for that chain.

18. However, as a general matter only competitors have standing to sue. See 3B Antitrust Law ¶774d.

19. See 3B Antitrust Law ¶771a.

The intuitive attraction of requiring the owner of an "essential facility" to deal fairly with the plaintiff is weak in the case of the consumer, perhaps stronger where the monopolist distorts competition between the plaintiff and its rivals, and perhaps stronger still where the plaintiff seeks to be a rival of the monopolist. It may be strongest where a public franchise or fortuitous monopoly radiates outward to strangle competition that is possible in adjoining markets. For example, whether or not local "hard-wired" telephone service is best delivered by a monopoly, it would be unwise to allow that monopoly to obstruct free competition in long distance services or telephone instruments, where competition is clearly possible.

As we shall see, the primary use of the so-called essential facility doctrine has been in cases where a monopolist refuses to share some important input with actual or potential competitors. This recognition should make clear that the "essential facility" is just an epithet describing the monopolist's situation: the monopolist possesses something the plaintiff wants. It is not an independent tool of analysis but only a label--a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications already considered at length in this chapter.

In possible support of imposing a duty upon a monopolist to share its essential facility are cases falling into two groups, one involving horizontal combinations (*Terminal Railroad, Associated Press*), and one involving single, dominant firms (*Griffith, Otter Tail* and arguably *Aspen*). Taken individually, none of these decisions comes close to establishing an "essential facility" doctrine. Taken collectively, as we show, they do very little more. And in any event the Supreme Court's *Trinko* decision undermined or at least severely qualified almost everything that *Aspen* gave.

### **Dealing obligations imposed by §2 -- Historical Decisions**

The Supreme Court has never articulated or approved the modern version of the essential facility doctrine, although neither has it categorically rejected it.<sup>20</sup> The most recent decision finding a basis in §2 doctrine for condemning a unilateral refusal to deal expressly avoided reliance on any essential facility claim.<sup>21</sup> Nevertheless, several older decisions contain either factual elements or dicta upon which modern protagonists of the doctrine rely. We develop these briefly, and then turn to the Supreme

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20. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring).

21. *Aspen Skiing*, note \_ at 611 n.44.



Court's two most recent statements -- first, the problematic and overused *Aspen* decision; and second, the severe qualifications developed in *Trinko*.

*Terminal Railroad*.<sup>22</sup> An "essential facility" doctrine might be traced to the *Terminal Railroad* case. The Terminal Company controlled a bridge across the Mississippi River, and the approaches and terminal at St. Louis, which was a very significant junction point for competing railroads. That company had every incentive to serve all railroads entering or leaving St. Louis, charging whatever the market or any applicable rate regulation would bear.<sup>23</sup> However, a coalition of railroads organized by Jay Gould and others acquired the terminal and may have wished to use it to exclude or prejudice rival railroads.<sup>24</sup> Rather than order dissolution of the combination, with restoration of the Terminal Company's independence, the Supreme Court required the members to admit their railroad competitors to their consortium.<sup>25</sup> Although the Court did not use the word, we might describe the Terminal Company's bridge, tracks, and terminals as "essential facilities" that had to be shared with competitors.

But the *Terminal Railroad* decision itself proclaimed no such duty. The Court's emphasis and reasoning were entirely upon the combination of competitors acquiring control of the Terminal Company and excluding their rivals from the combination. The alternatives mentioned by the Court were only dissolution or expansion of the combination and did not include dissolution accompanied by any requirement that an independent terminal company deal in any particular way with the railroads.

In addition, the peculiar facts of *Terminal Railroad* should be noted. The Terminal Company's St. Louis monopoly was apparently "natural" in the double sense that its minimum efficient scale could accommodate all the traffic, and that topographical features of the terrain made construction of an alternative impossible or prohibitively expensive. Moreover, the facilities were "essential" in the bottleneck sense: substantial competition over extensive railroad networks on each side of St. Louis might be

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**22.** *United States v. Terminal R.R. Assn.*, 224 U.S. 383 (1912); insofar as the decision involved a concerted refusal to deal, see 12 Herbert Hovenkamp, *Antitrust Law* ¶2221b1 (2d ed. 2005).

**23.** Were it able to discriminate, it might charge less to those railroads that could cross the river elsewhere.

**24.** For a brief history of the controversy, see David Reiffen & Andrew N. Kleit, *Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?*, 33 J.L. & Econ. 419 (1990); see also Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 *Stan.L.Rev.* 1187 (1999).

**25.** 224 U.S. at 410-411.

prevented through control of a few miles of track at this strategic location.

The *Terminal Railroad* Court's concern was solely with the competitors of the defendant combination. Had the Terminal Company remained independent, or had the combination been required to divest it, its facilities would have been no less essential to the several railroads, but they were not competitors of an independent Terminal Company, which had no economic incentive to harm any of the railroads serving St. Louis. It might have behaved arbitrarily or unwisely toward some or all of them, but market pressures would tend to push it toward efficient decisions without management by the Court. In sum, a rule permitting all affected railroads to share the bottleneck facilities on equal terms tended to minimize the operating costs of all railroads and left them free to compete with one another in those parts of the market where competition was appropriate.

The Court did not need to inquire into the combination's intention, for admission of other railroads was consistent with the rationale for the combination -- joint ownership by the users of common facilities. Nor did judicial interference compromise any efficiencies or chill any desirable or pro-competitive activity. The defendants had not built or created anything except a combination to take over existing facilities. Requiring admission of other railroads could not impair the utility of the takeover (unless the combination's rationale was the anticompetitive one of injuring its rivals).

Furthermore, given that the terminal was a combination to begin with, the Court developed the easily administrable remedy of admitting rivals to the combination on the same terms as existing members were admitted. This is in sharp contrast to the facility controlled by the monopolist, where forcing the sale says nothing about the price at which the sale must be made, and may be impossible without judicial administration of prices.

Even the most ardent interventionist does not usually claim that an individual monopoly should be required to give or sell an equity interest in itself to actual or would-be competitors. By contrast, a joint venture such as the railroad terminal could presumably be opened to additional members with relative ease. These points add up to relative clarity of the legal rule. Competitors contemplating joint acquisition of a preexisting monopoly know what their duties are to their rivals, as do subsequent courts applying the *Terminal Railroad* ruling.

*Associated Press.*<sup>26</sup> Though more complex in several dimensions,

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<sup>26</sup>. *Associated Press v. United States*, 326 U.S. 1 (1945). See also 12 Antitrust Law ¶2221b2; and Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Columbia Bus. L. Rev. 1.

the *Associated Press* case also involved a combination. Some 1,200 newspapers created the Associated Press, both (1) as a vehicle for transmitting and exchanging among themselves news reports generated by the members and by certain foreign publications and (2) as a new enterprise that would generate news reports through its own employees at such centers as Washington and London. Because of the resulting scale economies and the skill with which it performed its tasks, the Associated Press became very successful. It welcomed new members to provide additional news input and to share its costs, but allowed existing members to obstruct the admission of rival newspapers -- for example, of another afternoon paper in the same city. Although the competition of other news gathering organizations -- including United Press, International News Service, Reuters, and many others -- meant that the Associated Press was probably not a monopoly, it nevertheless commanded a sizeable market share.<sup>27</sup>

The Supreme Court held that the Associated Press' discriminatory admission policy violated the §1 proscription of unreasonable combinations. The Court expressly distinguished market power attributable to individual activity from that arising from a combination of existing competitors.<sup>28</sup> The Court did not reach the question whether AP was obliged to admit any newcomers at all. Although Justice Frankfurter's concurring opinion agreed with the divided lower court that a business clothed in a public interest must deal with all,<sup>29</sup> the Court expressly disclaimed any such "public utility concept."<sup>30</sup> Rather, the court required AP to admit on terms that did not discriminate against newspapers that competed with existing AP members.

Even if *AP* were read to require the organization to admit others, one can hardly build any general duty to deal upon it. The Court dealt only with the combination before it under §1 and specifically disclaimed reliance on any public utility-type duty under §2. Moreover, although the collaborators created a productive new enterprise for exchanging and generating news reports, their rationale of shared economies of scale

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27. See 52 F. Supp. at 366:

81 percent of the morning newspapers of the United States are members, and 59 percent of the evening newspapers; the aggregate of circulation of these newspapers is 96 percent of the total circulation of morning newspapers in the United States, and 77 percent of that of the evening newspapers.

28. 326 U.S. at 15.

29. *Id.* at 28.

30. *Id.* at 19.

seemed consistent with admitting new members; admission sacrificed no efficiencies and chilled no desirable activities. Two possible inconsistencies seem insubstantial. (1) A member would not want its own news reports used by a local rival. And even if the former's reports could not be duplicated once the event had passed, requiring one to share its own news reports with rivals diminishes the competitive reward from covering local news and therefore chills the incentive to do so. But this problem is easily solved, for members could exclude access to news generated by local rivals and still allow access to AP-generated news -- that is, a "less restrictive alternative" than outright exclusion of competing papers was available.<sup>31</sup> (2) Without the exclusive local right to AP-generated news, perhaps there would have been no impulse to create the Associated Press in the first place. However, there were in fact competing members. Further, as the lower court emphasized, some newspapers used no particular wire service dispatch at all; of those who did, some printed the text verbatim, some edited it or combined it with other sources, and some used their own headlines.<sup>32</sup> In any event, the real value of AP membership was as a mechanism for obtaining news from remote sources.

Note also that the defendant here, like the one in *Terminal Railroad*, could take in additional members without either displacing existing users or adding significantly to existing facilities.<sup>33</sup> More importantly, the remedy was relatively simple: the combination was simply forbidden from discriminatorily denying admission to competitors of members. No more complex order was made by the Court.<sup>34</sup> Furthermore, if AP were regarded as an essential facility to which admission was to be compelled, only competitors of the AP's owners were accorded any protection by the Court. Finally, although AP's service was not a monopoly, the case hardly means that any distinctive service or product must be made available to competitors. The lower court emphasized the peculiar importance to our society of news reports, and the Supreme Court emphasized concerted action "bound to reduce their competitor's opportunity to buy or sell the

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**31.** On the relevance of less restrictive alternatives in joint venture cases under the rule of reason, see 7 Phillip E. Areeda & Herbert Hovenkamp ¶1505 (2d ed. 2004), 11 *id.* ¶11913.

**32.** 52 F. Supp. at 372. Moreover, many newspapers used multiple wire services. For example, of the thousand or so United Press subscribers, about a third were AP members.

**33.** I.e., because the relevant input was intellectual property it could be expanded (which involves only duplication of the news story) without limit.

**34.** Had the AP then closed its membership ranks against all newcomers, it would become necessary somehow to define the conditions of membership if the Court were to require admission--the public utility concept that the Court expressly declined to reach.

things in which the groups compete."<sup>35</sup>

"*Unilateral*" cases: Griffith<sup>36</sup> and *Otter Tail*.<sup>37</sup> The *Griffith* decision is best known for its controversial "leverage" dictum that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."<sup>38</sup> If construed literally, that formulation appears to condemn all vertical integration by the supplier of a vital component that gives it a competitive advantage in a second-level market. For example, the dominant computer maker who integrates forward into retailing or backward by making its own disc drives thereby obtains a "competitive advantage" over independent retailers or disc drive makers and acts unlawfully. It would be strange to invest with such weight these words pronounced in a case that had nothing to do with vertical integration and that certainly did not discuss either such integration or absolute refusals to deal.

*Griffith* dealt with a claim that a dominant owner of movie theaters with a monopoly in some towns used its bargaining position to force movie producers to impose unfavorable terms on competing theaters in other towns. No claim was made that the defendant must supply the competing theaters with anything. Further, the remedy may not have required judicial administration of prices and terms, but only an injunction forbidding the defendant from interfering in the contract terms of others. On the other hand, ordering the defendant to behave in the competitive towns as if it had no monopoly in other towns would be irrational, and presumably it would use its competitive advantage to obtain deals that competitive theaters could not match. In any event, neither the facts of the case nor the resolution imposed any constraints whatsoever on vertical integration. The *Griffith* dicta are often quoted out of this important context.<sup>39</sup>

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35. 326 U.S. at 15.

36. *United States v. Griffith*, 334 U.S. 100 (1948).

37. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

38. 334 U.S. at 107. See 3 Antitrust Law ¶652.

39. To like effect is *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), which only upon the most superficial reading imposes a general duty on a manufacturing monopolist to be its downstream rivals' supplier. In fact, the allegations were that the defendant had entered into a "combination" with numerous other firms, in part "brought about by purchasing and acquiring the control of competing companies engaged in manufacturing [photographic] materials; that it engaged in exclusive dealing arrangements and unlawful resale price maintenance; and that, only after failing to acquire the plaintiff as it had the plaintiffs' other rivals, it refused to deal with it as part of this overall monopolization scheme. *Id.* at 368-369. The refusal to supply rivals was only a small portion of an overall scheme that involved at least some concerted activity and that, in any event, the Court regarded as aggressively monopolistic.

The *Otter Tail* case also included compulsory dealing claims. A monopolist of electric transmission lines, who also generated power and distributed it to ultimate consumers, refused to supply or "wheel" power to municipalities that undertook to operate their own retail distribution facilities rather than franchising Otter Tail to sell directly to consumers. The Court appeared to ground its condemnation on the *Griffith* formula, which was not further elaborated or discussed, and on the defendant's undoubted purpose to create or maintain a retail monopoly. But that reasoning is not very helpful, given that any refusal to sell an essential good or service necessarily produces monopoly at another level. Perhaps the Court meant to condemn only those unjustified refusals that enhance monopoly power rather than serve other legitimate objectives. If so, one might understand the Court's invocation of an exclusionary or monopolistic purpose to contain an implicit reservation "solely for an exclusionary purpose."

The peculiarities of *Otter Tail* should be noted. The defendant possessed a natural monopoly. This monopoly was partially regulated in ways that may have allowed it to operate to the detriment of consumers through vertical integration. Thirdly, the case ought to be read in light of strong historical formulations from the common law imposing broad duties to deal on public utilities. Fourthly, there existed a nonjudicial agency (at that time, the Federal Power Commission) accustomed to regulating both the prices and terms of dealing of transmission monopolists; in this case, however, as a result of an omission in the Federal Power Act that agency lacked the authority to order wheeling of wholesale power, and the Court took used antitrust to fill this regulatory vacuum.<sup>40</sup> As a result, *Otter Tail* is quite distinguishable from the Supreme Court's subsequent *Trinko* decision, where federal and state regulators had all the power to issue and had issued the dealing orders that the plaintiff was requesting, as well as the power to remedy violations.

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**40.** *Id.* at 241. The omission was a "common carrier" provision applying to wholesale power, that would have required regulated utilities to act as transport agencies for one another's power. On the somewhat broader antitrust duty of regulated firms to deal, see 3B Antitrust Law ¶787.

Finally, the Court's analysis was driven in part by §1 considerations: *Otter Tail* had provision contracts with another agency, the Bureau of Reclamation, and alleged that these contracts forbade it from providing wheeling services to the municipalities in question. The Supreme Court approved a district court finding that these contracts created vertical territorial divisions unlawful under §1. To be sure, the Court nowhere stated that §2 liability depended on the §1 violation, but the latter violation was clearly important nonetheless.

**Aspen.**<sup>41</sup>

Although the Supreme Court in *Aspen* did not rest on the essential facility doctrine, as the Tenth Circuit below had, its decision has had considerable influence on both unilateral refusal to deal doctrine and essential facility claims.

Plaintiff Highlands and defendant Ski Co. operated rival skiing facilities in Aspen, Colorado, a so-called destination ski resort, which mainly served not local residents but skiers who traveled there from elsewhere in the state, the nation and even other parts of the world. Of the four skiing mountains in Aspen, Ski Co. operated on three and Highlands on one. Ski Co. enjoyed more than 80 percent of the Aspen ski revenues.<sup>42</sup>

The antitrust dispute arose out of Ski Co.'s and Highland's agreement to issue a joint "all Aspen" ski ticket that entitled skiers to use any of the four mountains owned by the two firms. Tickets to use a firm's ski lifts can be sold on a daily basis, but many firms offer multi-day tickets at a discount below the daily rate. For example, when the daily rate was \$132, a six-day ticket was sold for \$114, a saving of about 14 percent as compared with the daily rate. In addition, the all-Aspen multi-day ticket issued by the joint venture allowed patrons to ski on any of the four mountains in Aspen.

Initially, Highlands and Ski Co. divided revenues from the multi-area ticket by estimating usage of their respective facilities, as monitored by ski lift operators. Highlands generally received 16 to 18 percent of the revenues, although in one year its share dropped to 13.2 percent. For the 1977-78 season, Ski Co. offered to continue this joint arrangement only if Highlands would accept 13.2 percent of revenues as its share, regardless of actual usage; the parties worked out an agreement for that year at a higher rate. Thereafter, Ski Co. became increasingly dissatisfied, attempted to reduce Highlands' share again, and finally made an offer that Highlands would and did find unacceptable.

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41. See note \_\_.

42. Nevertheless the defendant was very likely not a monopolist, for it competed for the bulk of its patronage with other destination ski resorts. But because market issues had not been properly preserved for appeal, the parties and the Supreme Court accepted the finding that Ski Co. possessed an "Aspen only" monopoly. On the highly problematic market definition see 2B Phillip E. Areeda & Herbert Hovenkamp ¶1533g (2d ed. 2007). The fact that the two parties subsequently merged into a single firm without challenge also suggests a market significantly larger than Aspen itself.

Once the four-area ticket was ended, Ski Co. marketed its own three-area ticket.<sup>43</sup> When Highlands attempted to market its own multi-area ticket that included coupons exchangeable for Ski Co.'s day tickets at the going rate for day tickets, Ski Co. refused to accept the coupons, which were backed by funds at a local bank and were freely accepted by other Aspen merchants. Ski Co. also refused to sell day tickets to Highlands at the discounts it granted tour operators and indeed refused to sell Highlands any tickets at all. Highlands' share of Aspen revenues dropped steadily, reaching 11 percent in 1980-81, the year after the antitrust complaint was filed.

Ski Co.'s justifications for abandoning the joint marketing venture were not persuasive. Ski Co. said that it was dissatisfied with the ways in which actual usage of the multi-area tickets was determined, but it rejected Highlands' offer to engage well-known accountants at its own expense to survey usage. Ski Co. said that it refused to accept Highlands' coupons because of the administrative burden of processing them, although there was no indication that such processing was more administratively burdensome than Ski Co.'s acceptance of credit card charges.

The outside observer would understand that Ski Co. abandoned the joint marketing arrangement with Highlands in order to increase its own revenues. Because Ski Co.'s three mountains offered skiers a wide choice of terrain, Ski Co. probably calculated that those coming to Aspen for a ski week would prefer a discounted six-day ticket for Ski Co.'s three mountains over a discounted six-day ticket at Highlands and over non-discounted day tickets allowing them to ski at Highlands on some days and at Ski Co.'s mountains on other days. This might seem a form of quasi-exclusive dealing--manipulating the price structure of the single day and multi-day tickets in a way that gave skiers a discount for not skiing at Highlands. Under *Lorain Journal*<sup>44</sup> -- a case heavily relied on by the Supreme Court on the issue of specific intent -- it clearly would have been illegal for Ski Co. to sell lift tickets only to skiers who agreed not to purchase from Highlands. The price structure adopted by Ski Co. might be thought to have a similar practical effect. That would explain liability without any need for a showing of essential facility.

The *Aspen* court did not directly analyze the case in these terms. Instead, the district judge instructed the jury, as the Supreme Court summarized, that the monopolization offense consisted of the possession of monopoly power and "the willful acquisition, maintenance, or use of that

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43. On the assumption that the four-area ticket was generally more attractive to skiers than a three-area ticket, one might suppose that total output in the market would decline.

44. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).



power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes."<sup>45</sup> The district judge elaborated that a monopolist is *not*

under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate §2 if valid business reasons exist for that refusal. ... We are concerned with conduct which unnecessarily excludes or handicaps competitors. ... To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or submarket.<sup>46</sup>

The jury then answered in a specific query that Ski Co. had "willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident."<sup>47</sup>

Judgment was entered for the plaintiff, and the Tenth Circuit affirmed on the grounds (1) that the multi-day, multi-area ticket was an "essential facility" that Ski Co. had a duty to market jointly with Highlands and (2) that there was sufficient evidence supporting the jury finding that Ski Co.'s intention was to create or maintain a monopoly. Without reaching the first ground, the Supreme Court affirmed.

The Court began by declaring that a monopolist has no unqualified duty to cooperate with rivals but that non-cooperation may "have evidentiary significance."<sup>48</sup> Although the Court did not indicate what it was that the refusal to deal might be evidence of, it turned immediately to exclusionary intention, observing that a monopolist's "intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" The Court thus seemed to say that non-dealing may be evidence of an anticompetitive intent, which in turn helps characterize the non-dealing as exclusionary or

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45. 472 U.S. at 595-596.

46. *Id.* at 597.

47. *Id.* at 597-598 n.21.

48. *Id.* at 601.

anticompetitive. At the same time, the Court characterized non-cooperation as anticompetitive not because of the defendant's state of mind but because of evidence that "interchangeable tickets are used in other multi-mountain areas which apparently are competitive."<sup>49</sup>

The defendant's important change from cooperation with rivals to non-cooperation was not necessarily anticompetitive, but the jury found that it was, apparently concluding that there were no "valid business reasons" for the defendant's conduct -- a conclusion the Court held to be adequately supported. The defendant's justifications were unpersuasive. The refusal deprived consumers of an option they preferred. Ski Co.'s refusal to accept Highlands' coupons sacrificed short-run revenue<sup>50</sup> and thus allowed the inference "that it was more interested in reducing competition in the Aspen market over the long-run by harming its smaller competitors" and this was "a deliberate effort to discourage its customers from doing business with its smaller rival." Its own "three-area six-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands." The Court concluded that "the evidence supports an inference that Ski Company was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." The Court went so far as to say that exclusion of rivals "on some basis other than efficiency" is "predatory."<sup>51</sup>

Of course it may be that marketing of ski tickets enjoys some economies of scale. The cost of advertising in national ski magazines, for example, would be lower per lift ticket for the 80 percent firm than for a 20 percent firm. However to reason from that premise to a conclusion compelling joint advertising cuts very broadly. We do not ordinarily require large firms to include the offerings of their rivals in their advertisements. This conclusion is not changed by the larger firm's knowledge that, if forced

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49. *Id.* at 603.

50. It seems doubtful that a refusal to deal would, even in the short-run, reduce Ski Co.'s revenues. Although Ski Co. might lose the revenues of a particular skier who had already taken a six-day ticket at Highlands, its business calculation was doubtless that its short-run revenues during the current season would be higher with a three-area ticket than with a four-area ticket. Furthermore, the success of this strategy does not in any way depend upon the destruction of Highlands, although its profits would almost certainly be higher if Highlands were forced out of business.

51. *Id.* at 602-603. The plaintiff also objected to Ski Co.'s advertisements exhibiting four peaks in Aspen but naming only the three that it controlled. The plaintiff alleged that such advertising misled consumers into believing that there were only three rather than four skiing mountains there. The Court observed that this evidence was consistent with its own conclusion even though it would not itself be sufficient to sustain the judgment. *Id.* at 611 n.43.

to advertise separately, the smaller firm has significantly higher per unit advertising costs than the larger firm.

The Court also did not worry that joint marketing by the only two firms in the assumed Aspen market could easily facilitate price fixing among them. The two firms could simply have estimated the profit-maximizing monopoly price for a four-area ticket and charged accordingly on their individual day tickets. Indeed, the Colorado Attorney General had previously filed a complaint against the two companies under Sherman Act §1 and had obtained a consent decree under which the parties were permitted to participate in joint marketing provided "they set their own ticket prices unilaterally before negotiating its terms."<sup>52</sup>

In sum, although no general or absolute duty was imposed on a monopolist to deal with or cooperate with actual or would-be competitors, any of its actions might be condemned if the jury finds that it "willfully" acquired, maintained, or used monopoly power "by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes."<sup>53</sup> Such means or purposes were contrasted with "valid" or "legitimate business reasons." The Court's logic was apparently that legitimate business reasons prevent the characterization of the defendant's behavior or purpose as anticompetitive or exclusionary.

#### *Aspen's problematic reach and potential limitations*

The *Aspen* case shares with essential facility cases the fact that it involves vertical integration.<sup>54</sup> The input in this case is promotion, and the plaintiffs' claim was that antitrust requires participation in a joint venture that reduced promotion's per user costs. The peculiarity is that *Aspen* was not the typical essential facility case where one firm is vertically integrated, the other is not, and the second firm wishes the first firm to be forced to share its internally produced input.

The jury instructions given in *Aspen* invite courts to reach too broadly.<sup>55</sup> Consider several examples. (1) When a monopolist refuses to license its patent, would the Court say that there is no general duty to

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52. *Id.* at 591 n.9.

53. *Id.* at 595-596 (emphasis added).

54. See 3B Antitrust Law ¶1771a.

55. For example, see *Sunshine Cellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486 (S.D.N.Y. 1992) (interpreting *Aspen* to require a firm to deal with a competitor if its refusal was designed to enable it "to gain a competitive advantage" in its market).

license but that the refusal may nevertheless be condemned if the monopolist acted with the anticompetitive effect or purpose of limiting competition with itself? Indeed, is it not likely that every refusal to license has such a purpose or effect?<sup>56</sup> (2) When a monopolist opposes a would-be rival's licensing by a regulatory agency, might the *Aspen* Court say that there is no general duty to refrain from political action but that lobbying may be condemned if the jury finds an anticompetitive purpose or effect?<sup>57</sup> (3) When a newspaper monopolist refuses to supply independent dealers with the product, might the *Aspen* Court say that there is no general duty to supply would-be competitors at the distribution level but that the refusal to do so may be condemned if the effect or purpose is anticompetitive or exclusionary? Again, it certainly is exclusionary in the lay sense of eliminating rivals in the distribution of a "monopoly" newspaper. (4) When a monopolist refuses to predisclose the results of its research and development, would the *Aspen* Court say that there is no general or absolute duty to predisclose but that the failure to do so might be condemned if a jury finds that the effect or purpose is anticompetitive or exclusionary?<sup>58</sup> It seems obvious, of course, that such a monopolist intends to retain as much of the market for itself as possible, just as the defendant did in *Aspen*.

Permitting such conclusions sends juries off on a wide ranging hunt for anticompetitive intent in circumstances where such "intent" can always be found. In concentrated markets the intent to maintain or improve one's own market position always entails the knowledge that rivals must suffer. Of course, the *Aspen* Court did not consider the implications for other situations of the jury instructions it approved. It surely did not intend to legislate on so grand a scale as to subject all the preceding illustrations to a jury's policy decision upon a monopolist's duty to deal or cooperate with rivals. Furthermore, the *Aspen* Court's own formulation is itself qualified in several ways.

*First*, some of our examples involve conduct that may be regarded as absolutely privileged. For example, political action or a refusal to license a patent seem absolutely privileged, as does the refusal to give rivals the benefit of one's R & D. Indeed, the rationale for such a privilege respecting R & D is that burdening individual research and development with any duty

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56. The Ninth Circuit thought not in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 125 F.3d 1195 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998); see 3 Antitrust Law ¶1709b (3d ed. 2008).

57. See 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1202 (3d ed. 2006) (non-sham political action privileged without regard to petitioner's intent).

58. See 3B Antitrust Law ¶1776b.

to share it with rivals would reduce the incentives for it and therefore tend to chill that desirable activity.<sup>59</sup> Much the same could be said of the other examples given above. Antitrust law does not wish to discourage firms from building optimal size plants or warehouses by threatening their builders with any duty to share what might be regarded as excess or available capacity. Although the same point might be made about independently developed advertising, promotion, or weekly ski lift tickets -- that is, forcing a monopolist to share successful promotion or marketing tools attractive to consumers might chill the incentives for undertaking them -- we might distinguish Aspen's multi-area ticket developed not by the monopolist alone but jointly with its competitors.

*Second*, the *Aspen* Court made much of the defendant's important change in long-standing arrangements, whose prior existence in this and other markets indicate that they satisfy consumer desire and are optimally efficient. This would not be the case for most demands for access to a monopolist's goods, services, or facilities. Although a shift from individual distribution to self-distribution does alter preexisting arrangements, the supplier making such a shift usually has good business reasons for doing so.

*Third*, *Aspen* does not consider or define the terms on which dealing might take place. It certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price.<sup>60</sup> Indeed it is generally assumed that an otherwise lawful monopolist does not violate the statute by charging a monopoly price. So, even if a monopolist were obliged to make a patent or its research available, it could charge the full monopoly price.

*Fourth*, given that a monopolist may charge a monopoly price for anything it provides, its refusal to make the product available need not have any detrimental price-output effects and therefore would not be "anticompetitive" in purpose or effect. Although it still might be "exclusionary" in a lay sense, that term in antitrust parlance designates

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59. See 3B Antitrust Law ¶¶776, 781 (3d ed. 2008).

60. Distinguishing the monopoly price from one that exceeds the monopoly price and therefore that is equivalent to refusing to sell at all will be difficult, and may suggest that it is unwise for the antitrust court to adopt legal rules whose administration depends on such distinctions. We therefore question the holding in *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), cert. denied, 500 U.S. 928 (1991) that an essential facility violation can be established by a willingness to deal only on "unreasonable" terms -- in this case, by an insistence that the defendant railroad make just as much money from a shared arrangement as it would have made if it had served the customer alone. Evaluating that claim necessarily puts the court in the position of a price regulatory agency.

acts that the law deems improperly anticompetitive, and thus would not cover behavior which the law deems not to be offensively anticompetitive.

*Fifth*, the facts before the Court, as well as the formulations used, make clear that only that conduct affecting competition in the monopolist's market was covered. Thus, a monopolist's behavior affecting competition among its independent customers is not addressed by the *Aspen* ruling.

*Sixth*, and fundamental, *Aspen* leaves monopolists free to refuse to deal or cooperate with rivals for legitimate business reasons.<sup>61</sup> Observe, moreover, that the Court did not call for any balancing of the social gains from refusing to deal or cooperate with rivals based on legitimate business purposes against the losses resulting from that refusal. Rather, the Court classified conduct or intention as either lawful or not on the basis of the presence or absence of legitimate business purposes. Of course, the Court's proposition generates several subordinate questions. (1) What constitutes a legitimate business purpose? By what criteria is it to be determined? (2) Does the defendant have not only the burden of coming forward with evidence of a legitimate business purpose but also the burden of persuasion on that issue? If so, it would be much simpler to rule that monopolists are always obliged to deal or cooperate unless the challenged conduct is either privileged or affirmatively justified by legitimate business purposes. (3) Is the jury relatively untrammelled in making the policy decision as to what constitutes a legitimate business purpose, or only whether the challenged conduct in fact serves it, or whether the defendant reasonably believed that the challenged conduct served an objective that either the judge or the jury determines to be legitimate? (4) As the last question implies, are we to focus on the defendant's state of mind or on the objective question whether the challenged conduct actually serves a legitimate purpose?

As elaborated elsewhere, we would approve only that part of the above quoted jury instructions stating that a monopolist commits an unlawful exclusionary practice when it engages in conduct "which unnecessarily excludes or handicaps competitors,"<sup>62</sup> analyzed under an objective test. Condemnation would be appropriate only for conduct that (1) clearly injures an actual or prospective rival either (2a) with no good business justification at all, or (2b) with a business justification that is poorly fitted to the result or wholly disproportionate to the harm that is inflicted. Finally, the conduct must be capable of creating or sustaining a

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<sup>61</sup>. On business justification defenses in §2 cases generally, see 3 Antitrust Law ¶1658f (3d ed. 2008).

<sup>62</sup>. *Aspen*, note \_ at 597.

monopoly.<sup>63</sup>

*Aspen remedy contrasted with "essential facility" remedies generally*

On the one hand, Aspen resembles a modern essential facility case in that the Supreme Court required the defendant to supply an essential input to its rivals. On the other hand, the case is significantly different because of the idiosyncratic nature of the input at issue. The marketing joint venture between the plaintiff and the defendant was produced by the parties jointly; they shared revenues in proportion to market share, and presumably shared expenses in the same proportion. To this end, the terms were more-or-less self-executing and apparently required little ongoing judicial supervision.<sup>64</sup>

This should be contrasted with the essential facility case where the defendant produces the claimed essential input exclusively and the plaintiff wants to purchase it, generally at some unestablished "reasonable" price.

**Trinko**

In *Trinko* the Second Circuit embraced the extension of the essential facility doctrine to a situation in which dealing with rivals may have required the defendant to construct additional facilities or hire additional employees.<sup>65</sup> The plaintiff, a competitive local exchange carrier,

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<sup>63</sup>. See 3 Antitrust Law ¶1651.

<sup>64</sup>. However, the case left unresolved such important administrative issues as how revenues should be split, what kinds of information would be used to determine revenue splits and the like.

<sup>65</sup>. *Law, Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), rev'd, 540 U.S. 398 (2004).

See also *Covad Communic. Co. v. Bellsouth Corp.*, 299 F.3d 1272, 1286 (11th Cir. 2002), vacated, 540 U.S. 1147 (2004), cert. denied, 544 U.S. 904 (2005) (responding to defendant's attack on essential facility doctrine as inconsistent with antitrust principles by stating that "[w]e are not authorized to abrogate doctrines that have been endorsed and not yet rejected by the Supreme Court," quoting *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), cert. denied, 516 U.S. 1184 (1996)). See also *Ohio Bell Tel. Co. v. Corecomm Newco, Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002) (refusing to dismiss essential facility claim by CLEC); *Davis v. Pacific Bell Tel. Co.*, 204 F. Supp. 2d 1236 (N.D. Cal. 2002) (consumers had standing to claim that ILEC violated antitrust laws by causing service disruptions to "migrating" customers — that is, those in the process of switching service to other carriers).

Contrast *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F.Supp.2d 123 (D.D.C. 2002), aff'd in part, rev'd in part, 398 F.3d 666 (D.C.Cir. 2005) (plaintiff's allegations were essentially of violations of Telecommunications Act); *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002), aff'd, 300 F.3d 176 (4th Cir.

or CLEC, claimed that the defendant Bell Atlantic (now Verizon) had failed to fulfill its orders for interconnection capacity sufficiently quickly, in part because of understaffing in its order-filling office, and had discriminated against competitive carriers in supplying new capacity.<sup>66</sup> While these practices if true as alleged could violate the Communications Act or the interconnection agreement between Verizon and competitive carriers, the court also found that they stated an antitrust claim for denial of an essential facility.

Further, many of the facilities the plaintiffs sought were generally covered by FCC rules that required them to be sold at very low prices.<sup>67</sup> Recognizing an essential facility violation in these circumstances may require a firm to give up profitable retail business that it already has in order to make less profitable wholesale transfers to a reselling rival. If a CEO intentionally abandoned profitable retail business in favor of less profitable wholesale business he would justifiably be fired.<sup>68</sup>

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2003), cert. denied, 540 U.S. 1148 (2004) (similar); *Stein v. Pacific Bell Tel. Co.*, 173 F.Supp.2d 975 (N.D. Cal. 2001), aff'd in part, vacated in part, 172 Fed.Appx. 192 (9th Cir. Mar. 22, 2006) (similar; DSL services); *Goldwasser v Ameritech Corp.*, 222 F.3d 390, 399 (7th Cir. 2000) (similar). Cf. *United States Telecom Assn. v. FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002), cert. denied, 538 U.S. 940 (2003) ("Scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access").

**66.** See also *Covad*, 299 F.3d 1272, 1278 (11th Cir. 2002) (alleging that defendant "strategically understaffed" its order-filling department for interconnection services, with the result that the plaintiff suffered an order backlog).

**67.** See *Verizon Communications v. FCC*, 535 U.S. 467 (2002), which approved on facial challenge an order that requires ILECs to share inputs with CLECs at the most efficient competitive price that would be charged for the lowest cost technology, rather than a price that reflects the ILEC's actual historical cost or the price that would obtain in an unregulated market. The result, as the Supreme Court described it, is:

an explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) ... in favor of novel rate setting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.

Id. at 489.

**68.** For these reasons the Sherman Act has never required a firm to make an unprofitable sale or forego profitable sales in order to make less profitable sales to a competitor. See *Aspen*, 472 U.S. at 608 (condemning refusal to deal that was not "justified by any normal business purpose"; defendant "elected to forgo" the immediate profits of ticket sales "because it was more interested in reducing competition ... by harming its smaller competitor").

See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 451, 460 (1992) (refusal would be lawful if supported by a "business justification"); and on remand, 125 F.3d 1195, 1212-1213 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998) ("When a



Finally, the Telecommunications Act gives CLECs a choice between leasing access to a particular input from the incumbent carrier or providing the input for itself. As a result, some CLECs provide certain hardware or capacity for themselves while others lease the same hardware or capacity from the incumbent. But antitrust's essential facility doctrine knows no such distinction. A particular facility or input is not "essential" simply because one particular firm would prefer to rent it from the monopoly rather than provide it for itself. Rather, it must be shown that rivals in general are unable to duplicate the facility.<sup>69</sup>

Confining the essential facility doctrine to cases involving "unjustified" refusals serves in some measure to distinguish the competitive goals of the antitrust laws from more interventionist regulatory regimes. "Unjustified" refusals make economic sense only because of their adverse impact on rivals. As a result, such refusals are relatively rare — most firms would be willing to sell unused capacity at a profit — and relatively easy to identify. But to use the antitrust laws to compel "irrational" dealing — that is, dealing that is less profitable than alternative sales of the same resources — could turn every monopolist into a utility and condemn it even when it was serving every customer it could possibly reach. It also places the antitrust tribunal even more firmly in the position of public utility regulator, forcing firms to make judgments that an unregulated firm would not make.

#### Complaints alleging the denial of shared access to an existing input

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legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate §2 of the Sherman Act"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1978) (defendant refused to sell power at profitable rates to adjacent utilities for sole purpose of destroying them). See also *Cities of Anaheim, Cal., et al. v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1379 (9th Cir.1992) (duty to deal arises only "when there is no justification for refusing to aid a competitor"); *State of Illinois ex rel. Burris v. Panhandle Eastern Pipeline Co.*, 935 F.2d 1469, 1483 n.13 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992) (defendant's wish to protect itself from "added costs or lost profits" provides business justification defense to essential facility claim); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir.), cert. denied, 488 U.S. 870 (1988) (legitimate business justification immunizes monopolist against essential facility claim); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987) (essential facility doctrine requires showing of absence of business justification); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 540 (7th Cir. 1986) (finding essential facility violation because defendant "had no legitimate business reason not to negotiate" with the plaintiff); *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123, 131-132 (D.D.C. 2002), aff'd in part, rev'd in part, 398 F.3d 666 (D.C.Cir. 2005) (limiting essential facility claim to refusals to deal that "lack a legitimate business justification").

**69.** See 3B Antitrust Law ¶1773b; and see, e.g., *International Audiotext Network v. AT&T*, 893 F. Supp. 1207 (S.D.N.Y. 1994), aff'd, 62 F.3d 69 (2d Cir. 1995) (AT&T's international calling services were not an essential facility where other firms provided similar services for themselves).

with excess capacity are quite different from complaints requesting the defendant to add additional capacity in the form of either hardware or technical support. The essential facility doctrine has always been restricted to the sharing of existing facilities said to be essential, and even such orders strain the capacity of a federal court of general jurisdiction and place it nearly in the shoes of the regulator. Requiring a defendant to expand its facilities and determining the rate and scope of expansion and incremental services that should be offered would make the antitrust role indistinguishable from that of the regulator.<sup>70</sup>

Antitrust essential facility claims should also be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms. This seems implicit in the Supreme Court's *Otter Tail* decision, which forced an electric utility to "wheel" power because the statutory authorization to the Federal Power Commission failed to give that agency the power to order wheeling.<sup>71</sup> Determining the

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**70.** The *Trinko* complaint alleged that the defendant Bell Atlantic filled orders for competitive carriers' customers only after filling the orders of its own customers. 305 F.3d at 95. In *Covad*, note \_\_\_, the Eleventh Circuit recognized that the essential facility doctrine is limited to refusals to deal, but found a fact dispute about whether the defendant had in fact refused. *Covad*, 299 F.3d at 1290 n.16.

Cf. *Verizon New Jersey, Inc. v. Ntegrity Telecontent Svces., Inc.*, 219 F.Supp.2d 616 (D.N.J. 2002) (alleged breaches of interconnection agreement did not give rise to §2 claim; no claims of competitive injury; "[e]ssentially what is before this Court is Ntegrity's disappointment with the interconnection agreements that it negotiated with Verizon"); *Covad Communications Co. v. Bell Atlantic Co.*, 201 F. Supp. 2d 123, 132 (D.D.C. 2002), aff'd in relevant part, 398 F.3d 666 (D.C.Cir. 2005) (plaintiff failed to state essential facility claim because all the terms of dealing that it disputed were governed by the telecommunications act rather than the antitrust laws:

The particular terms of that statutorily mandated access are now fully regulated by the FCC and state commissions through their oversight and approval of detailed interconnection agreements. In this setting, there can be no significant harm to competition or anti-competitive effect as a matter of antitrust law, as every relevant facet of Bell Atlantic's relationship with Covad is subject to regulation under the 1996 Act, the rulings of the FCC, and the affirmative and active supervision of state public utility commissions charged with the 1996 Act's enforcement.

**71.** *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-376 (1973):

As originally conceived, [the Federal Power Act] would have included a "common carrier" provision making it "the duty of every public utility to ... transmit energy for any person upon reasonable request. . . ." In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be "necessary or desirable in the public interest." H.R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve "the voluntary action of the utilities." S. Rep. No. 621, 74th Cong., 1st Sess., 19 ....

Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for,

scope and terms under which sharing must occur is a technically complex task for which antitrust courts are ill suited, particularly via jury trials. Indeed, the courts and the agencies themselves often disagree over the appropriate scope and terms of sharing obligations.<sup>72</sup> Where the agency unambiguously has the authority to order sharing and to supervise its scope and terms, parallel antitrust intervention undermines the agency prerogative and exposes parties to needless collateral attack in an area where directly affected parties are entitled to full judicial review of agency actions. Even in *Otter Tail*, the Supreme Court affirmed a decree that compelled the wheeling that the then-existing Federal Power Act failed to mandate,<sup>73</sup> but then transferred to the Federal Power Commission the obligation to identify the scope and terms of the wheeling obligation.<sup>74</sup>

The Supreme Court reversed the Second Circuit and severely narrowed the antitrust duty of a monopolist to deal with rivals.<sup>75</sup> The Court found "no need either to recognize or to repudiate" the essential facility doctrine.<sup>76</sup> Its conclusions apply to all the legal theories for treating simple, or unconditional, refusals to deal under §2 of the Sherman Act.<sup>77</sup>

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or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations....

**72.** *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387-391 (1999) (Court and agency disagreed over which network elements were "necessary" under statutory definition and thus required to be shared); *United States Telecom Assn*, note \_\_, 290 F.3d at 422-430 (similar).

**73.** See *Otter Tail*, note \_\_ at 376:

So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted. The Act as passed contained only the interconnection provision set forth in §202(b). The common carrier provision in the original bill and the power to direct wheeling were left to the "voluntary coordination of electric facilities." Insofar as the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail, there is no conflict with the authority of the Federal Power Commission.

**74.** *Otter Tail*, note \_\_ at 376-377.

**75.** *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Six Justices signed the Court's opinion, which was authored by Justice Scalia. Three concurring Justices (Stevens, Souter, and Thomas) would also have dismissed the complaint, but on grounds of standing. There were no dissents.

**76.** 540 U.S. at 880-881, citing Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *Antitrust L.J.* 841 (1989).

**77.** "Conditional" refusals are of course different, such as when the monopolist conditions dealing on the buyer's acceptance of a "tied" product (tying), or on the buyer's promise not to deal with rivals (exclusive dealing), or on the buyer's promise to resell the

As the Supreme Court summarized the alleged facts, the plaintiff was a customer of AT&T, a competitive local exchange carrier, or CLEC. Under the 1996 Telecommunications Act the defendant Verizon, an incumbent local exchange carrier, or ILEC, was required to enter an interconnection agreement providing for the sharing of its network elements with any CLEC that requested such interconnection.<sup>78</sup> The antitrust dispute arose when Verizon failed to provide such access in a timely fashion. The plaintiff complained that the failure was not an oversight, but rather was "part of an anticompetitive scheme to discourage customers from becoming or remaining customers" of CLECs.<sup>79</sup> The complaint requested damages as well as a mandatory injunction ordering Verizon to fill orders for new services from CLECs on the same terms and timing as it took care of its own customers.<sup>80</sup>

The Supreme Court declined to find an implied regulatory immunity.<sup>81</sup> However, it did hold that the effectiveness of the regulatory regime entailed that antitrust could at best effect only a "slight" improvement in outcome, and that no improvement was likely when the substantive offense was as difficult to administer as a claim of unilateral refusal to deal.

The Court reiterated that the monopolization offense requires both power and conduct:

It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product,

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good at a specified price (resale price maintenance). These were not addressed by the Court. The Court did cite one resale price maintenance case, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), but only for the proposition that

the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

*Trinko*, 540 U.S. at 408.

**78.** On the regulatory environment, see 2A Antitrust Law ¶243.

**79.** *Trinko*, 540 U.S. at 404.

**80.** *Ibid.* The 1996 Telecommunications Act also requires CLECs to provide such access on "just, reasonable, and nondiscriminatory terms." 47 U.S.C. §251(c)(3).

**81.** See 2A Antitrust Law ¶243g.

business acumen, or historic accident." The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — at least for a short period — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.<sup>82</sup>

An overly expansive §2 duty to deal comes dangerously close to being a form of "no-fault" monopolization if refusal to share productive assets with rivals is the monopolist's only offense.<sup>83</sup> Apropos of this, the Court noted the "tension" that exists whenever a court is asked to require a monopolist to share its lawfully acquired inputs:

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.<sup>84</sup>

Further, forced sharing blends the roles of antitrust court and regulator:

Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill-suited.<sup>85</sup>

Further, noting an evil that was present — although not much discussed — in *Aspen Skiing*, forced sharing requires firms to cooperate rather than compete, and cooperation can "facilitate the supreme evil of antitrust: collusion."<sup>86</sup> As a result, antitrust has traditionally been reluctant

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<sup>82.</sup> 540 U.S. at 407, quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

<sup>83.</sup> See 3B Antitrust Law ¶1771a.

<sup>84.</sup> 540 U.S. at 407.

<sup>85.</sup> *Ibid.*

<sup>86.</sup> *Id.* at 408, citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 591 n.9 (1985) (noting

to impose sharing obligations even on proven monopolists. Nonetheless,

[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.<sup>87</sup>

The Court then described *Aspen* as being "at or near the outer boundary of §2 liability."<sup>88</sup> Then it noted why the allegations in the present case fell short of the facts that the Supreme Court had found sufficient in *Aspen*. First,

[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.<sup>89</sup>

By contrast, in the present case the "complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion."<sup>90</sup>

Second, because there was no previous voluntary dealing, "the defendant's prior conduct sheds no light upon the motivation of its refusal to deal — upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice."<sup>91</sup> This was in contrast to *Aspen*, where the defendant had voluntarily entered a joint venture with the plaintiff and then pulled out of it, even though remaining in the venture was clearly profitable. Indeed, defendant Ski Company had even refused to sell to the plaintiff at its own retail price, "suggesting a calculation that its future

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that the Colorado attorney general had filed a complaint alleging that the marketing joint venture in question would provide the parties "with a forum for price fixing in violation of §1 of the Sherman Act"; the parties settled with a consent decree permitting the venture but requiring them to set their prices individually).

87. *Ibid.*

88. *Id.* at 409.

89. *Ibid.* (Court's italics).

90. *Ibid.*

91. *Ibid.*

monopoly retail price would be higher."<sup>92</sup> In sharp contrast, "Verizon's reluctance to interconnect at the cost-based rate of compensation available under [the Telecommunications Act,] §251(c)(3) tells us nothing about dreams of monopoly."<sup>93</sup>

The Court also observed that *Aspen* involved a situation in which the defendant refused to sell something that "it already sold at retail"<sup>94</sup> in any event. That also explained the *Otter Tail* case, where the defendant simply refused to wholesale, or "wheel," power it was already generating and transmitting at wholesale to others.<sup>95</sup> In the present case, however,

the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created "something brand new" — "the wholesale market for leasing network elements."<sup>96</sup> The unbundled elements offered pursuant to §251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort.<sup>97</sup>

Further,

[n]ew systems must be designed and implemented simply to make that access possible — indeed, it is the failure of one of those systems that prompted the present complaint.<sup>98</sup>

As a result, "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's

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92. *Ibid.*

93. *Ibid.*

94. *Id.* at 410. Following *Trinko*, see *Stein v. Pacific Bell*, 172 Fed.Appx. 192, 2006 WL 751812, 2006-1 Trade Cas. ¶75287 (9th Cir. March 22, 2006, unpublished) (*Trinko* foreclosed consumer refusal to interconnect claim against incumbent telephone carrier; no refusal to deal case when product that plaintiff was seeking was not one that defendant ordinarily sold at retail).

95. *Ibid.*, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

96. *Ibid.*, citing *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 528 (2002).

97. *Trinko*, 540 U.S. at 410.

98. *Ibid.*

existing refusal-to-deal precedents."<sup>99</sup>

As noted, the Court declined either to embrace or to repudiate the essential facility doctrine itself.<sup>100</sup> Its restrictions on the law of unilateral refusal to deal were written so as to apply to all unconditioned unilateral refusals to deal, whether or not denominated as denials of an essential facility. The Court did observe:

It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general §2 argument, we reject it.<sup>101</sup>

The Supreme Court's opinion very severely limits the scope of unlawful unilateral refusals to deal under §2 of the Sherman Act. The limitations apply to both the "essential facility" doctrine and the refusal to deal doctrine as articulated in *Aspen Skiing*.

*First*, before a unilateral refusal to deal is unlawful under §2, the refusal must be "irrational" in the sense that the defendant sacrificed an opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival.<sup>102</sup> The Court found such a sacrifice in *Aspen*, which *Trinko* declared to be "at or near the outer boundary" of §2 liability.<sup>103</sup> *Aspen* had condemned the refusal to deal because the defendant had been willing to sacrifice immediate profits — even refusing to make sales to its rival at its ordinary retail price — in order to exclude.

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**99.** Ibid.

**100.** Ibid.

**101.** Ibid.

**102.** An amicus brief filed by the government had urged the Court to adopt a test that a refusal to deal is not unlawful unless it involves a short-run "sacrifice" of this nature. *Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner*, 2003 WL 21269559 (May 23, 2003).

**103.** *Trinko*, 540 U.S. at 409.



*Trinko* refused to condemn, because there was no evidence of such a short-term sacrifice; in fact, the sales in question were made at steeply discounted wholesale prices under price rules established by the FCC. Presumably, it would have been at least as profitable for Verizon simply to serve these customers directly at its usual retail prices. In any event, there was no allegation to the contrary.

*Second*, the Court did not categorically restrict the realm of unlawful refusals to situations in which the defendant had voluntarily established and later repudiated a course of dealing with the plaintiff. But the Court made the existence of a previous voluntarily relationship very close to dispositive. Once again, considering *Aspen* to establish the "outer boundary" of liability, the Court noted that in *Aspen* the prior history of dealing enabled the fact finder to draw inferences from the defendant's change of behavior.<sup>104</sup> In the present case, by contrast, "the defendant's prior conduct sheds no light upon the motivation of its refusal to deal — upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice."<sup>105</sup> The Court appeared to leave barely open the possibility that "anticompetitive malice" could be established by means other than an unexplained, apparently irrational change in an established course of dealing.

*Third*, the Court limited liability for refusal to deal to those situations where the defendant was already selling some particular product or service to others but refused to sell that same product or service to the plaintiff. That is, the doctrine does not apply where the requested assets are "not otherwise marketed or available to the public."<sup>106</sup> There is no duty to sell something that the firm is using only internally, or to share some facility that the firm is using for its own internal production but is not in the business of sharing with others. On this point, the Court distinguished the *Aspen* and *Otter Tail* cases from the present one:

In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail — to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail*., another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its

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**104.** See *Aspen*, 472 U.S. at 604: "Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market."

**105.** *Id.* at 409.

**106.** *Id.* at 410.

network), and refused to provide the same service to certain other customers. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.<sup>107</sup>

On grounds of administrability alone, it is one thing to order a firm to share something that it is already independently making and marketing to others. It is quite another to order a firm to share an input that it has never independently marketed at all. Such a decision much more clearly places the antitrust tribunal in the position of regulatory agency, requiring collateral decisions about the scope and terms of the forced sale.

The Court noted that this limitation to goods or inputs that the defendant was already selling to others was consistent with the Supreme Court's own precedents. However, lower courts had been more expansive, and this limitation appears to overrule holdings in many lower court decisions. For example, the stadium owner asked to share its facility, or the pipeline asked to lease space, were very likely not in the business of leasing out stadiums or pipeline space at all. Rather, their business was the sale of athletic event tickets or natural gas transported through the pipeline.<sup>108</sup> Even the venerable *MCI* decision in the Seventh Circuit employed the essential facility doctrine to require AT&T to interconnect with a rival, something that AT&T was not doing on the general market.<sup>109</sup>

*Fourth*, the Court noted one reason for denying §2 liability in this

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**107.** *Ibid.*

**108.** E.g., *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (refusal to share athletic stadium with rival); *Consolidated Gas Co. of Fla, Inc. v. City Gas Co. of Fla, Inc.*, 665 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir.), opinion vacated, 889 F.2d 264 (11th Cir.1989), on reh'g, 912 F.2d 1262 (11th Cir.1990), *rev'd per curiam* on non-antitrust grounds, 499 U.S. 915 (1991) (refusal to share gas pipeline); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991) (refusal to share track with rival railroad, as opposed to transporting the latter's cargo). The same thing very likely applies to cases holding that such things as telephone subscriber lists demanded by competing producers of telephone directories are essential facilities. Presumably a telephone company is not in the general business of selling its subscriber list. See, e.g., *Direct Media Corp. v. Camden Telephone & Telegraph Co.*, 989 F. Supp. 1211 (S.D. Ga. 1997) (recognizing possible essential facility claim); *BellSouth Advertising v. Donnelley Information Publishing, Inc.*, 719 F. Supp. 1551 (S.D. Fla. 1988) *aff'd*, 933 F.2d 952 (11th Cir. 1991), *vacated* 977 F.2d 1435 (11th Cir. 1992)(same). See also *Great Western Directories, Inc. v. Southwestern Bell Tel.*, 63 F.3d 1378 (5th Cir. 1995), *rev'd in part*, 74 F.3d 613 (5th Cir.), *cert. dismissed*, 518 U.S. 1048 (1996). Likewise, one doubts that UPS is in the general business of selling use of its package-tracking software to rival shippers. *EVIC Class Action Litigation (Farina v. UPS)*, 2002 WL 1766554 (S.D.N.Y., July 31, 2002).

**109.** *MCI Communic. Co. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983), *appeal after remand*, 748 F.2d 799 (7th Cir. 1984).

case was that "[n]ew systems must be designed and implemented simply to make" the rival's request for access possible.<sup>110</sup> It is one thing to force a firm to share out of its excess capacity, but quite another to order it to build new facilities or expand existing facilities beyond their current capacity. Once again, such orders place enormous additional "regulatory" burdens on courts. The Telecommunications Act imposes such requirements, but strictly in the context of agency-supervised interconnection agreements.

*Fifth*, while the Court did not expressly repudiate the essential facility doctrine, there seems to be little continuing need for two different sets of rules governing unilateral refusals to deal under §2. *Aspen*, perhaps inadvertently, created the apparition of separate doctrines by finding liability but expressly refusing to embrace the essential facility doctrine.<sup>111</sup> By contrast, *Aspen* imposed severe limitations on both doctrines.<sup>112</sup> One is hard-pressed to see any separate vitality remaining in the essential facility doctrine.

One purpose of an "essential facility" doctrine is to shift the focus away from the defendant's intent or conduct, and toward the nature of the input, or "facility," that the defendant owns and the plaintiff wishes to share. That is why the doctrine is sometimes said to come dangerously close to condemning monopoly without fault. Mere ownership of a "facility" that is "essential" to rivals' ability to produce or sell is said to be sufficient to create the duty. However, *Trinko* makes clear that mere ownership of an "essential" input is insufficient. There must also be other acts, including short-run "sacrifice" showing bad intent, and perhaps including a history of dealing, that serve to show that the refusal was a product of anticompetitive animus. Or, to say it differently, the Court required an element of anticompetitive conduct above and beyond the refusal to deal itself.

*Sixth*, the Court expressed concern about the anticompetitive tendencies, or "tensions," inherent in refusal to deal claims. It observed three. (1) A refusal to deal rule can "lessen the incentive" to invest to the extent that it later requires the successful investor to share its "economically beneficial" facilities with rivals who have not made the

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110. *Trinko*, 540 U.S. at 410.

111. See *Aspen*, 472 U.S. at 611 n.44. ("we find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose in its business methods').

112. See 540 U.S. at 410-411 (noting that the Court's 'conclusion would be unchanged even if we considered to be established law the 'essential facilities' doctrine crafted by some lower courts").

investment.<sup>113</sup> (2) Sharing facilities with rivals is a form of cooperation that can increase the risks of collusion, the "supreme evil of antitrust."<sup>114</sup> (3) The doctrine must be strictly limited to circumstances where the requested assets are completely unavailable. "[W]here access exists, the doctrine serves no purpose."<sup>115</sup> Although the Court did not pursue the implications of this third point, they are clear enough. A rule that permits firms to obtain from a larger rival inputs that they or other rivals could possibly construct for themselves reduces rather than increases competitive incentives. When the dominant firm refuses to sell an asset, the rival must construct it for itself or obtain it from another source. As a general proposition competition is best served not by numerous firms sharing the same productive assets, but rather when firms each have and control their own production resources. This conclusion almost certainly overrules elements of decisions such as the Ninth Circuit's *Kodak* case, which condemned Kodak's refusal to sell aftermarket repair parts without requiring a showing that the plaintiffs could not obtain the parts in question from alternative sources.<sup>116</sup>

*Seventh*, other than speaking about the absence of short-run sacrifice, as noted above, the Court did not say anything about business justifications. By contrast, *Aspen* rested in part on the conclusion that there was no business justification for the defendant's refusal to deal.<sup>117</sup> The difference is readily explained. Business justifications become relevant, and thus must be asserted, only *after* a prima facie unlawful refusal to deal has been found. Not having found any prima facie unlawful refusal to deal in the first place, the Supreme Court did not require any evidence of business justifications.

*Eighth*, three Justice<sup>118</sup> would have decided the case against the plaintiff on grounds of standing. Essentially, the plaintiff in this case was a customer of a rival, and his injuries were derivative of the rival's injuries. Further, the rival was in a much better position to make the claim.<sup>119</sup>

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113. *Id.* at 408.

114. *Ibid.*

115. *Id.* at 411.

116. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 125 F.3d 1195, 1209-1212 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998).

117. See *Aspen*, 472 U.S. at 605.

118. Stevens, Souter & Thomas, JJ.

119. *Id.* at 417:

[Whatever antitrust injury respondent suffered because of Verizon's conduct was purely

Disposing of the case on standing grounds would have eliminated customer suits of this type but left suits by rivals intact. In deciding the case on the merits, however, the Court also very likely overruled the relevant portions of decisions such as the Eleventh Circuit's *Covad* case, which pursued largely the same substantive theories but was brought by a CLEC rival of the defendant.<sup>120</sup>

*Ninth*, the Court took care to maintain the all-important distinction between unilateral refusals to deal addressed under §2 of the Sherman Act and concerted refusals addressed under §1. It distinguished the Court's previous *Terminal Railroad* and *Associated Press* cases as inapt because they involved concerted activity.<sup>121</sup>

*Tenth*, the Court repudiated the Second Circuit's treatment of monopoly leveraging, relying on its *Spectrum Sports* decision for the proposition that no §2 action can be maintained unless there is a "dangerous probability of success" in monopolizing the second market.<sup>122</sup> The importance of this conclusion is that monopoly leveraging can exist *only* where the requirements for the attempt to monopolize offense in the second market have been satisfied, which is to say simply that there no longer exists a free-standing monopoly leveraging claim. Additionally, however, the Supreme Court noted that even the monopoly leveraging theory "presupposes anticompetitive conduct," and the Court had already rejected the plaintiff's proposition that the refusal to deal in question qualified as such conduct. The attempt to monopolize offense generally has more severe conduct requirements than the substantive monopolization offense.<sup>123</sup>

*Eleventh*, under the particular approach that the Supreme Court took to the immunity issue there is no general immunity for antitrust violations in this industry, and the Court's holding is limited to claims of

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derivative of the injury that AT&T suffered. And for that reason, respondent's suit ... runs both the risk of duplicative recoveries and the danger of complex apportionment of damages.

(Stevens, J., concurring).

**120.** *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), vacated 540 U.S. 1147 (2004).

**121.** See *Trinko*, 540 U.S. 410 n.3. citing *Terminal Railroad* and *Associated Press*.

**122.** *Id.* at 415, citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). On monopoly leveraging claims, see 3 Antitrust Law ¶1652.

**123.** See 3B Antitrust Law ¶806d (3d ed. 2008).

unilateral refusal to deal and monopoly leveraging.<sup>124</sup> For example, if two or more ILECs or any other participants in telecommunications markets should fix prices, divide markets, or boycott outsiders, the question of antitrust liability would have to be revisited under the principles the Supreme Court expounded.

### **Limitation to Termination of or Significant Change in Pre-existing Arrangements**

The jury instruction approved in *Aspen* suggested antitrust liability for a firm that without proper justification "refuses to enter" a new joint venture with a competitor.<sup>125</sup> But the facts found antitrust significance only in the defendant's abandonment of a joint venture initially entered voluntarily. The Court did not impose a prospective duty to deal where no such dealing had occurred previously, and there is no reason for thinking it would have done so. Indeed, the Court made clear:

In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.<sup>126</sup>

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**124.** For the Court's treatment of the immunity issues, see 1A Antitrust Law ¶1243g.

**125.** As the trial judge instructed,

Also a company which possesses monopoly power and which refuses to enter a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate §2 if valid business reasons exist for that refusal....

*Aspen*, note \_ at 597.

**126.** *Id.* at 603. The Court also noted:

"In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs."

*Aspen*, 472 U.S. at 604 n. 31, quoting Robert H. Bork, *The Antitrust Paradox: A Policy at War Against Itself* 156 (1978).

*Kodak*,<sup>127</sup>

The other Supreme Court decision since *Otter Tail* condemning a unilateral refusal to deal, was similar. It found a duty only because the defendant had established a course of selling repairs parts to independent service organizations and then withdrew from that market in favor of exclusive self-distribution. Relying on this, the Second Circuit rejected a claim that elevator manufacturers designed their aftermarket elevator parts so that they were not interchangeable with the parts of rivals in order to create an aftermarket monopoly in the maintenance of their own elevators.<sup>128</sup>

The limited nature of [the Sherman Act] exception to the right of refusal to deal is further supported by *Eastman Kodak*. After five years working with independent service organizations ("ISOs") to provide maintenance services on Kodak copiers, Kodak suddenly implemented a policy of refusing to do business with the ISOs; as a result, "ISOs were unable to obtain parts ... and many were forced out of business."<sup>129</sup> While *Eastman Kodak* does not expressly say that a Section 2 claim premised on a refusal to deal cannot survive absent a prior course of dealing, it was decided in that fact context, and has been read to support that proposition.<sup>130</sup>

And in *Schor* the Seventh Circuit denied that the defendant had a general antitrust obligation to set a lower price for its primary product in order to enable a rival to sell its complementary product to AIDS patients who needed both products together and who wished the rival's product rather than the defendant's.<sup>131</sup> *Kodak* and *Aspen* had imposed a duty to deal only when changing an existing course of distribution enabled them to "take advantage of customers' sunk costs":

Kodak sold copiers that customers could service themselves (or through independent service organizations). Having achieved substantial sales, Kodak then moved to claim all of the repair work for itself. That change had the potential to raise the total cost of

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**127.** *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

**128.** *Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007).

**129.** Quoting Supreme Court *Kodak* decision, 504 U.S. at 458.

**130.** *Elevator*, 502 F.3d at 53-54.

**131.** *Schor v. Abbott Laboratories*, 457 f.3d 608 (7th cir. 2006), cert. denied, 127 S.Ct. 1257 (2007).

copier-plus-service above the competitive level-and ... *above the price that Kodak could have charged had it followed a closed-service model from the outset.* Schor does not accuse Abbott of any similar switch that would exploit customers' sunk costs; none is possible in this market.<sup>132</sup>

Judge Easterbrook's observation is particularly interesting because it suggests one relatively uncommon situation in which consumer harm from a unilateral refusal to deal is possible. Assume that a monopolist has a profit maximizing price for parts-plus-service of \$100 (parts) plus \$10 (service), or \$110. At a higher price it will lose too many sales. It provides some service itself at the \$10 price and other service is provided by rivals, to whom it sells parts. After numerous customers have purchased the \$100 copier the firm stops supplying parts to others and raises its own service price to \$15.<sup>133</sup> While customers contemplating the defendant's *package* of copier-plus-service at a price of \$115 would balk, customers who already own the copier are in a different position. They must contemplate the costs of extracting themselves from the photocopier, and this might justify payment of a higher price for the service. The issue is not altogether different from that involving a firm's inducement to others to adopt its proposed technology standards, while surreptitiously perfecting patents on them. The firm can surprise rivals with a higher royalty demand after they have made a prior commitment to a technology standard than when the relevant choice is prospective.

A precondition for this situation is a prior course of dealing that commits the customer to the defendant's technology, and then a change in dealing policy. Presumably that would not work in a case such as *Schor* because the two products were consumed at the same time, and thus there was no "lock-in." Whether the application in *Aspen* was correct is dubious because skiers do not make long-term commitments to a particular "technology" that ties them to the subsequent services offered by a particular seller. Presumably, they enter the market anew each time they wish to go skiing.

In *Trinko* the Supreme Court emphasized that the defendant in that case had never entered into voluntary dealing, but interconnected with CLEC's only under compulsion of the Telecommunications Act.<sup>134</sup> As a result, nothing could be inferred from a decision not to cooperate with a

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**132.** *Schor*, 457 F.3d at 614 (emphasis added).

**133.** Of course, it could accomplish the same result by continuing to sell the parts to independent service organizations, except at the higher price.

**134.** *Trinko*, 540 U.S. 398 at 410.



rival. Indeed, the things for which interconnection was required were inputs that Verizon had not been in the business of selling to *anyone*. They had been developed for strictly internal use.<sup>135</sup>

The administrative problem of requiring new dealing is also severe. Firms create only a small number of actual joint ventures, but they might create an infinite number of possible joint ventures. The amount of judicial intervention required to create a new venture is much greater than the amount needed to maintain an existing one. Suppose, for example, that a resort town had two amusement parks, one large and quite successful, the other smaller and less successful. Until now the parks have marketed their services independently, but now the smaller park claims an antitrust right that the larger park enter a venture for joint provision of travel packages including air flights, hotels, ground transportation, and access to both parks. In granting such relief the court would have to determine from among infinite possibilities how the parties might have negotiated such a contract and split its revenues, what kinds of services should be included in it, which particular hotels or other service providers should be included, how the package is to be marketed and the like.

As a general matter, court imposed sharing obligations created under the very general provisions of the antitrust laws must be restricted to circumstances where the defendant terminated an existing joint venture without justification. We would not interpret it to give the plaintiff a right to create a new venture where none had existed before.<sup>136</sup>

### Collusion Risks

Judicial treatment of *Aspen*-style claims of refusal to assist a competitor must be mindful of the fact that significant risks of collusion may

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**135.** Ibid.

**136.** Thus the Ninth Circuit concluded in *SmileCare Dental Group v. Delta Dental Plan, Inc.*, 88 F.3d 780 (9th Cir.), cert. denied, 519 U.S. 1028 (1996) that a dental insurer's refusal to permit its dentists to accept co-payments from a secondary insurer whose coverage provided such payments was not a §2 violation. The court refused to extend §2 to joint ventures not yet in existence earlier:

Unlike the defendant skiing company in *Aspen*, Delta Dental did not discontinue a marketing arrangement with SmileCare. Delta Dental's copayment plan pre-existed SmileCare's supplemental plan and the parties have never cooperated to supply the market with a new or better product.

Id. at 786. In any event, the defendant had a valid business justification: the "disciplinary effect" of insurer copayments prevented overuse of the primary insurer's coverage -- something that was undermined by the plaintiff's insurance that provided the copayment. Ibid.

attend a joint venture between a dominant firm and its only rival or rivals. Indeed, the *Aspen* joint venture had been challenged under §1 and made subject to a consent decree requiring firms to set price independently before discussing the venture.<sup>137</sup> But joint price setting is almost inherent in a marketing venture and the risks of collusion must be counted as considerable. If the firms in such a market are *able* to compete effectively without such a venture, antitrust would not wish to compel it. Further, except in clear cases an antitrust tribunal would be hard pressed to balance any gains from increased venture efficiency against the offsetting losses attending possible or even likely collusion.

Problematically, the smaller firm benefits from *either* the efficient venture enabling it to take advantage of joint economies, or the joint venture facilitating collusion. To the extent the joint venture/cartel increases prices, the smaller and less efficient firm can prosper while the larger firm earns even more, both at the expense of consumers.

Collusion risks are presumably insubstantial when the plaintiff could not compete in the market at all unless given access to the claimed facility. In that case both sharing and refusing to share yields the monopoly output. But when the plaintiff is capable of operating in the market without sharing of the facility, then sharing might facilitate collusion or even make it irresistible, depending on the circumstances. The risk of collusion is greatest when the venture itself sets the price, as *Aspen*-style marketing ventures typically do. By contrast, the risk of collusion presumably diminishes as the shared input is further removed from the price-setting process. For example, the surgeon who successfully claims that a hospital is an essential facility and joins its staff will not necessarily fix prices with fellow staff surgeons, although the opportunity for such price fixing must be counted as greater than if the surgeon practiced in his own office.

Finally, to say that a firm risks §2 liability for failing to enter all "justified" ventures, but that it risks §1 liability for entering a venture subsequently found unreasonable<sup>138</sup> forces the dominant firm to thread a very small needle in an area where antitrust is plagued with ambiguity. It should not be forgotten that the *Aspen* claim begins with the essential premise that the defendant is a monopolist, or dominant firm. Joint ventures of all the competitors in a market containing such a firm almost

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**137.** See *Aspen*, 472 U.S. at 591 n.9 (noting that the Colorado attorney general had filed a complaint alleging that the marketing joint venture in question would provide the parties "with a forum for price fixing in violation of §1 of the Sherman Act"; the parties settled with a consent decree permitting the venture but requiring them to set their prices individually).

**138.** On the rule of reason for joint activities, see 7 Antitrust Law, Ch. 15.

always invite antitrust scrutiny for possible §1 violations, but particularly if price must be determined through the venture itself.

While the *Aspen* opinion seems to be unconcerned about collusion risks, *Trinko* was not. It warned that forced sharing can "facilitate the supreme evil of antitrust: collusion."<sup>139</sup>

### **Administrability of remedies**

Both *Terminal Railroad* and *Associated Press* involved collusion, a fact that clearly limits their application. To be sure, the effects on the plaintiff and on the market from denying access to an "essential facility" are the same whether the facility is owned by a combination or by a single monopolist. Nevertheless, the distinction between the *Terminal-AP* situations and the single firm owning an allegedly essential facility is important for interconnected doctrinal and practical reasons.

Most explicitly, the Sherman Act itself divides its proscriptions between concerted and unilateral activity, addressing the former in §1 and the latter only in §2. For example, the economic effects of price fixing by a combination of competitors may be identical with the price unilaterally set by a monopolist, yet the former is condemned categorically under §1 while the latter is not condemned at all under §2.<sup>140</sup>

This accepted dichotomy reflects the reality that conspiracies among unrelated units are relatively infrequent, more easily appraised for reasonableness, and -- most significantly -- simply remedied through prohibition. By contrast, unilateral behavior is not only omnipresent, but also often difficult to evaluate or remedy without involving the antitrust tribunal in the day-to-day management of the enterprise.

Given the need to distinguish unilateral from collective behavior, the ordinary business corporation is regarded as a single entity, even though it comes into being through the combination of the investors who create it. The creators of a business enterprise necessarily agree or "conspire," but once the enterprise is lawfully formed, antitrust law usually regards it as the relevant actor. By contrast, the members of the combination controlling the Terminal Company or the Associated Press continued to be important profit-maximizing entities individually in the railroad or newspaper business.

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<sup>139</sup>. *Trinko*, note \_\_\_ at 408, citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

<sup>140</sup>. See 3A Antitrust Law ¶720 (3d ed. 2008).

Perhaps the standard collective-unilateral distinction might be seen as a mere statutory formality that is unresponsive to the essential facility concern and hence that does not illuminate the proper application of §2. But the distinction is more than a formality. Without necessarily precluding the imposition of a duty to deal upon a monopolist in some circumstances, there are several reasons for doing so much less readily than in the combination cases like *Terminal Railroad* and *AP*.

*First*, forcing the combination to admit others to their collaboration requires less ongoing day-to-day judicial supervision than requiring a firm to supply its goods or services. When admission is sought at the outset, the combination need only provide the excluded parties with the same terms the collaborators provided for each other. Even later, discriminatory admission can be remedied simply by ordering admission on non-discriminatory terms. Even if no one is being admitted, the necessity of supervising the terms of admission are most often a one-time intervention. By contrast, requiring a monopolist to sell its goods or services cannot be implemented unless some agency stands ready to supervise the price or other terms.

*Second*, admission to a combination is less likely to require rationing or other control of assets. In *Terminal Railroad* and *AP*, the competitors could apparently take in additional users without either displacing existing users or having to add significantly to existing facilities. In the more typical case of an integrated manufacturing monopolist, a compulsory dealing decree usually confronts a court with two dubious alternatives: directing the defendant to expand its capacity or formulating an "equitable" rationing scheme. The first would force the monopolist to take investment risks that no court could protect it against, while the second may require price control to make it effective and offers no guiding principle to determine who gets what.

*Third*, admission to a combination is less likely to impair any efficiencies. By contrast, one cannot, for example, require a transmission monopolist to wheel power for someone else without attention to the monopolist's own need for its facilities. Or one cannot compel a monopolist of a product to sell to independent dealers without attention to the distribution it carries out through its own employees.

*Fourth*, admission to a combination is less likely to chill desirable and pro-competitive activity. Compelling admission on equal terms at the outset of a combination would chill only those combinations designed to exclude and to impair rivals' competitive vitality.<sup>141</sup> By contrast, a general

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<sup>141</sup> If the combination seeks a competitive advantage through means that are reasonably available to their competitors, the combination would not be an essential facility.

duty to share output or facilities with rivals could affect the actual or potential monopolist's choice of what size or type of facility to build in directions that would be inefficient and, apart from threatened legal requirements, nonoptimal.

Indeed, a nonexclusivity requirement may be essential in certain joint venture cases if we are to have assurance that the venture is not engaged in price fixing or other forms of collusion. We permit certain joint venture because they enable the firms to reduce costs or improve product quality with negligible risk of a concerted output reduction and price increase. In some cases open admissions policies act as an assurance that such output reductions cannot occur: the cartel cannot survive if it must continually admit new firms wishing to join.<sup>142</sup>

*Fifth*, exclusion from a combination may be found to be anticompetitive more readily and without reliance on inherently ambiguous intent than an individual firm's denial of its goods or services. The existence of a combination of competitors is itself evidence that its activities are both important and beyond the capacity of its individual members, for otherwise the combination itself would not be justified. If the excluded firm cannot accomplish the same result by itself or find similar partners in the industry, the inference is very strong that it will be disadvantaged by virtue of the combination.

By contrast, the mere existence of a monopolist gives no hint of which of its activities might somehow be essential to its actual or would-be rivals. Nor does its denial of any requested service to others indicate an anticompetitive purpose or effect, for there obviously are many innocent and legitimate reasons for not accommodating the desires of some would-be purchasers of a good or service. To be sure, that intent might be inquired into, but the immediate point is that such complex and often inconclusive inquiries will be more often necessary when dealing with single firms than when examining the duties of a combination to admit its rivals.

*Sixth*, a legal rule governing combinations will be invoked rarely and can give relatively clear guidance to the parties and to subsequent tribunals. By contrast, an "essential facility" doctrine addressed to individual firms is open-ended and potentially applicable to anything an actual or attempted monopolist does or has.

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<sup>142</sup>. See 13 Herbert Hovenkamp, *Antitrust Law* ¶¶2220-2223 (2d ed. 2005).