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THE ESSENTIAL FACILITIES DOCTRINE IN THE DEREGULATED TELECOMMUNICATIONS INDUSTRY

By John T. Soma, David A. Forkner, and Brian P. Jumps

ABSTRACT

The Telecommunications Act of 1996 required the formerly monopolistic telephone local exchange companies to open their networks up for competitors' use. This shift from anticompetitive federal regulation to mandated competition shook up an industry and necessitates another look at the basic antitrust jurisprudence undergirding the pro-competitive rationale. As this article points out, sections 251 and 252 of the Act, while purporting to encourage competition, actually may hamper entry into the local services market and provide a disincentive for current market participants to innovate. These deleterious effects can be overcome, the authors postulate, by returning to antitrust principles enumerated in the essential facilities doctrine.

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I. INTRODUCTION

After six decades of regulation, the judicial break-up of the Bell System, and no fewer than four legislative endeavors to regulate telecommunications, the advent of the Telecommunications Act of 1996 (1996 Act)\(^1\) attempts to create the collapse of an anticompetitive telecommunications industry "like the walls of Jericho."\(^2\) A transition away from an antiquated regulatory paradigm, however, is "never complete and immediate."\(^3\) Rather, the transition toward a truly competitive telecommunications environment necessitates the return to basic antitrust jurisprudence.\(^4\) Specifically, invocation of the essential facilities doctrine within section 251\(^5\) and section 252\(^6\) of the 1996 Act provides the doctrinal tool necessary to unravel the Gordian knot of federal telecommunications regulation.\(^7\)

Part I of this article reviews the telecommunications regulatory history preceding the 1996 Act. Part II examines the 1996 Act and its purposes. Part III explains the interconnection, unbundling, and resale provisions of the 1996 Act. Part IV evaluates the emergence of the essential facilities doctrine and provides its historical underpinnings and doctrinal justifications. Finally, part V posits a vital role for the essential facilities doctrine

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4. See id.
5. See infra notes 81-93 and accompanying text.
6. See infra notes 94-102 and accompanying text.
within a deregulated telecommunications industry to achieve facilities-based competition and an ordered transition toward competition.

II. TELECOMMUNICATIONS REGULATORY BACKGROUND

Telecommunications, as an industry, has transformed from "technical balkanization" to a "reality of technological convergence." This technological convergence, however, has not engendered a consonant response in the regulatory field. Of consequence, only four significant governmental responses have occurred in the past 63 years, the last of which is the 1996 Act. These responses furnish the relevant telecommunications regulatory and legal backdrop for this discussion.

The Federal Communications Act of 1934 (1934 Act) provided the original and only national telecommunications policy for more than sixty years. Congress enacted the 1934 Act to address the monopoly of the Bell System over telephony in the United States. Functionally, the most important attributes of the 1934 Act were the creation of a dualistic regulatory scheme and the establishment of the Federal Communications Commission (FCC). Pursuant to the 1934 Act, the FCC inherited the regulatory authority over interstate wire and radio communications, a dominion

8. Thomas G. Krattenmaker, The Telecommunications Act of 1996, 29 Conn. L. Rev. 123, 127 (1996) ("The perception of technological balkanization has yielded to the reality of technological convergence. Since the 1934 Act, we have witnessed satellites, microwave, television, computers (with their transistors and microprocessors), fiber optics, and the World Wide Web. These have shattered our previous illusion of tightly compartmentalized technologies.").

9. These include the passage of the Federal Communications Act of 1934, the 1956 Consent Decree, the 1982 Modified Final Judgment, and the Telecommunications Act of 1996.


11. See Krattenmaker, supra note 8, at 127 (noting that the governmental response to the technological convergence has been one of forcing the new technologies into the regulatory framework of the old technologies thereby creating a "Procrustean bed").


13. AT&T, the Bell Operating Companies, and Western Electric were colloquially known as the Bell System.


15. See id.; see also Robert B. Friedrich, Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC Can Encourage Competition and Technological Progress in Telecommunications, 80 Cornell L. Rev. 646, 655 (1995) (stating that "[t]he most important feature of the Communications Act [was] its establishment of the FCC").
formerly held by the Interstate Commerce Commission. The states retained regulatory control over intrastate wire and radio communications.

The AT&T antitrust litigation provided the next two pertinent regulatory and legal developments. Until 1984, the Bell System represented both the largest company and the largest monopoly in the world. The Bell System controlled "nearly every sector of the telecommunications industry within the United States," of which the most influential included long-distance service, local communications networks, and telecommunications equipment manufacturing and leasing. The Department of Justice (DOJ) initially addressed the anticompetitive aspects of the Bell System in 1949, which resulted in the 1956 Consent Decree. In 1974, the DOJ attacked AT&T's Bell System again, resulting in the 1982 Modified Final Judgment (MFJ). Although both actions sought structural adjustments, it was not until the 1982 MFJ that radical changes transpired.

The 1949 DOJ suit against the Bell System sought to end the anticompetitive equipment manufacturing and leasing activity of Western Electric. The DOJ alleged "that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale, and installation of telephones, telephone apparatus, equipment, materials, and sup-

17. See id. § 152. This section provides in part:
   Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier ....

18. See Friedrich, supra note 15, at 655 & n.50 (stating that "in 1980, the Bell System's operating revenues exceeded $50 billion—almost 2% of the gross national product of the United States"); SONNY KLEINFIELD, THE BIGGEST COMPANY ON EARTH 3-12 (1981).
20. See id. The Long Lines Division provided the long-distance services while the Bell Operating Companies (BOCs) exclusively maintained the local communications networks. AT&T's Western Electric division maintained almost exclusive control over the telecommunications equipment manufacturing and leasing. See id.
22. See id. at 225.
23. See id. at 136, 160-95.
24. See id. at 135.
plies, in violation of Sections 1, 2, and 3 of the Sherman Act.  

Thwarting divestiture, AT&T utilized its political influence over the DOJ by arguing that a divestiture of Western Electric from the Bell System would "effectively disintegrate the coordinated organization which [was] fundamental to the successful carrying forward of critical defense projects" contrary to the "vital interests of the nation."  

In 1956, to serve the interests of the public, the United States District Court for the District of New Jersey approved the Consent Decree absent any structural changes within the Bell System.  

AT&T, however, did agree to focus exclusively on the telecommunications industry and, of course, remain regulated by the FCC and the 50 state public utility commissions (PUCs). Remedially, the 1956 Consent Decree was considered "virtually useless in restraining AT&T's exercise of its anticompetitive capabilities."  

The DOJ's next offensive stratagem against the Bell System began on November 20, 1974, when the DOJ filed suit against AT&T, Western Electric, and Bell Telephone Laboratories alleging that AT&T had violated section 2 of the Sherman Act by monopolizing a range of telecommunications services and equipment markets. Again, the DOJ brought suit seeking remedial divestiture of the Bell Operating Companies (BOCs) and the dissolution of Western Electric. The MFJ resulted from Judge Harold Greene's review of the Consent Decree proposed by the parties.


27. See AT&T, 552 F. Supp. at 138.

28. Friedrich, supra note 15, at 656. The Consent Decree remedy consisted of: (i) precluding AT&T from engaging in any business other than the provision of common carrier communications services (i.e., both local and long-distance), (ii) precluding Western Electric from manufacturing equipment other than that used by the Bell System, and (iii) requiring the defendants to license their patents to all applicants upon the payment of appropriate royalties. Meadows, supra note 14, at 206.

29. See Friedrich, supra note 15, at 656.

30. See AT&T, 552 F. Supp. at 139. The DOJ instituted this lawsuit because "the 1956 consent decree was not adequate to prevent activities that unreasonably restrained competition in telecommunications equipment markets, and did not protect against antitrust violations in the intercity telecommunications field." Id. at 139 n.18; see also Competitive Impact Statement, 47 Fed. Reg. 7170 (1982).

31. See AT&T, 552 F. Supp. at 139.

32. See id. at 225.
The MFJ mandated divestiture of the BOCs, inclusion of line-of-business restrictions on the BOCs, and equal exchange access.\footnote{See id. at 160-95.}

A. Divesture of the Bell Operating Companies

The first remedy mandated by the MFJ was the total divestiture of the 22 BOCs.\footnote{See id.} Due to this forced divestiture, seven surviving independent Local Exchange Carriers (LECs)\footnote{See id.} emerged as the controllers of the local telephony service domain.\footnote{These included Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, SBC Communications, Inc., and U.S. West, Inc. These seven BOCs commonly became known as the Baby Bells.} Each of the seven LECs maintained a monopoly over several local networks, also known as “exchange areas” or “local access and transport areas” (LATAs).\footnote{See United States v. American Telephone & Telegraph Co., 569 F. Supp. 990 (D.D.C. 1983) (LATA Opinion) (noting that the seven remaining BOCs provide local service to the 164 local access and transport areas (LATAs) created by the reorganization). A Local Operating Company could encompass several LATAs, but the LECs were only authorized to transmit telecommunications information between points within a single LATA. See id.} Each exchange area was designed to be “large enough to comprehend contiguous areas having common social and economic characteristics but not so large as to defeat the intent of the decree to separate the provision of intercity services from the provision of local exchange service.”\footnote{See id.} In essence, the LECs would “provide[] telephone service from one point in an exchange area to other points in the same exchange area (called ‘exchange telecommunications’), and to originate and terminate calls from one exchange area to another exchange area (called ‘exchange access’).”\footnote{Competitive Impact Statement, 47 Fed. Reg. 7176 (1982).} Any interexchange of a call from one exchange area to another remained the province of AT&T and other interexchange carriers like Sprint and MCI.\footnote{Meadows, supra note 14, at 208.}

The rationale underlying the divestiture of the BOCs was that AT&T would be unable to exercise monopoly control over the long-distance market without control of access to the local operating networks.\footnote{Id.} Prior to the divestiture, AT&T restrained competitors’ endeavors to provide competitive long-distance service by requiring customers of competing carriers to dial significantly more numbers to acquire network access than users of
AT&T long-distance. AT&T also refused to provide a number of specialized local services to competing long-distance service purchasers. Last, evidence during the suit demonstrated that AT&T subsidized its long-distance rates with monopoly profits from its local access operations.

Central to all of these practices was the fact that the BOCs were "functioning as bottlenecks." The BOCs possessed facilities deemed essential to competition for the competing interexchange carriers. These facilities were the local network. Local networks dictated all access to long-distance communications, and thus, all "user premises telephone equipment had to be connected to the local network." The MFJ countered AT&T's monopolistic anticompetitive practices with divestiture because the local networks were "textbook examples of natural monopolies."

B. Line-of-Business Restrictions on the Local Operating Companies

The MFJ also included restrictions on the newly created independent LECs to avert the recurrence of monopolistic control by the Bell System. Of importance to this discussion were the restrictions on the LECs' ability to enter interexchange markets. These particular restrictions were thought necessary because, even with heavy regulation from the district court and the FCC, each of the seven independent LECs maintained monopolistic control over their corresponding local access networks. As with the Bell System before divestiture, any company with monopoly

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42. See id. at 161-63; see also BRIDGER M. MITCHELL & INGO VOGELSANG, TELECOMMUNICATIONS PRICING: THEORY AND PRACTICE 166-67 (1991).
43. AT&T, 552 F. Supp. at 161 n.124 (detailing discriminatory practices such as denying customers of competing carriers foreign exchange service and common control switching arrangements).
44. See id. at 223.
45. Friedrich, supra note 15, at 659.
46. Id.
47. See id.
48. Id. at 659 & n.81 ("The local access sector of the telecommunications industry traditionally has been considered a natural monopoly because of the high capital costs of entry and sharply declining long-run average costs.").
49. See AT&T, 552 F. Supp. at 186-94.
50. See id. The interexchange market is also commonly known as the long-distance market. "Long-distance service is defined within the industry as service between 'local access and transport areas,' or 'LATAs.'" Meadows, supra note 14, at 215.
51. See Friedrich, supra note 15, at 660 (citing United States v. Western Elec. Co., 969 F.2d 1231, 1238 (D.C. Cir. 1992)).
control over the local access networks could discriminate against competing interexchange carriers with respect to interconnection facilities essential for service.\footnote{52} This discrimination could occur by means of complete denial, or if they allowed access, inferior quality of access and transmission.\footnote{53} Further, the LECs would have the impetus and the capacity to cross-subsidize their prices with profits from the local exchange markets.\footnote{54}

Although the restrictions applied to all seven of the independent LECs, a provision in the MFJ allowed courts to waive the competition restriction under certain circumstances.\footnote{55} Originally, a petitioning LEC only had to demonstrate that “no substantial possibility” existed that the LEC “could use its monopoly power to impede[] competition in the market” it sought to enter.\footnote{56} Subsequent case law, however, expanded the requirements to include the public interest considerations so prevalent throughout the MFJ.\footnote{57} Examples of these considerations include protection of equal access for interexchange carriers and the maintenance of quality telephony services.\footnote{58}

C. Equal Exchange Access

Part VIII of the MFJ focused on the removal of barriers to interconnection.\footnote{59} A central concern was the inherent bias in favor of AT&T that existed in the telephone network.\footnote{60} To alleviate this bias, the MFJ required that by September 1, 1986, the LECs would have to provide access services to competing interexchange carriers that were “equal in type, quality and price” to the services provided to AT&T and its affiliates.\footnote{61}

\begin{footnotes}
\footnote{52. See Meadows, supra note 14, at 215.}
\footnote{53. See AT&T, 552 F. Supp. at 188-90.}
\footnote{54. See id.}
\footnote{55. See id. at 231.}
\footnote{56. Id.}
\footnote{57. See United States v. Western Elec. Co., 592 F. Supp. 846, 858 (D.D.C. 1984) (noting that the court must “take into account ... the decree’s fundamental principles and purposes” when ruling on a petition to waive the line-of-business restrictions).}
\footnote{58. See id. at 860-62.}
\footnote{59. See AT&T, 552 F. Supp. at 197-200.}
\footnote{60. See id. For example, before divestiture, a caller would only have to dial ten or eleven digits to place a long distance call with AT&T as opposed to 22 or 23 with a competing carrier. See Meadows, supra note 14, at 217.}
\footnote{61. AT&T, 552 F. Supp. at 196. The MFJ approved an exception to Equal Exchange Access involving the number of digits a customer had to dial. Total equality in the number of digits between AT&T and other carriers was simply not feasible because it would have required a change in the numbering system for all of the telephones in the United States. The court, therefore, approved reduction in digits to fourteen for competitors. See id. at 197-200; see also Meadows, supra note 14, at 218.}
\end{footnotes}
III. THE IMPETUS FOR AND PURPOSE OF THE 1996 TELECOMMUNICATIONS ACT

Since the MFJ, the advent of new technologies has continually altered the telecommunications landscape. Though by no means complete, many monopolies in the local telecommunications markets have been eroded.\(^{62}\) Cellular communication providers, cable providers, and “bypass” access carriers\(^ {63}\) serve as the catalysts for change.\(^ {64}\) Although questions exist whether these alternatives can provide direct competition, “satellites, cellular service, land microwave networks, and expanded fiber optics have been viewed as technologies capable of allowing direct competition in transmission of local calls.”\(^ {65}\) Moreover, “[n]ew developments in switching facilities” and “coaxial cables” may also furnish potential competition. These changes provided the impetus for the 1996 Act.\(^ {66}\)

The purpose of the 1996 Act is to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”\(^ {67}\) The 1996 Act’s delineated goals were to establish a “national policy framework” calculated to deploy private sector advanced telecommunications services to all customers in the United States by opening up competition.\(^ {68}\) In addition, the 1996 Act sought to: (1) promote and encourage affordable advanced telecommunications; (2) spur economic growth; and (3) preserve and advance universal service.\(^ {69}\) Congress also issued a series of findings pertaining to

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63. See Nowicki, supra note 7, at 357 n.19.
64. See id. at 357-58.
65. Id. at 358.
66. See infra notes 69-79.
68. Section 4 states that “[t]his Act is intended to establish a national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition ....” S. 652, 104th Cong., 1st Sess. § 4 (1995).
69. Section 4 included the following goals:
   (1) To promote and encourage advanced telecommunications networks, capable of enabling users to originate and receive affordable, high-quality voice, data, image, graphic, and video telecommunications services.
   (2) To improve international competitiveness markedly.
   (3) To spur economic growth, create jobs, and increase productivity.
the stated goals. Among these findings were that: (1) competition should supplant regulation as the impetus for technological advancement; (2) the monopolistic nature of local telephony market hindered competition and necessitated a cooperative effort on the part of both the state and federal systems to develop a regulatory regime that facilitated a transition

(4) To deliver a better quality of life through the preservation and advancement of universal service to allow the more efficient delivery of educational, health care, and other social services.

70. Section 5 set forth the list of findings. See id. § 5.

71. These findings include:

(1) Competition, not regulation, is the best way to spur innovation and the development of new services. A competitive market place is the most efficient way to lower prices and increase value for consumers ...

(9) Achieving full and fair competition requires strict parity of marketplace opportunities and responsibilities on the part of incumbent telecommunications service providers as well as new entrants into the telecommunications marketplace, provided that any responsibilities placed on providers should be the minimum required to advance a clearly defined public policy goal.

72. "Local telephone service is predominantly a monopoly service .... Some States have begun to open local telephone markets to competition. A national policy framework is needed to accelerate the process." Id.

73. The section includes "[b]ecause of their monopoly status, local telephone companies and the Bell operating companies have been prevented from competing in certain markets. It is time to eliminate these restrictions. Nonetheless, transition rules designed to open monopoly markets to competition must be in place before certain restrictions are lifted." Id.

74. These include:

(11) Ensuring that all Americans, regardless of where they may work, live, or visit, ultimately have comparably access to the full benefits of competitive communications markets requires Federal and State authorities to work together affirmatively to minimize and remove unnecessary institutional and regulatory barriers to new entry and competition ...

(10) Congress should not cede its constitutional responsibility regarding interstate and foreign commerce in communications to the Judiciary through the establishment of procedures which will encourage or necessitate judicial interpretation or intervention into the communications marketplace.

75. This regime includes:

(6) Congress should establish clear statutory guidelines, standards, and time frames to facilitate more effective communications competition and, by so doing, will reduce business and customer uncertainty, lessen regulatory processes, court appeals, and litigation, and thus encourage
from regulation to a competitive marketplace; (3) a competitive marketplace engenders technological development;\textsuperscript{77} and (4) the protections of antitrust law within a competitive marketplace ensure economic growth and universal access.\textsuperscript{78} The importance of these findings is set forth in part V in conjunction with a discussion of the deficiencies of the 1996 Act and the overlay of antitrust law to its current interconnection mandate.\textsuperscript{79}

\begin{quote}
the business community to focus more on competing in the domestic and international communications marketplace.

(7) Where competitive markets are demonstrably inadequate to safeguard important public policy goals, such as the continued universal availability of telecommunications services at reasonable and affordable prices, particularly in rural America, Congress should establish workable regulatory procedures to advance those goals ....
\end{quote}

\textit{Id.}

76. This includes:

(4) Transition rules must be truly transitional, not protectionism for certain industry segments or artificial impediments to increased competition in all markets. Where possible, transition rules should create investment incentives through increased competition. Regulatory safeguards should be adopted only where competitive conditions would not prevent anticompetitive behavior.

\textit{Id.}

77. These include:

(5) More competitive American telecommunications markets will promote United States technological advances, domestic job and investment opportunities, national competitiveness, sustained economic development, and improved quality of American life more effectively than regulation ....

(12) Effectively competitive communications markets will ensure customers the widest possible choice of services and equipment, tailored to individual desires and needs, and at prices they are willing to pay.

(13) Investment in and deployment of existing and future advanced, multipurpose technologies will best be fostered by minimizing government limitations on the commercial use of those technologies.

\textit{Id.}

78. This includes "[c]ompetitive communications markets, safeguarded by effective Federal and State antitrust enforcement, and strong economic growth in the United States which such markets will foster are the most effective means of assuring that all segments of the American public command access to advanced telecommunications technologies."

\textit{Id.}

79. \textit{See infra} part VI.
IV. THE CURRENT MANDATE

Section 251(a) of the 1996 Act imposes a general duty upon all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." The 1996 Act also requires LECs to provide: (1) resale of telecommunication services; (2) nondiscriminatory access to "telephone numbers, operator services, directory assistance, ... directory listing[s];" and (3) access to "poles, ducts, conduits, and rights-of-way" to competing telecommunications service providers. Section 251(c) imposes coterminous requirements on incumbent local exchange carriers (ILEC). ILECs must pro-

81. The section states, "(49) Telecommunications Carrier -- ... A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is providing telecommunications services ...." 47 U.S.C. § 251 (1994).
82. Id. Specifically, "(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS - Each telecommunications carrier has the duty--(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; ...." Id.
83. See id. § 251(b) (providing that "[e]ach local exchange carrier has the following duties: (1) Resale - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services").
84. See id. § 251(b)(3). Section 251(b)(3) states:
Dialing Parity - The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.
Id.
85. See id. § 251(b)(4) (providing carriers with a duty to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224).
86. ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS - In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
DUTY TO NEGOTIATE - The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.
Id. § 251(c).
87. See id. § 251(c)(h)(1) (defining an ILEC as "the local exchange carrier that — (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area").
vide interconnection to facilities and equipment at the request of any challenging local exchange carrier (CLEC)\textsuperscript{88} and unbundled access to "network elements."\textsuperscript{89} In order to render interconnection and unbundled access economically feasible, ILECs must permit physical collocation of their competitors' equipment.\textsuperscript{90} Additionally, in order to effectuate price

\textsuperscript{88} Section 251(c)(2) states:
INTERCONNECTION - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network —
(A) for the transmission and routing of telephone exchange service and exchange access;
(B) at any technically feasible point within the carrier's network;
(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; ....

\textit{Id.} § 251(c)(2).

\textsuperscript{89} Section 251(c)(3) provides:
Unbundled Access - The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. A "network element" includes not only the physical equipment used to provide telecommunications service, but also significant functions, systems, and information used in the transmission of telecommunications service. These would include local loops and sub-loops, switching, and signaling functions ....

\textit{Id.} § 251(c)(3).

\textsuperscript{90} Section 251(c)(6):
Collocation - The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations. In other words, incumbent LECs must allow other telecommunication carriers to place their equipment at the site of the incumbent's own switching center. Again, rates charged for using these premises must be reasonable and nondiscriminatory.

\textit{Id.} § 251(c)(6).
competition, the 1996 Act requires ILECs to resell their telecommunications services to CLECs at wholesale prices.\textsuperscript{91}

Section 251’s interconnectivity, unbundling, and resale mandates are premised upon the supposition that permitting competitors to interconnect with an incumbent’s network, expedites both price-based competition and facility based competition: ultimately enabling the generation of an acquired customer base from which new entrants may construct rival facilities. The 1996 Act’s interconnectivity, unbundling, and resale mandates remain effective until “explicitly superseded by regulations prescribed by the Commission.”\textsuperscript{92} Notwithstanding an express legislative override, the only limitation on the Act’s interconnectivity and unbundling mandates is a simultaneous requirement that the rates, terms, and conditions of interconnectivity and unbundled access be just, reasonable, and nondiscriminatory.\textsuperscript{93}

A host of harmonious standards exists for determining the reasonableness of rates, terms, and conditions of interconnectivity.\textsuperscript{94} The result is a

\begin{footnotesize}
\begin{enumerate}
\item (4) Resale - The duty — (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers. \textit{Id.} § 251(c)(4).
\item This includes: (g) Continued Enforcement of Exchange Access and Interconnection Requirements - On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. \textit{Id.} § 251(g).
\item See id. § 251(c)(2)(d).
\item Section 252(d) establishes relatively few standards for determining whether rates for interconnection, unbundling, and resale are reasonable:
\end{enumerate}
\end{footnotesize}
quagmire of disjunctive standards. In response to the anticipated conflict between ILECs and CLECs, the 1996 Act imposes a system of dispute resolution by which either party may request mediation by a state commission during the negotiation process.  

Failure to reach a negotiated settlement for interconnectivity within 135 days leads to mandatory binding arbitration to settle any remaining unresolved issues. The 1996 Act designates the State as the arbitrator of the dispute and mandates the resolution of all contested issues no later than nine months after the dispute becomes the subject of arbitration.

(d) Pricing Standards - (1) Interconnection and Network Element Charges - Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section — (A) shall be — (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit. (3) Wholesale Prices for Telecommunications Services - For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Id. § 252(d).

95. See id. § 252(a)(2) ("Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.").

96. See id. § 252(e)(2).

97. Section 252(b)(1):

(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION -

(1) ARBITRATION - During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Id. § 252(b)(1).

98. See id.

99. Section 252(b)(4)(c):

(c) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.
The state commission must review all negotiated and arbitrated agreements. Rejection of an agreement is warranted if the agreement fails to comply with the interconnection requirements of section 251 or the pricing standards of section 252(d). Despite these ostensible requirements, the 1996 Act purports to entitle an aggrieved party to appeal a state commission’s determination to a federal district court.

V. THE ESSENTIAL FACILITIES DOCTRINE WITHIN THE DEREGULATED TELECOMMUNICATIONS MARKET

Section 251 clearly imparts a duty to deal on the part of telecommunications providers, LECs, and ILECs with respect to facilities and equipment useful for providing telephony services. Antitrust law confers a corresponding duty to deal in the form of the essential facilities doctrine. The essential facilities doctrine imparts liability on a monopolist who denies competitor access to a resource essential for competition in a relevant antitrust market. This confined duty to confer access to an essential resource provides a viable mechanism to supplant section 251’s general

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Id. § 252(b)(4)(c).

100. See id. § 252(e) ("Approval by State Commission - (1) Approval Required - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.").

101. This includes:

Grounds for Rejection - The State commission may only reject—(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; 252(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

Id. § 252(e)(2).

102. See id. § 252(e)(6).

103. Notice there is no requirement that the duty to deal be based on equipment “necessary” for the provision of telephony service.

104. See A.D. Neale, The Antitrust Laws of the United States of America: A Study of Competition Enforced by Law 67 (2d ed. 1970) ("The Sherman Act requires that where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.").

105. See discussion infra notes 253-66 and accompanying text.

106. See id.
duty to share equipment necessary for the provision of local telephony services.

In addition to offering an ordered deregulation of the local exchange market, the essential facilities doctrine provides an alternative avenue for challenging a monopolist's conduct. To understand fully the role of the essential facilities doctrine in the deregulation of the local exchange market, however, it is necessary to examine antitrust's doctrinal justifications, the essential facility doctrine's role within antitrust jurisprudence, and the doctrine's historic underpinnings.

A. Antitrust's Doctrinal Justifications and the Essential Facilities Doctrine

Congress enacted the antitrust laws to promote economic efficiency via the protection of the competitive process. Courts and commentators have recognized that distortion occurs in the competitive process when a monopolist refuses access to an essential facility. The instances in which a monopolist has a duty to provide access to an essential facility is "one of the most 'unsettled and vexatious' issues in antitrust law." Antitrust law rarely mandates access to a monopolist's facility for several reasons: (1) liberal access encourages firms to abstain from significant in-
vestment initiatives in an attempt to free ride on the investment of their competitors; (2) access inhibits firms from undertaking risky and costly investment in the absence of countervailing first-mover advantages; and (3) mandated access does not have pro-competitive effects unless the terms and conditions of access are reasonable. Absent reasonable access requirements, a monopolist can either permit access on terms that are so onerous that, as a practical matter, access is unavailable or charge monopoly rents for access, in which case price competition becomes impossible.

Despite these implications, antitrust policy supports a limited duty to deal only when an actual probability exists for enhancing competition. The essential facilities doctrine facilitates competition in two circumstances: (1) a monopolistic consortium of competitors jointly controls an essential facility enabling the consortium to restrain trade; and (2) a single monopolist controls an essential facility and via this control unilaterally forecloses competition in a relevant antitrust market. Antitrust liability attaches only when a particular resource is central to a competitor’s viability in the marketplace. Liability primarily occurs when a monopolist obtains a substantial cost advantage by possessing an essential

111. See generally Pitofsky, supra note 3.
113. Before liability attaches, courts must discern whether a refusal to deal has a truly deleterious effect upon competition. A monopolist has no duty to deal unless doing so actually enhances competition. Absent enhanced competition, a monopolist’s refusal to deal does not trigger invocation of the essential facilities doctrine. See, e.g., Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc., 957 F.2d 765 (10th Cir. 1992); see also Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co., 1993-2 Trade Cas. (CCH) ¶ 70,316, ¶ 70,650, ¶ 70,651 (11th Cir. 1993) (invalidating the plaintiff’s claim that a refusal to deal violated section 2 because it could not show that it was prepared to enter the market but for the refusal to deal, and therefore could not demonstrate that it had been foreclosed from the market). But see Oahu Gas Serv. v. Pacific Resources, Inc., 838 F.2d 360, 368 (9th Cir. 1988). In Oahu Gas, the Ninth Circuit stated that an affirmative duty to deal arises when there is no justification for refusing to aid a competitor. Id. This passage suggests that the Ninth Circuit would impose an affirmative duty to deal without first finding a negative effect on competition.
resource\textsuperscript{117} that competitors cannot practicably duplicate;\textsuperscript{118} the monopolist possesses a natural monopoly; and the monopolist has no valid business justification for denying access to the essential resource.\textsuperscript{119}

B. The Doctrine's Historical Underpinnings: Supreme Court Recognition Of The Essential Facilities Doctrine

In support of the essential facilities doctrine, two clusters of Supreme Court precedents have emerged: concerted horizontal combination cases in violation of section 1 of the Sherman Act\textsuperscript{120} and unilateral monopoly misuse cases in violation of section 2.\textsuperscript{121} Concerted action among unrelated enterprises occurs infrequently, is readily detectable, and is easily reme- died.\textsuperscript{122} Unilateral activity, however, is pervasive, evades detection, and frequently requires remedial measures that consign the courts' duties to those of a regulatory agency.

1. The Essential Facilities Doctrine as Applied to Horizontal Combination Cases: Concerted Action In Violation of Section 1

The seminal case establishing the essential facilities doctrine pursuant to section 1 of the Sherman Act is United States v. Terminal Railroad Ass'n of St. Louis.\textsuperscript{123} The Terminal Railroad Association (Association)

\textsuperscript{117} See, e.g., AREEDA & HOVENKAMP, supra note 112, ¶ 736.1a (describing an essential facility as providing a substantial cost advantage).

\textsuperscript{118} Inability to duplicate the essential facility has been broadly construed as being fulfilled if it is not economically feasible or practical to duplicate the facility. See Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 179 (2d Cir. 1990). However, mere inconvenience or some economic loss does not suffice. See Twin Lab. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

\textsuperscript{119} See infra notes 250-69 and accompanying text.

\textsuperscript{120} Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, ...." 15 U.S.C. § 1 (1994). Section 1 has been expansively utilized to control such practices as price fixing, tying arrangements, and refusals to deal. See generally WILLIAM C. HOLMES, 1987 ANTITRUST LAW HANDBOOK 35-137 (1987).

\textsuperscript{121} Section 2 condemns "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1994).


\textsuperscript{123} 224 U.S. 383 (1912).
was a unitary corporation consisting of fourteen competing railroads. The Association acquired numerous independent terminal companies and operated them as a united system. The Association sought to control all practicable means of railroad access through St. Louis by acquiring ownership of all trackage, access bridges, and terminal facilities necessary for effective interchange in the St. Louis terminal. At the time, St. Louis was the terminus for numerous trunk-line railroads and a critical terminal for a substantial amount of rail transportation.

The Association permitted all railroads to use its facilities, whether or not they were Association members. While no showing existed that the Association had excluded nonparticipating carriers, there was nothing preventing the Association from doing so. Consonant with the simplest economic theory of vertical integration, the Association charged nonmembers the same price for terminal access that they charged themselves. This price, however, constituted monopoly rents that disadvantaged nonparticipating carriers.

The Supreme Court recognized that in ordinary circumstances, a number of independent entities could combine for the purpose of controlling or acquiring terminals for their common but exclusive use. If access or exclusion terms were excessively onerous, competitors had the ability to exercise the right and power to construct plausible substitutes. Two factors were determinative of the inability to construct plausible substitutes in this case. First, the Association was a natural monopoly. The geographical constraints made the construction of a viable rail alternative

124. Id. at 391.
125. Id.
126. Id. at 393-95.
127. Id. at 403 (noting that “St. Louis is one of the largest railroad centers in the world”).
128. Id. at 400.
129. Id. at 410-11.
130. Id. at 400 (noting “[t]hat other companies are permitted to use the facilities of the terminal company upon paying the same charges paid by the proprietary companies”).
131. Id. at 410-11.
132. Id. at 406.
133. Id. at 405.
134. Id.
135. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.1b, at 646 (stating that the monopoly was “apparently ‘natural’”). A “natural monopoly” is a market structure where one firm can satisfy the demand in a market at a lower cost than could two or more firms. See MARSHALL HOWARD, ANTITRUST AND TRADE REGULATION 7 (1983); F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE 111 (3d ed. 1990).
infeasible. The minimum efficient scale also easily accommodated all existing railway traffic. Secondly, control over the trackage and access bridges created a bottleneck. Limiting access to the St. Louis interchange threatened to substantially curtail travel along an extensive rail network on either side of the interchange.

Given the essential nature of the St. Louis interchange and resultant inability to construct a viable substitute, the Court viewed the Association’s unified ownership as “an obstacle, a hindrance, and a restriction upon interstate commerce.” Rather than ordering dissolution of the Association, the Court entered a decree requiring the consortium to allow nonparticipating competitor railroads access to the facilities essential for the St. Louis interchange. The Court ordered access for the ten remaining railroads “upon such just and reasonable terms as shall place such [railroads] upon a plane of equality in respect of benefits and burdens [incurred by Association members].” Forcing the Association to admit competitors to their collaboration enabled the Court to avoid becoming a regulatory agency charged with ordering the rationing of the Association’s assets.

The Court’s focus upon the essential nature of the trackage, access bridges, and terminals accessing the St. Louis terminal lends support for the existence of the essential facilities doctrine. Even the most conten-

136. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.1b, at 646 (“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”); see also Terminal R.R. Ass’n, 224 U.S. at 396, 404 (noting the importance of “[t]he physical or topographical conditions peculiar to the locality”).
137. Terminal R.R. Ass’n, 224 U.S. at 396-98.
138. Id.
139. See supra notes 17-23 and accompanying text.
140. Terminal R.R. Ass’n, 224 U.S. at 396-98.
141. Id. at 399-401.
142. Id. at 405.
143. Id. at 410-11.
144. Id.
145. Id. at 412-13.
146. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.1b, at 645; see also Kezsborn & Goldman, supra note 109, at 4 (stating that the doctrine was derived from the Terminal Railroad decision); Robert H. Lande & Sturgis M. Sobin, Reverse Engineering of Computer Software and U.S. Antitrust Law 9 HARV. J.L. & TECH. 237, 262 (1996) (noting the essential facilities doctrine originated in part in the Terminal Railroad decision).
tious critics\textsuperscript{147} acknowledge that the \textit{Terminal Railroad} decision imparts a limited responsibility upon competitors who jointly acquire a natural monopoly to allow reasonable access for rivals.\textsuperscript{148}

The rationale undergirding \textit{Terminal Railroad} was eventually extended in \textit{Associated Press v. United States}.\textsuperscript{149} Approximately 1,200 newspapers joined together creating the Associated Press News Organization (AP). The AP provided a vehicle for the gathering, transmission, and exchange of news reports created by domestic and foreign newspaper members.\textsuperscript{150} The collaboration realized significant economies of scale resulting in the saturation of the news gathering market.\textsuperscript{151} Although the AP generally extended membership to all news-generating newspapers,\textsuperscript{152} the AP bylaws established oppressive entry requirements for applicant papers in competition with existing local incumbents.\textsuperscript{153} Each existing member could “block membership by competing newspapers and thereby remain

\begin{quote}
\textsuperscript{147} Commentators have criticized the doctrine as having nothing to do with the purposes of antitrust law. See, e.g., Phillip Areeda, \textit{Essential Facilities: An Epithet in Need of Limiting Principles}, 58 \textit{Antitrust L.J.} 841 (1990); Herbert Hovenkamp, \textit{Federal Antitrust Policy: The Law of Competition and Its Practice} \S\ 7.7 (1994); Scott D. Makar, \textit{The Essential Facilities Doctrine and the Health Care Industry}, 21 \textit{Fla. St. U. L. Rev.} 913 (1994). As one court stated:

\begin{quote}
Had the terminal facilities been owned by a firm unaffiliated with any railroad, the firm could have charged whatever prices it wanted, including prices that discriminated against some of the users (monopolists frequently price discriminate), because the antitrust laws do not regulate the prices of natural monopolists. A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of ‘monopolizing’ in violation of the Sherman Act, and can therefore charge any price that it wants, for the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute.
\end{quote}

\textit{Blue Cross \& Blue Shield United of Wisconsin v. Marshfield Clinic}, 65 F.3d 1406, 1412 (7th Cir. 1995) (internal citations omitted).

\textsuperscript{148} See generally Hovenkamp, \textit{supra} note 147.

\textsuperscript{149} 326 U.S. 1 (1945).

\textsuperscript{150} \textit{Id.} at 4.

\textsuperscript{151} The record demonstrated that “morning newspapers, which control 96\% of the total circulation in the United States, have AP news service.” \textit{Id.} at 18. In fact, the record evidenced that “[e]ighty-one per cent of the morning newspapers of the United States ... [were] members, and 59\% of the evening newspapers; the aggregate of circulation of these newspapers ... [was] 96\% of the total circulation of morning newspapers in the United States, and 77\% of that of the evening newspapers.” \textit{United States v. Associated Press}, 52 F. Supp. 362, 366 (S.D.N.Y. 1943), \textit{aff’d}, 326 U.S. 1 (1945).

\textsuperscript{152} \textit{Associated Press}, 326 U.S. at 9.

\textsuperscript{153} \textit{Id.} at 10-11.
the exclusive outlet for AP news in its locality."¹⁵⁴ Blocked entrants were able to access a limited number of alternative news gathering organizations.¹⁵⁵

Despite the existence of limited competition among newsgathering enterprises,¹⁵⁶ the Supreme Court, in a plurality opinion, determined that the concerted effort of AP members to exclude local competitors violated section 1 of the Sherman Act.¹⁵⁷ Justice Frankfurter's concurring opinion offers the only clear support for the essential facilities doctrine.¹⁵⁸ Equating the AP with a public utility,¹⁵⁹ Justice Frankfurter opined that AP was clothed in public interest and must, therefore, deal with its rivals.¹⁶⁰ Although the remaining Justices expressly disclaimed Frankfurter's public utility rationale for the opinion,¹⁶¹ it provides a useful perspective for invoking the essential facilities doctrine.

Despite confusion over the proper rationale underlying the decision,¹⁶² the case seems to stand for the proposition that in limited situations, collaborators must allow access to rivals on nearly equal terms.¹⁶³ These limited circumstances exist when competitors collaboratively conceive a profitable facility, the facility is essential to the competitive viability of rivals and to a competitive market, and admission of rivals is consonant with the legitimate goals of the collaboration.¹⁶⁴

2. Monopoly Misuse Cases in Violation of Section 2

The Otter Tail Power Co. v. United States¹⁶⁵ decision formed the foundation of the essential facilities doctrine within the single firm con-

¹⁵⁵ The district court noted that "[t]here are a great many other news gathering associations of one sort or another in the United States; but of these, only two are comparable in size and efficiency with AP—United Press ... and International News Service." Associated Press, 52 F. Supp. at 366.
¹⁵⁶ See id.
¹⁵⁷ Associated Press, 326 U.S. at 24-25.
¹⁵⁸ Id. at 26-29 (Frankfurter, J., concurring).
¹⁵⁹ "A free press is indispensable to the workings of our democratic society." Id. at 28 (Frankfurter, J., concurring).
¹⁶⁰ Id. at 28-29 (Frankfurter, J., concurring).
¹⁶¹ Id. at 46-47.
¹⁶² See AREEDA & HOVENKAMP, supra note 112, ¶ 736.1c, at 647-48.
¹⁶³ See id.; Areeda, supra note 147, at 844.
¹⁶⁴ See id.
Otter Tail Power Co. (Otter Tail) was a regulated public power utility that maintained an upstream monopoly in electric transmission lines while simultaneously selling power at the retail level. Otter Tail refused to sell wholesale power to municipal systems and to transfer electric power from one utility to another over the facilities of an intermediate utility. Additionally, Otter Tail instituted litigation aimed at fore-stalling or delaying the establishment of alternative systems, and invoked contract provisions aimed at denying municipal systems access to alternative suppliers requiring the use of Otter Tail's transmission lines. The effect of Otter Tail's refusal to deal was the elimination of competition in the downstream market.

The Court determined that Otter Tail violated section 2 of the Sherman Act by intentionally exploiting its wholesale energy monopoly power to gain a competitive advantage at the retail level. The Court affirmed the decree enjoining Otter Tail to either sell its own power or wheel power supplied by other wholesalers to the downstream retail market.

The Otter Tail decision has generated a torrent of conflicting commentary over the duties owed to competitors by the owner of an essential facility. Some commentators suggest that Otter Tail does not establish a general duty to deal. The unique circumstances surrounding the case serve as the premise of this argument. Otter Tail possessed a natural monopoly subject to governmental regulation. The regulatory agency had the authority and capacity to regulate prices and terms of transmission. The existence of agency oversight supplanted the need for the Court to

166. Id. at 368 (delineating that the suit was brought against a single electric utility company).
167. Id. at 373.
168. Id. at 368, 370 & n.2.
169. Id. at 368.
170. Id. at 371.
171. Id.
172. Id. at 371, 372.
173. Id. at 372.
174. Id. at 377-82. The decree also provided “that the District Court, concluding that Otter Tail violated the antitrust laws, should be impervious to Otter Tail’s assertion that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public.” Id. at 382.
175. Id. at 381.
176. See Areeda, supra note 147, at 848.
177. The Court held that the Federal Power Commission’s authority to compel “pro-competitive” conduct did not provide antitrust immunity. Otter Tail, 410 U.S. at 374.
assume the role of energy transmission regulator. Some commentators conclude that in these limited circumstances, a duty to deal exists.

*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* represents the second unilateral refusal to deal case considered by the Supreme Court. Aspen Skiing Company (Ski Co.) and Aspen Highlands Skiing Corp. (Highlands) competed in the Aspen Ski basin skiing facilities market. Ski Co. owned three of the four skiing mountains in Aspen and thereby obtained control of 80 percent of the Aspen area ski ticket sales. For many years, Ski Co. cooperated with Highlands, the owner of the fourth mountain, to jointly provide a four-mountain, multi-area, six-day, ski pass. Ski passes are typically sold on a daily basis, but the four mountain pass enabled skiers to access any of the four mountains throughout a six-day ski week. Ski Co. and Highlands sold the six-day pass at nearly 14 percent below the equivalent six-day daily rate. Initially, Ski Co. and Highlands divided revenues received from the multi-area pass based upon the actual usage of their respective facilities. The Highlands facility

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178. Areeda, *supra* note 147, at 848 (noting that the existing regulatory agency enabled the court to “airily require Otter Tail to deal but never burden itself with the administrative details”).

179. See generally Areeda & Hovenkamp, *supra* note 112.


181. *Aspen* was more conspicuous for what it did not decide than for what it did. Many thought that the case would resolve the debate over the so-called “bottleneck” or “essential facilities” doctrine; arguably it did not. Instead, *Aspen* appeared to open a Pandora’s box in which a Section 2 plaintiff could claim that any refusal to deal by a monopolist that is not justified with concrete evidence supporting a valid business purpose can form the basis of Section 2 liability.


182. *Id.* at 587-90.

183. *Id.*

184. *Id.* at 590 & n.8.

185. *Id.* at 589-90.

186. *Id.* at 589.

187. *Id.* The Court did not worry that joint marketing by the only two firms in the Aspen market could easily facilitate price fixing among them. In fact, the Colorado Attorney General had previously filed a complaint against the two companies under Section 1, and had obtained a consent decree under which the parties were permitted to participate in joint making provided “they set their own ticket prices unilaterally before negotiating … terms.” *Id.* at 591 n.9.

188. *Id.* at 589.

189. *Id.* at 589-90.
typically received 16 to 18 percent of total revenues from the multi-area pass.\textsuperscript{190}

Ski Co. threatened to discontinue the multi-day pass unless Highlands was willing to reduce its percentage of the revenue to 13.2 percent without regard to actual usage.\textsuperscript{191} Despite the abandonment of this particular effort to reduce Highlands’ share, Ski Co. became increasingly dissatisfied.\textsuperscript{192} Ski Co. continued its efforts to reduce Highlands’ revenue share from the four-mountain pass. Ultimately, Ski Co. refused to continue its participation in the four-area ski pass.\textsuperscript{193}

After discontinuing the four-area pass, Ski Co. instituted its own three-area pass allowing access exclusively to its three skiing facilities.\textsuperscript{194} Highlands made several attempts to accommodate Ski Co.’s new position including marketing its own multi-area pass that contained coupons exchangeable for Ski Co.’s day pass, at day pass prices.\textsuperscript{195} Despite the backing of a local bank, Ski Co. refused to accept Highlands’ coupons.\textsuperscript{196} Highlands responded by offering to purchase passes directly from Ski Co.\textsuperscript{197} Ski Co. refused to sell any skiing passes to Highlands despite continual requests from Highlands.\textsuperscript{198} The result of Ski Co.’s actions was a significant decline in Highlands’ revenue share of the skiing market.\textsuperscript{199} Ski Co.’s lower prices also had the practical effect of capturing consumers unwilling to purchase a more expensive Highlands’ pass.\textsuperscript{200} Once Ski Co. was determined to be a monopolist in possession of a unique facility, its actions constituted a de facto exclusive dealing arrangement.\textsuperscript{201}

Ski Co. justified its actions on the grounds that (1) Highlands was an inferior skiing facility; (2) the method of determining actual usage was unsatisfactory; and (3) accepting Highlands’ coupons created an undue administrative burden. Ski Co. offered these explanations despite no evidence of a greater administrative burden, Highlands’ willingness to pro-

\begin{enumerate}
\item Id. at 590-91.
\item Id. at 591.
\item Id. at 591-92.
\item Id. at 592-93.
\item Id. at 593.
\item Id. at 593-94.
\item Id. at 594.
\item Id. at 593.
\item Id.
\item Id. at 594-95.
\item Id. at 594 n.15.
\item See AREEDA & HOVENKAMP, supra note 112, ¶ 736.1g, at 657-658.
\end{enumerate}
vide qualified accountants to survey usage rates, and Ski Co.’s continued dealings with inferior ski facilities in other markets.\textsuperscript{202}

The Tenth Circuit determined that the multi-day, multi-area, ski pass was an essential facility;\textsuperscript{203} and that Ski Co.’s actions evidenced intent to create or maintain a monopoly.\textsuperscript{204} Without addressing the essential facilities claim,\textsuperscript{205} the Supreme Court affirmed the decision.\textsuperscript{206} The Court declared that a monopolist does not have an unqualified duty to deal with competitors, but refusals to deal may have "evidentiary significance."\textsuperscript{207} The Court seemed to suggest that the refusal to deal might evidence an anticompetitive intent for the purposes of determining impermissible exclusionary conduct. Ski Co.’s radical departure from its cooperative effort with Highlands,\textsuperscript{208} coupled with a lack of valid business justifications,\textsuperscript{209} formed the basis of the Court’s conclusion that Ski Co. willfully acquired, maintained, and used its monopoly power in the destination ski resort market for anticompetitive and exclusionary purposes and this violated section 2 of the Sherman Act.\textsuperscript{210} Affirming the lower court’s decision, the Court upheld a jury instruction requiring jurists to find the defendant liable if “the defendant acted ‘with exclusionary or anticompetitive purpose or effect.’”\textsuperscript{211} Despite the possibility that nearly any act by a monopolist

\begin{itemize}
  \item \textsuperscript{202} \textit{Aspen Skiing}, 472 U.S. at 608-10.
  \item \textsuperscript{203} \textit{Aspen Highlands Skiing Corp. v. Aspen Skiing Co.}, 738 F.2d 1509, 1520-21 (10th Cir. 1984), \textit{aff’d}, 472 U.S. 585 (1985) (relying on United States v. Terminal Railroad Ass’n of St. Louis, 224 U.S. 383 (1912)).
  \item \textsuperscript{204} \textit{Aspen Highlands}, 738 F.2d at 1522.
  \item \textsuperscript{205} \textit{Aspen Skiing}, 472 U.S. at 611 n.44.
  \item \textsuperscript{206} \textit{Id.} at 611.
  \item \textsuperscript{207} As the Court explained, the refusal to cooperate may have evidentiary significance or give rise to liability under certain circumstances: “The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances.” \textit{Id.} at 601.
  \item \textsuperscript{208} The Court concluded that, by abandoning the All-Aspen ticket, Ski Co., a monopolist, had intentionally changed a pattern of distribution in the competitive market and therefore its conduct raised the inference that it had acted anticompetitively—on some basis other than efficiency. \textit{Id.} at 603-04.
  \item \textsuperscript{209} \textit{Id.} at 608. Refusal to accept Highlands Ski Pass Coupons resulted in a decline of short-run profits thereby evidencing that Ski Co. was interested in more than reducing competition by harming smaller competitors. \textit{Id.} at 610.
  \item \textsuperscript{210} \textit{Id.} at 611.
  \item \textsuperscript{211} \textit{Id.} at 595-96.
\end{itemize}
could render a monopolist liable pursuant to this jury instruction, several factors limit the instruction's application.

First, the Court's formulation emanates from the particular factual background of the case. The Court never implied that monopolists have a general duty to cooperate with rivals. Secondly, the decision does not mandate the particular terms on which Ski Co. must deal with Highlands. Nothing in the opinion prevents Ski Co. from charging monopoly prices for its goods and services either to its customers or to Highlands. Finally, the decision allows a monopolist to deny access to particular goods, services, and facilities if a legitimate business reason exists. The Court seemed to suggest that a legitimate business justification negates a monopolist's anticompetitive purpose.

3. Lower Courts' Distillation of Supreme Court Doctrine: The MCI Test

Attempts to distill Supreme Court precedent in a consistent and predictable way has confounded lower courts and generated a torrent of conflicting commentary. Given the Court's insistence on an ad hoc ap-

212. Id. at 597.
214. Aspen Skiing, 472 U.S. at 600 (stating that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor"). In this respect, the Court reiterated what has been the law since United States v. Colgate & Co., 250 U.S. 300 (1919), that a monopolist has a general right to refuse to deal with anyone, including its competitors, "[in the absence of any purpose to create or maintain a monopoly."
Colgate, 250 U.S. at 307; see also Becker v. Egypt News Co., 713 F.2d 363, 366 (8th Cir. 1983); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir. 1978) (en banc) ("It has always been the prerogative of a manufacturer to decide with whom it will deal.").
215. Aspen Skiing, 472 U.S. at 597. This was reinforced by the Supreme Court in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). The post-Aspen cases raise several distinct issues: (1) When does a monopolist have a duty to deal absent a legitimate business justification?; (2) If an alleged monopolist must offer a business justification for its refusal to deal with a competitor, who bears the burden of proof and what is the scope of that burden?; (3) Which business justifications have been accepted or rejected since Aspen? The answers to these questions show that, even after nearly a decade, the legacy of Aspen has not been fully defined.
216. The essential facilities doctrine has been the subject of a good deal of academic and other criticism because of its potential to frustrate rather than promote competitive behavior and economic efficiency. See, e.g., Kenneth L. Glazer & Abbott B. Lipsky, Jr., Unilateral Refusals to Deal Under Section 2 of the Sherman Act, 63 ANTITRUST L.J. 749, 756-59 (1995); William Blumenthal, Three Vexing Issues Under the Essential Facilities
proach to the essential facilities doctrine, the key issue is its proper scope. Courts should employ a theoretical framework that limits the doctrine’s applicability to situations that enhance competition. This is the only viable reconciliation of Supreme Court precedent, antitrust law’s conventional underpinnings, and congressional intent as embodied in the Telecommunications Act of 1996.\(^{217}\)

In *MCI Communications Corp. v. American Telephone & Telegraph Co.*\(^{218}\) (*MCI*), the Seventh Circuit devised a useful test delineating the applicable standards for invoking the essential facilities doctrine.\(^{219}\) MCI filed its original complaint on March 6, 1974, alleging four counts, including “monopolization, attempt to monopolize ... conspiracy to monopolize ... and conspiracy in restraint of trade ....”\(^{220}\) A major contention by MCI was the extent to which AT&T allowed MCI to interconnect with “local circuits.”\(^{221}\) According to MCI, it was imperative that MCI make contact with the AT&T operating companies’ local networks to provide “full end-to-end transmission.”\(^{222}\) MCI attested that AT&T unlawfully proscribed interconnections for particular switches and local lines.\(^{223}\) MCI further alleged that AT&T unlawfully refused multipoint interconnections.\(^{224}\) These behaviors, according to MCI, “constituted an abuse of AT&T’s monopoly power over facilities essential to MCI’s success.”\(^{225}\)

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*Doctrine: ATM Networks as Illustration, 58 Antitrust L.J. 855 (1990); David Reiffen & Andrew N. Kleit, Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simply Horizontal Monopoly?, 33 J.L. & Econ. 419 (1990).*

\(^{217}\) See *infra* notes 300-41 and accompanying text.

\(^{218}\) 708 F.2d 1081 (7th Cir. 1983).

\(^{219}\) Id. at 1132-33.

\(^{220}\) Id. at 1092.

\(^{221}\) Id. at 1131 ("The interconnection issue arose in part because MCI had facilities in place to serve only a limited number of cities and in part because MCI was unable to provide the local circuits necessary to connect its long-distance service to the telephone customer.").

\(^{222}\) Id. (noting that “[t]he dispute thus focuse[d] on the local interconnections between MCI towers and its customers’ premises and on ‘multipoint’ interconnections ... between MCI towers and certain AT&T long-distance circuits").

\(^{223}\) Id. at 1132. These included “interconnection for FX and CCSA services, both of which use switching machines, and for essentially local lines that led beyond a limited, defined geographical area.” *Id.*

\(^{224}\) *Id.*

\(^{225}\) *Id.* Although AT&T supplied some interconnections when required by a 1973 district court injunction, it promptly terminated those connections when the injunction was vacated on appeal because the same issues were pending before the FCC. MCI alleged that these terminations were aimed at maintaining AT&T’s monopoly by injuring MCI’s reputation as a reliable firm and were improper because an FCC decision on the very matter of interconnections was imminent.
The court set forth a four-part test to discern the merits of MCI's essentiality claim. This test has come to dominate the essential facilities landscape. Pursuant to MCI, courts must examine the following factors: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

The second element of the test is effectively part of the definition of what constitutes an essential facility. If a competitor can reasonably or practically duplicate the facility, the facility is not essential. The fourth element implicates the question of whether a legitimate business justification exists for the refusal to provide access to the facility. An analysis of each aspect of this test illuminates the proper role of the essential facilities doctrine.

4. Control of an Essential Facility by a Monopolist

The essentiality of a facility is the initial condition required by the doctrine before a duty to deal attaches. A facility is essential only when two conditions are satisfied: (1) an alternative viable facility is impossible or unduly expensive to construct, and (2) the facility is central to the

226. See Frank A. Edgar, Jr., The Essential Facilities Doctrine And Public Utilities: Another Layer Of Regulation?, 29 IDAHO L. REV. 283, 303 (1992/93) (noting that "[m]ost courts apply a variation of the test for liability set out by the Seventh Circuit Court of Appeals in MCI Communications Corp. v. American Telephone & Telegraph Company").

227. MCI, 708 F.2d at 1132-33 (citations omitted).

228. Id. at 1132 (noting that "a competitor's inability practically or reasonably to duplicate the essential facility" is the second element of the doctrine); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) ("To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.").

229. See infra notes 253-66 and accompanying text; see also Willman v. Heartland Hosp. E., 836 F. Supp. 1522 (W.D. Mo. 1993), aff'd, 34 F.3d 605 (8th Cir. 1994) (stating that the hospital was not an essential facility with respect to surgery when the general surgical market was competitive); Thompson v. Metropolitan Multi-List, 1990-2 Trade Cas. 69,173 (N.D. Ga.) (holding multi-listing service for real estate not an essential facility where a competing service existed), aff'd in part, 934 F.2d 1566 (11th Cir. 1991).

230. See infra notes 285-99 and accompanying text.

231. See Consolidated Gas Co. v. City Gas Co., 665 F. Supp. 1493 (S.D. Fla. 1987), aff'd, 880 F.2d 297 (11th Cir.), vacated, 889 F.2d 264 (11th Cir. 1989), reh'g granted, 912 F.2d 1262 (11th Cir. 1990), rev'd per curiam on non-antitrust grounds, 499 U.S. 915 (1991) (finding that a natural gas pipeline was essential and duplication was possible, though expensive and unnecessary, because the defendant's pipeline could easily carry gas for the plaintiff as well as the defendant.).
competitor's viability in the relevant antitrust market.\textsuperscript{232} A number of factors operate to satisfy the first condition: geographical and topographical conditions prevent construction of alternatives; a legal license precludes duplication;\textsuperscript{233} a natural monopoly exists;\textsuperscript{234} the unique physical characteristics of the resource are not duplicable; a bottleneck exists;\textsuperscript{235} the governmental regulatory environment prohibits the construction; the existing resource satisfies the minimum efficiencies of scale; public subsidies are necessary for construction and are lacking;\textsuperscript{236} a minimum market condition exists;\textsuperscript{237} natural fortuity disallows the construction of an alternative;\textsuperscript{238} lags in technology render the alternative infeasible or unduly expensive; or any other factor that provides a substantial cost disincentive for the creation of a viable alternative.\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{232} See Willman, 836 F. Supp. at 1522; Thompson, 1990-2 Trade Cas. ¶ 69,173 (holding multi-listing service for real estate not an essential facility where a competing service existed).
\item \textsuperscript{233} For example, a telecommunications provider may hold a patent upon a particular switching device, or be required to obtain a license, or have obtained either copyright or trademark protection for a database used in connecting customers across lines.
\item \textsuperscript{234} See generally Lawrence Sullivan, Elusive Goals Under the Telecommunications Act, 25 SW. U. L. REV. 487, 494-507 (1996); Joseph Farrell, Creating Local Competition, 49 FED. COMM. L.J. 201, 201 (1996) (noting that “[t]he bottleneck segment of the telecommunications network is traditionally viewed as a ‘natural monopoly’”).
\item \textsuperscript{235} A bottleneck occurs when a competitive market exists on either side of a particular monopoly. Consider, for example, a situation in which the geographical and topographical conditions render only one plausible mode to transmit telecommunications across a particular area and on either side of this area exists multiple suppliers and buyers. For examples of bottlenecks within the telecommunications industry, see Nowicki, supra note 7, at 373 n.56 (concluding that “[f]or local exchange purposes, a bottleneck exists in the access service market which supplies the connection between incoming telecommunications from outside areas and the local loop receivers”); Farrell, supra note 234, at 201.
\item \textsuperscript{236} The telecommunications industry provides many examples of how governmental subsidies affect entry by new suppliers in regulated markets. See David L. Kaserman & John W. Mayo, The Economics of Regulation: Theory and Policy in the Postdivestiture Telecommunications Industry, in PUB. POL’Y TOWARD CORP. 141, 148 (Arnold A. Heggstad ed., 1988) (noting that unregulated entities chose to enter unsubsidized portions of the telecommunications industry).
\item \textsuperscript{237} A minimum market typically means there are few buyers and sellers participating in the market. For example, a sparsely populated area could only support a single telecommunications provider.
\item \textsuperscript{238} Natural fortuity would exist if only one facility is able to produce a resource needed for the production of advanced communication technologies.
\item \textsuperscript{239} See Areeda & Hovenkamp, supra note 112, ¶736.2b, at 671.
\end{itemize}
Although a substantial reproductive cost may render a facility essential, the key factor is that the reproductive cost be enormous. The requisite high costs are most frequently typified by the existence of public subsidization. The substantiality of the requisite cost advantage, however, involves difficult questions of degree. A competitor can invariably replicate a facility at some price, constrained only by technological and legal impediments. The existence of technological impediments, legal prohibitions, or the necessity of public subsidization, coupled with a natural monopolistic market condition, are all factors in determining if a facility is essential.

Satisfaction of the second condition proves equally onerous because successful invocation of the doctrine imposes two distinct requirements: (1) a competitor must demonstrate that the facility is central to competitive viability, and (2) in a relevant antitrust market. Examination of

240. See, e.g., id. ¶ 736.1a, at 670 (describing an essential facility as providing a "significant cost advantage").

241. Presumptively, a monopolist depends upon substantial cost advantages to maintain its monopoly. However, using substantial cost advantage as a criteria for the invocation of the essential facilities doctrine is "too broad to be useful." See, e.g., id.

242. See id.

243. Courts and commentators have employed various modifiers to determine the degree of centrality required for invocation of the essential facility doctrine. See, e.g., id. ¶ 736.2d, at 675-76 (stating that the facility must be vital to competition). Still other courts have seemed to interlineate monopoly leveraging theory into the essential facilities doctrine. See, e.g., In re Air Passenger Computer Reservations Systems Antitrust Litig., 694 F. Supp. 1443, 1455 (C.D. Cal. 1988), aff'd, 948 F.2d 536 (9th Cir. 1991) (concluding that "when applying the essential facilities doctrine in the context of section 2 of the Sherman Act, a facility should be deemed essential to the downstream market only where control of the facility by a competitor poses a danger of monopolization of the downstream market"). This is true because:

The essential facilities doctrine is designed to deal with the danger that a monopolist in control of a scarce resource will "extend its power vertically from one level of production to an other." ... [A] facility becomes essential if, in restricting competitors' access to that facility, a monopolist gains a competitive advantage in another level of the market — that is, a market downstream or upstream from the market containing the facility itself.


244. See Southern Pacific Comm. Co. v. American Telephone & Telegraph Co., 740 F.2d 980 (D.C. Cir. 1984) (holding that local distribution facilities are essential facilities and by using its control over access to these essential facilities, AT&T had the ability to extend its natural monopoly power in the market for local public switched telephone service to the competitive market for intercity private line service). Twin Lab., Inc. v.
these requirements in inverse order necessitates the owner of the essential facility first to be a monopolist in the relevant antitrust market. An analysis of the relevant antitrust market requires an examination of the market allegedly controlled by the owner of an essential facility and the market for the unique facility itself. To illustrate the distinction, sup-

Weider, 900 F.2d 566, 569 (2d Cir. 1990) (determining that a valid essential facilities claim requires that the defendant possessed monopoly power in relevant antitrust market); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 369 n.4 (9th Cir. 1988) (rejecting, in dictum, applicability of the essential facilities theory because defendant had no monopoly power over supplies of propane to the relevant geographic market); Consul Ltd. v. Transco Energy Co., 805 F.2d 490, 494 n.11 (4th Cir. 1986) (rejecting the plaintiff's argument that "essential facility," "leveraging," and "market foreclosure" cases are not concerned with market definition). Some courts have mistakenly replaced the analysis of whether the defendant has power in the "relevant market" with a determination of whether the plaintiff is able to duplicate the defendant's facility. See MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132 (7th Cir. 1983) (noting that "a competitor's inability practically or reasonably to duplicate the essential facility" is the second element of the doctrine); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484, 487 (1st Cir. 1952) (suggesting that because "a monopolized resource seldom lacks substitutes," the existence of "alternatives will not excuse monopolization," so that a produce warehouse was the "most economical" facility where "[t]o impose upon plaintiff the additional expenses of developing another site, attracting buyers, and transshipping his fruits and produce by truck is clearly to extract a monopolist's advantage").

245. See International Audiotext Network v. American Telephone & Telegraph Co., 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 to which the plaintiff billing service provider was denied access because numerous other firms provided similar calling services.).

246. The first step in a court's analysis must be to define the relevant market or markets involved in the case. See Soap Opera Now, Inc. v. Network Publishing Corp., 737 F. Supp. 1338, 1343 (S.D.N.Y. 1990) (supporting the proposition that an essential facilities claim exists only when ownership of the facility enables a firm to monopolize a relevant market); Olympia Equip. Leasing v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (concluding the "relevant market" is the market "to which access had allegedly been foreclosed by the challenged conduct, not the market for similar business opportunities"). Other courts have mistakenly ignored the relevant market analysis. See, e.g., Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286, 1306 (5th Cir. 1971). As explained in Woods Exploration:

When one must "look" for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further.
pose an ILEC in the telecommunications industry owns all of the copper telephone lines that comprise the local exchange grid. Although the ILEC is a monopolist of copper telephone lines, the essential facilities doctrine is not premised upon a copper telephone line monopoly. Rather, application of the doctrine requires the examination of competition in the relevant market controlled by the facility, anticompetitive radiations among local telephony service providers. If cellular, fiber-optic, cable, and satellite technologies effectively compete with the copper telephone lines, the ownership of copper telephone lines would not be central to the provision of telephone service within the relevant market. Possession of a copper telephone line monopoly would also not be central to competitive viability if: (1) the copper telephone lines are available from another source, (2) copper telephone lines are easily duplicable by a competitor, or (3) other technology provides an equivalent substitute. Allowing access to copper telephone lines within the confines of these divisions enables a competitor to simply substitute itself for the incumbent local exchange pro-

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Id. But cf. City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517, 1532 (D. Kan. 1989), aff'd, 955 F.2d 641 (10th Cir. 1992) (expressly rejecting the plaintiffs' contention that Woods Exploration stands for the proposition that traditional market definition is not required under an essential facility claim, although observing that "under the 'essential facilities' doctrine, analysis of the relevant market may not take on the same implications as it does in other cases").

247. If they are essential, the owner is not using his ownership to obtain a monopoly. Therefore, antitrust liability would not attach.

248. See Data Gen. Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185 (D. Mass. 1991), aff'd, 36 F.3d 1147 (1st Cir. 1994) (holding that the defendant's diagnostic program for analyzing its computers was not an essential facility as to independent computer repairers where (1) such repairers were capable of producing their own diagnostic programs, and (2) the program was made available to purchasers of the defendant's computers); Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc., 737 F. Supp. 610 (D. Kan. 1990) (holding that Rural Telephone Services Company's refusal to license its white pages listings to the publisher of a competing directory was not the denial of an essential facility; the information contained in the listings could have been obtained economically from other sources); 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) (finding no violation under the essential facilities doctrine where others could have entered the market through alternative pipelines).

249. See Grumman, 761 F. Supp. at 185.

250. See Picker Int'l. v. Leavitt, 865 F. Supp. 951, 965 (D. Mass. 1994) (holding that a replacement part for a sophisticated machine was not an essential facility where the part had adequate substitutes); Flip Side Prod. v. Jam Prods., 843 F.2d 1024 (7th Cir. 1988) (declaring that a rock concert arena was not an essential facility where several alternatives were available); McKenzie v. Mercy Hosp., 854 F.2d 365 (10th Cir. 1988) (declining to find a hospital emergency room and obstetrical care unit essential facilities for a plaintiff who performed the same services in his own private office.).
vider. This substitution creates few (if any) pro-competitive effects and has the potential of chilling desirable behavior.251

Determining the required level of monopolistic control that ownership of an essential facility must have before antitrust liability attaches has spawned numerous judicial decisions. Some courts treat the threat of downstream monopolization as the sine qua non of a valid essential facilities claim.252 Other courts require that the control of the facility actually be accompanied by the power to eliminate competition in the relevant downstream market.

5. The denial of the use of the facility to a competitor

Under the essential facility doctrine, a valid antitrust claim is contingent upon the denial of access to the essential facility.253 Obviously, a competitor permitted to access an essential facility has little room to contest the actions of a monopolist. The denial need not be a total denial; rather, it is sufficient that the “terms of [access] be unreasonable in price, profit margin, time obligation, or other substantive criteria.”254 Additionally, denying access does not automatically implicate antitrust liability.255

251. See analysis infra part VI.
252. See In re Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1455 (C.D. Cal. 1988), aff’d, 948 F.2d 536 (9th Cir. 1991). ("[W]hen applying the essential facilities doctrine in the context of section 2 of the Sherman Act, a facility should be deemed essential to the downstream market only where control of the facility by a competitor poses a danger of monopolization of the downstream market.”); see also Consolidated Gas Co. v. City Gas Co., 912 F.2d 1262, 1292 (11th Cir. 1990) (Tjoflaj, C.J., dissenting), vacated, 499 U.S. 915 (1991), dismissed with prejudice on remand pursuant to settlement, 931 F.2d 710 (11th Cir. 1991). As explained in Consolidated Gas:

[T]he essential facilities doctrine is designed to deal with the danger that a monopolist in control of a scarce resource will “extend its power vertically from one level of production to an other.”... [A] facility becomes essential if, in restricting competitors’ access to that facility, a monopolist gains a competitive advantage in another level of the market—that is, a market downstream or upstream from the market containing the facility itself.

Id.
253. See David A. Balto, Access Demands To Payment Systems Joint Ventures, 18 HARV. J.L. & PUB. POL’Y 623, 640 (1995) (noting that the essential facilities doctrine “requires a monopolist to share its facility or business relationship where the denial of access would permit the monopolist to extend its monopoly into an adjacent market”).
254. Nowicki, supra note 7, at 366.
255. Numerous cases have expressly precluded liability under the essential facilities doctrine where the denial of access did not create a risk of monopolization in the “downstream” market. See, e.g., Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987) (holding the doctrine inapplicable to Port Authority’s refusal to allow a
Antitrust liability is premised on the enhancement of competition.\textsuperscript{256} Denying access to a competitor or potential competitor may do little to effectuate competition.\textsuperscript{257} Output and price-competition are unaffected so long as the monopolist is permitted to charge monopoly rents for use of the facility.\textsuperscript{258} A different result occurs when the monopolist operates in a regulatory environment. When a regulated monopolist denies access to a competitor and this denial aids in the evasion of rate regulation or undermines the regulatory competition enhancement scheme, an antitrust claim exists.\textsuperscript{259}

In situations involving firms that do not compete in the market dominated by the essential facility owner, a duty to deal does not attach, as a monopolist has little incentive to restrain competition in an upstream or downstream market in which the monopolist does not compete.\textsuperscript{260} A monopolist refusing to deal with a non-competitor may have a negative impact upon firms in competition in a downstream market. For example, dealing with firm A while simultaneously refusing to deal with firm B, firm A’s competitor, may enable firm A to charge lower prices, thereby distorting competition in a downstream market. Courts recognizing this

charter airline to use particular terminal because “the doctrine aims to prevent a firm with monopoly power from extending that power ‘from one stage of production to another, and from one market into another’...; [thus] it is difficult to see how denying a facility to one who, like [the plaintiff], is not an actual or potential competitor (of the facility owner) could enhance or reinforce [that owner’s] market power”); Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920, 927-28 (2d Cir. 1980) (finding the doctrine inapplicable where a monopolist has “no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively”).

\textsuperscript{256} See generally Pitofsky, supra note 3.

\textsuperscript{257} For example, a network-controlling firm may deny access to a second firm for reasons unrelated to competition. See Drinkwine v. Federated Publications, 780 F.2d 735, 740 (9th Cir. 1985) (noting that a newspaper’s refusal to carry a rival’s advertising insert was based on the rival’s failure to pay bills); HyPoint Tech., Inc. v. Hewlett Packard Co., 949 F.2d 874 (6th Cir. 1991) (finding that although the defendant’s withdrawal of a favorable service option hurt the plaintiff’s business, it effectively increased competition because it lowered the standard of service, making it easier for competitors to enter the business).

\textsuperscript{258} See AREEDA & HOVENKAMP, supra note 112, ¶ 736.2b, at 671.

\textsuperscript{259} See id.

\textsuperscript{260} See Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3rd Cir. 1983) (acknowledging that the essential facilities’ goal of competition enhancement would not be fostered by allowing a non-competitor access to an essential facility); Interface Group, 816 F.2d at 11 (noting that “it is difficult to see how denying use of a facility to one who ... is not an actual or potential competitor could enhance or reinforce the monopolist’s market power”); Garshman v. Universal Resource Holding, 824 F.2d 223 (3rd Cir. 1987) (refusing to apply the essential facilities doctrine when the plaintiff was not in competition with the essential facility owner).
phenomenon have entertained an essential facilities claim in situations where a monopolist has refused access to a non-competitor. This precedent, however, ignores the fact that refusal to deal with non-competitors neither produces competitive dominance in a vertically related market nor bolsters the monopolist's power in the monopolized market. The absence of these effects necessarily confines the essential facilities doctrine to refusals of a competitor or a potential competitor to deal with the owner of the essential facility.

261. See LaPeyre v. Federal Trade Commission, 366 F.2d 117, 120 (5th Cir. 1966); Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920 (2d Cir. 1980). Although not stating this explicitly, the decision in Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979), in which the essential facility charge was brought by a customer-competitor, implicitly supports extending the doctrine to non-competitors. The FTC had not found it necessary that the denial be to a competitor in order to grant relief. But see Grand Caillou Packing Co., 65 F.T.C. 799, 868-69 (1964), aff'd in part, rev'd in part sub nom. LaPeyre, 366 F.2d at 117 (separate opinion of Commissioner Elman) (suggesting that a finding of harm to competitor was not necessary for a violation of section 5 of the Federal Trade Commission Act). The Fifth Circuit upheld the portion of the FTC decision concerning the denial to a non-competitor. See LaPeyre, 366 F.2d at 121-22; see also Getaway Travel, Inc. v. Philadelphia, No. 88-3126, 1989 U.S. Dist. LEXIS 2673, at *3 (E.D. Pa. Mar. 16, 1989) (holding that the doctrine was inapplicable to the denial of airline terminal counter space to a travel agency because such space was not essential to the conduct of agency business and the agency was "not a competitor of any defendant which has monopoly control over the Philadelphia airport.").

262. See Official Airline Guides, 630 F.2d at 920 (acknowledging that arbitrary refusals to deal among different customers in a market in which a monopolist does not directly participate does not impair competition in a downstream market).

263. See id. (opining that a monopolist is legally free to refuse to deal with non-competitors, so long as the monopolist does not have a purpose to restrain competition or enhance or expand monopoly power). The Official Airline Guides court concluded that refusing to deal with a non-competitor neither evinced an anti-discriminatory purpose nor enhanced monopoly power. In reaching this conclusion, however, the court agreed that competition in another market might improve if access to an essential facility was ordered. Additionally, hindered access often hurts the monopolist. See Weiss v. York Hospital, 745 F.2d 786 (3d Cir. 1984) (denying an essential facilities claim on the grounds that the monopolist denied access to a non-competitor and no incentive existed to monopolize a downstream market because providing access would maximize the monopolist's revenue). Thus, denials of access are often undergirded by a legitimate business justification or constitute a bad business decision for which antitrust policy is ill-equipped to remedy. See Areeda & Hovenkamp, supra note 112, ¶ 736.2, at 685.

264. See TV Communications Network v. ESPN, 767 F. Supp. 1062 (D. Colo. 1991), aff'd, 964 F.2d 1022 (10th Cir. 1992) (holding that the essential facilities doctrine did not apply to a cable television programmer's refusal to deal with a cable operator because the two were not competitors, but stood in a vertical relationship); Garshman v. Universal Resources Holding, Inc., 824 F.2d 223, 230 (3rd Cir. 1987); Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987). Courts usually permit unilateral refusals by a defendant who does not compete with the plaintiff in another market.
6. The feasibility of providing the facility

The scope of the doctrine is further limited by the existence of a legitimate business justification for denial of access. Several ensuing subordinate questions arise. First, what constitutes a legitimate business purpose and what criteria are to be used to evaluate whether a business purpose is legitimate? Second, does the fact-finder have unfettered discretion to determine the legitimacy of the business justification? Third, does the monopolist have deference in devising a legitimate business justification? Fourth, does the monopolist’s state of mind factor into the legitimacy afforded the business justification? And finally, does a legiti-

See, e.g., Official Airline Guides, 630 F.2d at 920 (single publisher of an airline flight schedule guide not liable for refusal to include plaintiff airlines); Homefinders of Am., Inc. v. Providence Journal Co., 621 F.2d 441 (1st Cir. 1980) (monopolist newspaper need not sell space to a rental service bureau); Mannington Mills, Inc. v. Congoleum Indus., 610 F.2d 1059, 1069 (3d Cir. 1979) (“We seriously doubt that an arbitrary or discriminatory unilateral refusal to deal by a lawful monopolist is actionable under § 2 of the Sherman Act.”); Fulton v. Hecht, 580 F.2d 1243, 1247-48 (5th Cir. 1978) (single-firm owner of race track); Fishman v. Wirtz, 807 F.2d 520 (7th Cir. 1986). Similarly, while not couching the issue in essential facilities terms, the Second Circuit found that the Official Airline Guide was not required to provide access to a customer who was not a competitor. See Official Airline Guide, 630 F.2d at 927-28.

265. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-10 (1985) (placing an affirmative duty to deal on a monopolist that controls an essential facility, absent a legitimate business justification). A duty to deal will not be imposed where a monopolist offers a legitimate business justification to excuse its refusal. See, e.g., Town of Massena v. Niagara Mohawk Power Corp., 1980-82 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y. Sept. 8, 1980) (permitting a power company to refuse to ‘wheel’ power to a municipally owned retail electric distribution system because the town’s subtrans-

mission plan was unsound from an engineering standpoint). Courts have recognized valid business justifications in a wide range of circumstances. See, e.g., Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 (5th Cir. 1980) (refusal to sell electricity to mall owners for resale to business tenants); Homefinders of Am., 621 F.2d at 441 (refusal to print admittedly deceptive advertisement); Aspen Skiing, 472 U.S. at 605, 608 (determining that liability under an attempted monopolization analysis was predicated on the defendant’s “failure to offer any efficiency justification” or other “valid business rea-

sons” for its refusal to continue joint ski lift ticket marketing program with competitor); In re Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1456 (C.D. Cal. 1988), aff’d, 948 F.2d 536 (9th Cir. 1991); Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 704 F. Supp. 1309, 1325 (4th Cir. 1989), aff’d, 924 F.2d 539, 545 (1991) (finding that it was “not feasible” for CSX to provide trackage rights without altering the very basic nature of its permissible business).

266. See AREEDA & HOVENKAMP, supra note 112, at 660.

267. See Areeda, supra note 147, at 849.
mate business justification accompanied by an anticompetitive intent warrant a finding of illegitimacy? 268

The answers to these questions continue to confound courts and commentators. In general, "a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare." 269 A proper distillation of a legitimate business justification defense, however, must recognize such a defense at both a micro and a macro level. 270 The micro level consists of the particular facts of each case. 271 For example, if a firm can demonstrate that providing access would violate an existing regulatory scheme, a legitimate business justification exists. 272 Telephone interconnection cases provide good examples. AT&T was a natural monopoly protected from rivalry by public restrictions on entry. 273 Prior to divestiture, AT&T provided local and long-distance service. 274 Rival producers of long-distance service needed to connect their long-distance lines with callers through the local telephone exchanges. 275 AT&T allegedly misused its local monopolies to protect its long-distance power by denying or obstructing those interconnections. 276 The Seventh Circuit held that notwithstanding any duty to interconnect, AT&T may deny interconnection if it had a "reasonable basis in regulatory policy to conclude, and in good faith concluded that denial of interconnection is required by concrete, articulable concerns for public interest ...." 277 AT&T failed to articulate any such legitimate reason. 278

268. See Oahu Gas Serv. v. Pacific Resources, 838 F.2d 360 (9th Cir. 1988) (refusing to hold a defendant liable where the defendant had both economically legitimate motives for refusing to deal with competitors and a desire to restrict the supply of goods). "A legitimate purpose renders any accompanying purpose irrelevant." AREEDA & HOVENKAMP, supra note 112, ¶ 736.2, at 688.


270. See Areeda, supra note 147, at 850-51.

271. See id.

272. See City of Malden v. Union Elec. Co., 887 F.2d 157 (8th Cir. 1989) (noting that the owner of an essential facility, an electric transmission line, could refuse to deal if dealing was impractical under a regulatory tariff); 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) (finding no illegal denial of an essential facility where the owner was constrained by a regulatory regime in providing access to others).


274. See id. at 1093.

275. See id. at 1093 n.9.

276. See id. at 1094.

277. See id. at 1137.

278. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.2c, at 674.
The proper methodology for determining the legitimacy of the monopolist's business justification at the micro level begins with the plaintiff's burden to persuade the fact-finder that the defendant's refusal is unreasonable. The burden of production then shifts to the defendant to provide evidence establishing a legitimate business justification. An important caveat exists: Claims of economic self-interest rarely serve as a legitimate justification for denying access. A firm is never obliged to sacrifice legitimate business objectives. Upon evidencing a legitimate business justification, the plaintiff is charged with demonstrating that the defendant's justification is merely pretextual.

The essential facilities doctrine also recognizes a legitimate business justification at the macro level. Macro legitimate business justifications do not pertain to any particular firm, but constitute "propositions of general policy." For example, the justification for refusing access to a patented invention does not implicate the practicality of providing access. Such a denial is predicated on social policy grounds that access would both deprive a lawful monopolist of its legitimate rewards and chill desirable innovative activities. Determining whether access deprives a law-

279. See id. ¶ 736.2, at 688.
280. See id.
281. But see Olympia Equip. Leasing v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986) (holding that Western Union's desire to enhance sales of its own product constituted a legitimate business justification). The facts of Western Union illuminate the court's reasoning. Western Union sought to sell terminals used in providing telex service. Olympia purchased Western Union's terminals for resale. For a period of time, Olympia relied upon Western Union's sales force and vendors' list to sell terminals. Western Union determined that the liquidation of its own terminals was occurring too slowly. Western Union responded by discouraging its sales force from promoting Olympia owned terminals. Olympia had no sales force of its own. The Seventh Circuit determined that the essential facilities doctrine was inapt because firms have no duty to sell the wares of their competitors and all firms have access to advertising and marketing devices. Thus, Western Union did not engage in predatory acts worthy of antitrust proscriptions.
282. See Oahu Gas Serv. v. Pacific Resources, 838 F.2d 360 (9th Cir. 1988) (concluding that antitrust liability did not attach when the defendant refused to expand his plant when economic conditions did not support such an expansion); Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991) (noting that the essential facilities doctrine does not require a defendant to cut back its own use of its own facility in order to serve a competitor).
283. See Areeda & Hovenkamp, supra note 112, ¶ 736.2, at 688.
284. See Areeda, supra note 147, at 851.
285. Id.
286. See Nowicki, supra note 7, at 372:

[M]andated interconnections actually would stimulate a skewed competitive result because any service provider requesting interconnections
ful monopolist of legitimate rewards or chills desirable behavior provides the requisite criteria for determining the applicability of legitimate business justifications at the macro level. Macro level policy decisions necessitate the oversight of a judge rather than a jury. This requirement facilitates the development of consonant standards for similar firms in similar markets, and removes the determination of national economic policy from the unqualified hands of jurors.

C. The Role of the Regulatory Regime Within the Essential Facilities Doctrine

Invocation of the essential facilities doctrine necessarily implicates the prices upon which the court orders compulsory access. Plaintiffs invariably will challenge the defendant’s access price on the grounds that the price: (1) is so excessive as to constitute a denial of access, (2) impedes price competition, or (3) precludes a reasonable rate of return. Courts are often ill-equipped adequately to assume the role of a price regulatory agency by entertaining such claims. Courts willing to undertake a price control function still must grapple with the unyielding antitrust principal that a legal monopolist may charge monopoly rents for an essential facility. Charging monopoly rents for access does little to effectuate compe-

would probably receive them. Also, mandated interconnections would discourage innovations: market entrants would have no need to innovate because interconnections are readily available, and market incumbents would have no incentive to innovate because they would be forced to share anything they produced. Mandated interconnections would also stifle the true competitive functioning of the market.

287. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.2, at 689.
288. See Areeda, supra note 147, at 851.
289. See id.
290. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.2, at 692.
291. According to one commentator:

[T]he essential facility doctrine should not be invoked unless there is a pre-existing regulatory agency capable of adequately supervising relief, and there are a number of reasons for completely eliminating the doctrine as an antitrust cause of action. Essential facility issues often are best addressed on an industry-wide basis, through legislation or administrative regulation.


292. See David J. Gerber, Rethinking The Monopolist’s Duty To Deal: A Legal And Economic Critique Of The Doctrine Of ‘Essential Facilities,’ 74 Va. L. Rev. 1069, 1087 (1988) (noting that a monopolist can generally “charge a fee that extracts monopoly rents from the users’ market”). This situation does not arise when a monopolist is precluded from extracting such fees in the case of a regulated industry. See id.
tition within a relevant antitrust market. Additionally, the essential facilities doctrine heavily relies on legal precedent derived from various courts resulting in a lack of coherence and consistency.

The regulatory environment rectifies many of the problems that elude antitrust enforcement. For example, the existence of a regulatory agency both facilitates the price control function and provides an industry-specific solution. Regulatory agencies have the expertise and continuing relationship with a regulated industry so as to eliminate the presumption that a monopolist may charge monopoly rents for access. It is within this regulatory context that the essential facilities doctrine has unique relevance.

The case for applying the doctrine is strongest when a regulated monopolist's "denial of access aids [the monopolist] in evading rate regulation or undermines the regulator's plan to encourage rivalry in either the primary or adjacent markets." This situation currently confronts the telecommunications industry.

VI. THE ROLE OF THE ESSENTIAL FACILITIES DOCTRINE WITHIN THE DEREGULATED TELECOMMUNICATIONS INDUSTRY

Despite the transformation of the telecommunications industry from "technical balkanization" to a "reality of technological convergence," the local telephony market remains highly concentrated. Currently, ILECs control 99.7 percent of the local exchange market. The advent of section 251 was intended to provide a transitory legislative decree aimed at facilitating a competitive local exchange market via interconnectivity, un-

293. Obviously the price competition cannot occur when a competitor is forced to charge monopoly rents simply to recover the costs of access.
294. See generally Pitofsky, supra note 3.
295. Regulators often fulfill the role of taking into account antitrust considerations in the regulatory process. This is especially true where the regulatory agency has been commanded specifically to consider the competitive aspects of its decisions. See Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).
296. See generally Pitofsky, supra note 3.
297. See AREEDA & HOVENKAMP, supra note 112, ¶ 736.2b-c, at 672-75.
298. Id. ¶ 736.2a, at 665. Some commentators go as far as to claim that some regulatory agencies are ill-equipped to handle some situations which, without application of the antitrust laws, would harm both consumers and competition. See, e.g., Bruce M. Owen, Determining Optimal Access to Regulated Essential Facilities, 58 ANTITRUST L.J. 887, 893 (1990).
299. See generally Krattenmaker, supra note 8.
bundling, and resale provisions.301 Despite its purpose, congressional enactment of section 251 is incongruous with a transitional regulatory regime free from artificial impediments. The result is price competition without limitation and retarded growth in facilities-based competition.

Section 251 is premised upon the notion that competition, rather than regulation, provides the necessary incentive to spur innovation and alternative telephony services.302 Section 251, however, establishes highly discounted resale rates, unbundling below-full-cost items, and ordered interconnectivity.303 ILECs confronted with below cost resale and unbundling requirements have little incentive to invest in the public network when doing so automatically benefits competitors.304 Section 251's interconnectivity, unbundling, and resale provisions also discourage incumbents and competitors from directing their efforts toward alternative technologies and delivery systems. Entrants permitted to access an incumbent’s facilities are obligated to obtain market share by engaging in price warfare for delivery differentiation.305

Absent substantial improvements in efficiency, price competition necessarily entails revenue losses. Telecommunication providers are forced to lower prices to obtain a sizeable customer base.306 Discursively, the development of alternative telephony infrastructure is highly capital intensive and generally requires subsidization via the price mechanism.307 Reduced revenue coupled with capital intensive technological development threatens to create stasis for the industry where competitors simply divide a dollar market without simultaneously facilitating new demand sources via technological differentiation.308 The resulting predicament threatens to freeze current communication modes for the next ten years.309

Additionally, section 251's resale, unbundling, and interconnectivity requirements remain effective until explicitly superseded by regulations

301. See supra notes 69-79.
302. See id.
304. See id.
306. See id.
307. See Laurence Huntley, The Telecommunications Revolution: A Survivor’s Guide, 230 TELEPHONY 78, 88 (1996) ("[E]very extra call or minute is in practice a direct contribution to fixed costs and overheads. Once these are paid for, incremental traffic is virtually 100% profit.").
308. See Alexander, supra note 305, at 56.
309. See id.
prescribed by the FCC.\(^{310}\) The absence of any clear statutory time limitation on section 251 expressly contradicts congressional findings\(^ {311}\) and undermines the rationale underlying the 1996 Act. Three problem areas may arise. First, Congress intended section 251 to expedite facility-based competition by first fostering price-based competition on the assumption that price-based competition enables new entrants to acquire a requisite customer base from which they may construct rival facilities.\(^ {312}\) Many of the new entrants, however, are multi-billion-dollar service providers such as AT&T, Sprint, and MCI. These service providers have historically invested billions of dollars in their brand images and have obtained more than 80 percent customer awareness.\(^ {313}\) Entrants armed with an arsenal of name-brand recognition and capital base do not seem to require the ability to piggyback off incumbents' facilities.

Second, section 251 makes no distinction among these multi-billion-dollar entrants and smaller revenue based entrants with respect to interconnectivity, unbundling, and resale. Smaller revenue based entrants face a daunting challenge in attempting to compete with large scale service providers other than incumbents possessing name-brand recognition and large capital bases.\(^ {314}\) The 1996 Act thus paves the way for an oligopolistic market structure in which well-financed and well-known entrants piggyback off the facilities of incumbents, driving prices down and stripping the incumbents of their most profitable customers while simultaneously overpowering smaller, revenue-based competitors. Third, an absence of temporal limitations on the 1996 Act forces incumbents to provide access, resale, and unbundling in perpetuity. Incumbents are thus forced to commit massive resources to the sustenance of the current copper wire system. As technological developments render this system obsolete, incumbents are placed at a competitive disadvantage. Entrants are encouraged to resell copper wire service in an effort to cross subsidize the development of new technology. Without proper judicial interpretation, the 1996 Act could simultaneously relegate incumbents to ditch diggers and force service repair personnel to maintain an outdated exchange system for competitor exploitation.

\(^{310}\) See supra notes 69-79.

\(^{311}\) See id.


\(^{313}\) See generally Vaneetha Demski, Finding the Formula for Success, 232 TELEPHONY 74 (1997).

\(^{314}\) See id. (recognizing that commentators believe "that because of the tremendous amount of money that interexchange carriers have already spent on their advertising, the LECs can never catch up").
Ironically, the 1996 Act provides no evidence of congressional intent to divest incumbents of their local networks, even if some natural monopolies survive. Indeed, the 1996 Act verifies congressional intent that ILECs be vigorous competitors. Mandating interconnection, however, enables a competitor to abstain from economically and technologically duplicating the incumbent’s facilities. The 1996 Act permits a competitor simply to request interconnection without further justification or explanation. Competitors thus have little incentive to construct alternative rival facilities or engage in highly capital intensive technological development. LECs are faced with a Hobbesian choice of either incurring substantial development costs while risking the potential of allowing competitor access, or choosing not to take the development initiative, instead relying upon competitors to develop the new facility. Either choice has deleterious consequences upon competition by discouraging the development of new facilities among competitors.

The solution lies in the antitrust principles embodied within the essential facilities doctrine. Congress explicitly recognized the role of antitrust enforcement in the deregulation of the telecommunications industry but failed to interlineate antitrust principles properly within the confines of section 251. Instead, Congress generated a highly complex regulatory environment. The Interconnection Order alone comprises more than 700 pages of regulations and guidelines. The highly regulatory environment is entirely inconsistent with congressional findings that the “deployment of

315. See Stoffels, supra note 301, at 38.
316. See id.
317. See Nowicki, supra note 7, at 369-70.
318. A legislative mandate requiring one to “share” innovations when this innovation has led to a position of market domination seems contrary to public policy. The judiciary in United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir.1945), expressed the same concern, stating that “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.” Even the spokesman for the Department of Justice, Antitrust Division, conceded that valid protest can exist when a facility’s owner is denied a legitimate return on his investment. See Michael Boudin, Antitrust Doctrine and the Sway of Metaphor, 75 GEO. L.J. 395, 402 n.52 (1986). The argument against mandating interconnections is best summarized by the simple observation that this is a policy consideration; “[r]equired sharing discourages building facilities … even though they benefit consumers.” Areeda, supra note 147, at 851. A legislative mandate of interconnection would fuel these concerns, while a restraint via the antitrust laws would not.
319. See supra notes 69-79. Governmental regulation and antitrust laws may be viewed as flip sides of the same coin; “regulation is an alternative to antitrust” laws, as both focus on a competitive goal. STEPHEN BREYER, REGULATION AND ITS REFORM 158 (1982).
320. See Rose, supra note 303, at 10.
existing and future advanced, multipurpose technologies will best be fos-
tered by minimizing government limitations on the commercial use of those technologies." 321

Fortunately, the existing provisions of section 251, coupled with modification of section 252 pricing terms, enable a regulatory reduction and the infusion of the essential facilities doctrine. Section 251 requires that access, resale, and unbundling be just, reasonable, and nondiscriminatory. In determining just, reasonable, and nondiscriminatory interconnectivity, resale, and unbundling terms the following criteria should be considered. First, the duration of ordered resale must reflect the relative size of each entrant. Well-established interexchange market carriers should receive less deference than fledgling exchange providers when determining the continuance of the resale provisions as applied. Second, below-cost resale must be limited in duration to the time necessary to give each carrier an adequate opportunity to establish a necessary customer base. Carriers such as MCI and AT&T obviously need less time to establish the requisite customer base than lesser-known entrants. This limitation would preclude carriers with substantial name recognition and an established customer base from overly relying on an incumbent’s facilities. Third, regulators must determine access and unbundling terms by drawing upon the essential facilities doctrine. The essentiality of a facility becomes the first relevant inquiry. 322 The particular facility must be central to competition in the local telecommunications market and not practicably duplicable. 323

Within the local exchange networks, operational features such as switching elements, transport elements, signaling systems, and databases seem to satisfy these requirements. 324 The essentiality of ILEC’s local exchange networks arise inter alia from legal licenses; the existence of a

322. See discussion supra part V.
323. See id.

[T]he local loop is not an essential facility because there exist many alternatives to the existing local exchange network provided by the regulated local exchange carriers. The multiple technologies currently available for telecommunications transmission, including coaxial cable, fiber optics, and wireless technologies such as cellular and microwave, are sufficient to establish the feasibility of constructing alternative transmission facilities to supplement, compete with, or even replace portions of the local exchange network provided by the RBOCs.
bottlenecks; a historically rigid regulatory environment; the satisfaction of minimum efficiencies of scale by the existing local exchange loop; the necessity of public subsidies for the development of relevant exchange loop elements and telephony services; the presence of a minimum market within rural areas; the high cost associated with the development of technologically viable alternatives; and the ability of ILECs to cross-subsidize future endeavors by their ownership of the local exchange loop.\textsuperscript{325} Despite the fact that technological development promises to erode the essentiality of the facilities and generate facilities-based competition,\textsuperscript{326} ILECS currently supply the wires, which provide the path for the vast majority of voice and data services reaching consumers.\textsuperscript{327} Replication of the essential elements built over 120 years and valued at $270 billion would cost trillions of dollars.\textsuperscript{328} Thus, ILECs have effectively obtained a vital bottleneck on the local exchange market.\textsuperscript{329}

The essential facilities doctrine recognizes that the effect the copper telephone line monopoly has is limited over time.\textsuperscript{330} As cellular, fiber-optic, cable, and satellite technologies become more prevalent, ownership of a copper telephone delivery system no longer remains central to the

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\textsuperscript{325} See Lawrence A. Sullivan, \textit{Elusive Goals Under The Telecommunications Act: Preserving Long-Distance Competition Upon Baby Bell Entry And Attaining Local Exchange Competition: We'll Not Preserve the One Unless We Attain The Other}, 25 Sw. U. L. REV. 487, 496 (1996) (noting that the “RBOCs have long been and still remain LX monopolists protected by the vast sunk costs of their systems and the technological and economic constraints on duplicating them as well as by regulation and exploitative conduct”).

\textsuperscript{326} See Spulber, \textit{supra} note 62, at 38-39:
Improvements in computers and related switching technology allow different firms to build and operate multiple networks that can then be interconnected. The costs of interconnection have fallen substantially as the costs of switching technology have decreased. Open network architecture further reduces the benefits of a centrally switched network. In addition, new developments in switching have allowed customer premises equipment, such as the private branch exchange (PBX) and local area networks, to be substituted for transmission and switching by the telecommunications utility. These significant developments promise to render the concept of a natural monopoly telecommunications network obsolete.

\textsuperscript{327} Will Rodger, \textit{Telecommunications Reform Doesn’t Ring True}, \textsl{INTER@CTIVE WEEK}, Feb. 10, 1997, at 64.

\textsuperscript{328} See id.

\textsuperscript{329} See id.

\textsuperscript{330} See discussion \textit{supra} part V.
\end{flushright}
provision of telephone service within the relevant exchange market.\textsuperscript{331} If the potential market entrant is able to duplicate the copper lines monopoly with a new telecommunications technology, the essential facilities doctrine does not apply.\textsuperscript{332} Thus, the essential facilities doctrine recognizes the dynamic nature of the telecommunications industry and serves as a catalyst for advanced multi-purpose technologies.\textsuperscript{333} Potential market entrants unwilling to forgo the expanding telecommunications market will either develop alternate facilities or merge with other telecommunications providers to engender facilities-based competition with the incumbent provider.\textsuperscript{334}

The second inquiry pertains to the denial of the essential facility to a competitor.\textsuperscript{335} Because the 1996 Act mandates interconnectivity and unbundling, this question seems moot. The terms of access, however, remain relevant. Access terms pertaining to a facility deemed essential should remain consistent with section 252. The essential facilities doctrine forecloses an entrant’s ability to free ride on nonessential facilities owned by the ILECs.

The final inquiry pertaining to the essential facilities doctrine is the feasibility of providing access to the facility.\textsuperscript{336} The 1996 Act partially addresses this issue. Section 251 permits regulators to deny access plans that are contrary to the public interest.\textsuperscript{337} This broad policy statement rec-

\textsuperscript{331} See Spulber, supra note 62, at 34-35. The traditional justifications for regulating industries, such as the presence of natural monopoly technologies, may no longer apply in the presence of technological change and competitive entry. See id. at 29, 34. Multiple telecommunications technologies in addition to the traditional copper wire—including coaxial cable, fiber-optic cable, satellite, microwave, cellular, and other radio technologies—signify that it may no longer be possible to define a natural monopoly technology for local telephony. See id. at 34.

\textsuperscript{332} See Nowicki, supra note 7, at 369-70.

\textsuperscript{333} See id. at 368 (arguing that the essential facilities doctrine “litigation would bring the technological discussion to the forefront”).

\textsuperscript{334} See id. at 370. It seems as though telecommunication providers have chosen the latter route. See Rodger, supra note 327, at 64 (noting that one year after the 1996 Act, media and telephone companies merged like never before. U.S. West purchased Continental Cablevision Corp. for $10.8 billion, Walt Disney Co. purchased Capital Cities/ABC Inc. for $19 billion, Bell Atlantic Corp. and Nynex Corp. agreed to merge for $22.7 billion, SBC Communications Inc. purchased Pacific Telesis Group for $16.7 billion, Time Warner Inc. purchased Turner Broadcasting for $7.8 billion, British Telecommunications PLC purchased MCI Communications Corp. for $20 billion, WorldCom Inc. purchased MFS Communications Co. for $12 billion, and Westinghouse Electric Corp. purchased Infinity Broadcasting Corp. for $3.9 billion).

\textsuperscript{335} See discussion supra part V.

\textsuperscript{336} See id.

ognizes a legitimate business justification for denying access at the macro level. The ability to deny access plans should also extend to micro legitimate business justifications when an incumbent can establish that access is not technically or economically practicable. The nature of the existing local loop limits the applicability of a micro level business justification.

Disputes will invariably arise over the essentiality of a particular facility or the existence of a legitimate business justification. Infusing the essential facilities doctrine into the 1996 Act's interconnectivity, unbundling, and resale provisions, however, provides a superior mechanism to continuing adherence to the rigid anticompetitive terms of section 251 for achieving ordered deregulation of the telecommunications industry. Simply allowing access to copper telephone delivery systems without invocation of the essential facilities doctrine enables a competitor to substitute itself for the incumbent local exchange provider. This substitution has limited pro-competitive effects and has the potential of chilling desirable behavior. Nothing in the legislative history of the 1996 Act suggests that Congress intended such a skewed competitive result.

VII. CONCLUSION

Recognition of the essential facilities doctrine provides invaluable transition rules and criteria in the ordered deregulation of the telecommunications industry. Infusing essential facilities principles within section 251 of the 1996 Act creates investment incentives and ensures a competitive marketplace by mandating interconnectivity, resale, and unbundling at competitive rates only when a monopolist denies access to a facility essential to competition in the local telecommunications market that cannot be practicably duplicated by a competitor. The essential facilities doc-

338. See Nowicki, supra note 7, at 371-72 (arguing that the rigidity of the interconnection order is unnerving).

The Congressional mandate on interconnections in § 101 of the Act makes the denial of access virtually unlawful per se for local exchange carriers. The obligation of interconnection seems directly opposed to the theory that “denial of access is never per se unlawful.” ... While Sherman Act § 2 claims allow flexibility, mandated interconnection allows none. Even at the most basic level, in achieving the goal of competition, mandating interconnections is wrong. Regulating by mandating interconnections “replicates the results of competition.” The antitrust laws, however, “seek to create or maintain the conditions of a competitive marketplace.” Congress intended a competitive marketplace, not a marketplace that replicates competition.

Id. (internal citations omitted).

339. See discussion supra part V.
trine thus provides an incentive for facilities-based competition necessary to achieve the congressional goal that "all Americans, regardless of where they may work, live, or visit, ultimately have comparable access to the full benefits of competitive communications markets." \(^{340}\)

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