PILLSBURY WINTHROP LLP

1133 CONNECTICUT AVENUE NW WASHINGTON, DC 20036 202.775.9800 F: 202.833.8491

May 30, 2003

Kenneth P. Quinn
Phone: 202.775.9898
kquinn@pillsburywinthrop.com

The Honorable Kirk Van Tine
General Counsel
Office of the General Counsel, C-1
Department of Transportation
400 7th St., S.W.
Washington, D.C. 20590

Re: CRS Regulations, Docket Nos. OST-97-2881; OST-97-3014; OST-98-4775; OST-99-5888

Dear Kirk:

This letter calls your attention on behalf of our client Sabre Holdings Corporation ("Sabre") to an amicus brief filed by the government last week in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, Supreme Court Docket No. 02-682 (copy attached). It urges the Court to reject the "essential facilities" and "monopoly leveraging" doctrines as contrary to the text and policy of the Sherman Act. The analysis in the joint brief by DOJ's Antitrust Division and the Federal Trade Commission has special relevance to the Department's draft CRS Regulations because that proposal purports to be justified by these doctrines.

This DOJ/FTC brief presents a powerful analysis that explains why neither doctrine is consistent with current antitrust law or sound economics. Its primary argument is that both doctrines disregard the basic antitrust requirement that the Sherman Act's prohibition on monopolization applies only where exclusionary conduct creating or maintaining monopoly power has been shown. The DOJ/FTC brief also explains that both doctrines rest "on the unstated and incorrect assumption that the antitrust laws require a monopolist – either through the 'essential facilities' or 'monopoly leveraging' doctrines – to assist competitors." (p. 29) To accept these theories "would fundamentally transform the Sherman Act so as to require monopolists to pull their competitive punches, assist their competitors, convert themselves from retailers into wholesalers, and share monopoly profits on demand." (p. 30) That, the antitrust agencies point out, "is not conduct the Sherman Act requires." (*Id.*)

The analysis in the government's amicus brief exposes fatal flaws in the draft CRS Regulations. The proposed rules rely principally on two arguments: first, a misstatement of *Aspen Skiing's* holding that otherwise exclusionary conduct is permitted if it is efficiency enhancing; and second, an application of the erroneous essential facilities and monopoly leveraging doctrines. The Department acknowledged the error of its reliance on *Aspen Skiing* the day before the Comments were due on March 17, 2003. The DOJ/FTC brief now undermines the Department's remaining reliance on the essential facilities and monopoly leveraging doctrines to justify the regulation of computer reservation systems. With this removal of the Regulations' foundation by the federal government's expert antitrust agencies, it seems likely that any attempt to regulate CRSs on this basis would fail on judicial review. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

We respectfully submit that this latest governmental brief underscores the infirmity of the NPRM and independently justifies its withdrawal and expiration of the current rules on the January 31, 2004 scheduled sunset date. Pursuant to the Department's rules of practice, we have filed a copy of this letter and the government's amicus brief in *Trinko* in the above-referenced public docket. Thank you for your consideration.

Sincerely,

Kenneth P. Quinn

Enclosure

cc: T. Ray
E. Gellhorn

Supreme Court, U.S.
FILED
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CLERK

No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC., PETITIONER

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AND THE FEDERAL TRADE COMMISSION
AS AMICI CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

R. HEWITT PATE
Acting Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
DAVID SEIDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM E. KOVACIC
General Counsel
Federal Trade Commission
Washington, D.C. 20403

QUESTION PRESENTED

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws, and thus a strong interest in the correct application of those laws.

STATEMENT

This case concerns the relationship between the Nation's antitrust laws and the Telecommunications Act of 1996 (1996 Telecommunications Act or 1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq.*). The 1996 Act requires incumbent local exchange carriers to share their facilities with rivals on certain terms. The question presented concerns whether the antitrust laws impose similar duties.

1. Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful for any firm to "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." Section 2 does not specify the elements of monopolization and attempted monopolization. It is nonetheless well established that Section 2 does not prohibit monopoly status in and of itself. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, Section 2 makes it unlawful to acquire or maintain monopoly power through predatory or exclusionary conduct. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). That prohibition is most often enforced through negative duties, *i.e.*, by requiring firms to *refrain* from anticompetitive conduct directed against rivals. But in limited circumstances, Section 2 may impose an *affirmative* duty to deal with or assist rivals.

While the antitrust laws provide a general framework for the protection of competition, the 1996 Telecommunications Act imposes detailed duties on certain market participants in order to change the competitive structure of the telecom-

munications industry. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 475, 489 (2002). The current structure of that industry is in part a product of the 1982 consent decree that settled the United States' antitrust suit against AT&T. *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). That decree separated AT&T's long-distance and equipment units from the units that provided local telephone service, and barred the latter from providing long-distance telephone service except in limited circumstances. See *Verizon* v. *FCC*, 535 U.S. at 475.

Since then, the incumbent local exchange carriers (ILECs), such as the Bell Companies that inherited AT&T's local telephone franchises, have remained dominant in the provision of local telephone service. The 1996 Act seeks to introduce competition into local exchange and related markets by requiring ILECs to assist potential rivals by "shar-[ing] their own facilities and services on terms to be agreed upon with new entrants." *Verizon* v. *FCC*, 535 U.S. at 476. In addition, the 1996 Act empowered the FCC to "prescribe methods for state commissions to use in setting rates that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce." *Ibid.*

Roughly speaking, new entrants may obtain the use of an incumbent's local telephone network in three ways. First, they may purchase an incumbent's local telephone service at a wholesale rate and resell it. 47 U.S.C. 251(c)(4). Second, they may build their own facilities and "interconnect" them with the incumbent's network. 47 U.S.C. 251(c)(2). And third, they "may choose to lease" some or all of the components of the incumbent's network—known as "network elements"—"which the incumbent has a duty to provide 'on an unbundled basis' at terms that are 'just, reasonable, and nondiscriminatory,'" 47 U.S.C. 252(c)(3). See *Verizon* v. *FCC*, 535 U.S. at 491-492; *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act provides that new and incumbent carriers must negotiate critical terms in good faith.

Verizon v. *FCC*, 535 U.S. at 492-493. If they fail to agree, either may seek mediation or arbitration by the public utilities commission of the relevant State. *Ibid.* In furtherance of the goal of "jumpstart[ing]" competition, the 1996 Act provides pricing rules that require incumbents to provide unbundled elements at rates that will "attract new entrants when it would be more efficient to lease than to build or resell." *Id.* at 539. The resulting pricing rules may require ILECs to provide new entrants with access to the local telephone network at rates that are below the ILEC's historical cost. *Id.* at 497-498. The resulting rates may also generate less revenue for the ILEC than would selling to retail customers directly.[1]

The 1996 Act includes an antitrust savings clause, § 601(b), 110 Stat. 143. It declares that, "except as provided" in provisions not relevant here, "nothing in this Act * * * shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note.

2. This case arises out of a dispute between AT&T, which is a competitive local exchange carrier (CLEC), and petitioner Verizon Communications Inc., an ILEC. The dispute involves petitioner's performance of an agreement with AT&T for telephone service in the State of New York following negotiation and binding arbitration pursuant to 47 U.S.C. 251 and 252. See Pet. App. 5a, 22a; *Order Approving Interconnection Agreement*, Case No. 96-C-0723 (N.Y. Pub.

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[1] For example, petitioner asserts that it can earn substantially more by selling its services at retail than it does by leasing facilities at "unbundled network element" rates to competitors. See Pet. Cert. Reply 5 n.5. For present purposes, it is sufficient to observe that the 1996 Act's pricing standards are not designed to ensure that ILECs earn the same revenues selling to competitors as they do by serving retail customers directly. As one competitive local exchange carrier told the FCC, the Act shifts ILECs "from a high margin retail base to lower-margin wholesale business." Letter from Robert A. Curtis, President, Z-Tel Network Services, CC Docket No. 01-338, at 7 (Sept. 23, 2002).

Serv. Comm'n June 13, 1997) (*available in* 1997 WL 410707). The agreement specifies the terms under which petitioner is to provide AT&T with the use of petitioner's local telephone network so that AT&T can sell local telephone service in competition with petitioner. The agreement also specifies dispute-resolution procedures that are "the exclusive remedy for all disputes between" petitioner and AT&T "arising out of th[e] [a]greement or its breach." Pet. App. 5a (quoting 1997 WL 410707, at *23). On March 9, 2000, the FCC and petitioner entered into a consent decree resolving the FCC's investigation into petitioner's potential violations of Section 271 of the 1996 Act. The decree required that petitioner, among other things, pay $3 million to the United States, and petitioner agreed to pay $10 million to AT&T and other CLECs. Pet. App. 5a, 50a.

One day after the FCC issued the consent decree, respondent filed this putative class action lawsuit. Pet. App. 51a. Respondent is an AT&T customer, *id.* at 5a, but has no apparent business relationship with petitioner. The complaint alleged:

> [Petitioner] has not afforded CLECs access to the local loop on a par with its own access. Among other things, [petitioner] has filled orders of CLEC customers after fulfilling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with [petitioner].

Id. at 6a (quoting J.A. 39 (Am. Compl. ¶ 21)); see J.A. 46-47 (Am. Compl. ¶ 54).

Respondent did not allege in the complaint that petitioner had failed to fill, or had delayed filling, any order relating to its own AT&T local telephone service. Respondent instead alleged that petitioner's conduct had affected its "ability

* * * to obtain satisfactory Local Phone Service," and injured petitioner's competitors "in the provision of" local phone service. J.A. 47 (Am. Compl. ¶ 57). Respondent further alleged that petitioner's conduct "had no valid business reason and was intended to exclude competition * * * 'by making it difficult for competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market.'" Pet. App. 6a-7a (quoting J.A. 46 (Am. Compl. ¶ 52)). Respondent asserted a treble damages claim under Section 2 of the Sherman Act. *Id.* at 6a.[2]

The district court dismissed the complaint. Pet. App. 49a-61a. After holding that respondent had standing under the Sherman Act, *id.* at 53a-54a, the court concluded that the complaint did not state a claim because the only anticompetitive conduct it identified was petitioner's "failure * * * to cooperate with competing local carriers" as required by 47 U.S.C. 251. *Id.* at 53a. "The affirmative duties imposed by the Telecommunications Act," the court observed, "are not coterminous with the duty of a monopolist to refrain from exclusionary practices." *Id.* at 54a.

Respondent amended the complaint, adding allegations that petitioner breached its contracts with CLECs "with the purpose of acquiring or maintaining monopoly power in the local phone service market." Pet. App. 63a. The district court again dismissed the complaint. *Id.* at 64a-68a. The court noted that, under respondent's Sherman Act theory, "when a firm with enough market power" and anticompetitive intent "breache[s] the terms of contracts it has with competitors that assist those competitors," it "violates Section 2 of the Sherman Act." *Id.* at 66a. The antitrust laws, the court observed, do not put monopolists under a general

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[2] Respondent also asserted claims under the Communications Act of 1934, 47 U.S.C. 202, and the 1996 Act. The reformulated question presented does not encompass those claims.

duty to cooperate with competitors. The district court therefore held that the alleged breaches of contract "were not 'anticompetitive' conduct within the meaning of the antitrust laws." *Id.* at 67a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-48a. The court of appeals agreed that respondent had antitrust standing. *Id.* at 26a-27a. The court of appeals disagreed, however, with the district court's holding that respondent's complaint is insufficient to "support an antitrust claim." *Id.* at 29a. Instead, the court held that the complaint "may state a claim under the 'essential facilities' doctrine," under which "a monopolist has a duty to provide competitors with reasonable access to * * * facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Ibid.* Alternatively, the court concluded that respondent "may have a monopoly leveraging claim," which could be established by showing that "the defendant '(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct.'" *Id.* at 30a.

SUMMARY OF ARGUMENT

I. Telecommunications firms must comply with both the 1996 Telecommunications Act and the Sherman Act. As the antitrust savings clause in the 1996 Act makes clear, that Act neither restricts the scope of the antitrust laws by conferring implied immunity, nor expands antitrust liability by creating new antitrust duties that did not exist before the 1996 Act's passage.

II. A. Although the court of appeals in form acknowledged the distinction between the 1996 Act and the Sherman Act, in substance it conflated the two. To "jump-start" competition, the 1996 Act requires incumbent local exchange carriers to "share" their facilities with new entrants, offering them access equivalent to the incumbent's, at regulated

rates. But conduct that violates the obligations imposed by the 1996 Act does not *ipso facto* violate the antitrust laws.

To the contrary, unilateral conduct can violate Section 2 of the Sherman Act—it can constitute monopolization or attempted monopolization—only if it is exclusionary or predatory. In the context of an alleged refusal to assist a rival, conduct is exclusionary only if it would not make business or economic sense apart from its tendency to reduce or eliminate competition. That demanding standard is necessary to ensure that the Sherman Act promotes competition. A more generalized duty would rarely enhance consumer welfare and would threaten to impair the competition the antitrust laws are designed to promote.

B. The court of appeals erred in displacing the requirement of exclusionary conduct with the so-called essential facilities doctrine. That doctrine does not establish an independent antitrust tort; it describes certain types of monopolization and attempted monopolization cases. Essential facilities cases, like all other Section 2 cases, require proof of exclusionary conduct.

C. The court of appeals similarly erred in failing to require exclusionary conduct in connection with so-called "monopoly leveraging" claims. The court of appeals' leveraging theory would effectively create a new category of antitrust liability for monopolists that gain a competitive advantage —such as that which results from economies of scope or scale—unless they "share" that advantage with competitors. The Sherman Act prohibits exclusionary conduct that perpetuates or threatens to create monopoly; it does not prohibit failure to share monopoly power.

D. The complaint in this case fails to allege exclusionary conduct and thus fails to state a claim. The complaint does not allege circumstances suggesting that petitioner's failure to assist rivals by providing them with access to its network, on the terms and at the rates required by the 1996 Act, would not make business sense apart from the effect on

competition, the pertinent standard here. For example, it nowhere asserts that, by refusing to sell to competitors as a wholesaler at regulated rates, instead of serving customers itself as a retailer, petitioner undertook a sacrifice of short-term profits that would make sense only if it had the effect of impairing competition. Nor does the complaint address the cost of providing competitors with wholesale access as required by the Act. Contrast *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610-611 (1985) (conduct that imposed a "sacrifice" of "short-run benefits" and made sense only because it "reduc[ed] competition * * * over the long run"); 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773, at 211 (2d ed. 2002) ("[N]o firm has a general duty to injure itself in order to benefit a rival."). Instead, the complaint rests on the assumption that any conduct that violates the 1996 Act necessarily violates the antitrust laws. Because that assumption is incorrect, and because the complaint fails to allege a sufficient basis for finding the conduct exclusionary, the court of appeals erred in sustaining it.

ARGUMENT

THE 1996 TELECOMMUNICATIONS ACT NEITHER MODIFIES THE SHERMAN ACT NOR ELIMINATES THE REQUIREMENT THAT PLAINTIFFS SHOW EXCLUSIONARY CONDUCT

A straightforward reading of the Telecommunications Act of 1996 and the Sherman Act makes clear that firms in the telecommunications industry must conform their conduct to the requirements of *both* of those Acts, for both Acts apply. The court of appeals correctly so held. The Acts, however, impose distinct requirements, such that a violation of one is not *ipso facto* a violation of the other. While the court of appeals recognized that in form, in substance it applied mistaken antitrust standards that effectively conflate the duties imposed by the two Acts.

The district court dismissed the complaint in this case because respondent failed to allege "exclusionary" practices. The court of appeals did not disagree that the complaint failed to plead such practices. The court of appeals reversed nonetheless because, in its view, Sherman Act liability could be sustained under two alternative theories—"essential facilities" and "monopoly leveraging"—without showing exclusionary conduct. Those theories, however, do not provide stand-alone bases for liability under Section 2, and they do not permit liability absent proof of exclusionary conduct. The Sherman Act prohibits anticompetitive restraints of trade. It is not a license for federal courts to create codes of desirable business conduct under which competitors must assist each other for the public good.

I. The 1996 Act Neither Bars Nor Supports Claims Alleging Sherman Act Violations

The 1996 Act and the Sherman Act implement the national commitment to competitive markets in fundamentally different ways. The 1996 Act was "intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises; [an] objective * * * considered both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal telephone service." *Verizon Communications* v. *FCC*, 535 U.S. 467, 476 (2002). The Act thus sought to "uproot[]" local telephone monopolies, *id.* at 488, and to "reorganize" and "bring competition to local-exchange markets," *id.* at 489, 539, without regard to whether ILEC monopolies developed and persisted lawfully in the first instance. To achieve that end, the 1996 Act provides a detailed blueprint under which ILECs must assist their rivals to "jumpstart" competition. See *id.* at 488. It requires ILECs, for example, to "lease elements of their networks" to their competitors "at rates that would attract new entrants when it would be more efficient to lease than to build or

resell." *Id.* at 539. The resulting "wholesale market for leasing network elements" and resulting pricing structures are "brand new." *Id.* at 528; pp. 1-3 & note 1, *supra.*

Section 2 of the Sherman Act, in contrast, proscribes *conduct* that monopolizes, *i.e.*, monopolization or attempted monopolization. It thus does not prohibit or condemn "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911)). And it neither expressly mandates the sharing of an incumbent firm's facilities nor provides concrete pricing and access rules for such sharing. That is because, unlike the 1996 Act, the Sherman Act does not impose a generalized duty to assist rivals, much less a generalized duty to assist them by sharing facilities at rates that are "attractive" or on terms different from those offered to non-competitor customers. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-601 (1985); see also *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375-376 (7th Cir. 1986) (Section 2 imposes on a monopolist "no general duty to help its competitors" and "no duty to extend a helping hand to new entrants"). Simply put, the Sherman Act does not require firms—whether or not monopolists—to sacrifice profits to sell to competitors at a discount. 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773, at 211 (2d ed. 2002) ("[N]o firm has a general duty to injure itself in order to benefit a rival."); see *id.* ¶ 772, at 188 (*Aspen Skiing* "certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price.").

Although the two statutes adopt different strategies to promote competition, Congress intended them to coexist. The more specific provisions of the 1996 Act provide detailed obligations that ILECs must meet. But the 1996 Act does not by its terms bar application of the Sherman Act to the same sphere of conduct or provide immunity from Section 2 prosecutions. To the contrary, the 1996 Act includes a savings clause that recognizes that the antitrust laws impose

distinct obligations and that neither set of laws displaces the other. Specifically, the 1996 Act provides (with certain exceptions not applicable here) that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws." See 47 U.S.C. 152 note. Recognizing the import of that language, the decision below correctly held that the 1996 Act does not immunize conduct from antitrust scrutiny. See Pet. App. 32a. The other courts of appeals have uniformly reached the same conclusion. See *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000) (suggestion that the 1996 Act confers "implied immunity on behavior that would otherwise violate the antitrust law * * * would be troublesome at best given the antitrust savings clause in the statute"); *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272, 1280-1281 (11th Cir. 2002), petition for cert. pending, No. 02-1423 (filed Mar. 20, 2003); *MetroNet Servs. Corp.* v. *US West Communications*, 325 F.3d 1086, 1099-1101 (9th Cir. 2003); *Cavalier Tel. Co.* v. *Verizon Va., Inc.*, No. 02-1337 (4th Cir. May 20, 2003), slip op. 19-20.

Conversely, the 1996 Act does not expand the scope of the antitrust laws to outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws. Such an expansion of Sherman Act duties would "modify * * * the applicability of * * * the antitrust laws" in contravention of 47 U.S.C. 152 note. Violations of the duties imposed by the 1996 Act are just that—violations of the 1996 Act, subject to the sanctions and penalties imposed by that Act. They do not automatically amount to treble-damages antitrust claims. The courts of appeals are again in accord. Pet. App. 29a; *Covad*, 299 F.3d at 1283 ("[W]e agree with *Goldwasser* that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations."); *Goldwasser*, 222 F.3d at 400 (It is "both illogical and undesirable to equate a failure to

comply with the 1996 Act with a failure to comply with the antitrust laws."); *Cavalier Tel. Co.*, slip op. 20-21 (similar).[3]

Instead, whether ILEC conduct violates the antitrust laws must be determined according to *antitrust* standards. That is not to say that the presence of regulation is irrelevant. Regulation may affect the economic analysis of an industry, sometimes substantially. Regulation may, for example, render certain business propositions unattractive where, but for regulation, they might be attractive, or vice versa. And regulation might alter likely competitive consequences. As then-Judge Breyer observed in a case concerning a so-called "price squeeze," price regulation "dramatically alters the calculus of antitrust harms and benefits" by "significantly diminish[ing] the likelihood of major economic harm." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), cert. denied, 499 U.S. 931 (1991). But regulation does not necessarily eliminate the risk of monopolization; nor does it obviate the need for antitrust analysis. See *id.* at 28 (limiting holding to the "ordinary" case); *Southern Pac. Communications Co.* v. *AT&T*, 740 F.2d 980, 1001 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

In all events, the effect of regulation on the incentives for and the economic consequences of particular conduct is highly fact and industry specific. 1A Areeda & Hovenkamp, *supra*, ¶ 240d, at 17-18. The mere existence of a regulatory structure, even the detailed structure established by the

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[3] In other contexts not implicated here, courts have sometimes found that the violation of other extrinsic duties—such as prohibitions against fraud and deception—may be a significant factor when ascertaining whether the conduct is exclusionary for antitrust purposes. See ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002) ("where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws"); *Cavalier*, slip op. 20 (holding does not preclude consideration of extrinsic duties outside 1996 Act context); see also pp. 14-15 note 4, *infra*.

1996 Act and the FCC's implementing regulations, does not de facto create antitrust immunity for otherwise anticompetitive conduct. To the extent petitioners contend otherwise, see Pet. 8-9, they are mistaken. But equally important, the 1996 Act does not create an antitrust minefield in which any regulatory violation by a monopolist substitutes for a showing of exclusionary conduct.

II. The Court of Appeals Erred In Failing To Require Exclusionary Conduct Under Section 2 Of The Sherman Act

Although the court of appeals correctly recognized the distinction between the 1996 Act and the Sherman Act as a matter of form, in substance it imported 1996 Act duties into antitrust law. The Sherman Act may require a dominant firm to deal with competitors in limited circumstances. But the court of appeals' decision unduly expands those circumstances by endorsing "essential facilities" and "monopoly leveraging" theories uncabined by the requirement of exclusionary or predatory conduct.

A. Exclusionary Conduct Is Essential To Any Section 2 Claim Premised On Unilateral Action

Section 2 of the Sherman Act specifies two offenses that can be committed by a firm acting unilaterally—monopolization and attempted monopolization. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-769 (1984)). As this Court made clear long ago, Section 2 does not prohibit monopoly as such, *i.e.*, "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, the offense of monopolization is broadly defined as (1) the willful *acquisition or maintenance* of monopoly power (2) by the use of *anticompetitive conduct* "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United*

States v. *Griffith*, 334 U.S. 100, 107 (1948)); see *United States* v. *ALCOA*, 148 F.2d 416, 432 (2d Cir. 1945).

1. *Monopolization and Attempted Monopolization Require Exclusionary Conduct*

A *sine qua non* for any claim of monopolization or attempted monopolization is conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 Areeda & Hovenkamp, *supra*, ¶ 651f, at 83-84; *Spectrum Sports*, 506 U.S. at 458-459. Even where actions threaten to create or maintain a monopoly, only "exclusionary" or "predatory" conduct is proscribed by Section 2. *Aspen Skiing*, 472 U.S. at 602. The conduct must "not only (1) tend[] to impair the opportunities of rivals, but also (2) either * * * not further competition on the merits or do[] so in an unnecessarily restrictive way." *Id.* at 605 n.32.

Applying that standard "can be difficult," because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.) (en banc), cert. denied, 534 U.S. 952 (2001). However, it does not entail open-ended "'balancing' of social gains against competitive harms," for "a firm is under no obligation to sacrifice its own profits" for the public weal. 3 Areeda & Hovenkamp, *supra*, ¶¶ 651a, 658f, at 72, 131-132, 135. Instead, the harm to competition must be disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition). See *ibid.* Under that standard, this Court has recognized a variety of anticompetitive means by which defendants may seek or maintain monopolies.[4]

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[4] For example, the enforcement of a fraudulently obtained patent may amount to exclusionary conduct under Section 2 if it has the requisite effect on competition. See *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-178 (1966). Likewise, sham litigation or

The requirement of exclusionary conduct emanates from the Sherman Act itself. Imposing liability in the absence of exclusionary conduct risks discouraging, even punishing, the very competition the antitrust laws are intended to encourage. This Court has noted the difficulty of "distinguish[ing] robust competition from conduct with long-run anti-competitive effects." *Copperweld*, 467 U.S. at 767-768. Indeed, the conduct of a vigorous competitor may "appear[] to 'restrain trade' unreasonably" even where that conduct "is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Id.* at 767. Thus, "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Id.* at 775. As Judge Hand wrote, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." *ALCOA*, 148 F.2d at 430.[5]

2. *In Cases Asserting A Duty To Assist Rivals, Conduct Is Exclusionary Only If It Would Not Make Economic Sense But For The Tendency To Impair Competition*

Where, as here, the plaintiff asserts that the defendant was under a duty *to assist a rival*, the inquiry into whether conduct is "exclusionary" or "predatory" requires a sharper focus. In that context, conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

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bad-faith contact with administrative agencies may create substantial anticompetitive impact in violation of Section 2. See, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). And the private standard-setting process may afford opportunities for opportunistic behavior that may harm competition. See, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988).

[5] Different considerations apply to concerted action, which is "inherently * * * fraught with anticompetitive risk." *Copperweld*, 467 U.S. at 768-769. As a result, concerted action is evaluated for its reasonableness—and is, in some instances, summarily condemned as illegal per se.

This Court has emphasized that sort of analysis with respect to predatory pricing. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986); ABA Section on Antitrust, *Antitrust Law Developments* 247 (5th ed. 2002) ("courts have held conduct to be predatory where it would be economically irrational for the monopolist but for the conduct's adverse impact on competition"). In that context, this Court has expressed concern that conduct perfectly consistent with robust competition—"cutting prices in order to increase business"—should not lightly give rise to antitrust liability, because doing so may "chill the very conduct that antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Price cuts, moreover, rarely harm consumers, because "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 589.

Likewise, in the context of asserted duties to assist rivals, this Court and the courts of appeals have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power. See *Aspen Skiing*, 472 U.S. at 608, 610-611 (conduct that "sacrifice[s] short-run benefits," such as immediate income and consumer goodwill, undertaken because it "reduc[es] competition * * * over the long run"); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987) (conduct "anti-competitive" if "its 'anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power.'"); see also *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 523-524 & n.3 (5th Cir. 1999) (conduct exclusionary if it harms the monopolist but is justified because it causes rivals more harm); *Advanced Health-Care Servs.* v. *Radford Cmty. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990) ("making a short-term sacrifice" that "harm[s] consumers and competition" to further "exclusive, anti-competitive objectives"). In con-

trast, a refusal to aid rivals that makes economic or business sense *apart* from a tendency to impair competition is not exclusionary.

That demanding standard, like the one employed in the predatory pricing context, reflects the infrequent pro-competitive benefits and the frequent anticompetitive risks posed by a generalized requirement that firms assist rivals. Consumers are generally "no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." 3A Areeda & Hovenkamp, *supra*, ¶ 771b, at 171-172. At the same time, dealings among rivals create a risk of collusion. *Id.* ¶ 772c4, at 191-192 (discussing "Collusion risks"); see *Aspen Skiing*, 472 U.S. at 598 n.22. That alone renders lawsuits premised on a failure to cooperate with rivals troublesome.

Even in the absence of collusion, dealings among rivals can have the unintended consequence of forestalling rather than promoting competition. A firm that has the right to utilize an input from an incumbent—or that can claim that right through litigation—may have a reduced financial incentive to develop the input itself. 3A Areeda & Hovenkamp, *supra*, ¶ 771b, at 172 ("[T]he right to share * * * discourages firms from developing their own alternative inputs."); *Verizon* v. *FCC*, 535 U.S. at 550 (Breyer, J., concurring and dissenting in part) (sharing of facilities is not "consistent with * * * competition," although competition may emerge with respect to elements that are not shared); see *id.* at 551, 560; see also L. Sullivan & W. Grimes, *The Law of Antitrust* § 3.4, at 112 (2000) ("Compelling a monopolist to grant competitors access to a facility that the monopolist has alone developed is problematic" because it "collides with" the "commonplace propositions" that "not even monopolists need give positive assistance to competitors" and "that innovation should be encouraged and rewarded."). Finally, mandated sharing could impose substantial administrative burdens for courts. "Even the simplest kind of compelled sharing * * *

means that someone must oversee the terms and conditions of that sharing." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (2000) (Breyer, J., concurring in part and dissenting in part).

Congress and regulatory agencies, of course, may identify circumstances where it is economically efficient to require the incumbent to share its facilities under a system of price and access regulation; or where new entrants should be permitted to use the monopolist's facilities while establishing themselves, and their customer base, before they are expected to build their own facilities. Indeed, the 1996 Act rests in part on that kind of industry-specific determination. See *Verizon* v. *FCC*, 535 U.S. at 510-511 & n.27; *Cavalier Tel. Co.*, slip op. 18 (1996 Act a "distinctly different approach to jump-start and accelerate competition"); *Goldwasser*, 222 F.3d at 399 (similar). But the identification and remediation of those situations is best dealt with through industry-specific legislation and regulation—like the 1996 Act—which can be developed by legislative branches and administrative agencies with superior factfinding ability, greater industry expertise, existing capacity for ongoing oversight and refinement, and the public accountability that is an important companion to such economic policy choices. But where, as here, Congress enacts a regulatory structure that imposes affirmative obligations to assist rivals and expressly disclaims any intent to "modify * * * the applicability of any of the antitrust laws," 47 U.S.C. 152 note, it is clearly inappropriate for a court automatically to perceive antitrust consequences from regulatory violations.

Instead, the antitrust laws generally afford all firms—including monopolists—great discretion in determining with whom they will and will not deal. *Aspen Skiing*, 472 U.S. at 600-603. They also permit firms to charge whatever prices they can obtain in the marketplace. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir.

1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute"), cert. denied, 516 U.S. 1184 (1996); *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.) ("even a monopolist is free to exploit whatever market power it may possess" by "charging uncompetitive prices"), cert. denied, 471 U.S. 1029 (1985).

Nonetheless, a monopolist's right to refuse cooperation with rivals is not wholly unqualified. *Aspen Skiing*, 472 U.S. at 600-601. If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful. In *Aspen Skiing*, for example, this Court upheld a verdict against the Ski Co., which had terminated its former cooperation with a smaller rival, Highlands, and refused numerous proposals for resumed cooperation. In finding sufficient evidence that the Ski Co.'s conduct could "properly be characterized as exclusionary," 474 U.S. at 605, this Court repeatedly stressed that the Ski Co.'s decision to refuse cooperation required the sacrifice of immediate profits. The Ski Co., for example, refused to sell its lift tickets to its rival *at full price*, "forgo[ing] daily ticket sales" and the goodwill of its own customers, who were inconvenienced by that choice. 472 U.S. at 608; *id.* at 593 & n.14 (Ski Co. refused to sell to its competitor "any lift tickets" of its own, "either at the tour operator's discount or at retail"). The Ski Co. "elected to forgo these short term benefits," the evidence showed, "because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.* at 608; see *id.* at 610 (offers rejected by Ski Co. "would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers"); *id.* at 610-611 (Ski Co. "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival"). Moreover, Ski Co. could not

satisfactorily explain how its conduct made economic sense apart from the harm to competition. *Id.* at 608. The conduct was thus condemned because it made no economic sense but for its anticompetitive consequences.

When, on the other hand, a monopolist's refusal to deal (or, as here, breach of an agreement to deal) on particular terms does make business sense apart from exclusionary consequences, antitrust law should avoid interfering with such business choices. At one extreme, a refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense. But even in less extreme circumstances, courts should be hesitant to impose a duty to assist rivals. The decisions of a seller, even a monopolist, regarding to whom it will sell, on what terms, and under what sort of quality and purchaser-satisfaction measures, generally reflect its own assessment of how to compete and provide goods most effectively in the marketplace. There is good reason to be cautious when setting the standard under which such conduct is condemned as exclusionary, lest consumers be deprived of the benefits of pro-competitive business practices, or potential competition be displaced by cooperation as would-be rivals share inputs. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); pp. 15-18, *supra.*

B. The Court of Appeals Improperly Applied The "Essential Facilities" Doctrine To Dispense With The Exclusionary Conduct Requirement

Departing from that approach, some courts of appeals have developed an "essential facilities" doctrine divorced from traditional antitrust requirements, including proof of exclusionary conduct. As articulated by those courts, the doctrine requires a monopolist to assist rivals by sharing a facility if, by refusing to do so, the monopolist can "extend monopoly power from one stage of production to another" and the following four elements are found:

> (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.

MCI Communications Corp. v. *AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983). See 3A Areeda & Hovenkamp, *supra*, ¶ 771a, at 169-170; see also P. Areeda, *The "Essential Facility" Doctrine: An Epithet in Need of Limiting Principles*, 58 Antitrust L. J. 841 (1989).

This Court has never adopted the essential facilities doctrine in a Section 2 case. *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And the doctrine has been heavily criticized. See, *e.g.*, 3A Areeda & Hovenkamp, *supra*, ¶ 771c, at 173 ("the essential facility doctrine is both harmful and unnecessary and should be abandoned"). That criticism is well-founded. Requiring a firm to share its monopoly with its competitors, as the essential facilities doctrine does, can be inconsistent with the fundamental, pro-competitive goals of the antitrust laws. *Id.* ¶ 771b, at 171; see pp. 17-18, *supra*.

The problem, however, is not so much that the four factors articulated by the *MCI* decision are irrelevant; they can be helpful. See p. 22 note 6, *infra*. Rather, the difficulty is that federal courts have sometimes articulated the essential facilities doctrine and the four factors as if they described a stand-alone antitrust violation, untethered to traditional Sherman Act requirements. See 3A Areeda & Hovenkamp, *supra*, ¶ 772, at 175 (doctrine not "an independent tool of analysis but only a label—a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications"). Section 2, however, prohibits only acts that constitute "monopolization" or "attempts to monopolize." It does not establish essential facilities violations as an independent antitrust tort. The four factors identified in *MCI* and other decisions thus are relevant

but neither necessary nor sufficient to establish Section 2 liability.[6] As one court has explained, the essential facilities doctrine is "a label that may aid in the analysis of a monopoly claim, not a statement of a separate violation of law." *Viacom Int'l, Inc.* v. *Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992). It relieves plaintiffs "of no burden they would otherwise bear, and constitutes no substitute for a showing that the requirements of a cause of action under the antitrust laws have been met." *Ibid.* Consequently, as with any other monopolization or attempted monopolization claim, so-called essential facilities claims must include some showing of "exclusionary" or "predatory" *conduct.* In this context, that means conduct that would not make sense but for its tendency to reduce or eliminate competition.[7]

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[6] The first two factors—that the facility (1) is controlled by a monopolist, and (2) cannot be duplicated by those seeking to compete in a related market—may help identify circumstances in which a refusal to deal might "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3 Areeda & Hovenkamp, *supra*, ¶ 651f, at 83-84. The fourth requirement in particular—the feasibility of providing the access that was refused—relates to whether the defendant's conduct may be viewed as exclusionary, but does not itself demonstrate it. Cf. *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir.) (feasibility of providing access must be analyzed in the context of the monopolist's normal course of business), cert. denied, 502 U.S. 814 (1991); *MCI*, 708 F.2d at 1133 ("No legitimate business or technical reason was shown for AT&T's denial of the requested interconnection"; "MCI was not requesting preferential access"; MCI was not "asking that AT&T in any way abandon its facilities"); *id.* at 1144 (allegation that AT&T had sold the requested access "to local customers, independent phone companies and other[]" non-competitors "for years").

[7] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), is not to the contrary. *Otter Tail* was not based on an "essential facilities" theory of liability, and the trial court found that the sole reason for the conduct there was to prevent erosion of monopoly power. See *id.* at 378; see also *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971) ("defendant has a monopoly * * * market and has consistently refused to deal with municipalities which desired to establish municipally owned systems on the alleged justification that to do so would impair its position

For that reason, a monopolist's refusal to sell his goods or services below the monopoly price would not ordinarily be actionable, because that price maximizes profits apart from its effect on competitors in related markets. See pp. 18-19, *supra*. Whether that price is above the price set by regulators or higher than the would-be competitor is willing to pay is irrelevant. *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir.) (rejecting view that essential facilities doctrine requires that access be provided to a monopolist's competitor on terms that would permit the competitor to make a profit), cert. denied, 502 U.S. 814 (1991). Indeed, the contrary rule would not merely require the monopolist to share its facility. It would, in effect, require the monopolist to share its profits.[8]

In this case, the court of appeals focused on the existence of a so-called essential facility and lost sight of the need for exclusionary conduct. It thus treated the essential facilities doctrine as a free-standing basis for Sherman Act liability, on a par with monopolization and attempted monopolization, but without examining the standards applicable to those offenses. In particular, the court of appeals deemed it sufficient that the complaint alleged that the local loop was es-

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of dominance in selling power at retail to towns in its service area"). The defendant, which was already in the business of wheeling power, not only refused to deal, but also demanded and enforced anticompetitive provisions in contracts with potential competitors. 410 U.S. at 378-379.

[8] For that reason—and because of the difficulties inherent in determining the price and other terms a non-exclusionary monopolist would demand—the circumstance most likely to lead to liability is "a monopoly supplier's *discriminating* against a customer because the customer has decided to compete with it." *Olympia Equip.*, 797 F.2d at 377 (emphasis added). The monopolist's willingness to offer non-competitors particular terms is evidence that those terms are profitable to it, and that the refusal to offer the same terms to competitors represents a sacrifice of immediate profits that would not make sense but for the tendency to impair competition. Judge Posner has therefore described such discrimination as the "essential feature of the refusal-to-deal cases." *Ibid.*

sential to competing in the local phone service market; that recreating the local loop was prohibitively expensive; and that petitioner denied AT&T, a competitor, "reasonable access" to the loop. Pet. App. 29a-30a.

The court of appeals contemplated that petitioner might eventually escape liability if it established either that the local loop was in fact not essential, or that it actually had provided "reasonable access." Pet. App. 30a. But the court did not address whether the complaint alleged exclusionary or predatory conduct. Furthermore, it appears to have assumed that "reasonable access" means access on the terms provided under the 1996 Telecommunications Act rather than access on such terms as would make business sense apart from their effect on competition, such as those offered to non-competitor customers.[9] That inappropriately imports Telecommunications Act duties and standards into the antitrust laws, violating the 1996 Act's instruction that "nothing

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[9] The court of appeals interpreted the essential facilities doctrine to require that access be provided on "just and reasonable terms" placing all—apparently including the monopoly supplier of the facility—on an "equal plane." Pet. App. 29a. That language, however, is not drawn from standards relating to antitrust liability but from the remedial requirements this Court addressed in *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912). See *Southern Pac. Communications Corp.*, 740 F.2d at 1008-1009; *United States* v. *AT&T*, 524 F. Supp. 1336, 1352-1353 (D.D.C. 1981). *Terminal Railroad*, moreover, was not based on an essential facilities theory of liability. That case concerned whether "unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade." 224 U.S. at 394. Nor was a denial of access at issue there, since the fact "[t]hat other companies are permitted to use the facilities of the Terminal Company upon paying the same charges paid by the proprietary companies seem[ed] to be conceded." *Id.* at 400. The Court chose to impose a requirement of equal access on reasonable terms as part of a remedial scheme because it found that dissolving the combination would be injurious to the public. *Id.* at 409-411; *Associated Press* v. *United States*, 326 U.S. 1, 25 (1945) (Douglas, J., concurring) (*Terminal Railroad* "held that as an alternative to dissolution a plan should be submitted which provided for equality of treatment of all railroads.").

in" it "shall be construed to modify * * * the applicability of any of the antitrust laws." 47 U.S.C. 152 note. By equating the specific regulatory duties of affirmative assistance imposed by the 1996 Act with conduct required to avoid Sherman Act liability, the court misconceived the distinct purpose of the 1996 Act.[10] That Act's requirements reflect a variety of regulatory objectives. The specific duty to assist competitors by leasing access to the local loop was not designed merely to protect competition, but to restructure an entire industry by, among other things, encouraging new entry; consequently, the Act in some circumstances imposes duties to assist rivals on terms that are more favorable than would be offered by a profit-maximizing monopolist not engaged in predatory or exclusionary conduct. The failure to fulfill those specific 1996 Act duties (or to dedicate sufficient resources to their fulfillment) may amount to a regulatory violation without *ipso facto* violating the antitrust laws.[11]

C. The Court Of Appeals' Application Of "Monopoly Leveraging" Is Inconsistent With Section 2 Principles

The court of appeals' articulation of its second theory of Section 2 liability—monopoly leveraging—similarly countenances an antitrust violation unsupported by fundamental antitrust principles. The phrase "monopoly leveraging" is often employed to describe the use of power in one market to affect competition in a second, related market. In this case,

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[10] As we have observed (p. 12 note 3, *supra*), in other contexts, violation of extrinsic statutory or legal duties may be significant in determining whether conduct is exclusionary for antitrust purposes.

[11] Even if the 1996 Act is merely viewed as a legislative remedy to deal with the competitive challenge posed by a monopolist's control of the "essential facility" of the local loop, it does not follow that a regulatory violation always amounts to an antitrust violation. Indeed, even a violation of a court order requiring non-discriminatory access to a particular facility, see p. 24 note 9, *supra*, would not without more constitute an independent antitrust violation, even though it might be a basis for contempt.

the court of appeals held that a "monopoly leveraging" violation is established if a monopolist in one market uses its monopoly to "gain a competitive advantage" in a second market, Pet. App. 30a, even if the monopolist does not have "a dangerous probability" of successfully monopolizing the second market, *id.* at 31a n.13. That formulation is difficult to reconcile with the text of the Sherman Act, which proscribes monopolization and attempted monopolization, rather than "misuse" of market power. 3 Areeda & Hovenkamp, *supra*, ¶ 652a, at 89. It is also inconsistent with *Spectrum Sports*, 506 U.S. at 459, which clarifies that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[12]

Moreover, the Second Circuit's "monopoly leveraging" formulation suffers from the same defect as its "essential facilities" holding—it does not require the monopolist's conduct to be "exclusionary" or "predatory" within the meaning of Section 2 jurisprudence. The court of appeals identified only one conduct element of the leveraging violation alleged here, the "use" of monopoly power in one market. Pet. App. 31a. But use of monopoly power is not unlawful; predatory or exclusionary conduct to create or maintain a monopoly is. The court of appeals failed to recognize that distinction.[13]

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[12] The Second Circuit has elsewhere acknowledged that tension. See *Virgin Atl. Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 272 (2001) (*Spectrum Sports* creates "uncertainty * * * as to the continued scope of a monopoly leveraging claim as an independent cause of action."). The court of appeals' use of a "competitive advantage" formulation may not matter in this case, because the complaint may sufficiently allege a dangerous probability of successful monopolization.

[13] The court of appeals appears to have considered the use of monopoly power in a monopoly leveraging claim to be "anticompetitive or predatory conduct" per se, Pet. App. 31a n.13, perhaps as a matter of definition. But the court never explained why petitioner's or any other monopolist's use of monopoly power to gain a competitive advantage in a second market would always be economically irrational except insofar as it tended to eliminate or lessen competition. The Second Circuit appears to have

The court of appeals' test for monopoly leveraging would, like its essential facilities formulation, also condemn non-exclusionary conduct that neither creates nor sustains monopoly power. It would, in essence, create a new category of antitrust liability, applicable to monopolists that gain any competitive advantage—such as that which results from economies of scope or scale, or the ability to sustain expensive research and development efforts—in their activities in competitive markets unless they "share" that advantage with competitors. Such a theory is incompatible with the antitrust laws. What offends the Sherman Act is not the use of monopoly power as such, but exclusionary techniques. Here, petitioner is alleged to have breached contractual and regulatory requirements under the 1996 Act that it provide CLECs with access to its facilities on specified terms. Unless that conduct would not make economic sense apart from a tendency to impair or forestall competition, it is not exclusionary and is not actionable under Section 2.

D. Under The Proper Standards Of Section 2 Liability, Respondent's Complaint Fails To State A Claim

The Federal Rules require only that a complaint include "a short and plain statement of the claim showing that the

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derived its monopoly leveraging formulation from *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), by way of *Berkey Photo*, 603 F.2d at 275. *Griffith* declared it "unlawful" to use "monopoly power, however lawfully acquired, * * * to gain a competitive advantage," and *Berkey Photo* stated that "a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another." But the court of appeals took the *Griffith* language out of context. *Griffith* concerned the alleged use of monopoly power to extract "exclusive privileges" that "unreasonably restrained competition"; it was the extraction of privileges that was found problematic. 334 U.S. at 103-104. Moreover, *Berkey Photo* nowhere suggests that a monopolist in one market may not lawfully benefit from that monopoly when competing in a second market. See 603 F.2d at 276 (noting that "an integrated business" does not "offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market").

pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a statement that need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Swierkiewicz* v. *Sorema*, 534 U.S. 506, 512 (2002) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)). Even when evaluated by the liberal notice pleading standards of the Federal Rules of Civil Procedure, respondent's complaint fails to state a claim for relief under Section 2 of the Sherman Act, because it fails to allege exclusionary conduct.

The gravamen of respondent's claim is that, by failing to fill its competitors' orders in a timely fashion, petitioner failed to provide them with full and nondiscriminatory access to its local telephone network so as to permit them to use that network in competition with petitioner's own use of it. See J.A. 39, 46-47 (Am. Compl. ¶¶ 21, 54); p. 4, *supra*. Respondent's complaint does not implicate an antitrust duty to provide such access, because the complaint does not allege that any refusal to deal was predatory or exclusionary in the sense relevant here, *i.e.*, that the refusal would not make business sense unless it tended to eliminate or lessen competition. Contrast *Aspen Skiing*, 472 U.S. at 608, 610-611; pp. 15-17, 19-20, *supra*. The complaint makes no allegations whatsoever relating to price, profitability, or the costs of complying with 1996 Act access requirements. It thus nowhere suggests that petitioner's failure to comply—or failure to devote sufficient resources to achieve any particular level of compliance—would make no economic sense apart from the tendency to impair competition.

That omission is no mere drafting oversight. The district court dismissed respondent's initial complaint for failure to allege facts establishing "any 'willful acquisition or maintenance' of monopoly power," Pet. App. 55a—that is, for failure to allege exclusionary or anticompetitive conduct. After seeking and receiving permission to replead, *id.* at 62a, respondent filed an Amended Complaint, which the district court also dismissed for failure "to allege any anticompeti-

tive conduct." *Id.* at 67a. Respondent's failure to allege exclusionary conduct even after having been put on notice of the need to allege it is reason enough to conclude that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). Notice pleading may not require that a complaint "include evidentiary detail. On the other hand, the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome." *DM Research, Inc.* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (Boudin, J.). Respondent's two successive failures to allege such a factual predicate show it cannot pay the price of entry.

The complaint does allege that petitioner "had no valid business reason" for the challenged conduct, Pet. App. 6a (quoting J.A. 47 (Am. Compl. ¶ 57)), and that the petitioner "has engaged in exclusionary and anticompetitive behavior," J.A. 46 (Am. Compl. ¶ 52). But those conclusory assertions are not sufficient allegations that the conduct was exclusionary—in the context of failure to assist a rival, that the conduct would not make economic sense apart from an effort to restrain competition. See *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (court not "bound to accept as true a legal conclusion couched as a factual allegation"). The court of appeals, moreover, did not refer to either allegation in its antitrust analysis. See also *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 180 (2d Cir. 1990) (treating conduct that makes business sense as illegitimate).

Ultimately, the complaint must be dismissed because it rests on the unstated and incorrect assumption that the antitrust laws require a monopolist—either through the "essential facilities" or "monopoly leveraging" doctrines—to assist competitors by acting as a wholesaler, offering them access to the incumbent's facilities equal to that which the incumbent gives itself on terms not offered to non-competitor cus-

tomers. The 1996 Act, as implemented by FCC regulations upheld by this Court in *Verizon* v. *FCC*, *supra*, does impose those requirements. See 535 U.S. at 539; Pet. App. 5a (under 47 U.S.C. 251(c), ILECs must provide competitors access "at least equal in quality to that provided by the local exchange carrier to itself"). But, as the Seventh Circuit recognized in *Goldwasser*, "the duties the 1996 Act imposes" are not "coterminous with the duty of a monopolist to refrain from exclusionary practices." 222 F.3d at 399; see also 47 U.S.C. 152 note (Act does not "modify * * * the applicability of any of the antitrust laws."). Respondent has not alleged an exclusionary refusal, apparently because respondent believed that an allegation of a regulatory violation of the 1996 Telecommunications Act suffices. But not every violation of the 1996 Act constitutes exclusionary or predatory conduct under the antitrust laws. Nor, contrary to the decision below, does the allegation that the monopolist owns an essential facility or employs a facility to leverage market power substitute for allegations of predatory conduct. To permit this case to go forward under the Second Circuit's erroneous construction of Section 2 would fundamentally transform the Sherman Act so as to require monopolists to pull their competitive punches, assist their competitors, convert themselves from retailers into wholesalers, and share monopoly profits on demand. That is not conduct the Sherman Act requires.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

R. HEWITT PATE
Acting Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
DAVID SEIDMAN
Attorneys

WILLIAM E. KOVACIC
General Counsel
Federal Trade Commission

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