NEW ANTITRUST ISSUES IN A DEREGULATED ENVIRONMENT: ACCESS TO PIPELINES

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Although the natural gas industry long has been subject to the antitrust laws,[1] extensive industry regulation has limited the scope and number of antitrust challenges to industry activities. The Natural Gas Policy Act of 1978,[2] however, by relaxing various pricing and other regulatory provisions, has reduced the scope and extent of regulation and, correspondingly, increased the scope of antitrust exposure. Currently proposed additional deregulation measures would, of course, further broaden the applicability of the antitrust laws. This phenomenon is reflected in the increased activity of and interest in the views of the Department of Justice and Federal Trade Commission with respect to activities in a deregulated environment.[3]

While many new antitrust issues may be expected to arise in a deregulated environment, one issue of particular concern and difficulty is access and utilization of gas transmission and distribution facilities. Access to certain facilities of importance to participation in industry activities is a developing issue of concern in several recently-deregulated industries, including telephone communications, railroads, and airlines.[4] Analysis of the antitrust implications of requests for access to such facilities has not, however, been well-developed at this relatively initial stage of deregulation. One clear tendency has been to suggest broadly that, in a wide range of circumstances where access is technically feasible, access is required by the antitrust laws. In our view, however, such a broad reading of the scope of the antitrust laws as imposing access requirements is not well-founded. Indeed, current trends in judicial and economic analysis of refusals to deal by monopolists provides considerable support for the view that nonpredatory denials of access, based on such legitimate business considerations as efficiency and profitability, are appropriate and consistent with both antitrust policy and the competitive purposes of industry deregulation.

The general principle has long been established under the antitrust laws that a firm is free, absent a monopolistic purpose, to make unilateral decisions not to deal with any present or potential supplier or customer. This principle was first articulated by the Supreme Court in *United States v. Colgate & Co.*:[5]

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of a trader or manufacturer engaged in an entirely

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[1]*See California v. FPC*, 369 U.S. 482, 486 (1962).

[2]Pub. L. No. 95-621, 92 Stat. 3350, codified at 15 U.S.C. §§ 3301-3432 (Supp. III 1979). *See generally* MacAvoy, The Natural Gas Policy Act of 1978, 19 *Nat. Resources J.* 811 (1979).

[3]*See, e.g.*, FTC response to questions of Chairman Sharp, House Subcommittee on Fossil and Synthetic Fuels (April 28, 1983); Department of Justice Business Review Letter regarding Venture Resources, Inc. (June 18, 1982); FTC Advisory Opinion regarding Resource Analysis & Management Group (April 18, 1983).

[4]*See* Kahn, The Passing of the Public Utility Concept: A Reprise, in *Telecommunications Regulation Today and Tomorrow* 3, 24-26 (E. Noam, ed. 1983). *See also Report and Recommendations of the Airport Access Task Force* (Civil Aeronautis Board, March 10, 1983).

[5]*United States v. Colgate & Co.*, 250 U.S. 300 (1919).

> private business, freely to exercise his own independent discretion as to parties with whom he will deal.[6]

Collective refusals to deal, however, are *per se* unlawful under Section 1 of the Sherman Act.[7]

A narrow exception to this fundamental principle of unilateral freedom to deal has been developed, under Section 2 of the Sherman Act,[8] limiting the right of a monopolist that controls certain essential facilities to refuse to deal and imposing an obligation, in certain circumstances, to make the facility available to others on non-discriminatory terms. This doctrine is generally referred to as the "bottleneck" monopoly or "essential facility" doctrine.

A threshold consideration in the application of this doctrine is the determination of whether a firm has monopoly (sole seller) or monopsony (sole buyer) power in a relevant market. Determinations as to the relevant market in Sherman Act cases concerning the natural gas industry have been narrowly drawn. For example, in *Woods Exploration and Producing Co. v. Aluminum Co. of America*,[9] the court found that a single natural gas field constituted the relevant market.[10] Even if, for example, it would be possible for another pipeline to be constructed to transport natural gas to potential customers in the event of a refusal to provide access, if this alternative is "impractical" for the producer, in either an engineering or a financial sense, it is likely that the relevant market will be defined narrowly to include the existing pipeline as the only potential purchaser. This analysis reflects the definition of what constitutes an "essential facility." As stated by one court, "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."[11]

Mere possession of monopoly or monopsony power, however, does not constitute a Sherman Act Section 2 violation.[12] In order to find a violation of Section 2, it must also be established that a firm that has the requisite power in a relevant market has exercised that power with the specific intent to maintain or extend it.[13] The bottleneck monopoly or essential facility doctrine cases condemn, as a misuse of monopoly power, the attempt by a firm with monopoly power in one market to leverage that power to secure a competitive advantage in a second, non-monopoly market, or to unreasonably deny access to a facility that is essential to allow others to compete in the market.[14] It has thus been considered that a firm possessing a lawful monopoly over a "unique resource" can violate the antitrust laws "if it exploits that resource in ways that exclude or disadvantage customers arbitrarily or invidiously. For the purpose of assuring reasonable access, this rule treats scarce resource or natural advantage monopolies the way regulatory law treats a public utility."[15] This

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[6] *Id.* at 307.

[7] 15 U.S.C. § 1. *See Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The intra-corporate conspiracy doctrine is relevant to decisions undertaken among separate subsidiaries. *See, e.g., Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968). *See also Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982), *cert. granted*, 103 S. Ct. 3109 (1983).

[8] 15 U.S.C. § 2.

[9] 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[10] *Id.* at 1304.

[11] *Hecht v. Pro-Football, Inc.*, 570 F.2d 82, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

[12] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62 (1911); *Byars v. Bluff City News Co.*, 609 F.2d 843, 853 (6th Cir. 1979).

[13] *See United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966).

[14] *See generally* III P. Areeda & D. Turner, *Antitrust Law*, 270-76 (1978).

[15] L. Sullivan, *Antitrust* 125 (1977).

"public utility" approach to obligations under the antitrust laws requires the monopolist (or monopsonist) to provide, in effect, a reasonable business justification for refusals to deal, whereas business justifications are not required of entities that do not possess the characteristics of "essential facilities."

The difficult question, consequently, is what range and types of business justifications are to be considered reasonable, providing thereby a basis under the antitrust laws to support denials of access.

The obligation of a firm possessing an essential facility has been stated quite broadly by some commentators:

> 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 an illegal restraint of trade to foreclose the scarce facility.[16]

Thus, under such an unqualified view of the bottleneck principle, where there is no "practical" alternative to an "essential facility," the person or persons possessing the facility must allow it to be shared on fair terms. A broad reading has also been given to this doctrine in some discussions in the context of the natural gas industry:

> [W]here a pipeline serving a producing field has the attributes of an essential facility that cannot practically be duplicated by competing producers at reasonable cost and where the pipeline has adequate capacity to serve all producers desiring its use, an owner or joint owners of such a pipeline would be well advised to make the pipeline facilities available to all producers on a non-discriminatory basis.[17]

As reviewed briefly below, however, the significant elements of the bottleneck monopoly doctrine have been developed and discussed in relatively few cases. Broad readings of the scope of the doctrine, particularly those which do not incorporate consideration of recent trends in antitrust analysis of activities of monopolists, thus are, in our view, questionable and overly restrictive of legitimate competitive conduct.

The focus in bottleneck cases has been upon "fairness" concerns to the suppliers who would be cut off from the relevant market by the monopolist's refusal to deal, rather than upon economic effects on competition.[18] These cases presume that the defendant has the requisite intent to monopolize once it has been shown that (1) the defendant possesses monopoly power, and (2) has refused to deal. The burden then shifts to the monopolist to come forward with a legitimate business reason for refusing to deal:

> [T]he latent monopolist must justify the exclusion of a competitor from a market which he controls. . . . The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize.[19]

[16] A. Neale, *Antitrust Laws of the U.S.A.*, 67 (2d ed. 1970). *See* L. Sullivan, *Antitrust* 131 (1977). *See generally* Note, Unclogging the Bottleneck: A New Essential Facilities Doctrine, 83 *Colum. L. Rev.* 441 (1983).

[17] Burke & Oliver, Current Antitrust Developments in Oil and Gas Exploration and Production, in *Proceedings of the Thirtieth Annual Institute on Oil and Gas Law and Taxation* 271, 306 (A. Ernst, ed., 1979). For a similar broad view, *see* Lambert & Gilfoyle, Reforming Natural Gas Markets: The Antitrust Alternative, *Public Util. Fort.* 15 (May 12, 1983).

[18] *See, e.g.,* C. Kaysen & D. Turner, *Antitrust Policy* 90 (1959).

[19] *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484, 488 (1st Cir.), *cert. denied,* 344 U.S. 817 (1952).

The Supreme Court decided the first essential facility case, *United States v. Terminal Railroad Association of St. Louis*, in the early 1900s.[20] In that case, a number of railroads jointly owned and operated a railroad terminal facility which, because of certain unique physical characteristics of the locality, controlled all economically feasible routes for rail service into the City of St. Louis. Other railroads were denied access to the terminal. The Supreme Court stated that "in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use."[21] The Court found, however, that because of the extraordinary physical characteristics of the City of St. Louis, the defendant's competitors could not exist without access to the terminal facility. The Court therefore found that the owners of the facility had a duty to permit all railroads to use the facility and to do so on non-discriminatory terms.[22]

Another leading essential facility case, *Gamco, Inc. v. Providence Fruit and Produce Building Co.*,[23] involved access to a building constructed by a railroad subsidiary to provide selling, storage and shipping facilities to local fresh fruit and vegetable dealers. In that case, a group of wholesalers formed a corporation to lease the building. One of the wholesalers, Gamco, facing financial difficulties, transferred its stock in the lease corporation to an out-of-state wholesaler. Subsequently, Gamco was refused renewal of its lease for space in the building on the grounds that the transfer of stock violated Gamco's agreement with the corporation not to transfer any interest in the business without written permission from the board.

The court found that, despite the fact that the physical facilities of the building could be duplicated elsewhere along the railroad line, the defendants could still be liable for monopolization, stating that "the exclusion from an appropriate market or business opportunity is actionable, notwithstanding substitute opportunities."[24] The court explained the obligations of the defendants, and some types of reasonable justifications supporting denials of access, as follows:

> Admittedly the finite limitations of the building itself thrust monopoly power upon the defendants, and they are not required to do the impossible in accepting indiscriminately all who would apply. Reasonable criteria of selection, therefore, such as lack of available space, financial unsoundness or possibly low business or ethical standards, would not violate the standards of the Sherman Act. But the latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize. Defendants thus had the duty to come forward and justify Gamco's ouster.[25]

The court determined that the defendants had failed to justify adequately Gamco's "ouster" and that the exclusion of Gamco violated the antitrust laws.[26]

Some of the possible justifications for refusals to provide access in a monopoly situation were noted by the Supreme Court in its most recent decision directly dealing with this area, *Otter Tail Power Co. v. United States*.[27] That case involved a

[20] 224 U.S. 383 (1912).
[21] *Id.* at 405.
[22] *Id.*
[23] 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).
[24] *Id.* at 488.
[25] *Id.* at 487-88.
[26] *Id.* at 489.
[27] 410 U.S. 366 (1973).

question of access to certain transmission lines owned by Otter Tail, an electric utility company that produced, transferred over its own lines ("wheeled"), and sold electric power. Otter Tail distributed electric power at retail to towns pursuant to municipally-granted franchises. The towns serviced by Otter Tail generally could accommodate only a single distribution system, thus making each town a natural monopoly market for the retail sale of electric power. Upon the expiration of Otter Tail franchises, several towns sought to establish municipal distribution systems to purchase power wholesale for resale to residents. In order to establish this system, the municipalities required access to transmission lines over which power purchased at wholesale could be wheeled to the municipal distributing centers. Otter Tail refused to allow the municipal distributing centers access to these transmission lines.[28]

The Supreme Court found that Otter Tail was attempting to use its monopoly power in one market to gain, or leverage, a competitive advantage in a second market. Otter Tail's transmission lines were held to be a scarce facility and the company's refusal to share the lines was found to violate § 2 of the Sherman Act, since the refusal was "solely to prevent municipal power systems from eroding its monopolistic position."[29] The Court noted, however, that such sharing or forced interconnection would not be required if to do so would "erode" Otter Tail's system or otherwise threaten its ability to provide adequate service to the public.[30]

Similar limitations on imposing an access requirement were noted in *Hecht v. Pro-Football, Inc.*,[31] where a group of promoters, seeking to obtain an American Football League ("AFL") franchise for Washington, D.C., sought to obtain use of the Robert F. Kennedy ("RFK") Stadium, operated and maintained by the District of Columbia Armory Board. The Armory Board, however, had leased the RFK Stadium to the competing National Football League (NFL) franchise, with a covenant in the lease restricting further lease of the Stadium to any other professional football team. The promoters claimed that they were unsuccessful in obtaining the AFL franchise because they were unable to gain access to the RFK Stadium.[32]

The court found that the RFK Stadium constituted an essential facility, and remanded for a new trial, noting that the doctrine would also support an allegation that the NFL franchise's refusal to waive the restrictive covenant constituted illegal monopolization and that where a restrictive covenant covers an essential facility, all possible competition is by definition excluded and the restraint is *per se* unreasonable.[33] The court noted, however, that the essential facility doctrine "must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."[34]

Several recent decisions have discussed the elements of the essential facilities doctrine in the context of the telecommunications industry. In *MCI Communications Corp. v. AT&T Co.*,[35] the Seventh Circuit considered a challenge made in part to control of certain long distance telephone services to customers. Specifically, in order to provide service to its customers, it is necessary for MCI to interconnect with the

[28] *Id.* at 368-71.
[29] *Id.* at 379.
[30] *Id.* at 382.
[31] 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).
[32] *Id.* at 986-87.
[33] *Id.* at 993.
[34] *Id.* at 992-93.
[35] 708 F.2d 1081 (7th Cir. 1983).

local distribution facilities of the Bell operating companies then controlled by AT&T. The court found that it would not be economically feasible for MCI to duplicate these facilities and that, as essential facilities, AT&T had an obligation to make the facilities available on non-discriminatory terms.[36] The court summarized that:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (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.[37]

The court found that it was "economically and technically possible for AT&T to have provided the requested interconnections," and that "no legitimate business or technical reason" was shown by AT&T for its denial of the requested interconnections.[38]

In *United States v. AT&T Co.*,[39] the court considered, as part of the challenge leading to the recent AT&T divestiture consent order,[40] similar allegations involving refusals to provide interconnection with local telephone distribution facilities. The court stated the applicable legal standard as follows:

> Any company which controls an "essential facility" or a "strategic bottleneck" in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them. Such access must be afforded upon such just and reasonable terms and regulations as will, in respect of use, character and cost of services, place every such company upon as nearly an equal plane as may be.[41]

The court found that the local facilities controlled by the Bell operating companies were "essential facilities" within the meaning of this doctrine and that the defendants were obligated to provide competitors nondiscriminatory access to those facilities. The court cautioned, however, that "absolute equality of access to essential facilities, without regard to the feasibility of such access or the burden it would impose upon the owner of these facilities, is not mandated by the antitrust laws."[42]

The bottleneck monopoly doctrine has been applied only in a few instances in the context of refusals to provide access to natural gas pipelines. The principal antitrust law considerations concerning access and transportation decisions in the pipeline context include whether it is feasible to provide access — that is, do the relevant facilities have any available practical capacity. Another major consideration is whether it is reasonably practical or impractical to duplicate or bypass the "essential" facility. Whether a reasonably practicable alternative exists with respect to a particular request will depend in part on the nature of the requester. Furthermore, whether legitimate business or technical reasons can be demonstrated to support the denial of access will also significantly affect the antitrust analysis regarding access and transportation decisions. For example, in *Town of Massena v. Niagara Mohawk Power Corp.*,[43] the court held that an electric utility that possessed monopoly power in the retail distribution market because of its complete control over certain transmission facilities was justified in refusing to wheel power to certain

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[36] *Id.* at 1133.
[37] *Id.*
[38] *Id.*
[39] 524 F. Supp. 1336 (D.D.C. 1981).
[40] *See United States v. AT&T Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S.Ct. 1240 (1983).
[41] 524 F. Supp. at 1352-53.
[42] *Id.* at 1360.
[43] 1980-2 Trade Cas. ¶ 63.526 (N.D.N.Y. 1980).

municipalities where the utility had identified significant technical engineering concerns that would arise under the terms of the proposed request.[44] In addition, such factors as whether denials of access to a gas pipeline are made on a consistent basis, and whether there is adequate and demonstrable factual support for the business reasons underlying a refusal to deal with potential purchasers, or for insisting upon specified conditions of access, will be of importance in any antitrust challenge.

One of the few decisions to consider access issues in the natural gas pipeline context is *Woods Exploration and Producing Co. v. Aluminum Co. of America.*[45] Plaintiffs in that case had leased acreage of less than one-half of one percent of a natural gas field (Appling Field). The defendants, Alcoa and a wholly-owned subsidiary, Lavaca, had a pipeline into the Appling Field used to transport gas to an Alcoa plant. Alcoa also used the pipeline to market gas from the field for third parties. The plaintiffs requested Alcoa to transport their gas through the Lavaca pipeline and to unitize or pool the gas of the parties. Alcoa refused both requests, and plaintiffs subsequently formed a company and began construction of a pipeline. The defendants then took certain actions designed to thwart the construction of the pipeline, such as forcing the plaintiffs to file condemnation proceedings to gain a right-of-way.[46]

The Fifth Circuit, in reinstating a jury verdict, stated with regard to the monopolization claims:

> We think that plaintiffs' allegations come within the spirit and rationale of these [Section 2 monopolization] cases. Basically, plaintiffs contend that defendants violated Section 2 by their (1) refusal to unitize or pool; (2) refusal to transport plaintiffs' gas; (3) harassment in drilling; and (4) refusal to grant a right-of-way to Southeastern. In essence, plaintiffs paint a picture of concerted action by defendants to restrain, hinder, or eliminate plaintiffs' extraction of gas from the common gas reservoir shared with defendants. We are not saying that pooling, unitization, and joint operating agreements are in themselves maligned under the Sherman Act, but even if we consider that the Act impliedly immunizes these collective activities as benign in themselves, they cannot be the instruments of economic predatism or oppression. Buying and selling are innocent activities in and of themselves but each can be converted into an antitrust malefaction. We think that the pattern of conduct alleged here may be held unlawful under the Sherman Act. . . . at the least the jury could so hold.[47]

In the other case considering an antitrust challenge to a refusal to provide access to a gas pipeline, *Venture Technology, Inc. v. National Fuel Gas Co.*,[48] a conspiracy was alleged among National Fuel Gas, its distribution subsidiary, and Flint, an independent gas producer, to exclude the plaintiff from the production of natural gas. The plaintiffs alleged that the "spacing" policy, under which National Fuel Gas' distribution company refused to purchase gas from the plaintiff (a would-be competitor of the independent producer from which National Fuel Gas currently purchased) during the plaintiff's initial stages of production, was enforced in a retroactive and discriminatory manner in order to exclude the plaintiff from competing with the defendants in the production of natural gas.[49] The jury found that the parent, National Fuel Gas, was not a participant in the alleged conspiracy,

[44] *Id.* at p. 76,811-14.

[45] 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

[46] *Id.* at 1289.

[47] *Id.* at 1309-09 (citations omitted).

[48] 1980-81 Trade Cas. ¶ 63,780 (W.D.N.Y. 1981), *rev'd,* 685 F.2d 41 (2d Cir.), *cert. denied,* 103 S.Ct. 362 (1982).

[49] 1980-81 Trade Cas. at p. 78,152-53.

but did find a conspiracy between the subsidiary distribution company and the independent producer.[50]

The defendant alleged that it was unable to accept the gas of the plaintiff at the time the plaintiff requested a hookup to the defendant's pipeline because the defendant's pipeline did not then have the capacity to accept such gas. The court noted that the defendant had failed to prove this factual assertion at trial, and that it was reasonable for the jury to infer that this purported reason was spurious because the defendant did not offer to purchase the plaintiff's gas if, or when, such capacity became available.[51] The trial court charged the jury that the pipeline was an essential facility, that the owner of such a facility must "share its use on fair and equitable terms," and that the failure to do so as part of a conspiracy is an unreasonable restraint of trade.[52] On appeal, however, the Second Circuit reversed the jury verdict, stating that there was no evidence that would permit an inference that there had been any conspiracy among the defendants.[53]

The relative paucity of cases applying the bottleneck monopoly/essential facilities doctrine, particularly in the natural gas pipeline context, renders conclusions as to the appropriate scope of the doctrine uncertain. Focusing solely on general language in some of these decisions, some commentators have, as noted previously, taken a broad view of the scope of the doctrine in the gas pipeline context. Lambert and Gilfoyle, for example, recognizing as reasonable business justifications for refusals by pipelines to provide access only such factors as lack of capacity or impairment of service to existing customers, conclude: "If it is technically and economically feasible for the monopolist to allow access to its facilities, the antitrust laws will compel access."[54]

Such a conclusion is, however, in our view, overly broad and fails to take into account recent trends in judicial and economic analysis of competitive activities, including refusals to deal, by monopolists and the appropriateness of such activities under the antitrust laws. To limit appropriate responses by gas pipelines to requests for access to refusals based only on such grounds as capacity or technical limitations, or impairment of service to existing customers, would be to impose, in effect, common carrier obligations on gas pipelines. In the absence of common carrier status, however,[55] other reasonable business justifications are available to gas pipelines, in our view, that would provide a defensible basis to support refusals to provide access in the event of an antitrust challenge.

As discussed in detail below, a wider range of reasonable business justifications, including considerations of the impact on efficiency and profitability of the pipeline, appear available on the basis of recent antitrust decisions than are recognized in such broad formulations of the scope of the bottleneck monopoly/essential facilities doctrine. While decisions to deny access to a pipeline are clearly unsupportable if undertaken for a predatory or anticompetitive purpose, refusals to provide access,

[50]*Id.* at p. 78,155.

[51]*Id.* at p. 78,155-56.

[52]*Id.* at p. 78,169.

[53]685 F.2d at 47. In the oil pipeline context, *see Denver Petroleum Corp. v. Shell Oil Co.*, 306 F.Supp. 289, 301 (D. Colo. 1969), finding a refusal by a monopsony oil pipeline common carrier to purchase or transport unlawful under the antitrust laws. *See also* Remarks by D.A. Kaplan, Dept. of Justice Antitrust Division, "Vertical Integration: Should the *AT&T* Doctrine Be Extended to Other Regulated Industries? — Application of the Theory to Oil Pipelines," bfore a joint meeting of the ABA Antitrust Law and Public Utilities Law Sections, Atlanta, Ga. (August 1, 1983).

[54]*See* Lambert & Gilfoyle, Reforming Natural Gas Markets: The Antitrust Alternative, *Public Util. Fort.* 15, 18 (May 12, 1983).

[55]*See generally* Reiter, Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation Under the Federal Power and Natural Gas Acts, 18 *Land & Water L. Rev.* 1 (1983).

or the conditioning of access on certain terms, that are based on analyses of the economic impact on the pipeline of granting or denying the request for access are defensible under several recent decisions. As the Second Circuit observed, in reversing an FTC decision in *Official Airline Guides, Inc. v. FTC,*[56] "even a monopolist, as long as he has no purpose to restrain competition or expand his monopoly, and does not act coercively, retains the right, under *Colgate,* to decide with whom to deal."[57]

In recent years, an increasing number of judicial opinions have recognized the propriety of aggressive competitive decisions by monopolists and have stressed that legitimate competitive conduct should not be condemned under the antitrust laws simply because of possible adverse effects on competitors. For example, in *Berkey Photo, Inc. v. Eastman Kodak Co.,*[58] the Second Circuit observed that "a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market."[59] The court noted further that:

> [A] large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity — more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.[60]

In rejecting various challenges to introduction of new products by a monopolist, the court concluded that "a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits."[61]

Similarly, in *Northeastern Telephone Co. v. AT&T Co.,*[62] the court stated that, "in spite of the law's abhorrence of monopoly, even monopolists must not, without more, be flatly prohibited from competing,"[63] and that, "should a conflict arise in a particular case between the desire to preserve the competitive process and the wish to rescue a competitor, courts must favor competition."[64]

In a comprehensive analysis in *In re E.I. duPont de Nemours and Co.,*[65] the FTC concluded that the dominant producer of a particular chemical product did not unlawfully attempt to monopolize the industry by undertaking a long-term expansion project designed to capture substantially all growth in demand by expanding capacity and exploiting superior new technology. The Commission concluded that dominant firms have a right to "aggressively pursue competitive opportunities," acknowledging that some business conduct that may be legitimate unavoidably may have incidental exclusionary effects.[66] The FTC summarized recent decisions such as *Berkey Photo,* observing that these recent "extensive efforts

[56] 630 F.2d 920 (2d Cir. 1980), *cert. denied,* 450 U.S. 917 (1981).
[57] *Id.* at 927-28.
[58] 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980).
[59] *Id.* at 274.
[60] *Id.* at 276.
[61] *Id.* at 281.
[62] 651 F.2d 76 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982).
[63] *Id.* at 87.
[64] *Id.*
[65] 3 Trade Reg. Rep. ¶ 21,770 (FTC 1980).
[66] *Id.* at p. 21,975 n.25.

by the courts to devise tests for determining whether conduct by a monopolist is unreasonably exclusionary or constitutes legitimate competitive behavior" have resulted in fashioning such criteria as "whether the behavior amounted to ordinary marketing practices" and "whether it was profitable or economically rational."[67]

The range of business justifications considered reasonable and appropriate has also included efficiency and profitability considerations in the specific context of consideration of antitrust challenges to refusals to deal by monopolists. For example, in *Byars v. Bluff City News Co.*,[68] the Sixth Circuit court found that a regional distributor of periodicals that possessed monopoly power did not violate Section 2 where the distributor refused to deal with an independent contractor. The court concluded that the distributor's refusal to deal was justified by "efficiency and business reasons" relating to its relationship with national distributors.[69]

In *Almeda Mall, Inc. v. Houston Lighting and Power Co.*,[70] the developers and owners of regional shopping centers brought an antitrust claim under Section 2 of the Sherman Act against a utility company because the company refused to install a single meter at their respective malls and sell electricity to the malls at a wholesale rate. The malls intended to sell electricity purchased at wholesale rates to tenants at the utility company's retail rate. In holding that the defendant did not violate Section 2, the Fifth Circuit found that the plaintiff malls were attempting to appropriate the profit-margin of the utility company.[71] The court noted that the malls did not generate, transmit, or distribute electricity, nor did they intend to do so except only on their own property and at a price no different from that which would be charged by the utility. The court concluded: "What the malls wished to do is pre-empt the utilities business for their own profit, not as true competitors for the same market."[72] The court found that plaintiffs attempted action was "more akin to mere substitution" than to competition, and that mandating access under the antitrust laws was not required in such circumstances.[73]

In *Becker v. Egypt News Co.*,[74] an exclusive wholesale distributor of horse-racing publications refused to continue to deal with a retail concessionaire at a racetrack whose retailing performance had diminished. The trial court found that the distributor's refusal to sell to the concessionaire and its attempt to sell the publications at the racetrack itself "were not unreasonably anticompetitive but a valid exercise of business judgment to protect its investment."[75] The trial court noted that:

> by seeking control of the retail sales [at the racetrack] Egypt News not only sought to increase its profits, a goal that is the basic fabric of business in America, but also sought to protect its substantial investment. The court does not wish to unnecessarily inhibit by judicial fiat the right of any business to freely exercise its discretion in an effort to protect its valid business interest."[76]

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[67] *Id.* at p. 21,978.

[68] 683 F.2d 981 (6th Cir. 1982).

[69] *Id.* at 983. *See Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 (7th Cir. 1977) (monopolist can justify a refusal to deal if its purpose is to improve the efficiency of its manufacturing or marketing).

[70] 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980).

[71] *Id.* at 353.

[72] *Id.*

[73] *Id.*

[74] 548 F.Supp. 1091 (E.D. Mo. 1982), *aff'd*, 713 F.2d 363 (8th Cir. 1983).

[75] 548 F.Supp. at 1098.

[76] *Id.*

On appeal the Eighth Circuit affirmed reliance on this business justification, discussing the focus on profitability, increased control and better service, and the absence of any predatory purpose, as supporting the initial decision.[77] The FTC has similarly rejected, in *In re General Motors Corp.*,[78] a challenge to a decision by a dominant automobile manufacturer to refuse to deal with independent body shops, on the basis of the manufacturer's business justification that its parts distribution system would be "extremely costly to revise."[79]

The increased possibility to successfully defend decisions to deny access to transmission or distribution facilities by gas pipelines should, however, be accompanied by attention to internal documentation with respect to such decisions. In *Venture Technology*, for example, the district court characterized the defendant's proferred business justifications variously as "a sham" and a "pretext" in view of the absence of contemporaneous documentation.[80] The effectiveness of such challenges can be reduced if appropriate steps are taken to document decisions to refuse pipeline access, establishing contemporaneously the factual bases for them.

Recent judicial decisions expanding the range of legitimate business justifications for monopolists in refusal to deal contexts thus provide, in our view, considerable support for broader competitive business flexibility for access decisions by gas pipelines. Reference to the bottleneck monopoly/essential facility doctrine as mandating access in virtually all situations where access is physically or technically possible increasingly appears inconsistent not only with the competitive purposes underlying natural gas deregulation but also with recent trends in antitrust analysis.

[77]713 F.2d at 368. *Contrast Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334, 400 (5th Cir. 1970).

[78]3 Trade Reg. Rep. ¶ 21,931 (FTC 1982).

[79]*Id.* at p. 22,344.

[80]1980-81 Trade Cas. at 78,156-58.