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The Evolution of the Essential Facilities Doctrine and Its Application to the Deregulation of the Natural Gas Industry

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I. INTRODUCTION

In 1887 Congress created the Interstate Commerce Commission (ICC), the nation's first federal regulatory agency. Three years later Congress passed the Sherman Act reflecting the legislative judgment that "competition is the best method of allocating resources in a free market." For one hundred years federal antitrust law has coexisted with the public policy favoring the regulation of certain industries. Within the last fifteen years, however, situations have arisen as a result of the federal government's movement toward deregulation where the two regimes of competition and regulation have collided head-on within a single market. At times that market has been dominated by affiliates or subsidiaries of a single firm which traditionally had been regulated as a public utility.

Courts have responded to this new phenomenon by expanding and applying the essential facilities doctrine under section 2 of the Sherman Act. The doctrine, however, has been applied not only to single-firm natural monopolies that historically were considered public utilities, but also to single-firm monopolies that conceivably could have acquired their


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market dominance by superior skill and intelligence.³

A violation of section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.⁴ The essential facilities doctrine provides that when market dominance is acquired by monopolistic conduct, a resource vital to competitive viability cannot be withheld from a competitor.⁵

What is troubling about this proliferation of essential facilities cases under section 2 is that the Supreme Court has never ruled directly whether the essential facilities doctrine applies under section 2 analysis. In Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,⁶ the Supreme Court’s most recent opportunity to address this issue, the Court evaded the issue by concluding in the last footnote of the opinion that in this case it was “unnecessary to consider the possible relevance of the essential facilities doctrine.”⁷

Application of the essential facilities doctrine to natural gas pipelines under section 2 of the Sherman Act is consistent with the original intent of the Sherman Act and should be affirmed by the Supreme Court. Aspen and its progeny, which are cases dealing with monopoly power achieved through superior product, business acumen, or historic accident, however, should be rejected.

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³ The essential facilities doctrine has touched even the research and citations used in this Article. West Publishing operates the WESTLAW database and has acquired a monopoly in the publication of court opinions through the West reporter system. As a result of litigation, Mead Data, who operates the competing LEXIS database, now has its own citation system. See Mead Data Cent. v. West Publishing, 679 F. Supp. 1455 (S.D. Ohio 1987). Mead alleged that West Publishing enhanced its monopoly power in legal materials by denying Mead access to the West reporter system which is an essential facility. Id. at 1460.

⁴ United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). The text of § 2 states: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation; or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 2 (1982).

⁵ On the other hand, an inventor or holder of a patent not engaged in predatory acts can restrict access to an essential facility to recover a reasonable return on his investment in research and development. See infra note 49 and accompanying text.


⁷ Id. at 611 n.44.
THE ESSENTIAL FACILITIES DOCTRINE

II. BACKGROUND

A. Rationales for Regulating Industries

There are two distinguishable rationales for regulating certain industries. One theory is that competition simply does not work in every industry. The other theory is that some industries are natural monopolies based on the characteristics of the industry.

Congress formed the ICC to bring the nation’s railroads under federal regulation based on the belief that competition does not work in every industry. The domestic airline market prior to 1978 was also regulated based on the general perception that public policies favoring reliable service to most areas and the best possible safety practices simply were not weighed by the free market to the same degree that they were weighed by society.8

The argument that competition does not work has appeared regularly when vigorous competition has threatened the continued existence of small businesses, a symbol of the vitality of the American entrepreneurial spirit. Economists, however, have shown that competition is the best method of allocating resources in a free market. The problem is that externalities distort the free market.9 As demonstrated during the last ten years since the deregulation of the airline industry, and in innovative approaches to regulation of otherwise competitive industries, the free market can be regulated just enough so that it is forced to weigh public policy concerns to the same degree that these concerns are weighed by society.

Regulating an industry because competition does not work is no longer a policy option within the political mainstream. While federal antitrust law historically tolerated such an argument under the Sherman Act,10 modern courts have taken the position that a defense based on the assumption that competition itself is unreasonable is totally inconsistent with the Sherman Act’s endorsement of competition as the best method

10. See Arthur, Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act, 74 CALIF. L. REV. 263, 302-08 (1986). For example, in Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), the Supreme Court upheld the legality of a cartel thinly disguised as a joint selling agency. This reflected the Court’s view that the public interest favored experimentation to end the Depression. Chief Justice Hughes found the Sherman Act to be a “charter of freedom” that necessarily had the “generality and adaptability” that had been “found to be desirable in constitutional provisions.” Id. at 306-08.
of allocating resources in a free market.\footnote{National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978).}

A completely different theory of regulation is based on the fact that some industries are natural monopolies. The theory is typically applied to industries that are heavily capital intensive and face continually decreasing long run average costs. Heavy capital expenditures are generally required to construct and maintain an infrastructure.

In these instances, public policy is based on the belief that it is in society's best interest for one firm, such as a public utility, to exploit economies of scale and avoid duplication of an identical infrastructure, subject, however, to direct regulation that prevents the firm from reaping monopoly profits.\footnote{See, e.g., MORGAN, supra note 8 at 73-75.} Until recently natural monopolies were believed to exist in long distance and local telecommunications; the generation, transmission, and local distribution of electricity; and in the production, transportation via pipeline, and local distribution of oil and natural gas.\footnote{This is an approach that until only recently had been unique to the United States. European democracies favored having the government directly provide services. If an industry turned out to be a natural monopoly, it was not inconsistent with democracy to nationalize that industry. Under Prime Minister Thatcher, however, Britain has imitated the American experience and "privatised" government owned public utilities such as British Telecom. Mercury Communications Ltd v. Scott-Garner [1984] 1 A11 E.R. 179. In February 1982, the Secretary of State granted Mercury Communications a license to operate private telecommunications systems in competition with British Telecom. Mercury, however, required interconnections with British Telecom's system, and the union, reflecting the Labour Party's opposition to privatisation, refused to provide these interconnections. The Court of Appeals, Civil Division, granted Mercury's request for an injunction ordering the union to provide interconnections. Id. at 179-81.}

A changing approach to regulation and new technology in recent years, however, have led to deregulation of many of these industries. New technology and increased output have created the situation in many markets where long run average cost no longer continues to decline at the output demanded. This situation has made it economically feasible for more than one firm to compete and achieve economies of scale in industries that were formerly believed to be natural monopolies, even when that means constructing and maintaining a duplicate infrastructure.

B. Deregulation of the Natural Gas Industry

Under the Natural Gas Act\footnote{15 U.S.C. §§ 717, 717(Z) (1982).} (NGA), the Federal Energy Regulatory Commission (FERC) regulated the price of gas at the wellhead and

\begin{itemize}
  \item 12. See, e.g., MORGAN, supra note 8 at 73-75.
  \item 13. See, e.g., MORGAN, supra note 8, at 105-07.
\end{itemize}
during transportation via interstate pipelines. Historically pipeline companies purchased gas from producers and then sold that gas to local natural gas distribution companies (LDC's). Intrastate pipelines, however, generally were not under FERC jurisdiction.

When the price of natural gas, as well as that of oil and other sources of energy, rose dramatically in the 1970's, producers were able to sell their limited supplies of gas at higher prices to intrastate pipelines since FERC's jurisdiction did not extend to intrastate markets. These intrastate pipelines simply passed the extra cost on to consumers. Meanwhile, customers of interstate pipelines were subjected in many cases to shortages and rationing of natural gas.

By the Natural Gas Policy Act of 1978\textsuperscript{15} (NGPA), Congress required FERC to deregulate the price at the wellhead of many sources of natural gas.\textsuperscript{16} Congress enacted the NGPA to remedy regulatory failure that led to shortages of natural gas in the 1970's.

In the NGPA Congress eliminated the distinction between intrastate and interstate gas and proposed a timetable to decontrol the price of gas at the wellhead. In the interim, gas that had already been committed under the NGA retained the status of being "old gas." New gas reserves committed under the NGPA and NGA were deemed "new gas" and were gradually allowed to fluctuate with the market price subject only to price ceilings.

Finding that partial wellhead decontrol had led to the new phenomenon of an interstate spot market for natural gas, FERC sought to make this gas available to LDC's. By Order No. 380\textsuperscript{17} FERC eliminated variable cost minimum billing which had the effect of releasing LDC's from their long-term obligation to buy a specified amount of their gas supply from the servicing pipeline. Although LDC's could now contract directly with producers for their gas needs, most pipelines were unwilling to transport gas from producers to LDC's while the pipelines still had their long-term take-or-pay contracts with producers.

As reflected in Order No. 436,\textsuperscript{18} FERC concluded that the infrastructure of a national interstate transmission grid was mature, and that

\begin{itemize}
\item \textsuperscript{15} 15 U.S.C. §§ 3301-3432 (1982).
\item \textsuperscript{16} See \textit{W. MOGEL, TRANSPORTATION AND MARKETING OF NATURAL GAS} 68-69 (1985). On April 17, 1989, the House passed and sent to the Senate a bill sponsored by Representative Philip Sharp (D-Indiana) to remove remaining price controls at the wellhead. Washington Post, Apr. 18, 1989, D-1.
\item \textsuperscript{18} 50 Fed. Reg. 42,408 (1985). Order No. 436 was FERC's response to the mandate of the court in Maryland People's Counsel v. FERC [hereinafter \textit{MPC 1}], 761 F.2d 768 (D.C. Cir. 1985),
\end{itemize}
LDC's could now arrange transportation from producers along competing pipeline routes in many parts of the country. The order proposed a voluntary program to entice pipelines to change their roles from merchants of gas for LDC's to transporters of gas from producers to LDC's. The program was voluntary in that FERC offered "436" pipelines the "carrot" of blanket certificates under section 7 of the NGA to transport without individual prior application and approval in exchange for the "stick" of requiring nondiscrimination in transportation. Alternatively, if pipelines chose to transport gas under Section 311 of the NGPA, which already required nondiscriminatory access, they were also deemed 436 pipelines.

Order No. 436 was intended to encourage pipelines to bargain with producers on take-or-pay provisions of existing contracts and to adopt the more limited role of transporting under simplified blanket certificates. Pipelines, however, did not bite at FERC's carrot. In fact, they went to great extremes to avoid becoming 436 pipelines. For example, the Southern Natural Gas Company filed forty-three separate applications for limited-term certificates of public convenience and necessity under section 7(c) of the NGA instead of filing an application for one blanket certificate under Order No. 436.19

Panhandle Eastern Pipe Line Company, on the other hand, agreed

and Maryland People's Counsel v. FERC [hereinafter MPC I], 761 F.2d 780 (D.C. Cir. 1985). The court in MPC I invalidated as arbitrary and capricious FERC's authorization of a "special marketing program" which allowed producers to by-pass LDC's (and state regulation) and sell high-priced gas already committed elsewhere, at the market price, directly to large industrial end users and credit that gas against the producer's take-or-pay obligations with the pipeline. Under FERC's special marketing program, producers were able to have their cake and eat it too. Residential customers and LDC's, however, could not also take advantage of the special marketing program. MPC I, 761 F.2d at 77. FERC did not define end user to include LDC's and their residential customers.

The court in MPC II took a hard look and held that this action was also arbitrary and capricious. Even more significant was the court's ruling that FERC betrayed its prime constituency—consumers—whom the NGA was designed to protect from exploitation at the hands of natural gas companies. In failing to consider the anticompetitive consequences of its action, FERC violated the "public convenience and necessity" standard under § 7 of the NGA. MPC II, 761 F.2d at 786.

Antitrust policy "is a factor relevant to responsible administration of the 'public convenience and necessity' standard under § 7 of the NGA." MPC II, 761 F.2d at 786; Northern Natural Gas Co. v. FPC, 399 F.2d 953, 958 (D.C. Cir. 1968). See Tenneco Oil Co., 26 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,029 (Jan. 16, 1984) (FERC must weigh competitive concerns even if no party raises them). The reason that FERC must evaluate the relevance of antitrust law is that "the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible, thereby avoiding monopoly profits." Northern Natural Gas, 399 F.2d at 959.

to become a 436 pipeline by initiating interim transportation under Section 311 of the NGPA. However, prior to publicly announcing this decision, Panhandle gave advance notice to a select group of customers, most notably its marketing affiliate (a broker who arranges contracts between producers and LDC's), so that these customers could be at the front of the line when Panhandle initiated "open-access" on a first-come, first-served basis. Panhandle's marketing affiliate, not surprisingly, was first in line.

In finding that Panhandle violated 18 C.F.R. Section 284.9(b), requiring that transportation under Section 311 of the NGPA be provided on a nondiscriminatory basis, FERC considered that Panhandle's marketing affiliate shared office space, computer and word processing facilities, clerical staff, and corporate officers with its parent company. Under these circumstances, FERC ruled that any suggestion that Panhandle's marketing affiliate did not have advance knowledge when space was available to transport on the pipeline "simply strains credibility."20

While these two examples illustrate overt opposition to deregulation, many other pipelines engaged in more subtle tactics. Faced with open-access, some pipelines objected for the first time that the gas of long-time suppliers was too wet or otherwise did not meet the pipeline's standards, and that transporting such gas would ruin the pipeline or other gas.21 To address issues such as these, FERC proposed inquiring into alleged anticompetitive practices of marketing affiliates.22

Not surprisingly, attorneys from "virtually every sector of the natural gas industry" challenged the simplification that Order No. 436 promised, and the potential danger to their own livelihood it posed.23 The United States Court of Appeals for the District of Columbia Circuit responded by vacating Order No. 436 in Associated Gas Distributors v. FERC.24

FERC responded by issuing Order No. 50025 which repromulgated the regulations that the court had vacated. The regulations were issued

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23. Associated Gas Distributors v. FERC, 824 F.2d 981, 994 (D.C. Cir. 1987) [hereinafter AGD]. The court noted that even with its decision in the case at hand, "[t]he fallout . . . appears still to provide a rich lode" for lawyers who perhaps are the only beneficiaries of the complicated law in this area. Id. at 994 n.2.
24. Id. at 981.
without notice and comment, pursuant to standards that the D.C. Circuit had set out for interim rulemaking in another recent decision addressing FERC regulations.\(^{26}\) The reissued regulations also addressed the court's concerns with take-or-pay, the long-term contracts with producers that prevent pipelines from freely converting to a transportation-only role. Enforcement attorneys continue to operate a hot line to settle disputes informally.\(^{27}\)

With FERC's rulemaking authority effectively emasculated by the D.C. Circuit in AGD and preceding cases,\(^{28}\) and in the absence of congressional action to clarify FERC's policy and authority to implement that policy, frustrated producers, brokers, and LDC's have resorted to the courts and the application of antitrust law to seek damages and force pipelines to transport natural gas. Courts have held that the natural gas industry is not immune from antitrust law.\(^{29}\) Also, FERC lacks

\(^{26}\) Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987).

\(^{27}\) FERC NEWS RELEASE (June 8, 1987).

\(^{28}\) See supra note 18 and accompanying text.

\(^{29}\) In Otter Tail Power Co. v. United States, the Supreme Court held that implied immunity from the antitrust laws for regulated industries is strongly disfavored. 410 U.S. 366, 372 (1973) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963)). *Otter Tail* is factually very similar to developments in the natural gas industry as a result of FERC's decision to entice gas pipelines to become open-access carriers. The case arose under FERC's predecessor, the Federal Power Commission (FPC). Moreover, the legislative history of the Natural Gas Act (NGA) of 1938 and Natural Gas Policy Act (NGPA) of 1978 model that of the Federal Power Act (FPA). In *Otter Tail*, the court held in effect that Otter Tail's transmission lines were an essential facility, even though Congress had not imposed common carrier status on electric utilities; § 202(b) of the FPA encourages voluntary interconnections of power. *Id.* at 373-75. Similarly, Congress declined to impose common carrier status on gas pipelines in the NGA. *AGD*, 824 F.2d 981, 997 (D.C. Cir. 1987).

Section 602(b) of the NGPA specifically provides the following:

(b) Common carriers.

   No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation . . . authorized by the Commission under . . . [section 311(a) of the NGPA].

*Id.* at 1002 (quoting 15 U.S.C. § 3432(b) (1982)).

The United States Court of Appeals for the District of Columbia Circuit nonetheless recently held that imposing open-access was consistent with the Congressional intent reflected in the NGPA that gas pipelines not be regulated as common carriers by state regulatory agencies. *Id.* at 1001-03.

The legislative history of the FPA, NGA, and NGPA indicates that Congress did not intend to impose common carrier status on electrical utilities or gas pipelines. Although Congress formed the ICC initially to bring the nation's railroads under federal regulation, in 1906 Congress brought oil pipelines under ICC jurisdiction. *Id.* at 997. In 1910 Congress added telephone and telegraph companies to the umbrella of ICC regulation and designated industries under ICC regulation as common carriers, which were required "to provide service upon request at just and reasonable rates, without unjust discrimination or undue preference." MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1100 (7th Cir. 1983). AT&T continued to be regulated as a common carrier after 1934 under the Federal Communications Commission (FCC). *Id.* at 1101. The Supreme Court's willingness to apply the essential facilities doctrine under § 2 to Otter Tail, even though Congress had not imposed common carrier status on electric utilities, suggests that common carrier status is not relevant to the application of the essential facilities doctrine.
authority to address antitrust claims for past injuries under the doctrine of primary jurisdiction.\textsuperscript{30}

The essential facilities doctrine provides a conceptual framework to analyze pipelines’ ability to translate legal monopoly power into a competitive edge.\textsuperscript{31} For LDC’s, producers of natural gas, and brokers who arrange contracts between producers and local gas companies, access to gas pipelines is an essential facility required to compete on an equal basis with other sellers of gas. Within the past two years, producers, brokers, and LDC’s have succeeded for the first time in gaining access to pipelines’ transportation facilities by relying, in part, on the essential facilities doctrine under section 2 of the Sherman Act.

III. THE EVOLUTION OF THE ESSENTIAL FACILITIES DOCTRINE

A. The Essential Facilities Doctrine Under Section 1

While the application of the essential facilities doctrine under section 2 of the Sherman Act may be uncertain, the doctrine’s application to joint ventures under section 1 has a long history. What is now called the essential facilities doctrine or bottleneck theory originated in United States v. Terminal Railroad Association.\textsuperscript{32}

Under Jay Gould’s direction, fourteen railroads formed the Terminal Railroad Association of St. Louis in 1899 to operate the ferry and two bridges that crossed the Mississippi River at St. Louis. The facilities were used exclusively for the benefit of members. Based upon a finding of fact that because of geography it was not possible to build any more bridges or construct any more ferry routes across the Mississippi at St.


\textsuperscript{31} See, e.g., W. Hederman, A Comparative Analysis of Two Difficult Market Transitions: Telecommunications and Natural Gas, in A. Danielsen & D. Kamerschen, Telecommunications in the Post Divestiture Era 207-14 (1986). Pipelines can by-pass state regulation and their obligation to act in the consumer’s interest (“raid core markets” in the industry metaphor) by allowing their broker marketing affiliate to match an end user with a producer that already supplies the pipeline with gas under take-or-pay contracts. The producer, even if it is not also a subsidiary of the pipeline, is happy because it gets to contract, usually with a large factory, to sell gas at the market price without the hassle of dealing with a state public service commission (which typically makes even FERC look like a model of efficiency in comparison). At the same time, the producer can credit this sale against its take-or-pay obligations at the higher regulated price, which becomes only more advantageous if that take-or-pay obligation is with its subsidiary. Everybody gets to have their cake and eat it too. \textit{Id.}

\textsuperscript{32} 224 U.S. 383 (1912).
Louis, the Court held that the Terminal Railroad Association's control and possession of the only means to cross the Mississippi River constituted an illegal combination and illegal restraint under section 1 of the Sherman Act. The Court gave the Terminal Railroad Association a choice: either reach an agreement to admit competitors or submit to dissolution.

Applying analogous reasoning in Associated Press v. United States, the Supreme Court held that the Associated Press news service's policy of discrimination was an unreasonable combination under section 1 of the Sherman Act. Terminal Railroad and Associated Press have been read expansively to stand for the essential facilities doctrine.

Joint venture agreements that exclude competitors from access to a new facility are almost indistinguishable from concerted refusals to deal or group boycotts which had been held to violate section 1 of the Sherman Act under a per se rule. The Supreme Court addressed the distinction recently in Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.

Northwest Wholesale was a cooperative of office supply retailers, and Pacific Stationery was a former member that had been expelled. Recognizing that there was confusion about the scope of the per se rule against concerted refusals to deal, Justice Brennan, writing for the majority, formulated a standard for invoking the per se rule. The rule requires more than allegations of a concerted refusal to deal. A plaintiff must also show that the joint venture possessed market power and enhanced that market power by denying access to the cooperative. Moreover, the defendant's denial of access to the cooperative had to be predominantly anticompetitive.

The effect of Justice Brennan's formulation is that cases such as Northwest, in which plaintiffs do not establish a prima facie case for per se treatment, must undergo rule-of-reason analysis. The court must determine whether the restraint on competition is a naked one which only

33. Id. at 410.
34. Id. at 411-12.
35. 326 U.S. 1 (1945).
36. Id. at 15.
39. Id. at 286-87.
40. Id. at 294-98.
41. Id. at 296-98.
42. Id.
43. Id. at 297.
restricts output, or whether the restraint is ancillary. Ancillary re-
straints promote wealth by creating voluntary exchanges and facilitate
joint productive activities. Such joint ventures increase economic ef-
iciency and render markets more, rather than less, competitive.

Applying the essential facilities doctrine under section 1 is consis-
tent with the legislative history of the Sherman Act. In enacting the
legislation, Congress made the policy choice that cartels (loose combina-
tions) and mergers to monopoly (trusts) would be violations of the Act,
while other mergers and single firm monopolies of superior efficiency
would be allowed. A denial of access to an essential facility corre-
sponds with congressional intent to find both cartels and mergers to mo-
nopoly in violation of section 1. The legislative history, however,
indicates that Congress clearly did not intend to apply section 2 to single
firm monopolies that acquired market dominance by superior skill and
intelligence.

Not even Senator Sherman could have foreseen in 1890 that compe-
tition would be possible for single firm natural monopolies which histori-
cally had been regulated as public utilities. These single firm monopolies
did not acquire their market dominance by superior skill and intelli-
gence, but rather were granted monopolies by federal, state, and local
governments on the condition that they would be subject to regulation.
In a sense, these natural monopolies had a license or charter from the
government. Requiring these single-firm natural monopolies to provide
access to essential facilities or rescinding their licenses, therefore, is con-
sistent with Congress' intent not to penalize single firm monopolies that
acquired their market dominance by superior skill and intelligence.

44. See Arthur, supra note 10, at 281, 296-98 (setting out Judge Taft's identification of the
American common law majority rule, which Senator Sherman intended to adopt as federal law
under the Sherman Act, in United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898)).
Because the Supreme Court never adopted Taft's methodology, subsequent courts set sail on a sea of
doubt. Id. at 292, 297-98.
45. Addyston Pipe, 85 F. at 280-81.
46. Northwest Wholesale Stationers, 472 U.S. at 295 (quoting Broadcast Music, Inc. v. Colum-
bia Broadcasting System, Inc., 441 U.S. 1, 20 (1979)).
47. Hence the origin of the term "anti-trust" law.
48. See Arthur, supra note 10, at 284-89.
49. See id. at 288-89 (quoting 21 CONG. REC. 3152 (1890) as cited in United States v. E.I. Du
Pont De Nemours & Co., 351 U.S. 377, 390 n.15 (1956)).
50. Compare with supra note 12 and accompanying text (Mercury Communications, the MCI
of the U.K., received a license from the government to operate its telecommunication system that
competed with British Telecom).
B. The First Essential Facilities Cases Under Section 2

The Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Co.* to refrain from ruling on the application of the essential facilities doctrine under section 2 of the Sherman Act is appropriately characterized as evasive in view of the circumstances under which the doctrine first arose in a section 2 case. In *Otter Tail Power Co. v. United States* the Court reached its decision by applying the essential facilities doctrine under section 2, but omitted reference to the doctrine by name. Thus, *Otter Tail* was in a sense the first essential facilities case under section 2 of the Sherman Act.

Otter Tail Power Company refused to wheel electricity for cities that sought to use its transmission lines for power bought from other sources. The Court held that "Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of" section 2 of the Sherman Act. Although the district court specifically relied on the bottleneck theory of antitrust law to reach its decision, the Court was still not yet ready in 1973 to clarify the law. In *Otter Tail*, as in *Aspen*, the issue of whether the essential facilities doctrine is applicable under section 2 was directly before the Court and the Court declined to address it.

The first reported opinion incorporating the essential facilities doctrine under section 2 was the decision of the D.C. Circuit Court of Appeals in *Hecht v. Pro-Football, Inc.* (Hecht II). A private group of

53. Id. at 377.
55. Perhaps the Supreme Court's omission of reference to the essential facilities doctrine or bottleneck theory was intentional and meant to limit the doctrine's application to the facts of the case. Moreover, the fact that the district court referred to the litigation in *Hecht I*, albeit for the immunity issue, underscores that it was questionable at the time whether the essential facilities doctrine was even applicable under § 2 of the Sherman Act. The district court, no doubt, wanted to raise the issue first before the Court of Appeals for the District of Columbia Circuit got another chance.

Taking into account that it was possible to buy tickets for games of the Washington Federals of the USFL for the short time that they existed, one skeptical of the essential facilities doctrine might conclude that perhaps more than just access to RFK Stadium is "essential" to compete on equal terms as a professional football team in Washington, D.C. Perhaps burgundy-and-gold jerseys, a catchy fight song to the tune of "Hail to the Redskins," and access to the Super Bowl are also essential facilities.

56. 570 F.2d 982 (D.C. Cir. 1977).
investors doing business as the Washington Federals, sought an American Football League franchise in Washington, D.C., and sued the Washington Redskins and the D.C. Armory to gain access to RFK Stadium.\(^5\)

The court in *Hecht II* held that if the trial judge had given proper jury instructions, a jury could have found that RFK Stadium was an essential facility required for operation of a professional football team in the Washington, D.C., metropolitan area.\(^5\) Moreover, the Redskins’ denial of access to RFK Stadium could have led a jury to conclude that the Redskins monopolized professional football in Washington, D.C., in violation of section 2 of the Sherman Act.\(^5\)

**C. The Essential Facilities Doctrine and Telecommunications**

The success of AT&T’s competitors after deregulation demonstrates that competition is possible in long distance telecommunications, even though each competitor had to construct and maintain its own network using microwave and fiber optic cable technology. The essential facilities doctrine provides a conceptual framework to analyze AT&T’s ability to translate what is left of its legal monopoly power in local service into a competitive edge in long distance service.

An essential facility is, at a minimum, a resource possessed by the defendant that is vital to the plaintiff’s competitive viability.\(^6\) In the telecommunications industry, interconnections with local telephone companies are essential facilities necessary for long distance carriers to compete on an equal basis with each other.\(^6\) AT&T, however, had an

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57. *Id.* at 985. In *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir.1971) (hereinafter *Hecht I*), the United States Court of Appeals for the District of Columbia Circuit held that the D.C. Armory’s leasing of RFK Stadium was not governmental action immune from the antitrust laws. After a remand for a trial on the merits, the case came before the court again and the court remanded the case a second time. *Hecht II*, 570 F.2d at 982.

58. *Id.* at 992-93.

59. *Id.* at 988-96.


61. Even with divestiture and equal access, a vestige of AT&T’s former legal monopoly power remains. Long distance calls, made using local telephone companies’ calling credit cards, are routed through AT&T Long Lines. *Southern Bell, Greater Atlanta Telephone Directory* 18 (Dec. 1987-Dec. 1988).

Part of the problem lies in the fact that many customers still place calls only through AT&T. Southern Bell maintains that “technical limitations” prevent customers from charging long distance telephone calls routed through other long distance carriers except AT&T on their Southern Bell Calling Cards. *Id.* This is mystifying now that other long distance carriers’ bills appear on Southern Bell’s monthly bill. It must really require a lot of effort on Southern Bell’s part to hook up an alternative long distance carrier under equal access, if one actually believes that the three months and $3.50 Southern Bell requires to make a change is warranted for an electrical engineer to physically solder a new interconnection. *Id.*

For rural customers, however, equal access is not yet a reality. In Georgia, originally each of
advantage over competitors because it has always had interconnections with local telephone companies, while its competitors are just getting equal access.

The most significant advancement of the essential facilities doctrine occurred in *MCI Communications v. American Telephone & Telegraph Co.* Relying on *Hecht II, Otter Tail,* and *Terminal Railroad,* the Seventh Circuit Court of Appeals outlined 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.

The *MCI* court held that: (1) AT&T had complete control over the local distribution facilities that MCI required; (2) given present technology, local telephone service is generally regarded as a natural monopoly and it would not be economically feasible for MCI to duplicate Bell's local distribution facilities and regulatory authorization could not be obtained for such an uneconomical duplication; (3) the evidence supports the jury's determination that AT&T denied MCI the essential facilities; and (4) it was technically and economically feasible for AT&T to provide MCI with the requested interconnections. Therefore, AT&T's refusal to provide interconnections constituted an act of monopolization under section 2 of the Sherman Act.

**D. Expansion of the Essential Facilities Doctrine**

Expanding on the *MCI* test in *Aspen,* the Tenth Circuit Court of Appeals relied on the essential facilities doctrine as one of two tests to find Aspen Skiing Company liable under the second element of section 2.
THE ESSENTIAL FACILITIES DOCTRINE

of the Sherman Act: "the willful acquisition or maintenance of . . . [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." 66

Aspen, Colorado, has four major ski resort facilities. Since 1958 Aspen Skiing Company (Ski Co.) operated Ajax, and Aspen Highlands Skiing Corporation (Highlands) owned Highlands. 67 Ski Co. bought Buttermilk in 1964 and in 1967 opened Snowmass. Practical considerations prevented developing additional ski resort facilities.

Since 1962 all the Aspen resorts participated in offering an interchangeable six-day, all-Aspen ticket. 68 In 1978, however, Ski Co. discontinued its participation. 69 In 1979, after experiencing lost revenues, Highlands filed suit alleging that Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of section 2 of the Sherman Act and sought treble damages. 70 The jury found that Ski Co. violated section 2 and calculated Highland's actual damages at 2.5 million dollars. 71 The trial court denied Ski Co.'s motion for judgment notwithstanding the verdict, and the Tenth Circuit Court of Appeals affirmed.

Applying the MCI test to the facts of Aspen, the Court of Appeals for the Tenth Circuit held that: (1) Ski Co. had control of an essential facility: the ability to market a multi-day multi-mountain ticket, analogous to the control of transportation across the Mississippi in Terminal Railroad; (2) there was evidence concerning the difficulty of duplicating the essential facility since regulatory restrictions, delays, and the expense and time required to develop new mountains made it difficult to construct another ski area in Aspen; (3) Ski Co. admitted that it denied Highlands access to the essential facility; and (4) there was evidence that it was feasible for Ski Co. to provide access to the essential facility because Ski Co. had previously done so. 72 Therefore, Ski Co.'s wrongful refusal to deal satisfied the test of the essential facilities doctrine to establish liability under the second element of section 2 of the Sherman Act.

The Aspen court also found Ski Co. liable under an intent test for the second element of section 2 of the Sherman Act. The court held that there was sufficient evidence to find that Ski Co.'s intent in refusing to

67. Id. at 1512.
68. Id.
69. Id. at 1512-13.
70. Id. at 1513.
71. Id.
72. Id. at 1520-21.
cooperate was to create or maintain a monopoly.\textsuperscript{73}

Application of the essential facilities doctrine is not as straightforward in the Seventh Circuit as the \textit{MCI} court suggests without considering Judge Posner's opinion in \textit{Olympia Equipment Leasing Co. v. Western Union Telegraph Co.}.\textsuperscript{74} Judge Posner opined that \textit{Aspen} "is narrowly written. If it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is

\textsuperscript{73} Id. at 1521-22. Relying solely on this intent test, the Supreme Court evaded the essential facilities doctrine.

\textsuperscript{74} 797 F.2d 370 (7th Cir. 1986) cert. denied, 480 U.S. 934 (1987). \textit{Olympia} also arose out of the deregulation of the telecommunications industry. As AT&T acquired a natural monopoly in long distance telephone transmission, local telephone transmission, and telephone, Western Union developed a natural monopoly in long distance telegraph transmission, local telegraph transmission, and telex teletypewriter terminals. Similarly, Western Union, under FCC regulation, required customers to lease telex terminals, as AT&T had required customers to lease telephones. In 1971, as a condition allowing Western Union to buy the competing TWX service from AT&T, the FCC required Western Union to open up the market for telex terminals to independent competitors, as AT&T was required to permit independent telephone manufacturers to compete in 1968. In 1973 Western Union announced that it was not only opening up the market for telex terminals by allowing customers to cancel leases, but it had decided to get out of the equipment market and sell off all of its terminals to raise capital to buy satellites. In furtherance of this business strategy, Western Union actually instructed its salesmen to give customers a list of competing vendors of telex terminals. \textit{Id.} at 372.

\textit{Olympia} was formed in 1975 to take advantage of this business opportunity. It bought telex terminals from Teletype Corporation, Western Union's supplier. It had no sales force of its own, relying totally on referrals by Western Union salesmen who were encouraged by a schedule of commissions to push independent vendors. During several months of 1975, \textit{Olympia} captured 20 percent of the market for telex terminals. When Western Union discovered that it was not selling its own telex terminals fast enough, it changed its schedule of commissions and instructed its own salesmen to stop referring customers to competing independent vendors. \textit{Olympia}'s market share declined, and even after hiring its own sales force, \textit{Olympia} had to go out of business in 1976. \textit{Olympia} filed suit seeking damages for monopolization and attempted monopolization under § 2 of the Sherman Act. The jury awarded \textit{Olympia} $12 million, which was trebled to $36 million, plus attorneys' fees. Western Union appealed. \textit{Id.} at 371-73.

Recognizing that this case was different and that neither the intent nor essential facilities tests applied, Judge Posner distinguished \textit{Olympia} and held that Western Union's actions did not violate § 2 of the Sherman Act. First, Judge Posner noted that, "the emphasis of antitrust policy [has] shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency." \textit{Id.} at 375.

Second, Judge Posner discussed \textit{MCI}, \textit{Otter Tail}, and the essential facilities doctrine and concluded that while \textit{Otter Tail} was an essential facilities case that he accepts as absolutely authoritative, the case at hand was not an essential facilities case because "[t]he essential feature of the refusal-to-deal cases [a monopoly supplier's discriminating against a customer because the customer has decided to compete with it] is missing here." \textit{Id.} at 377. Judge Posner noted that \textit{Aspen} was "not a conventional monopoly refusal-to-deal case like \textit{Otter Tail} because [Highlands] was never a customer of... [Ski Co.;] the skiers are the customers. But... [Aspen] is like the essential-facility cases in that the plaintiff could not complete with the defendant without being able to offer its customers access to the defendant's larger facilities." \textit{Id.} "In other words, competition required some cooperation among competitors." \textit{Id.} \textit{Olympia}, however, required access to Western Union's referral list solely for its own benefit. Judge Posner concluded that "\textit{Olympia} had no right under antitrust law to take a free ride on its competitor's sales force." \textit{Id.} at 377-78.
indispensable to effective competition.”75 In such circumstances, “society as a whole benefits from the competitive process.”76

E. Critique of the Essential Facilities Doctrine Under Section 2

The Supreme Court should limit expansion of the essential facilities doctrine under section 2 to natural monopolies that have been deregulated. Otherwise, creative applications of the doctrine will continue and result in frivolous cases. Application of the doctrine to single-firm monopolies that acquired their market dominance by superior skill, intelligence, or some other intangible clouds the clear intent of Congress reflected in the Sherman Act to allow firms to recover a reasonable return on their investment in research and development.77

IV. APPLICATION OF THE ESSENTIAL FACILITIES DOCTRINE TO THE NATURAL GAS INDUSTRY

A. The Early Cases

Before a plaintiff can test the essential facilities doctrine under the second prong of section 2, a plaintiff must prove the threshold determination that the defendant has monopoly power in the relevant market. In Woods Exploration & Producing Co. v. Aluminum Co. of America,78 the Fifth Circuit Court of Appeals held for the first time that an individual natural gas field could constitute a relevant geographic market under section 2 of the Sherman Act.79 Subsequent courts, however, have relied on a threshold determination that the defendant did not possess monopoly power in the relevant market to deny plaintiffs’ claims that defendants violated section 2.80

In Garshman v. Universal Resources Holding Inc.,81 the United States Court of Appeals for the Third Circuit declined to apply the essential facilities doctrine under section 2 to enforce a producer’s take-
or-pay contract with a pipeline for its expensive gas. The court held that the pipeline’s efforts to get out of the contract were pro-competitive rather than anticompetitive. 82

In Illinois v. Panhandle Eastern Pipeline Co., 83 a federal district court seriously considered for the first time granting a plaintiff’s motion for a preliminary injunction against a pipeline, relying on the essential facilities doctrine under section 2. 84 The court, however, declined to grant the preliminary injunction. It found that the plaintiff failed to prove the likelihood of success on the merits on the third element of the MCI test, denial of use of the essential facility, because plaintiff had not met its burden of proving that Panhandle’s transportation guidelines constituted a denial of use of the pipeline to transport. 85

B. Consolidated

Consolidated Gas Co. v. City Gas Co. 86 was the first case in which a plaintiff managed to convince a federal district court to enjoin a pipeline from denying it access relying primarily on the essential facilities doctrine under Section 2 of the Sherman Act. Consolidated won not only an injunction, but almost five million dollars in damages for the section 2 violation as well. 87 The facts of Consolidated, however, were unique, and defendant City Gas was a predatory monopolist that would make even Jay Gould proud.

Both Consolidated and City Gas began in the 1950’s serving subdivisions in south Dade County, Florida, with liquid petroleum (LP) gas that was shipped in storage tanks and then transported through an underground local distribution system. 88 When natural gas became available via pipeline to south Florida in the 1960’s, City Gas and Peoples, another supplier, shifted to providing natural gas by connecting up to Florida Gas Transmission’s pipeline. 89 City Gas and Peoples agreed to a territorial division of south Florida, and both expanded, leaving Consolidated’s small distribution system for LP gas virtually surrounded by 1984. 90

82. Id. at 230.
84. Id. at 791-92.
85. Id.
87. Id. at 1501.
88. Id. at 1502.
89. Id. at 1502-03.
90. Id. at 1505-06.
When the price of LP gas rose even higher than that of natural gas during the 1970's, Consolidated also sought to hook up to Florida Gas Transmission's pipeline. The hook up, however, required either Florida Gas Transmission to provide a pipeline connection to its system, or connecting to City Gas' system and buying natural gas from City Gas.

City Gas followed a strategy of acquiring small LP systems such as Consolidated. When Consolidated refused the offer of City Gas, City Gas went after Consolidated's customers by starting its own parallel distribution system alongside Consolidated's using Consolidated's easements.

Consolidated filed suit alleging monopolization under section 2 of the Sherman Act. In a fifty-page opinion with a table of contents mirroring that of MCI, the district court found that City Gas violated section 2 of the Sherman Act under virtually every test in the mothball fleet of antitrust. In particular, the court found that the connection to Florida Gas Transmission's pipeline constituted an essential facility. Therefore, the court ordered that City Gas sell or transport natural gas to Consolidated at a reasonable price.

C. City of Chanute

*City of Chanute v. Williams Natural Gas Co.* involved a more typical situation confronting municipalities seeking to take advantage of FERC's deregulation to purchase lower cost gas directly from producers. In December of 1986, Williams, the only pipeline serving the cities in this suit, became an open-access pipeline, and the cities began contracting directly with producers for gas that cost less than that which Williams sold under its take-or-pay contract with Amoco Production Company. Faced with having to transport lower cost gas in competition with its

91. *Id.* at 1504.
92. *Id.*
93. *Id.* at 1507.
94. *Id.* at 1514.
95. *Id.* at 1522-42.
96. *Id.* at 1539.
97. *Id.* at 1545.
98. 678 F. Supp. 1517 (D. Kan. 1988). The City of Chanute court, moreover, denied Williams' motion to modify the court's preliminary injunction and stay its implementation until FERC held an administrative hearing or Williams appealed the court's order to the Court of Appeals for the Tenth Circuit. *Id.* at 1534-35. The parties settled out of court on the preliminary injunction but are presently proceeding toward a trial on the merits to litigate damages. Interview with Charles F. Wheatley, Jr., of Wheatley & Ranquist, Annapolis, Md., counsel for City of Chanute (May 11, 1989).
99. *Id.* at 1520.
100. *Id.*
own sales supplied by Amoco, and unable to renegotiate its take-or-pay contracts any further with Amoco, Williams closed its pipeline to transportation. Forced to buy Amoco’s high cost gas from Williams, the only pipeline serving the cities, the cities filed suit alleging monopolization under section 2 of the Sherman Act and seeking a preliminary injunction forcing Williams to transport on their behalf. Finding that the cities’ suit had a likelihood of success on the merits, the court granted the preliminary injunction and ordered that Williams transport gas for the eight plaintiff cities.

In reaching its decision, the court in City of Chanute relied primarily on the finding that Williams’ pipeline was an essential facility. Plaintiffs’ allegations passed the threshold test of showing that Williams had monopoly power in the relevant market: Williams was the only pipeline serving the area.

Relying on the Tenth Circuit’s adoption of the MCI test in Aspen, the court further found that: (1) Williams controlled an essential facility, the only natural gas pipeline serving the area; (2) it was not reasonable to require the cities to duplicate Williams’ pipeline; (3) Williams denied use of the essential facility by discontinuing open-access transportation; and (4) it was feasible for Williams to provide the cities access to its facility, since Williams had allowed open access for six months.

Most significantly, the court found that Williams could not rely on the threat of take-or-pay exposure as a defense because the cities showed that it was feasible for Williams to provide access. The court reached this conclusion by finding an analogy to the situation in Consolidated, and cited the case for the proposition that self-preservation alone is not a defense to deny access to an essential facility. Even more persuasive to the court was the similarity of this fact pattern to that in Otter Tail.

V. CONCLUSION

The Supreme Court has yet to address directly whether the essential facilities doctrine is applicable under section 2 of the Sherman Act.

101. Id. at 1520-21.
102. Id. at 1521.
103. Id. at 1534.
104. Id. at 1531-34.
105. Id. at 1533-34.
106. Id. at 1534.
108. 678 F. Supp. at 1533.
Cases involving natural monopolies that have been deregulated—*Otter Tail*, *MCI*, *Consolidated*, and *City of Chanute*—are consistent with the original intent of Congress that section 2 of the Sherman Act not penalize single-firm monopolies that acquired their market dominance by superior skill and intelligence. Cases such as *Aspen*, however, which may not be limited to its unusual facts, persuasively expand the essential facilities doctrine under section 2 of the Sherman Act beyond deregulated natural monopolies to situations that Congress clearly intended to fall outside section 2.

At the next opportunity, the Supreme Court should address whether the essential facilities doctrine is applicable under section 2 of the Sherman Act. Instead of evading the issue, the Court should clarify that the doctrine is applicable under section 2, but only to natural monopolies that have been deregulated.\(^\text{109}\)

\(^{109}\) *Id.* at 1534.