1 UNITED STATES FEDERAL TRADE COMMISSION
2 and
3 UNITED STATES DEPARTMENT OF JUSTICE
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6
7 SHERMAN ACT SECTION 2 JOINT HEARING
8 REFUSALS TO DEAL PANEL
9 TUESDAY, JULY 18, 2006
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14 HELD AT:
15 UNITED STATES FEDERAL TRADE COMMISSION
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18 WASHINGTON, D.C.
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23
24 Reported and transcribed by:
25 Sally Jo Bowling

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3 Federal Trade Commission

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6

7 PANELISTS:

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9 William J. Kolasky

10 R. Hewitt Pate

11 Robert Pitofsky

12 Steven C. Salop

13 Thomas F. Walton

14 Mark Whitener

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1 P R O C E E D I N G S
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3 MR. ABBOTT: Good afternoon. I'm Alden Abbott,
4 Associate Director of the Bureau of Competition of the
5 Federal Trade Commission. I wish to join my
6 co-moderator, Deputy Assistant Attorney General for
7 Antitrust, Bruce McDonald, to welcome you to today's
8 session of the FTC/Justice Department hearings on the
9 antitrust implications of single firm conduct.
10 This is the fourth session in the ongoing
11 hearings. Prior sessions involved an introductory
12 overview of the topic, and sessions on predatory pricing
13 and buying.
14 Before we start, I need to cover a few
15 housekeeping matters. First, please turn off cell
16 phones, Blackberries and any other electronic devices.
17 Second, and most important, the restrooms are outside
18 the double doors and across the lobby. There are signs
19 to guide you. Third, in the unlikely event building
20 alarms go off, please proceed calmly and quickly as
21 instructed. If we must leave the building, go out the
22 New Jersey Avenue entrance by the guard's desk, follow
23 the crowd of FTC employees to a gathering point and
24 await further instruction. Finally, we request you not
25 make comments or ask questions during the session.

1 Thank you.
2 Now, before turning the podium over to my
3 colleague, Bruce McDonald, I'll briefly mention, prior
4 to giving more fullsome introductions, we're honored to
5 have six of the most distinguished leading lights of
6 antitrust here today. Bill Kolasky, Wilmer Cutler &
7 Pickering, former deputy assistant Attorney General;
8 professor and former dean and FTC chairman Robert
9 Pitofsky of Georgetown University Law Center, and Arnold
10 & Porter; Hew Pate, former assistant Attorney General
11 and currently partner at Hunton & Williams; Professor
12 Steven Salop, Georgetown University Law Center,
13 Consultant CRA International, and also an FTC alumnus;
14 Thomas Walton, director economic policy analysis,
15 General Motors Corporation, and also an FTC alumnus; and
16 Mark Whitener, senior counsel, competition law and
17 policy, General Electric Company, and also an FTC
18 alumnus. So we see there's a certain FTC flavor to the
19 distinguished speakers here today, but I won't say
20 anything more about that.
21 Bruce?
22 MR. McDONALD: If counting, there is a distinct
23 DOJ flavor on the panel, too. Let me say my welcome to
24 the joint DOJ/FTC single firm conduct hearings. The
25 hearings opened on June 20 with an overview of the

1 issues presented by single firm conduct and the
2 enforcement of Sherman Act Section 2. At the opening
3 hearings, both FTC Chairman Debbie Majoras and antitrust
4 AAG Tom Barnett emphasized the challenges in identifying
5 what conduct threatens long-term harm to competition and
6 the importance of developing clear rules to guide
7 business and that both underdeterrence and
8 overenforcement need to be considered.
9 Today is our fourth session, and our third day
10 of hearings. Our topic today is refusals to deal, which
11 is hard fought ground in the single firm conduct debate.
12 Our distinguished panel will focus on the circumstances
13 in which a firm's unilateral refusal to deal with a
14 competitor violates or should or should not violate
15 Section 2, addressing issues raised by Colgate, Otter
16 Tail, Kodak, Aspen, Microsoft and Trinko. The views of
17 our panelists have been influential in this debate, and
18 we appreciate the time that they have devoted to these
19 hearings.
20 Let me outline the agenda for you this
21 afternoon. Each of the panelists will take about 15
22 minutes to outline the issues and things critical, then
23 we'll take a 15-minute break, and then we'll dig deeper
24 into a discussion, giving the panelists an opportunity
25 to respond to each other's presentations and to consider

1 several propositions and hypotheticals that we hope will
2 initiate further discussion. The hearing will end at
3 about 5:00.
4 Let me turn the podium back to Alden Abbott to
5 introduce the presenters. Thank you.
6 MR. ABBOTT: Thank you, Bruce. Our first
7 speaker, Bill Kolasky, is cochair of Wilmer Hale Cutler
8 & Pickering, actually Wilmer Cutler Pickering Hale &
9 Dorr, it's a problem with all of these law firm mergers.
10 He co-chairs the firm's antitrust and competition
11 practice group. He's also had a distinguished record of
12 public service. From September 2001 through December
13 2002, he served as Deputy Assistant Attorney General for
14 International Antitrust at the Justice Department, at
15 which time he spoke out vociferously on the benefits of
16 an economic approach to antitrust in the international
17 forum and was very active in helping launch the
18 International Competition Network. His private practice
19 covers a full range of antitrust matters and Bill has
20 also taught antitrust law at American University, and he
21 speaks regularly on antitrust topics.
22 Bill?
23 MR. KOLASKY: Thank you very much, Alden, and
24 thank you, Bruce, as well, for inviting me to
25 participate in this. I have to say that it's somewhat

1 intimidating to be the first speaker in this afternoon's
2 session, especially given that I think all of the other
3 members of the panel, and probably most of you in the
4 audience, have thought longer and harder about these
5 issues than I have.
6 The other disadvantage of speaking first, of
7 course, is that everyone gets the chance to shoot at
8 what I'm about to say. I do think that I have, perhaps,
9 one comparative advantage, and only one, I'm going to
10 try to take full advantage of that, and that is my age,
11 and therefore, in fact, I've been doing this a lot
12 longer than most of the people in the room.
13 I've titled my talk refusals to deal with
14 rivals, because I want to distinguish very clearly
15 between refusals to deal with competitors as opposed to
16 refusals to deal with customers.
17 Refusals to deal with customers, I think involve
18 very different competitive concerns. The exclusionary
19 effects are more likely to be direct and immediate, and
20 there's a long line of cases running from Lorain Journal
21 to Dentsply that deal with refusals to deal with
22 customers. As I understand it, we're not here to
23 discuss those, we're here today to discuss refusals to
24 deal with rivals.
25 In structuring my remarks, I felt that I made

1 one of the classic rookie mistakes, I have far too many
2 slides and so I'm going to have to skip around somewhat,
3 but I wanted to touch on five basic topics. The first
4 is the pre-Trinko refusal to deal cases. Next I want to
5 talk briefly about Trinko. Then I want to talk about
6 the current dialogue that is going on, among others,
7 between Steve Salop and my partner, Doug Melamed over
8 the various standards for applying Section 2 generally.
9 I then want to stake out my own position as to what
10 analytical framework I think should be applied to
11 Section 2, and it's basically a step-wise rule reason
12 approach, applying the California Dental sliding scale.
13 And then I propose to talk about how they apply to
14 refusals to deal with rivals.
15 Focusing first on the pre-Trinko refusal to deal
16 law, there are basically, I think, four distinct lines
17 of cases. The first line of cases, and the oldest, are
18 the vertical integration cases from the 1970s and early
19 80s. The second line of cases are the essential
20 facilities cases, largely from the 1980s and early
21 1990s. The third line of cases are the intellectual
22 property cases, most recently the Federal Circuit's
23 decision in CSU. And then finally there is Aspen, which
24 because it's a Supreme Court case, I think deserves
25 particular mention and focus.

1 In the debate over refusals to deal, I've been
2 surprised in the recent publications how little
3 attention has been paid to the vertical integration
4 cases, which is really where a lot of the law in this
5 area was first developed. And when you go back and read
6 those cases, I believe, at least, that the analytical
7 framework that they used is a surprisingly sound one,
8 given that these cases were decided largely in the 1970s
9 and early 80s as we were just emerging from what Doug
10 Ginsburg refers to as the dark ages of antitrust.
11 Many of the cases, some of which my firm was
12 involved in, involved refusals to deal by monopoly
13 newspapers that were vertically integrating into
14 distribution. The obvious reason why these papers were
15 vertically integrating into distribution was to get
16 around the problem that was created by Albrecht, by the
17 rule that maximum resale price by principles is per se
18 unlawful. Since it was obviously efficient to have a
19 single delivery person covering each block, newspapers
20 found themselves basically with the situation where they
21 were dealing with independent dealers, giving those
22 dealers a monopoly, and they had no way to prevent those
23 dealers from charging monopoly prices higher than what
24 the newspaper itself would have charged.
25 It's not surprising, therefore, that the cases

1 for the most part ended up with the courts ruling in
2 favor of the newspapers and upholding their refusal to
3 continue to deal with independent dealers and vertically
4 integrating into the distribution themselves.
5 When you go back and read the cases, and most
6 notable the Paschall versus Kansas City Star decision,
7 in 1984, which was an en banc decision of the Eighth
8 Circuit, what you find is that the courts applied
9 essentially a Section 1 rule of reason standard in
10 evaluating these unilateral refusals to deal. In that
11 sense, I would argue that they are in a way ahead of
12 their time, because it was really not until the
13 Microsoft decision in 2001 that a court of appeals here
14 in the D.C. Circuit affirmatively embraced the rule of
15 reason as the applicable standard for Section 2.
16 Applying that Section 1 rule of reason
17 framework, the Eighth Circuit found that the
18 anticompetitive effects from the alleged loss of
19 potential competition as claimed by the plaintiffs were
20 slight, and that the newspaper had offered several
21 legitimate business reasons for its decision to
22 vertically integrate into distribution.
23 One of the most interesting things about the
24 case is that the newspaper did not rely on the argument
25 that I relied on in my opening remarks about this case,

1 namely the need to get around Albrecht. Instead, the
2 newspaper focused on the desire to be more responsive to
3 subscribers and have more uniform pricing in order to
4 facilitate advertising.
5 Quite frankly, those are relatively weak
6 justifications for what the newspaper was doing, and yet
7 nevertheless the court held without scrutinizing those
8 justifications very closely, that they outweighed the
9 rather minimal showing of anticompetitive injury that
10 the plaintiffs had made.
11 One of the key factors in causing the court to
12 reach that decision was its determination -- and this is
13 consistent with what I said earlier on Albrecht -- that
14 a vertically integrated newspaper was likely to charge
15 lower prices than if you had unintegrated monopolists at
16 both the publication level and the distribution level.
17 The essential facilities cases, I'm going to
18 skip over lightly, because others are going to be
19 speaking about those in more detail. There are two
20 things that I want to note about them. The mother of
21 essential facilities cases, at least with respect to
22 unilateral conduct, is of course the Supreme Court's
23 decision, Otter Tail. What people often don't comment
24 on is that that was a decision in the mid-1970s, again,
25 as we were just emerging from the dark ages, it was a

1 four to three opinion written by Justice Douglas, who
2 probably wrote more decisions that antitrust lawyers now
3 try to distance themselves from than almost any other
4 Justice.
5 The other thing that's important about the key
6 essential facilities cases such as Otter Tail and the
7 Seventh Circuit's decision in MCI v. AT&T is that these
8 cases do not involve just a simple refusal to deal by a
9 monopolist. Rather, they were cases in which the
10 monopolist had engaged in a whole pattern of conduct
11 that was designed to exclude rivals from these monopoly
12 markets.
13 The next line of cases, as I mentioned, are the
14 cases involving intellectual property rights, the First
15 Circuit's decision in Data General, the Ninth Circuit's
16 decision in Kodak and the Federal Circuit's decision in
17 CSU. There's been an enormous amount of ink spilled
18 about these decisions, including a very good article by
19 Hew Pate, and I'm sure Hew will have something to say
20 about this line of cases.
21 The important point, I think, that one draws
22 from these line of cases is the Second Circuit's
23 recognition, which was endorsed even by the Ninth
24 Circuit, that an author's or inventor's desire to
25 exclude others from the use of copyrighted or patented

1 work is a presumptively valid business justification for
2 any immediate harm to consumers that might result from a
3 refusal to license.
4 The debate really, then, is between the Ninth
5 Circuit and the Federal Circuit under what's necessary
6 to rebut that presumption, with the Federal Circuit
7 taking probably the most restrictive view that the
8 presumption is virtually irrebuttable unless there is
9 additional conduct beyond just the simple refusal to
10 license, such as an illegal tie, fraud on the Patent &
11 Trademark Office, or sham litigation. And I think that
12 is consistent, in fact, with cases like MCI and Otter
13 Tail, if you go back and read those decisions.
14 That brings me to Aspen Ski, which was the first
15 serious effort, I would argue, by the Supreme Court to
16 deal with the question of what standards should apply to
17 refusals by monopolists to deal with its rivals, and the
18 key points here that I want to bring out are that the
19 Court focused not just on the impact on the rival, but
20 also on the impact of the refusal on consumers, and the
21 Court also made it clear that what it was looking at
22 under Section 2 was whether the defendant was seeking to
23 exclude rivals on some basis other than efficiency, that
24 is other than through competition on the merits. And I
25 think that's a very important strand that needs to be

1 kept in mind as one thinks about these cases.
2 The other point that's important to make about
3 Aspen requires really looking at the facts of the case
4 and what the conduct was. Again, as in Otter Tail and
5 MCI, the conduct was not a simple refusal to deal.
6 There was a lot of other conduct going on there,
7 including to me most significantly the fact that Ski Co.
8 discontinued its own three-day, three mountain pass so
9 that the only way somebody could get a discount on a
10 multi-day, multi-mountain pass was to buy a six-day
11 pass, and that meant that if the vacationer wanted to
12 ski the Highlands, they almost certainly had to pay
13 twice, both for the day ticket to the Highlands and the
14 six-day pass to the Highlands. The other thing that's
15 important is that, while the court described Ski Co.'s
16 justification as pretextual, the court also gave fairly
17 close scrutiny to those justifications before reaching
18 that conclusion.
19 Trinko, I'm not going to spend very much time
20 on, because others are going to spend a lot of time on
21 it. The key message point, of course, is that the Court
22 appeared to adopt a very restrictive view as to when a
23 monopolist might have a refusal to deal and cooperate
24 with its rivals.
25 Because I'm running out of time, I'm going to

1 jump ahead to the contending standards. As I say, there
2 are basically three sets of contending standards out
3 there now, in this area. One is what I would call the
4 Section 2 rule of reason approach, taken by the D.C.
5 Circuit in Microsoft and by the Eighth Circuit in
6 Paschall, the profit sacrifice or no economic sense test
7 that Greg Werden from the Justice Department and Doug
8 Melamed have been advocating and I think Hew from time
9 to time has advocated it as well, and then finally the
10 essential facilities doctrine.
11 Again, because we're running out of time, I'm
12 going to skip ahead to my proposed synthesis. I come
13 down, as I think about this, in favor of basically the
14 Microsoft step-wise rule of reason test for exclusionary
15 conduct. I think that test involves, as the court said,
16 basically four steps. First, an examination of whether
17 the monopolist's conduct, in this case its refusal to
18 deal, had the requisite anticompetitive effect.
19 Second, a requirement that the monopolist, if
20 the plaintiff establishes a prima facie case, proffer
21 some nonpretextual procompetitive justification for its
22 action, and if it does so, the burden then slides back
23 to the plaintiffs to rebut that justification. And it's
24 only if the plaintiff meets that burden that you move on
25 to the fourth and final stage, which is balancing.

1 That's the reason why I don't particularly like to have
2 this test described as the balancing test, because in
3 fact, you rarely reach the fourth balancing step in the
4 test.
5 In applying the step-wise rule of reason under
6 Section 2, I would argue that the courts should do just
7 as they do in Section 1, and as I believe they do in
8 practice under Section 2, and that is apply a sliding
9 scale. That is to say, as Justice Souter wrote in
10 California Dental, what is required is an enquiry need
11 for the case. In other words, the stronger the evidence
12 of anticompetitive harm, the closer the scrutiny of
13 proper justifications.
14 Going back to, I'm not sure how to go to a
15 previous slide, I want to go back to Microsoft for a
16 second, because -- I'm sorry about this. I hope I get a
17 minute for my technological ineptitude. Here we go.
18 In Microsoft, if you read the decision closely,
19 you will see that the court, in fact, applied exactly
20 this kind of a sliding scale. When it came to the
21 license restrictions that Microsoft imposed on OEMs, the
22 court subjected Microsoft's proposed justifications to
23 very close scrutiny. When it came, however, to the
24 integration of Internet Explorer and Windows, the court
25 expressed at the very outset of that section of its

1 opinion a general deference to the dominant firm's
2 product design decisions, and the only reason it found
3 Microsoft's conduct unlawful, to the extent it did, is
4 that Microsoft proffered no justification whatever for
5 its decisions.
6 What I found interesting, and I credit this to
7 one of our summer associates, Tian Mayimin, who is in
8 the audience today, is how similar the California Dental
9 sliding scale approach to the rule of reason is to what
10 the courts do in the constitutional area, both under the
11 First Amendment, and under equal protection, where over
12 the years, what began back in the 1960s as a balancing
13 test, has evolved instead to three different levels of
14 review, strict scrutiny, intermediate scrutiny, and weak
15 scrutiny, in which the degree to which the court
16 subjects the proffered justifications for the
17 government's action depends on how objectionable the
18 conduct is in terms of First Amendment principles and/or
19 equal protection.
20 And I would suggest that the analogy in the
21 antitrust area is to the test we use for determining
22 whether or not the proper justifications justify the
23 conduct at issue. We often talk about needing to find
24 that the conduct is reasonably necessary, that's a
25 relatively tough standard.

1 A more relaxed standard would be to find that
2 it's reasonably related, and an even more relaxed
3 standard would be that it's plausibly related, which is
4 the standard the Supreme Court adopted in Broadcast
5 Music in determining whether or not the per se rule
6 should be applied. I would argue that you could use
7 that same sliding scale under Section 2, where the
8 degree of scrutiny depends on the nature of the conduct
9 in question.
10 Why do I prefer the rule of reason approach to
11 the profit sacrifice test? I think basically four
12 simple reasons. One is that it focuses directly on
13 competitive effects, whereas the profit sacrifice test
14 focuses more on the effect on the monopolist, rather
15 than the effect on consumers. Second, because, as Steve
16 Salop has pointed out quite persuasively, exclusionary
17 conduct can be profitable, even in the short-term, and
18 in fact, if you read the facts of Aspen Ski, I suspect
19 that even there, Aspen's conduct was profitable in the
20 short-term, even though it degraded the attractiveness
21 of its product to the skiers, and that's because it
22 would have shifted skiers from Highlands to the Aspen
23 mountains, thereby increasing its revenues, i.e., even
24 if the total number of skiers coming to the Aspen area
25 generally declined.

1 Third, at least as I have read the articles, the
2 profit sacrifice test, as it has been articulated,
3 doesn't acknowledge the need to calibrate the degree of
4 scrutiny of the business justifications based on the
5 strength of the evidence of competitive injury. Doug
6 Melamed, for example, has argued that one can look at a
7 refusal to deal as basically a make-or-buy decision, and
8 that it should be unlawful if it would be more
9 profitable for the monopolist to buy the downstream
10 services than to vertically integrate them. I would
11 argue that that is too high a degree of scrutiny for the
12 courts to impose on those kinds of decisions.
13 And then finally, there is no obvious reason why
14 courts should be any less able to evaluate competitive
15 injury and business justifications in a Section 2 versus
16 a Section 1 setting. What should differ is how strictly
17 they scrutinize the justifications, not the test that
18 they apply.
19 Thank you.
20 (Applause.)
21 MR. ABBOTT: Thank you, Bill. Now I have the
22 honor of introducing Robert Pitofsky, a name known
23 certainly to all of you and throughout the antitrust
24 world, former FTC Chairman, Commissioner and Bureau of
25 Consumer Protection Director, distinguished background

1 in private practice, currently of counsel at Arnold &
2 Porter, and of course very distinguished academic,
3 former NYU law professor, then dean of Georgetown Law
4 School, currently Sheehy Professor in Antitrust and
5 Trade Regulation Law at Georgetown University Law
6 Center. His writings are many. He has co-authored,
7 Cases and Materials on Trade Regulations, which is in
8 its fifth edition, one of the most widely used antitrust
9 and trade regulation case books.
10 Bob Pitofsky.
11 (Applause.)
12 MR. PITOFSKY: Thank you all and good afternoon.
13 It's great to be back at the FTC, and to see that the
14 DOJ and the FTC are continuing the tradition of taking
15 on the toughest issues and addressing them not
16 necessarily by litigation, but by hearings like this.
17 And I do regard the definition of exclusion under
18 Section 2, and refusals to deal in particular, as about
19 the toughest issues that an antitrust lawyer is required
20 to face today.
21 I'm going to do three things here. One, I want
22 to put refusals to deal in a broader context, and I
23 believe that's what Trinko's majority opinion was
24 designed to do. Secondly, I want to say a little bit
25 about the general universal test that Bill talked about

1 in such an interesting way. I just have one question,
2 because I agree with virtually all that he had to say.
3 And then I'm going to discuss, the antitrust concept of
4 essential facilities and whether essential facilities is
5 such an unwise doctrine that it ought to be abolished.
6 Let's start with Trinko, because I don't think
7 Trinko is just about the facts of that particular case.
8 It was a unanimous opinion. I would have voted to
9 reverse the Second Circuit, too. I had no problem with
10 the holding. It's the dicta in Trinko that went on and
11 on and on, and I'm disappointed that other judges on the
12 court didn't concur separately, and write that they were
13 not ready to go along with all this additional talk.
14 More broadly, I think Justice Scalia was saying, very
15 directly, that he's uncomfortable, he's skeptical about
16 enforcement of Section 2, and thinks that Section 2,
17 certainly compared to Section 1 of the Sherman Act,
18 causes more harm than good. His reasons were that there
19 are too many false positives, as he put it, in Section
20 2, that Section 2 enforcement tends to chill the
21 incentives of aggressive and innovative companies, that
22 he's uncomfortable with a generalist antitrust court
23 taking on issues like those raised by Section 2
24 enforcement, and the remedy, especially with refusal to
25 deal, is at least difficult and may be impossible.

1 Let me just go through these. First of all,
2 what is this false positives thing? I didn't agree with
3 the Second Circuit either, but I didn't conclude that
4 Section 2 raised many false positives as a result of
5 that wrong decision. Is the meaning that lots of
6 Section 2 cases have been brought by the government and
7 private parties and have been thrown out on motions to
8 dismiss, not stating a legitimate case? Well, let's go
9 back and review the record: Lorain Journal, Walker
10 Process, Otter Tail, Kodak, Xerox, Aspen, and Intel.
11 The plaintiff won every one of those Section 2 cases.
12 Now you might say yes, but they were false positives,
13 Otter Tail should have been decided the other way. But
14 the Supreme Court decided Otter Tail in favor of the
15 plaintiff, and the Court has not subsequently overruled
16 the decision.
17 Now there have been mistakes that have been
18 made, but the idea that there's just constant false
19 positives in Section 2 enforcement, I don't know where
20 that's coming from.
21 Second, Section 2 enforcement chills incentives
22 for innovative companies. I'm agnostic on that. Maybe
23 that's true. Just show me the data. Show me anyone who
24 has done a study which demonstrates that once a company
25 is aware that it may have to engage in mandatory

1 licensing, at a reasonable royalty, they cut back on
2 their investment in innovation. I haven't seen it. But
3 I'm uncomfortable with all these ex cathedra statements
4 that that would occur.
5 Third, uncomfortable because generalist
6 antitrust judges are deciding these cases? Well, who
7 are the judges deciding joint venture cases? Merger
8 cases? Rule of reason cases? They all involve
9 trade-offs, just like Section 2; they all involve
10 generalist judges. Up until now, I thought U.S.
11 antitrust was doing a pretty good job, and I'm not
12 troubled that district judges are making a botch out of
13 these trials.
14 On refusal to deal, if you mandate disclosure,
15 you have not just the decision about mandating, you have
16 a decision about at what royalty, what terms, what
17 timing, and so forth. And there's no question, that
18 complicates this issue immensely. It was worked out in
19 Aspen Ski, it was worked out in Otter Tail, although
20 there was a Federal Power Commission at the time Otter
21 Tail was decided to help to work out the remedy. The
22 question for me is, given the fact that the remedies in
23 these cases are difficult, do you throw up your hands
24 and say, impossible, therefore the monopolist can do
25 anything it wants, or do you try to work out the best

1 remedy you can? Sometimes the remedy is easy. Perhaps
2 the monopolist has already been licensing other people,
3 but refuses to license potential competitors. It's not
4 common, but it happens.
5 Sometimes the monopolist has been selling in
6 other markets at a price it was comfortable with.
7 That's the beginning of negotiation for this remedy. I
8 grant immediately, it's difficult, the question is, does
9 that mean free reign for the monopolist?
10 Second, on proposals for a general rule, first
11 of all, I want to compliment Hew Pate, now Bill Kolasky,
12 Steve Salop, Doug Melamed, Greg Werden, all of whom are
13 trying to come up with a rule that lends certainty and
14 predictability to Section 2 generally and refusals to
15 deal specifically. But in the end, I think the
16 balancing test as advocated in Aspen and Microsoft is
17 where you have to end up. I'm uncomfortable with the
18 universal rule that focuses on the welfare of the
19 monopolist. That's the profit sacrifice test. I'm more
20 concerned about the consumer, not whether the monopolist
21 sacrificed profits.
22 On the approach that asks if there was any
23 plausible economic reason for doing something, you know,
24 I think lawyers can always come up with a plausible
25 economic reason. That's not the issue. The issue is

1 whether that reason is good enough to outweigh the
2 anticompetitive effects. And that, it seems to me, is
3 what you have to do.
4 I would welcome a clearer rule, but in the end,
5 you have to take into account the redeeming virtues, the
6 business reasons, the justification, but if the
7 anticompetitive effects are large and the efficiencies
8 small, you can't stop with step one, you have to get to
9 as many steps as you can, and that's the question that I
10 would like to address to Bill. His third step is: what
11 was your justification? Suppose the defendant states
12 it, and then the other side comes in and let's say fails
13 to show that your justification was not plausible,
14 substantial, significant -- that is, there was some
15 justification. Do we stop there? Or do we go on to the
16 question of maybe you had a good justification, but it
17 didn't outweigh the anticompetitive effects?
18 Let me return finally return to the issues
19 relating to essential facilities. Let me start with the
20 proposition that the general rule is and must be no
21 general duty to deal. You don't have to disclose these
22 kinds of information except under a very rare exception,
23 and the exception is where a monopolist has a bottleneck
24 monopoly. The scholars are suppose to all say let's get
25 rid of the doctrine. That's really not what they say.

1 They say it should be rare and extremely narrow, that's
2 Areeda, that's Hovenkamp. I say the same thing. It
3 should be very rare, and very narrow.
4 But I think it should be an exception to the
5 general rule. I think the best summary of the
6 limitations on essential facility claims is in the MCI
7 case, which I notice virtually every lower court that
8 either sustains or overrules the essential facilities
9 claim, they all use the MCI test. The test is as
10 follows: one, it only applies to a monopolist; two,
11 other potential rivals cannot duplicate the facility or
12 the service. It's not just that it would be hard to
13 duplicate it, it's they can't do it at all. Three, the
14 monopolist denies access to the service or the facility;
15 and four, that it's feasible to make use of the facility
16 available.
17 I remember there was a throw-away line in Otter
18 Tail, and that's not my favorite case in this area, but
19 there's a throw-away line saying, you know, if you had
20 said that there's an engineering reason why you couldn't
21 wheel power to those municipalities, this would be a
22 different case. The problem with Otter Tail is there
23 was no plausible explanation except anticompetitive
24 purpose for refusing to wheel the power.
25 The EU has added a few additional

1 qualifications: The refusal to deal must eliminate all
2 competition, and that the product that the person
3 seeking access would make is not just a clone of the
4 first product, I don't think you need those two
5 additional restrictions, although they do narrow the
6 doctrine.
7 I think with the general qualifications stated
8 in MCI, we're in good shape. And I do want to emphasize
9 here -- the idea is not that the monopolist is giving
10 anything away, it's receiving reasonable royalties that
11 a court or an expert witness figured out was acceptable.
12 Finally, it has been said that there's Terminal
13 Railways, there's Otter Tail, there's Associated Press,
14 and there aren't many cases that address the essential
15 facility issue. That's just not true. There are scores
16 of lower court cases, including lower court cases since
17 Trinko kicked a lot of mud on the essential facilities
18 doctrine, which have addressed the claim of essential
19 facilities.
20 Let me conclude by saying that while Section 2
21 enforcement is an area that deserves to be addressed, at
22 least for the time being, I think Aspen Ski is the best
23 approach to it. It applies a rule of reason, and the
24 Court looked at and rejected any plausible business
25 justification. It seems to me a monopolist ought to

1 have some reason for refusing to do business with a
2 potential rival. I just don't think of antitrust as
3 being so narrowly confined when it comes to the market
4 power of a monopolist. I look forward to the
5 discussion. Thank you.
6 (Applause.)
7 MR. ABBOTT: Well, so far we've heard one
8 endorsement of the Cal Dental sliding scale approach and
9 an endorsement of an approach based on Aspen Ski,
10 variations on balancing approaches, and it will be
11 interesting to see what our next speaker has to say
12 about such approaches.
13 Hew Pate, partner and head of Hunton & Williams'
14 Global Competition Practice Group, is a former Assistant
15 Attorney General for antitrust, until relatively
16 recently. Hew's practice involves all aspects of
17 competition law, counseling and litigation. Hew has
18 served as Ewald Distinguished Visiting Professor of Law
19 at Virginia, from which he graduated first in his class.
20 Hew clerked for two Supreme Court Justices, Justice
21 Powell and Justice Kennedy.
22 Hew?
23 (Applause.)
24 MR. PATE: Thank you very much, Alden. It is
25 great to be here at the Commission's conference facility

1 for these hearings. I appreciate the opportunity to
2 take a part in them. I have submitted some written
3 testimony, which I have prepared on behalf of the United
4 States Telecom Association. That, as I understand it,
5 will be available on the website for these hearings. As
6 to my elaborations on that and what I say in the
7 exchange, you've just got me, and all the views I
8 express, both in the written testimony and here, are my
9 own.
10 The general point of the testimony I'm going to
11 give is that independent competition among competitors
12 who are not relying upon one another for assistance or
13 even for pulled punches in the competitive process is
14 what best produces innovative products at low prices.
15 Government-imposed duties to assist competitors force
16 courts into setting prices, a task for which they are
17 not very well equipped, particularly in capital
18 intensive or high technology fields. The uncertainty
19 that is caused by indeterminate liability rules and
20 duties to assist competitors are likely to retard
21 desirable investment.
22 And the U.S. system of private litigation, which
23 uniquely puts decisions on these types of issues in the
24 hands of general judges, as has been mentioned, and in
25 the hands of juries, sometimes with very vague

1 instructions, exacerbates the problem. And I would
2 suggest that recent experience in the telecommunications
3 field provides a good illustration of this point.
4 This testimony, my testimony is first going to
5 talk about refusals to deal and essential facilities.
6 The question is where after Trinko these doctrines
7 should go in the future, and my suggestion is not much
8 of anywhere. These doctrines inherently generate
9 uncertainty, they threaten returns on investment, and by
10 doing so, they discourage investment from taking place.
11 With respect to refusals to deal, or as I prefer
12 to think of it, duties to assist competitors, all have
13 the right to take a different tack. I think in the wake
14 of Trinko, as we have seen lower courts try to make
15 sense of, and cabin the Aspen decision, that the time
16 has come for Aspen to be overruled, and that the law
17 would be better with it off the books, and that the
18 Commission and the Division would do a service to the
19 law by advocating that in their report from these
20 hearings.
21 The second major point I want to make, while I
22 don't at least in this presentation want to debate the
23 variety of standards, as has been mentioned, I think the
24 no economic sense test has a good deal to be commended.
25 At the Antitrust Modernization Commission, I have

1 responded to some criticisms and made a general defense
2 of that test, but for today, I simply want to suggest
3 that the agencies would do a service by continuing to
4 push for more objective standards in this area. And to
5 my mind, while a general balancing test is flexible,
6 because it can apply in a wide variety of circumstances,
7 it is inherently lacking in any objective content that
8 businesses can apply in a predictable manner to make
9 their decisions. And while there may be different
10 formulations of it, some variation of a price-cost
11 comparison in my judgment is going to be necessary if
12 objectivity is going to be brought to the inquiry.
13 With respect to the telecommunications industry
14 experience, I think it does shed some light on whether
15 duties with forced sharing are likely to produce
16 desirable results. Telecommunications is an area where
17 huge capital expenditures and great risk need to be
18 undertaken to provide the product, and before any
19 profits can be made. I had a good deal of experience in
20 this industry in working on DOJ's implementation of the
21 1996 Act. And my experience there was that the DOJ
22 staff worked tremendously hard to try to implement that
23 act. But my experience in that process also left me
24 convinced that forced sharing of assets with competitors
25 is not a sound foundation for promoting competition.

1 As you all you are aware, the unbundling
2 obligations of the 1996 Act were premised on a so-called
3 stepping stone theory, the idea that if competitive
4 local exchange providers were given mandated wholesale
5 price access to incumbent local exchange providers'
6 facilities, this would allow so-called CLACs to enter
7 these markets officially without building facilities,
8 without undergoing that inherent risk. This would bring
9 immediate competition of a sort, and importantly, it
10 would then allow CLACs to build their own facilities so
11 that facility-based competition could follow thereafter.
12 A lot of water has gone under the bridge since
13 the passage of that Act in attempts to administer it. I
14 think the basic lessons are difficult to deny at this
15 point. Rather than provide a stepping stone to
16 independent competition, sharing obligations led to
17 demands for ever greater and more complicated sharing
18 obligations, many of which were found unlawful by the
19 courts in ensuing litigation.
20 One writer who has actually supported forced
21 sharing as a part of the antitrust laws recently summed
22 it up this way: "The 1996 Act is arguably a good
23 example of the questionable effectiveness of legally
24 mandated sharing. After eight years, the FCC has failed
25 to produce a legal system of access, and has instead

1 furthered a disastrous $50 billion Telecom boom and bust
2 in local telecommunications."
3 The experience there, I would suggest, is
4 illustrative of what happens when -- even when an
5 agency, but when an agency and parties who can be
6 protected want to litigate over the agency's rulings and
7 what the forced sharing obligation will mean, I think
8 provides an illustration of what is likely to ensue.
9 I think it also appears clear at this point that
10 the Act's forced sharing obligation has in many
11 instances slowed investment that otherwise would have
12 been made. Bob asked, and other speakers wonder what is
13 the empirical case for suggesting that incentives would
14 be chilled. Among one collection of studies, I would
15 point you to one by Scott Wallsten at the AEI-Brookings
16 Joint Center For Regulatory Studies, which can be found
17 on their website, and in summarizing the work in this
18 area, he suggests that although there are a few
19 dissenting voices, most economists and most studies
20 conclude that unbundling obligations in the U.S. reduced
21 incentives to invest in high-speed Internet
22 infrastructure. Cable companies which weren't bound by
23 these sort of unbundling obligations deployed more
24 quickly. DSL has lagged behind cable in terms of
25 deployment. That's the opposite situation we see in

1 many other countries.
2 The telecommunications industry recently has
3 rebounded, perhaps not coincidentally, with a diminution
4 of forced sharing obligations, and where reform of the
5 1996 Act is headed, is not entirely clear. But I do
6 think that antitrust generally can learn some lessons
7 from the experience, and the most important is that
8 forced sharing discourages and slows innovation.
9 Second, I certainly do believe that the many
10 complex and unforeseeable consequences of a forced
11 sharing regime are extremely difficult to administer.
12 It may be that in certain circumstances a regulatory
13 framework can administer forced sharing obligations in
14 some circumstances, or that a regulatory judgment will
15 be made that it should, but as a general matter, as a
16 general antitrust principle, and this is a point Justice
17 Stewart made in his dissent in Otter Tail, the rare
18 situations where that would be necessarily are not very
19 easily translated into a general duty of antitrust to be
20 applied across all industries. So, certainly in my
21 judgment, the transaction costs that come with a broad
22 sharing obligation are likely to outweigh the benefits.
23 Let me turn to refusals to deal and essential
24 facilities under the antitrust laws. We've heard some
25 comment about Trinko, and Aspen, already, and the three

1 rationales that the Court in Trinko offered for
2 limiting, very severely, any duty to assist competitors.
3 The Court did that in granting a motion to dismiss,
4 holding that the plaintiff's claim in Trinko was so
5 lacking in traditional antitrust merit that it does not
6 even require discovery before dismissal of the case.
7 And the three rationales, as you know, were the
8 negative incentive effects, both on the incumbent, the
9 high-market share incumbent, and on potential new
10 entrants from a sharing rule. Yes, skepticism of
11 generalist courts and juries' ability to manage sharing
12 obligations to set terms and prices. And then finally,
13 this idea of false positives. I think false positives
14 doesn't necessarily mean that we go to the Supreme Court
15 or even to lower courts and figure out whether the
16 defendants or the plaintiffs were winning, or whether
17 cases were rightly decided, but it does require some
18 consideration of the duties of those who are charged
19 with risking capital and conducting business, about
20 whether, in fact, their potential competitive activities
21 are chilled by the fear of being embroiled in litigation
22 under sharing duty types of rules, and for that reason,
23 I think that the risk of false positives is significant.
24 As to Aspen, while I think Aspen, as I have said
25 elsewhere, can be reconciled with a no economic sense

1 approach to the law and as consistent with it, since
2 Trinko, a number of courts, and some commentators have
3 come to view Aspen as standing for the proposition that
4 once a course of sharing conduct begins, that it
5 shouldn't be stopped. And if that's what Aspen is going
6 to stand for, then I think we would all be better off if
7 the case were overruled.
8 The reason for that, I think is pretty simple,
9 that while it is a way to distinguish the fact pattern
10 in Aspen from the fact pattern in Trinko, there's
11 nothing in economics that would suggest that the facts
12 are not likely to change in a pre-existing relationship.
13 There's no particular reason to believe that a course of
14 conduct that was once entered into remains efficient
15 forever.
16 So, it may be true that a voluntary course of
17 dealing provides an initial benchmark to set a price
18 that presumably the parties wouldn't have entered into
19 the relationship unless it were mutually profitable, all
20 that's true, and mitigates to some extent the concerns
21 that were in existence in Trinko, but it does not
22 eliminate them.
23 The other serious problem I think with a duty of
24 continued sharing is that it can prevent voluntary
25 sharing from taking place in the first place. This is a

1 point Judge Posner made in the Olympia Equipment Leasing
2 Company case, a case where Western Union had initially
3 assisted Olympia, decided to stop, got sued for doing
4 so, and as Judge Posner put it, if Western Union had
5 known that it was undertaking a journey from which there
6 could be no turning back, a journey it could not even
7 interrupt momentarily, it would have been foolish to
8 have embarked. And I think that's the real risk of a
9 developing idea that Aspen stands for the proposition
10 that you just can't stop sharing if you ever start.
11 Essential facilities, I won't spend too much
12 time on. I certainly do not think it adds anything as a
13 stand-alone theory of liability. I think Professors
14 Areeda and Hoenkamp said it well, the doctrine is
15 harmful because, I quote, "Forcing a firm to share its
16 monopoly is inconsistent with antitrust basic goals for
17 two reasons. First, consumers are no better off when a
18 monopoly is shared. Ordinarily a price and output are
19 the same as they were when one monopolist used the input
20 alone. And second, the right to share monopoly
21 discourages firms from developing their own alternative
22 inputs."
23 I will conclude, and time is running out, simply
24 by renewing a call for the agencies to participate in
25 advocating more objective standards. I think we're at a

1 high water mark now of criticisms leveled at the
2 standard-less nature of Section 2 generally. The OECD
3 competition committee recently issued a background note
4 that collects a number of these. I recall Elhauge has
5 described the exclusionary conduct law that exists today
6 as using a barrage of conclusory labels to cover for a
7 lack of any well-defined -- for any well-defined
8 criteria for sorting out desirable from undesirable
9 conduct. Even Eleanor Fox, with whom I often disagree
10 on panels like this, states that a number of the
11 contemporary cases tend to be noncommittal and rely on
12 obfuscatory language in their use of terms, such as
13 anticompetitive.
14 So, I think uncertain legal and regulatory
15 regimes, like limits on investment, are likely to prove
16 strong deterrents to investment, and innovation.
17 Certainly the continued reliance in some cases on intent
18 is one example of the type of subjective standards that
19 can lead to uncertainty and retard investment.
20 There is some positive sign, I think, on the
21 horizon that the Supreme Court may continue to look into
22 this area in the Weyerhaeuser case that they've granted
23 recently, where liability was imposed on the basis of
24 purchasing more saw logs than were needed. I would
25 suggest that we're really not going to do very well in a

1 regime where juries make a determination based on what
2 is right and wrong in log buying, without any more
3 objective basis for decision.
4 I'll stop there. As to the empirical basis for
5 all this, I would simply suggest that if the government
6 is going to intervene, if it's going to decide to
7 require sharing of a facility, if it's going to decide
8 not to use a property rule for determining how assets
9 are going to be used, but instead use a liability rule
10 to take from the Doug Melamed paradigm from the famous
11 law review article he authored with Judge Calabresi a
12 long time ago, that it ought to have some pretty serious
13 grounding for believing that the situation is going to
14 be made better. I don't think right now that an
15 empirical case can be made that forced sharing, that
16 this aspect of antitrust used to assist competitors is
17 going to leave consumers better off. I suggested some
18 time before I left government that the Modernization
19 Commission could do a study by trying to look into the
20 empirical basis for different areas of antitrust.
21 That's a hard thing to do, as they quickly decided, but
22 without it, in an area where the economics don't produce
23 a real consensus, I think the basis for government
24 intervention is lacking.
25 Bob asked whether we should just throw up our

1 hands because it's so difficult. Emil Paulis, who works
2 at the European Commission, used to make the same
3 comment after he heard me speak, and he would always
4 say, well, Hew, you just want to throw the baby out with
5 the bath water, because the standards are so difficult.
6 And I always would respond by saying, well, Emil, if
7 I've got a baby, and I've got to dip it into some bath
8 water, I would like to have some reason to believe that
9 the baby is going to be cleaner after I take it out than
10 it was before I put it in. And I don't think in this
11 area of the law that we have that.
12 Thanks, I look forward to the discussion.
13 (Applause.)
14 MR. ABBOTT: The people who are standing in the
15 back, there are some seats up front, so don't be shy,
16 there are seats. Thanks, Hew.
17 So, now we have two rational balancers and one
18 antitrust skeptic, and now we're going to turn to our
19 first academically trained economist on the panel, Steve
20 Salop, professor of economics and law at Georgetown
21 University Law Center, where he teaches antitrust law
22 and economics, economic reasoning for lawyers, and in
23 addition maintains an active consulting practice at CRA
24 International. Steve is no stranger to government,
25 having worked at the Civil Aeronautics Board, the

1 Federal Reserve Board and the Federal Trade Commission.
2 Now I remember him giving tutorials to young staffers on
3 economics at the FTC, young bright staffers, I was one
4 of them. And he did a very impressive job in that
5 regard. Steve has written widely in leading antitrust
6 journals, on this topic of Section 2, and I, for one,
7 look forward eagerly to hear his comments.
8 Steve?
9 (Applause.)
10 MR. SALOP: Thank you. I'm really pleased to be
11 here. I'm thrilled that Bill Kolasky seems to agree
12 with me. That's one down at Wilmer Cutler and several
13 to go I guess.
14 I want to talk a little bit about the general
15 exclusion standards, but just for a moment, and then go
16 on and talk about the application of refusals to deal.
17 As you know, there are two standards that people
18 have been talking about, what I call the consumer
19 welfare effects standard, I just want to focus on the
20 fact that that's really the effective price and quantity
21 effect, not some complicated balancing, and then the
22 profit and no economic sense test. I favor the consumer
23 welfare effect test. You know, it's focused on the goal
24 of antitrust, it's flexible, it is an enquiry meet for
25 the case, I agree with Bill on that. It implies a

1 tailored structural enquiry for each type of
2 exclusionary conduct.
3 It's not an open-ended balancing of the sort
4 that was suggested in Chicago Board of Trade, but rather
5 there's a series of steps that one must go through and
6 those series of steps differ for different types of
7 exclusionary conduct.
8 For example, I spoke at the -- at this panel the
9 FTC had last month on timber overbuying and so on, and I
10 distinguished between predatory overbuying and raising
11 rivals costs overbuying and depending on the
12 characterization of the conduct, there was a different
13 test that was used.
14 Should be still a different test for predatory
15 pricing, still a different test for refusals to deal,
16 still a different set of tests for exclusive dealing,
17 but all within the umbrella of a focus on consumer
18 welfare and this consumer welfare approach.
19 So, I don't think that the consumer welfare
20 standard leads to balancing. I also don't think it
21 leads to false positives. Indeed the sacrifice test is
22 usually criticized for causing false negatives, but as I
23 discuss in my article, it also causes false positives,
24 and indeed I'll argue that with refusals to deal, the
25 sacrifice standard would be more likely to cause false

1 positives than would the consumer welfare test.
2 We've talked a little bit about whether the
3 innovation incentives are a reason to cut back Section
4 2. I'm going to talk about this before we get to
5 refusals to deal, but just basically, you know, firms
6 have incentives to compete, incentives to innovate in
7 competitive markets. I believe it's the consensus of
8 economists that innovation incentives are greater in
9 competitive markets than in monopoly markets,
10 monopolists have weaker innovation incentives than
11 competitors. I would cite you to Mike Scherer's
12 article, which is cited in my antitrust law journal
13 article. And of course, you know, if a monopolist, if
14 the dominant firm knocks the entrants out of business,
15 then it will, of course, reduce the innovation
16 incentives of the entrants as well.
17 Well, now, how would you apply this to refusals
18 to deal? Well, here, you've got the consumer welfare
19 test, we've got the first -- the profit sacrifice, or
20 NES test, and then of course per se legality. What I
21 want to say about this is that the consumer welfare test
22 and the sacrifice test actually have a lot of
23 similarities. They both require a price benchmark, and
24 a lot of people say the price benchmark is the fatal
25 flaw in anything other than per se legality. I'm going

1 to explain why I don't think that's true. And I'll also
2 talk about why I think the sacrifice test is more likely
3 to lead to false positives, because it does not have any
4 or may not have any anticompetitive effects prong. And
5 of course I say legality leads to false negatives.
6 Okay, so what should the rule be under the
7 consumer welfare test? I'm going to talk about the
8 rule. I have a hand-out, which you can pick up at the
9 break, which sets out the rule I've composed in detail,
10 but we can talk a little bit about that now.
11 There will be basically three pieces to it.
12 First of all you have to show that the defendant has
13 monopoly power, and that would be monopoly power in the
14 input market and actual or likely monopoly power in the
15 output market, so we're talking about a vertically
16 integrated monopolist.
17 You would have to show that the plaintiff has
18 made a genuine offer to buy at or above some benchmark
19 price, and I'll talk in a bit about how you determine
20 that benchmark price. So, this is not a matter of
21 saying that the monopolist has to sell at cost, I'm
22 going to come up with a benchmark that's going to
23 compensate the monopolist adequately, and the plaintiff
24 would have the burden of showing that it made an offer.
25 So, the plaintiff can't go to the court first, the

1 plaintiff has to go to the monopolist and try to get the
2 product, and if it fails, and the defendant, you know,
3 refuses to deal, then there is at least potential for a
4 case.
5 This test I use, which I call a compensation
6 test, is going to compensate the monopolist for its lost
7 profits for the customers that it loses to the entrant,
8 and this is very much a sacrifice test, a no economic
9 sense test. But under the consumer welfare analysis,
10 you also require the plaintiff to prove anticompetitive
11 harm. And that would be during the output market, or
12 the input market, or some other -- some other market
13 where the firms are actual or potential competitors.
14 It's not clear to me that the sacrifice standard
15 requires this third step, and that's why I think it's
16 going to lead to false positives. I think it only
17 requires the first two. Now, if you actually parse the
18 literature, Greg Werden probably does not have this
19 third step. He has some type of incipiency standard for
20 the third step. I think Doug Melamed, I think, adds
21 this third prong.
22 In which market do I have to show
23 anticompetitive effects? Well, that's going to depend
24 on the case. But, you know, a refusal to deal could
25 cover up, you know, a naked noncompete. For example,

1 you know, a contemporary example might be suppose
2 Halliburton, which has a monopoly over certain
3 transportation services in Iraq, suppose it says to a
4 firm, I will only provide you transportation services in
5 Iraq which you need in order to sell other commodities
6 to the armed forces, I will only provide that input to
7 you if you promise not to compete with me in providing
8 oil field services in Louisiana.
9 Well, that's a refusal to deal, the harm would
10 not be in the geographic market in whatever Halliburton
11 competes in in Iraq, but rather some other unrelated
12 market. So, it's possible that this litigation could be
13 brought here.
14 Or, you know, more generally, if it's not the
15 input or output market, it's going to be a complementary
16 product, it's going to be a complementary product
17 market.
18 So, notice, this consumer welfare test, it's not
19 an open-ended Chicago Board of Trade inquiry, have to
20 show market power, have to show anticompetitive effects
21 in a particularized way, and you have to show that the
22 price offered by the plaintiff meets the compensation
23 test.
24 Okay. Well, the real issue is, what about this
25 price benchmark? This is where the controversy is. And

1 there are several candidates, as Hew pointed out.
2 There's the prior price paid by the plaintiff, as in the
3 case of Aspen. It could be the price charged to other
4 buyers, which also was an issue in Aspen, where they
5 were willing to deal with other mountains in other ski
6 resorts. Or there could be some benchmark, if the first
7 two don't work, either because there's no course of --
8 previous course of dealing, or because of some reason
9 they're not appropriate, and I agree with you that they
10 may not be appropriate, then you need another benchmark
11 and the benchmark that I've come up with is a benchmark
12 I call protected profits benchmark, and it's a price
13 that compensates the defendant for the monopoly profits
14 lost to plaintiff from losing -- from customers that
15 shift from the defendant to the plaintiff.
16 I'll give you an example. So, it is a sacrifice
17 test, it is giving the defendant the monopoly profits
18 that it's earned, and I think that's a key issue. You
19 might want to adjust this benchmark. For example,
20 suppose dealing with the plaintiff raises the
21 defendant's production costs. Well then you would have
22 to take that into account in setting the benchmark.
23 Suppose the plaintiff creates real reputational
24 free-riding, you know, suppose it says, well, we've
25 used -- we've used this input that we got from GE, and

1 suppose their product is no good, and that hurts GE's
2 reputation, well that could would be a reason why GE
3 should be permitted not to deal with them or charge them
4 a higher price.
5 And lastly, suppose the monopoly, we've been
6 acting up until now that these monopolies are attained
7 legitimately. If they're not obtained legitimately,
8 then it's not clear that you want to give someone
9 protection from the monopolist. Not clear that you
10 would worry so much about protecting those monopoly
11 profits or protecting the incentives.
12 Finally, the other adjustment I would make is
13 this is a rule intended to generate negotiation, so if
14 the defendant just has a flat refusal to deal, a
15 non-negotiable refusal to deal, or only makes sham
16 offers, as they did in Aspen, then the burden is going
17 to shift to the defendant to show that the plaintiff's
18 price offer was good.
19 So, for example, in Aspen, it's not as if
20 Highlands said, I'll pay you ten cents for the daily
21 tickets, and Ski Co. said, no, no, no, I want $44,
22 that's much more reasonable, and Highlands said, I'm
23 going to sue you. It wasn't like that at all. In fact,
24 Highlands made an offer, in fact the retail price, but
25 Ski Co. made a counteroffer designed for Highlands to

1 turn down. I mean, it was not a real counteroffer, it
2 was one that Highlands would be forced to reject. So, I
3 place some burden on the defendant in those
4 circumstances.
5 Okay, so how do you calculate this? Well, this
6 is the part with the math, but as I tell my law
7 students, this is not really math, it's just shorthand,
8 it's just abbreviations. So, my benchmark has two
9 important properties to it. One is it compensates the
10 defendant for the monopoly profits that it loses on the
11 customers that it loses to the plaintiff. However, it
12 does not get compensation for price competition that's
13 induced by entry by a firm that has lower costs or
14 superior product.
15 So, I'm compensating them for their monopoly
16 profits they have, but I'm not allowing them to deter
17 entry by a more efficient competitor, one that has lower
18 costs or a better product. Where did I get the standard
19 from? Well, I didn't invent it. This goes way back.
20 It's called the efficient components pricing standard,
21 first started in the late 70s or early 80s. It's been
22 referred to in the context and there's been a lot of
23 commentary on this basic standard by people, among
24 others, John Vickers, who just left heading up the OFT
25 in Europe.

1 The way you calculate this, this benchmark
2 price, is the monopolist's input cost, plus it gets its
3 margin, plus its margin times the fraction of the
4 plaintiff's customers that get diverted from the
5 monopolist. This is not -- it's not a lot of letters,
6 it looks like algebra, but it's not really so
7 complicated.
8 So, let me give you an example to show that, and
9 I'll use -- suppose the Trinko case were not in the
10 context of regulation, how would you, you know, how
11 would you use this protected profit standard? Well,
12 here's the data. Suppose Verizon's incremental cost of
13 providing DSL, wholesale DSL, suppose that were $10.
14 Suppose Verizon's margin on retail DSL, their monopoly
15 margin, suppose that were $50. And suppose that if
16 Verizon sells wholesale DSL to AT&T, half the customers
17 AT&T gets will come out of the hide of Verizon, and the
18 other half will come from cable and dial-up. And yes, I
19 know Verizon provides dial-up in its own territory, but
20 they probably don't make much money there, so I am just
21 leaving that out for now. But if you will, you could
22 make it more complicated to take into account the
23 dial-up margin, but I think Verizon probably sells at a
24 negative margin on dial-up anyway.
25 So, under these circumstances, half of AT&T's

1 retail DSL customers are going to come out of Verizon,
2 half are going to come out of the hide of Comcast, Time
3 Warner and so on. So, this diversion rate would be 50
4 percent. Diversion rate, you know, it's something we
5 use in mergers all the time.
6 What would be the benchmark price? It would be
7 $35. Verizon's $10 cost, plus they get a monopoly
8 margin of $50, they lose that monopoly margin on half
9 their customers, so half of $50 is $25, you have to
10 compensate them for those expected losses, that gives us
11 $35. Okay?
12 If AT&T were going to get all its customers out
13 of the hide of Verizon, then the benchmark would be a
14 lot higher, it would be $60, Verizon would have to be
15 compensated for its costs, plus the margin that it lost.
16 Okay? Not so difficult to do this at all.
17 Under this standard, and this is another sort of
18 key aspect, I probably should have put it on the
19 previous slide. The entrant will not be able to succeed
20 in the market under this standard, unless it has lower
21 costs or a superior product for at least some consumers.
22 So, this is not a prescription for inducing inefficient
23 entry, the only kind of entry that gets induced as a
24 result of this test is efficient entry, and therefore I
25 think it meets the -- I think it meets the standard.

1 So, for that reason, I think this, you know,
2 this consumer welfare standard, look at how much the
3 plaintiff has to prove. Monopoly power in the input
4 market, you know, if the entrant's got an alternative,
5 then they're out. The defendant has to have actual or
6 potential monopoly power in the output market, or else
7 the plaintiff loses.
8 A lot of things for plaintiffs to prove. It's
9 got to prove that the price offered exceeds the test, a
10 test that I don't think is very difficult for a firm,
11 certainly not a firm like Verizon, to calculate. I
12 don't think it's hard for any firm.
13 This is the same sort of data we routinely use
14 for merger analysis, and that a firm needs to run its
15 own business. A firm needs to know its margin. And in
16 fact, it can look up its margin, it can ask the CFO for
17 their margin, it's on the profit and loss statement and
18 should be on the profit and loss statement for each
19 division. And they just need to know the extent to
20 which they compete with the plaintiff.
21 And the plaintiff here also has to prove
22 anticompetitive effects. So, there's big barriers for
23 the plaintiff here. So, this is not -- this is not a
24 standard that's going to lead to overwhelming amount of
25 litigation.

1 Now, this is the standard, how do we deal, what
2 do we have to say about Trinko? Well, Trinko raises a
3 number of cautions that have been discussed by the
4 earlier speakers. They pointed out that there's no
5 general Sherman Act duty to deal, and they said forced
6 share, I guess red flags is my term, the justice
7 division did not use the term red flags, but it raises a
8 number of red flags. Lessens investment incentives,
9 requires courts to act as central planners, that's the
10 red flag. And the compelling negotiation can facilitate
11 collusion. All of this adds up to the concern with
12 false positives.
13 Well, let me go through these and look at these
14 in a little more detail. Well, first of all, the no
15 general Sherman Act duty to deal, that's true. I teach
16 antitrust, every antitrust professor knows that. I wish
17 that in the Trinko opinion, however, they had quoted
18 Colgate correctly. They said Colgate stands for no duty
19 to deal. The proper quote says, i.e., in the absence of
20 any purpose to create a monopoly, there's no duty to
21 deal. So, Colgate is limited and in that Justice Scalia
22 tried to change the meaning of Colgate.
23 So, what about these more detailed questions?
24 Well, first is this investment incentives, this has been
25 alluded to by several speakers. I think the first

1 point, the key point is the benchmark price compensates
2 the defendant for the monopoly profits that it loses on
3 customers that it loses to the plaintiff. So, in terms
4 of reducing their investment incentives, we're making,
5 and I thought Hew was exactly right, it is a liability
6 standard. It's making them whole on the profits they
7 lose, on the customers that they would lose to the
8 plaintiff.
9 But there's other reasons why I think it will
10 not reduce investment incentive. First of all, Scalia
11 worries about reducing the entrant's investment
12 standards, that the entrant would otherwise enter the
13 input market on its own. But that is a very weak
14 statement. I mean, you don't get into one of these
15 cases unless the defendant's got monopoly power in the
16 input market, and what we mean by monopoly power is
17 durable monopoly power. What we mean by durable
18 monopoly power is that there are high barriers to entry.
19 So, unlikely that the plaintiff otherwise would
20 have entered the input market. It also means you can't
21 get into the -- you can't enter one market at a time,
22 you're unlikely to see leapfrog competition. Secondly,
23 we know the competitive markets increase the defendant's
24 innovation incentives. Monopolists have weaker
25 innovation incentives than do competitors and, you know,

1 I mean, the telephone companies have a million excuses
2 for why they never innovate, and we have just heard some
3 others.
4 I think that -- but I think if they had faced
5 more competition, they would have stronger innovation.
6 They are certainly innovated in trying to come in to
7 compete with cable, where they don't have -- where
8 Telecom is not -- where telephone companies do not have
9 a monopoly.
10 Of course entering the output market will
11 increase the entrant's innovation incentives. And
12 finally, and this is I think a key point, and I think in
13 Bill Kolasky's list of cases, Kodak was conveniently
14 left out. In Trinko, Kodak doesn't get mentioned.
15 Well, one very important point that was made in the
16 Kodak opinion is that you can't call the entrant a free
17 -rider if they only enter one market rather than all of
18 them.
19 Kodak says that this understanding of
20 free-riding is an argument made by -- made by Kodak, and
21 the Supreme Court said, this understanding of
22 free-riding has no support in the case law. So, you
23 know, I think that argument just does not add up.
24 The courts as central planners, I'm running out
25 of time, so let me go quickly. You know, I guess the

1 point I've been making all along is this isn't so hard.
2 Market prices often provide a good benchmark. I think
3 this protected profits compensation benchmark is not too
4 difficult to evaluate, and then the other point I want
5 to make here is, you know, if antitrust withdraws, it's
6 not clear that we're going to have laissez faire. This
7 has not been the way the United States economy has
8 worked.
9 When antitrust fails, we often get real formal
10 public utility commission regulation, real central
11 benefits, and so I just want to raise the question about
12 whether we're really going to get ourselves into the
13 federal operating system commission if antitrust drops
14 out. And of course the essential facility doctrine fits
15 in here.
16 Okay, finally is this issue about facilitating
17 collusion. I think that one is really silly. You know,
18 if you believed -- if you believed this argument that
19 letting people negotiate is going to facilitate
20 collusion, well then we also prohibit voluntary dealing,
21 we also prohibit joint ventures, we also prohibit patent
22 settlements, which we know from the FTC experience are
23 sometimes used to strike noncompetition agreements.
24 It's also, you know, the refusal to deal can be
25 used, if it's a threatened refusal to deal, can be used

1 to facilitate collusion. I'll sell to you, but only if
2 you promise not to compete with me. So, I think that
3 the -- that effect put out that dicta by the Trinko
4 court was really they -- it's either insignificant or
5 goes the other way.
6 Finally, I want to raise the question of if we
7 go down Hew's route for per se legality, where are we
8 going to stop? I note that's perhaps not a question
9 that Hew is worried about, but it's a question that I'm
10 worried about. If it's per se illegal -- per se legal
11 to refuse to deal with firms that compete with you, then
12 what about exclusive dealing? Why isn't that, per se,
13 legal, either with respect to whether if the firm wants
14 to buy stuff from you, sell it to your competitors, or
15 if they want to buy from your competitors? What about
16 the tie-in? Why doesn't it make tie-in per se legal,
17 because that's just basically refusal to deal. What
18 about noncompetition agreements? What if a firm says,
19 like in my little Halliburton example, we're going to
20 compete with you in some unrelated market, and they say,
21 well, in that case, I'm not going to sell to you. Well,
22 that would be -- that would be per se legal.
23 And finally, what if they use a refusal to deal
24 in order to force the firm to raise prices, either in
25 the market -- the output market that we're talking about

1 or some other market. Would that also be per se legal
2 for them to make that argument? So, I would be quite
3 concerned about that.
4 I'm out of time, thank you very much.
5 (Applause.)
6 MR. ABBOTT: Thank you, Steve, for presenting an
7 attempt to establish an administrative rule that will
8 undoubtedly bring forth some more discussion about the
9 rule that might apply in evaluations under the rule of
10 reason.
11 Now we have another economist who is going to
12 take a crack at this difficult set of topics. Tom
13 Walton, director of economic policy analysis, General
14 Motors Corporation, in which position he oversees the
15 analysis of costs, current and prospective governmental
16 policies and regulations, and their implications for
17 General Motors. Tom Walton received a Ph.D. in
18 economics from UCLA, was assistant professor at NYU,
19 before joining GM, and served briefly as special advisor
20 for regulatory affairs at the FTC. He's vice chair of
21 the Business Research Advisory Counsel for the U.S.
22 Bureau of Labor Statistics in Washington, D.C.
23 Tom?
24 (Applause.)
25 MR. WALTON: Thank you very much. I'm going to

1 try a little bit of a change of pace to give you an idea
2 of what it's like to be inside the fish bowl of
3 competition.
4 Well, it all began back in 1963 when the Federal
5 Trade Commission launched its first investigation into
6 the manufacturing and distribution practices of the
7 major auto makers with regard to the production and sale
8 of their single source crash parts. Now, these are the
9 parts that are most frequently damaged in the event of
10 auto accidents, and which also happen to be single
11 source. They include radiators, bumpers, fenders,
12 grills, all the sheet metal. They don't include glass,
13 because glass is multiple source.
14 At that time, Chrysler, Ford and GM, the major
15 manufacturers at that time, distributed these parts
16 exclusively through our franchised auto dealers. Our
17 franchised line-make auto dealers. That's an important
18 distinction. For example, Chevrolet parts we
19 distributed exclusively through Chevrolet. If an
20 independent body shop wanted to buy a part, it could
21 only get a Chevrolet brand part at Chevrolet, they could
22 not get it at Pontiac, for example.
23 Insurance companies instigated the
24 investigations. Congressional investigators had been
25 constantly pressing them to reduce their auto insurance

1 premiums. Insurance had a pretty good handle on the
2 labor rate at the auto shops, both at the auto dealers
3 and the independents, but they wanted to set up
4 independent warehouse distributors or wholesale
5 distributors so they could get similar concessions on
6 parts. They brought along with them the lobbying arm of
7 the independent body shops, or IBSs, as they called
8 themselves. They complained that GM and other auto
9 manufacturers, everyone used the same system at the
10 time, were discriminating against them because they --
11 because in the case of the independent body shop, they
12 had to buy the part from the dealer at a mark-up, or
13 have the dealer provide the part directly from the
14 manufacturer, General Motors or another manufacturer at
15 wholesale.
16 Of course, the auto dealers, like any other
17 retailer, have the wholesaling cost. They have the cost
18 of ordering, carrying, insuring and financing the
19 distribution of the parts. And of course they charge
20 for those wholesaling services. So, the IBSs, the
21 independent body shops and insurers went to the Congress
22 and went to the Federal Trade Commission to try to force
23 us to directly sell those parts, those single-sourced
24 crash parts to the body shops and to the independent
25 wholesalers.

1 Little interest was expressed by the large
2 warehouse distributors, and later they would testify
3 that they had no interest in taking on the business.
4 They also believed that there was no need to take on
5 additional wholesalers, additional customers. There was
6 no shortage of GM dealers to handle the business.
7 There's something like 12,000 dealers spread out in
8 every area of the country. They thought they could do
9 the best job of handling the bulky and complex repair
10 parts because in part, they shared our incentive to keep
11 the customer happy and make sure that the owner of a
12 Chevrolet vehicle was put quickly and efficiently back
13 on the road.
14 Sure, they shared our interest in the integrity
15 of the brand name. We believe that opening up the
16 system to tens of thousands of independent body shops
17 would reduce the availability of the parts and increase
18 the time necessary to get them to the customer. We knew
19 it would impose substantial additional administrative
20 and monitoring costs. We didn't feel we could derive
21 the monopoly profits from pricing the parts, because we
22 would be jeopardizing 95 percent of our business, that's
23 the vehicle business, by trying to achieve a monopoly on
24 the parts.
25 Higher priced parts would have meant driving up

1 the repair costs for our customers, and would have
2 reduced the likelihood that a Chevrolet vehicle owner
3 would become a repeat customer. We knew that one
4 company, Renault, had recently ceased doing business in
5 this country because of a faulty service repair system.
6 Another company, another competitor, Chrysler, had spent
7 something like $350 million to convert from the system
8 the FTC was proposing, this open warehousing, open
9 distribution system, back to the system of distributing
10 the parts exclusively through its franchised dealers.
11 We did offer subsidies for GM dealers to sell
12 the parts to the independent body shops at reduced
13 prices. In order to pacify them and to pacify the
14 Federal Trade Commission, in September 1967, we proposed
15 a plan in which we would offer a 12 percent discount on
16 the parts resold through the independents. A program we
17 then called wholesale compensation.
18 In February of 1968, the Commission, though,
19 told us that they intended to file a lawsuit in order to
20 bring about price parody between the GM dealer body
21 shops and the independent repair shops. Further
22 negotiations ensued and in the fall of 1968, the
23 Commission accepted our proposal to raise that subsidy,
24 that incentive for reselling to 23 percent. Accordingly
25 we increased our prices on all crash parts in order to

1 try to recoup the cost of the program, including those
2 costs of administration and monitoring.
3 Later, the Commission would estimate the total
4 costs at $70 million per year, that's almost half of a
5 billion dollars per year in today's dollars. Now, we
6 knew the promo would be expensive, but we thought that
7 opening up our warehouses would be still more expensive.
8 Well, the arrangement did not satisfy our critics for
9 long.
10 In the early 1970s, in the era of wage and price
11 controls, the President's Council on Wage and Price
12 Stability raised its own pricing investigation into
13 crash part pricing. The investigation provided an
14 extended period of full employment for an economist like
15 myself at the auto companies and in the President's
16 Office of Management and Budget. It turned out that
17 much of the increase in prices was by the newly
18 installed auto pricing regulations, especially by the
19 bumper standards that were being -- that had been
20 suggested by the insurance companies, and that in that
21 case, not being to enhance safety, but substantially
22 increase the price of our bumpers, which accounted for
23 40 percent of any kind of a crash parts price index.
24 As you can see, the relations between us and the
25 insurance companies wasn't the best at that time. In

1 1970, the Commission launched yet another investigation.
2 What did the Commission want this time? Nothing less
3 than a remedy at the manufacturing level. That we be
4 required to make a unique and extremely expensive
5 tooling for these crash parts available to outside
6 manufacturers.
7 Fortunately, they later dropped this proposal.
8 We heard that their Office of Policy and Planning
9 Evaluation had estimated that if successfully
10 implemented, the proposal would increase crashed parts
11 prices by somewhere between 150 and 580 percent. But
12 the Commission still wanted GM to sell its GM-branded
13 crash parts "to all vehicle dealers, independent body
14 shops, and independent wholesalers at the same prices,
15 terms and conditions of sale, said prices to be subject
16 to reasonable cost-justified quantity discounts and
17 stocking allowances." And I would disagree with my
18 friend, Steve Salop, on the simplicity of arriving at
19 that kind of price.
20 We made one final effort to stave off
21 litigation. In early October 1975, we raised our
22 wholesaling discount to 30 percent of the dealer price
23 on the crash part resale to independents. In early 1976
24 we announced that we would broaden the plan to allow all
25 GM dealers to distribute all GM crash parts to anyone.

1 This meant that independent body shops could now buy
2 that Chevrolet crash part from a Pontiac dealer or from
3 any other General Motors dealer. The program never took
4 hold. The independents stayed with their existing
5 dealer suppliers. Chevrolet for Chevrolet parts,
6 Pontiac for Pontiac, so forth. This confirmed our
7 belief, at least to us, that the existing system was an
8 efficient way of getting our parts to the independents.
9 None of it worked.
10 By March 22nd, 1976, the Commission issued a
11 complaint charging GM with unfair methods of competition
12 for refusing to deal with everyone on the same terms we
13 gave anyone. It said that the wholesaling parts
14 discount had not achieved price parody between us and
15 the independents -- between our dealers and the
16 independents, and that "the consumer was being asked to
17 subsidize the wholesaling profits of the dealer," which
18 it was, "and that eliminating the program resulted in an
19 estimated drop of 10 percent in consumer prices."
20 So, some 13 years after the initial
21 investigation had begun, we were in litigation over our
22 right to choose the customers with whom we would deal.
23 The Commission extended freight upon us for what they
24 called a "duty to deal." As an economist, I was the
25 economist assigned the case. Did we consider settling?

1 Yes. But Frank Dunne, our lead General Motors counsel
2 in the case, and his superior, Tom Leary, the recently
3 retired FTC commissioner, and Bob's former colleague,
4 pressed management to stay the course because in their
5 words, "It was the right thing to do."
6 They also felt that GM would ultimately prevail
7 in the courts, if not with the full Commission. They
8 did not want to surrender GM's right to freely and
9 voluntarily choose the customers with whom we would and
10 would not deal. We did not want to be forced to accept
11 a system that was less efficient and less competitive.
12 Somehow the complaints and investigations never resulted
13 in any Commission actions against our competitors. Our
14 chairman, Tom Murphy, agreed, and the rest is history.
15 We fought the charges to the bitter end.
16 Three years later, on September 24th, 1979, the
17 ALJ, Administrative Law Judge, found no evidence that
18 GM's refusal to deal and its pricing policies injured
19 the independent body shops as a class. Every
20 independent body shop witness was doing very well, and
21 the industry was doing better than comparable
22 industries, growing faster than, for example, our own
23 General Motors body shops and general repair shops.
24 He also found no harm to independent part
25 distributors. Crash parts prices were actually rising

1 less rapidly than general inflation and, normally less
2 rapidly than the price of the so-called competitive
3 products, such as spark plugs and fan belts. He found
4 that "creating a duty to deal would increase GM's
5 distribution costs." He said, and again I quote, "The
6 evidence here does not show that GM has discouraged,
7 defeated or prevented the rise of new competition in the
8 new GM crash parts market."
9 He concluded that GM did not have any predatory
10 intent in establishing the system and that there
11 appeared to be "no substantially adverse effect on
12 competition attributable to the refusal to sell new GM
13 crash parts to anyone other than GM dealers." He did
14 find, however, that under Section 5 of the Federal Trade
15 Commission Act, that we had unfairly discriminated
16 against the independent body shops whom he found had to
17 pay more for the parts than did our GM dealers. He
18 agreed that, indeed, some of our dealers were engaged in
19 extensive wholesaling and thus engaged and incurred
20 extensive wholesaling costs, but he rejected our
21 contention, based on our own GM financial studies, that
22 when the dealer's wholesaling and carrying costs were
23 included in the prices that their body shops had to pay,
24 were actually below the prices that they were charging
25 the independent body shops.

1 He ordered us to terminate our wholesale
2 compensation plan. He decreed the implementation of the
3 joint GM/Commission staff which would "cooperatively"
4 devise a nondiscriminatory plan for distributing new GM
5 crash parts.
6 The Commission staff appealed, the headline in
7 the October 4th Washington Post read, "FTC Challenged
8 Its Own Ruling on GM Crash Parts." So did we. Finally,
9 on June 25th, 1982, the full Commission dismissed the
10 complaint in its entirety. Unlike the ALJ, they did
11 find injury to competition to the independent body
12 shops -- to the independent body shop repair witnesses,
13 I should say. But in their words, apparently, and in
14 spite of the fact that they could find no overall injury
15 to the body shops as a class, what disturbed them was
16 this perceived difference in price at the GM repair
17 shops and body shops, independent body shops.
18 The Commission found, though, that the injured
19 body shop competition was offset by business
20 justifications. That creating a duty to deal could
21 result in higher costs of distribution, which ultimately
22 would be passed on to consumers in the form of higher
23 prices for GM crash parts. Just as we had said 19 years
24 earlier.
25 They found no injury to competition in wholesale

1 parts distribution. Most importantly, they rejected the
2 proposed remedy as unworkable. They did not want the
3 Commission to be involved in "ongoing supervision of the
4 system." They did not want to, in effect, become
5 another Council on Wage and Price Stability, having to,
6 "commit extensive resources to reviewing GM's
7 interpretations of to whom and at what price it could
8 sell these crash parts."
9 The long ordeal was over. After 19 years of
10 investigation and tens of millions of dollars in
11 corporate and commission resources, we have not opened
12 up our distribution system since. We have not sold
13 crash parts directly to independent body shops or to
14 independent warehouse distributors. Neither has anyone
15 else. We did drop the costly and ineffective wholesale
16 compensation plan, the subsidy for dealer resales.
17 We have further simplified our pricing program,
18 in response to the modern computer and the high speed
19 Internet. In the final analysis, the issue came down to
20 who can more efficiently manage GM's business? Who can
21 more efficiently choose the customers with whom we deal
22 and the prices we charge? We share the Commission's
23 interest in an efficient system of distribution and in
24 keeping the car buyer happy.
25 So, the only question, was and is, who can do

1 the better job? Thankfully, on June 25th, 1982, the
2 Commission finally said, and for very good reasons, it
3 did not want to second guess our business judgment
4 anymore. We could only hope in the future that the
5 courts and the Congress also will share these
6 sentiments. Thank you.
7 (Applause.)
8 MR. ABBOTT: Thanks, Tom, for a cautionary tale
9 about agency antitrust enforcement. One of the things
10 we are hoping to do in these hearings is to get the
11 views of business planners, people inside the
12 businesses, and their reactions to antitrust
13 enforcement.
14 Our next speaker also comes from the business
15 world, Mark Whitener, senior counsel, competition law
16 and policy at General Electric Company. Prior to
17 joining GE, Mark was deputy director of the Federal
18 Trade Commission's Bureau of Competition, where he was
19 responsible for a variety of antitrust enforcement and
20 policy initiatives, where he worked on merger
21 guidelines, health care, intellectual property, and
22 international enforcement. Mark also spent several
23 years in private practice in Washington and London
24 prior to joining the FTC. Mark has written widely,
25 testified before Congress, and was editor of the ABA

1 antitrust section's antitrust magazine.
2 Mark?
3 (Applause.)
4 MR. WHITENER: Well, thank you. Tom did all the
5 heavy lifting for us now, and makes my job a bit easier,
6 because I can just tell you what I think are all the
7 policy implications of what Tom just said. I'm going to
8 urge the agencies to use these hearings to set out a
9 pretty simple position on this topic, and the topic that
10 I'm addressing is unilateral, unconditional refusals to
11 deal with competitors. I think other forms of behavior
12 that take the form, for example, of the vertical
13 restraints or exclusive dealing, I think all of those
14 are readily distinguished from what we're talking about
15 here today. Perhaps we can get into that during the
16 discussion.
17 So, it seems to me that what the agencies can do
18 here is set out a position that you can call it per se
19 legality, I suppose, but my sense is that we're really
20 not creating a rule of exclusion, but what we're doing
21 is addressing rules of definitions. What does it mean
22 when we talk about exclusionary conduct under Section 2?
23 And I think that what the agency should say is that
24 unconditional refusals to deal with competitors simply
25 do not constitute exclusionary conduct. And I think

1 that position, by the way, can be taken consistently
2 with any of the various analytical models one might
3 choose for looking at Section 2 issues generally.
4 That position can be consistent with an
5 aggressive view of how to look at other forms of
6 behavior, or a permissive view, because definitionally,
7 it seems to me what we're saying is that when we try and
8 define what is exclusion, versus what is the simple
9 exercise of one's property rights, or even one's market
10 power, if that's what we're -- if that's what exists in
11 the technology, that we're taking the rights to one's
12 property, that exploiting those rights unilaterally,
13 that choosing not to deal with competitors by supplying
14 them licensing is within the inherent property right, or
15 if market power exists, is simply the exercising the
16 market power and not the unlawful maintenance of
17 increasing that power.
18 If the Commission were to take this position, it
19 seems to me that there are a couple of positive effects.
20 Not including, by the way, any significant shift in
21 federal enforcement policy. This is not an area where
22 the agencies have been active for many years, and I
23 think quite rightly so.
24 When businesses look at this issue and assess
25 risk, they're looking at two things. Private

1 litigation, which plays out before generalist judges and
2 agencies, and increasingly international enforcement.
3 And I think for the agencies to take a clear view, clear
4 position on this issue, would not only promote the
5 sensible interpretation of the law in the U.S. as it's
6 applied to private litigation, but also can help us
7 advocate for sensible policy abroad. And I'll come back
8 to that topic in a moment, but I think it's a very
9 important one.
10 The ramifications of this approach would be
11 essentially to say that unconditional refusals to deal
12 with competitors are not exclusionary, regardless of the
13 nature of the property, intellectual or otherwise,
14 regardless of whether the property owner began dealing
15 and stopped or never began dealing at all, I believe we
16 made that point. It's not a meaningful distinction or
17 way to distinguish between anticompetitive and
18 competitive action, regardless of the property owner's
19 reasons for not dealing. Whether we use that as a
20 question of intent or pretext or otherwise. And
21 regardless of the price that's charged, if a firm with
22 monopoly power decides to deal, and decides to exercise
23 the right that's recognized elsewhere in Section 2 to
24 charge different prices for different end users and in
25 essence price discriminate, this conduct, standing

1 alone, is not a Section 2 violation.
2 Because again, as an analytical matter, I'm not
3 advocating changing the law or defining a category of
4 practices that otherwise are exclusionary as lawful, but
5 simply recognizing that what we're talking about here in
6 this clear case of the unconditional refusal whether to
7 license or to sell, this is simply the exercise of all
8 the rights and the capturing of all the value inherent
9 in the firm.
10 Now, the reason for this, analytically, what
11 exists with antitrust and the reasons for this have
12 essentially gone off the radar. The reason why these
13 cases are rare is because in most instances, courts
14 either through express analysis or intuition come to a
15 view essentially like the one that I'm describing, but
16 if you ask judges and juries to apply the ill-defined
17 standards that exist today, some of them are going to
18 answer the question the other way. You're really not
19 given much guidance in terms of how to address it.
20 There is, I think, an important incentives issue
21 in play here. I think Bob asked the right question,
22 which is where's the evidence? I think we should be
23 looking for evidence to underlie more of our antitrust
24 judgments, in many areas of the law, rather than relying
25 on intuition or case law or anything else that might not

1 really tell us a lot about reality.

2 So, I think it's a fair question. Hew offered
3 some examples, some studies. I do think, though, there
4 is a doctrinal or analytical or philosophical question
5 here to be answered in terms of incentives, and that is
6 we, I think, should assume, you're entitled to assume
7 that incentives are diminished when firms are forced to
8 share their property and their technology. For the same
9 reason that we assume that the antitrust laws bring
10 something positive to the economy.

11 The antitrust laws reflect a belief in a
12 competitive model, and it seems to me that forced
13 sharing, which I think is a fair way to describe as a
14 corollary to the refusals to deal area, in essence
15 replaces the competition with regulation. I don't think
16 we can imagine any remedy to a refusal to deal case that
17 is not in some very substantial sense regulatory. And
18 you can talk about the various models and Steve has made
19 a serious attempt to describe how one may engage in that
20 regulation, but I think we have to call it what it is,
21 which is price regulation of every firm that is being
22 forced to share.

23 Now, Trinko was a step in the right direction,
24 in general terms, in the sense that it expressed a
25 skepticism about refusals to deal and a skepticism about

1 its cousin essential facilities. But what Trinko didn't
2 do, by following this Court's tendency to decide cases
3 generically with a sweeping view of the actual holding,
4 is the scenario of what exists after Trinko and what has
5 been applied by the lower courts following Trinko.
6 There are several analytical tests that really are not
7 satisfying, that really don't help businesses evaluate
8 risk very well, and that really don't pose a meaningful
9 way to distinguish between precompetitive and
10 anticompetitive conduct.
11 Most of these have been referred to already.
12 This question of whether one has ever dealt or has
13 stopped dealing with a competitor. Well, that may be,
14 as a factual matter, something that reduces litigation.
15 Whether a firm is more likely to have a happy
16 competitor, if you deal with them and stop, that doesn't
17 really help us say what is or isn't anticompetitive.
18 The question of whether someone's refusal
19 relates to intellectual property or not. Not a question
20 that Trinko exactly addressed, but certainly an issue
21 that now is clear that there is a -- there is arguably a
22 different treatment under the law, depending on whether
23 you look at Xerox or the decision in Kodak or Trinko.
24 Depending on whether the property is intellectual or
25 tangible, depending on what circuit you can be sued in.

1 The question of intent, and this I think is a
2 really important point in understanding why I think we
3 should not view unconditional refusals as exclusionary
4 at all. The intent by a firm that has developed a
5 product or technology is always essentially the same.
6 Regardless of how they express it in the conversation or
7 in the documentation, that intent is to maximize
8 profits, to maximize the returns on the investment in
9 that product.
10 That intent might be expressed in ways that are
11 very pleasing to the ear of the antitrust lawyer or a
12 judge or a jury, protecting the intellectual property
13 rights. Kodak tells us that that's legitimate and
14 contextual. Maximizing returns on investment. As
15 opposed to other sorts of ways to describe profit
16 maximization, which might in the case of refusal to
17 deal, essentially say, keep -- make sure I can keep this
18 all to myself. Make sure I can exclude other types of
19 service competitors from competing with me. Well, that
20 begins to sound like something in the words of the model
21 jury instruction that the ABA has put out on refusals to
22 deal. Like something that is intended to block
23 competitors.
24 If you look at the jury instruction that the ABA
25 has promulgated in this area, blocking competitors is

1 not a legitimate business justification for the refusal
2 to deal. Now, how do you distinguish blocking
3 competitors from the actual fact of keeping the returns
4 for myself, maximizing my profits, maximizing the return
5 on my investment.
6 So, I think the fact that Trinko has perpetuated
7 the law in language that I found so surprising when I
8 read it coming from Justice Scalia's process and his
9 clerks. This procompetitive zeal, anticompetitive
10 malice, language is not helpful. And some of us may
11 think, you know, as we see it, the risk here is not that
12 our colleagues in the federal agencies are putting forth
13 cases, it's that claims will be filed, it's that judges
14 will look at the law and conclude that they have to let
15 it go to trial, it's that juries will be asked to
16 decide, in essence, when you boil it down, whether this
17 refusal was good or bad.
18 And again, I don't think this is an area where
19 we're facing the onslaught of litigation. It is an area
20 where I think there is some natural tendencies that
21 diminish the number of cases that are filed. Section
22 two cases are not quick hits for class action lawyers.
23 They're not -- if you get to trial, they're massive and
24 resource intensive. They may have settlement value, so
25 there is risk. They certainly impose costs on firms

1 that have to defend them if they're brought and they
2 have to counsel around them if they're not.
3 So, I don't think Trinko really settled it. I
4 think it was a step, some might say, and Bob might be
5 right, it was a signal of a very fundamental or
6 philosophical view. The lower courts aren't bound by a
7 philosophical view, they're still allowing some cases to
8 go through.
9 And I think the jury instructions are
10 instructive. If you look at monopolization instruction
11 two and three, if you put those together and you ask
12 yourself, for example, if I'm a firm and I've developed
13 a piece of sophisticated equipment, maybe it's got some
14 patent protection, maybe other parts of it don't, it has
15 parts, integrated parts, I provide service, and for now
16 I'm the only service provider and for now I've decided
17 not to sell parts, or make it a little bit easier, I've
18 decided not to train my competitors. Service
19 organizations come to me and want to pay me Steve's
20 monopoly price or exclusionary price, they want to pay
21 me a lot for service, or service training, train them to
22 come in and service my equipment. And I decide I'm not
23 going to set up a service operation, I'm not going to
24 offer that service to my competitors. And so in the
25 short run, I would make a lot of money this quarter if I

1 sold my service, but I know over the next two or three
2 or four years, my service is going to be substantially
3 lower, because I've created competitors in my service
4 operation.
5 So, then I think we have the profit sacrifice.
6 I think if I understand the test, and again, the
7 question here is not to criticize the profit sacrifice
8 test, it's to say that we really should not put that
9 behavior in that test at all, because I don't think it
10 should be viewed as exclusionary.
11 So, just to finish up, private litigation is
12 where the real risk is in many of these areas. It's not
13 a question of the floodgates being opened. I think the
14 floodgates were probably turned down a bit after Trinko,
15 but I think the agencies can be more instructive, and I
16 think in the international market, this can be much more
17 than theoretical. U.S. enforcers and practitioners and
18 academics go out and talk to those in other countries
19 who are developing laws or who are developing
20 enforcement policy, such as the European Union review of
21 Article 82, or who are creating an entirely new
22 anti-monopoly law, as is happening in China, we see
23 subtle expression of this policy, or in some cases very
24 unsubtle expressions, such as an essential facilities
25 doctrine written in ways that were similar to the U.S.

1 version, or even a doctrine written similarly to some of
2 the recent cases in the refusal to deal area. We look
3 at that and we're concerned, because we understand how
4 it can be used, and in fact, it's likely to effect on
5 limiting innovation and being used to confiscate
6 property, being used to bring about industrial policy,
7 being used to bring about a different economic status
8 that some regulator may prefer than the one that would
9 happen if people who innovated brought in terms of
10 innovation.
11 And when we are commenting on those issues, and
12 I've experienced this myself, sometimes the audience
13 says yes, but you have the essential facilities
14 doctrine, or you have refusals to deal. In fact, we've
15 basically taken this out of cases, post-Trinko cases,
16 and these are the questions that we're going to empower
17 our regulators to ask, and by the way, very substantial
18 fines or other penalties that can come into play for the
19 violations. I think the way that would be described in
20 other countries, I think that is diminished when we
21 still have work to do in cleaning up the vestiges of
22 these sorts of policies in our own law. I think this
23 could be applied to refusals to deal.
24 (Applause.)
25 MR. ABBOTT: Thanks, Mark, for bringing in the

1 international dimension and the vagaries of juries and
2 jury instructions. Quite interesting. We are going to
3 take a ten-minute break now, and I would urge people to
4 try and get back here as promptly as possible. Thank
5 you.
6 (Whereupon, there was a recess in the
7 proceedings.)
8 MR. McDONALD: Ladies and gentlemen, thank you
9 for your attention and returning to your seats following
10 our very outstanding presentations from the panel. As
11 promised, we will ask the panelists to take about three
12 minutes each to respond to panelists' remarks, to defend
13 their remarks and to defend their honor. We will go in
14 the initial order that they made their presentations.
15 Bill Kolasky?
16 MR. KOLASKY: Thank you. Thank you very much,
17 Bruce. I realized when I sat down that I hadn't really
18 gotten to the punchline of my presentation, which was
19 how do you apply the Section 2 depth-wise sliding scale
20 rule of reason to refusals to deal. And so I just
21 wanted to sort of move through that very quickly.
22 First, I agree with those who say, and Mark Whitener in
23 particular, that in general unconditional, unilateral
24 refusals to deal ought not to be unlawful. And so I
25 think in evaluating competitive effects in the first

1 step of the rule of reason analysis, courts should
2 distinguish sharply between a simple unilateral refusal
3 to deal, and a refusal that is part of a broader pattern
4 of anticompetitive conduct.
5 The classic example of that is the MCI/AT&T
6 case, where AT&T basically played rope a dope with MCI
7 in their negotiations over interconnection and their
8 misuse of the regulatory process through sham
9 litigation. That was what really constituted the
10 exclusionary conduct.
11 Second, in evaluating proper justifications,
12 courts should, and here I agree completely with Hew, as
13 Phil Areeda used to say, courts should really take into
14 account macro justifications, namely that they should
15 recognize that a monopolist's desire to capture the
16 value of its investments and innovation is part of what
17 stimulates the economy. It is competition on the
18 merits, and it is a legitimate business justification in
19 and of itself.
20 Third, as with any rule of reason test, with
21 respect to refusals to deal, the degree of scrutiny of
22 the proffered business justifications, including that
23 one, should depend on the strength of the showing of
24 anticompetitive effect. But most importantly, courts
25 should not substitute their judgment for that of the

1 monopolist, as to its business strategies, as to what is
2 the most profitable business strategy. And then
3 finally, again agreeing with Hew, courts should not
4 impose any remedy that they cannot efficiently enforce.
5 I know we're going to talk about the
6 efficient -- the essential facilities doctrine, so I am
7 going to save my remarks on that until we get to it.
8 Thanks.
9 MR. McDONALD: Thank you. Bob Pitofsky?
10 MR. PITOFSKY: Bill, let me start off with a
11 question, in your sliding scale approach to refusals to
12 deal, which I found very helpful, but what do you do
13 with a situation, you get to step three, the defendant
14 says, well, I had these good business reasons, and then
15 you say, well, the burden is now on the plaintiff to
16 show that they are not persuasive. And suppose the
17 plaintiff somehow falls short? Is that -- that's the
18 end of the deal?
19 MR. KOLASKY: No, I think that there could be a
20 case in which the plaintiff is not able to rebut the
21 justifications, but nevertheless shows that there are
22 anticompetitive effects, and you might have to engage in
23 a balancing then of the anticompetitive effects against
24 the procompetitive benefits of the conduct. My point is
25 simply, if you look at Section 1, rule of reason cases,

1 courts almost never reach that fourth step, and I doubt
2 that they would reach it very often in Section 2 cases.
3 MR. PITOFSKY: I think that's fine, I
4 couldn't -- I'm comfortable, entirely comfortable with
5 where you are, and I think the emphasis on why they did
6 it and what their reasons are is certainly where the
7 emphasis should be, and if you get to step four, where
8 you have to balance anticompetitive effects against
9 something, you know, it's really a crap shoot, and very
10 hard to expect the judges, much less juries to do that
11 in a reasonable and rational way. And I don't end up
12 agreeing with too many people up here.
13 Mark, I think your unconditional refusal to
14 deal, conditional refusal to deal is an excellent way of
15 introducing the subject. I'm just a little
16 uncomfortable with absolute select safe harbor. I go
17 along with you as far as strong, strong presumption, but
18 then I sort of get off the train, because I worry about
19 the really unusual case, and I think IHS in Europe, and
20 I'm not one to know enough about it, but I'm going to
21 oversimplify it. A company with a monopoly position on
22 a form of intellectual property says I will deal with A,
23 B, C and D, that's all fine, I'll work out the terms,
24 but as far as X, you've already said that you want
25 access because you want to be my rival, and I'm not

1 going to do that. And I refuse to deal with you. And
2 then it turns out on careful analysis that the alleged
3 investment, all the incentive, all the work that the
4 monopolist is supposed to do, approached zero. This
5 monopoly fell in its lap, and yet it refuses to license
6 a rival. It is, it is a sort of an unconditional
7 refusal to deal, but I would like someone to take a look
8 at it. I would like to not close the door before a
9 little more analysis takes place.
10 Third, I mentioned that I looked carefully at
11 Greg Werden's piece on no economic sacrifice of profits.
12 You know, when you get to the end, after all the talk
13 about universal meetings, he has a balancing test in
14 there, too. So, there's going to have to be some sort
15 of balance, and I'll stop there.
16 MR. McDONALD: Thank you. Hew?
17 MR. PATE: Not surprisingly, I would like to
18 close the door, and I think when Steve and I have talked
19 about this, he says in a way, my part of this is much
20 easier, because basically everything I'm saying boils
21 down to don't try this at home. And that's right. And
22 it may be fine for Professor Salop to put -- charge up
23 and to propose formulas, but the basic thrust of my
24 presentation is that if businesses are required to
25 undergo this sort of exercise in district courts in

1 front of juries, that the uncertainty and the lack of
2 predictability that is created are going to be harmful
3 to economic activity. That does not make me, as Alden
4 suggested, an antitrust skeptic, it makes me a skeptic
5 about the ability of antitrust to provide general rules
6 that should require firms to assist their rivals.
7 I'm not a skeptic about doing this in Section 1,
8 in the same way, I think some of the examples that Steve
9 mentioned in terms of the Halliburton example, reaching
10 an agreement not to compete in Kansas in return for
11 getting transportation in Iraq, or what have you, you
12 know, that's a Section 1 agreement not to compete. It
13 need not be characterized as a Section 2 refusal to
14 assist, and I don't think that there's any slippery
15 slope that leads from saying you shouldn't have that
16 sort of duty to authorizing everything else.
17 As to the balancing test and the meet for the
18 case and these sorts of things, the problem is that the
19 information to make these decisions is not going to be
20 available to businesses at the time they have to decide
21 whether to undertake the unilateral conduct, and
22 deciding what the consumer welfare effects are going to
23 be is extremely difficult. It is not the same as what
24 the agencies do or purport to do in a merger context,
25 where both parties have voluntarily entered into a

1 transaction knowing that all of their information is
2 going to be available, that third party information is
3 going to be available, and that a prediction can be
4 made. Very different from making a business decision
5 exante about whether to undertake competitive activity
6 and risk capital.
7 So, Bob concedes that step four is a crap shoot,
8 if you get to it, I think steps three are a crap shoot,
9 too, because we're going to be rummaging around in files
10 looking for sound bits from sales executives memos and
11 the like if we're going to embrace an intent base
12 approach to all this.
13 So, to me, I'm very attracted to Mark Whitener's
14 idea that just carve out the idea of a unilateral
15 unconditional refusal to assist a competitor. Many of
16 the cases that are going to be litigated won't be that
17 simple, but if we had agreement on that, as a very
18 clear, crisp proposition, it would certainly be helpful
19 in terms of how the case would be analyzed thereafter.
20 IMS Health and IP, there's some different things
21 there, I think that, you know, maybe a copyright was
22 recognized in a system that shouldn't, but I really do
23 think that if you're going to grant an IP right, which
24 should provide very great certainty, and then leave the
25 door just a little bit open to analyzing case by case

1 whether enough effort was put into the innovation, that
2 can't be a sensible way to run an IP system.
3 So, if there's a problem with the IP system,
4 maybe that needs to get fixed, as a better way to
5 approach those sorts of situations. Thanks.
6 MR. McDONALD: Thank you. Steve?
7 MR. SALOP: I guess I want to make three
8 comments. The first is that I heard a lot of criticisms
9 of intent tests, but no, the sacrifice standard, the NES
10 standard is inherently an intent test. It's just an
11 intent test that doesn't work -- that doesn't
12 quantitatively, but does it in an objective way. That
13 it's fundamentally an intent test, we're trying to
14 figure out whether the sole purpose of the conduct was
15 to generate monopoly power.
16 With respect to balancing, I find I have to
17 disagree with Bob, it's not trying to -- it's not some
18 sort of social balancing adding up the social debits and
19 credits. What it actually is is trying to figure out
20 the effect on consumers, and I think that's different,
21 because it's more -- it is something that is more
22 objective.
23 For example, just like in mergers, you do
24 balancing efficiencies and -- efficiency effects and
25 market power effects, but in the end, the question is:

1 Is the merger going to raise prices? And so I wouldn't
2 call it -- act as if it's some kind of open-ended
3 balancing, it's something that's really fairly
4 objective.
5 The general criticism that balancing tests are a
6 crap shoot, you know, there are balancing tests all over
7 the law. All over the place. And a generalized
8 criticism that courts aren't good at balancing, well,
9 that's pretty much what courts do. In negligence cases,
10 in first -- in due process cases and so on.
11 Finally, don't do this at home, Mark said,
12 whether or not we do it at home, we shouldn't let the
13 Chinese do it.
14 (Laughter.)
15 MR. SALOP: In the end, this don't do it at home
16 argument always comes down to saying you want to
17 eliminate the jury system, and/or generalist judges.
18 And, you know, if you think that antitrust is beyond the
19 capability of juries, and you want to get Congress to
20 change the rules or amend the constitution, and have it
21 all done by an expert agency, like the FTC, well then go
22 after that. That's an issue of throwing the baby out
23 with the bath water. If it's a problem of the juries
24 can't do it, then get somebody to make the decisions
25 that are good at it. And just like if antitrust isn't

1 up to the task of maintaining competition or economy,
2 well then maybe we have to go with regulation, but you
3 have to solve the problem in a way that's tailored to
4 what the problem really is, not some other problem.
5 So, for example, dealing with a -- if you don't
6 like the law, the issue is change the law, don't change
7 the standard itself, and that would be another example
8 of something that the courts might do. I say the way to
9 make antitrust coherent is that another 30 years from
10 now we don't make fun of the dark ages now is to make
11 sure that the rules make logical sense, rational
12 economic sense, not just the goal-oriented to solving
13 the problem of higher prices.
14 MR. WALTON: I guess I'm still worried about the
15 remedy in the Hughes case and I go back to the testimony
16 for 19 years the Commission tried to get us to sell
17 these crash parts to all vehicles and customers, at the
18 same prices, terms and conditions of sale, this is their
19 words, said prices to be subject to reasonable cost
20 justified quantity discounts and documents. We argued
21 for 19 years on what that meant. We have very good
22 economists, excellent economists at the Federal Trade
23 Commission, we had economists elsewhere and we could
24 never come to an agreement as to what that meant.
25 The Commission finally 19 years later said they

1 didn't want to have anything to do with it. They said
2 they didn't want to "commit extensive resources to
3 redoing GM's interpretations to whom and what price it
4 should sell its crash parts."
5 The other thing is, why do we have a dealer
6 list? One of the major reasons we have a dealer
7 distribution system is we don't know what the price
8 should be. That's a subject between the dealer and the
9 dealer's customers and the region in which the dealer
10 operates. It depends on the trade-in analysis the
11 dealer gets on the car, that's part of the price, it
12 depends on financing, insuring, there's no way that we
13 in Detroit, folks in the central office, can tell the
14 dealer what price to charge for its products.
15 And then how, if we didn't do it, how can
16 someone in the court, the jury, or the government figure
17 out what the prices should be? That just goes to, I
18 think, basically the onus that debate has been won and
19 lost on what's been more effective, central planning or
20 decentralized markets, and it's decentralized markets
21 that we're trying to take advantage of in our dealer
22 distribution system. That's it.
23 MR. WHITENER: Okay, well, on the Chinese point,
24 I think what I'm trying to say is when we say to them
25 don't do it, we're essentially saying, do as I say, not

1 as I do. So, I don't think it's credible if we say
2 don't do it if we're doing it.
3 On the sort of regulation point, taking a point
4 that Bob made, sort of a general sense that you don't
5 want to slam the door on the rare case that might be
6 meritorious. You put that alongside Steve's concern
7 that if we withdraw antitrust from the field, we're
8 inviting sort of massive direct regulation that we
9 might -- and we might, you know, regret. It seems to me
10 that if you put those two together, the instances when
11 real intervention to force some holder of a bottleneck,
12 or a dominant standard that's durable, the instances
13 when that's really going to be in the public interest
14 are going to be rare, and my point is that that's
15 something that antitrust is not really set up to do.
16 So, if you encounter one of those situations, to
17 Bob's point, when you haven't slammed the door on the
18 government's ability to exercise the power to take, or
19 to regulate. But that's the proper way to do it,
20 because that's in essence what you're doing, not really
21 applying the antitrust standards that are going to be
22 applied to other types of cases.
23 MR. McDONALD: Thank you. We have developed a
24 list of propositions that we would like to get the
25 response of the panelists to, both in terms of

1 determining whether there's a general consensus or
2 perhaps a widespread disagreement on these propositions,
3 and also to get their more in-depth views on these
4 particular points.
5 Let's start with one on the essential facilities
6 doctrine as distinct from the refusals to deal more
7 generally. Could I have by show of hands from the panel
8 whether they agree with the proposition that courts
9 should abandon the essential facilities doctrine.
10 MR. SALOP: Could you define essential
11 facilities doctrine so we know which one you're
12 referring to?
13 MR. McDONALD: That is actually a question that
14 I've got for the panel, so if you want to abstain for
15 the moment, let's see the hands --
16 MR. SALOP: I'll abstain until I find out what
17 the doctrine is.
18 MR. McDONALD: Those who agree with the
19 proposition. Very good. Bob Pitofsky, it would be
20 helpful to know from you as one of the proponents of a
21 rare essential facilities doctrine is what does it mean,
22 and is there a requirement, or do the general
23 requirements of Section 2 apply when you're bringing an
24 essential facilities claim? Do you, for example, have
25 to show the representing competitive effect?

1 MR. PITOFSKY: Well, I think that if you sum up
2 the four qualifications in MCI, which virtually every
3 lower court adheres to, then you, in effect, you have
4 found an anticompetitive effect. And the four I believe
5 was: This only applies to monopolists, it must truly be
6 essential, you can't compete without it, and therefore
7 if the monopolist doesn't make it available, it won't be
8 in the competition. The monopolist has requested and
9 denies making it available, and -- oh, and that it's
10 feasible to make it available. There aren't any
11 chemical engineering business reasons why it can't be
12 done.
13 If all of those circumstances are true, and they
14 will rarely all be present, then it seems to me that
15 allowing the monopolist to charge any price it chooses
16 up to the point where substitute products can become
17 available, is not a good idea. You're better off
18 cautiously making essential facilities doctrine actual.
19 MR. McDONALD: So, your point is at least under
20 the first two elements of the MCI test implicitly
21 incorporate the rest of Section 2?
22 MR. PITOFSKY: I think so.
23 MR. McDONALD: Is there anyone who wants to
24 disagree with that and say we ought to demand more for
25 any sort of essential facilities case?

1 MR. KOLASKY: I'll take the bait, I think you
2 should do that, because the first two, as I understand
3 those requirements, is simply that the monopolist has an
4 essential facility, that it owns and controls an
5 essential facility, and that it has a monopoly, and that
6 the plaintiff is going to -- or the rival is not able to
7 duplicate that facility. I think if you allow the
8 essential facilities test to be imposed on that basis,
9 then you really are in an area where you're going to
10 have compulsory sharing in lots of cases.
11 And I guess one question I would like to turn
12 and put to Bob, as an advocate of the essential
13 facilities doctrine, is: Would you apply the doctrine
14 in cases of intellectual property, because there, when
15 you're talking about patents and copyrights, it's going
16 to be rare that the defendant would be able to show that
17 it's not feasible to make the essential facility
18 available?
19 MR. PITOFSKY: That's a good question, and the
20 answer is that I am not sure it does apply with
21 intellectual property. I think that's where the case
22 law now is.
23 MR. McDONALD: Steve Salop, did your fellow
24 panelists answer your question or would you like to
25 yourself pose what the essential facilities doctrine

1 ought to look like?
2 MR. SALOP: Well, I set out my -- I set out my
3 standard, I think in cases where it's a really big
4 monopoly, you know, I mean, you know, I -- the first
5 couple of MCI prongs or about monopoly power in the two
6 markets, so I would say in the situation where it's a
7 really big monopoly and in a very important market, then
8 maybe it will weaken the plaintiff's need to show as
9 much anticompetitive effect, and you use my prong two
10 test as a way to determine the rate that's pressed, and
11 that would be the way to handle it. You would have to
12 worry there about incentives, and I think you would, but
13 yeah, I think it's -- I think it is something that we
14 should do where it's a really important monopoly.
15 You know, there's a lot of markets where
16 normally, take Trinko, something like Trinko, that you
17 say, oh well, the regulator is going to get it. But,
18 you know, it's an accident of history that this industry
19 has been regulated and say operating systems are not
20 being regulated. So, the question is, what do you do
21 where you have like a big monopoly, if this was -- if
22 the FCC had made the decision 25 years ago to include
23 operating systems in its jurisdiction and it had held up
24 with the courts well then, you know, the case in Europe
25 that, you know, some of the prongs in the case here

1 would have gone to the FCC and we would be in a
2 situation like Trinko. They would have made a decision
3 of whether or not Microsoft had to "share," had to give
4 access to the information that they wanted in Europe to
5 the APIs or to look into the operating systems of
6 someone here. But Microsoft turns out not to be
7 regulated. Nobody took on the task of regulation.
8 So, the question is, should the court take over
9 the regulation, and I agree there is regulation, should
10 the court take over the regulation when nobody else is
11 doing it, or where the company otherwise isn't
12 regulated. I don't see why not. You know, it's not as
13 if courts never do that. Gas prices have been regulated
14 since 1950, for example. There are little places where
15 district courts are acting like regulators. They're
16 extreme, I agree they're extreme, and they're rare, but
17 it's not to say that it should never be done. And I
18 don't think that's all Bob is trying to get at by
19 preserving the essential facilities doctrine for
20 extraordinary cases.
21 MR. McDONALD: Hew, do you have a comment on the
22 implication of applying the essential facilities
23 doctrine in the intellectual property area?
24 MR. PATE: Sure, I would say before that, I
25 don't think it's an accident of history that some of

1 these cases occur in situations where the State had
2 previously put a firm in a monopoly position and tried
3 to interfere in the first place and the law is trying to
4 introduce competition. I don't think it's an accident.
5 As to IP, yes, I think the interesting thing
6 about the MCI, the four-part test, is it would be a very
7 good way to describe exactly what the patent system is
8 trying to incentivize, and the paradigm of the most
9 valuable patent that produces something brand new that's
10 extremely valuable, that nobody can duplicate, and we
11 have a patent system that says, in order to incentivize
12 that, you ought to have the exclusive right to it. And
13 it just can't make sense, in my judgment, for antitrust
14 then to come along and second guess that.
15 We're seeing that now in Europe, where the
16 question is on the table whether it was sufficiently
17 innovative intellectual property to be protected in the
18 trade secret realm, for example, and I think that's just
19 a very disorderly way to go forward, because it damages
20 the predictability on which businesses rely to commit
21 capital.
22 MR. McDONALD: Thank you. Steve, did you start
23 to respond?
24 MR. SALOP: I just wanted to make a footnote to
25 what you said. I mean, the court didn't create the Ma

1 Bell monopoly, the Ma Bell monopoly got created by a
2 series of mergers and certain conduct that was declared
3 not to follow antitrust laws. It was not as if the
4 government said all of these competing telephone
5 companies can merge.
6 MR. PATE: No, but there was a state sanctioned
7 local loop monopoly in place was what I was suggesting.
8 Not that -- not that the court ordered the creation of a
9 monopoly.
10 MR. SALOP: Well, they didn't disagree, they
11 didn't break up the operating companies 80 years ago.
12 They didn't. It's not like they made them do it. They
13 committed.
14 MR. PITOFSKY: Just one line. Look, the fact is
15 lower courts have mandated access in situations where
16 intellectual property was involved, and I didn't notice
17 that it asked for investments or anything on patent work
18 or intellectual property followed that, but I have to
19 agree with you. The essential facilities doctrine runs
20 head on into the very purpose of the patent system, and
21 underlying that purpose, when the patent system is out
22 of control, and this is for a different panel, but it's
23 just, it leaves you with a feeling that essential
24 facilities wasn't designed to do that.
25 MR. McDONALD: The last comment, Bill Kolasky?

1 MR. KOLASKY: I guess I will make what I call
2 the Robert Bork point, and that is that all of the
3 discussion so far has been about policy reasons why you
4 should or should not have an essential facilities
5 doctrine. There really is a more fundamental point, and
6 that is the language and the congressional intent
7 underlying Section 2. Section 2 is designed to prohibit
8 affirmative conduct that is designed to gain a monopoly
9 through improper means. And I don't think that you can
10 use Section 2 to impose an affirmative duty on someone
11 to share, unless they have taken affirmative acts to
12 acquire or maintain their monopoly by improper means.
13 Simply not sharing is not an affirmative act. I mean,
14 you contrast that to the affirmative acts that were
15 taken by Aspen Ski Co., which went beyond a simple
16 refusal to deal.
17 MR. WHITENER: Right, and that was essentially
18 the comment that I was trying to make, there's no
19 essential principle, once you declare that retaining is
20 maintaining. Yes, we can understand how the English
21 language can be used if I say that I take steps to
22 retain my rights and not share them, I'm maintaining a
23 monopoly if there's a monopoly on the product. But
24 that's semantics. That's the point I was trying to
25 make.

1 A minute ago Steve said I thought basically that
2 it's an accident of history that some segments are
3 regulated and some aren't, and therefore some courts
4 should and do step into those voids where the lack of
5 regulations occurred. I think if I understood it right,
6 that's a fundamental -- well, I don't agree with that
7 idea of the political system, the regulatory act is
8 conscious, a lack of regulation is the result of a
9 judgment at some level of the political administrative
10 system, that there's not going to be regulation, and my
11 point is that those -- it's in the political process
12 where decisions expressly to regulate a particular
13 sector, to re-allocate resources, to take to cap prices,
14 et cetera, those should be made in the political
15 process, not where courts decide that a failure to
16 regulate is a mistake.
17 MR. McDONALD: Very strong points. Shall we
18 move to the second proposition?
19 MR. ABBOTT: Yes, the second proposition is the
20 antitrust laws should never require a firm to deal with
21 a rival. Who agrees with this proposition?
22 MR. PITOFSKY: Wait, wait, wait, what does it
23 mean? Does never include remedy law? That after you
24 found a violation on some basis, remedy is mandating the
25 theory?

1 MR. ABBOTT: Let's stipulate, I'll say, that we
2 have not found an antitrust violation and assume as part
3 of a remedy certainly that's been required and so let's
4 stipulate that's not included in the statement.
5 MR. KOLASKY: So you're assuming this is a
6 liability question?
7 MR. ABBOTT: Right, so this is a very broad
8 question, that the antitrust laws should never require a
9 firm to deal with a rival.
10 MR. SALOP: We each answered this question
11 already.
12 MR. ABBOTT: Well --
13 MR. WHITENER: If a refusal is unconditional, I
14 agree with the statement.
15 MR. ABBOTT: Is there anybody else who would say
16 if the refusal is unconditional, they agree with this
17 statement? Mark and Hew?
18 MR. PATE: Unilateral and unconditional, I
19 assume you're meaning.
20 MR. ABBOTT: Unilateral and unconditional.
21 Because clearly if you add conditional, then the
22 conditions can mimic, you know, tying, exclusive
23 dealing, other arrangements. So, clearly, good point.
24 So --
25 MR. WHITENER: And Bob makes a good point, too,

1 excepting other situations where you're recommending a
2 merger.
3 MR. ABBOTT: Right. Sure, sure. So, I think
4 the panel has ably pointed out that the statement was --
5 MR. SALOP: I have a question. I have a
6 question. On this word unconditional, if two companies
7 go to the monopolist and they both want to buy the input
8 and one says -- and he says why do you want it? And one
9 says I want it to enter a market and compete with you,
10 and the other says I want it to put on my coffee table,
11 and he gives it to the second but not the first, is that
12 conditional or unconditional?
13 MR. WHITENER: He doesn't give it to the firm
14 who says he wants to buy it to compete with you, right?
15 That shouldn't be unlawful. There's no condition
16 whatsoever.
17 MR. SALOP: I'm sorry.
18 MR. KOLASKY: There is a condition. I will not
19 sell it to you unless you agree not to sell it to me.
20 MR. WHITENER: No, I'm not going to sell to
21 somebody who is a competitor or who is going to use the
22 product to compete with me. That's --
23 MR. SALOP: Can I just get where you're going?
24 If he says I'm not going to sell to anybody unless he
25 agrees not to compete. Is that legal?

1 MR. WHITENER: No, that's illegal. Let's put it
2 this way, if you want to call the fact that it's a
3 competitor a condition, I'll grant that. I don't think
4 I'm going to grant anything else, but I'll grant that.
5 If you want to say that the fact that --
6 MR. SALOP: I don't believe that you still
7 believe in so much in RPM law. I mean, here we are in
8 the thick of Parke-Davis versus Dr. Miles, this is --
9 MR. WHITENER: No, I think you're distinguishing
10 between agreements and unilateral practice is important
11 in a lot of settings, including this one.
12 MR. SALOP: So, if he has a history in which
13 5,000 people have asked him to sell, and half of them
14 don't compete and they get it, and the other half which
15 did want to compete, who said, just stupidly said to the
16 guy, when they asked for the product, that they were
17 going to compete, he said no to them, but you would not
18 infer that illegal agreement?
19 MR. WHITENER: Not illegal for the firm --
20 MR. SALOP: Should it get to the jury as to
21 whether there was an agreement or not or is that as a
22 matter of law there was no agreement?
23 MR. WHITENER: It didn't sound like agreement
24 evidence to me just now, but --
25 MR. PATE: Do you, Steve, feel that field of use

1 restrictions and licenses should be subject to antitrust
2 scrutiny? IP licenses, patent licenses? I mean?
3 MR. SALOP: Subject to the other conditions of
4 my rule, but there can be an argument that IP has got
5 some special place, you know, I could imagine the
6 Supreme Court could make that declaration, but, you
7 know, the thing, very few refusals to deal would be
8 actionable under my view because very few people have
9 the requisite monopoly power in the two markets, but,
10 you know, this constitutional question of whether IP is
11 different, until the Supreme Court decides it, I'm not
12 going to decide it, I'm not going to argue IP.
13 MR. ABBOTT: I think there's also, we've
14 probably spent a lot of time on IP and I'm sure it will
15 rise again. There's also statutory construction
16 questions regarding section 271 of the patent act which
17 raises questions about whether that section should be
18 construed as applying to antitrust or just to so-called
19 patent misuse.
20 But let me move away from IP for a second and
21 relatedly ask what is the difference between charging a
22 price higher than a buyer is willing to pay, and
23 refusing to deal? One can imagine offering to deal at
24 an infinite price is tantamount to refusal to deal, but
25 what if you just say, okay, I'm a monopolist, have a

1 right to charge my price, and a potential competitor
2 says, well, this is just way higher than I'm willing to
3 pay. Bill?
4 MR. KOLASKY: You know, one of the problems I
5 have with -- one of the problems I have with a lot of
6 these questions is that antitrust is necessarily a very
7 fact-specific field, and it's one of the beauties of the
8 common law approach and the rule of reason. And, so, I
9 think it's very hard to answer these questions in the
10 abstract without knowing the facts of the particular
11 case. You have a case such as the MetroNet decision in
12 the Ninth Circuit which was decided on remand after the
13 Supreme Court's decision in Trinko, where prior to
14 Trinko, the Ninth Circuit had held that Quest had to
15 make Centrex features available to a reseller at a price
16 at which that reseller would be able to resell those
17 features profitably.
18 On remand, the Ninth Circuit realized the error
19 of its ways, which were particularly clear in that case,
20 because you had dozens of other resellers who were able
21 to compete profitably, buying the features at the price
22 that Quest was willing to sell them to this reseller.
23 So, my point is simply, you have to look at the
24 facts of each individual case, and I don't think you can
25 answer it globally.

1 MR. ABBOTT: Anybody want to elaborate on that?
2 MR. SALOP: Well, I'll just say a word on it.
3 You have to distinguish between bargaining failure and
4 an anticompetitive refusal to deal. I think that's the
5 issue we're getting at. So, you know, aside from
6 everything else involved, that might have just been the
7 defendant's posted price, and he might say that's the
8 price I posted and I might be open to negotiate and the
9 plaintiff never even offered me a price, didn't make a
10 genuine offer. And I think that the plaintiff should
11 have to make a genuine offer over and above the, you
12 know, the compensatory price.
13 MR. ABBOTT: Hew?
14 MR. PATE: I don't think that that distinction
15 is going to hold up in practice, and I do think, Alden,
16 that it is very difficult to draw this boundary. It has
17 been understood, I thought, that American antitrust law
18 does not tell the monopolist that it is unlawful to
19 charge the monopoly price. That's a difference we have
20 with the Europeans, where under article 82, it can be an
21 abuse to charge a high price. That is of why it's so
22 hard categorically to tell Europeans under their system
23 that what they're doing when they look at compelled
24 sharing is fundamentally inconsistent with the
25 principles of antitrust. I think it is fundamentally

1 inconsistent with an important principle of antitrust
2 here.
3 MR. SALOP: I guess that the refusal to deal
4 approach, then, that I'm taking and a lot of other
5 economists have taken is the situation where the firm is
6 trying to charge a price above the monopoly price, and
7 that's -- so, you know, what it's saying is that it's a
8 sacrifice of profits in some sense in order to achieve
9 and obtain --
10 MR. WHITENER: See, what's not clear to me is
11 where the sacrifice is, if I'm charging the profit
12 maximizing price for me. You know, at some point I can
13 set a price that fully compensates me, not only for what
14 I think Steve calls the monopoly price, but the
15 exclusionary price. That is the price of not having
16 somebody else take this product and compete with me with
17 it. I think I'm entitled to charge that, and I think
18 what's being proposed is simply a scheme to regulate the
19 monopolist pricing, but at a level called something like
20 an exclusionary price, rather than the monopoly price.
21 It's still essentially third party intervention saying
22 we're going to decide what price the monopolist can
23 capture for its profit.
24 MR. WALTON: I guess I have a problem with how
25 do we get this pricing? I just, first of all, what if

1 it is a false positive? Then I'm not really a
2 monopolist. What if we're misidentified as a false
3 positive. Even if we identified you correctly, who's
4 going to set this price? I just told you it's very,
5 very difficult for someone, even in our position in
6 Detroit to set the prices, let alone someone else. So,
7 I worry about this stringently.
8 MR. ABBOTT: Okay, I suggest we move on to the
9 next question.
10 MR. McDONALD: A firm can refuse to deal with
11 its competitors only if there are legitimate competitive
12 reasons for the refusal. The burden of coming forward
13 with legitimate competitive reasons has been imposed on
14 the defendant. Who agrees with this proposition?
15 (No response.)
16 MR. McDONALD: Not even Bill Kolasky on the
17 step-wise approach?
18 MR. SALOP: It doesn't say whether they have
19 monopoly power. It doesn't --
20 MR. McDONALD: I would think that would -- I
21 would bet that would be implicit.
22 MR. SALOP: Are you thinking whether we think
23 that Kodak was rightly decided? Is that the question?
24 MR. McDONALD: No. Steve?
25 MR. SALOP: Actually the opinion of the Supreme

1 Court, yes, I thought that opinion was rightly decided,
2 I thought the Justice Department and Kodak took a really
3 extreme position, and, you know, killing their argument
4 was like shooting fish in a barrel.
5 MR. PITOFSKY: Disclosure.
6 MR. SALOP: And I could write the brief.
7 MR. PITOFSKY: I do, too, think Kodak was right.
8 This was the famous footnote that caused a lot of people
9 to be upset. And I don't believe any subsequent case
10 has taken that footnote as accurate.
11 MR. McDONALD: Very good. Bill Kolasky, on the
12 subject of legitimate reasons, you directed us to
13 consider macro reasons, macro justifications, such as
14 the defendant's -- a defendant wanting to maintain
15 incentives to innovate, a defendant wanting to recoup
16 the investment it's made in the innovation. As a
17 practical matter, how would a defendant go about proving
18 that?
19 MR. KOLASKY: I don't think that you need proof
20 of that, in an individual case. The analogy I would use
21 is to the law in the area of conscious parallelism,
22 where one of the reasons why we don't allow conscious
23 parallel pricing behavior to be attacked under Section 1
24 is because it is perfectly natural competitive behavior.
25 It's the kind of behavior that you would expect of a

1 firm in an oligopoly market.
2 Similarly, you would expect a firm, including a
3 monopolist, that spends good money developing new
4 facilities, inventing new products, in order to gain a
5 competitive advantage, to want to use those products and
6 those facilities for that purpose. And that is a
7 legitimate business justification in and of itself. I
8 don't think it requires further additional proof. I
9 think the burden is really on the plaintiffs then to
10 show that there is some other purpose underlying the
11 refusal to make the facilities or the inventions
12 available.
13 MR. McDONALD: That's probably especially
14 applicable in the intellectual property context. Any
15 comments from the other panelists quickly on this point?
16 MR. SALOP: Well, I gave a quote from Kodak on
17 this about the limits on this defense. You know, I
18 mean, what worries me about it is the proof of
19 competitors could equally not well make this argument.
20 The group of competitors could say, you know, if we
21 can't set the price jointly, we're going to be involved
22 in doing this competition, and we won't be able to make
23 enough money to re-invest and next thing you know the
24 United States is going to lose out to China. And, you
25 know, just antitrust categorically does not -- does not

1 permit that argument with regard to competition. The
2 antitrust courts are very suspicious of that kind of
3 argument, and I think we should be when a firm makes it
4 as well.
5 As for these, you know, expectations, Bill said
6 that it's what we expect the firm to do. I mean, I
7 don't agree with that. I mean, we expect firms in the
8 paper industry to collude, but that doesn't mean we let
9 them do it.
10 MR. PATE: I don't think this comparison to a
11 group of horizontal competitors makes much sense, and
12 courts are pretty well equipped to investigate whether
13 there has been an agreement among competitors. Firms
14 are pretty well equipped to understand that they're not
15 supposed to get involved in that kind of conduct, and so
16 there the law has a workable mechanism to enforce a
17 judgment about whether society is going to be better or
18 worse off with that sort of collusion.
19 I don't think anybody on the panel would argue
20 that if you had a magic machine that would correctly
21 tell us the consumer welfare balancing answer, that we
22 wouldn't want to impose it. The point is that there is
23 no such machine, and in the unilateral context, there's
24 no way to give firms a basis on which to make decisions
25 about investing capital that is workable when we're

1 talking about this category of forced sharing.
2 MR. McDONALD: Thank you. Strong points.
3 Moving to the next proposition.
4 MR. ABBOTT: Yes, next proposition, and don't
5 ask me to define the language here, because it's
6 Professor Hovenkamp. Herb Hovenkamp, "Condemnation for
7 unilateral refusals to deal should be reserved for
8 situations in which firms have extraordinary amounts of
9 very durable market power." So, extraordinary, very
10 durable, and he doesn't define what it means, but do you
11 agree with his statement?
12 (No response.)
13 MR. ABBOTT: So, he's saying here that there
14 should be condemnations in the rare instances, for
15 instance, where there are extraordinary amounts of very
16 durable market power.
17 MR. KOLASKY: I suspect you have people
18 disagreeing for a lot of different reasons on this one.
19 MR. ABBOTT: So, does anyone agree with that?
20 MR. SALOP: Well, if you let me define the
21 words, I could -- I can define extraordinary amount and
22 very durable market power in a way that I agree with it
23 100 percent.
24 MR. ABBOTT: Does it make any sense to use those
25 terms which by definition are extremely, one might

1 argue, open for debate?
2 MR. PITOFSKY: You could interpret this as an
3 expansion of the essential facilities doctrine, which
4 I'm sure Hovenkamp didn't intend. I mean, it's hard to
5 deal with really vague language like that.
6 MR. KOLASKY: I was going to make the same point
7 with the flip side of this. I haven't read this
8 particular passage of the antitrust enterprise, but from
9 reading his treatise, I would be -- I would be surprised
10 if he didn't say this in the context of suggesting how
11 the essential facilities doctrine should be limited, and
12 if that's the case, you know, my response is since I
13 think the essential facilities doctrine should be
14 abandoned all together, you know, I suppose if you're
15 not going to do that, I would agree it should be limited
16 in some way and this is as good a way to limit it as
17 any.
18 MR. ABBOTT: Mark, do you have any thoughts on
19 that?
20 MR. WHITENER: Actually, I think I tend to agree
21 with what Bill just said. I would eliminate the
22 doctrine, but if you couldn't do that, you know, look
23 for some limiting factors. I don't think this concept,
24 again, going back to my earlier comments, really helps
25 you distinguish as a matter of antitrust policy when you

1 want to intervene. It's just sort of a directional
2 thing that's saying if the, you know, the impact is
3 great we're going to intervene and if it's not we
4 aren't. But so I think it's better just -- in fact, I
5 think this point illustrates why the doctrine probably
6 isn't very helpful.
7 MR. ABBOTT: Yes, why don't we try, I think
8 given the inexactitude of the terms here, why don't we
9 move to the next proposition.
10 MR. McDONALD: This is one that we discussed in
11 the forward, the legality of a refusal to deal should
12 depend on whether the refusal constitutes a change from
13 prior business practices. Hew, you outlined some of the
14 reasons that you thought that that was probably
15 incorrect. Let's see the vote.
16 (No response.)
17 MR. McDONALD: Who agrees with this proposition?
18 MR. SALOP: May I rephrase the proposition?
19 (Laughter.)
20 MR. McDONALD: Who invited the economist?
21 MR. SALOP: You know, economists go through
22 depositions, we know better than to answer questions
23 like this. How about you ask whether the refusal
24 constitutes a change from prior business practice is a
25 relevant fact, agree or disagree. Would you accept that

1 rephrasing?
2 MR. McDONALD: I'll accept that amendment.
3 What's the vote? Hew, do you think it's not relevant?
4 MR. PATE: I'm on board for the idea that if
5 it's really unilateral and unconditional, I wouldn't
6 ask, but is it a relevant fact, I mean I guess that
7 describes the current state of the law, and similar to
8 Bill's answer, if we're going to get into this
9 enterprise, I would make it a relevant fact instead of a
10 dispositive fact. So, I guess I would go with you that
11 far.
12 MR. SALOP: What if you were not sure whether it
13 was conditional or unconditional? Would it be relevant
14 then? Because you're never sure whether it's
15 conditional or unconditional.
16 MR. PATE: The way I say it in the written
17 paper, do I believe it's relevant, it does provide some
18 benchmark, it gives some indication that there was a
19 price at which one time there was a willingness to deal.
20 I'm not sure that I see why it's relevant to whether --
21 just deciding whether something is conditional or
22 unconditional or that I would use it as sort of a tie
23 breaker if I wasn't sure.
24 MR. SALOP: Oh, no, no, I agree with you, it
25 doesn't tell you anything about whether it's conditional

1 or unconditional, but if you want per se legality for
2 refusals to deal that you know are unconditional, but
3 it's potentially actionable if you knew it was
4 conditional, then you've got two prongs, you've got two
5 issues now, and so the threshold question would be is it
6 conditional or not, and once you've answered that, you
7 would know where to go.
8 So, I'm just suggesting what if you weren't sure
9 whether it was conditional. You know, you're going to
10 have to have some burden of proof to define at some
11 threshold on what defines conditional, and so if there's
12 some uncertainty about that, that might take you a step
13 further and then this would be relevant.
14 MR. PATE: Yeah, I'm not sure I agree that
15 there's a connection. Again, I think the relevance is
16 that if you were in a situation where the court is going
17 to get into policing a duty of forced dealing, then it
18 is true that prior practice gives you a starting point
19 where the complete absence of prior practice doesn't,
20 but that's the best I'll say for it.
21 MR. McDONALD: Bob?
22 MR. PITOFSKY: I think I -- look, this is a
23 response to arguments that the defendant might make.
24 The defendant might say, it's not feasible for me to
25 make this particular service or facility available, and

1 the answer is you used to do it, why can't you do it
2 now? Well, the defendant might say, we'll never figure
3 out what a fair price is if you mandate the price, and
4 the answer is, well, you seem to have come up with a
5 fair price before. In that sense, it could be a factor.
6 Is it really the heart of the matter, is it dispositive?
7 I don't think so.
8 MR. McDONALD: Don't you think, Bob, that in
9 Aspen and in Trinko's characterization of Aspen, this
10 was a liability factor?
11 MR. PITOFSKY: The court made a fair amount
12 about the Aspen, I -- I wouldn't do it that way. The
13 fact that it's a departure from my entire business, it's
14 one factor among five or six others, and I wouldn't even
15 make it high on my list of factors.
16 MR. McDONALD: Okay. I'm getting strong
17 endorsement of this.
18 MR. KOLASKY: Can we just follow up on that.
19 And I think Aspen really illustrates the problem very
20 well. You know, I agree completely with Bob. I think
21 it's a relevant factor, but by no means a dispositive
22 factor. I think what the court found particularly
23 relevant about it in Aspen was that Ski Co. had entered
24 into the multi-mountain pass at a time when the three
25 mountains that it later owned were separately owned.

1 And, so, you know, there was a belief that a basis for
2 concluding that in a competitive market, you would have
3 a multi-mountain pass that covered all of the mountains
4 in that particular area, and the same was true at other
5 areas around the country where there were multiple
6 peaks, including ones in which Ski Co. operated, so
7 there was a good basis for the court to believe, and
8 infer, that it was a profitable, procompetitive,
9 cooperative arrangement that benefited consumers.
10 The problem with it in Aspen, if you look
11 closely at the facts, and there's a very good article in
12 the Antitrust Law Journal by Lopatka and Page which
13 could do that, is that, you know, they show that given
14 the way the revenue sharing was done in Aspen, Highlands
15 was benefitting disproportionately to Ski Co., and, you
16 know, I think Steve and I may disagree about the facts
17 of the case on this, you could actually argue that all
18 that Ski Co. was trying to do in that case was to
19 renegotiate the price. You know, there was some bravado
20 in the language they used about making an offer to
21 Highlands that it couldn't accept, but that's the sort
22 of thing people often kind of, you know, overstate and
23 that often engage in when they're in tough negotiations.
24 MR. McDONALD: Facts are important. Steve, you
25 have a point on this and Tom Walton had his hand up,

1 too.
2 MR. SALOP: I was going to say that the Trinko
3 court is all over the place on this, because there was
4 a, you know, a lot of different conduct, as Bill pointed
5 out, in Aspen. With respect to the sharing of, you
6 know, with respect to the joint ticket, that was
7 collusion. So, you know, and indeed they were sued by
8 the Colorado Attorney General for it. So, yeah, in some
9 sense, all they were trying to do, on that part, they
10 were just trying to redistribute cartel profits.
11 I think what the -- what the part of Aspen that
12 the Trinko court endorsed was not about the four
13 mountain pass, though they talked about the four
14 mountain pass. They were really animated, as I am,
15 about the fact that they refused to sell daily tickets
16 in bulk or indeed at retail to Highlands, even though
17 they sold them to a lot of other people. And that's the
18 part that really showed the sacrifice. And, you know,
19 so the part that's the outer boundary of antitrust, it's
20 not the refusal to sell daily tickets, I would say, you
21 know, which is well within the refusal of the law, but
22 the fact that you find a firm liable for a Section 2
23 violation for refusing to sell to its competitor.
24 MR. McDONALD: Tom Walton?
25 MR. WALTON: I'm not an expert in any of this,

1 which is why I'm abstaining from most of the questions.
2 One thing that's been addressed partially, I think it's
3 important that if someone had decided that Chrysler had
4 tried the system that the Commission was recommending,
5 that we could somehow have a burden to go back to that
6 failing system.
7 MR. SALOP: Actually, if you show they failed,
8 it would be important -- but if they succeeded.
9 MR. WALTON: I think it did in that case, the
10 ALJ, the Administrative Law Judge did take that into
11 account in his decision that there were competitive
12 reasons, efficiency reasons for adopting this.
13 MR. PATE: And it only took 17 years, 19, yeah.
14 MR. SALOP: What do you expect in the Nixon
15 antitrust with Muris and Jim Miller. I mean, they were
16 just very slow and much too interventionalist.
17 MR. KOLASKY: If I can just respond to Steve's
18 point, because one thing that I, you know, Aspen really
19 illustrates how you have to be careful here. The mere
20 fact that Ski Co. was not willing to sell tickets to
21 Highlands at the retail price, does not necessarily show
22 that their decision made no economic sense and was not
23 profit maximizing. If the availability of the four
24 mountain pass diverted a large enough number of skiers
25 from the three Ski Co. mountains to Highlands, then even

1 if Highlands was willing to pay the full retail price
2 where the Ski Co. tickets had sold, it could be a
3 money-losing proposition for Aspen, depending on how the
4 revenue sharing was done.
5 MR. SALOP: I agree with that, that's a footnote
6 in my paper, and interestingly, what's really actually
7 interesting about the Trinko court, is they did not
8 balance the losses in the one market against the gains
9 in the other. When they did their profit sacrifice
10 test, they took the very superficial naive approach.
11 They said, oh, you sacrificed profits on the daily
12 ticket, that's it, that's your profit sacrifice. So,
13 really they took quite an extreme position in that.
14 MR. McDONALD: Thank you. Moving to the next
15 proposition.
16 MR. ABBOTT: Yes, the next proposition.
17 MR. McDONALD: It is difficult to craft an
18 injunctive remedy in a refusal to deal case.
19 MR. KOLASKY: You mean one that works well?
20 MR. McDONALD: It's really easy to craft one
21 that doesn't, yes, Hew probably agrees. Everybody
22 agrees. Steve, yours is difficult enough. Bob
23 Pitofsky, you've said that you thought that one reason
24 that it was appropriate to have refusal to deal
25 liability is that the defendant would get a reasonable

1 royalty from the remedy. How would you calculate that
2 reasonable royalty?
3 MR. PITOFSKY: Well, it's hard to generalize. I
4 mentioned two examples, one is that you previously have
5 been dealing with people and charging them a royalty,
6 and you know, the first thing I would do is say to the
7 parties, why don't you try to work it out, and come back
8 to us with a proposal. And they come back and say we
9 can't work it out and you say, I'm going to refer it to
10 arbitration. And then the arbitrator comes back and
11 comes up with a number. Presumably that will work most
12 of the time. And if neither one of those approaches
13 work, you get some expert economist to come in and argue
14 with some other expert economist and you come up with a
15 reasonable number. Look, we all voted, it's very
16 difficult, the most difficult part of this whole area to
17 accomplish, but it has been done, it can be done, and
18 the price is not, I think, part of it.
19 MR. McDONALD: Steve, is your formula one that
20 can be applied by a jury in district court?
21 MR. SALOP: With expert economists and good
22 lawyers, yeah, I think so. I think it can be proved.
23 MR. McDONALD: All right, we'll move on to the
24 next proposition.
25 MR. ABBOTT: Next proposition is that an

1 intellectual property owner's unconditional, unilateral
2 decision not to license technology to others cannot
3 violate the antitrust laws. Again, this is that the
4 unilateral, unconditional decision not to license
5 technology to others cannot violate the antitrust laws.
6 Who agrees?
7 MR. PITOFSKY: That's what the law is.
8 MR. ABBOTT: All right, one, two, three, four.
9 Who disagrees?
10 MR. SALOP: I don't agree.
11 MR. ABBOTT: Steve Salop abstains and Bill
12 Kolasky disagrees.
13 MR. KOLASKY: Can we explain why?
14 MR. ABBOTT: Yes, explain why you disagree,
15 Bill.
16 MR. KOLASKY: Again, I'm going to keep coming
17 back to the common law nature of antitrust. Suppose the
18 fact pattern similar to what you had in MCI and AT&T but
19 involving intellectual property rights instead of
20 interconnection. A patent owner knows that rival A is
21 thinking about investing in R&D to develop a competing
22 technology, and so it strings A along, promising to
23 license it, but in fact, playing rope-a-dope with it,
24 delaying it, in order to discourage the rival from
25 investing in its own technology. I would think in those

1 circumstances, you could hold the refusal to license to
2 be an antitrust violation.
3 Again, it's not a simple unconditional refusal
4 to license, but there's a pattern of conduct that is
5 having an anticompetitive effect.
6 MR. WHITENER: I think that last point is
7 important, it's outside the context of unilateral,
8 unconditional behavior. You have something else going
9 on, whether that's something that would be an antitrust
10 violation, I don't know, but now you're describing
11 something else, and I think it's very, very important
12 and useful to always come back in these cases to what it
13 is we are looking for and separate out conduct of what
14 you described by the simple decision to obtain the
15 property one's self.
16 MR. PATE: And you probably plead the elements
17 of fraud in the way you described it, right, so it's an
18 open question whether that needs to stay an antitrust
19 claim before you can prove the wrongful behavior.
20 MR. SALOP: That's what the Microsoft cases and
21 the Telecom cases that all of these allegations are
22 still rolling in the negotiations and, you know, they
23 were elements.
24 MR. ABBOTT: Should one distinguish between
25 patent licensing, let's maybe soften the unconditional,

1 in other forms of intellectual property licensing, such
2 as trademarks. For example, trade secrets, is there a
3 reason to distinguish among forms of IP?
4 MR. PATE: I would say as long as they're
5 defined correctly, if there isn't a problem with the
6 underlying IP system, the answer probably is no, that
7 there shouldn't be a requirement to license any of
8 those, as long as they're performing their proper
9 function, and I think you have to give a conclusive
10 promotion of correctness to the IP system in doing so,
11 and then turn to IP reform as the way to handle it if
12 the IP system isn't. Otherwise, you have this collision
13 that defeats the purposes of both bodies of law.
14 MR. ABBOTT: Anyone disagree, or are we all of a
15 common mind here?
16 (No response.)
17 MR. ABBOTT: Okay. Well, let's move to the next
18 proposition, which is compulsory licensing of IP as an
19 antitrust remedy should be rare. Now, probably we
20 should distinguish between remedies in different sorts
21 of cases here, but first I would like to get people to
22 vote on this proposition as a general matter. Who
23 agrees?
24 MR. PITOFSKY: Yeah, I agree it should be rare.
25 MR. KOLASKY: Are you taking merger out?

1 MR. ABBOTT: Well, that's why I said we should
2 distinguish between all the forms of situations in which
3 remedies arise.
4 MR. WALTON: In a merger case, it could be the
5 least restrictive, most effective remedy in some cases.
6 If it was a remedy for a unilateral, unconditional
7 refusal, you shouldn't be doing it in the first place.
8 MR. ABBOTT: So, what you're saying is that this
9 decree depends upon the facts, and certainly we've seen
10 a number of major cases in mergers in which IP was very
11 key to the merger, in which compulsory licensing was
12 required. How about the nonmerger context?
13 MR. PITOFSKY: Let me just in the merger
14 context, the leading example is Ciba-Geigy where the
15 Commission allowed the merger to go through on the
16 condition that a basket of intellectual property rights
17 were divested to a third party. And as that's the one
18 time that I think Business Week said that the government
19 finally got something right. So, it can be a least
20 restrictive alternative can be the best way to go. Does
21 it come up a lot? It has been known to come up.
22 MR. ABBOTT: Okay, I think this question has
23 raised fewer sparks than some of the other ones, and
24 let's see if the next one generates some sparks.
25 MR. McDONALD: This one is tailor made for Tom

1 Walton. A manufacturer's refusal to deal with
2 independent service organizations should not violate the
3 antitrust laws.
4 MR. WALTON: Yes, I would be all for that. I
5 would say in Kodak, General Motors, there's two -- there
6 was a -- I'm not an expert in Kodak, by any means, I've
7 read it briefly, but apparently there was a distinction
8 between whether Kodak was going to impose this refusal
9 to deal on manufacturers that already had their copy
10 machines, that was one issue. But the other issue was
11 whether it would be going forward, whether it would
12 impose -- it did not do that, it did not do that, first
13 thing.
14 The second thing it did was impose this
15 restriction on companies like General Motors that were
16 going to buy the machines, or bought a new machine, then
17 they would have to use only the parts provided by Kodak
18 or not use the independent service organization. You
19 have the right to not enter into that agreement.
20 So, the Kodak market was a competitive market,
21 so I don't see any -- I may be wrong, but I just don't
22 see any problem with that situation.
23 MR. SALOP: That case was not the first
24 situation.
25 MR. WALTON: Oh, was it? I may stand corrected.

1 MR. McDONALD: By a show of hands, who else is
2 willing to share Tom Walton's is unconditional
3 endorsement to this proposition?
4 MR. PATE: If the question is competitive
5 upstream market, would you have agreed with the Kodak
6 result, I would say no, so I think I would raise my hand
7 on that.
8 MR. WHITENER: Same.
9 MR. McDONALD: Do any of the panelists care to
10 speak on the circumstances in which refusal to deal with
11 an ISO definitely should be an antitrust violation?
12 (No response.)
13 MR. KOLASKY: Again, I think what makes it
14 difficult is the qualification that Hew put on his
15 answer, you know, if you had a situation like Kodak
16 where you had a competitive upstream equipment market,
17 then it's hard to imagine the circumstances in which you
18 would find a refusal to deal with an ISO unlawful. But
19 what if you had the circumstance where you had a
20 monopolist upstream who is refusing to deal with ISOs?
21 Again, I think as a general matter, there's a strong
22 presumption that it's not unlawful, but if the plaintiff
23 is willing to show facts that show that it was a part of
24 an anticompetitive pattern of conduct that was designed
25 to maintain or expand your monopoly, then it could be

1 unlawful if there are not legitimate business reasons
2 for it.
3 MR. SALOP: I would not use the distinction Bill
4 did, but rather I would ask whether it was a change in
5 conduct such as it was a monopoly, so if even a
6 monopolist from the get-go says you have to deal with
7 me, that would be okay, but the question is, you know,
8 the Kodak case was about the change in conduct.
9 MR. KOLASKY: But another situation, normally
10 you think that the markets for ISOs are relatively easy
11 to enter, and that therefore a refusal to deal with ISOs
12 is not likely to raise entry barriers, but suppose the
13 plaintiffs were able to show that the reasons the
14 monopolist was refusing to deal with ISOs was to make it
15 more difficult for somebody else to enter the equipment
16 market, and thereby break down their monopoly. On those
17 facts, then I think you might have a basis for
18 liability.
19 MR. McDONALD: Thank you. We're going to move
20 now to a couple of hypotheticals.
21 MR. ABBOTT: Okay. The first hypothetical
22 raises a question of IP, and let me read it: Ajax
23 Company holds a patent (patent X) over a small part of a
24 device that provides a new broadband service far
25 superior to any alternatives. There are no acceptable

1 substitutes for that patented part; without it the new
2 broadband service cannot be deployed. Firms holding all
3 patents covering all other essential parts of the device
4 have entered into a patent pool that sets a reasonable
5 royalty. Under this all third party businesses may
6 obtain a license. Ajax, however, refuses to license
7 patent X to anyone, thereby preventing third party
8 companies from having any access to the part that is
9 necessary to be able to provide the welfare-enhancing
10 broadband service."
11 Well, again, this is a small component of a
12 larger device, but by holding the patent and refusing to
13 license the patent for that one component, despite the
14 fact there are many other components, in effect, Ajax is
15 able to prevent any other firm from launching the
16 broadband device, and the broadband service that depends
17 upon the device. First of all, does Ajax have an
18 absolute right not to license patent X?
19 MR. WHITENER: I mean, I think it does, but I'm
20 not sure in the hypothetical yet really if I understand
21 what Ajax is doing. I don't particularly care, because
22 I don't think I'm going to condemn their decision to sit
23 on their patent, but what are they planning to do to
24 make money? Are they going to invent some other way to
25 do the broadband service? If they're just trying to

1 stupidly put the patent in a drawer, I don't think that
2 subjects them to liability.
3 MR. PATE: No, I don't think that they are
4 required to license the patent, and it really doesn't
5 matter to me whether they put it in the drawer or not.
6 Not because that wouldn't produce a situation wherein
7 that case consumer welfare wouldn't be enhanced by
8 taking it from them, but because of a judgment that a
9 property rule here is going to be superior to a
10 liability rule in producing innovation over the
11 long-term. And if the broadband service is one that's
12 going to cure avian flu or something, then presumably
13 the government can take, and with just compensation, use
14 it if there's some sort of emergency at issue, but
15 otherwise, no, I don't think Ajax has any obligation.
16 MR. ABBOTT: Does anyone else think it matters,
17 does it matter if Ajax plans to launch a new broadband
18 service itself? We've heard from a couple of people, as
19 opposed to just sitting on the patent, or alternatively,
20 and the facts haven't been presented here, but maybe
21 they have some interest in some other broadband
22 investment, and they find it profitable, at least in the
23 near term, not to have a new broadband service
24 introduced by anyone.
25 Steve?

1 MR. SALOP: It would make it a lot more
2 interesting. But Ajax is a client of mine and I don't
3 feel that I should comment. You know, I think that it's
4 what we've been talking about all day. I mean, once you
5 say Ajax has an -- is a competitor downstream, that
6 they've got ISDN, and now this is DSL, then you've got
7 the vertically integrated -- if they're a monopolist
8 downstream, then you basically have the hypothetical
9 that we've been talking about all day.
10 MR. ABBOTT: Does anybody, and we heard Hew Pate
11 speak directly to this, does anybody believe that the
12 welfare impact on the industries or consumers who would
13 benefit from the new broadband service should be taken
14 into account?
15 (No response.)
16 MR. ABBOTT: No one is willing to comment on
17 that? So, you all agree with Hew's proposition that it
18 doesn't matter, and the absolute right not to license?
19 And you don't need to -- you don't take into account any
20 potential welfare effects?
21 MR. PITOFSKY: I find this very difficult to
22 deal with, because as a practical matter, you have to
23 ask Ajax why? Why are you doing this? What's your
24 role? What are your other facilities? What are your
25 resources? And I know you don't like the idea of

1 somebody having to explain why, but in a bizarre
2 situation like this, I can't even begin to cope with
3 this hypothetical. Well, what do you mean you want
4 what? Is there no price under the sun that will be
5 enough that this patent pool can induce you to come into
6 the transaction? And depending on what that reason is,
7 then we go forward with, under what circumstances, if
8 any, should the law intervene.
9 MR. KOLASKY: I'm sort of with Bob on this in
10 the sense that I don't think there are nearly enough
11 facts in this hypothetical to begin to answer the
12 question. I mean, on its face, this sounds like Ajax
13 has simply invented a better mousetrap and it ought to
14 be free to capture the value from that new mousetrap
15 however it wants, and if, for example, hypothetically
16 the members of the patent pool currently have, you know,
17 100 percent of the market and Ajax is a new entrant,
18 that using this new device as its entry point, then it's
19 perfectly natural that it would want to have a period of
20 time in which it has exclusive rights to that device.
21 It may down the road license others, and in addition its
22 refusal to license may stimulate the others to try to
23 develop an alternative to this new device. So, this
24 doesn't sound anticompetitive on its face. It sounds
25 like competition on the merits.

1 MR. ABBOTT: Steve, a quick comment?
2 MR. SALOP: I agree with Bob, and I think
3 stating that in this pristine way, you know, in Aspen,
4 the reason why Aspen took that extreme position that
5 they just had a right to do whatever they wanted, was
6 because they squandered all their other defenses in the
7 courts below. And, you know, in a real world case,
8 unless Ajax just decided to fight this because, you
9 know, their CEO or board members were intellectual
10 property lawyers and they felt it was a good thing just
11 to fight it for the good of the country, they would give
12 a reason. And the reason -- and then the reason is
13 going to matter.
14 MR. PATE: But the thing that's important is
15 that requiring them to give a reason, in and of itself,
16 is going to generate a tremendous amount of uncertainty
17 in our system of litigation-based decision making. So,
18 you can always come up with a better result in the
19 individual case, you've got to consider what you do to
20 the system when you do that.
21 MR. WHITENER: Right, and if somebody states the
22 reason bluntly in an email, which is I want to keep
23 others from competing with me in my IP, you know, you
24 might get to trial and you might have liability, even
25 though, beyond repeating myself, all you were doing was

1 keeping it.
2 MR. PATE: I don't know which is better, we've
3 had some strain of this conversation that has said that
4 the worst thing would be that if Mr. Ajax is cranky and
5 has it in the drawer, then we're worried about the
6 consumer welfare effects of it not being used, but that
7 if it's being used to get a competitive advantage, then
8 that's good, that's the American way, but, you know, as
9 Mark points out, it may be that if the email says that
10 we're going to use this to stick it to the competition,
11 that's when you have a really protracted litigation.
12 MR. ABBOTT: Well, let's turn quickly to the
13 last hypothetical, we're going to make this litigation
14 last some more. The final hypothetical is a shorter
15 one, so -- but perhaps ironically has fewer ambiguities
16 than our previous hypothetical. Alpha Company owns the
17 only source of an input (input Z), or if we had an
18 English speaker here, it might be input Zed, and alpha
19 uses input Z to make widgets. Beta Company invents a
20 new technology that uses input Z to make widgets at a
21 lower cost than Alpha's technology. Alpha refuses to
22 sell input Z to Beta, but Alpha does sell input Z to
23 firms in other industries for $100 per unit.
24 First of all, should Alpha be required to sell
25 input Z to Beta, since it sells to firms in other

1 industries? Hew?
2 MR. PATE: Well, and you're eliminating
3 arbitrage, they can't get it from the $100 purchasers
4 for some reason?
5 MR. ABBOTT: Yes, let's assume that. Yes, I
6 think --
7 MR. PATE: No, I don't think Alpha has an
8 obligation to sell the input it owns to Beta.
9 MR. ABBOTT: Anybody else?
10 MR. KOLASKY: Again, too few patent facts. Does
11 Alpha have a monopoly on the widgets market, are there
12 other ways to make widgets with inputs A, B and C? I
13 mean, you just don't know enough.
14 MR. WHITENER: I actually think under these
15 facts, I know enough to say no obligation to deal, no
16 obligation if they deal, no obligation to deal at $100,
17 no obligation to deal at Steve's, you know, the monopoly
18 at nonexclusionary price. I mean, look, Alpha owns Z.
19 Alpha has the rights to all the return money on Z, and
20 it really shouldn't matter if Z can be deployed in one
21 antitrust market or 50. It's all the same way of saying
22 Alpha owns, lawfully, I assume, developed Z, it gets
23 every dollar attributable to ownership of Z by
24 exploiting it itself. And I do have a question for
25 Steve, if Beta, with this low-cost technology, assume if

1 they get the input at whatever, let's say $100, if we
2 can predict that their lower cost widget manufacturing
3 method is going to let them ultimately take most or all
4 the sales of widgets, do they have to share their
5 manufacturing technology with Alpha?
6 MR. KOLASKY: That's an interesting question.
7 MR. SALOP: I mean, that's an interesting
8 question. It would depend, is there a monopoly on that
9 technology or are there other makers of that technology?
10 MR. WHITENER: We are predicting over that,
11 since they get the input at $100, they are going to get
12 all the widget sales because they have a lower cost of
13 manufacturing. And let's assume they can readily
14 license this device to Alpha. Do they have to share it?
15 MR. SALOP: I mean, I think you have to go
16 through now it's the machinery is an input, but it
17 wouldn't -- so I guess you're saying they have a
18 monopoly on securing your technology, but they may have
19 no market power in the widget business, and, you know,
20 the monopoly power in the widget business, which is what
21 Bill is getting at, is a very important element, not to
22 mention the alternatives to input Z.
23 MR. WHITENER: I think what would happen if you
24 did conclude there was monopoly power and an obligation
25 to deal, one consequence is Alpha's incentive to develop

1 a lower cost technology itself is now removed, because
2 they can share, and if Beta gets to buy the input at
3 $100, their incentive to innovate around or replicate Z
4 I think is what is similarly diminished.
5 So, I mean, I think you can construct a set of
6 facts that says they have to deal with each other and I
7 think you have wound up essentially with the economics
8 of one firm producing rather than two firms struggling
9 to compete with each other.
10 MR. SALOP: Or the two firms competing. That's
11 the problem with the competitive nature, if they do or
12 not.
13 MR. ABBOTT: Any additional comments on that
14 hypothetical?
15 (No response.)
16 MR. ABBOTT: Well, if not, let just have a few
17 closing remarks, and I think my colleague, Bruce
18 McDonald, may want to say one or two things as well.
19 Let me move to the podium, very briefly.
20 It's difficult to generalize based on depth and
21 also the comments that were made today, but I think
22 we've heard some interesting discussions and analyses of
23 different aspects of the refusals to deal with
24 competitors. Number one, we have heard alternative
25 forms of multipart balancing tests, some of these tests

1 have been characterized as really sliding scale, tests
2 that rely on certain propositions, but that don't
3 require a lot of difficult administration. We've also
4 heard some concerns that the problem with any of these
5 tests, and this is going to repeat a theme, that when
6 you go to a jury, will the jury be able, sensibly, to
7 apply them given their, in effect, potentially high
8 error costs. We've heard some responses that, well, no,
9 the juries are in the business of doing that, generalist
10 courts and judges are in the business of weighing,
11 applying weighing balancing tests in all sorts of areas
12 of law.
13 We've also, I think, heard all speakers,
14 certainly emphasize the theme that facts and hard facts
15 and details are very important, that's certainly come up
16 in the context of propositions we raised and in
17 hypotheticals. There's always a demand, quite
18 understandable, for more details and more facts. I
19 think that all of this, and in particular, the specific
20 written comments and written presentations by our
21 panelists will prove quite valuable as we ponder the
22 record developed throughout the hearings and there are
23 no simple or some might argue there are simple answers
24 here, but certainly there are no -- there is no
25 unanimity of opinion.

1 Despite that fact, I think we've heard that, and
2 it seems to be a general theme, that imposing a duty to
3 deal on the monopolist is something that is very rare.
4 Some would say that general unconditional impositions to
5 deal should never be applied, others say there's more
6 nuance to that, but I think there's a general
7 understanding that this is a very unusual sort of
8 requirement, and certainly perhaps intentionally with
9 antitrust law and having more to do with regulation, and
10 that brings us to the sort of broader question that over
11 the tension and the dividing line between antitrust
12 remedies and regulation in general, and the ability of
13 courts and expert agencies to administer such tests will
14 remain with us.
15 And now I would like to turn briefly to Bruce
16 McDonald to see if he has any additional insights to
17 share, and also to thank him and all of the people from
18 the Department of Justice who have helped so much in
19 putting together this session. I would also like to
20 thank all of my colleagues in the Federal Trade
21 Commission, too numerous to mention, who have done a
22 wonderful job in making this session a success.
23 Bruce?
24 MR. McDONALD: Let me just add thank you that
25 today's discussion does highlight that even though this

1 may be one of the most narrow grounds for battle in the
2 refusal to deal -- in the single firm conduct debate, it
3 is certainly one of the most hard fought. The agencies
4 work hard to try to incorporate the latest thinking into
5 their enforcement decisions and these hearings are a
6 part of helping us to remain on the cutting edge. We
7 can't thank the panel enough for the time they devoted
8 to preparing their presentations and for being here and
9 for sharing their expertise for us.
10 On behalf of the FTC and DOJ, thank you very
11 much.
12 (Applause.)
13 (Whereupon, at 5:13 p.m., the hearing was
14 concluded.)
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