

## Lorain Journal Co. v. United States

342 U.S. 143 (1951)

Mr. Justice BURTON delivered the opinion of the Court: The principal question here is whether a newspaper publisher's conduct constituted an attempt to monopolize interstate commerce, justifying the injunction issued against it under §§ 2 and 4 of the Sherman Antitrust Act. For the reasons hereafter stated, we hold that the injunction was justified.

This is a civil action, instituted by the United States in the District Court for the Northern District of Ohio, against The Lorain Journal Company, an Ohio corporation, publishing, daily except Sunday, in the City of Lorain, Ohio, a newspaper here called the Journal. The complaint alleged that the corporation, together with four of its officials, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of § 1 of the Sherman Antitrust Act, and in a combination and conspiracy to monopolize such commerce in violation of § 2 of the Act, as well as attempting to monopolize such commerce in violation of § 2. The District Court declined to issue a temporary injunction but, after trial, found that the parties were engaging in an attempt to monopolize as charged. Confining itself to that issue, the court enjoined them from continuing the attempt. They appealed to this Court under the Expediting Act of 1903, 15 U.S.C. § 29, and the issues before us are those arising from that finding and the terms of the injunction.

The appellant corporation, here called the publisher, has published the Journal in the City of Lorain since before 1932. In that year it, with others, purchased the Times-Herald which was the only competing daily paper published in that city. Later, without success, it sought a license to establish and operate a radio broadcasting station in Lorain.

The court below describes the position of the Journal, since 1933, as "a commanding and an overpowering one. It has a daily circulation in Lorain of over 13,000 copies and it reaches ninety-nine per cent of the families in the city." 92 F.Supp. at 796. Lorain is an industrial city on Lake Erie with a population of about 52,000 occupying 11,325 dwelling units. The Sunday News, appearing only on Sundays, is the only other newspaper published there.<sup>3</sup>

\*\*\* From 1933 to 1948 the publisher enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character. However, in 1948 the Elyria-Lorain Broadcasting Company, a corporation independent of the publisher, was licensed by the Federal Communications Commission to establish and operate in Elyria, Ohio, eight miles south of Lorain, a radio station whose call letters, WEOL, stand for Elyria, Oberlin and Lorain.<sup>4</sup> Since then it has

---

<sup>3</sup> The Sunday News has a weekly circulation of about 3,000 copies, largely in Lorain. The Chronicle-Telegram is a newspaper published daily, except Sunday, eight miles away in Elyria. It has a daily circulation in that city of about 9,000 but none in Lorain. The Cleveland Plain Dealer, News and Press are metropolitan newspapers published daily, except Sunday, in Cleveland, 28 miles east of Lorain. They have a combined daily circulation in Lorain of about 6,000. The Cleveland Sunday Plain Dealer has a Sunday circulation in Lorain of about 11,000. The Cleveland papers carry no Lorain advertising and little Lorain news. No reference has been made in the record or in the argument here to competition from any radio station other than WEOL.

<sup>4</sup> The license also covers WEOL-FM but the two stations are here treated as one. WEOL operates on a frequency of 930 kilocycles and WEOL—FM of 107.6 megacycles. The station outlines its primary listening or market area on the basis of a half millivolt daytime pattern and a two millivolt nighttime pattern. Its day pattern reaches an area containing all or part of 20 counties and an estimated population of over 2,250,000. Its night pattern reaches an area containing parts of nine of these counties and an estimated population of about 450,000. Lorain County, which includes the communities of Lorain, Elyria and Oberlin, contains about 120,000 people, 52,000 of whom live in the City of Lorain.

operated its principal studio in Elyria and a branch studio in Lorain. Lorain has about twice the population of Elyria and is by far the largest community in the station's immediate area. Oberlin is much smaller than Elyria and eight miles south of it.

While the station is not affiliated with a national network it disseminates both intrastate and interstate news and advertising. \*\*\* Substantially all of the station's income is derived from its broadcasts of advertisements of goods or services. About 16% of its income comes from national advertising under contracts with advertisers outside of Ohio. This produces a continuous flow of copy, payments and materials moving across state lines.

The court below found that appellants knew that a substantial number of Journal advertisers wished to use the facilities of the radio station as well. For some of them it found that advertising in the Journal was essential for the promotion of their sales in Lorain County. It found that at all times since WEOL commenced broadcasting, appellants had executed a plan conceived to eliminate the threat of competition from the station. Under this plan the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who appellants believed to be about to advertise over WEOL. The court found expressly that the purpose and intent of this procedure was to destroy the broadcasting company.

The court characterized all this as "bold, relentless, and predatory commercial behavior." 92 F.Supp. at 796. To carry out appellants' plan, the publisher monitored WEOL programs to determine the identity of the station's local Lorain advertisers. Those using the station's facilities had their contracts with the publisher terminated and were able to renew them only after ceasing to advertise through WEOL. The program was effective. Numerous Lorain County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL.

\*\*\* 1. The conduct complained of was an attempt to monopolize interstate commerce. It consisted of the publisher's practice of refusing to accept local Lorain advertising from parties using WEOL for local advertising. Because of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families, this practice forced numerous advertisers to refrain from using WEOL for local advertising. That result not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station.

\*\*\* It is not necessary, however, to rely on the above suggestions. The findings go further. They expressly and unequivocally state that the publisher's conduct was aimed at a larger target—the complete destruction and elimination of WEOL. The court found that the publisher, before 1948, enjoyed a substantial monopoly in Lorain of the mass dissemination not only of local news and advertising, but of news of out-of-state events transmitted to Lorain for immediate dissemination, and of advertising of out-of-state products for sale in Lorain. WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of interstate as well as local commerce.

\*\*\* 2. The publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated § 2. The findings and opinion of the trial court describe the conduct of the publisher upon which the Government relies. The surrounding circumstances are

important. The most illuminating of these is the substantial monopoly which was enjoyed in Lorain by the publisher from 1933 to 1948, together with a 99% coverage of Lorain families. Those factors made the Journal an indispensable medium of advertising for many Lorain concerns. Accordingly, its publisher's refusals to print Lorain advertising for those using WEOL for like advertising often amounted to an effective prohibition of the use of WEOL for that purpose. Numerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio.

WEOL's greatest potential source of income was local Lorain advertising. Loss of that was a major threat to its existence. The court below found unequivocally that appellants' conduct amounted to an attempt by the publisher to destroy WEOL and, at the same time, to regain the publisher's pre-1948 substantial monopoly over the mass dissemination of all news and advertising.

To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. "(W)hen that intent (to monopolize) and the consequent dangerous probability exist, this statute (the Sherman Act), like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift & Co. v. United States*, 196 U.S. 375, 396.

Assuming the interstate character of the commerce involved, it seems clear that if all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate §§ 1 and 2 of the Sherman Act. Cf. *Fashion Originators' Guild v. Federal Trade Comm.*, 312 U.S. 457, 465. It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the "attempt to monopolize" clause of § 2 when it uses its monopoly to destroy threatened competition.

The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 358. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal". (Emphasis supplied.) *United States v. Colgate & Co.*, 250 U.S. 300, 307. See *Associated Press v. United States*, 326 U.S. 1, 15.

---

### **Aspen Skiing Co. v. Aspen Highlands Skiing Corp.**

472 U.S. 585 (1985)

Justice STEVENS delivered the opinion of the Court: In a private treble-damages action, the jury found that petitioner Aspen Skiing Company (Ski Co.) had monopolized the market for downhill skiing services in Aspen, Colorado. The question presented is whether that finding is erroneous as a mat-

---

ter of law because it rests on an assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating § 2 of the Sherman Act.

## I

Aspen is a destination ski resort with a reputation for “super powder,” “a wide range of runs,” and an “active night life,” including “some of the best restaurants in North America.” Tr. 765-767. Between 1945 and 1960, private investors independently developed three major facilities for downhill skiing: Aspen Mountain (Ajax),<sup>2</sup> Aspen Highlands (Highlands),<sup>3</sup> and Buttermilk.<sup>4</sup> A fourth mountain, Snowmass,<sup>5</sup> opened in 1967.

The development of any major additional facilities is hindered by practical considerations and regulatory obstacles. The identification of appropriate topographical conditions for a new site and substantial financing are both essential. Most of the terrain in the vicinity of Aspen that is suitable for downhill skiing cannot be used for that purpose without the approval of the United States Forest Service. That approval is contingent, in part, on environmental concerns. Moreover, the county government must also approve the project, and in recent years it has followed a policy of limiting growth.

Between 1958 and 1964, three independent companies operated Ajax, Highlands, and Buttermilk. In the early years, each company offered its own day or half-day tickets for use of its mountain. In 1962, however, the three competitors also introduced an interchangeable ticket. The 6-day, all-Aspen ticket provided convenience to the vast majority of skiers who visited the resort for weekly periods, but preferred to remain flexible about what mountain they might ski each day during the visit. It also emphasized the unusual variety in ski mountains available in Aspen.

As initially designed, the all-Aspen ticket program consisted of booklets containing six coupons, each redeemable for a daily lift ticket at Ajax, Highlands, or Buttermilk. The price of the booklet was often discounted from the price of six daily tickets, but all six coupons had to be used within a limited period of time—seven days, for example. The revenues from the sale of the 3-area coupon books were distributed in accordance with the number of coupons collected at each mountain.

In 1964, Buttermilk was purchased by Ski Co., but the interchangeable ticket program continued. In most seasons after it acquired Buttermilk, Ski Co. offered 2-area, 6- or 7-day tickets featuring Ajax and Buttermilk in competition with the 3-area, 6-coupon booklet. Although it sold briskly, the all-Aspen ticket did not sell as well as Ski Co.’s multiarea ticket until Ski Co. opened Snowmass in 1967.

---

<sup>2</sup> Ski Co. developed Ajax in 1946. The runs are quite steep and primarily designed for expert or advanced intermediate skiers.

<sup>3</sup> In 1957, the United States Forest Service suggested that Ajax “was getting crowded, and ... that a ski area ought to be started at Highlands.” Tr. 150. Whipple V.N. Jones, who owned an Aspen lodge at the time, discussed the project with Ski Co. officials, but they expressed little interest, telling him that they had “plenty of problems at Aspen now, and we don’t think we want to expand skiing in Aspen.” Id., at 150-151. Jones went ahead with the project on his own, and laid out a well-balanced set of ski runs: 25% beginner, 50% intermediate, 25% advanced. \*\*\* Respondent Aspen Highlands Skiing Corporation provides the downhill skiing services at Highlands Mountain. \*\*\*

<sup>4</sup> In 1958, Friedl Pfeiffer and Arthur Pfister began developing the ranches they owned at the base of Buttermilk Mountain into a third ski area. Pfeiffer, a former Olympian, was the director of the ski school for Ski Co., and the runs he laid out were primarily for beginners and intermediate skiers. More advanced runs have since been developed. \*\*\*

<sup>5</sup> In the early 1960’s William Janss, a former ski racer, and his associates had acquired three ranches in the Snowmass Valley, and had secured Forest Service permits for a ski area. The developer sold the company holding the permits to Ski Co. to allow it to develop a downhill skiing facility for the project, leaving him to develop the land at the base of the site. A fairly balanced mountain was developed with a mixture of beginner, intermediate, and advanced runs.

---

Thereafter, the all-Aspen coupon booklet began to outsell Ski Co.'s ticket featuring only its mountains.

In the 1971-1972 season, the coupon booklets were discontinued and an "around the neck" all-Aspen ticket was developed. This refinement on the interchangeable ticket was advantageous to the skier, who no longer found it necessary to visit the ticket window every morning before gaining access to the slopes. Lift operators at Highlands monitored usage of the ticket in the 1971-1972 season by recording the ticket numbers of persons going onto the slopes of that mountain. Highlands officials periodically met with Ski Co. officials to review the figures recorded at Highlands, and to distribute revenues based on that count.

There was some concern that usage of the all-Aspen ticket should be monitored by a more scientific method than the one used in the 1971-1972 season. After a one-season absence, the 4-area ticket returned in the 1973-1974 season with a new method of allocating revenues based on usage. Like the 1971-1972 ticket, the 1973-1974 4-area ticket consisted of a badge worn around the skier's neck. Lift operators punched the ticket when the skier first sought access to the mountain each day. A random-sample survey was commissioned to determine how many skiers with the 4-area ticket used each mountain, and the parties allocated revenues from the ticket sales in accordance with the survey's results.

In the next four seasons, Ski Co. and Highlands used such surveys to allocate the revenues from the 4-area, 6-day ticket. Highlands' share of the revenues from the ticket was 17.5% in 1973-1974, 18.5% in 1974-1975, 16.8% in 1975-1976, and 13.2% in 1976-1977. During these four seasons, Ski Co. did not offer its own 3-area, multi-day ticket in competition with the all-Aspen ticket.<sup>9</sup> By 1977, multiarea tickets accounted for nearly 35% of the total market. Holders of multiarea passes also accounted for additional daily ticket sales to persons skiing with them.

Between 1962 and 1977, Ski Co. and Highlands had independently offered various mixes of 1-day, 3-day, and 6-day passes at their own mountains. In every season except one, however, they had also offered some form of all-Aspen, 6-day ticket, and divided the revenues from those sales on the basis of usage. Nevertheless, for the 1977-1978 season, Ski Co. offered to continue the all-Aspen ticket only if Highlands would accept a 13.2% fixed share of the ticket's revenues.

Although that had been Highlands' share of the ticket revenues in 1976-1977, Highlands contended that that season was an inaccurate measure of its market performance since it had been marked by unfavorable weather and an unusually low number of visiting skiers.<sup>11</sup> Moreover, Highlands wanted to continue to divide revenues on the basis of actual usage, as that method of distribution allowed it to compete for the daily loyalties of the skiers who had purchased the tickets. Fearing that the alternative might be no interchangeable ticket at all, and hoping to persuade Ski Co. to reinstate the usage division of revenues, Highlands eventually accepted a fixed percentage of 15% for the 1977-1978 season.

---

<sup>9</sup> In 1975, the Colorado Attorney General filed a complaint against Ski Co. and Highlands alleging, in part, that the negotiations over the 4-area ticket had provided them with a forum for price fixing in violation of § 1 of the Sherman Act and that they had attempted to monopolize the market for downhill skiing services in Aspen in violation of § 2. In 1977, the case was settled by a consent decree that permitted the parties to continue to offer the 4-area ticket provided that they set their own ticket prices unilaterally before negotiating its terms.

<sup>11</sup> The 1976-1977 season was "a no snow year." There were less than half as many skier visits (529,800) in that season as in either 1975-1976 (1,238,500) or 1977-1978 (1,273,400). In addition, Highlands opened earlier than Ski Co.'s mountains and its patrons skied off all the good snow. Ski Co. waited until January and had a better base for the rest of the season.

No survey was made during that season of actual usage of the 4-area ticket at the two competitors' mountains.

In the 1970's the management of Ski Co. increasingly expressed their dislike for the all-Aspen ticket. They complained that a coupon method of monitoring usage was administratively cumbersome. They doubted the accuracy of the survey and decried the "appearance, deportment, [and] attitude" of the college students who were conducting it. In addition, Ski Co.'s president had expressed the view that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. In fact, Ski Co. had reinstated its 3-area, 6-day ticket during the 1977-1978 season, but that ticket had been outsold by the 4-area, 6-day ticket nearly two to one.

In March 1978, the Ski Co. management recommended to the board of directors that the 4-area ticket be discontinued for the 1978-1979 season. The board decided to offer Highlands a 4-area ticket provided that Highlands would agree to receive a 12.5% fixed percentage of the revenue—considerably below Highlands' historical average based on usage. Later in the 1978-1979 season, a member of Ski Co.'s board of directors candidly informed a Highlands official that he had advocated making Highlands "an offer that [it] could not accept."

Finding the proposal unacceptable, Highlands suggested a distribution of the revenues based on usage to be monitored by coupons, electronic counting, or random sample surveys. If Ski Co. was concerned about who was to conduct the survey, Highlands proposed to hire disinterested ticket counters at its own expense—"somebody like Price Waterhouse"—to count or survey usage of the 4-area ticket at Highlands. Ski Co. refused to consider any counterproposals, and Highlands finally rejected the offer of the fixed percentage.

As far as Ski Co. was concerned, the all-Aspen ticket was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people who were unfamiliar with Aspen that Ajax, Buttermilk, and Snowmass were the only ski mountains in the area. For example, Ski Co. had a sign changed in the Aspen Airways waiting room at Stapleton Airport in Denver. The old sign had a picture of the four mountains in Aspen touting "Four Big Mountains" whereas the new sign retained the picture but referred only to three.

Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering. Ski Co. discontinued the 3-day, 3-area pass for the 1978-1979 season,<sup>13</sup> and also refused to sell Highlands any lift tickets, either at the tour operator's discount or at retail. Highlands finally developed an alternative product, the "Adventure Pack," which consisted of a 3-day pass at Highlands and three vouchers, each equal to the price of a daily lift ticket at a Ski Co. mountain. The vouchers were guaranteed by funds on deposit in an Aspen bank, and were redeemed by Aspen merchants at full value. Ski Co., however, refused to accept them.

---

<sup>13</sup> Highlands' owner explained that there was a key difference between the 3-day, 3-area ticket and the 6-day, 3-area ticket: "with the three day ticket, a person could ski on the ... Aspen Skiing Corporation mountains for three days and then there would be three days in which he could ski on our mountain; but with the six-day ticket, we are absolutely locked out of those people." As a result of "tremendous consumer demand" for a 3-day ticket, Ski Co. reinstated it late in the 1978-1979 season, but without publicity or a discount off the daily rate.

---

Later, Highlands redesigned the Adventure Pack to contain American Express Traveler's Checks or money orders instead of vouchers. Ski Co. eventually accepted these negotiable instruments in exchange for daily lift tickets.<sup>15</sup> \*\*\*

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." Highlands' share of the market for downhill skiing services in Aspen declined steadily after the 4-area ticket based on usage was abolished in 1977: from 20.5% in 1976-1977, to 15.7% in 1977-1978, to 13.1% in 1978-1979, to 12.5% in 1979-1980, to 11% in 1980-1981. \*\*\*

## II

In 1979, Highlands filed a complaint in the United States District Court for the District of Colorado naming Ski Co. as a defendant. Among various claims, the complaint alleged that Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of § 2 of the Sherman Act, and prayed for treble damages. The case was tried to a jury which rendered a verdict finding Ski Co. guilty of the § 2 violation and calculating Highlands' actual damages at \$2.5 million.

In her instructions to the jury, the District Judge explained that the offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. Although the first element was vigorously disputed at the trial and in the Court of Appeals, in this Court Ski Co. does not challenge the jury's special verdict finding that it possessed monopoly power.<sup>20</sup> Nor does Ski Co. criticize the trial court's instructions to the jury concerning the second element of the § 2 offense.

On this element, the jury was instructed that it had to consider whether "Aspen Skiing Corporation willfully acquired, maintained, or used that power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes." The instructions elaborated: "In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its superior business ability and efficiency does not constitute monopolization. "For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal. "In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in

---

<sup>15</sup> \*\*\* For the 1981-1982 season, Ski Co. set its single ticket price at \$22 and discounted the 3-area, 6-day ticket to \$114. According to Highlands, this price structure made the Adventure Pack unprofitable.

<sup>20</sup> The jury found that the relevant product market was "[d]ownhill skiing at destination ski resorts," that the "Aspen area" was a relevant geographic submarket, and that during the years 1977-1981, Ski Co. possessed monopoly power, defined as the power to control prices in the relevant market or to exclude competitors.

---

a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition. “To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market.” The jury answered a specific interrogatory finding the second element of the offense as defined in these instructions. \*\*\*

The Court of Appeals affirmed in all respects. 738 F.2d 1509 (CA10 1984). The court advanced two reasons for rejecting Ski Co.’s argument that “there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in.” First, relying on *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383 (1912), the Court of Appeals held that the multiday, multiarea ticket could be characterized as an “essential facility” that Ski Co. had a duty to market jointly with Highlands. Second, it held that there was sufficient evidence to support a finding that Ski Co.’s intent in refusing to market the 4-area ticket, “considered together with its other conduct,” was to create or maintain a monopoly. \*\*\*

### III

In this Court, Ski Co. contends that even a firm with monopoly power has no duty to engage in joint marketing with a competitor, that a violation of § 2 cannot be established without evidence of substantial exclusionary conduct, and that none of its activities can be characterized as exclusionary. It also contends that the Court of Appeals incorrectly relied on the “essential facilities” doctrine and that an “anticompetitive intent” does not transform nonexclusionary conduct into monopolization. In response, Highlands submits that, given the evidence in the record, it is not necessary to rely on the “essential facilities” doctrine in order to affirm the judgment.

“The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors.” *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975). Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. Ski Co. is quite wrong, however, in suggesting that the judgment in this case rests on any such proposition of law. For the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals.

The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman’s cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), we squarely held that this right was not unqualified. \*\*\* In *Lorain Journal*, the violation of § 2 was an “attempt to monopolize,” rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a “specific intent” to accomplish the forbidden objective—as Judge Hand explained, “an

intent which goes beyond the mere intent to do the act.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (CA2 1945). In the latter case evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as “exclusionary” or “anticompetitive”—to use the words in the trial court’s instructions—or “predatory,” to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that “no monopolist monopolizes unconscious of what he is doing.” \*\*\*

The qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*. In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when the character of the market was changed by Ski Co.’s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multimountain areas which apparently are competitive, it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.

Ski Co.’s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market. \*\*\* Since the jury was unambiguously instructed that Ski Co.’s refusal to deal with Highlands “does not violate Section 2 if valid business reasons exist for that refusal,” we must assume that the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record.

#### IV

The question whether Ski Co.’s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been “attempting to exclude rivals on some basis other than efficiency,”<sup>33</sup> it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.’s smaller rival, and on Ski Co. itself.

#### *Superior Quality of the All-Aspen Ticket*

The average Aspen visitor “is a well-educated, relatively affluent, experienced skier who has skied a number of times in the past....” Over 80% of the skiers visiting the resort each year have been there before—40% of these repeat visitors have skied Aspen at least five times. Over the years, they developed a strong demand for the 6-day, all-Aspen ticket in its various refinements. Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend at the resort; they can then spend more time on the slopes and enjoying apres-ski amenities and less time standing in ticket lines. The 4-area attribute of the ticket allowed the skier to purchase his 6-day ticket in advance while reserving the right to decide in his own time and for his own reasons which moun-

---

<sup>33</sup> R. Bork, *The Antitrust Paradox* 138 (1978).

tain he would ski on each day. It provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to him during the week's vacation.

While the 3-area, 6-day ticket offered by Ski Co. possessed some of these attributes, the evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket. In the first place, the actual record of competition between a 3-area ticket and the all-Aspen ticket in the years after 1967 indicated that skiers demonstrably preferred four mountains to three. Highlands' expert marketing witness testified that many of the skiers who come to Aspen want to ski the four mountains, and the abolition of the 4-area pass made it more difficult to satisfy that ambition. A consumer survey undertaken in the 1979-1980 season indicated that 53.7% of the respondents wanted to ski Highlands, but would not; 39.9% said that they would not be skiing at the mountain of their choice because their ticket would not permit it.

Expert testimony and anecdotal evidence supported these statistical measures of consumer preference. A major wholesale tour operator asserted that he would not even consider marketing a 3-area ticket if a 4-area ticket were available. During the 1977-1978 and 1978-1979 seasons, people with Ski Co.'s 3-area ticket came to Highlands "on a very regular basis" and attempted to board the lifts or join the ski school. Highlands officials were left to explain to angry skiers that they could only ski at Highlands or join its ski school by paying for a 1-day lift ticket. Even for the affluent, this was an irritating situation because it left the skier the option of either wasting 1 day of the 6-day, 3-area pass or obtaining a refund which could take all morning and entailed the forfeit of the 6-day discount. An active officer in the Atlanta Ski Club testified that the elimination of the 4-area pass "infuriated" him.

#### *Highlands' Ability to Compete*

The adverse impact of Ski Co.'s pattern of conduct on Highlands is not disputed in this Court. Expert testimony described the extent of its pecuniary injury. The evidence concerning its attempt to develop a substitute product either by buying Ski Co.'s daily tickets in bulk, or by marketing its own Adventure Pack, demonstrates that it tried to protect itself from the loss of its share of the patrons of the all-Aspen ticket. The development of a new distribution system for providing the experience that skiers had learned to expect in Aspen proved to be prohibitively expensive. As a result, Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated. The size of the damages award also confirms the substantial character of the effect of Ski Co.'s conduct upon Highlands.

#### *Ski Co.'s Business Justification*

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.

That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct. In defending the decision to terminate the jointly offered ticket, Ski Co. claimed that usage could not be properly monitored. The evidence, however, established that Ski Co. itself monitored the use of the 3-area passes based on a count taken by lift operators, and distrib-

uted the revenues among its mountains on that basis.<sup>40</sup> Ski Co. contended that coupons were administratively cumbersome, and that the survey takers had been disruptive and their work inaccurate. Coupons, however, were no more burdensome than the credit cards accepted at Ski Co. ticket windows. Moreover, in other markets Ski Co. itself participated in interchangeable lift tickets using coupons.

In the end, Ski Co. was pressed to justify its pattern of conduct on a desire to disassociate itself from—what it considered the inferior skiing services offered at Highlands. The all-Aspen ticket based on usage, however, allowed consumers to make their own choice on these matters of quality. Ski Co.’s purported concern for the relative quality of Highlands’ product was supported in the record by little more than vague insinuations, and was sharply contested by numerous witnesses. Moreover, Ski Co. admitted that it was willing to associate with what it considered to be inferior products in other markets.

Although Ski Co.’s pattern of conduct may not have been as “ ‘bold, relentless, and predatory’ ” as the publisher’s actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands.<sup>42</sup> The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.

Because we are satisfied that the evidence in the record,<sup>44</sup> construed most favorably in support of Highlands’ position, is adequate to support the verdict under the instructions given by the trial court, the judgment of the Court of Appeals is

*Affirmed.*

---

<sup>40</sup> \*\*\* The United States Forest Service, however, required the submission of financial information on a mountain-by-mountain basis as a condition of the permits issued for each mountain. \*\*\*

<sup>42</sup> “[W]hy didn’t they buy an individual daily lift ticket at Aspen Highlands? ... For those who had bought six-day tickets, I think despite the fact that they are all relatively affluent—a lot of them are relatively affluent when they go to Aspen—they are all sort of managerial types and they seem to be pretty cautious. Certainly the comments that I have had from individual skiers and from the tour operators, club people that I have talked to—they are pretty careful with their money and they would feel—these are the people who will buy the six-day, three-area ticket that giving up one of those days and going over to ski at Aspen Highlands would mean spending extra money.” Tr. 777.

<sup>44</sup> Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the “essential facilities” doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anti-competitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.

---

**Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP**

540 U.S. 398 (2004)

Justice SCALIA delivered the opinion of the Court: The Telecommunications Act of 1996 imposes certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors, and establishes a complex regime for monitoring and enforcement. In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act.

**I**

Petitioner Verizon Communications Inc. is the incumbent local exchange carrier (LEC) serving New York State. Before the 1996 Act, Verizon, like other incumbent LECs, enjoyed an exclusive franchise within its local service area. The 1996 Act sought to “uproo[t]” the incumbent LECs’ monopoly and to introduce competition in its place. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 488 (2002). Central to the scheme of the Act is the incumbent LEC’s obligation under 47 U.S.C. § 251(c) to share its network with competitors, see *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999), including provision of access to individual elements of the network on an “unbundled” basis. § 251(c)(3). New entrants, so-called competitive LECs, resell these unbundled network elements (UNEs), recombined with each other or with elements belonging to the LECs.

Verizon, like other incumbent LECs, has taken two significant steps within the Act’s framework in the direction of increased competition. First, Verizon has signed interconnection agreements with rivals such as AT&T, as it is obliged to do under § 252, detailing the terms on which it will make its network elements available. (Because Verizon and AT&T could not agree upon terms, the open issues were subjected to compulsory arbitration under §§ 252(b) and (c).) In 1997, the state regulator, New York’s Public Service Commission (PSC), approved Verizon’s interconnection agreement with AT&T.

Second, Verizon has taken advantage of the opportunity provided by the 1996 Act for incumbent LECs to enter the long-distance market (from which they had long been excluded). That required Verizon to satisfy, among other things, a 14-item checklist of statutory requirements, which includes compliance with the Act’s network-sharing duties. § § 271(d)(3)(A) and (c)(2)(B). Checklist item two, for example, includes “nondiscriminatory access to network elements in accordance with the requirements” of § 251(c)(3). § 271(c)(2)(B)(ii). Whereas the state regulator approves an interconnection agreement, for long-distance approval the incumbent LEC applies to the Federal Communications Commission (FCC). In December 1999, the FCC approved Verizon’s § 271 application for New York.

Part of Verizon’s UNE obligation under § 251(c)(3) is the provision of access to operations support systems (OSS), a set of systems used by incumbent LECs to provide services to customers and ensure quality. Verizon’s interconnection agreement and long-distance authorization each specified the mechanics by which its OSS obligation would be met. As relevant here, a competitive LEC sends orders for service through an electronic interface with Verizon’s ordering system, and as Verizon completes certain steps in filling the order, it sends confirmation back through the same interface. Without OSS access a rival cannot fill its customers’ orders.

In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon’s obligation to provide access to OSS functions. The PSC and FCC opened parallel investigations, which led to a series of orders by the PSC and a consent decree with the FCC. Un-

der the FCC consent decree, Verizon undertook to make a “voluntary contribution” to the U.S. Treasury in the amount of \$3 million; under the PSC orders, Verizon incurred liability to the competitive LECs in the amount of \$10 million. Under the consent decree and orders, Verizon was subjected to new performance measurements and new reporting requirements to the FCC and PSC, with additional penalties for continued noncompliance. In June 2000, the FCC terminated the consent decree.

Respondent Law Offices of Curtis V. Trinko, LLP, a New York City law firm, was a local telephone service customer of AT&T. The day after Verizon entered its consent decree with the FCC, respondent filed a complaint in the District Court for the Southern District of New York, on behalf of itself and a class of similarly situated customers. The complaint, as later amended, alleged that Verizon had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs’ ability to enter and compete in the market for local telephone service. According to the complaint, Verizon “has filled orders of [competitive LEC] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers ..., and has systematically failed to inform [competitive LECs] of the status of their customers’ orders.” The complaint set forth a single example of the alleged “failure to provide adequate access to [competitive LECs],” namely the OSS failure that resulted in the FCC consent decree and PSC orders. It asserted that the result of Verizon’s improper “behavior with respect to providing access to its local loop” was to “deter potential customers [of rivals] from switching.” \*\*\*

The District Court dismissed the complaint in its entirety. As to the antitrust portion, it concluded that respondent’s allegations of deficient assistance to rivals failed to satisfy the requirements of § 2. The Court of Appeals for the Second Circuit reinstated the complaint in part, including the antitrust claim. We granted certiorari, limited to the question whether the Court of Appeals erred in reversing the District Court’s dismissal of respondent’s antitrust claims.

## II

To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles. The Act imposes a large number of duties upon incumbent LECs—above and beyond those basic responsibilities it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way, see 47 U.S.C. § § 251(b)(2), (4). Under the sharing duties of § 251(c), incumbent LECs are required to offer three kinds of access. Already noted, and perhaps most intrusive, is the duty to offer access to UNEs on “just, reasonable, and nondiscriminatory” terms, § 251(c)(3), a phrase that the FCC has interpreted to mean a price reflecting long-run incremental cost. See *Verizon Communications Inc. v. FCC*, 535 U.S., at 495-496. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. See § § 251(c)(2), (4). The Act also imposes upon incumbents the duty to allow physical “collocation”—that is, to permit a competitor to locate and install its equipment on the incumbent’s premises—which makes feasible interconnection and access to UNEs. See § 251(c)(6).

That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. See, e.g., *United States v. National Assn. of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange, Inc.*,

422 U.S. 659 (1975). In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme "that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Assn. of Securities Dealers, Inc.*, *supra*, at 734.

Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 110 Stat. 143, 47 U.S.C. § 152, note. This bars a finding of implied immunity. As the FCC has put the point, the saving clause preserves those "claims that satisfy established antitrust standards." Brief for United States and the Federal Communications Commission as *Amici Curiae* Supporting Neither Party in No. 02- 7057, *Covad Communications Co. v. Bell Atlantic Corp.* (CAD), p. 8.

But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust laws. We turn, then, to whether the activity of which respondent complains violates preexisting antitrust standards.

### III

The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under § 2 of the Sherman Act, 15 U.S.C. § 2, which declares that a firm shall not "monopolize" or "attempt to monopolize." *Ibid.* It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

However, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, be-

cause of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anti-competitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing, supra*. The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. *Id.*, at 593-594. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition ... over the long run by harming its smaller competitor." *Id.*, at 608.

*Aspen Skiing* is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. See *id.*, at 608, 610-611. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Ibid.* Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.

The specific nature of what the 1996 Act compels makes this case different from *Aspen Skiing* in a more fundamental way. In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail—to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. *Id.*, at 370-371, 377-378. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created "something brand new"—"the wholesale market for leasing network elements." *Verizon Communications Inc. v. FCC*, 535 U.S., at 528. The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New sys-

tems must be designed and implemented simply to make that access possible—indeed, it is the failure of one of those systems that prompted the present complaint.<sup>3</sup>

We conclude that Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the “essential facilities” doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent’s allegations might state a claim. See generally Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989). We have never recognized such a doctrine, see *Aspen Skiing Co.*, 472 U.S., at 611, n. 44; *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S., at 428 (opinion of BREYER, J.), and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the “essential facilities”; where access exists, the doctrine serves no purpose. Thus, it is said that “essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.” P. Areeda & H. Hovenkamp, *Antitrust Law*, p. 150, ¶ 773e (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent’s “essential facilities” argument is distinct from its general § 2 argument, we reject it.

#### IV

Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, “careful account must be taken of the pervasive federal and state regulation characteristic of the industry.” *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86, 91 (1975); see also P. Areeda & H. Hovenkamp, *Antitrust Law*, p. 12, ¶ 240c3 (2d ed. 2000). “[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.” *Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (C.A.1 1990) (Breyer, C.J.) (internal quotation marks omitted).

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, “[t]here is nothing built into the regulatory scheme which performs the antitrust function,” *Silver v. New York Stock Exchange*, 373 U.S. 341, 358 (1963), the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, see, e.g., *United States v. National Assn. of Securities Dealers, Inc.*, 422 U.S., at 730-735, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

---

<sup>3</sup> Respondent also relies upon *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1945). These cases involved *concerted* action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.

---

The regulatory framework that exists in this case demonstrates how, in certain circumstances, “regulation significantly diminishes the likelihood of major antitrust harm.” *Concord v. Boston Edison Co.*, *supra*, at 25. Consider, for example, the statutory restrictions upon Verizon’s entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of § 271’s competitive checklist, which as we have noted includes the nondiscriminatory provision of access to UNEs. Section 271 applications to provide long-distance service have now been approved for incumbent LECs in 47 States and the District of Columbia.

The FCC’s § 271 authorization order for Verizon to provide long-distance service in New York discussed at great length Verizon’s commitments to provide access to UNEs, including the provision of OSS. *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953, 3989-4077, ¶ ¶ 82-228 (1999) (Memorandum Opinion and Order) (hereinafter *In re Application*). Those commitments are enforceable by the FCC through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. See 47 U.S.C. § 271(d)(6)(A). Verizon also subjected itself to oversight by the PSC under a so-called “Performance Assurance Plan” (PAP). The PAP, which by its terms became binding upon FCC approval, provides specific financial penalties in the event of Verizon’s failure to achieve detailed performance requirements. The FCC described Verizon’s having entered into a PAP as a significant factor in its § 271 authorization, because that provided “a strong financial incentive for post-entry compliance with the section 271 checklist,” and prevented “‘backsliding.’” *In re Application* 3958-3959, ¶ ¶ 8, 12.

The regulatory response to the OSS failure complained of in respondent’s suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon’s servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under § 251(c), imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with *daily* reporting requirements. In short, the regime was an effective steward of the antitrust function.

Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 “can be difficult” because “the means of illicit exclusion, like the means of legitimate competition, are myriad.” *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (C.A.D.C. 2001) (en banc) (*per curiam*). Mistaken inferences and the resulting false condemnations “are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). The cost of false positives counsels against an undue expansion of § 2 liability. One false-positive risk is that an incumbent LEC’s failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. *Amici* States have filed a brief asserting that competitive LECs are threatened with “death by a thousand cuts,” Brief for New York et al. as *Amici Curiae* 10 (internal quotation marks omitted)—the identification of which

would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.

Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of § 251 may be, as we have concluded with respect to above-cost predatory pricing schemes, “beyond the practical ability of a judicial tribunal to control.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993). Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.” Areeda, 58 Antitrust L.J., at 853. In this case, respondent has requested an equitable decree to “[p]reliminarily and permanently enjoin [Verizon] from providing access to the local loop market ... to [rivals] on terms and conditions that are not as favorable” as those that Verizon enjoys. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.<sup>4</sup>

\* \* \*

The 1996 Act is in an important respect much more ambitious than the antitrust laws. It attempts “to eliminate the monopolies enjoyed by the inheritors of AT&T’s local franchises.” *Verizon Communications Inc. v. FCC*, 535 U.S., at 476 (emphasis added). Section 2 of the Sherman Act, by contrast, seeks merely to prevent *unlawful monopolization*. It would be a serious mistake to conflate the two goals. The Sherman Act is indeed the “Magna Carta of free enterprise,” *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. We conclude that respondent’s complaint fails to state a claim under the Sherman Act.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

---

## Spectrum Sports, Inc. v. McQuillan

506 U.S. 447 (1993)

Justice WHITE delivered the opinion of the Court: Section 2 of the Sherman Act, makes it an offense for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States....” The jury in this case returned a verdict finding that petitioners had monopolized, attempted to monopolize, and/or conspired to monopolize. The District Court entered a judgment ruling that petitioners had violated § 2, and the Court of Appeals affirmed on the ground that petitioners had attempted to

---

<sup>4</sup> The Court of Appeals also thought that respondent’s complaint might state a claim under a “monopoly leveraging” theory (a theory barely discussed by respondent). We disagree. To the extent the Court of Appeals dispensed with a requirement that there be a “dangerous probability of success” in monopolizing a second market, it erred, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.

---