

University of Colorado Law School

Colorado Law Scholarly Commons

Publications

Colorado Law Faculty Scholarship

2003

Goldwasser, the Telecom Act, and Reflections on Antitrust Remedies

Philip J. Weiser

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), [Communications Law Commons](#), and the [Courts Commons](#)

Citation Information

Philip J. Weiser, *Goldwasser, the Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003), available at <https://scholar.law.colorado.edu/faculty-articles/541>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

HEINONLINE

Citation: 55 Admin. L. Rev. 1 2003

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Tue May 2 15:26:11 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

ARTICLES

GOLDWASSER, THE TELECOM ACT, AND REFLECTIONS ON ANTITRUST REMEDIES

PHILIP J. WEISER*

Introduction	1
I. <i>Goldwasser</i> and Antitrust Meekness	3
II. Back to Basics and the <i>Town of Concord</i>	9
III. In Search of an Appropriate Remedial Model	14
A. Relying on a Regulated Input: The <i>Otter Tail</i> Case	16
B. Mandating a Wider Provisioning of an Existing Access Right: The Case of the <i>Terminal Railroad</i>	18
C. Relying on a Prior Course of Dealing: The <i>Aspen Skiing</i> Case	18
D. The Non-Discrimination Model: The <i>AT&T</i> and <i>Kodak</i> Cases	20
Conclusion	21

INTRODUCTION

Not so long ago, the different sectors of the information industries—telecommunications, computing, and entertainment—looked to different models of legal regulation. But as these industries are increasingly related to and converging with one another, lawyers need to take a broader look at how the legal regimes that govern these industries relate to one another.¹ In this Essay, I discuss how antitrust oversight can complement and work in

* Associate Professor, University of Colorado School of Law and Department of Telecommunications. Thanks to Christina Burnett, Jonathan Feinberg, Ellen Goodman, Merril Hirsh, Roy Hoffinger, Mark Lemley, Larry Malone, Gil Seinfeld, Steve Semeraro, Brad Sonnenberg, John Thorne, Phil Verveer, and Greg Werden for helpful comments and encouragement.

1. This theme is one that I have developed elsewhere. See Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMM. & HIGH. TECH. L. 1 (2002) [hereinafter Weiser, *Information Platforms*].

tandem with telecommunications regulation, particularly when it comes to remedying anticompetitive conduct.

Within antitrust circles, there is almost a cottage industry of calling for modesty in developing legal rules that regulate economic behavior. Given that legal metaphors often expand far beyond their envisioned purpose,² admonitions that highlight the limits of antitrust—as Judge Easterbrook once put it—are entirely appropriate.³ In the case of antitrust law, such admonitions guard against overreaching applications of doctrines like the essential facilities principle, which has supported the requirement that a football team share its stadium with a competitor⁴ and that Western Union provide support to a competitive teletype machine marketer who wanted access to Western Union's customer lists.⁵ With respect to the role of antitrust law in the telecommunications industry, however I am afraid that we are moving well past the stage of correcting past excesses to erecting unnecessary barriers to antitrust oversight. In particular, this Essay will focus on the so-called *Goldwasser* doctrine.⁶

2. For a discussion of this point, see Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 404 (1986) (“Eventually, through repeated use, a metaphor is likely to exhaust itself.”).

3. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21-23 (1984) (discussing use of presumptions in antitrust law to screen out cases in which loss to consumers and economy is likely outweighed by cost of inquiry and risk of deterring pro-competitive behavior).

4. See Boudin, *supra* note 2, at 397 (discussing *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), which held the stadium owner liable).

5. See Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 843 (1989) (discussing *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), which overturned a district court's ruling against Western Union).

6. See *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) (dismissing appeal for lack of actionable antitrust claim). The basic thrust of my argument may also help to explain the Federal Circuit's limitation of liability as to intellectual property holders. See *In re Indep. Serv. Org. Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000) (barring antitrust claim on the ground that it advanced a duty to deal in patented and copyrighted works); see also Weiser, *Information Platforms*, *supra* note 1, at 15-22 (criticizing decision); Steven Semeraro, *Regulating Information Platforms: The Convergence to Antitrust*, 1 J. TELECOMM & HIGH TECH. L. 143, 149-171 (2002) (same); A. Douglas Melamed & Ali M. Stoeppelwerth, *The CSU Case: Facts, Formalism, and the Intersection of Antitrust and Intellectual Property Law*, 10 GEO. MASON L. REV. 407 (2002) (same).

I. GOLDWASSER AND ANTITRUST MEEKNESS

The Telecommunications Act of 1996⁷ (Telecom Act or 1996 Act) set forth a new legal environment to facilitate competition in the telecommunications industry. In essence, it envisioned that, with certain legal mandates in place, new entrants could compete against established monopoly incumbents in local telecommunications markets. Based on this premise, the Telecom Act provided that the local Bell Companies, which were prohibited from offering long distance services under the AT&T consent decree, could apply for entry into a state's long distance market once they established that they had opened their local markets in that state to competition.⁸ After Ameritech applied unsuccessfully for long distance entry under the Act, a number of consumers of its telecommunications services claimed that its failure to comply fully with the Act's long distance entry requirements violated the antitrust laws.⁹ Ultimately, the district court dismissed the case, holding that "because of the potential for frustrating the goals of the 1996 Act, Plaintiffs should not be permitted standing to continue with its claims in this case."¹⁰

When the Seventh Circuit affirmed the district court's ruling in the *Goldwasser* case,¹¹ it did not suggest that its decision launched a new doctrine. At bottom, Judge Diane Wood's opinion eschewed any reliance on standing and imposed a sensible rule of pleading: if a plaintiff does not explain how actions taken by an incumbent local exchange carrier constitute an abuse of its monopoly power in violation of the antitrust laws, the case is for the regulatory authorities, not the antitrust courts. As Judge Wood put it, any attempt to "equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws" should be rejected outright by antitrust courts.¹² Conversely, this rule appeared to allow new entrants to challenge any number of actions by incumbents—intentionally-caused problems in interconnection, for example—as violations of the antitrust laws even if those actions also happened to be subject to the regulatory oversight of the Telecom Act.¹³

7. Pub. L. No. 104-104, 110 Stat. 56 (1996).

8. See 47 U.S.C. § 271.

9. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

10. *Id.* at 10. The district court also rejected plaintiffs' request for damages as inconsistent with the filed rate doctrine set forth in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). See *id.* at 7.

11. *Goldwasser*, 222 F.3d at 390.

12. *Id.* at 400.

13. A number of entrants into the local telecommunications market have invoked antitrust law in actions against incumbent local exchange carriers. For a list of such cases, see Pulver.com's Telecom Antitrust Intelligence Report, available at <http://pulver.com/antitrust>

To be sure, the Sherman Act may not be an appropriate primary tool for opening the local telephone market to competition, but it does provide an important set of backstop remedies to supplement the Telecom Act's market-opening measures.¹⁴ After all, both the Telecom Act's pro-competitive purpose¹⁵ and its antitrust savings clause¹⁶ should leave no doubt that Congress envisioned that antitrust law would play a role in opening up local telephone markets to competition.¹⁷

The rule of pleading conception of *Goldwasser* is not the only viable understanding of that opinion. In fact, a number of courts have adopted a much more aggressive reading: if the Telecom Act covers a specific antitrust claim, the antitrust claim should be dismissed. Picking up on dicta from *Goldwasser*, a number of courts have concluded that "the Telecom-

report, see also Gail Lawyer, *The Last Resort*, XCHANGE MAG. (July 1, 2001), available at <http://www.xchangemag.com/articles/171front.html> (reporting on antitrust cases brought by competitive local exchange carriers).

14. See Joel I. Klein, *The Race for Local Competition: A Long Distance Run, Not A Sprint 6-7* (Nov. 5, 1997), at <http://www.usdoj.gov/atr/public/speeches/1268.htm> (noting that the antitrust remedies apply to local telecommunications markets, but that they "are not well suited to serve as the first line method for opening the local market."). Randy Picker elaborated on the point as follows:

As a matter of first principles, it is hard to understand why we could not apply both the 1996 Telecommunications Act and the Sherman Act . . . Imagine access regulations consisting of detailed statutory mandates coupled with general fill-in powers. We normally understand fill-in powers to reflect the considerable costs of specifying ex ante rules that will apply to difficult-to-imagine future states of the world. So we legislate in specifics for the things we understand now and build in flexibility to address change in the future. This is a conventional way of describing incomplete contracts written by private parties.

15. H.R. CONF. REP. NO. 104-458, at 201 (1996) ("The [Federal Communications] Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws.").

16. See Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56 (1996) ("[N]othing in the Act or in the amendments made by this Act shall be construed to modify, impair or supercede the applicability of any antitrust laws."); see also H.R. CONF. REP. NO. 104-458, at 201 (1996) (explaining clause "prevents affected parties from asserting that the [Act] impliedly pre-empts other laws."); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45,476, 45,494 (Aug. 29, 1996) ("[N]othing in [the FCC's] regulations is intended to limit the ability of persons to seek relief under the antitrust laws.").

17. Some courts have found this rationale persuasive. See, e.g., *Law Offices of Curtis v. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 112 (2d Cir. 2002) ("To the contrary, if the defendant's conduct did violate the antitrust laws, the fact that the regulatory commission also condemned the conduct of the [incumbent telephone company] may indicate that the purposes of the two schemes are in synch, reinforcing our conclusion that there is no 'plain repugnancy' between the two statutes."), *pet. for cert. filed*, 71 USLW 3352 (Nov. 1, 2002); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1282 (11 Cir. 2002) (merely pleading violations of the 1996 Act does not state a claim under the Sherman Act).

munications Act is more specific legislation that takes precedence over the general antitrust legislation.”¹⁸ Although a number of other courts have adopted the more narrow rule of pleading approach, quite a few have, however, dismissed antitrust claims based on an aggressive reading of *Goldwasser*.¹⁹

At bottom, the aggressive reading of *Goldwasser* suggests an uneasy relationship between antitrust law and telecommunications regulation. First, it expresses some skepticism about the comparative value of antitrust in the local telephone market-opening process spawned by the Telecom Act and emphasizes the dictum, often taken out of context from *Goldwasser*, that the “antitrust laws would add nothing to the oversight already available” under the Telecom Act.²⁰ Second, it maintains that imposing antitrust duties in this context would be incompatible with the “elaborate system of negotiated agreements and enforcement established by the [Telecom] Act.”²¹

In seeking to fit antitrust oversight within the model of the Telecom Act, *Goldwasser* and its progeny correctly appreciate that “an industry’s regulated status is an important ‘fact of market life’” that needs to be taken into account in designing antitrust rules and remedies.²² In previous cases, where antitrust plaintiffs sought to facilitate competition in regulated industries, such as the *Otter Tail* and *AT&T* cases,²³ the courts took actions that enabled the plaintiffs to obtain relief that was consistent with the regulatory regime. By contrast, the aggressive reading of *Goldwasser* suggests that the Telecom Act occupies the field in ways that previous regulatory regimes did not and, as a result, there is no value added from antitrust oversight.

18. *MGC Communications, Inc. v. BellSouth Telecomms., Inc.*, 146 F. Supp. 2d 1344, 1352 (S.D. Fla. 2001); see also *Goldwasser*, 222 F.3d at 401 (explaining that the Act imposes more specific obligations than the antitrust laws).

19. See *Covad Communications Corp. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123, 130 n.19 (D.D.C. 2002) (collecting cases). The alternative approach follows the course recommended by the Justice Department’s Antitrust Division and the Federal Communications Commission. See Brief of Amicus Curiae United States and the Federal Communications Commission, *Intermedia Communications, Inc. v. Bell South, Inc.*, No. 01-10224-JJ (Mar. 28, 2001), available at <http://www.usdoj.gov/atr/cases/f7700/7777.htm>; see also, *Trinko*, 305 F.3d at 109-112 (following this approach).

20. 222 F.3d at 401.

21. *Id.*

22. *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1105 (7th Cir. 1983) (internal quotations and citations omitted).

23. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (refusing to confer antitrust immunity based on Federal Power Act); *MCI Communications*, 708 F.2d at 1101-04 (denying AT&T implied immunity); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

My evaluation of the relationship between antitrust oversight and regulation suggests that there is an important value that antitrust can add to the equation. In particular, the comparative advantage of antitrust in this context parallels what it offered in both the *AT&T* and *Otter Tail* cases. In the antitrust litigation against AT&T, the lack of effectiveness and speed with which a regulatory agency could act vis-a-vis an antitrust court emerged as a basic theme of the case. In the *Otter Tail* case, the Supreme Court underscored that an antitrust court could empower the Federal Power Commission to enforce pro-competitive actions that were not authorized by, but were consistent with, the Federal Power Act.²⁴ Similarly, even under a pro-competitive regime like the Telecom Act, antitrust courts can act in conjunction with regulators to provide expeditious and effective remedies for anticompetitive conduct.

Antitrust courts also possess advantages over regulatory agencies relating to the nature of a judicial forum. These advantages, such as broader discovery, a wide scope of remedial authority, and freedom from political interference, are not inherent advantages of courts over agencies; rather, they reflect the current state of agency practice and structure. In theory, then, regulatory agencies could be as effective as courts in dispute resolution, but the experience and practical advantages possessed by courts suggest that they will be (for at least the foreseeable future) both more effective in adjudicating disputes as well as in spurring the parties to settle complex cases.

With respect to the ability of antitrust courts to bring an issue to closure more effectively than a regulatory agency, it is important to note that antitrust courts provide parties with an alternative forum in the event that regulatory agencies have difficulty adapting to the new role of adjudicating disputes and enforcing legal duties in an emergingly competitive environment. The Massachusetts Department of Telecommunications and Energy, for example, recently decided a matter involving allegations of illegal and anticompetitive cross-subsidization by Boston Edison over two and one half years after the case stood submitted to the agency.²⁵ Regardless of

24. See *Otter Tail Power*, 410 U.S. at 375-78 (imposing an antitrust remedy on Otter Tail Power Co.).

25. See Investigation by the Department of Telecommunications and Energy, on its own motion, Into Boston Edison's Compliance with the Department's Order in D.P.U. 93-37, D.P.U./D.T.E. 97/95 (Dec. 28, 2001), available at <http://www.state.ma.us/dpu/electric/97-95/1228finorder.pdf>; see also Investigation into Boston Edison Company's (BECo) compliance with the Department's Order in Boston Energy Company, D.P.U. 93-37 (1993); BECo's investment in Boston Energy Technology Group (BETG), Order Opening Investigation of BECo's Compliance with D.P.U. 93-37, D.P.U./D.T.E. 97-95 (1997). My exposure to this proceeding comes from my work with Cablevision Systems Corp., an intervenor in this matter.

one's views of the outcome of the *Microsoft* case, the ability of an antitrust court to expedite a case of that complexity and importance from complaint to resolution on appeal in three years is an admirable achievement.²⁶ To be sure, not all antitrust courts will provide as effective a forum as did the *Microsoft* court nor will all regulatory agencies act with the lack of alacrity as did the Massachusetts commission, but the availability of an antitrust remedy provides an important safety valve for and a backstop to the regulatory regime. In the *AT&T* case, the Federal Communications Commission was particularly bad at keeping AT&T in line—two former Common Carrier Bureau Chiefs testified that the agency could not do so²⁷—but it need not reach that extreme for antitrust oversight to provide a valuable pro-competitive alternative to the regulatory agency.

In *Otter Tail*, the Supreme Court's willingness to order the wholesale wheeling of power necessary to facilitate competition provided the Federal Power Commission with the authority it did not enjoy as part of its statutory mandate.²⁸ One could argue, as the dissent did in that case, that such a role for an antitrust court intrudes on the governing regulatory framework.²⁹ The majority, however, explained that the mere absence of authority for a regulatory agency to take an action that would otherwise be mandated under antitrust law does not mean that the regulatory statute views that act as repugnant to it.³⁰ As for the Telecom Act, the ability of state and federal regulators—both legally and practically—to enforce its pro-competitive obligations remains uncertain. Consequently, it is quite plausible that the availability of antitrust remedies will prove very important.³¹

The role of antitrust law, in a world where telecommunications regulation facilitates competition, will generally be to supplement regulatory

26. *United States v. Microsoft Corp.*, 253 F.3d 34, 48 (D.C. Cir. 2001) (“[I]t is noteworthy that a case of this magnitude and complexity has proceeded from the filing of complaints through trial to appellate decision in a mere three years.”).

27. See STEPHEN COLL, *THE DEAL OF THE CENTURY* 373 (Collier Macmillan, Inc. 1986) (describing testimony of former Common Carrier Bureau Chiefs Bernard Strassburg and Walter Hinchman in the AT&T case); see also *United States v. Western Electric Company, Inc. & American Telephone & Telegraph Company*; Competitive Impact Statement in Connection with Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7180 (Feb. 17, 1982) (noting that the relief obtained in the case imposed equal access standards on the local network in “greater detail” and effectiveness than had the regulatory authorities).

28. *Otter Tail Power*, 410 U.S. at 375-76 (concluding that Federal Power Act did not authorize wheeling mandate, but holding that antitrust remedy could do so).

29. *Id.* at 389-90 (stating that the court's reasoning was “at odds with the congressional purpose in specifying the conditions under which interconnections can be required.”).

30. *Id.* at 372.

31. See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (discussing how the Telecom Act's enforcement mechanisms should work).

sanctions, not to second-guess regulatory requirements on the scope of dealing. At present, there are a number of regulatory failings with respect to enforcement, including limits on the authority of regulatory agencies to impose monetary damages and a hesitancy to grant (and inexperience with) preliminary relief. Thus, for areas where an antitrust duty to deal also is regulated by telecommunications law, it is quite likely that the relief afforded by the regulatory authorities will be less than that available from antitrust courts. Unfortunately, an aggressive reading of *Goldwasser* leads courts to dismiss any antitrust claim that is potentially governed by telecommunications law—inserting, in effect, an exhaustion of remedies requirement into antitrust law.³² The courts adjudicating the antitrust litigation against AT&T also could have adopted such an approach, as the FCC possessed the authority to mandate interconnection, but they wisely declined to do so.³³

Some of the same forces that previously led to judicial shortcuts such as an unfortunate overuse of per se rules and a less than careful application of legal metaphors may well account for a judicial eagerness to use *Goldwasser* as a bar to antitrust scrutiny. As Judge Boudin put it in explaining the overextension of certain antitrust metaphors: “antitrust law is hard and courts often look for simplifying doctrines, be they metaphors, per se rules, or easy exits that avoid more difficult factual and analytical inquiries.”³⁴ To avoid the temptation of adopting an easy shortcut that would cut off liability for firms regulated by telecommunications law, courts should heed the admonition that “[w]hen the adverse effect of allowing a monopolist to maintain certain practices is clear, a court should stay its hand rarely, if ever.”³⁵ Admittedly, there are certain exceptions where antitrust courts should withhold relief, but the courts that have adopted an aggressive reading of *Goldwasser* have not explained why those cases fit within such exceptions. To understand which cases fall within the exceptions to the

32. See *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123, 134 (D.D.C. 2002) (insisting on a regulatory determination “as an initial matter at least” of interconnection agreement requirements before allowing an antitrust claim to proceed).

33. See, e.g., *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1102-03 (7th Cir. 1983) (concluding that “FCC’s regulatory authority under the Communications Act does not preclude application of the Sherman Act.”) (citation omitted).

34. See Boudin, *supra* note 2, at 403. Judge Boudin elaborated on this phenomenon as follows:

Antitrust law is a difficult subject, and the underlying economics are even more baffling to most judges and lawyers. An understandable impulse to simplify antitrust law is reflected in many places, including per se rules, cost tests for predatory pricing, and mathematical formulas for determining undue concentration or monopoly power.

Id. (citations omitted).

35. *Byars v. Bluff City News Co.*, 609 F.2d 843, 864 n.57 (6th Cir. 1980).

general rule, Part II explains how regulation and antitrust oversight should fit together.

II. BACK TO BASICS AND THE *TOWN OF CONCORD*

To understand how antitrust and regulation should coexist, a natural place to begin is by examining *Goldwasser's* cousin, then-Chief Judge (now-Justice) Breyer's opinion in the *Town of Concord* case.³⁶ The plaintiff in that case, unlike in *Goldwasser*, pled its complaint in antitrust terms.³⁷ In particular, the Town of Concord claimed that Boston Edison, even though its prices were regulated at both the wholesale and retail level, had violated Section 2 of the Sherman Act by engaging in a price squeeze.³⁸ In rejecting this claim, Justice Breyer analyzed carefully the pitfalls of antitrust oversight over utility prices that were approved by a competent regulatory authority.³⁹ Unlike the aggressive interpretation of *Goldwasser*, Justice Breyer's *Town of Concord* opinion provides an exemplary exposition of the relationship between antitrust and regulation. The general rule, as Breyer recognized, is that antitrust oversight is proper.⁴⁰ Nonetheless, the opinion determined that where a firm raises a price squeeze claim arising from a context where the wholesale and retail markets are both regulated, there are strong reasons for doubting the comparative advantage of antitrust oversight over price regulation.⁴¹

Under the *Town of Concord* model, there are three types of cases involving regulated entities where antitrust law should refrain from providing relief. First, and most classically, there may be some cases where, as then-Judge (now-Justice) Kennedy put it, granting relief would impinge on the regulatory agency's "freedom of action to carry out its regulatory mission" or require the regulated entity to "act with reference to inconsistent standards of conduct."⁴² In those limited cases where antitrust oversight would lead to outcomes different than those mandated by the regulatory regime,

36. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990).

37. *See id.* at 20.

38. *See id.* at 21.

39. *See id.* at 23.

40. *See id.* at 41.

41. *See id.* at 22-23.

42. *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 732 (9th Cir. 1981). This was the model adopted by Judge Greene, who concluded that: "It presumably follows that, unless defendants are able to demonstrate that they were *precluded* by the FCC (acting under Communications Act standards) from interconnecting, they had an obligation to interconnect if failure to do so was anticompetitive under the Sherman Act." *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 336, 1359 n.100 (D.D.C. 1981) (alteration in original).

antitrust law should yield to regulation.⁴³ Second, some claims may not present proper concerns for antitrust courts. In a private antitrust action against AT&T case, for example, the Seventh Circuit rejected MCI's claims that the antitrust laws mandated a duty for AT&T to resell its long haul network as a duty to deal obligation on a non-essential facility,⁴⁴ but did hold AT&T liable for refusing to interconnect MCI's network to its own. Finally, as in *Town of Concord*, there are cases that, from the standpoint of an antitrust court, are irremedial because they would require certain judgments—particularly those involving price-setting—that are outside the competence of antitrust courts and within the core province of regulatory agencies.

The significance of the *Town of Concord* model is that it will focus antitrust courts on where they can further the pro-competitive goals of the Telecom Act. In some rare cases, this model will suggest withholding relief where antitrust courts are asked to sort through the competitive impact of regulated pricing.⁴⁵ More significantly, this model will provide a forum for antitrust courts to oversee the most competitively significant duties imposed by the Telecom Act, such as interconnection and other areas where a local incumbent provider "refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition."⁴⁶ In theory, regulatory agencies should focus on such issues with the utmost urgency and concern, but in practice, it is important that to the extent that the agencies cannot enforce or under-enforce such obligations, antitrust courts are there to pick up the slack.⁴⁷ Thus, as the litigation against

43. See, e.g., *Brown v. Pro Football, Inc., Washington Redskins*, 518 U.S. 231, 250 (1996) (holding that antitrust oversight in area governed by labor law was improper).

44. See *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1149. Judge Greene rejected a similar request in the context of the AT&T consent decree. See *United States v. Am. Tel. & Tel. Co.*, 604 F. Supp. 316, 324 (D.D.C. 1985) ("The purpose of the decree . . . is not the artificial creation of competition by enabling [alternative] inter-exchange carriers to share AT&T's interexchange capabilities and facilities.").

45. Such cases also might be immune from antitrust liability under the tariffed rate doctrine, which holds that a "filed rate"—i.e., one approved by a regulatory agency—cannot be challenged in an antitrust suit. See, e.g., *Town of Norwood v. New England Power Co.*, 23 F. Supp. 2d 109, 118 (D. Mass. 1998), *aff'd in relevant part*, 202 F.3d 408, 422 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (2000) (refusing to grant immunity from antitrust law pursuant to the filed rate doctrine to a wholesale power provider); see also *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 56 (1922) (setting out the scope of the filed rate doctrine). But see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-76 (1973).

46. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

47. See *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d at 112 ("While ideally, the regulatory process alone would be enough to bring competition to the local phone service markets, it is possible that the antitrust laws will be needed to supple-

AT&T recognized the mere fact that the regulatory agency possesses the authority—or even the duty—to consider enforcing an interconnection requirement does not displace the role of antitrust law in ensuring that a party acts in good faith to interconnect with its rivals.⁴⁸

The problem with some of the post-*Goldwasser* cases is that they transform the three exceptions listed above into a general rule. Of the three exceptions, the concern regarding remedies is the most compelling and merits close attention. In particular, the aggressive reading of *Goldwasser* appears to rely on the theory that, assuming that the Telecom Act's remedial scheme works perfectly, there will be no need for antitrust oversight in the telecommunications arena. Alternatively, one might argue that, even if antitrust courts could eventually supplement the pro-competitive efforts of the Telecom Act, they should withhold relief until the nature of the Act's remedial scheme is fleshed out more fully and/or proven inadequate to deter and address anticompetitive conduct. Either one of these justifications for the aggressive reading of *Goldwasser* fails to counter the argument that an appropriately implemented remedial strategy (as outlined in Part III) does not substitute for regulatory oversight, but provides a role for antitrust as a means to either empower the relevant regulatory agency and/or keep the it honest where it has failed to act effectively. Moreover, the essence of this argument against antitrust oversight would also justify withholding relief where tort actions could redress the conduct at issue, but antitrust courts regularly reject this line of argument.⁴⁹

Before moving on to discuss the challenges of remedying antitrust violations in the context of local telecommunications markets, it is important to acknowledge that the legal uncertainty involving refusal to deal cases may well underlie the aggressive reading of *Goldwasser*. Both the *Aspen* case and the essential facilities cases illustrate this point, because they do not provide a clearly defined standard for antitrust liability.⁵⁰ Stated most basically, *Aspen* held illegal an effort by a firm with market power to raise its rivals' costs through actions that were economically irrational (i.e., did

ment the regulatory scheme."); see also *MCI Communications*, 708 F.2d at 1102 (relying on antitrust laws used to supplement regulatory remedies).

48. This is the mistake made by many courts that adopt the aggressive interpretation of *Goldwasser*. See, e.g., *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123, 133 (D.D.C. 2002) (concluding that the remedial schemes established by antitrust law and the Telecom Act are "fundamentally incompatible"), for an example of this mistake.

49. See, e.g., *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 783-84 (6th Cir. 2002) (antitrust liability proper, even where actions at issue also redressable under tort law), *cert. denied*, 2003 WL 102537 (Jan. 13, 2003).

50. See Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749, 759 (1995) (discussing the ambiguous nature of the essential facilities).

not have any efficiency justification), but for their exclusionary effect.⁵¹ This general formulation does not, however, provide for a clearly defined judicial inquiry and *Aspen* may raise more questions than it answers.⁵²

Similar to the criticisms that *Aspen* failed to define clearly what type of conduct gives rise to liability, the essential facilities doctrine also remains open to substantial criticism, most notably Professor Areeda's judgment that it is "less a doctrine than an epithet."⁵³ Even though the Supreme Court has declined to set forth explicitly the scope or nature of an essential facilities doctrine, Section 2's core prohibition on exclusionary conduct extends to denials of necessary cooperation like interconnection or in the switching of customers from the incumbent to a rival whether or not framed under the heading of "essential facilities."⁵⁴ What is worth noting

51. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (acknowledging antitrust laws prevent competitors from "exclud[ing] rivals on some basis other than efficiency."); see also *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir. 1997) ("Section 2 of the Sherman Act prohibits a monopolist's unilateral action, like Kodak's refusal to deal, if that conduct harms the competitive process in the absence of a legitimate business justification."), *cert. denied*, 523 U.S. 1094 (1998); *Olympia Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) ("The monopoly supplier who retaliates against customers who have the temerity to compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition."). In a well developed explanation of what constitutes "predatory" or "exclusionary" conduct, the D.C. Circuit explained that:

[P]redation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986).

52. See, e.g., Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659, 659 (2001) (criticizing *Aspen*). One area of antitrust law where *Aspen* may have provided some clarity is in dispelling a myth about the so-called category of "intent cases" under Section 2 (often distinguished from the "essential facility" cases). See *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1980) (noting the distinction). In particular, this label implied that proving an intent to exclude a competitor from the market was either a necessary or sufficient condition to establish liability under Section 2. As *Aspen* makes clear, the appropriate inquiry is into the exclusionary effect of the conduct at issue and "evidence of intent is merely relevant to the question of whether the challenged conduct is fairly characterized as 'exclusionary.'" *Aspen*, 472 U.S. at 602; see also *Olympia Equip. Leasing Co.*, 797 F.2d at 379-80 (asserting that "if conduct is not objectively anticompetitive the facts that it was motivated by hostility to competitors is irrelevant").

53. Areeda, *supra* note 5, at 841 (1989).

54. See *Eastman Kodak Co. v. Technical Images Serv., Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)) (rivals are not permit-

about some of the skepticism expressed about the viability of the essential facilities doctrine is the crucial insight that no access right demanded by competitors should be granted if that right would, if granted *ex ante*, have led the owner of the facility (real or virtual, as in the case of a network of subscribers) not to build the facilities in the first place or would otherwise impair its use.⁵⁵ Even with this limiting principle, however, I suspect that courts will increasingly confront bona fide access right claims under the antitrust laws.⁵⁶ Thus, the proper response to criticisms of *Aspen* or the essential facilities principle is to apply those doctrines in a more limited and careful fashion, not to create categorical exemptions to them.

In sum, it is critical that the *Goldwasser* doctrine not expand to provide that antitrust scrutiny does not apply to incumbent local exchange carriers because of a prediction that only few meritorious claims could be brought in the context of the local market opening effort of the Telecom Act. First, any insistence on a general rule barring antitrust liability contradicts the longstanding antitrust principle that *per se* rules—either endorsing the illegality or legality of a particular practice (or set of practices)—should only be instituted after longstanding experience demonstrates the competitive significance and effect of the conduct at issue.⁵⁷ This logic tracks the argument that barring antitrust claims in the intellectual property context would elevate a formal and categorical rule above a careful, factual inquiry

ted to take actions designed solely “to foreclose competition, to gain a competitive advantage, or to destroy a competitor”); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (antitrust laws prevent competitors from “exclud[ing] rivals on some basis other than efficiency.”); *see also Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183-84 (1st Cir. 1994) (“It is not entirely clear whether the Court in *Aspen Skiing* intended to create a category of refusal-to-deal cases different from the essential facilities category or whether the Court was inviting the application of more general principles of antitrust analysis to unilateral refusals to deal.”).

55. *See Areeda*, *supra* note 5, at 851 (forced sharing of facilities may discourage the building of such facilities in the first place, which would leave consumers worse off).

56. *See* Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons From the Microsoft Case*, 69 ANTITRUST L.J. 87, 97 (2001) (explaining how network effects can, under certain circumstances, entrench a monopolist by raising barriers to entry); *cf. Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 821 (1st Cir. 1995) (Boudin, J., concurring) (“Lotus has already reaped a substantial reward for being first; assuming that the Borland program is now better, good reasons exist for freeing it to attract old Lotus customers to take advantage of a new advance, and to reward Borland in turn for making a better product.”).

57. *See Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (“But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing.”); *see also N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1957) (announcing rule that “there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”).

that is sensitive to economic realities.⁵⁸ Second, for cases like *Goldwasser* where the plaintiffs raise claims that clearly do not rise to a level of competitive significance to trigger antitrust liability, courts can and should dismiss those claims—either for failure to state a claim or at the summary judgment stage—without any great costs to the defendant or the legal system.⁵⁹ But where there are plausible claims of exclusionary conduct with real anticompetitive effects, courts should examine the facts at issue rather than rely on a categorical rule to end their inquiry.⁶⁰ As courts confront these claims, they will be forced to consider what types of remedies are appropriate where a plaintiff establishes antitrust liability under Section 2 (or under Section 1) of the Sherman Act. Part III proceeds to examine this question, reflecting on alternative remedial strategies.

III. IN SEARCH OF AN APPROPRIATE REMEDIAL MODEL

Antitrust law, as a common law-like regime, has long recognized that the scope of liability must be related to the availability of a suitable remedy. In criticizing the essential facilities doctrine, Professor Areeda argued that antitrust claims should be “deemed irremedial” in cases where “compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”⁶¹ Similarly, as Professor Turner argued in regard to conscious parallelism and tacit collusion as practiced by oligopolists, the antitrust laws should withhold a right of action to address such conduct as they cannot provide any meaningful remedy to end such conduct.⁶² (Recognizing that antitrust law has its limits, regulators occasionally have stepped in to institute proactive measures—with mixed results—to eliminate allegedly abusive practices.⁶³) These criticisms against

58. See Melamed & Stoepelwerth, *supra* note 6, at 425-26 (noting antitrust law’s hesitance to adopt formal, categorical rules).

59. Given pleading rules and ordinary practice, dismissals at the motion to dismiss – as opposed to the summary judgment stage – should be rare. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (stating that motion to dismiss should be granted only when “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

60. See Steven Semeraro, *The Antitrust Telecom Connection*, SAN DIEGO L. REV. (forthcoming 2003) (discussing the nature of the appropriate inquiry).

61. Areeda, *supra* note 5, at 853; see *Byars v. Bluff City News Co.*, 609 F.2d 843, 864 (6th Cir. 1979) (“[T]he difficulty of setting a price at which the monopolist must deal might well justify withholding relief altogether.”).

62. See Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 671 (1962).

63. *Compare United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107 (7th Cir. 1985) (Posner, J.) (upholding regulation of airlines to address, among other things, practices with respect to the operation of computerized reservation systems) *with* Schurz Communi-

antitrust actions, rather than suggesting that antitrust should withhold relief in cases involving claims against incumbent local telephone companies, actually point the way to a solution.

Both Professor Areeda's and *Goldwasser's* concern regarding the imposition of antitrust duties based on Section 2 of the Sherman Act can be understood as focused not on the scope of liability as such, but rather on the possibility that antitrust remedies for such duties would mire courts in supervisory roles for which they are ill-suited. The short answer to this concern is that antitrust courts can and should craft remedies that are not only sensitive to, but may well rely on the presence of an existing regulatory regime.⁶⁴ The longer answer is that there are four alternate approaches that would enable an antitrust court to provide meaningful relief without undertaking the role of a regulatory agency.⁶⁵ In particular, courts can rely on: (1) an arrangement or industry custom regulated by a regulatory agency; (2) an existing access arrangements provided to other competitors; (3) a prior course of dealing; or (4) a non-discrimination standard whereby a company gives its competitor access to a facility on the same terms and conditions as it gives itself or a preferred customer. The first three of these access rights find support in the Supreme Court's seminal cases on the subject—*Terminal Railroad, Otter Tail*, and *Aspen*—and the last one involves a familiar antitrust principle, which was employed, for example, in the AT&T consent decree. Within the telecommunications context, the first of these remedial options will almost always be preferable, but the others may be valuable in certain contexts. I will address each in turn.

ations, Inc. v. FCC, 982 F.2d 1057, 1059-60 (7th Cir. 1992) (Posner, J.) (rejecting regulation of television network's entry into production as unjustified).

64. Justice Breyer's *Town of Concord* opinion supports this approach, underscoring that "where regulatory and antitrust regimes coexist, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (internal quotations and citations omitted); see also *Otter Tail Power Co.*, 410 U.S. at 381 (counseling sensitivity to the regulatory regime in fashioning antitrust remedies); *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d at 113 ("[C]ourts must be both mindful and wary of the strong possibility that injunctive relief could have the unintended consequence of disrupting the regulatory scheme . . . [and should] exercise their discretion with restraint in any case where such relief is appropriate, consistent with respect for the overarching regulatory regime that Congress has created.").

65. In addition to these four approaches, antitrust courts can also impose monetary damages either based on actual economic harm or through a "sin no more" decree that would trigger fines for acting in contempt of court. See, e.g., *United States v. Microsoft*, 231 F.Supp. 2d 144 (D.D.C. 2002) (instituting an injunction that includes a set of requirements that are backed by threats of contempt sanctions).

A. *Relying on a Regulated Input: The Otter Tail Case*

Antitrust remedies in the context of regulated industries provide courts with a unique opportunity to award pro-competitive relief without undertaking the responsibilities of superintending the remedy itself. In the *Otter Tail* case,⁶⁶ for example, the Supreme Court made clear that the presence of a regulatory agency was key to the award of injunctive relief. That case involved an electric utility's effort to prevent municipalities in its region from competing with it at the retail level by refusing to sell power at wholesale rates or to wheel power from other wholesalers. Notably, the judicially ordered remedy of mandatory wheeling was not one authorized by the Federal Power Act itself, although the agency presumably enjoyed the competence to enforce such a remedy.⁶⁷ The brilliance of imposing this remedy and leaving it to the agency to administer it was that the regulatory commission, although not authorized to mandate this pro-competitive remedy itself, could evaluate and enforce a tariff—and reject it if it was unreasonable—if the regulated utility decided to file one or an antitrust court directed it to do so.

The model employed in *Otter Tail* provides an ideal approach for antitrust courts to wade into cases arising in regulated industries and award relief without becoming mired in the day-to-day administration of a conduct remedy that a regulatory agency can better monitor. Like in *Otter Tail*, antitrust litigation within the context of local telephone markets provides the opportunity for parties to seek relief that may not presently be available, but that, if granted, could be enforced by the regulatory agency and not the court.⁶⁸ The converse of this point is that regulatory agencies should be mindful of antitrust concerns and regulate access arrangements with an eye to potential antitrust litigation. Significantly, this approach will require antitrust courts and regulators to adjust to a different mindset from times past when it was safe to say that the goal of regulation was to address market power concerns directly while antitrust sought to do so indirectly by facilitating competition.⁶⁹

The *Otter Tail* model of relief encompasses the analytically distinct components of defining the terms of access and remedying a violation of

66. *Otter Tail Power*, 410 U.S. at 366.

67. *See id.* at 373.

68. *See id.* at 375.

69. As then-Judge Breyer put it, “[e]conomic regulators seek to achieve [the goals of low prices, innovation, and efficient production methods] directly by controlling prices through rules and regulation; antitrust seeks to achieve them indirectly by promoting and preserving a [competitive] process that tends to bring [these goals] about.” *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990), *cert. denied*, 500 U.S. 930 (1991).

the requisite terms. In some areas, as was the case in *Otter Tail*, where the terms of dealing need to be defined and overseen, antitrust courts should generally defer to the regulatory agency on the administration of access arrangements.⁷⁰ In other cases, including ones where the agency has defined—or defines pursuant to an antitrust decree—the terms of dealing, there may still be room for antitrust remedies. Put differently, where the question is not the terms of access, but the consequences for failing to provide such access, antitrust law may be able to provide additional remedies, including preliminary relief and monetary damages, to what the regulatory regime can provide.

The reluctance of antitrust courts to enter the business of supervising access governed by telecommunications regulation is quite sound, but the presence of regulatory agencies to define the terms of access can simplify the role of antitrust courts. To be sure, antitrust courts should not seek to enforce all of the Telecom Act's market opening obligations. Nonetheless, where there is a duty to deal on an area that is "indispensable to effective competition," a systematic violation of a particular duty – if it has exclusionary effects – can give rise to a viable antitrust claim.⁷¹ If, for example, an incumbent local telephone provider agreed to use certain procedures for switching customers to a rival's network, but the incumbent provider willfully and systematically failed to follow those procedures so as to substantially impair the entrant's ability to compete, this practice might violate the antitrust laws as well as the Telecom Act.⁷² Similarly, if an incumbent provider caused customers to experience unnecessarily high rates of blocked calls (i.e., busy signals) after they switched to a competitor, thereby deterring other customers from switching service, that practice would also warrant antitrust scrutiny. In cases such as these, courts should generally follow the *Otter Tail* model by leaving it to the regulatory agency to define and enforce the precise terms on which the parties must deal, undertaking for itself only the role of evaluating whether the conduct gives rise to antitrust liability and assessing appropriate monetary damages.

70. This is the argument developed in Gregory J. Werden, *The Law and Economics of The Essential Facilities Doctrine*, 32 ST. LOUIS U. L.J. 433, 473-74 (1987).

71. *Olympia*, 797 F.3d at 379.

72. See *N.E. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 94 (2d Cir. 1981) (arguing that the use of an interconnection arrangement that imposed "a significant and probably unnecessary disadvantage" stated an antitrust claim).

*B. Mandating a Wider Provisioning of an Existing Access Right:
The Case of the Terminal Railroad*

In the *Terminal Railroad* case, the Supreme Court confronted a situation where an access arrangement existed, but only for certain parties.⁷³ Although *Terminal Railroad* arose under Section 1 of the Sherman Act and involved a number of parties to an access arrangement, this case is significant in that it essentially invented the concept of an access right based on the antitrust laws. In that case, the United States requested the dissolution of the Terminal Railroad Association on the ground that the Association's control of the gateways into St. Louis unreasonably restrained trade. The Court properly noted that it was not the joint ownership of the facility per se that violated the antitrust laws, but rather that the discriminatory access arrangements disadvantaged those who were not participants in the Association. Thus, the Court offered the Association a choice: either allow other companies to join the association and enable non-participants to use the facilities on just and reasonable terms or dissolve the Association (which brought together three separate facilities). In outlining the former remedy, the Court made clear that access to the bottleneck facility must be provided "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."⁷⁴ The Association took that course. In a later appeal, the Supreme Court explained that it would not get dragged into some of the finer points about the rates charged by the Association—namely, whether it could charge differential rates on the east and wide side; instead, it stressed that rate setting is a legislative function and that the Interstate Commerce Commission is authorized to oversee the association's rate structure.⁷⁵ In so doing, the court followed the same model discussed above and used in *Otter Tail*.

C. Relying on a Prior Course of Dealing: The Aspen Skiing Case

The *Aspen* case presents yet another model for developing a judicially manageable remedy. To be precise, *Aspen* does not provide a direct precedent for enjoining conduct on the basis of a prior course of dealing because it did not actually involve an award of injunctive relief. Nonetheless, the treble damages verdict in that case served as an instruction to the same effect. Unfortunately, this remedy may be insufficient in markets that

73. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912).

74. *Id.*

75. *See Terminal R.R. of St. Louis v. United States*, 266 U.S. 17, 30-31 (1924).

move very quickly, as yesterday's terms of access may be insufficient to enable a company to remain a viable competitor today.

The challenge of the prior course of dealing concept in high technology industries, as is evident from the remedial proceedings in the *Microsoft* case, is to determine what baseline is an appropriate one to codify in an antitrust decree. In *Microsoft*, for example, the federal government and Microsoft agreed to regulate older versions of the Windows operating system, but the litigating States maintained that Microsoft should also be required to make available a modular version of the operating system—i.e., without “middleware” technologies previously not included in the prior version of the system.⁷⁶ In making this argument, the litigating states invoked a version of the prior course of dealing concept by arguing that Microsoft actually provides such a version to certain customers.⁷⁷

Finally, it is important to highlight two cautionary considerations for courts evaluating a remedy that would require a continuation of a prior course of dealing. First, courts should appreciate that such a remedy levies a tax on a firm's prior willingness to deal (by punishing its subsequent change) and thus might deter valuable experimentation in future business strategies.⁷⁸ Second, courts should recognize that the benefit of this model is to avoid placing themselves in the role of overseeing day-to-day relations between the affected companies.⁷⁹ In theory, relying on a prior course of dealing provides a baseline for rules and remedies that are easy to administer and will avoid placing an antitrust court in the role of constantly

76. See Nicholas Kulish, *Ballmer Says Windows Rests on Ruling*, WALL ST. J., Mar. 5, 2002, at B6 (discussing this dispute).

77. See Joe Wilcox, *States Missed A Break In Microsoft Trial*, CNET News.com (May 13, 2002), at <http://news.com.com/2100-1001-912128.html> (explaining argument that Windows XP Embedded, which was designed to run devices with embedded processors, proves that middleware can safely be removed).

78. As Judge Posner put it:

Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exit from a market in which it was a major seller.

Olympia Equip. Leasing v. W. Union Tel. Co., 797 F.2d 370, 379-80 (7th Cir. 1986). In *Aspen*, the Court may have doubted that it was imposing such a tax because, in areas where ski slopes competed with one another, the defendant in that case actually behaved in the manner sought by the plaintiff. See *Aspen Skiing*, 472 U.S. at 603 n.30. In many cases, however, such a benchmark may not be available, making such a judgment more difficult.

79. Another area of antitrust law that endeavors to follow this caution is the technological tying doctrine. Similar to the prior course of dealing concept used here, that area of the law can look to whether competitors also use the approach in question. See M. Sean Royall, *Coping With The Antitrust Risks of Technological Integration*, 68 ANTITRUST L.J. 1023, 1056 (2001) (discussing issue).

regulating a business, but courts should be careful to ensure that this approach works in a minimally intrusive fashion in practice.⁸⁰

D. The Non-Discrimination Model: The AT&T and Kodak Cases

To account for a degree of dynamism in an industry, courts sometimes impose a non-discrimination requirement that sets a moving benchmark for an access right. In practice, this often means identifying preferred customers—or internal division of its own operations—and ensuring that the would-be-discriminated against party obtains the same treatment.⁸¹ In the *AT&T* case, the obvious benchmark for access to the local network was to require that AT&T's long distance competitors obtained "equal access" to what AT&T received from the local Bell Companies.⁸² In *AT&T*, the anti-trust court could—and did—rely on a regulatory agency to enforce the terms of access by requiring the Bell Companies to file tariffs that defined the access arrangements.⁸³ More recently, the Ninth Circuit's decision in *Kodak* approved an injunction that imposed a non-discriminatory access obligation on Kodak's distribution of parts to independent service organizations that repaired its copiers.⁸⁴

80. See, e.g., *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) ("Antitrust courts normally avoid direct price administration, relying on rules and remedies [such as structural ones] that are easier to administer."). Critics routinely assailed the AT&T consent decree on this ground. See Howard A. Shelanski & J. Gregory Sidak, *Anti-trust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 36 (2001) (noting the criticism and the point that "the greater the administrative requirements of a remedy, the greater the risk that antitrust enforcement converts into expensive and inefficient industrial policy."); see also Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation Under Judge Greene*, 50 HASTINGS L.J. 1395, 1402 (1999) (discussing this criticism and defending Judge Greene).

81. Contract law, in enforcing the requirement to deal in good faith, sometimes imposes a similar obligation upon firms. See, e.g., *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 614 (2d Cir. 1979) (Friendly, J.) (discussing implications of good faith effort requirement).

82. See *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982); *United States v. AT&T*, Competitive Impact Statement, 47 Fed. Reg. 7170, 7184 (Fed. 17, 1982); see also Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 184 (2001) ("[T]he most important provision of the decree was a requirement that the Bell companies modify their switching facilities to provide equal access to all long-distance competitors, a requirement that the FCC subsequently extended to the independent local companies.").

83. See *United States v. AT&T*, Competitive Impact Statement in Conjunction with Proposed Modification of Judgment, 47 Fed. Reg. 7170, 7180 (Feb. 17, 1982) (noting that the "tariffs remain subject to regulatory jurisdiction").

84. See *Image Technical Serv., Inc. v. Eastman Kodak, Co.*, 125 F.3d 1195, 1218 n.11 (9th Cir. 1997).

The Ninth Circuit's *Kodak* decision underscored the limits of antitrust remedies by lifting the part of the district court's injunction that imposed, in addition to a non-discriminatory access requirement, a reasonableness limitation on the price at which Kodak would license its intellectual property under the decree. By imposing a reasonableness limitation, the district court would have both involved itself in price-setting decisions. In rejecting the district court's regulation of pricing, the Ninth Circuit explained that the non-discrimination provision would avoid this challenge while limiting Kodak's ability to abuse its market power.⁸⁵

CONCLUSION

In rejecting the aggressive reading of *Goldwasser*, antitrust courts should follow three principles in applying the Sherman Act to the telecommunications industry. First, they should not use the *Goldwasser* doctrine as a form of backdoor immunity to evaluating the merits of an antitrust action. Second, they should appreciate that the domain of antitrust is more focused than the wide array of duties (and potential remedies) imposed by the Telecom Act. Indeed, it is the focused, clearly authorized, and effective nature of antitrust oversight that makes it so important that antitrust courts not stay their hand when presented with viable claims of anticompetitive conduct in the telecommunications industry. Finally, when a plaintiff establishes a case for liability, courts should consider carefully how to craft a remedy that coheres with the regulatory regime, avoiding, except for the most exceptional situations, regulating the price of access.⁸⁶

85. 125 F.3d at 1226 n.19 (explaining concerns related to "direct price regulation").

86. See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (noting that antitrust courts generally should avoid taking on the role of a "rate-setting regulatory agency"); see also *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995) (Posner, C.J.) ("[T]he antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute."); III PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 720b, at 207-08 (2d ed. 1996) (arguing that antitrust courts generally avoid direct price regulation because "tribunals lack both the expertise and the narrow jurisdictional focus necessary to make such regulatory schemes work").

* * *