

SAVING *OTTER TAIL*: THE ESSENTIAL FACILITIES DOCTRINE AND ELECTRIC POWER POST-*TRINKO*

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I. INTRODUCTION

As with other network-based industries, regulation of electric power continues to evolve and embrace market-based reforms. These reforms include the Federal Energy Regulatory Committee’s (FERC) expanded regulatory authority to mandate open access to electric power transmission infrastructure and to force vertically integrated electric power wholesalers/transmitters to “wheel” power of their competitors.¹ The continuing changes in the wholesale electric power market’s regulatory scheme have fueled a discussion over the role of antitrust law in the industry.² Similarly, deregulatory changes in other regulated industries, such as telecommunications, have spawned a similar debate.³

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1. See discussion *infra* Part IV.C.

2. This discussion is occurring in several areas of antitrust law, including the utility’s use of the filed rate defense, see Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591 (2003), and the price-squeeze doctrine, see Greg Goelzhauser, Comment, *Price Squeeze in a Deregulated Electric Power Industry*, 32 FLA. ST. U. L. REV. 225 (2004), and Lawrence J. Spiwak, *Is the Price Squeeze Doctrine Still Viable in Fully-Regulated Energy Markets?*, 14 ENERGY L.J. 75 (1993).

3. See, e.g., Robert W. Crandall, *The Remedy for the “Bottleneck Monopoly” in Telecom: Isolate It, Share It, or Ignore It?*, 72 U. CHI. L. REV. 3 (2005); Philip J. Weiser, Goldwasser, *the Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003).

An issue of particular concern in wholesale electric power regulation (as well as antitrust law generally⁴) is the further need for the essential facilities doctrine, given the current authority of FERC to compel competition in the industry. The essential facilities doctrine, which emerged from the United States Courts of Appeal in the late 1970s, generally states that an owner of an “essential facility” has a duty to grant others access to the facility and that refusing such access violates section 2 of the Sherman Act.⁵ In circuits where the doctrine is recognized, an essential facilities claim is applicable to all industries (regulated or unregulated), but most commentators recognize that essential facilities claims have a “larger place” within regulated markets.⁶

Since being introduced as a theory of antitrust recovery, however, the essential facilities doctrine has endured a great amount of criticism.⁷ The author of the leading treatise on antitrust law has dubbed the doctrine as “one of the most troublesome, incoherent and unmanageable of bases for Sherman § 2 liability.”⁸ Additionally, the United States Supreme Court has repeatedly refused to formally adopt the essential facilities doctrine.⁹ Regardless of the nearly universal criticism of the doctrine, it is still considered a viable cause of action in most circuits under the Sherman Act. This conventional wisdom particularly applies to Sherman Act claims in the sphere of wholesale electric power markets given that *Otter Tail Power Co. v. United States*,¹⁰ a case where the Supreme Court ordered a vertically integrated electric power utility to wheel power for a competitor, is considered by some to be a significant part of the foundation of the essential facilities doctrine, as crafted in the lower courts.

Recently, however, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,¹¹ the United States Supreme Court cast doubt for the first time over the continuing viability of essential facilities claims in regulated markets. Although *Trinko* involved antitrust claims in the context of telecommunications regulation under

4. See Stanley M. Gorinson, *Overview: Essential Facilities and Regulation*, 58 ANTITRUST L.J. 871 (1989) (discussing the practical difficulties in implementing antitrust remedies under the essential facilities doctrine in regulated industries).

5. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 7.7, at 306 (2d ed. 1999).

6. *Id.* § 19.5, at 708. Professor Hovenkamp argues that the major essential facilities doctrine cases share a common thread—regulatory policy created the alleged essential facility. Examples of policy creating the essential facility are telephone directories, the connection of terminal equipment to telephone lines, interconnection with railway lines, and electric transmission lines. *Id.*

7. See *infra* Part II.A.

8. HOVENKAMP, *supra* note 5, § 7.7, at 305.

9. See *infra* Part II.A.

10. 410 U.S. 366 (1973).

11. 540 U.S. 398 (2004).

the Telecommunications Act of 1996, this Comment argues that the language used by the Court almost certainly forecloses most future essential facilities claims in the electric power context. Further, as a policy matter, there is a strong argument that FERC's authority to compel open access and wheeling *should* replace claims under the essential facilities doctrine, as FERC is more likely to have the expertise and flexibility necessary to address competitive concerns in electric power markets that is largely lacking in federal courts. Thus, judicial "regulation" under the Sherman Act would be overly duplicitous and costly. However, the courts should not completely abdicate their role in addressing antitrust concerns in the electric power industry. This Comment argues that antitrust claims similar to those addressed in *Otter Tail* should remain available to plaintiffs as a method of redress when an electric power company's anticompetitive conduct evades regulation. In this regard, *Otter Tail* should not be considered an essential facilities case, but an example of anticompetitive conduct within a regulated industry rooted in the competitive concerns of section 2 of the Sherman Act.

Part II of this Comment discusses the basis of the essential facilities doctrine in decisions of the United States Supreme Court, its subsequent development in the circuit courts, and some of its prevailing criticisms. Part III explores *Trinko* and its implications on essential facilities claims in the context of regulated markets. Part IV briefly discusses the structure of the electric power industry and describes FERC's authority to ensure a competitive market in electric power wholesale and transmission, including the effect of the 1992 Energy Policy Act and FERC Order No. 888. Part V discusses the use of essential facilities claims in electric power litigation. Part VI argues that the above statutes and policies, under *Trinko*, effectively remove most essential facilities claims from antitrust litigation in the electric power wholesale market. Part VI also argues that the elimination of such claims, as a policy matter, is beneficial because FERC, rather than the courts, is a more appropriate body to ensure competition in the electric power market, as opposed to the courts. However, § 2 Sherman Act claims under *Otter Tail* should remain available to address gaps in FERC's regulatory scheme. Part VII concludes this Comment.

II. THE ESSENTIAL FACILITIES DOCTRINE

Prior to discussing the development of the essential facilities doctrine, a basic explanation of Sherman Act claims is necessary. Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is de-

clared to be illegal.”¹² Section 2 of the Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”¹³ Anticompetitive conduct falling under section 1 typically involves “combinations” or a contract, and thus, it typically involves more than one entity—such as group refusals to deal and horizontal price fixing.¹⁴ Section 2 claims primarily involve unilateral action by a single entity, such as unilateral refusals to deal.¹⁵ Essential facilities claims are generally categorized as unilateral refusals to deal under section 2 of the Sherman Act.¹⁶ It is important to note that under the antitrust laws, courts view concerted anticompetitive conduct of multiple firms (under section 1), such as a price-fixing arrangement, with much more suspicion than the action of a single entity, such as a unilateral refusal to deal with a rival.¹⁷ This is primarily due to the long standing principal of antitrust law that a firm, regardless of its market power, has the freedom to deal with whomever it wants and to set the terms under which it will deal with another.¹⁸

The following subparts will roughly summarize the basis and development of the essential facilities doctrine in the federal courts. The development of the doctrine occurred primarily in the circuit courts; however, those circuits that have adopted the doctrine claim that it is rooted in several United States Supreme Court cases. Therefore, a discussion of the relevant Supreme Court decisions is necessary.

A. “Development” in the Supreme Court

Most courts and commentators consider the Supreme Court’s decision in *United States v. Terminal Railroad Ass’n*¹⁹ the “seminal case” in the evolution of the essential facilities doctrine.²⁰ In *Termi-*

12. 15 U.S.C. § 1 (2000). The statutory language of both section 1 and section 2 of the Sherman Act is admittedly ambiguous. Thus, antitrust jurisprudence has been largely developed through case law. See HOVENKAMP, *supra* note 5, § 2.1b.

13. 15 U.S.C. § 2 (2000).

14. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 3-5 (1958) (discussing the various claims recognized as Sherman section 1 violations); *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007, 1008 (1985) (“Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade.”).

15. *Blanton*, 471 U.S. at 1008 (“Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization.”).

16. See HOVENKAMP, *supra* note 5, § 7.7, at 306.

17. *Id.*

18. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

19. 224 U.S. 383 (1912).

20. Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1204 (2002).

nal Railroad, an antitrust action was brought against the Terminal Railroad Association of St. Louis, which was organized pursuant to an agreement between Jay Gould and several railroad companies.²¹ The association was formed for the express purpose of obtaining and consolidating the properties of several terminal companies on each side of the Mississippi River in St. Louis, Missouri.²² After all acquisitions were completed, Terminal Railroad had complete control of facilities required for loading and unloading freight traffic and passengers on both sides of the Mississippi River.²³ The contract that formed Terminal Railroad Association ensured that only those companies with a proprietary interest in the association were allowed to use the association's facilities, unless there was a unanimous vote allowing use by a nonproprietary company.²⁴

The Court held that Terminal Railroad's combination ownership of all rail facilities in St. Louis violated the Sherman Act.²⁵ A primary reason for the Court's decision was the ability of Terminal Railroad to exclude competitors from the only rail facilities traversing the Mississippi in St. Louis.²⁶ As a remedy, however, the Court did not dissolve Terminal Railroad but mandated that they admit all competing railroads to ownership on the same terms as existing members.²⁷

Terminal Railroad is commonly included in the line of cases that establish the essential facilities doctrine,²⁸ yet the notion that *Terminal Railroad's* reasoning is readily applicable to the modern essential facilities doctrine is not without its critics. One commentator has noted the difficulty in reading a doctrine of shared access into the *Terminal Railroad* decision:

The Court made no theoretical or doctrinal generalizations. It seems to have accepted defendants' arguments that duplicate facilities were impractical (though this is not entirely clear), but it did not derive from that any reliable generalizations about what this implied. Although it chose to remedy the violation in this case by ordering shared access to the facilities, it conceded that the

21. 224 U.S. at 391. Initially, Terminal Railroad consisted of six members but was later expanded to include fourteen. *Id.* at 399.

22. *Id.*

23. *Id.* at 393-95. See also Abbot B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1189 (1999).

24. *Terminal R.R.*, 224 U.S. at 399-400.

25. *Id.* at 406-09.

26. *Id.* at 401 ("That through their ownership and exclusive control [Terminal Railroad is] in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable.").

27. *Id.* at 411-12.

28. HOVENKAMP, *supra* note 5, §7.7, at 306.

government's preferred remedy of dissolution . . . might be necessary.²⁹

Another valid criticism is that *Terminal Railroad* is distinguishable from most modern essential facilities cases because it involved concerted activity, which, as previously noted, is more suspect under the Sherman Act. Thus, as Herbert Hovenkamp notes, *Terminal Railroad* "makes a poor ancestor for the essential facility doctrine, because it was a § 1 case, involving an agreement among multiple firms who controlled the facility."³⁰

Two other Supreme Court decisions typically associated with the development of the essential facilities doctrine are *Associated Press v. United States*³¹ and *Otter Tail Power Co. v. United States*.³² *Associated Press*, considered "a more doubtful case" than *Terminal Railroad* by some,³³ involved a news cooperative (AP) whose membership included approximately 1200 daily newspapers.³⁴ AP collected news from its own staff, as well as affiliates and each of the 1200 member newspapers.³⁵ All member newspapers were entitled to access the news provided by any other member newspaper and AP.³⁶ This arrangement enabled members to collectively achieve economies of scale—"[t]he members collectively could support a reporter in Istanbul or a staff of economic experts to analyze antitrust decisions for the benefit of readers."³⁷ The problem with the arrangement, in the Court's opinion, was that AP's bylaws prohibited members from selling news to anyone other than AP members, and they also gave each member the power to block nonmember competitors from membership.³⁸ This allowed a daily newspaper which was a member of AP to prevent a rival newspaper from receiving news from an AP member.³⁹

The Court held that the ability of AP members to discriminate against competitors in its admission policies violated section 1 of the Sherman Act.⁴⁰ Although the Court's reasoning was slightly unclear,⁴¹ it considered the exclusivity bylaw provisions in question unreasonable because, as implemented, they were used to destroy com-

29. Robinson, *supra* note 20, at 1205.

30. HOVENKAMP, *supra* note 5, §7.7.

31. 326 U.S. 1 (1945).

32. 410 U.S. 366 (1973).

33. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 842 (1989).

34. 326 U.S. at 3-4.

35. *Id.* at 3.

36. *Id.* at 4.

37. Areeda, *supra* note 33, at 842.

38. 326 U.S. at 5-6.

39. *Id.* at 8-9.

40. *Id.* at 21-22.

41. Areeda, *supra* note 33, at 843.

petition.⁴² Professor Areeda summarizes the perceived black letter law of *Associated Press* in the following manner:

(1) whenever competitors jointly create a useful facility, (2) that is essential to the competitive vitality of rivals, (3) and (perhaps) essential to the competitive vitality of the market, (4) and admission of rivals is consistent with the legitimate purposes of the venture, then (5) the collaborators must admit rivals on relatively equal terms.⁴³

As with *Terminal Railroad*, the primary criticism of *Associated Press* as a basis for the essential facilities doctrine is that it involved the concerted group activity of several entities, as opposed to the unilateral activity of a single entity.⁴⁴ This criticism is important because the modern essential facilities doctrine primarily concerns unilateral refusals to deal.⁴⁵ Another important distinction between the factual background of *Associated Press* and current essential facilities cases concerns the available remedies to the alleged anticompetitive conduct. Thus, the available remedy in *Associated Press* (admission to the joint venture) is both relatively easy to administer and does not entail day-to-day monitoring and control.⁴⁶

*Otter Tail Power Co. v. United States*⁴⁷ is the first Supreme Court case that resembles a modern essential facilities claim.⁴⁸ The case is also important, for the purposes of this Comment, because it involved a fully integrated electric power company's refusal to wheel, or distribute power, to a municipality. Otter Tail Power was an investor-owned utility (IOU) that generated and transmitted electric power to the majority of towns in Minnesota, North Dakota, and South Dakota.⁴⁹ Several towns, however, received their power through municipal power companies that purchased low-rate power from the Federal Bureau of Reclamation Projects outside Otter Tail's power grid. The power purchased from these projects, though, had to be "wheeled" over Otter Tail's transmission lines to the individual municipalities.⁵⁰ Otter Tail resisted the efforts of the municipalities' at-

42. 326 U.S. at 15.

43. Areeda, *supra* note 33, at 844.

44. HOVENKAMP, *supra* note 5, § 7.7; Areeda, *supra* note 33, at 844-45.

45. HOVENKAMP, *supra* note 5, § 7.7.

46. Areeda, *supra* note 33, at 844-45.

47. 410 U.S. 366 (1973).

48. HOVENKAMP, *supra* note 5, §7.7. Lipsky and Sidak refer to it as "the high-water mark of the essential facilities doctrine." Lipsky & Sidak, *supra* note 23, at 1205.

49. *Otter Tail*, 410 U.S. at 368.

50. *Id.* at 370-71.

tempts to purchase power from other sources by refusing to allow use of its transmission lines.⁵¹

Though the Supreme Court did not rule against Otter Tail based on the essential facilities doctrine,⁵² it did hold that Otter Tail's conduct violated section 2 of the Sherman Act.⁵³ A unique obstacle to the Court, however, was the interrelation of the Sherman Act with existing regulations of electric power companies under the Federal Power Act. Otter Tail argued that its refusals to deal with the municipalities were immune from antitrust prosecution because the Federal Power Commission (FPC) had the power to compel involuntary interconnections of power under the Federal Power Act.⁵⁴ The Court rejected this contention because the interconnection provision of the Federal Power Act primarily emphasized *voluntary* interconnection agreements—in that the FPC could not mandate interconnection unless a power company refused to interconnect voluntarily.⁵⁵ Even when the FPC could order an involuntary interconnection, its authority in this regard was subject to restrictions unrelated to antitrust concerns.⁵⁶

Once the Court disposed of Otter Tail's regulatory argument, it held that "Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws."⁵⁷ Thus, the district court's decree ordering Otter Tail to wheel and/or sell wholesale power to the municipal power companies was upheld.

The *Otter Tail* decision was different, both factually and doctrinally, from *Terminal Railroad* and *Associated Press*. First, the anti-competitive conduct challenged in *Otter Tail* consisted of the actions of a single firm. Second, "[n]ot only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers."⁵⁸ Finally, *Otter Tail* raised the issue of the ability of the courts to regulate and enforce, in terms of access, rates, and terms—a decree that forces multiple firms to contract with each other. The majority solved this remedial hurdle by holding that such regulation fell within the responsibility of FPC

51. *Id.* at 368, 370-71. Professor Hovenkamp notes "Otter Tail's apparent purpose was to force the municipalities to become its own customers." HOVENKAMP, *supra* note 5, § 7.7.

52. The lower court did find Otter Tail guilty of anticompetitive conduct via the essential facilities doctrine. *See* *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971), *modified*, 410 U.S. 366 (1973).

53. *Otter Tail*, 410 U.S. at 378-79.

54. *Id.* at 372.

55. *Id.* at 373.

56. *Id.*

57. *Id.* at 377.

58. Areeda, *supra* note 33, at 848.

regulation—in that the FPC could regulate the rates Otter Tail charged.⁵⁹ In short, the Court ordered Otter Tail to give the municipalities access to its transmission lines but delegated the more difficult task—the terms of such access—to a regulatory agency.

Professor Areeda believes that the existence of a regulatory infrastructure to supervise the Court's order makes *Otter Tail* a narrow case in the line of essential facilities cases.⁶⁰ However, the FPC's administration of the Court's order involved more than just ensuring open access at reasonable rates and with reasonable terms. In the case, Otter Tail Power raised the valid concern of forced access eroding its system and damaging its ability to serve its customers.⁶¹ The majority opinion attempted to address this concern by simply stating that under federal statutes, the FPC could not order interconnection if to do so "would impair [the utility's] ability to render adequate service to its customers."⁶² However, the difficulty remained as to how Otter Tail was to establish priorities between the competing requests for service over its grid.⁶³

As stated above, many consider *Otter Tail* the first essential facilities case at the Supreme Court level. There is a strong argument, though, that *Otter Tail* is not an essential facilities case but is rooted instead in the language of section 2 of the Sherman Act. The easiest argument in support of this contention is that, as with many other cases since *Otter Tail*, the lower court adopted the essential facilities doctrine and resolved the dispute on those grounds, but the Supreme Court refused to follow suit. Further, the Court's antitrust analysis was not consistent with the elements of a modern essential facilities claim. In contrast, the Court's analysis of Otter Tail Power's conduct resembled a more traditional antitrust analysis under section 2 of the Sherman Act—the Court found that Otter Tail was a natural monopoly, and its refusal to wheel power for its competitors was motivated only by Otter Tail's intention to exclude its competitors from the market and preserve its monopoly.⁶⁴

The last case that many believe is part of essential facility jurisprudence is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*⁶⁵ In

59. 410 U.S. at 377. The partial dissenters in the case argued that FPC did not have regulatory jurisdiction over the decree. *Id.* at 392-93.

60. Areeda, *supra* note 33, at 848 ("Thus, the Court could airily require Otter Tail to deal but never burden itself with the administrative details, because the Federal Power Commission had the statutory authority and presumed expertness to regulate the prices and terms of dealing. *Otter Tail* is thus quite narrow.")

61. 410 U.S. at 380.

62. *Id.* at 381 (quoting 16 U.S.C. § 824a(b) (2000)).

63. Lipsky & Sidak, *supra* note 23, at 1207.

64. See also *Town of Massena v. Niagara Mohawk Power Corp.*, No. 79-CV-163, 1980 WL 1889 (N.D.N.Y. Sept. 8, 1980).

65. 472 U.S. 585 (1985).

Aspen, the owner of a downhill skiing facility brought a Sherman Act § 2 action against an owner of three competing skiing facilities in Aspen, Colorado. Initially, three separate owners operated the only three existing skiing facilities in Aspen—Ajax, Buttermilk, and Highlands.⁶⁶ The three facilities jointly agreed to offer an “all-Aspen” ticket, which allowed skiers flexibility and choice in which mountain(s) they used.⁶⁷ Eventually, Ski Co., the owner of Ajax, acquired ownership of Buttermilk, giving it control of two of three available skiing facilities.⁶⁸

The all-Aspen pass agreement continued between Ski Co. and Highlands, but Ski Co. also introduced a rival pass involving only Ajax and Buttermilk.⁶⁹ Soon thereafter, Ski Co. opened a new downhill facility—Snowmass.⁷⁰ Though Ski Co.’s separate pass initially outsold the all-Aspen pass, this trend reversed itself when Snowmass opened.⁷¹ The all-Aspen pass continued for the next several years with only a few functional changes, such as how to divide revenues and physical changes to the pass itself.⁷² However, in 1977, Ski Co. only agreed to continue the pass if Highlands accepted a lower percentage share of the pass revenue.⁷³ Though Highlands did not want to accept this change, it did so in order to continue to receive the marketing benefits of the all-Aspen pass.⁷⁴ The following year the all-Aspen pass ended when Ski Co. proposed an even lower percentage share of the pass revenue for Highlands, which Highlands found unacceptable.⁷⁵ Thereafter, the only ski pass available was that of Ski Co.’s, which covered Snowmass, Buttermilk and Ajax.⁷⁶ Highlands found it difficult to compete with Ski Co. and tried to duplicate the previous all-Aspen pass, but to no avail. Ski Co. even refused to sell Highlands the lift tickets to its facilities at retail costs.⁷⁷

The Supreme Court, in analyzing Highlands’s Sherman Act claim against Ski Co., restated the general antitrust principle that a firm

66. *Id.* at 587-88.

67. *Id.* at 589. The ticket was a six-day pass, consisting of a booklet of six coupons, which could be redeemed for daily lift tickets at either of the facilities. *Id.* The booklet’s price was lower than the price of buying individual tickets to each facility. *Id.* Revenues from the sale of the coupons were divided pro rata according to the number of coupons collected by the individual facilities. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 589-90.

72. *Id.* at 590.

73. *Id.*

74. *See id.*

75. *Id.* at 592-93.

76. *Id.* at 593.

77. *Id.* at 593-94.

with monopoly power has no duty to deal or cooperate with a rival.⁷⁸ The lack of this duty, however, did not mean that *all* refusals to deal with a competitor passed muster under antitrust laws—a firm’s refusal to deal cannot evidence an intent to create or maintain a monopoly.⁷⁹ In proceeding with its analysis, the Court examined the trial court record and determined that there was sufficient evidence to support the jury’s verdict that Ski Co.’s refusal to deal (its decision to discontinue the all-Aspen pass) with Highlands was not supported by a valid business justification.⁸⁰ The Court emphasized the history of the parties’ dealings (in offering the pass) and the fact that Ski Co. refused to sell its tickets to Highlands at retail price.⁸¹

The *Aspen* case is important in terms of the essential facilities doctrine because many subsequent essential facilities cases have incorporated language from the decision.⁸² However, the *Aspen* analysis may be a strong indicator that the essential facilities doctrine is unnecessary. Although the Tenth Circuit *Aspen* decision affirmed the jury’s decision on essential facilities grounds,⁸³ the Supreme Court, as has been its custom, expressly refused to consider the case on essential facilities terms, opting instead for a strict Sherman Act analysis.⁸⁴ Professor Herbert Hovenkamp believes that the Court’s resolution of the *Aspen* case, without relying on the essential facilities doctrine, is evidence that the doctrine is unnecessary—that courts only need to examine the defendant’s market power, its reasons for refusing to deal, and the resulting competitive harms.⁸⁵

78. *Id.* at 600. Interestingly, the issue of market power in the *Aspen* case was not preserved for appeal and the Court’s decision in *Aspen* was premised on the lower court’s finding that Ski Co. was a monopolist. *Id.* at 587. However, some believe the lower court’s holding that Ski Co. had market power was economically preposterous. See Lipsky & Sidak, *supra* note 23, at 1209. Lipsky and Sidak state:

[t]he ski slopes of Aspen were filled not with local residents, but with vacationers who traveled to Aspen after choosing it over alternative ski resorts. By definition, therefore, producer substitutability should have made the relevant market not Aspen, Colorado but . . . ski resorts in the United States, Canada, and perhaps even Europe.

Id.

79. *Aspen*, 472 U.S. at 603-04.

80. *Id.* at 608-11. More specifically, the Court’s decision was based on the harm to consumers created by the elimination of the all-Aspen pass, Highlands decreasing market share since after the pass’s elimination, and Ski Co.’s failure to persuade the jury that it had a business justification for eliminating the pass. See Lipsky & Sidak, *supra* note 23, at 1210-11.

81. *Aspen*, 472 U.S. at 593.

82. HOVENKAMP, *supra* note 5, § 7.7.

83. Lipsky & Sidak, *supra* note 23, at 1208-09.

84. *Id.* at 1211.

85. HOVENKAMP, *supra* note 5, § 7.7, at 306. Hovenkamp further notes that it is unfortunate that lower courts have not followed this route. *Id.*

B. The "Modern" Essential Facilities Doctrine and Its Critics

A general statement of the essential facilities doctrine, as developed in the district and circuit courts, is "that the owner of a properly defined 'essential facility' has a duty to share it with others, and that a refusal to do so violates § 2 of the Sherman Act."⁸⁶ The elements of an essential facilities claim consist of "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."⁸⁷ The threshold inquiry that courts must satisfy before applying the elements of an essential facilities claim is whether or not the facility in question is "essential."⁸⁸

Most of the things found by courts to be essential facilities have fallen into one of three classifications: (1) natural monopolies or joint venture arrangements subject to significant economies of scale; (2) structures, plants or other valuable productive assets that were created as part of a regulatory regime . . . ; or (3) structures that are owned by the government and whose creation or maintenance is subsidized.⁸⁹

The common thread between these three categories is that the owner of the facility has great cost advantages over those who seek access to it.⁹⁰ Thus, an essential facility is basically a "relevant market for some input that is crucial to the production of some secondary product."⁹¹ Among regulated industries, the courts have held the following facilities essential: telephone listings, the connection of terminal equipment to telephone lines, connections with railway lines, and of course, interconnection with electric transmission lines.⁹²

The development of the essential facilities doctrine over the past few decades has spawned a great deal of criticism from commentators. The most prolific criticism of the doctrine has come from Phillip Areeda.⁹³ Professor Areeda argues that no case "provides a consistent rationale for the doctrine" or "explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share

86. *Id.*

87. *Id.* § 7.7 (quoting *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983)).

88. *Id.*

89. *Id.* § 7.7a. (footnotes omitted).

90. *Id.* Professor Hovenkamp argues that because "monopolization is a market power offense, a properly defined essential facility must define a relevant market or a substantial portion of one; alternatively, it must serve as a bottleneck that permits market power to be exercised in a properly defined relevant market." *Id.* However, most courts have not required essential facilities plaintiffs to define such a market. *Id.*

91. *Id.*

92. *Id.* § 19.5.

93. *See* Areeda, *supra* note 33.

it with a rival.”⁹⁴ Thus, according to Areeda, essential facilities is “less a doctrine than an epithet”⁹⁵ In order to cut off the risk of a continuing and ridiculous expansion of essential facilities claims, Areeda offers six limiting principles to guide any essential facilities inquiry: (1) compulsory access should be exceptional, (2) a facility is essential only when it is vital to a plaintiff’s vitality in the market and duplication of the facility is not practical, (3) courts should not order sharing unless it is likely to improve market conditions, (4) a legitimate business purpose defense should always be available, (5) a defendant’s intent should not be relevant—all refusals to deal intend to limit competition and increase profits, and (6) courts should not order compulsory access when the remedy is difficult to supervise.⁹⁶

Professor Hovenkamp calls the essential facilities doctrine “troublesome, incoherent, and unmanageable.”⁹⁷ Professor Hovenkamp believes that a superior method of antitrust analysis in essential facilities situations would be to refine the general refusal to deal doctrine in such a manner to include the more troublesome situations that may now fall though the cracks.⁹⁸ Along these lines, Hovenkamp infers that the doctrine, as it is currently applied, is unnecessary. First, if proper application of the essential facilities doctrine primarily addresses anticompetitive refusals to deal, the general principles of the Sherman Act are all that are needed to remedy the situation.⁹⁹ However, if courts do not limit the application of the doctrine in this manner, the doctrine “loses its mooring in § 2 of the Sherman Act.”¹⁰⁰

Other relevant criticisms from Professor Hovenkamp include the fact that forced sharing requires courts to set the terms of access and, in essence, function as an administrative agency.¹⁰¹ Unlike agencies, however, courts are ill-suited for a regulatory role, and thus, the court’s use of the essential facilities doctrine will not im-

94. *Id.* at 841.

95. *Id.* Professor Areeda likens the rise of the doctrine to other instances of “judging by catch-phrase.” *Id.* In these instances, an extreme case comes before a court that creates a response. The language of the court’s response is later used to expand the doctrine to the “limits of its language,” which leads to absurd results. *Id.*

96. *Id.* at 852-53.

97. HOVENKAMP, *supra* note 5, §7.7, at 305.

98. *Id.* (“The antitrust world would almost certainly be a better place if [the essential facilities doctrine] were jettisoned, with a little fine tuning of the general doctrine of the monopolist’s refusal to deal to fill in the resulting gaps.”).

99. *Id.* Both *Otter Tail* and *Aspen* are examples of where the Court was faced with an essential facilities situation and resolved the respective matters by employing traditional antitrust principles that have developed from the Sherman Act. Further, in both cases, the Court did not adopt and/or use the essential facilities doctrine to aid its analysis.

100. *Id.* § 7.7d. Hovenkamp states that if the doctrine is not rooted in general antitrust principles, it basically becomes a fair access statute that forces one firm to accommodate another even if it does not result in improved market conditions. “As a result, the doctrine is either superfluous or else inconsistent with basic antitrust principles.” *Id.*

101. *Id.* § 7.7d1.

prove consumer welfare.¹⁰² Additionally, mandated sharing reduces the incentive for market entrants to develop their own facilities or infrastructure—once a plaintiff has access to a defendant’s facility, he has no incentive to create his own facility.¹⁰³ This runs counter to the competitive goals of the Sherman Act.¹⁰⁴

III. ENTER *TRINKO*

The latest word from the Supreme Court with regard to the essential facilities doctrine occurred last year in *Trinko*.¹⁰⁵ In *Trinko*, the Supreme Court ruled on the alleged anticompetitive conduct of a regulated entity—a local incumbent telephone exchange carrier.¹⁰⁶ The case is important for the purposes of this Comment because the Court addressed the interrelation of a regulatory scheme and anti-trust claims. The Court also explicitly refused to recognize the essential facilities doctrine but gave an indication of when, if the doctrine were recognized, it would apply in the regulatory context.¹⁰⁷

Verizon Communications was an incumbent local exchange carrier that served New York State.¹⁰⁸ Under the Telecommunications Act of 1996, Verizon was required to share its network with competitors, which included access to unbundled portions of their network.¹⁰⁹ Verizon also had a duty under the Act to give competitors access to its operation support systems (OSS)—without which the competitors

102. Professor Hovenkamp offers the following example:

[S]uppose that the defendant owns a gas pipeline from origin point X to market point Y. The cost of gas at point X is \$10.00 per unit, and the cost of pipeline shipment to point Y is \$2.00 per unit. But X is a monopolist and charges a delivered price of \$15.00 per unit, thus capturing \$3.00 in excess profits per unit shipped. Now a gas producer at point X, wishing to ship to point Y itself, uses the essential facility doctrine to obtain a judicial injunction ordering the defendant to lease space on its pipeline

Unless constrained by the court’s order the defendant will charge its profit-maximizing price of \$5.00 per unit shipped, reducing its own shipments accordingly. The result is that the amount of gas shipped through the pipeline will remain unchanged and the price will not budge. The pipeline owner simply obtains its monopoly overcharge through the lease of the pipeline rather than as a markup on the shipped gas.

Id.

103. *Id.* § 7.7d2.

104. *Id.* Many of Professor Areeda’s proposed limiting principles, if enacted, would address Hovenkamp’s many concerns. Thus, if the essential facilities doctrine were limited to situations where no forced dealing would occur unless it would substantially improve competition in the market, then there would not be a need to worry about perverse anticompetitive incentives. Additionally, if courts limited application of the doctrine to situations where there was a clear and easily applicable remedy, it would go far in curtailing concern over the role of courts acting as administrative agencies.

105. 540 U.S. 398 (2004).

106. *Id.* at 401-02.

107. *Id.* at 411.

108. *Id.* at 402.

109. *Id.*

could not fill their customers' orders.¹¹⁰ In 1999, many of Verizon's competitors complained to the FCC and the New York Public Service Commission (PSC) that Verizon was not meeting its obligations to provide access to OSS, as required by the Telecommunications Act, because many of their orders were not being filled.¹¹¹ The FCC and the PSC both opened investigations into Verizon's conduct, resulting in Verizon entering into a consent decree with the FCC and being subjected to several orders of the PSC.¹¹²

After Verizon entered into the consent decree, the Law Offices of Curtis V. Trinko filed a complaint against it alleging "that Verizon had filled rivals' orders on a discriminatory basis as part of an anti-competitive scheme to discourage customers from becoming or remaining customers of competitive LECs [local exchange carrier], thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service."¹¹³ For this alleged anticompetitive conduct, Trinko sought damages and injunctive relief under, *inter alia*, section 2 of the Sherman Act.¹¹⁴

The Court's analysis began with determining the effect of the Telecommunications Act's regulatory scheme on the application of traditional antitrust principles.¹¹⁵ Although the Court stated that the Act would otherwise appear to be a candidate for implied immunity from antitrust laws, the antitrust savings clause in the statute precluded an interpretation of implied immunity.¹¹⁶ Thus, the Court held that the Telecommunications Act preserved antitrust claims that satisfied existing standards, but it did not create new antitrust claims that go beyond those standards.¹¹⁷

Applying "existing" antitrust standards, the Court analyzed Trinko's claim under the traditional section 2 rubric of a unilateral refusal to deal¹¹⁸ and held that the complaint failed to state a cause of action under the Sherman Act.¹¹⁹ Importantly, the Court, echoing the sentiments of Professor Hovenkamp, discussed the difficulties that arise when firms are compelled to provide competitors access to their infrastructure.¹²⁰ First, forcing firms to grant access to their facilities is in tension with the purpose of antitrust law—that is, it may lessen the incentive for the monopolist, the rival, or both to invest in

110. *Id.* at 403.

111. *Id.*

112. *Id.* at 403-04.

113. *Id.* at 404.

114. *Id.* at 405.

115. *Id.*

116. *Id.* at 406.

117. *Id.* at 407.

118. *Id.* at 407-09.

119. *Id.* at 410.

120. *Id.* at 407-08.

those economically beneficial facilities.¹²¹ Further, as noted by commentators who have criticized the essential facilities doctrine,¹²² compelled access requires courts to assume the role of central planners and identify the price and terms of the compelled access.¹²³ Lastly, compelling a relationship between two or more competitors may facilitate horizontal collusion—a per se violation of the Sherman Act.¹²⁴ On these grounds, the Court reaffirmed the general antitrust principle that “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.’”¹²⁵

When addressing *Trinko*’s essential facilities claim, the Court refused to either adopt or repudiate the doctrine—even though the circuit court concluded that *Trinko*’s complaint might state a claim on essential facilities grounds.¹²⁶ The Court did state that even if the doctrine were viable, it would not apply to *Trinko*’s claim because “the indispensable requirement for invoking the doctrine is the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.”¹²⁷ Where a state or federal agency effectively has the authority to “compel sharing and to regulate its scope and terms,” essential facilities claims should be denied.¹²⁸ Therefore, “[t]he 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access.”¹²⁹

The effect of the *Trinko* decision on the essential facilities doctrine is apparent. Before *Trinko*, an essential facilities claim required proof of only the four elements discussed in Part II.B above. The essential facilities doctrine post-*Trinko* is on more shaky ground in that, if a monopolist who has control over an essential facility falls under the jurisdiction of a regulatory body which can compel access to the essential facility and monitor the scope and terms of the access, a plaintiff will not be able to use the essential facilities doctrine to compel open access under antitrust laws.

IV. THE REGULATED ENTERPRISE OF ELECTRIC POWER

This Part discusses the use of the essential facilities doctrine in the electric power industry. However, before summarizing the pre-

121. *Id.*

122. *See supra* Part II.B.

123. *Trinko*, 540 U.S. at 408.

124. *Id.*

125. *Id.* (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

126. *Id.* at 410.

127. *Id.* at 411.

128. *Id.*

129. *Id.*

vailing applications of the doctrine in this context, a discussion of the electric power industry's structure and the role of FERC in regulating aspects of the industry is necessary.

A. *Electric Power Industry Structure*

Provision of electric power can be divided into three service components: generation, transmission and distribution.¹³⁰ Generation involves producing electricity, mostly through power plants that use coal, oil, natural gas, or uranium as fuel.¹³¹ The transmission system moves the bulk power produced by a power plant to the consumer through an interconnected system of power lines.¹³² Finally, distribution involves transferring electricity to individual customers.¹³³ The distribution system consists of elements that most people, as electric power consumers, are familiar with—substations, poles, and wires.¹³⁴

Prior to more recent efforts to deregulate the electric power industry, fully integrated firms (single corporations) or municipal power companies (public utilities) provided all three services discussed above.¹³⁵ The new deregulatory model unbundles generation, transmission, and distribution functions in an effort to subject the electric power industry to market forces. This results in market competition among the wholesale and retail power generation firms and a natural monopoly in transmission services. Thus, the move to a deregulated model “reflects the view that generation and energy services can be competitive, but the ‘wires’ segments of the industry—transmission and distribution—retain natural monopoly attributes and therefore need to remain subject to regulation.”¹³⁶ As the industry moves toward the deregulated model, several changes in the industry's structure are occurring. The wholesale market for electric power generation is largely deregulated, and market forces, to a great extent, guide prices for wholesale electric power. Federal and state agencies, respectively, regulate the transmission and distribution of electric power. Additionally, some states are attempting to increase competition in retail markets.¹³⁷

130. See FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 654-57 (2000).

131. *Id.* at 654-55.

132. *Id.* at 656.

133. Goelzhauser, *supra* note 2, at 227.

134. BOSSELMAN, *supra* note 130, at 657.

135. See *id.* at 654; Goelzhauser, *supra* note 2, at 228.

136. Thomas M. Lenard, *FERC's New Regulatory Agenda*, J. REG. 36, 36 (Fall 2002). The deregulatory model depends, in large part, on four elements: (1) a deregulated wholesale generation market; (2) a federally regulated transmission market; (3) state regulated local distribution systems; and (4) active competition in retail power and energy services. *Id.*

137. Goelzhauser, *supra* note 2, at 228.

B. Wholesale Competition and Open Access to Transmission Lines

Maintenance of a competitive market in wholesale electricity and the success of the deregulation model depend largely on electric power transmission and open access to the power grid by competing generators.¹³⁸ However, transmission systems are natural monopolies that have all of the characteristics of an essential facility.¹³⁹ Thus, the continued viability of a competitive wholesale power market requires transmission owners to provide access to generators on equal terms and not to discriminate against other generators, if the transmission owner is also in the wholesale power market.¹⁴⁰

C. FERC's Authority to Ensure Open Access to Transmission Systems

Congress's passage of the Public Utilities Regulatory Policy Act (PURPA) marked the beginning of a push to move the electric power industry into a more market-based industry.¹⁴¹ PURPA included two provisions that helped to facilitate competition in the wholesale power market: (1) a provision that encouraged nonutility generators of electricity to be efficient and conserve power¹⁴² and (2) a provision that authorized FERC to mandate wheeling for wholesale customers and suppliers.¹⁴³ This second provision was groundbreaking in that, for the first time, FERC had statutory authority to order an electric power transmission company to wheel the power of a wholesale supplier of electricity. The FPC, FERC's predecessor, did not have such authority under the Federal Power Act.¹⁴⁴ Unfortunately, narrow court and agency interpretations of the wheeling provisions prohibited their beneficial use.¹⁴⁵

Thus, until the passage of the Energy Policy Act of 1992 (EPAAct), the next major reform of electric power regulation after PURPA, FERC remained effectively without authority to order wholesale wheeling to address anticompetitive concerns in the electric power

138. Lenard, *supra* note 136, at 37-38.

139. *Id.*

140. *Id.*

141. Goelzhauser, *supra* note 2, at 231.

142. See BOSSELMAN, *supra* note 130, at 718-19 (discussing, in a more detailed manner, the relevant provisions of PURPA).

143. *Id.* at 719.

144. *Id.* Recall that this was a major obstacle for the defendant in *Otter Tail*. Part of its defense was that the municipalities could receive an order from the FPC ordering Otter Tail to wheel power, thus, superceding the courts' jurisdiction regarding the plaintiff's claim. The Court ruled, however, that the FPA did not grant the FPC such jurisdiction.

145. *Id.* See also Goelzhauser, *supra* note 2, at 231-32. Note that Bosselman, Rossi, and Weaver believe that, although PURPA may have never been used to enhance competition directly, the provisions may have had some indirect effect on competition in the industry. BOSSELMAN, *supra* note 130, at 719-20.

market. The EPAct, adopted by Congress after the first Gulf War, further promoted competition in the electric power market.¹⁴⁶ The most significant development in the statute was that it granted FERC broad authority to mandate wholesale wheeling.¹⁴⁷ Under the EPAct, any electric power firm participating in the wholesale market can apply to FERC for an order mandating that a transmission utility provide wheeling services. FERC, in turn, has the authority to grant the request and order wheeling on “fair terms.”¹⁴⁸ FERC has not shirked from the authority Congress granted in the EPAct, as it has ordered transmission companies to wheel power and has interpreted its authority to order open access broadly.¹⁴⁹

FERC’s growing authority to mandate open access to electric power transmission lines continued in FERC’s formulation of FERC Order No. 888.¹⁵⁰ The purpose of Order No. 888, consistent with the deregulatory model, was to “remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers.” Generally, Order No. 888 required “all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce” to “file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service.”¹⁵¹ Part of the open access requirements of Order No. 888 was its mandated “functional unbundling” of wholesale power generation and transmission services, which required each utility to file separate rates for its wholesale generation, transmission and ancillary services.¹⁵² Order No. 888 extended these open access requirements over unbundled retail transmission in interstate commerce.¹⁵³ Though Order No. 888 did not assert jurisdiction over bundled *retail* sales of electric power and require function unbundling of those sales,¹⁵⁴ FERC did make Order No. 888’s open access requirements

146. Energy Policy Act of 1992, Pub. L. No. 102-486, § 722, 106 Stat. 2776 (1992).

147. Another important aspect of the EPAct was that it encouraged expansion of the independent power industry. BOSELMAN, *supra* note 130, at 731.

148. Goelzhauser, *supra* note 2, at 232 (quoting Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 460 (1993)).

149. BOSELMAN, *supra* note 130, at 732.

150. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities: Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,540 (Apr. 24, 1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888]. The validity of Order No. 888 with respect to FERC’s authority to require open access was upheld in *New York v. FERC*, 535 U.S. 1 (2002).

151. Order No. 888, 61 Fed. Reg. at 21,540.

152. *Id.* at 21,552.

153. *Id.* at 21,542.

154. *Id.* Interestingly, FERC did not conclude that it lacked jurisdictional authority over retail transmission; instead, it merely refused to assert such jurisdiction in the con-

applicable to retail wheeling that requires use of interstate power lines.¹⁵⁵

To summarize, the EPAct of 1992 gave FERC the much-needed statutory authority to order wheeling of wholesale bulk power. In order to further facilitate a competitive, nondiscriminatory wholesale power market, FERC adopted Order No. 888, which required all wholesale power transmission services and some retail services to file open access tariffs. These tariffs enumerate both the price and terms governing a wholesale power generator's access to transmission lines.

V. USE OF THE ESSENTIAL FACILITIES DOCTRINE IN ELECTRIC POWER LITIGATION

Essential facilities cases in the electric power context have typically, but not always, involved wholesale or retail wheeling. For example, in *City of Malden v. Union Electric Co.*,¹⁵⁶ a municipal power company, Malden, brought an antitrust action against Union Electric on an essential facilities theory. Malden owned and operated a utility that generated and distributed electric power to retail customers.¹⁵⁷ Because Malden did not have enough capacity to satisfy customer demand, it entered into an agreement with Missouri Utilities¹⁵⁸ to purchase wholesale power.¹⁵⁹ Missouri Utilities and Union Electric owned the only direct line connecting Malden to its generation facility. Before the expiration of the wholesale contract, Malden entered into negotiations with Missouri Utilities to determine rates at which Missouri Utilities would wheel wholesale power from other producers to Malden.¹⁶⁰ After a period of negotiations over wheeling rates, Malden filed suit under Sherman section 1 and section 2.¹⁶¹ The primary basis for Sherman section 2 liability was the essential facilities doctrine.¹⁶²

The court reiterated the elements necessary to prove an essential facilities claim: (1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of the facility to a competitor

text of Order No. 888. Whether it would have jurisdiction over such transactions remains an open question. *See* *New York v. FERC*, 535 U.S. at 27-28.

155. *See* Robert J. Michaels, *The Governance of Transmission Operators*, 20 ENERGY L.J. 233, 236 (1999).

156. 887 F.2d 157 (8th Cir. 1989).

157. *Id.* at 158.

158. Missouri Utilities was a wholly-owned subsidiary of Union Electric; the two later merged. *Id.* at 159.

159. *Id.* at 158.

160. *Id.* at 159.

161. *Id.* at 159-60.

162. *See id.* at 160.

when such use is economically and technically feasible.¹⁶³ The primary issues at the trial level were whether the Missouri Utility/Union Electric transmission line was the only practical method for Malden to receive power—the essentialness of the facility—and whether the conditions Missouri Utilities placed on use of the lines were reasonable.¹⁶⁴ The jury found for Missouri Utilities on both issues.¹⁶⁵ On appellate review of the district court’s denial of a new trial, the Eighth Circuit found that there was sufficient evidence to support the jury’s verdict against Malden.¹⁶⁶

City of Malden is indicative of most essential facilities cases involving wheeling in two respects. First, it appears that in most of these cases, the plaintiff has a great burden in proving its case and, more often than not, loses. Second, most, if not all, cases involving wheeling are initiated after negotiations over a “reasonable” wheeling rate fail. In this respect, the essential facilities doctrine appears to offer potential plaintiffs an extra bargaining chip in negotiations over wheeling rates. For example, in *Town of Massena v. Niagra Mohawk Power Corp.*,¹⁶⁷ the court denied the plaintiff’s antitrust claim under *Otter Tail* because the power company did not unconditionally refuse to deal with the plaintiff.¹⁶⁸ In support of its holding, the court noted the following:

The company indicated its willingness to pursue [negotiations over wheeling and wholesale power purchases from the utility] and suggested that the meeting be held during the week of March 19, 1979. However, before a meeting date could even be finalized, Massena commenced this action and unilaterally announced that further negotiations would be fruitless.¹⁶⁹

Similarly, in *City of College Station v. City of Bryan*,¹⁷⁰ the court noted that the dispute was essentially between two businesses maneuvering to obtain the best possible deal for themselves.¹⁷¹ The essential facilities theory in *College Station* hinged primarily on whether effective access to wheeling was being denied because the transmission company was offering “unreasonable” rates.¹⁷² The court noted that “when the reasonableness of a rate is at issue, the reasonableness

163. *Id.*

164. *Id.*

165. *Id.* at 161.

166. *Id.* at 161-62.

167. No. 79-CV-163, 1980 WL 1889 (N.D.N.Y. Sept. 8, 1980). Note that this case involved an antitrust action under *Otter Tail*, not an essential facilities claim—to the extent that they are distinct. However, the incentive is there under both doctrines.

168. *Id.* at *24.

169. *Id.*

170. 932 F. Supp. 877 (S.D. Tex. 1996).

171. *See id.* at 888.

172. *Id.* at 887-88.

standard of the access factor cannot be read to mean that the courts will secure a better deal for an antitrust plaintiff¹⁷³

As indicated above, most essential facilities claims involving the electric power industry are in the context of wholesale wheeling. However, claims can also arise in situations where a plaintiff is seeking forced retail wheeling—an area where FERC is currently without jurisdiction. For example, in *Snake River Valley Electric Ass'n v. Pacifcorp*,¹⁷⁴ an electric power cooperative brought a Sherman Act claim against Pacifcorp, who had a monopoly on generation and transmission services in the plaintiff's region. The cooperative intended to reduce Pacifcorp's near total market share by providing low-cost power to its members.¹⁷⁵ Pacifcorp, however, refused to sell wholesale power to the cooperative and also refused to wheel power to the cooperative's customers. Pacifcorp filed a motion to dismiss the cooperative's claim based upon state action immunity. In the alternative, Pacifcorp requested that the court stay the proceedings because FERC had jurisdiction over the matter.¹⁷⁶ The court, in denying Pacifcorp's motion, stated that it appeared FERC had jurisdiction over the transmission of the wholesale supply of electricity and the state regulatory body in Idaho had jurisdiction over transmission of that electricity to the end-user.¹⁷⁷ Though the plaintiff in *Snake River Valley* relied on *Otter Tail* and not the essential facilities doctrine per se, the case serves as a good example of situations where monopoly leveraging may occur and a regulatory remedy at the federal level (via FERC) is unavailable.

Another context in which essential facilities claims may arise, although not as frequently as wheeling cases, are disputes over access to power generation sources. The companion cases of *City of Anaheim v. Southern California Edison Co.*¹⁷⁸ and *City of Vernon v. Southern California Edison Co.*¹⁷⁹ are illustrative. Since both cases involved similar factual issues, a summary of only *City of Anaheim's* facts is necessary. Several cities, including the City of Anaheim, entered into negotiations with Edison, an investor-owned utility, to purchase access to the Pacific Intertie, which high-power transmission lines that brought low-cost hydroelectric power to Edison.¹⁸⁰ Edison was a fully integrated utility, and its service areas included the areas around the cities that were not served by the cities themselves.¹⁸¹ The cities dis-

173. *Id.* at 888.

174. No. CV 96-0308-E-BLW, 1997 WL 241086 (D. Idaho Apr. 25, 1997).

175. *Id.* at *1.

176. *Id.* at *8.

177. *Id.*

178. 955 F.2d 1373 (9th Cir. 1992).

179. 955 F.2d 1361 (9th Cir. 1992).

180. *City of Anaheim*, 955 F.2d at 1376.

181. *Id.* at 1375.

tributed power to end customers but did not generate power—receiving power from elsewhere over Edison’s transmission lines. The cities wanted firm or guaranteed access to the Pacific Intertie lines, but Edison refused such access because it expected to use its full capacity over those lines for Edison customers. Edison did offer the cities interruptible access.

The cities brought several claims under the Sherman Act against Edison, including a claim that the Pacific Intertie was an essential facility in Edison’s control and Edison unreasonably refused access to that source of power. The Ninth Circuit denied the cities’ essential facilities claim. The court held that the Pacific Intertie was not an essential facility because the cities had many other sources from which they could purchase power.¹⁸² Thus, the cities were merely attempting to use the essential facilities doctrine to receive power at a low price to the detriment of Edison customers. Further, even if the Pacific Intertie was an essential facility, it had a legitimate business reason for denying access to the cities because Edison was simply attempting to keep its costs as low as possible by using its limited capacity on the Pacific Intertie for itself.

VI. *TRINKO* AND FERC’S EXPANDED AUTHORITY TO MANDATE OPEN ACCESS DIMINISHES THE VIABILITY OF THE ESSENTIAL FACILITIES DOCTRINE IN THE ELECTRIC POWER CONTEXT

The Supreme Court’s treatment of the essential facilities doctrine in *Trinko* raises serious questions about the doctrine’s further viability in antitrust actions in the electric power arena. During the proliferation of the doctrine from the late 1970s through the 1980s, courts have mostly used essential facilities in the electric power context to compel electric power companies to wheel power to the antitrust plaintiff. However, in recent years FERC has received increased statutory authority to mandate wheeling and open access to transmission lines via the EAct. FERC has further asserted its authority to mandate open access under Order No. 888. As discussed in Part IV, Order No. 888 requires that all transmission service companies in the wholesale transmission market and some in the retail transmission market file nondiscriminatory, open-access tariffs for access to transmission services by competitors.

Similarly, the Federal Telecommunications Act of 1996 required incumbent LECs to offer competitors access to their network.¹⁸³ In

182. *Id.* at 1381. The Court also stated “the fact that the Cities could achieve savings at the expense of Edison and its other customers is not enough to turn the Pacific Intertie into an essential facility.” *Id.*

183. *See Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004).

disposing of the plaintiff's essential facilities claim in *Trinko*, the Court stated that the Telecommunications Act included extensive provisions for access, and the essential facilities doctrine, if it exists at all, does not apply when a state or federal agency maintains the effective power to force sharing under such provisions.¹⁸⁴ Thus, unavailability of access is "indispensable" to antitrust plaintiffs' essential facilities claims and a statutory scheme that provides avenues to gain access to a facility forecloses such claims.

The *Trinko* analysis is difficult to distinguish from a situation where an antitrust plaintiff brings an essential facilities claim to force a partially integrated power company to wheel wholesale power. FERC has the authority to hear and rule on petitions to mandate wholesale wheeling under the EPC and to ensure nondiscriminatory access under Order No. 888. Therefore, under *Trinko*, there is no "unavailability of access" to a potential essential facilities plaintiff—FERC can provide access in accordance with the EPC and Order No. 888.

In certain limited respects, however, the Telecommunications Act is different from FERC's jurisdiction to order wheeling. The primary difference is that the Federal Communications Commission, under the Telecommunications Act, has jurisdiction over all incumbent LEC networks.¹⁸⁵ FERC clearly has the authority under the EPC, and Order No. 888 to order a wholesale power company to wheel power for a competitor and probably has the authority to order retail distributors who use FERC jurisdictional power lines to provide non-discriminatory open access. However, FERC has reserved jurisdiction over retail distribution wheeling and over fully integrated retail service providers. Even under the restrictive language in *Trinko*, an essential facilities claim may still be viable against such entities—but only to the extent that a state agency does not have authority to mandate access to those facilities.

Whether the effect of the *Trinko* decision on essential facilities claims is good as a policy matter depends on one's view of the interrelation between antitrust law and regulation on one hand and agency enforcement versus judicial enforcement on the other. Some consider antitrust law and regulatory law to be somewhat in conflict.¹⁸⁶ Government regulations over an industry or part of an industry effectively remove market mechanisms as a source of governance, making

184. *Id.* at 411.

185. *See generally id.* (describing the FCC's role under the Telecommunications Act of 1996).

186. *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 341 (2004) ("One consequence of regulation is a reduced role for the antitrust laws.").

antitrust law less effective as a market governing mechanism.¹⁸⁷ Conversely, as an industry becomes more deregulated and more market forces are introduced, the role of antitrust law increases.¹⁸⁸

The competing viewpoint suggests that the view of antitrust and regulation as competing measures is flawed because (1) “deregulated” markets are still highly regulated (especially the electric power market) and (2) well-functioning markets and regulations of those markets are necessary for proper application of antitrust law.¹⁸⁹ Because deregulated electricity markets remain regulated, “[n]ascent electricity markets have idiosyncrasies that make exercises in market power highly likely: they are still subject to natural monopoly tendencies (*e.g.*, transmission of electricity) and consumers of electricity are not responsive to price in the short-term.”¹⁹⁰ Therefore, active regulation is necessary to prevent market manipulation and exercise of market power.¹⁹¹ Additionally, when burgeoning markets are developing, antitrust laws typically fail to protect the consuming public before it suffers consequences from anticompetitive conduct.¹⁹²

As mentioned above, the notion of a “deregulated” electric power market is somewhat of a misnomer. Even though market-based reforms are being implemented, the electric power market remains highly regulated. This is especially true with regards to the wholesale electric power transmission market. Most firms who are in this market must, pursuant to FERC regulations, provide open access to their transmission lines and file rates of access with FERC.¹⁹³ They may also be subject to regulation at the state level. Therefore, more agency, and less judicial, intervention may be justified because there are not sufficient market mechanisms present to prevent competitive harm. This conclusion is also consistent, at least in the electric power context, with the second view of agency versus court regulation discussed above. Because electric power transmission is still a natural monopoly for the most part, active agency regulation is necessary. FERC is currently providing the regulation of this market through the EPAct and Order No. 888. Court intervention via the essential facilities doctrine is most likely duplicative of FERC’s efforts.

Additionally, continued use of the essential facilities doctrine in light of FERC’s regulatory capabilities may not only be duplicative,

187. *Id.* at 340.

188. *Id.*

189. Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California’s Power Woes (or Why Antitrust Law Fails to Protect Against Market Power When the Market Rules Encourage Its Use)*, 83 OR. L. REV. 207 (2004).

190. *Id.* at 209.

191. *Id.*

192. *Id.* at 209-10.

193. *See supra* Part IV.C.

but it may also have negative effects. First, the decision to force access to transmission lines brings about the concerns Justice Scalia described in *Trinko* (along with the concerns raised by Professor Hovenkamp discussed in Part II): it may reduce incentives to invest in the facility, force the federal courts to act as central planners that must determine the terms of the access between the two parties, and facilitate collusion. A review of essential facilities cases in the electric power context reveals some of these difficulties—primarily with respect to the role of courts as central planners. Courts must determine whether to grant access, what price makes access to a facility “reasonable,”¹⁹⁴ under what other terms should access be provided, and how to balance the incumbent’s need to serve its existing customers.

Additionally, courts typically do not have special expertise in how particular industries, such as telecommunications or electric power, operate. FERC, however, has specialized expertise with regard to the electric power industry. Further, FERC has experience in dealing with competitive concerns in the electric power market in terms of fulfilling its authority to mandate wheeling and open access, approving agreements between wholesalers and retail power companies, and approving mergers between power companies.¹⁹⁵ FERC also has the tools available to proactively address most market failures that might invoke an essential facilities claim—including, of course, the EPAct and Order No. 888. If FERC fails in its responsibilities under applicable law, judicial review of its decisions to wheel or not remains available under administrative law.

The above arguments should not be construed to justify complete abandonment of antitrust concerns in the electric power enterprise. Though *Trinko* probably forecloses most essential facilities claims relating to open access to transmission lines within FERC’s jurisdiction, complete reliance upon FERC to ensure a competitive transmission service market may be premature at this point. As previously noted, some activities, such as the retail wheeling concerns raised in the *Snake River* case, are presently outside of the scope of FERC’s authority. If and when monopoly leveraging and anticompetitive harm arise in these contexts, an antitrust remedy should be available to address them. It is not necessary, however, to rely on the essential facilities doctrine to address anticompetitive activities in relating to electric power transmission that evades regulation. The Supreme Court has repeatedly demonstrated that anticompetitive conduct can be remedied through traditional antitrust principles.

194. Note that this goes to the element of the essential facilities doctrine that requires “reasonable” access. Recall, also, that this was the primary contention in *City of Anaheim*—the cities were attempting to equate reasonable access or rates with low cost access at the expense of the incumbent. 955 F.2d 1373 (9th Cir. 1992).

195. See *Env’tl. Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

A suggested model approach is the *Otter Tail* decision. As noted in Part II.A, *Otter Tail* was rooted in section 2 of the Sherman Act and is arguably not an essential facilities case. To the extent that *Otter Tail* is not an essential facilities case, it should remain available to potential antitrust plaintiffs who are damaged by the anticompetitive conduct of an upstream monopolist. Thus, as a guideline, Professor Areeda's interpretation of *Otter Tail* should be used to make section 2 of the Sherman Act available when (1) a regulated natural monopolist (2) engages in anticompetitive activity that *evades regulation* (3) to the prejudice of consumers.

The above approach partly addresses the concerns by some that, in relying more upon regulators to ensure competitive market concerns are addressed, we should not completely eschew judicial remedies, which have advantages over remedial action through regulatory agencies.¹⁹⁶ These remedial advantages include a forum where discovery is broader, an adjudicative body with broad discretion in its remedial authority, and an adjudicator not amenable to political influences.¹⁹⁷ Such remedial advantages are evidenced in cases involving regulated industries, like *Otter Tail* where the court was able "to award pro-competitive relief without undertaking the responsibilities of superintending the remedy itself," instead leaving the administration of the remedy to the regulatory body.¹⁹⁸ Though this Comment stops short of endorsing the rationale that a judicial forum offers benefits superior to an agency forum—at least in the electric power context, cases have shown that essential facilities plaintiffs strategically use the broad discovery provided in courts as contract negotiation leverage—retaining a Sherman Act claim under the rationale of *Otter Tail* offers a middle ground where the courts can step in and address anticompetitive harm that falls through the regulatory cracks.

VII. CONCLUSION

The efforts of Congress and FERC to introduce market-based reforms to electric power have succeeded in creating a large competitive wholesale power market. As FERC's regulatory scheme continues to change, courts will doubtlessly face new challenges in walking the line between regulatory schemes while safeguarding traditional antitrust principles under the Sherman Act. In *Trinko*, the Supreme Court attempted to walk this line and, in the process, may have ended an antitrust claim that has been a sore spot for commentators and antitrust defense attorneys. Though the viability of the essential

196. See Weiser, *supra* note 3.

197. *Id.* at 14.

198. *Id.* at 16.

facilities doctrine in the regulatory field may be in decline, regulatory agencies should use this opportunity to continue to involve themselves with competitiveness concerns in their respective industries. FERC, for example, now has an opportunity to ensure that it is more active in ordering wholesale wheeling to curtail attempts at monopoly leveraging. Additionally, FERC should also use this opportunity to expand its jurisdiction to fully integrated utilities and retail distributors, in an attempt to fill the regulatory gaps of the EPAct and Order No. 888.