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ACCESS DEMANDS AND NETWORK JOINT VENTURES

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The central message of the Sherman Act is that a business entity must find new customers and highest profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors.[2]

1. INTRODUCTION

Joint ventures play a critical role in the U.S. economy. Often they will seek to limit their membership and when they do they face the risk that an excluded party will resort to antitrust litigation in order to compel its admission.[3] Antitrust access disputes have had a profound impact on competition among network joint ventures, which include credit cards, Automated Teller Machine (ATM), and Point of Sale (POS) networks. There recently has been a bounty of litigation in this area, spurred by the lack of clarity in the legal standards.[4] Thus, competitors are often encouraged to compete through litigation (or by arranging treaties), rather than by offering better products or services.

This chapter describes a model for structuring the analysis of these access claims, which will lead to more effective judicial decision making and greater network competition. Section two describes how the lack of a structure for analyzing access demands involving payment networks has led to less competition. Section three discusses recent developments involving access demands brought against single firms. Courts have become more sensitive to the economic impact of these access demands and consequently have carefully structured their analyses of these claims. Section four explains how the lessons of those single-firm cases can be applied to demands for access to joint venture networks. This chapter suggests how analysis of these access demands should be structured. In section five this chapter considers why membership restrictions are efficient. It considers whether the typical rationale for denying access to a joint venture—the prevention of free-riding—applies to network joint ventures, such as credit card and ATM networks, which generally appear to be more efficient as they grow in size.

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2. ACCESS DEMANDS AND PAYMENT SYSTEM NETWORK JOINT VENTURES

In order to function joint ventures often adopt membership eligibility standards. These standards may operate to exclude from the venture firms that compete with the member firms, which may result in one or more of their rivals being excluded from the venture. The excluded party may then sue the venture and its members contending that its exclusion constitutes an unlawful group boycott in violation of Section 1 of the Sherman Act.[5] Litigation involving access demands has played an important part in the development of both credit card and ATM joint ventures.

2.1 The Worthen Case

VISA and Mastercard are associations whose membership consists primarily of the banks that issue their cards. Today practically all banks are members of both associations. This was not always the case, however. When Mastercharge (the predecessor to Mastercard) and National BankAmericard (the predecessor to VISA) were formed, their memberships were separate and there was vigorous competition between the two card systems. Card-issuing banks[6] were *either* a National BankAmericard bank *or* a Mastercharge bank. This situation evolved due to a National BankAmericard "anti-duality" rule, which prohibited banks from issuing both cards.

In the early 1970s the anti-duality rule was challenged by an Arkansas bank, Worthen Bank, in *Worthen v. National BankAmericard.*[7] Worthen, a National BankAmericard member, sought to become a Mastercharge card-issuer as well. It challenged the BankAmericard anti-duality rule as a *per se* illegal group boycott in violation of Section 1. The lower court agreed with Worthen, but the Eighth Circuit, relying extensively on an amicus brief from the Antitrust Division of the Department of Justice, reversed.[8] The litigation was settled after the appellate court decision.

In order to clarify the antitrust risk posed by its anti-duality policy, National BankAmericard sought the advice of the Antitrust Division. National BankAmericard sought a business review letter from the Department approving a proposed expanded anti-duality rule. After considering the matter for more than a year the Division declined to approve the proposed anti-duality rule. It suggested that a prohibition on duality among card-issuing banks might be permissible, but declined to approve a restriction on merchant bank duality, primarily because insufficient information was available to determine the competitive effects of the rule.[9] Faced with the threat of expensive private litigation and an ambivalent Antitrust Division, National BankAmericard changed course, reversed its position, and abandoned its anti-duality rule.

The ultimate result of the *Worthen* litigation and the Justice Department position did not benefit competition. With the anti-duality rule removed banks and merchants rushed to join both associations, and within a short time National BankAmericard and Mastercharge had largely overlapping memberships. The impact of duality on credit card competition has been mixed.[10] On the one hand, the emergence of "duality" enhanced both consumer and merchant convenience by permitting merchants to use a single bank for both National BankAmericard and Mastercharge transactions. During the 1970s and 1980s

there was a tremendous increase in the number of merchants, which would accept credit cards.

On the other hand, duality sounded a death knell to competition between the two card associations.[11] Under duality there has been relatively little competition between the two associations. Since their memberships overlap, there is a significant incentive for most members to assure that both associations offer nearly identical products. Additionally, there has been relatively little competition between the associations in either interchange fees[12] or systems developments. State antitrust enforcement officials, in particular, have recognized the "corrosive effect of duality."[13]

2.2 The National Bank of Canada Case

In 1980 Mastercard's anti-duality rule for its Canadian licensees was challenged in *National Bank of Canada v. Interbank Card Association.*[14] Mastercard (Interbank) was a late entrant into the Canadian credit card sçene and, like VISA, had an anti-duality rule for its Canadian members. When a Mastercard bank merged with a VISA bank, Mastercard invoked its anti-duality rule and gave the bank an ultimatum: either withdraw from VISA or lose its membership in Mastercard. Mastercard subsequently terminated the bank's membership, and the litigation followed.

As in *Worthen*, the court rejected the bank's claim that the anti-duality rule was *per se* illegal and chose to apply the rule of reason. It upheld the rule, focusing extensively on the efficiency rationale for restricting membership. The court considered that the rule was: (1) adopted when Mastercard entered the market; (2) necessary to protect the original members' start-up costs in the venture; and (3) for a limited period of time (i.e., eight years based on anticipated recovery of start-up costs). Moreover, the court noted that the "underlying purpose of the exclusivity provision was to enhance competition in the Canadian credit card market by introducing a new product, Mastercard."[15]

Thus, in Canada, unlike the United States, membership in either Mastercard or VISA has remained exclusive. Because of the distinct membership, competition between Mastercard and VISA is far more vibrant in Canada than in the United States.[16] Interchange fees seem more competitive: they change more frequently and currently are less than those in the U.S. Similarly, merchant discounts are on average over *40 percent less* than in the U.S. Merchants often switch banks for a very few basis points on the discount.[17] VISA and Mastercard also compete aggressively on systems innovations. From the cardholder perspective, non-duality has led to a proliferation of product development and innovations. Credit card usage is approximately 60 percent greater in Canada than in the U.S., in spite of the fact there are fewer cards per consumer in Canada.[18]

2.3 ATM Networks

ATM networks have also been the subject of several access demands. In the mid-1980s there was aggressive competition in New England between BayBanks and Yankee 24. At the time BayBanks owned the largest proprietary ATM network in the U.S. Yankee 24, by contrast, was a joint venture ATM network, which enabled banks with smaller ATM systems to compete with BayBanks. Yankee 24 offered an aggressive pricing structure to attract banks, and both networks offered low user fees to attract consumers. BayBanks

sought access to Yankee 24, and when rebuffed, sued claiming that its exclusion was an illegal group boycott.[19] The parties settled. BayBanks was admitted, and Yankee 24 eliminated its incentive pricing structure. Soon thereafter, consumer fees increased.

In 1983 the PULSE ATM network in Texas faced a similar access demand from First Texas Savings and Loan (First Texas). At the time there was aggressive competition in Texas between PULSE and a similar-sized network named MPACT. First Texas, a member of MPACT, claimed that its exclusion from PULSE would constitute an illegal group boycott. Recognizing that the admission of First Texas could create a *de facto* merger with MPACT, PULSE sought a business review from the Justice Department. PULSE posed three alternatives to the Division: (1) admit First Texas; (2) generally admit members of competing networks; or (3) implement an anti-duality rule. The Department addressed only the first alternative. At the time it stated that admitting First Texas would not pose an antitrust violation. The Department noted that the incremental consumer convenience that resulted from admitting First Texas (and permitting First Texas cardholders to have access to both PULSE and MPACT) appeared to outweigh the loss of rivalry that might occur between the two competing networks.[20]

Within six months after the business review letter was issued, practically every MPACT member joined PULSE. MPACT eliminated its incentive pricing. There was a similar impact on consumers, as several banks increased their consumer fees.[21]

2.4 The VISA/Discover Card Case

The most prominent network access dispute involved a suit by Dean Witter (the issuer of the Discover Card[22]), which sought access into VISA for its financial institution subsidiary, MountainWest Financial.[23] Dean Witter sought to issue a VISA card, known as "Prime Option." Dean Witter sued VISA claiming that its bylaw (2.06), which denies membership to any institution that issues Discover cards, American Express cards "or any other card deemed competitive by the Board of Directors," was an illegal group boycott in violation of Section 1. In response, VISA contended that its exclusion of a competitor was justified by the need to maintain and promote intersystem competition and to prevent free-riding on the VISA system and mark by a competitor. VISA also filed a counterclaim that alleged Dean Witter's acquisition of MountainWest's assets violated Section 7 of the Clayton Act[24] by in effect partially merging the competing credit card systems and significantly reducing intersystem competition in the general purpose credit card market.[25]

2.4.1 District court opinion

VISA moved for summary judgment. Because Dean Witter was a viable competitor in the credit card market, VISA argued that its action in excluding Dean Witter, as a matter of antitrust law and policy, could not violate Section 1. VISA argued that Dean Witter had a viable antitrust claim only if it could demonstrate that either: (1) VISA possessed market power in the relevant market and Dean Witter was foreclosed from competition with cardholders or merchants, or (2) VISA membership was an "essential facility" necessary for Dean Witter to compete in the general credit card market. Under these standards it was clear that the court would have granted summary judgment for VISA, because Discover Card had clearly been able to compete successfully even without VISA membership. In August 1992 the court rejected VISA's motion. Although it observed that VISA's policy

argument was "well taken" and "made with considerable force and persuasion," the court declined to dismiss the case and observed that the situation was "unique . . . in antitrust jurisprudence" and there was "no controlling authority directly on point."[26] Moreover, there were several factual disputes, such as VISA's market power, that could only be resolved at trial.

The jury returned a verdict for Dean Witter and on April 1, 1993 the judge denied VISA's motion for judgment notwithstanding the verdict. VISA argued that although the case was subject to a rule of reason analysis, the court should have dismissed the case as a matter of law based on the use of a preliminary "legal screen." The court considered three screens: a market power screen; an "economic sense" screen; and an essential facility screen. As to market power, the court held the plaintiff presented evidence sufficient to enable the jury to conclude that VISA members, through their combined share in VISA and Mastercard (of approximately 72 percent), possessed market power in the relevant market.[27] Further, it held that Dean Witter had presented an economically plausible claim, since it was arguably in the interests of VISA members to exclude Dean Witter.

The focus of the decision was on VISA's argument that the court should adopt an "essentiality" threshold, i.e., that the case should be dismissed unless Dean Witter could demonstrate that membership in VISA was essential for it to compete. Under the essentiality threshold proposed by VISA, the exclusion of a competitor by a joint venture should not be subject to rule of reason examination "unless the competitor meets a heightened standard—showing that it is unable to compete without the withheld property."[28] In other words, the plaintiff must demonstrate that the venture is an "essential facility" necessary for it to compete.

VISA argued that, absent such a rule, cooperative activity and innovation would be inhibited. "Compulsory sharing of private property discourages innovation and the creation of new products." Therefore, Visa's "right to deal with whomever it chooses should be upheld and respected by the antitrust laws," unless it was found to possess monopoly power, or unless the property was an essential facility for competition in the market.[29] A "duty to share or deal must be imposed only under very limited conditions—conditions captured in the notions of essentiality or market power . . . tantamount to monopoly or deprivation of an input necessary to effective competition."[30]

Dean Witter had conceded at trial that it could not demonstrate that access to VISA was essential to its ability to compete. The remarkable success of the Discover Card, which in a five-year period had become the most popular card in the U.S., would have made that argument difficult. Moreover, Discover Card had effectively replicated VISA's transaction clearance system and had arrangements with 80 percent of VISA's merchant base. Rather, Dean Witter argued that, without access to the VISA *mark*, its proposed Prime Option card would be placed at a competitive disadvantage vis-a-vis cards issued by VISA members. In effect, it argued that there was a certain group of consumers who perceived the VISA or Mastercard mark as providing a certain value and that the mark provided a competitive advantage in competing for these consumers.

On the essential facilities question, the court observed that "Sears clearly cannot make such a showing . . . it does not need membership in VISA in order to compete in the general purpose charge card market."[31] But the court relied heavily on the Supreme Court's 1945 decision in *United States v. Associated Press*,[32] which permitted access where the excluded parties suffered a "competitive disadvantage," to hold that a showing

of "essentiality" was unnecessary. (As suggested later, courts may do well in refraining from relying on *Associated Press* as precedent for their decisions.[33])

Having determined that there was no basis in the law to reverse the jury's verdict, the court reviewed whether there was a legally sufficient evidentiary basis. At the beginning of its analysis, the court made clear that "its view of the evidence differs from the jury's findings."

> If the court had been the fact-finder . . . it would most likely not have concluded that keeping Sears out of the VISA system substantially harms competition in the relevant market. In fact, the court would have concluded that the harm to competition from letting Sears into the VISA system is greater than any harm from keeping Sears out. If it had been the fact-finder, the court would have been inclined to find no net harm to competition from Bylaw 2.06. . . .[34]
>
> The court believes that Bylaw 2.06 fosters intersystem competition in the relevant market. . . . Simply adding another high-priced card issuer, as Sears has always been with both the Discover Card and the Sears charge card, to the VISA system will not solve the problem. It may provide short-term intrasystem competitive benefits within the VISA system, but in the long run, in the court's judgment, the damages from such inclusion will outstrip the benefits. *Eventually, consumers will be left with one more top-ten VISA issuer charging relatively high interest rates and a VISA/MasterCard system which will dominate the general purpose charge card field to an even greater extent than it does today.*[35]

The court's observations about the competitive impact of permitting Dean Witter to join VISA are particularly noteworthy since it was the trier of fact in equity for VISA's counterclaim. Thus, like the jury, it also had to weigh the evidence. Although the court clearly disagreed with the jury's assessment of the competitive effect of excluding Dean Witter, the jury's verdict could not be upset because there was sufficient evidence to support its findings.

The analysis of the Section 7 counterclaim focused on the effect of Dean Witter's admission into VISA on intersystem competition. The court found that intersystem competition was important and helped "promote innovation in the development of transactional processing systems and merchant base expansion, thereby benefiting consumers."[36] Intersystem competition would likely be harmed, because Discover would not compete as vigorously with VISA after it issues Prime Option and because Dean Witter would have access to VISA confidential information. Despite these findings, the court declined to enter judgment on the counterclaim for VISA, because it did not believe that the likely harm to competition would be significant in light of Dean Witter's expressed intention to continue to market Discover vigorously. Therefore, the court dismissed the Section 7 counterclaim.

2.4.2 Tenth Circuit decision

On September 23, 1994, in an opinion by Judge Moore, the Tenth Circuit Court of Appeals reversed the district court.[37] The Tenth Circuit began by emphasizing that the focus of the antitrust laws is on the impact of a practice on consumers. Early on, the court quoted

Justice Breyer that the objective of antitrust regulation is "to improve people's lives . . . [through] economic efficiency . . . and more efficient production methods . . . [and] through increased innovation."[38] Considering the context—that of an antitrust suit where "a successful competitor alleges antitrust injury at the hands of a rival"—a focus on the actual impact on consumers was very important. As the court observed, quoting Judge Easterbrook, whenever competitors "invoke the antitrust laws and consumers are silent" an inquiry into the impact on "consumers becomes especially pressing." Thus, using the prism of the "impact on consumers" in analyzing the critical issues of market power and efficiency, the appellate court ended up with an entirely different result than the trial court.

The court began its analysis with consideration of whether VISA possessed market power. Identifying the existence of market power begins with definition of the relevant market, which in this case had been obscured. Although the parties had appeared to litigate the case based on a systems market, the real focus of Discover's claims was on *issuer competition*. Discover argued that: (1) the purpose of excluding it from VISA was to protect VISA members from competition at the *issuer* level, and that (2) the benefits of the entry of Prime Option would be on credit card *issuance*. Thus, the court concluded that the focus of the inquiry was on market power in the credit card issuer market, which did not appear very concentrated. There are thousands of credit card issuers and no single issuer has more than a 12 percent market share.

The Tenth Circuit then addressed the district court's use of the aggregation theory proposed by Discover's expert, and the expert's claim that VISA's ability to pass a rule that excluded Discover was evidence of its market power. The court observed that collective rulemaking should not be suspect because joint ventures are made more efficient through such ancillary restraints. It is the *effect* of the rules and not the rulemaking itself that should be the focus of the market power inquiry, according to the court. In this respect Discover's case was wholly lacking: there was no evidence that VISA's rule led to higher prices or lower output. The court, quoting the Supreme Court, rejected the expert's testimony, because "expert testimony is a useful guide to interpreting market facts, but it is not a substitute for them."[39] Thus, the court concluded that the evidence was insufficient to demonstrate that VISA possessed market power.

The court went on to determine whether the VISA rule that prohibited its competitors from becoming members was "reasonably necessary" to the success of the venture. VISA claimed that the purpose of the rule was to protect its property from intersystem competitors who sought to free-ride on its efforts. It also claimed that, because of the small number of intersystem competitors, admitting Discover might harm intersystem competition and eventually lead to government regulation of VISA as a possible monopolist. Both of these concerns have been recognized in the case law and government antitrust guidelines.

Discover presented two arguments that these efficiency claims were pretextual. First, Discover claimed that the real purpose of the rule was to prevent entry of a low price competitor. This argument was unavailing, because intent to harm a rival was simply irrelevant to whether the restraint harmed consumers. Thus, the evidence the district court relied upon, that VISA's members sought to harm Discover, was "not an objective basis upon which . . . liability may be found."[40]

The second argument was more novel. Discover suggested that the efficiency justification was pretextual because VISA, unlike most joint ventures, was "open," i.e., it

had admitted thousands of members after its risk-taking phase. In addition, since VISA was a *network* joint venture whose integrative efficiencies grew as its membership increased, a rule excluding others could not be procompetitive.

The court did not directly address this claim. Rather it found that neither policy nor precedent supported this claim. In doing so, the court explained how the trilogy of Supreme Court exclusionary restraint cases—*Terminal Railroad*,[41] *Associated Press*,[42] and *Aspen Ski*[43]—did not compel a contrary result. *Terminal Railroad* was an extraordinary case; *Associated Press* never stated that a joint venture could not exclude; and *Aspen Ski* focused on conduct that changed the character of the market—a condition absent in this case. More important, the court emphasized that exclusion from VISA did not equate to exclusion from the market and that there was no evidence that Discover could not develop the Prime Option card under its own mantle.

Thus, the court determined that the bylaw was collateral to VISA's business in that it prevented competitors from free-riding on its efforts. In doing so, the court relied on an extensive discussion of *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*[44] which held that a joint venture's exclusivity rule was a legitimate response to the threat of free-riding.

More important than the lack of legal support for Discover's arguments was the fact that there was no evidence that the bylaw harmed consumers. Indeed, the court observed that the credit card market is "structurally competitive" with scores of issuers "targeting different consumer groups and consumer needs."[45] Discover already competes vigorously in the market, and a goal to compete "*more effectively*" did not "constitute the proverbial sparrow the Sherman Act protects."[46] Thus, the court concluded that because

> there was no evidence price was raised or output decreased or [Discover] needed VISA USA to develop the new card, we are left with a vast sea of commercial policy into which [Discover] would have us wade. To impose liability on VISA USA for refusing to admit [Discover] or revise the bylaw to open its system to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces. Whatever currents [Discover] imagines VISA USA wrongly created . . . can be better corrected by the marketplace itself. The Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare.[47]

2.5 The Mastercard/Discover Card Case

After the favorable jury verdict in the VISA case, Dean Witter submitted an application on behalf of MountainWest to issue a "Prime Option" Mastercard. On March 4, 1993, Mastercard's board of directors denied the application. Perhaps anticipating a suit by Dean Witter, Mastercard filed suit seeking a declaration that its refusal to admit Dean Witter did not violate state or federal antitrust laws. Dean Witter filed a counterclaim against Mastercard and several Mastercard board members, which asserted that their refusal to permit issuance of the Prime Option card violated the antitrust laws.

Mastercard filed a motion to dismiss the counterclaim which the district court rejected in August 1993.[48] First, the court rejected Mastercard's claim that Dean Witter failed to allege sufficient facts to establish concerted action. The court held that allegations that

"alleged competitors entered into an agreement which was designed to further their own economic interests" sufficiently demonstrated concerted action. At this early stage of litigation, allegations that executives of the Mastercard member banks serving on the Mastercard board when the alleged exclusionary decisions were made were sufficient to survive the motion to dismiss.[49]

Second, the court rejected Mastercard's claim that Dean Witter failed to properly allege an unreasonable restraint of trade. As in the *VISA* case, Mastercard argued there was no unreasonable restraint of trade because Dean Witter is still able to compete in the credit card market. The court disagreed. Like the court in Utah, it relied on *Associated Press* to hold that a restraint need not inhibit all competition in the relevant market to fall within the scrutiny of the antitrust laws. The parties settled the case in November 1993.[50]

2.6 A Net Assessment of Access Demands in the Context of Banking Joint Ventures

The record of over twenty years of access demands is not a promising one for competitors or consumers. First, in spite of the frequency of litigation, the standards governing these claims seem particularly cloudy. Although the *VISA* case was judged under the rule of reason, the failure to structure that inquiry by adopting a threshold inquiry makes it difficult to predict how any factfinder is likely to assess the "reasonableness" of an exclusion from membership. The fact that the judge and the jury reached *opposite* conclusions about the competitive effect of the admission of Dean Witter into VISA only emphasizes the magnitude of this uncertainty.

Second, because of this uncertainty, banking joint ventures are often presented with a difficult and unsalutary choice. They can either admit the competitor and face the risk of government enforcement action (as described below),[51] or deny access and litigate all the way to the jury with little certainty of success, substantial litigation costs, and the threat of treble damages (approximately $1 billion in the VISA). Banking joint ventures, which are typically not-for-profit entities, do not possess either the capital or the stamina for private litigation. Faced with the choice between the risks of private litigation versus those of government enforcement, in most cases, the likelihood is that the venture will disregard the threat of litigation with the enforcement agencies and admit the competitor. It is no surprise that the two other access cases brought in the early 1990s, involving suits against Mastercard and NYCE, were settled with the admission of the competitor.

Third, although the Tenth Circuit decision in *VISA* provided some clarification, it failed to address the crucial issue in most of these cases—how essential must access be in order to compel access. Many courts, like the district court in *VISA*, adopt a standard that compels access when the venture offers some "competitive advantage." This standard often may lead to anticompetitive results. It may lead to the diminution of competition between the venture and its competitors, because if the venture gains a competitive advantage a court may compel the venture to share the advantage with its competitors. If a competitor knows it can stand on the sidelines and later gain access to the competitive advantage through antitrust litigation, it has little incentive to replicate or surpass the advantage on its own.

Finally, as the BayBanks and PULSE matters demonstrate, the uncertainty in legal standards provides an incentive for potential or actual competitors to avoid competition with the venture by demanding and receiving access. As described in the last section, joint

ventures often seek to restrict participation for legitimate competitive reasons. Where efficient scale can be attained with only limited industry participation, such restrictions may be desirable because they enable the development of multiple, competing ventures and are more likely to yield an efficient market outcome. Where the legal standards are unclear, private parties have been able to use antitrust litigation or the threat of litigation to compel admission to banking joint ventures. In this way, competition between banking joint ventures has diminished and will continue to do so.

3. THE LIMITED CIRCUMSTANCES IN WHICH COURTS HAVE ORDERED ACCESS INVOLVING SINGLE FIRMS

When brought against single firms, access claims are considered a violation of Section 2 of the Sherman Act,[52] under what has been characterized as the "essential facility" doctrine. That doctrine requires a monopolist to share its facility or business relationship, where the denial of access would permit the monopolist to extend its monopoly into an adjacent market. The circumstances in which the courts have required access are very limited. Requiring access to a facility is really a public utility type of regulation and is at cross purposes with some of the essential ingredients of antitrust—freedom of association, right not to sell to a buyer,[53] promotion of rivalry and innovation. Thus, a leading antitrust treatise has suggested that the essential facility doctrine should be limited to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately."[54]

The paradigm of an essential facility case was MCI's successful suit against American Telephone & Telegraph (AT&T) in the early 1980s.[55] MCI, an emerging long distance carrier, sought access to AT&T's local telephone exchange. AT&T refused and MCI sued claiming that the refusal violated Section 2. MCI claimed that, without access to the local exchange, it would be unable to effectively offer long distance service to local residential customers. In finding that a jury could have concluded that the refusal constituted an act of monopolization, the court assessed the challenged conduct under the essential facility doctrine. The court set forward a four-part test for establishing liability for essential facility claims: "(1) control of an 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."[56] The court's rationale for applying the doctrine to single-firm conduct was that "a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market to another."[57]

The essential facility doctrine was very much in vogue in the mid- to late 1980s.[58] In 1988 the ABA Antitrust Section held a seminar on "cutting edge" issues that focused largely on that doctrine.[59] Since that seminar was held, there have been a number of interesting trends in cases decided under the doctrine. First, the courts have increasingly recognized that the concern of the doctrine is with the effect on competition in the primary market, i.e., the market in which the excluded party competes with the owner of the facility.[60] Second, courts have held that the fact that a facility offers a service that is simply *less costly* than other alternatives (or offers some type of competitive advantage) does not make the facility essential.[61] Third, the courts have focused on the effect of the exclusion

on the "competitive process," rather than on the harm to any individual plaintiff.[62] What is most remarkable about some of these cases is that the facility at issue was of the type traditionally perceived as essential: natural gas pipelines, electric utility transmission lines, railroad lines, or computer reservation systems. It is also notable that all of these cases were resolved by the courts without a full trial.

The most critical issue is the degree of competitive impediment that must be imposed to compel access. In the joint venture context, as in the *VISA* case, a plaintiff could argue that access should be required if it would offer a "competitive advantage." That argument is based on the Supreme Court's opinion in *Associated Press v. United States*.[63] In the single firm context, recent court decisions have soundly rejected the notion that a "competitive advantage" is sufficient to compel access.

For example, in *City of Anaheim v. Southern California Edison Co.*,[64] the Ninth Circuit considered a claim brought by municipal utilities that the denial of access to certain high-power transmission lines (the "Pacific Intertie" that provided access to power at significantly lower cost than other sources of power) violated the essential facility doctrine. The court rejected the argument that the high-power transmission lines were essential, because the municipal utilities had many alternatives to obtain power at reasonable rates.[65] Moreover, the theory that access should be compelled because it would offer a source of less expensive power was inconsistent with the purposes of the doctrine. The court, quoting the district court judge, explained:

> the Cities' whole argument asks the Court to turn the essential facilities doctrine on its head. Rather than seeking to impose a duty to deal based on the harm that would result to competition from the monopolist's refusal, the Cities seek to impose a duty to deal based on the extent to which a competitor might benefit if it had unlimited access to the monopolist's facility.[66]

The court concluded that the fact that the plaintiffs could achieve savings if access were provided was not enough to turn the Pacific Intertie into an essential facility. The clarity in the law appears to be having a desired effect. In the past several years, all of the reported essential facility cases have been resolved without a trial on the merits.

4. WHAT IS THE APPROPRIATE APPROACH TO COMPULSORY ACCESS CLAIMS INVOLVING NETWORK JOINT VENTURES?

Unfortunately, the clarity arising in the law of single firm cases such as *MCI* and *City of Anaheim* has not always found its way to access demands brought against joint ventures. The Supreme Court's 1984 decision in *Northwest Wholesale Stationers* clarified the scope of *per se* illegality for access demands, when it declared that exclusions by joint ventures are not *per se* illegal where the venture "does not possess market power or exclusive access to an element essential to effective competition."[67] Although *Northwest Wholesale Stationers* clarified the dimensions on *per se* liability, it did not explain how the liability inquiry under the rule of reason should be structured. Despite the need for an analytical framework for resolving liability under the rule of reason without a full trial, no appellate

court has furnished one. Thus, the courts have had little guidance for structuring analysis under the rule of reason in order to resolve liability without a full trial.[68]

4.1 Preliminary Observations

This analysis begins with discussion of two issues: (1) what policy considerations should inform the analysis of exclusion claims, and (2) whether the legal standards applied to denials by single firms should be applied to denials by joint ventures.

4.1.1 Policy considerations

Analysis of antitrust claims based on an exclusion of a competitor from a joint venture should address three important policy considerations. First, in many circumstances, requiring rivals to collaborate may diminish competition by placing a potential competitor within the venture. Second, it may diminish incentives to form collaborative ventures by forcing co-venturers to share the benefits of market success with parties that did not share the risks.

Perhaps the most important concern is predictability. Where legal standards are ambiguous, it is difficult for businesses to assess the risks of certain conduct. As Congress recognized when it passed the National Cooperative Production and Research Act of 1993 (NCPRA),[69] uncertainty in the law may deter desirable joint activity by creating the perception of exaggerated antitrust risks. This cost is especially significant when it involves collaborative activity, because these ventures often can bring new products and services to the market that cannot be provided by any individual member of the venture. Thus, the rule of law governing mandatory access should be predictable so that business executives can plan collaborative activities with an understanding of the effective legal standard. A broad "reasonableness" standard lacks that predictability and may inhibit procompetitive collaboration that requires a limited membership.

A final policy consideration is the effective use of judicial resources. Antitrust trials are costly, both for the parties and the courts. Thus, in many contexts, the courts have attempted to achieve greater efficiency and foster predictability by structuring the relevant legal inquiry so that a full trial may be unnecessary.[70] Notably, while almost all the recent Section 2 access cases have been resolved based on summary motions, several Section 1 cases have not.[71] Thus, in order to facilitate effective use of the courts and improve predictability, the rule of law should provide for a threshold inquiry in which the court can resolve the litigation.

4.1.2 Is a more lenient standard for joint ventures appropriate?

The more difficult policy question is why a more lenient standard should be applied to a refusal to provide access by a joint venture than by a single firm. After all, the effects of the denial of access on the plaintiff and the market are the same whether the facility is owned by a single firm or a joint venture. A single firm typically faces liability for a refusal to provide access under Section 2 only if: (1) it is a monopolist, (2) its facility is essential to the plaintiff's competitive viability, (3) the facility is not capable of duplication, and (4) there is no reasonable basis for the denial. For joint ventures the standards are far less clear. The decisions in the banking cases, however, suggest that there may be liability under Section 1 if: (1) the joint venture possesses a large market share (but is not a

monopolist) and (2) the facility offers a competitive advantage.[72] Thus, the standards for joint ventures seem considerably more lenient than those for single firms.[73]

Applying a more lenient standard for joint ventures needs explanation. Generally, the Supreme Court has observed that there are stricter standards for finding liability under Section 1 than Section 2 because of the risks of collusion.[74] The few commentaries that have addressed the issue in the context of access demands have suggested that the differing standards are based on the distinction between unilateral and concerted action and the greater likelihood that refusals to deal by joint ventures will lead to collusion among its members.[75]

It is questionable whether a collusion assumption, i.e., that joint ventures will exclude members in order to enforce a collusive agreement, is justifiable. First, the single firm standard of illegality should accurately detect joint behavior that threatens economic harm. As Professors Areeda and Turner have observed, joint action in the form of a cartel is hampered by "divergent interests, strong temptations to cheat on the cartel price, non-price competition and changes in market shares."[76] In order to overcome these problems, the members of a cartel would have to "emulate monopoly and fully control the operations and sales of the members."[77] Second, an assumption that joint venturers will exclude members in order to enforce a collusive agreement also runs counter to economic theory, which suggests that cartel members will seek to *include* all competitors in order to police behavior and ensure cooperation.[78]

The more lenient standard applied to concerted action can yield inconsistent results in the market. Joint ventures, unlike single firms, are restrained from certain efficient conduct, which may restrain trade to the same extent as a single firm. Yet, they can incur liability that the single firm would escape, even though the firms acting in concert did not possess monopoly power collectively.[79] Finally, the remedy sought in a compulsory access claim, that of admitting the excluded party, seems inconsistent with the concern of preventing collusion. Compelling the admission of new members, especially competitors, would appear to *raise* rather than reduce the risks of collusion.[80]

Applying more lenient standards to joint ventures than single entities may have several adverse effects on competition. First, as Congress recognized in passing the NCPRA, joint ventures serve an important role in bringing productive activity to the economy that often cannot be provided by single firms. Applying stricter or even less precise standards may deter this productive activity. Second, in markets where single firms compete with joint ventures, the joint ventures may be placed at a competitive disadvantage, because they face a greater threat of liability if they deny access. Third, under the *Associated Press* standard, if the joint venture acquires some sort of competitive advantage it may be compelled to share it with its competitors. Thus, the threat of compulsory sharing dampens the incentives to compete vigorously and innovate, for if the joint venture succeeds and acquires a competitive advantage or market power, it might be compelled to grant competitors access.

Thirdly, because of the stricter standard competitors can use the compulsory access doctrine to free-ride on an existing successful venture, rather than risk organizing a venture of their own. Finally, to avoid the risk of liability based on market power, a venture may choose to operate at "a suboptimal scale for fear that an efficiently sized venture would lead to compulsory access."[81] Thus, several recent commentaries have suggested that access

to joint ventures should be judged by essentially the same standards as are applied to single firms.[82]

4.2 How Should the Analysis Be Structured?

This chapter proposes a three-part inquiry, similar to that used in single firm essential facility cases, to structure the analysis of a joint venture access demand.[83] First, is the joint venture's facility critical to the ability of the excluded party to compete in the market? Second, can the excluded party duplicate the facility either individually or with others? Finally, does the joint venture possess market power? Unless each of these conditions are met, the access demand should not reach the jury.

4.2.1 Is the facility necessary to compete in the market?[84]

The first question focuses on how the competitive process is effected by the exclusion. The Supreme Court has proclaimed that the antitrust laws were enacted for the "protection of *competition,* not *competitors.*"[85] As the Tenth Circuit observed in the *VISA* case, although a party may be prevented from joining a collaboration, that exclusion does not necessarily have a significant impact on the market. The mere fact that a party is excluded from a collaboration is, in and of itself, insufficient to demonstrate injury to competition. The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.[86]

The Supreme Court in *Northwest Wholesale* implicitly recognized the importance of this distinction when it approved of the district court's analysis, which dismissed the case because there "simply [was] no showing by the Plaintiff... of a restraint of competition as distinguished from possible damage to the Plaintiff from being expelled from the association."[87] Similarly, the FTC and the Justice Department, in their *Health Care Policy Statements*, observed that "the focus of the analysis is not on whether a particular provider has been harmed by the exclusion, but rather whether the exclusion reduces competition among providers in the market and thereby harms consumers."[88]

Thus, the court should perform a preliminary inquiry whether membership in the venture is necessary for the excluded firm to compete effectively in the relevant market. The "necessary to competition standard" is that adopted in essential facility claims.[89] If the plaintiff is able to compete without access to the venture, then it is not essential. For example, MCI could not effectively compete as a long distance telephone service without access to local telephone exchanges, which were the only means to reach local customers. Moreover, MCI could not replicate AT&T's local exchanges, which were regulated monopolies.

Focusing on whether the facility is necessary to competition in the market will fulfill the policy objectives discussed earlier. First, if the party seeking access is an effective independent competitor, access would not be compelled. Thus, competition at the level of the joint venture will not diminish. Second, identifying whether the party seeking access is capable of effectively competing in the market, in many cases, may be relatively simple.[90] Thus, this test will improve predictability and business planning.

When the facility offers some sort of cost advantage, such as in the electric utility litigation discussed earlier,[91] this inquiry becomes more complicated. Such an advantage normally should not make a facility essential. As a former Acting Director of the FTC's

Bureau of Competition has stated: "if the facility offers a cost advantage or is capable of being duplicated, the denial of access will typically not raise antitrust concerns."[92] For example, *Northwest Wholesale Stationers* involved the membership rules of a stationery buyer's cooperative. The excluded party Pacific Stationers lost about $10,000 in rebates, which apparently had little or no effect on its ability to compete.[93] This was not a sufficient advantage to make the purchasing cooperative essential.

In other cases, the cost advantage may be so substantial that the denial of access effectively precludes the excluded party from effectively competing in the market.[94] For example, an alternative form of access may be so costly that the excluded party is unable to compete in terms of price. Before accepting the claim, one should look for evidence that because of this impediment the excluded party was a relatively insignificant competitor in the market.

Some courts, like the district court in the *VISA* case, have used a fairly lax standard of necessity—that access should be required if it would offer a "competitive advantage." That argument is often based on the Supreme Court's opinion in *Associated Press v. United States*.[95] Associated Press (AP) was a cooperative wire service that prohibited its newspaper members from making news gathered by themselves available to nonmembers prior to publication by AP. The organization's membership requirements permitted an incumbent member to veto the admission of a competing newspaper in its geographic area. These restrictions were challenged by the Justice Department. In defense, AP argued that because other wire services (INS and UPI) were available to nonmembers and because nonmember papers could gather their own news, its services were not strictly necessary to operate a competing newspaper.

The Court rejected that argument. It held that inability to belong to and buy news from the largest news agency could seriously affect the publication of competing newspapers.[96] Based on this reasoning, the courts in the credit card cases have assumed that the competitive advantage offered by a venture need not be indispensably necessary to competitive survival to mandate access. It may be sufficient that without access the excluded competitor be placed at a significant competitive disadvantage.

Associated Press is 50 years old and has not played a prominent role in decisions involving access claims. With the exception of the credit card cases, none of the other recent decisions that have permitted the plaintiff to go to trial have relied upon or even cited *Associated Press*.[97] Some have argued that the facility in *Associated Press* was essential to competitive viability.[98] It is worth noting that the decision is not a paradigm of clarity. The opinion of the Court garnered only three votes. The majority consists of three different opinions, and it is difficult to decipher the grounds for the judgment of illegality.[99] One of the opinions relied explicitly on First Amendment concerns.[100] The plurality opinion seems to assume that AP had market power based on the fact that it was "large," rather than by defining the relevant market and determining the existence of market power. The opinion does not even discuss the potential loss of competition between AP and INS and UPI by permitting members of competing news services to compel their admission into AP.[101]

Many prominent antitrust commentators have criticized the decision. Judges Posner and Easterbrook observed that the decision undermined incentives for venture members to invest in the venture.[102] Former Judge Bork noted that the opinion never addresses the "real question [of] whether exclusivity of membership tended to make possible efficiencies of operation or merely injured rivals for the purpose of establishing local monopolies."[103]

Former Assistant Attorney General Donald Baker observed that *Associated Press* is inconsistent with the efficiency-based thinking of the Supreme Court's recent joint venture cases, *Broadcast Music* and *NCAA*.[104] Thus, the precedential value of *Associated Press* is open to question.

Moreover, even if *Associated Press* provided a sound legal basis for compelling access where a facility offered only a competitive advantage, such an interpretation may lead to less than competitive results. Such a rule would encourage competitors to seek access whenever their competitor had acquired some sort of advantage in terms of cost or product differentiation. This result would spur litigation and dampen the incentives for innovation. From an economic perspective, it would be preferable for the excluded competitor to attempt to replicate or surpass the competitive advantage by producing a better product.

4.2.2 Can the facility be duplicated?

The second inquiry focuses on the question of whether the plaintiff can, within a reasonable time, create an alternative to the facility, either alone or with others. If the defendant could establish this fact, then the access claim should be dismissed. This inquiry would require an analysis of two subsidiary issues. The first focuses on whether there are regulatory or market barriers to entry at the venture level. For example, is there sufficient network demand available to create an alternative network?[105] If the joint venture has less than 50 percent of the available market demand, it seems likely there is sufficient available demand to create an alternative network.[106]

Second, membership in the venture must confer cost advantages that cannot be replicated, either individually or in combination with others. This prong of the test will fulfill the policy objective of improving predictability. A joint venture network is perhaps in the best position to determine if there are barriers to entry or sufficient demand available to create an alternative network. Based on this information, the venture should be able to assess whether an excluded competitor is capable of replicating the network, and in turn, the risks of exclusion.

One example where these standards were met involves the challenge brought in the mid-1970s by the Justice Department against two regional Automated Clearing Houses (ACHs) that excluded thrifts from their membership.[107] On the issue of duplication, the Department believed that there was insufficient available volume for the thrifts to create a competing ACH. Moreover, the Federal Reserve Board's almost total subsidy of the ACH operations made independent competitive alternatives economically unfeasible. The cases were settled with the admission of the thrifts.

The ability of the plaintiff to replicate the network is critical. Where the excluded party is able to compete effectively with the joint venture, its mandatory admission into the venture is likely to diminish competition in the market in which the venture competes. For example, in the ATM area described earlier, the compulsory admission of competitors has led on several occasions to less intersystem competition.

The converse is illustrated by the development of authorization technology for credit card transactions. When Dean Witter began issuing the Discover Card, it was denied access to Visa's point of sale transaction authorization terminals (which were not as universal as today.) Under the circumstances, Dean Witter could litigate could have brought an antitrust claim arguing that the transaction clearance system was essential,

because without it the cost of authorizing transactions would have been much higher. Instead, it chose the path of innovation and created its own terminals and transactions authorization system. Many merchants found these terminals to be more attractive than the products offered by VISA and Mastercard. In response, VISA and Mastercard had to improve their transaction processing system. Thus, the Discover Card led the conversion of merchants from a paper to a more efficient electronic processing system, which ultimately benefitted consumers.

4.2.3 Does the joint venture currently possess market power in the primary market? Courts, like the Tenth Circuit in *VISA*, increasingly have used a market power screen to dismiss cases. The theory is that if the firms imposing the restraint lack market power, then there is little chance consumers will be injured.[108] Cases involving access demands have met a similar fate where the excluding party lacked market power.[109]

The use of a market power screen, or of an assessment of the existence of a monopoly on the basis of market shares, may not always lead to accurate results. In a network it is very difficult to measure market shares: what constitutes an appropriate measure is not a simple question. William Blumenthal has observed that various properties of networks—alternative routings, market failure, and critical mass—make it difficult to use historic transaction data to measure of market power.[110] Moreover, as noted earlier, the approach in the *VISA* and *Mastercard* district court decisions—of aggregating transactions of venture members regardless of which network was used—may lead to misleading results.

To illustrate why this is so, consider a metropolitan area with 200 ATMs, each carrying the service mark of the CIRRUS national network. In deriving market shares under the *VISA* district court precedent, transactions at any ATM would be counted as CIRRUS transactions. This procedure would imply that CIRRUS is a monopolist in the metropolitan market. Similarly, if each ATM also had the logos of MOST, PLUS, and several other ATM networks, this approach would imply that each of these networks was also a monopolist.[111] Such an approach obviously does not make sense.

The existence of market power defined in terms of a large market share also raises a perplexing problem. Mandating access for potential competitors would only ***augment*** the market share and hence market power of the venture, which is the opposite result of what is required. If a joint venture is "too large," it is difficult to see why a court should attempt to "cure" the exercise of market power by forcing the venture to enhance its market power. As the Justice Department noted in its amicus brief in *Northwest Wholesale Stationers*:

> It would make little sense indeed to interpret the antitrust laws as providing for the forced expansion of a procompetitive horizontal arrangement to the point where the arrangement itself violates those laws. Not only does such an approach have little to recommend it as a matter of consistency, it could also lead to a loss of the substantial procompetitive benefits usually associated with purchasing cooperatives and similar joint ventures.[112]

Since market shares may be deceptive or uninformative, other types of evidence should be used to identify the existence of market power. There are three types of evidence that would be probative. First, there may be evidence that the exclusion either raised prices or

decreased output. Second, the members of the joint venture may possess such an overwhelming proportion of the potential volume of transactions (or other measure of potential capacity) that no other comparably efficient joint venture is likely to have the minimum efficient scale to compete effectively. Third, there may be unique barriers to duplication of the joint venture facility (such as those created by regulation in the *MCI* case).

In determining market power, a factfinder should proceed with caution. The key to the market power inquiry is the question of "essentiality." As the Acting Director of the FTC's Bureau of Competition has observed:

> the relevant market power inquiry . . . is whether the membership at issue is an "element essential to effective competition." An association's members could have a large market share in some market, but unless the facility controlled by the association was essential to competition in that market, exclusion from the facility might not have any effect on competition in that market.[113]

4.3 Remedy

The question of remedy is not a simple one. Where a competitor prevails in a compulsory access claim, that does not mean it should be admitted into the venture and should be able to use the venture's service or trademark. Permitting such broad access would diminish product differentiation and the incentives to invest in product development, for example maintaining the value of the mark or the product. Moreover, as the legislative history of the National Cooperative Research Act suggests,[114] compulsory licensing may also serve as a long-run disincentive to risk-taking and product differentiation. Thus, compulsory licensing of the trademark should be disfavored out of deference to the public policies, which give trademark owners broad rights to refuse to deal with others.[115]

In addition, where a competitor has prevailed in an access claim, its admission may raise concerns over improper information exchanges or other forms of improper coordination. Membership in the venture may facilitate the exchange of competitively sensitive information without the procedural safeguards against such sharing that antitrust orders have imposed on co-venturers in concentrated markets.[116] As an alternative, the excluded competitor could be furnished with access to the essential facility only.

For example, if a court found that the transaction authorization system of an ATM network could not be replicated (the example is described below), the excluded competitor might be furnished with access to the transaction authorization system, but not allowed full membership in the venture. In this way, it will continue to offer competition in terms of product differentiation and development, and the risks of improper information exchanges or other forms of improper coordination will be diminished.[117] Finally, as many commentators have noted, where access is compelled the new members should be required to "pay their fair share of total investment,"[118] taking into account the risk and investment incurred by the earlier members of the venture.

4.4 Analysis under the Structured Inquiry

The structured inquiry would lead to more efficient decision making and fewer anticompetitive results. For example, in the BayBanks/Yankee 24 dispute described earlier, access to Yankee 24 was not "vital to competition," since BayBanks was already a viable and strong competitor in the market. Moreover, since BayBanks had already created its own ATM network, replication was not at issue. Thus, the court would be able to dismiss the case without sending it to the jury, which would improve the use of judicial resources.

Other types of claims may require full analysis under the rule of reason. For example, assume that an ATM network has a transaction authorization system for point of sale transactions, which includes a computer switch, a data base, and terminals at merchants. A competing ATM network seeks access to that system. Because their space is at a premium, merchants are unwilling to have more than one authorization terminal. Assuming that the competing network lacks a sufficient volume of transactions (either alone or with others) to create an alternative authorization system and that merchants are unwilling to accept the competing network's card without an authorization system, an access claim may be worth further analysis. The advantage of the structured inquiry is that it will focus analysis under the rule of reason on the issues that are most likely to be dispositive—the impact on competition and the ability to replicate the facility.

5. EFFICIENCY RATIONALES FOR LIMITING MEMBERSHIP IN A JOINT VENTURE

The antitrust enforcement agencies and many commentators have observed that limitations on membership offer great procompetitive potential in terms of promoting risk taking and preventing free-riding.[119] As the former Assistant Director of the FTC's Office of Policy and Evaluation has observed:

> Venture participants have a legitimate interest in ensuring that their co-venturers make valuable contributions to the mission of the enterprise, and for this reason require the ability to exclude potential participants who cannot make meaningful contributions to the enterprise or would fail to share fully in the risks of the venture. . . . If free and open access is required, potential venturers may decide to avoid entering a joint venture, and incurring the risk that membership in the venture entails, because they may be required to share the fruits of the joint venture with outsiders if the venture succeeds but will be required to bear the losses alone if the venture fails. This free-rider effect creates a serious risk that some efficiency-enhancing projects would be delayed or altogether deterred.[120]

A second important objective of membership restrictions is to prevent a venture from being overinclusive so that its size or scope would deter the development of competing ventures.[121] Overinclusiveness has been identified as a particular risk in joint ventures to provide health care services. Both federal antitrust agencies have stated that overinclusiveness, rather than membership exclusions, is the primary concern when

analyzing joint ventures.[122] Both agencies have recently challenged physician joint ventures, because they were overinclusive.[123] The Health Care Enforcement Policy Statements recently issued by the FTC and the Justice Department also recognize this issue.[124]

To preserve the opportunities for competition with the joint venture and to protect from the risk of market power, it is often appropriate to restrict the size of the venture. For *network* joint ventures, such as ATM and credit card networks, "size" issues may appear more complex, because increased size may yield significant efficiencies, known as network externalities.[125] However, the existence of these externalities does not mean that enforcement agencies are or should be indifferent to size issues. For example, William Baxter, the former Assistant Attorney General in charge of the Antitrust Division, has observed that although ATM joint ventures can achieve efficiency benefits related to economies of scale, these efficiencies will cease to be significant once the venture reaches a certain size. Thus, it may be preferable for the network to remain open until it reaches this optimal scale. Beyond this point, Baxter suggests that the network should be permitted to close to encourage the creation of competing networks.[126]

The issue of whether the efficiencies inherent in a network joint venture require the venture to be open or closed was also studied by the National Commission on Electronic Funds Transfer (NCEFT) in the mid-1970s. At the time, some commentators argued that because of the efficiencies of EFT networks, they should be compelled to share their facilities to all comers. Some states incorporated this concept in state sharing statutes. In proceedings before the NCEFT, the Justice Department opposed the concept of mandatory sharing, in particular because it would deter the incentives to create competing networks.[127] The NCEFT adopted the Justice Department's view.[128] In addition, the Justice Department actively opposed the adoption of state sharing statutes.[129]

Thus, limitations on membership serve a valuable goal in that they may preserve both actual and potential competition with the venture. If a firm may obtain the product or service provided by the venture elsewhere, exclusion may be procompetitive, so long as it provides non-affiliated firms an incentive to support a competing joint venture or compete on their own.[130]

The concern about overinclusiveness was part of the reason why the state attorneys general challenged the Entree point of sale (POS) debit card joint venture.[131] Entree was a joint venture of Mastercard and VISA and thus consisted of many of the most likely entrants into the national POS market.[132] The states alleged that by entering through a single joint venture, VISA and Mastercard in effect foreclosed the development of competing POS ventures. The case was settled when VISA and Mastercard agreed to abandon the Entree joint venture. VISA and Mastercard have since created their own independent POS networks, Interlink and Maestro. In response to the concerns of the states, each network adopted rules preventing any bank member from belonging to a competing network.[133]

Competition between the networks, in terms of product promotion, product development and pricing has been aggressive, and far more significant than in the credit card market.[134] Each competes vigorously to sign up both banks and merchants by offering lower fees and other incentives. In addition, the fees charged within the networks, including interchange fees, are less than those involving credit cards.[135] The active

competition between Maestro and Interlink indicates that the states' judgment in challenging duality was correct.

One argument posed in the *VISA* litigation was that even if these free-riding and overinclusiveness justifications are generally legitimate, they are inapplicable to banking joint venture networks because these networks have admitted thousands of members after the risk-taking phase. The argument is that the traditional free-riding justification is inapplicable because: (1) the membership rules at issue permit admission of any financial institution *except* a competitor, and (2) these networks are efficient particularly because they are "open."

5.1 Should a Different Rule of Law Apply to a Rule That Excludes Only Competitors?

Not all access demands are problematic. Where a prospective member does not actually or potentially compete with the venture, its admission may raise few competitive problems. However, a competitor may not be a typical potential member that wishes to improve its ability to compete, but rather intends to subvert the competitive process. As described earlier, there have been a number of cases involving banking joint ventures, where rivals of the joint venture network have used antitrust claims to compel admission into the venture, and the result has been a diminution of competition.

A rule of law that made it easier for *competitors* to compel access into a joint venture may diminish competition in the market in which the venture competes.[136] Such a rule is without precedent. In no case other than the *VISA* district court decision has a joint venture been compelled to admit new members, which were actual or potential competitors. Only one other compelled admission case arguably did not concern a bottleneck monopoly. That case, *Associated Press*, dealt solely with competition against the venture's members, as the newspapers seeking admission did not compete with Associated Press in supplying a wire news service. *Associated Press* did not compel the defendant to admit any entity, but merely banned the practice of permitting incumbents to veto membership of new applicants. In particular, the order did not require the admission of any entity that would have competed with the Associated Press, and the Court's analysis surely would have been different if the excluded party been the Reuters or INS wire service rather than local newspapers.

Where competitors have been able to use access claims (and the threat of treble damages) to force their way into joint ventures, consumers have not benefitted for several reasons. First, the dynamics of joint venture decision making are delicate because ventures are collaborative bodies. It may be very difficult for a venture to act against the interests of any individual member, especially a large member.[137] Also a single member may attempt to tailor the joint venture's product to fulfill its own competitive agenda. As a leading commentary on payment systems has observed:

> The competitive complexity of a payments partnership is enhanced by the fact that its members are primarily competitors in selling the joint payments product to consumers and merchants. . . . Since individual members have separate and distinct business strategies, a major member may be expected to try to tailor the joint product or its terms to serve its parochial needs. If successful, these efforts

> may make the joint product less attractive to other members, merchants, or consumers—all to the detriment of the payments partnership's broad mission.[138]

Second, selectivity in membership will often enhance a venture's ability to compete. Admission (especially the forced admission) of members with diverse or contrary interests may lead to competition only on a least common denominator basis. Ultimately, mandating access may diminish the ability of the venture to compete. As Joseph Kattan has aptly explained in discussing why selectivity in membership may be critical to the ability of a joint venture to innovate:

> Because joint ventures have multiple owners who may otherwise compete with one another, the enterprise provides fertile ground for conflict. Decisionmaking can suffer when participating firms have differing objectives or opinions on the course of the venture, and the enterprise is vulnerable to efforts by participants to free-ride on co-venturers. . . . This "problem of trust" can stifle the transfer of technology that may be critical to the success of joint ventures and, indeed, may inhibit would-be collaborators from entering into ventures in the first place.[139]

Third, selectivity in membership can be vital to the success of a collaboration. A venture may seek to compete by offering a certain type of product or a certain standard of quality. If the venture cannot limit its membership to those which adhere to its objectives, success may be elusive. For example, in *Hassan v. Independent Practice Associates*,[140] the court rejected a claim brought by two allergists that their exclusion from an independent practice association was an illegal group boycott. The record was undisputed that the plaintiffs disagreed with the IPA's cost containment policy (which the plaintiffs had violated). Thus, the court concluded that the expulsion of the plaintiffs was "justified by enhancing economic efficiency and making markets more competitive."[141]

Finally, mandating access for a competitor may be a poor solution, because it may increase disputes within the venture, especially if the member has a different competitive strategy. Mandating access cannot eliminate the basic conflicts between an outsider and its new partners. At best, it simply shifts the conflicts from the courthouse to the governing bodies of the joint venture.[142] If the "outsider" competes with the joint venture, it may have a special incentive to use its voice and vote to retard the joint venture's efforts and innovations in the network market. For example, in the BayBanks/Yankee 24 matter described above, once BayBanks compelled its admission as a member of Yankee 24 the aggressive competition between the two networks decreased.

5.2 Should a Different Rule of Law Apply If the Joint Venture Has Been "Open" or the Venture Exhibits Positive Network Externalities?

Arguably the free-riding and risk-taking rationale for membership exclusions may be inapplicable for joint ventures, like ATM and credit card networks, which have admitted members after their risk-taking phase and generally have an "open" membership policy. This argument distinguishes between open joint ventures (i.e., that admit new members) and closed joint ventures (i.e., that restrict membership). Network joint ventures benefit through their inclusiveness, since they are characterized by positive network externalities.

Thus, as the plaintiff in the *VISA* case, one could argue that where a joint venture is characterized by positive network externalities, it should not be permitted to exclude members if those members can improve competition within the joint venture.

There are a number of reasons to question this argument. First, it would turn any joint venture that was characterized by network externalities into a ***public utility*** with the obligation to admit all comers. Some potential venture participants might offer little to the venture; others may pose a significant threat of free-riding. Still others may want to join to impede the competitive efforts of the venture. A rule of law that ***required*** open access would prohibit a venture from excluding any of these participants.[143]

Second, where a joint venture is characterized by positive network externalities, a joint venture would have no basis to ever deny access to a competitor. The fact that network externalities exist does not mean that they are infinite. At some point those externalities may cease to be significant.[144] When a network reaches its optimal size, adding members wastes resources. There may also be other beneficial reasons for denying access even where network externalities exist.[145] A rule of law that prohibited a venture from closing, taken to its logical conclusion, would permit competitors access regardless of whether externalities continue to exist or whether admission of a new member was economically efficient.

Under such a rule of law, practically any competitor could argue that it can offer more competition, if it has access to the joint venture and can offer the joint venture's product. This will ultimately lead to more consolidation and the creation of a single network. While a joint venture may need to be open at its inception, at some point the members of the joint venture may choose to close ranks and decide that the venture is large enough. (Perhaps all of the economies of scale have been achieved and further expansion would not be profitable.) Such a rule of law would prohibit a joint venture from ever being able to make that decision without facing liability.

Third, as noted earlier, a rule of law that compelled a joint venture to admit new members might be inconsistent with the interests of competition policy by forcing an entity to accept market power. As an Antitrust Division official recently stated, "an antitrust rule forbidding exclusion could result in the creation of market power that was not there to start with. That would make no sense."[146]

Fourth, treating a joint venture with network externalities like a public utility would impede risk-taking and innovation. If joint ventures are "told in advance, as a matter of law, that they are going to have to grant compulsory access to their competitors whenever they achieve a really significant success, then the law has blunted their incentive to invest and innovate."[147]

Fifth, this argument goes beyond the few cases which have compelled access. For example, in *Associated Press* the Supreme Court did not prohibit Associated Press from being closed. It only prohibited Associated Press from permitting local newspapers to veto the membership of competing newspapers.[148]

It is difficult to predict the impact of a rule of law that would treat VISA or Mastercard like a public utility and require them to be open to any new member. In the ATM area, however, where sharing has been compelled consumers have not benefitted. Some states have adopted a public utility model and have enacted mandatory sharing statutes which compel ATM networks to provide open access. Other states have not addressed the issue and have permitted sharing to evolve of its own accord. The Federal Reserve Board has

studied the impact of state mandatory sharing statutes on ATM deployment and usage. It has found that in those states which have compelled mandatory sharing, output in terms of ATM deployment and card usage is less than in those states that do not require sharing.[149]

Finally, a rule of law that compelled a joint venture network to provide open access would *close the book* on the opportunity for competition with the network. Rather than creating a competing product, potential entrants into the network market will simply demand and receive access to the venture. Thus, the opportunities for network competition, which could bring consumers better products and lower prices, will be lost.

6. CONCLUSION

Because of the recent antitrust litigation, the banking industry faces a critical turning point. How access claims are resolved has a significant impact on the level of competition between bank networks and the growth of various consumer financial services. The lack of clarity as to the legal standards governing access demands has inhibited the development of these ventures and has encouraged competitors to compete in the court house rather than in the marketplace. When competitors force their admission into a venture, moreover, consumers do not benefit.

As the courts seek to clarify this complex area of the law, they should recall President Clinton's words when he signed into law the National Cooperative Production Act. The Act provides that research and development and production joint ventures can receive limited protection from treble damage liability by submitting a notice filing with the antitrust enforcement agencies. When President Clinton signed the Act, he explained

> By *clarifying* and *eliminating* the apprehensions about antitrust risk, this legislation will allow joint ventures that can increase efficiency, facilitate entry into the markets, and create new productive capacity that otherwise would simply not be achieved. . . . Now is the time to strip away *outdated impediments* to economic growth and to our potential and to begin real movement in this last decade of the 20th century.[150]

President Clinton's concern about "outdated impediments" is germane as the courts evaluate the guidance provided by *Associated Press*. Joint ventures are an ever more essential facet of the economy. Providing a clear, predictable standard for the risks they face from access demands will enhance their ability to compete.

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NOTES

1. This chapter does not necessarily represent the views of the Commission or of any individual Commissioner.

2. *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975).

3. The term "access demands" as used in this chapter refers to situations in which a joint venture refuses a person participation in the venture. This assumes that the restriction in membership is not used to impose any other type of restraint. In other words, the source of any anticompetitive effect is the denial of access and not any other restraint imposed by the venture. Membership restrictions, used to impose other types of restraints, would be analyzed under the rubric appropriate for that type of restraint.

4. See *SCFC ILC, Inc. v. VISA U.S.A.*, 819 F. Supp. 956 (D. Utah 1993), *rev'd*, 36 F.3d 958 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995); *Mastercard Int'l Inc. v. Dean Witter, Discover & Co.*, 1993-2 Trade Cas. (CCH) ¶70, 352 (S.D.N.Y. 1993). See also Balto (1993a).

5. 15 U.S.C. § 1 (1988).

6. Banks perform two separate functions involving credit cards. They issue credit cards to consumers, and process businesses credit card transactions. In this chapter, I refer to banks as card-issuers and merchant banks.

7. 345 F. Supp. 1309 (E.D. Ark. 1972), *rev'd*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

8. 485 F.2d, p. 130.

9. See Letter to Francis R. Kirkham from Thomas E. Kauper, Assistant Attorney General, Antitrust Division (7 October 1975).

10. For a detailed discussion of the impact of duality, see Balto (1994).

11. See Baker and Brandel (1988) ¶23.O2[3]; Balto (1993a), pp. 266-68; Baxter (1983); Bernard (1980).

12. An interchange fee is paid by the merchant's bank to the cardholder's (consumer's) bank for processing the transaction. It is set by the bank card association and until the entry of the Discover Card, was set by both VISA and Mastercard on a fully allocated cost basis.

13. See Constantine (1990), p. 84. Constantine is the former head of the Antitrust Division in New York State. There is a renewed debate on duality within the bankcard associations. See "Mastercard and VISA Scuffle in New Debate on Duality," *American Banker* 1 (28 December 1993).

14. 507 F. Supp. 1113 (S.D.N.Y. 1980), *aff'd,* 666 F.2d 6 (2d Cir. 1981).

15. *Ibid.*, p. 1123. The Second Circuit affirmed the district court opinion in part on the merits and in part on grounds that the appellant failed to demonstrate a link between the behavior complained of and anticompetitive consequences to United States commerce. 666 F.2d 6 (2d Cir. 1981).

16. See Baker (1993), pp. 1065-68.

17. *Ibid.*

18. See Balto (1994).

19. See *BayBanks, Inc. v. New England Network, Inc.*, No. 86-3532-K (D. Mass. filed 9 December 1986).

20. See Letter from William F. Baxter, Assistant Attorney General, Antitrust Division, to Donald I. Baker (3 August 1983). The other two alternatives were not addressed because they were not considered ripe for review.

21. Ironically, three years later First Texas attacked PULSE's interchange fee structure, relying on PULSE's market power that was in part due to the *de facto* merger with MPACT. *In re Arbitration Between First Texas Savings Ass'n and Financial Interchange, Inc.*, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1380, p. 340 (Aug. 25, 1988); see Grimm and Balto (1993), pp. 852-57. First Texas sued seeking the ability to assess additional charges for PULSE cardholders using First Texas ATMs. The arbitrator ruled that PULSE was required to permit surcharges or rebates at their ATMs.

22. The Discover Card was originally issued by a financial subsidiary of Sears. Thus, the district court opinion refers to the plaintiff as Sears. Dean Witter formerly was a subsidiary of Sears.

23. See *SCFC ILC, Inc. v. VISA U.S.A.*, 819 F. Supp. 956 (D. Utah 1993), *rev'd,* 36 F.3d 958 (10th Cir. 1994), *cert. denied,* 115 S. Ct. 2600 (1995).

24. 15 U.S.C. § 18 (1988).

25. The case has been the subject of extensive legal and economic analysis. See Baker (1993); Carlton and Frankel (1995); Carlton and Salop (1995); Evans and Schmalansee (1995); Piraino (1995).

26. *SCFC ILC, Inc. v. VISA U.S.A.*, 801 F. Supp. 517, 521 (D. Utah 1992).

27. The court arrived at this share by aggregating the shares of each VISA member in the general credit card market, regardless of what brand of card the member issued. This effectively merged the market shares of VISA cards (46 percent) and Mastercard cards (26

percent). The court's aggregation of market shares in this fashion is open to question. Courts apply a market power screen to determine if a practice will adversely effect prices or output. Measuring the aggregated market shares of VISA members is uninformative. The fact that VISA cardholders possess a 72 percent market share does not mean that Dean Witter is excluded from that portion of the market, since those cardholders are not restricted from acquiring a Dean Witter card.

28. *Ibid.*, p. 972.

29. *Ibid.*, p. 973.

30. *Ibid.*, p. 974.

31. *Ibid.*, p. 980.

32. 326 U.S. 1 (1944). The decision in *Associated Press* is of dubious precedential value. See *infra* notes 96-105 and accompanying text.

33. The court also determined that the bylaw went beyond a simple refusal to deal and prevented current VISA members from issuing their own proprietary cards. 819 F. Supp., p. 977.

34. 819 F. Supp., p. 983.

35. *Ibid.*, pp. 983-84 (emphasis added).

36. *Ibid.*, p. 995.

37. *SCFC ILC, Inc. v. VISA U.S.A.*, 36 F.3d 958 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995).

38. *Ibid.*, p. 962.

39. *Ibid.*, p. 969 (quoting *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2598 (1993)).

40. *Ibid.*, p. 970.

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

42. *Associated Press v. United States*, 326 U.S. 1 (1945).

43. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

44. 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). Former Judge Bork, who filed an amicus brief supporting Discover, wrote this decision and was joined by Justice Ginsburg.

45. *VISA*, 36 F.3d, p. 972.

46. *Ibid.*

47. *Ibid.* For criticism of the Tenth Circuit's decision, see Carlton and Salop (1995); Piraino (1995).

48. 1993-2 Trade Cas. (CCH) ¶70, 352 (S.D.N.Y. 1993).

49. *Ibid.*, pp. 70, 839.

50. Under the settlement, MountainWest was not admitted into Mastercard. Rather, NationsBank, a Mastercard member, was permitted to issue a Prime Option Mastercard, co-branded with Dean Witter. See 61 Banking Report (BNA) 850 (29 November 1993). See also "Seeking an Edge, Prime Option Opts to Lower Its Interest Rate," *Credit Card News* (15 February 1994).

51. Payment systems joint ventures face the risk of government enforcement from three sources: the Antitrust Division of the Justice Department, the Federal Reserve Board, and State Attorneys General. For a description of the risks of government enforcement, see Balto (1993b).

52. 15 U.S.C. § 2 (1988).

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

54. Areeda and Hovenkamp (1993). The only successful essential facility cases are those that have effectively met those standards. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (electric power lines); *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1987) (basketball arena); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984) (mountain), *aff'd on other grounds*, 472 U.S. 585 (1985); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.) (local telephone exchanges), *cert. denied*, 464 U.S. 891 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (football stadium), *cert. denied*, 436 U.S. 956 (1978).

55. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

56. *Ibid.*, pp. 1132-33.

57. *Ibid.*, p. 1132. See *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1379 & 1380 n.5 (9th Cir.), *cert. denied*, 113 S. Ct. 305 (1992); *Alaska Airlines v. United Airlines*, 948 F.2d 536, 544-46 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

58. At the time, Judge Michael Boudin (1986, p. 402), observed that "despite its embarrassing weakness, the [essential facility] doctrine is nevertheless alive and well in the lower courts, doing mischief and gaining momentum."

59. ABA, Section of Antitrust Law (1989).

60. See *supra* note 58; *infra* note 62.

61. See, e.g., *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648-49 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992); *Alaska Airlines*, 948 F.2d, pp. 544-46; *Laurel Sand & Gravel, Inc. v. CSX Transp.*, 924 F.2d 539, 544-45 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991); *Twin Labs. v. Weider Health & Fitness*, 900 F.2d 566, 569-70 (2d Cir. 1990).

62. See *Alaska Airlines*, 948 F.2d, p. 544; see also *City of Anaheim*, 955 F.2d, p. 1380.

63. 326 U.S. 1 (1945).

64. 955 F.2d 1373 (9th Cir.), *cert. denied*, 113 S. Ct. 305 (1992).

65. *Ibid.*, p. 1381.

66. *Ibid.*

67. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-97 (1985).

68. For a thorough and insightful analysis of the inadequacy of traditional rule of reason analysis, see Baker (1993), pp. 1036-41.

69. 15 U.S.C. §§ 4301-4305 (1993). The Senate report that accompanied the NCPRA stated: "Our antitrust laws rely on private as well as public enforcement, however, and the fear of a private action for treble damages can be a powerful deterrent to procompetitive conduct where uncertainty exists regarding the applicable antitrust standards." Senate Report for S. 574, reprinted in Bureau of National Affairs, *Antitrust and Trade Regulation Reporter* 64 (10 June 1993), pp. 725, 729.

70. See American Bar Association (1992), p. 57; Baker (1993), pp. 1103-04; Calkins (1994).

71. Compare *supra* note 62 with *infra* note 98.

72. See *supra* section two.

73. See Blumenthal (1989), pp. 864-69.

74. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984).

75. Areeda and Hovenkamp (1993) ¶736.1d; Gerber (1988), pp. 1095-98. The observations of Areeda and Hovenkamp that refusals by joint ventures are easier to remedy may be overstated. See Baker (1993), pp. 1076, n.305, which observes that in some cases where the court mandated access, there was substantial subsequent litigation over the terms of access.

76. Areeda and Turner (1978) ¶405b; see *Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 67 (2d Cir. 1988).

77. Areeda and Turner (1978) ¶405b.

78. Gerber (1988), pp. 1095-98.

79. Blumenthal (1989), pp. 866-67.

80. Cf. Areeda (1986), ¶1477.

81. Blumenthal (1989), p. 868.

82. See Baker (1993), pp. 1102-11; Blumenthal (1989), p. 868; Werden (1987), pp. 477-78. See also Kattan (1993), p. 963; Steptoe (1994), p. 25; and Department of Justice (1988).

83. This discussion assumes that the denial of access is simply an exclusion from the venture, rather than part of an underlying agreement not to compete by the members of the venture. If the denial of access is part of a membership restriction that enforces an underlying agreement not to compete, the restriction may be subject to summary condemnation. For example, if members of a venture restrain competition among themselves by agreeing to refrain from advertising, that agreement might be condemned without full rule of reason analysis. The venture's exclusion from membership of those who engaged in advertising might also be summarily condemned. See Steptoe (1994), pp. 16-17.

This distinction helps to clarify the result in *Associated Press*. In *Associated Press*, the members had agreed to a system of exclusive territories. Each member had the power to veto the admission of new applicants in its territory. Exclusion from the association raised competitive concerns because it enforced that system of exclusive territories. The Court's concern was with the underlying restraint, not with the mechanism used to enforce it. Thus, the Court only struck down a member's veto power. It did not compel Associated Press to admit anyone. See 326 U.S., p. 24 (Douglas, J. concurring). See also *Consolidated Metal Prods., Inc. v. American Petroleum Inst., Inc.*, 846 F.2d 284, 291-92

n.21 (5th Cir. 1988); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1366-67 n.30 (5th Cir. 1980) (same); Areeda (1989), p. 842.

84. A preliminary factor that should be considered in each step of the analysis is defining precisely the facility to which the claimant seeks access. For example, does the claimant seek access to a computer system, a trademark, a group of merchants or a group of banks? Some facilities, such as an interchange system, may be far more difficult to replicate than a product mark assuming, for instance, insufficient demand to support a second network. A factfinder that defines the facility at issue too broadly may erroneously decide the joint venture possesses a facility impossible to economically duplicate, while a factfinder that defines the facility too narrowly risks erroneously deciding the joint venture's facilities may all be duplicated in a piecemeal fashion and so overlook a significant positive externality deriving from sheer size. See Stevens (1993), pp. 597-98, nn.109-112; *Ibid.*, p. 601, n. 124. Thus, disaggregating the elements of a payment system will lead to clearer decision making. See Baker (1993), pp. 1099-1102.

85. *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962) (emphasis in original).

86. See, e.g., *National Ass'n of Review Appraisers v. The Appraisal Foundation*, 64 F.3d 1130 (8th Cir. 1995); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 547 (2d Cir. 1993); *Fishman v. Estate of Wirtz,* 807 F.2d 520, 543 (7th Cir. 1986); *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663-665 (7th Cir. 1982); *Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n,* 767 F. Supp. 1573 (M.D. Fla. 1991); *Weight-Rite Golf Corp. v. United States Golf Ass'n,* 766 F. Supp. 1104 (M.D. Fla. 1991); *Martin v. American Kennel Club, Inc.*, 697 F. Supp. 997, 1002-03 (N.D. Ill. 1988); *Pretz v. Holstein Friesian Ass'n*, 698 F. Supp. 1531, 1539 (D. Kan. 1988); *Hassan v. Independent Practice Associates*, 698 F. Supp. 679, 695 (E.D. Mich. 1988).

87. 472 U.S., p. 297, n.9.

88. Department of Justice (1994).

89. See *Alaska Airlines,* 948 F.2d, p. 544.

90. In fact this issue has been dispositive in resolving a number of single firm access cases without a trial. See note 62, *supra.*

91. See *supra* notes 65-67 and accompanying text.

92. Steptoe (1994), p. 24; Department of Justice (1988), ¶3.42, n.95.

93. During the period of its exclusion, Pacific's sales actually increased by 33 percent.

94. For example, in the MLS cases brought by the FTC, it was clear that the MLS network could not be replicated and denial of access prevented the excluded brokers from effectively competing in the market. See, e.g., *United Real Estate Brokers of Rockland, Ltd.*, C-3461 (27 September 1993) (Commissioner Azcuenaga concurred in part and dissented in part). See also Austin (1970).

95. 326 U.S. 1 (1945).

96. *Ibid.*, pp. 17-18.

97. See, e.g., *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 1993-2 Trade Cas. (CCH) ¶70, 402 (7th Cir. 1993); *Thompson v. Metropolitan Multi-List,* 934 F.2d 1566 (11th Cir. 1991), cert. denied, 113 S. Ct. 295 (1992); *Spence v. Southwestern Alaska Pilots Ass'n,* 789 F. Supp. 1014 (D. Alaska 1992); *Medlin v. Professional Rodeo Cowboys Ass'n,* 1992-1 Trade Cas. (CCH) ¶69, 787 (D. Colo. 1991); *Carleton v. Vermont Dairy Herd Improvement Ass'n,* 1992-1 Trade Cas. (CCH) ¶69, 761 (D. Vt. 1991).

98. The Court observed that failure to have access to AP news could "have the most serious effects upon the publication of competitive newspapers" and it was practically impossible for a newspaper to develop a competitive source of news. *Associated Press,* 326 U.S., p. 17. Antitrust commentators and the Justice Department appear to have interpreted *Associated Press* as applying essential facility principles. See Areeda (1989), p. 842; Brief for the United States as Amicus Curiae, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, No. 83-1368, p. 16, n.14.

99. *Associated Press*, 326 U.S., p. 32 (Roberts, J. dissenting).

100. *Ibid.*, p. 28 (concurrence of Frankfurter, J.).

101. Justice Roberts in his dissent observed that the result in the case "may well result not in freer competition but in a monopoly in AP or UP, or some resulting agency." *Ibid.*, p. 48. Justice Roberts observations seem quite prescient, since AP today has a nearly-monopoly position in the news service market. See Baker (1993), pp. 1034-35, 1068-72.

102. See Posner and Easterbrook (1981), pp. 768-69 .

103. See Bork (1978), p. 341. Later he observed that "perhaps the decision stands for the proposition that efficiency is lawful so long as when there is a means by which the law can require that it be shared. Where it cannot be shared . . . the cause of the efficiency must be destroyed." *Ibid.*, p. 342.

104. Baker (1993), p. 1036. See also Areeda (1989), pp. 844-45.

105. If a network has achieved a certain "critical mass" there may be insufficient demand for the creation of an alternative network. See Stevens (1993), pp. 592-93.

106. See Baker (1993), p. 1108.

107. See *United States v. Rocky Mountain Automated Clearing House Ass'n*, No. 77-391 (D. Colo. 1977); *United States v. California Automated Clearing House Ass'n*, No. 77-1643-LTL (D. Cal. 1977).

108. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987); *Forest City Enterprises v. Polk Bros.*, 776 F.2d 185, 191 (7th Cir. 1985); see also Easterbrook (1984), p. 19.

109. See *Capital Imaging Assocs.*, 996 F.2d, p. 547; *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw.*, 810 F.2d 869, 878 (9th Cir. 1987); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1333 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986); *Rothery Storage & Van Co.*, 792 F.2d, p. 229; *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 355 (5th Cir. 1986). Cf. Kattan and Balto, (1993), p. 17.

110. See Blumenthal (1989), pp. 861-64.

111. The more appropriate approach may be to calculate market shares based on the ATM *network's* share of all transactions sent through an ATM network. See *Northwest Wholesale Stationers*, 472 U.S., p. 296.

112. Brief for the United States as Amicus Curiae, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, No. 83-1368, p. 16. See Steptoe (1994), pp. 27-28.

113. Steptoe (1994), pp. 23-24.

114. See note 70, *supra* and accompanying text.

115. See Baker (1993), pp. 1099-1101, 1117-22; Werden (1987), p. 475.

116. See, e.g., *General Motors Corp.*, 103 F.T.C. 374 (1984).

117. This was fundamentally the approach taken in litigation involving access demands brought against electric power pools. See *Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156, 1165 (D.C. Cir. 1979).

118. See Baker (1993), pp. 1122-24; Kattan (1993), p. 963; Pitofsky (1986), p. 903.

119. Although this discussion focuses on the justification of preventing free-riding, there are many other potential justifications that may be relevant in any individual case. For example, providing access may not be technically feasible. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973).

120. Kattan (1993), p. 963; see Areeda (1990), pp. 849-50; Pitofsky, *supra* note 119, p. 902; Stevens (1993), pp. 620-21; Department of Justice (1988) § 3.42.

121. See Department of Justice and Federal Trade Commission; Federal Trade Commission (1981), pp. 48990-91.

122. See Rule (1988), p. 15.

123. See *United States v. Health Choice of Northwest Missouri, Inc.*, Case No. 95-6171-CV-SJ-6 (W.D. Mo.; filed 13 September 1995), 60 Fed. Reg. 51808, 51815 (3 October 1995); *United States and State of Connecticut v. HealthCare Partners, Inc.*, Case No. 395-CV-01946-RNC (D. Conn.; filed 13 September 1995), 60 Fed. Reg. 52018, 52020 (4 October 1995); Justice Department, Antitrust Division, Press Release, 12 October 1983. Cf. *Home Oxygen & Medical Equipment Co.*, No. 901 0109, and *Homecare Oxygen & Medical Equipment Co.*, No. 911 0020 (consent orders issued for public comment 2 November 1993) (Commissioner Azcuenaga concurred with separate statement; Commissioner Starek dissented).

124. Department of Justice (1994). The risks of overinclusive joint ventures was also recognized by Congress when it enacted the National Cooperative Research Act of 1984. 15 U.S.C. §§ 4301-4305 (1988). The legislative history notes that:

> The greatest potential for harm . . . exists when a joint R&D venture is overinclusive—that is, when the venture includes a greater percentage of the potential market than it should under the circumstances. Overinclusiveness . . . reduces the number of competing R&D efforts [and] may increase the costs to society of mistakes in R&D strategy because there will be fewer other businesses pursuing different and potentially successful R&D paths. Moreover, as the number of its competitors with which a joint venture participant is required to share the benefits (of losses) of R&D increases, incentives to innovate may be decreased because the benefits of winning and the costs of losing in R&D competition may be reduced. H.R. Rep. No. 1044, 98th Cong., 2d Sess. 9, 10, reprinted in 1984 U.S. Code Cong. & Ad. News 3131, 3134-35.

125. "Network externalities" in this context reflect the fact that the value of a network to a consumer depends upon the number of users and the identities of other specific users. The larger the network, the greater the number of consumers who will join it and conversely, the smaller the network, the fewer the number of consumers who will join it. "Positive" network externalities reflect the fact that the value of the network increases to all of its incumbent users as new users join. See Stevens (1993), pp. 597-98; Katz and Shapiro (1985).

126. See Baxter (1983); Balto (1993b) pp. 113-14.

127. See Department of Justice (1977). At the same time, the Division has also declined to approve a statewide ATM/POS network in Nebraska, largely on the ground that the network by including virtually all the financial institutions in the state, was overinclusive. See Letter from Donald I. Baker, Assistant Attorney General, Antitrust Div. to William B. Brandt, Nebraska Bankers Association (7 March 1977).

128. National Commission on Electronic Fund Transfers (1977).

129. Rule (1985) A-141, n.5.

130. Steptoe (1994), p. 19.

131. See *State of New York v. Visa U.S.A., Inc.*, 1990-1 Trade Cas. (CCH) ¶69,016 (S.D.N.Y. 1990). See Balto (1993a), pp. 116-17.

132. VISA and Mastercard also allegedly controlled the two national ATM networks, PLUS and Cirrus, which were also considered to be potential entrants into the market.

133. The district court decision in *VISA* would appear to have put these anti-duality rules at risk. If a bank member of one of the POS networks wanted to issue the card of the other network, it could bring an antitrust suit challenging the anti-duality rule as an illegal group boycott.

134. See "Bankers are Burying the Hatchet to Join Forces for Debit Push," *American Banker* 20 (8 February 1994).

135. See Balto (1994); "Bank of America is Going to Bat for Maestro," *American Banker* 10 (5 April 1994); "Debit Card War Faces Tough Choices," *American Banker* 17 (7 February 1994); "Economics—More Issuers Get Debit Interchange," *POS News* (1 January 1994).

136. That is why cases in which the courts have mandated admission of competitors into collaborative ventures typically have involved bottleneck-type ventures which could not be effectively replicated by the plaintiff.

137. There was evidence presented at the *VISA* trial that Dean Witter's purpose in seeking membership in VISA was to deter VISA from competing as aggressively against Discover Card. See Balto (1993a), p. 271, n.38.

138. Baker and Brandel (1988), ¶23.01, pp. 23-24.

139. Kattan (1993), pp. 944-45; see *Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council,* 857 F.2d 55, 67 (2d Cir. 1988).

140. 698 F. Supp. 679 (E.D. Mich. 1988).

141. *Ibid.*, p. 694. Enforcement agencies have also recognized the importance of this type of exclusivity. See Department of Justice and Federal Trade Commission (1994), p. 103. See also FTC Staff Opinion Letter to J. Bert Morgan, Esquire (17 November 1993).

142. Baker (1993), pp. 1098-99.

143. Some may claim that this argument is supported by the district court's decision in the *VISA* case. However, the court's decision in the *VISA* case does not adopt the distinction between open and closed ventures. Consequently, the decision may tend to inhibit the formation of all sorts of joint ventures, rather than merely reduce incentives to maintain open networks.

144. See Stevens (1993), pp. 621-22; Gerber (1985), p. 1111.

145. A survey of electronic service networks suggests three reasons why denial of access may be socially beneficial, even in the presence of network externalities: (1) it is necessary to ensure the quality of network services; (2) if the excluded firms constrain the prices of the firms using the network; or (3) if supracompetitive profits produced by the exclusion are necessary to induce firms to undertake the risky investments required to develop the network. See Guerin-Calvert and Wildman (1991), p. 19.

146. FTC Watch, 3 (28 February 1993).

147. Baker and Brandel (1988) ¶21.05(2), pp. 21-36; Pitofsky (1985), p. 902.

148. See note 84, *supra*.

149. Laderman (1990).

150. Remarks on Signing the National Cooperative Production Amendments of 1993 (10 June 1993) (emphasis added).