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FEDERAL TRADE COMMISSION

SECTION 2 HEARINGS

UNDERSTANDING SINGLE-FIRM BEHAVIOR:
REMEDIES

MARCH 28, 2007

1 PROCEEDINGS

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3 MS. KURSH: Good morning, everyone. Thank you
4 for joining us.

5 I'm Gail Kursh. I'm with the Legal Policy
6 Section of the Antitrust Division, and I would like to
7 welcome everyone this morning to the first of three
8 panels on remedies in Section 2 cases.

9 These panels are part of an ongoing series of
10 public hearings on single-firm conduct.

11 My co-moderator today is Dan Ducore, the
12 assistant director of the Compliance Division in the
13 FTC's Bureau of Competition.

14 The Department of Justice and the Federal Trade
15 Commission are jointly sponsoring these hearings to help
16 advance development of the law concerning Section 2 of
17 the Sherman Act.

18 We began these hearings last June and have
19 covered a wide range of single-firm conduct that may
20 raise antitrust issues, including predatory pricing and
21 predatory bidding, tying, refusals to deal, exclusive
22 dealing, bundled rebates and misleading and deceptive
23 practices, among other topics.

24 It seems fitting to us as we get toward the end
25 of these hearings that we now address remedies.

1 However, it would have been just as fitting for
2 us to have addressed remedies at the very outset of
3 these hearings.

4 While I expect our panelists today may disagree
5 on the effectiveness of past Section 2 remedies and
6 perhaps even have differing views on the appropriate
7 goals of Section 2 remedies, I hope that we can all
8 agree today that crafting appropriate remedies in
9 Section 2 cases is critically important and that
10 consideration of remedies should begin very early in an
11 investigation or litigation.

12 So on behalf of the division, I want to thank
13 our panelists for participating today and agreeing to
14 share their insights with us.

15 I will introduce each panelist in more detail
16 before he speaks. But in brief, our speakers in order
17 are Dave Heiner, vice president and deputy general
18 counsel for Microsoft; Robert Crandall, a senior fellow
19 at the Brookings Institute; Per Hellstrom, chief of Unit
20 C-3 of the Directorate General for Competition, the
21 European Commission; and Tad Lipsky, a partner at Latham
22 & Watkins and former Deputy Assistant Attorney General
23 for the Antitrust Division.

24 I also want to thank my colleagues at the FTC
25 and at the division for organizing these hearings. And

1 our panel this morning will go as follows. We will ask
2 each of the four panelists to speak for approximately 15
3 minutes. We will then take a short break.

4 The panelists will each be given a couple
5 minutes to respond to each other and then we will have a
6 moderated discussion that Dan and I will lead.

7 We will not be taking any questions from the
8 floor, and we intend to end today at 12 noon, take a
9 lunch break and begin the afternoon session at around
10 1:30.

11 Before introducing our first speaker, I will
12 turn things over to Dan and let him make an
13 introduction.

14 MR. DUCORE: Thanks, Gail. On behalf of the
15 Federal Trade Commission, I also want to thank our
16 panelists for agreeing to share their time and
17 especially their views with us this morning.

18 Briefly, the remedies issue is obviously from
19 the agency's point of view about more than simply money
20 damages. That is somebody else's issue.

21 But certainly more so than in an area like
22 merger enforcement, Sherman 2 cases present much more of
23 a one of a kind kind of concern when you are trying to
24 develop the remedy in the sense that you have to be very
25 careful that the particular remedy matches the

1 particular facts and the particular theory of harm in
2 your case.

3 I expect today we will hear a lot about the
4 critical thinking that must go into fashioning effective
5 remedies for particular problems. And Gail is certainly
6 correct -- and I have seen this in my own experience --
7 that you have to be thinking about remedies at the
8 earliest stages of your case and, for an enforcement
9 agency, at the earliest stages of your investigation.

10 As someone who thinks about remedies pretty much
11 full-time, I'm going to be particularly interested in
12 hearing about both the broad approaches but also about
13 some of the smaller issues, including things such as
14 let's say administrability and the pitfalls and dangers
15 that can face an agency as it maybe starts to go off the
16 cliff and become an industry regulator.

17 With those introductions, let me get started,
18 with the exception I have to make a couple of logistical
19 announcements.

20 First, if there is an alarm, please go down the
21 stairway and get out of the building and follow the
22 instructions of people. You will be actually going
23 across the street. Second, the closest restrooms, men's
24 out the door and to the left, women out the door and
25 past the elevators to the left.

1 And finally, especially for the panelists,
2 please turn off cell phones, electronic devices,
3 especially things like Blackberries. They can create
4 static on the microphones.

5 With that more mundane information, let me turn
6 it back to Gail to introduce the first speaker.

7 MS. KURSH: Thanks, Dan. David Heiner is vice
8 president and deputy general counsel at Microsoft
9 Corporation, where he heads up the legal department's
10 antitrust group.

11 Since joining Microsoft in 1994, Dave has played
12 a leading role in Microsoft's response to government
13 antitrust proceedings in the United States, Europe and
14 Asia.

15 He is the author of "Assessing Tying Claims in
16 the Context of Software Integration: A Suggested
17 Framework for Applying the Rule of Reason Analysis."

18 Dave.

19 MR. HEINER: Thank you, Gail and Dan, for the
20 invitation to speak here today, which I very much
21 appreciate.

22 This is a subject upon which I think it is fair
23 to say Microsoft has quite a bit of experience, working
24 largely with many people I see in the room.

25 At the outset, I thought it might be useful to

1 briefly recap the remedies to which Microsoft has been
2 subject over the past decade or so.

3 In 1994, a consent decree was put in place and a
4 nearly identical European Union undertaking were put in
5 place. These were mostly contractual in nature.

6 In 2002, a consent decree and associated
7 litigated final judgment were entered in the Section 2
8 case against Microsoft.

9 The Section 2 case was followed by a number of
10 competitor lawsuits. Hundreds of consumer class actions
11 were filed. Nearly all of these private cases have been
12 settled with payments and some conduct relief as well.

13 In March 2004, the European Commission issued
14 its decision against Microsoft. The Commission took a
15 different approach to the issues than did the U.S.
16 court.

17 In February 2006, the Korean Fair Trade
18 Commission issued its decision against Microsoft. The
19 KFTC took yet a third approach. The EC and KFTC
20 decisions are on appeal now.

21 As you might imagine, all of this generates
22 quite a bit of work within Microsoft and its law
23 department.

24 When I joined the company in 1994, I was the
25 first antitrust lawyer at the company. Today I lead a

1 group of about 30 professionals dedicated full-time to
2 antitrust counseling and compliance.

3 This group includes software developers and
4 business personnel as well as lawyers and paralegals.

5 All told, a few hundred people at Microsoft are
6 engaged in compliance work over the past few years.

7 I would like to begin with a suggestion on the
8 overall approach to fashioning relief.

9 I would suggest that it's probably better to
10 focus on creating or preserving opportunities for
11 competitors rather than limiting the defendant's ability
12 to deliver consumer value. This is the approach very
13 much taken by the U.S. consent decree.

14 The Court of Appeals had reversed and remanded
15 the Section 1 tying claim against Microsoft but affirmed
16 Section 2 liability relating to the manner in which
17 Internet Explorer had been integrated into Windows 98.

18 The decree that resulted did not require that
19 any functionality be removed from Windows. Rather,
20 every provision of the decree is directed at creating or
21 preserving opportunities for competitors, both as a
22 matter of product design and contractually.

23 The focus is upon ensuring that distribution
24 channels remain open. This is an approach that was
25 strongly approved by the Court of Appeals in 2004.

1 Today, new Windows PCs come loaded up with
2 software from Microsoft's competitors, such as Google,
3 Yahoo, AOL, Semantec, McAfee and many others.

4 Under this approach, consumers benefit from the
5 ability to choose either integrated solutions or
6 separate stand-alone software or, as is so often the
7 case, to use both.

8 The European Commission has taken a different
9 approach. The Commission ordered Microsoft to create
10 new versions of Windows from which media playback
11 functionality had been removed. These are called
12 Windows XPN and Windows Vista N.

13 They were built following extensive compliance
14 discussions with the European Commission staff. They
15 are available in every European language.

16 However, not a single PC manufacturer has chosen
17 to license these operating systems. These operating
18 systems sit on the shelf. Costs have been imposed, but
19 there is little apparent benefit for anyone.

20 I will return to another aspect of this in a
21 moment. For now, I would note only that the U.S.
22 approach seems far more effective at advancing antitrust
23 values.

24 This focus on creating opportunity tells us
25 something about the proper objectives of antitrust

1 remedies.

2 I would suggest that remedies should be put in
3 place in order to safeguard competitive opportunities
4 but not necessarily to engineer any particular market
5 outcome, such as a reduction in market share. This is
6 for the market to determine once any competitive
7 restraints have been removed.

8 Indeed, even if engineering market outcomes were
9 thought to be desirable theory, it is hard to see how
10 this could be accomplished in practice in most cases.

11 By its nature, a remedy will only govern the
12 conduct of the defendant, not other market participants.

13 Everyone else, competitors, developers of
14 complementary products and, most notably, consumers will
15 act according to their self interest.

16 This is particularly noteworthy in high-tech
17 industries where products often interconnect with each
18 other in different ways.

19 For example, both the U.S. and EU remedies
20 require Microsoft to make available certain technology
21 called communication protocols to its competitors for
22 use in their products.

23 About 30 firms have taken licenses to this
24 technology under the U.S. program and one firm to date
25 under the similar European program.

1 But whether firms choose to take a license and
2 what kinds of products they build with those licenses
3 is, of course, entirely up to them and outside the
4 control of either Microsoft or any antitrust agency.

5 This general point is relevant outside the
6 context of access remedies as well.

7 Internet Explorer continues to have very high
8 share, although declining. Should this be seen as a
9 shortcoming of the U.S. consent decree?

10 Well, the open source Firefox Web browser now
11 has about 14 percent share, up from zero just a few
12 years ago.

13 Given the safeguards set up by the consent
14 decree which apply on a worldwide basis, there is no
15 reason why Firefox couldn't have a much higher share if
16 that reflected consumer preferences.

17 In fact, Firefox's share is about 33 percent in
18 some major European countries, up from 20 percent just a
19 year ago.

20 This focus on competitive opportunity rather
21 than outcome of market shares is especially important, I
22 think, in government actions.

23 As the Court of Appeals explained in the
24 Microsoft case, liability can be established with little
25 or no proof of actual market impact from the conduct at

1 issue.

2 This is what the court termed in the Microsoft
3 case a rather endogenous test for causation.

4 In fact, the District Court found that there was
5 no proof that the success of Internet Explorer had been
6 due to unlawful conduct.

7 Where there is no proof of market impact in the
8 first place, it would seem especially inappropriate to
9 expect a remedy to bring about a particular market
10 outcome.

11 This brings me to my third observation.
12 Whatever the proper role of antitrust remedies may be in
13 the abstract, I think, as Gail and Dan said at the
14 outset, it is really quite important that they be fully
15 thought through before liability proceedings are
16 commenced.

17 This is true for at least two reasons.

18 First and most importantly, if it is hard to
19 devise an appropriate remedy, that may suggest that
20 there is no liability in the first place. At the very
21 least, it may suggest that the liability rules were not
22 sufficiently clear to provide any real guidance or
23 notice to the defendant of what would be termed unlawful
24 later.

25 Second, absent a clear view on the question of

1 remedy, it may be difficult or impossible to obtain
2 rapid relief through settlement.

3 These points are well illustrated I think by
4 Microsoft's experience in dealing with the Windows tying
5 issues through the years.

6 The addition of new functionality to Windows can
7 present competitive challenges for firms that wish to
8 offer comparable functionality separately.

9 Antitrust agencies around the world have focused
10 on that over the past 10 years.

11 At the same time and as the Court of Appeals
12 noted in the Microsoft case, such integration can lead
13 to important benefits for software developers, PC
14 manufacturers, in fact, to the entire PC ecosystem.

15 That's why functionality has been integrated
16 into new operating system products steadily over the
17 past 20 years or so and why in fact we see integration
18 of functions as quite a common function across many
19 product categories.

20 So one has the question how should these
21 competing considerations be addressed in a remedy?

22 In the U.S., the consent decree approach I
23 outlined earlier is now in place. But there were quite
24 a few bumps along the road to getting there, including
25 three rounds of failed settlement talks, one before

1 Judge Posner in Chicago.

2 I think it is fair to say at least part of the
3 reason why those settlement talks failed is that there
4 was disagreement among the DOJ and the various states as
5 to what would be a suitable form of relief.

6 Absent a clear view on this, no agreement could
7 be reached, and the eventual remedy was delayed.

8 The history in Brussels is instructive as well.
9 In early 2004, Microsoft proposed a variety of remedies
10 to address the Commission's concerns regarding the
11 inclusion of media functionality in Windows.

12 The Commission case team devoted a great deal of
13 effort to defining and exploring those proposals, and
14 Microsoft is grateful for that.

15 Ultimately, however, the Commission determined
16 that a general remedy should be devised that would
17 address all future tying cases.

18 Given the range of possible fact patterns and
19 the benefits of integration, however, neither the
20 Commission nor Microsoft was able to articulate any such
21 rule that would govern future product design decisions
22 despite prodigious efforts by both sides.

23 As a result, settlement talks failed. The
24 Commission proceeded to impose the logical remedy for a
25 tying case, which was an order to untie. As a result,

1 PC manufacturers and consumers can now choose to get
2 Windows without media functionality.

3 As I have said, they have chosen the
4 full-feature version of Windows, as one might expect.

5 So the question becomes should it be unlawful
6 for a firm to fail to create a product for which there
7 is no appreciable consumer demand? Here consideration
8 of remedy may suggest that there was no unlawful tie in
9 the first place.

10 The same might be said about the package
11 discounting that was at issue in Lepages or the
12 selective discounting and output increases that were at
13 issue in the American Airlines case.

14 I would like to conclude with two final
15 observations of a practical nature.

16 First, in Microsoft's experience, it would seem
17 that the legal process is generally best suited to
18 contractual remedies.

19 Particular cases may call for other forms of
20 relief. But we should recognize that these come with
21 significant challenges for all concerned.

22 Contracts are good because they are within the
23 purview of lawyers. We understand contracts. We know
24 how to read them.

25 They are relatively easy to monitor, both for

1 the defendant and for the enforcement agency, and I
2 would note that essentially no issue of significance has
3 arisen through the years in Microsoft's compliance with
4 the contractual provisions of the U.S. consent decree.

5 Product design remedies are more difficult.
6 Here considerable technical expertise may be required in
7 order to devise and monitor a remedy.

8 Ultimately lawyers will remain responsible for
9 making compliance judgments regarding highly technical
10 matters, and this may be hard, even with expert
11 technical help.

12 In addition, agency lawyers will inevitably find
13 themselves drawn into the details of product design and
14 even the details of making engineering trade-offs which
15 are essential to the product design process.

16 To deal with these kinds of complexities, the
17 technical committee set up under the U.S. consent decree
18 now has more than 40 full-time employees.

19 Remedies that require sharing of complex
20 technical information are also quite challenging.
21 Technological complexity can quickly lead, I think it is
22 safe to say, to enforcement complexity.

23 Protocol licensing, for example, is just one of
24 eight major provisions of the U.S. consent decree, but
25 it takes up the lion's share of the compliance work,

1 both for Microsoft and for the agencies.

2 The EU protocol remedy introduces still greater
3 complexity. That is because it seeks to enable
4 fundamentally different computer operating systems with
5 different computer architectures to work together as if
6 they were one.

7 This is a computer science project, and even the
8 Commission itself has recently said that making this
9 work would require a massive development effort by third
10 parties, and that hasn't happened yet.

11 The result has been considerable frustration for
12 the Commission and for Microsoft.

13 This past summer, the Commission imposed fines
14 upon Microsoft of 280 million Euro for failing to
15 complete this project to the satisfaction of the
16 technical advisors set up under that decision.

17 Pricing is another challenge and likely will be
18 for any access case that involves information goods,
19 such as software.

20 The protocol technology that Microsoft has
21 developed was developed over the course of about 10
22 years. It is covered by 35 patents, and many more are
23 pending. It is covered by copyright and trade secret
24 law.

25 How is this to be valued? The answer is not

1 entirely obvious given the many ways that software is
2 monetized today and the varying business models that
3 people have.

4 Microsoft has suggested pricing that is
5 comparable to that which is in place under the U.S.
6 program where many firms have taken licenses. That
7 pricing is backed up by more than a thousand pages of
8 analysis and justification that the Commission
9 requested.

10 The Commission has taken issue with this
11 pricing, however, and is threatening to impose new fines
12 that could run to additional hundreds of millions of
13 Euros.

14 My final observation relates to globalization.

15 From Microsoft's perspective and I think it is
16 fair to say from that of other high-tech companies, it
17 is increasingly important that antitrust agencies
18 cooperate closely on remedies and show due respect for
19 principles of international comity.

20 For sound economic reasons, the Windows
21 operating system is essentially identical all over the
22 world. That uniformity is critical to the role that
23 Windows provides in enabling compatibility between
24 literally thousands of complementary software products
25 and hardware products.

1 And that is threatened today by the varying
2 approaches taken to the Windows tying issues in the
3 United States, in Europe and Korea, which I haven't had
4 time to go through this morning.

5 In the compulsory licensing area, I think it is
6 safe to say that the U.S. and foreign countries are
7 taking a different approach to compulsory licensing.

8 In the age of the Internet, once trade secrets
9 are revealed, they can never be recovered. Absent
10 greater deference to comity principles, we may well find
11 that the legal regime that imposes the most onerous
12 legal requirements de facto prevails on a worldwide
13 basis.

14 Again, thanks very much, Gail and Dan. I
15 appreciate the opportunity to speak here today.

16 (Applause.)

17 MS. KURSH: Thanks, Dave. Robert Crandall will
18 be next.

19 Robert is a senior fellow in economic studies at
20 the Brookings Institution. He has previously served as
21 acting deputy and assistant director at the Council on
22 Wage and Price Stability.

23 He has written extensively on antitrust policy,
24 with a particular emphasis on the telecommunications
25 sector and emerging issues in wireless and broadband

1 competition.

2 Among the antitrust topics on which he has
3 written is the effectiveness or lack thereof, I guess,
4 of relief in government Section 2 cases.

5 Bob.

6 MR. CRANDALL: Thank you, Gail. It is a
7 pleasure to be here.

8 I haven't written that extensively in antitrust.
9 In fact, I spent most of my career looking at regulatory
10 activities that range as far as environmental policy and
11 fuel economy standards and more recently
12 telecommunications regulation, which, of course, is
13 related to competition policy.

14 I have not spent as much time as my colleagues
15 on this panel have, I'm sure, on the details of
16 antitrust, nor the details of Section 2 remedies.

17 My purpose today is to provoke, frankly, and for
18 that reason I'm somewhat disappointed we will not have
19 questions in the audience, though I'm not sure how many
20 economists are in the audience anyway.

21 You see the title of my presentation. I will
22 focus on the AT&T divestiture, not simply because that's
23 the one I know a little bit about, but because some work
24 which I have done and which Clifford Winston and I have
25 done and Ken Elzinga and I have done on Section 2 relief

1 using a case-by-case approach to this, which I think is
2 the only way to go about it.

3 Each one of these cases is sui generis. It is
4 hard to do a more general study. It suggests very
5 little effect it creates on the market, on competition
6 in the market, on output, on prices.

7 In fact, not because of shameless
8 self-promotion, but because I would like to provoke
9 people to read the articles and maybe prove me wrong, I
10 have listed the articles in this first slide.

11 But the one case that everybody comes to as the
12 example of success in Section 2 structural relief cases
13 particularly is the AT&T divestiture, which, of course,
14 was negotiated someplace on a ski slope in Utah in 1982
15 and was executed effective January 1, 1984 after about
16 10 years of litigation.

17 Indeed, at first I would have been a supporter
18 of that and perhaps anyone that was wishing to get into
19 a debate with me on this would find things I have said
20 in the past, 20 years ago, that I might have approved.
21 Maybe I was overly seduced by Bill Baxter, who was a
22 very persuasive guy and a very good fellow to boot.

23 But over time I have come to question whether in
24 fact even the AT&T case can be considered a success in
25 terms of relief from a Section 2 prosecution.

1 Now, most people in the room would know about
2 this case. We don't have to spend much time on it.

3 The principal outcome was a divestiture of the
4 Bell operating companies from the rest of AT&T, AT&T
5 keeping the manufacturing and long distance arms and a
6 large share of the research operations.

7 The near-term result -- and I will show in a
8 second -- is long distance service increased. Long
9 distance service output increased and U.S. long distance
10 rates fell.

11 I do these slides myself. That's why they look
12 so bad.

13 But was the increased long distance competition
14 due to vertical divestiture? This is a very different
15 world in 1982.

16 AT&T accounted for 80, 85 percent of the access
17 lines and almost the same percentage of total telephone
18 subscribers, including wireless.

19 AT&T's wireless service was not launched until
20 1983 in Chicago, its cellular service. They had a more
21 mundane wireless service prior to that.

22 This is the period in which I think it was
23 McKinsey was predicting there would be a demand for no
24 more than one million cell phones in the United States.

25 At this time, though, we had so-called universal

1 service pricing, which is really inverse Ramsey pricing,
2 for you economists in the room. I suppose antitrust
3 lawyers may understand the jargon.

4 This, in fact, invited entry into long distance
5 service. It invited the likes of Bill McGowan of
6 Microwave Communications Incorporated -- he said he
7 changed the name to MCI because he didn't want people to
8 think he was going to fry them -- to enter the long
9 distance service to figure a way to get access to AT&T's
10 service, particularly with very low prices.

11 Indeed, they battled that out for many years,
12 culminating in a private antitrust action and convincing
13 the Justice Department in '74 to file the Section 2
14 case.

15 Once again, the question was was the vertical
16 divestiture which resulted in this case necessary to
17 promote long distance competition? What are the
18 numbers?

19 Here are the numbers on real interstate long
20 distance rates and AT&T's average share of revenues
21 using the same access on the left-hand side.

22 And you see that starting in 1984, after the
23 divestiture, AT&T steadily lost market share and long
24 distance rates came down steadily.

25 This is taken to reflect success of the decree.

1 Of course, we don't know what the but for would look
2 like. And it may well be that without some action that
3 we wouldn't have had this result.

4 In fact, most other countries had to take action
5 themselves, and they took action only along one
6 dimension of the decree. No other country that I'm
7 aware of has actually required a divestiture of their
8 operating companies from manufacturing or long distance
9 service companies in their country.

10 Virtually all of them, however, at some time
11 after 1984, as late as 1998 in the EU, required access,
12 equal access to the incumbent local exchange company
13 switches for terminating or originating calls.

14 This obviously is regulated access, and in any
15 regulated access there is going to be an argument about
16 the price. But nobody engaged in vertical divestiture.

17 One could argue that what Offcom is doing in the
18 U.K. today is a very mild version of structural
19 separation with British Telecom. We will see how that
20 works out.

21 But no other country actually engaged in
22 vertical divestiture.

23 Now, if you look at what happened to the price
24 of long distance services, comparing the U.S. interstate
25 rate -- the intrastate rates didn't go down as fast

1 because the states controlled and used their regulatory
2 controls to keep those prices relatively high, the
3 inverse Ramsey pricing continues to stay low.

4 If you look at the U.S. interstate prices
5 against the average for Canada and wouldn't make much
6 difference which one you use for the EU. I use the
7 three-minute price here, and I think they also publish
8 10-minute prices in the annual monitoring reports that
9 the EU does on monitoring effects of their regulatory
10 program.

11 What you see here is prices came down even more
12 rapidly in Canada and the EU, much more quickly
13 subsequent to their liberalization than it did in the
14 United States subsequent to ours.

15 In fact, equal access to the switches was all
16 that was required. And the FCC in the United States had
17 not done this of its own volition prior to the bringing
18 of the AT&T case in 1974 or prior to the negotiation of
19 the consent decree, the divestiture with the equal
20 access provisions in it in 1982.

21 Now, in no small part long distance rates in the
22 United States fell because of declining access charges.

23 One of the things -- and you could take this as
24 a measure of the success of the decree. One of the
25 things that the decree did was to expose exactly how

1 much if you want to call it broadly subsidy was going on
2 between long distance service and other service, local
3 access to the telephone network in the regulatory
4 process at the Federal Communications Commission.

5 With very high access charges now having to be
6 levied to keep the rates at about the same level, the
7 FCC started the process of rebalancing rates, lowering
8 access charges and putting all those complicated charges
9 that you and I don't understand on the back of our
10 telephone bills, which are in fact designed to try to
11 shield from the public information about what's really
12 going on here.

13 But it made good policy sense to put these
14 nontraffic-sensitive charges as a fixed charge on your
15 telephone bill and to lower the traffic-sensitive
16 charges of long distance by doing so.

17 In fact, a great deal, as you can see, of the
18 decline in long distance rates occurred because of the
19 decline in access charges.

20 My friends who worked on the AT&T case at DOJ
21 and others who have been involved in this process over
22 the years who don't like my presentation will argue with
23 me that this could not have happened but for the case.

24 In fact, that is one of the benefits of the
25 case, I suppose. We could not have persuaded the FCC to

1 undertake both equal access and to rebalance rates but
2 for the divestiture.

3 I suppose that is a benefit. But again, the
4 problem here was not AT&T's monopolization activities,
5 unless you consider their lobbying activities of the FCC
6 as part of it, but, rather, the FCC's seeming
7 incompetence or reluctance to do the right thing to
8 maximize economic welfare for people using the telephone
9 network.

10 As a mea culpa, I was actually at the FCC
11 advising part-time one of the commissioners, Glen
12 Robinson, who is now professor of administrative law at
13 University of Virginia. So I guess I'm tied up in the
14 complicity in all that.

15 This is simply saying much the same thing, that
16 in fact what happened was as a result of the
17 divestiture, there was an exposure of the folly of the
18 universal service pricing policy, something which the
19 FCC addressed with great opposition from so-called
20 consumer groups, who claimed that millions of low-income
21 people would fall off the telephone network.

22 Of course, we know better than that because we
23 know the price elasticity in the demand for access to
24 telephone service is very, very low.

25 What about the costs of the decree? My own

1 estimation -- and I haven't seen anyone else attempt to
2 address this -- was that we lost about \$5 billion of
3 output just in the transition from the old AT&T to the
4 new AT&T over 1984-85, in that period.

5 There are some estimates -- now, these were
6 funded by the Bell companies as attempting to get out of
7 the decree. There is an estimate by Paul Ruben, a
8 colleague at Emory, that the process of administering
9 the line of business restrictions in the decree totaled
10 about \$1.4 billion over time.

11 Though what happened -- and this goes to Dave's
12 presentation on trying to provide technological
13 prescriptions and deal with changes in technology in an
14 antitrust decree. What happened was that the market
15 changed rather dramatically.

16 Something called the Internet came up and the
17 separation of interstate from local and intrastate
18 services in the decree became extremely problematic.
19 Not only that, but the information restriction which
20 eventually was abolished by the Court of Appeals also
21 was a problem at a time when obviously information and
22 transmission switching of signals were melding together.

23 Now, here is one of the more interesting -- I
24 mentioned earlier that the estimates, at least one
25 commercial estimate of what cellular technology was

1 going to do back in the 1980s was seriously wrong.

2 At the very time that the AT&T case was brought,
3 the FCC was deciding what to do about the so-called
4 cellular spectrum.

5 It took about another nine years for them
6 finally to have one of these licenses begin to --
7 through one of these licenses for service to become
8 available. There was a lengthy hassle over how not only
9 to allocate the spectrum but how to assign it and divvy
10 it up among players.

11 We know what they did. They decided to have
12 only two licenses -- why is not at all clear -- and to
13 give one of them to the incumbent wireline carrier on
14 the grounds that I suppose that wireless was
15 complementary and not likely to be competitive with
16 wireline service.

17 Obviously one's perspective on that would change
18 over time.

19 So it wasn't until 1983 that wireless service
20 began. This is the time when the consent decree was
21 just going into effect, after it had been negotiated.
22 And in the negotiation of the consent decree, the Bell
23 companies were allowed to keep one of the wireless
24 licenses.

25 In retrospect, wireless became the most serious

1 competitor for a long period of time. Cable and VOiP
2 may now take its place in the future.

3 And it was certainly a mistake to do that. But
4 the bigger mistake was only to assign two bands to
5 cellular service.

6 It wasn't until we ran a huge federal budget
7 deficit and the Congress decided we needed to raise
8 money through spectrum auctions that we began to get
9 more spectrum allocated to, more and more licenses
10 awarded for cellular service.

11 And, of course, starting about 1995, 1996, the
12 new PCS cellular licenses were bid on and began to
13 operate, and we went from two carriers to six national
14 carriers over a period of time through a contorted
15 process I won't bore you with right now, because the
16 stuff was licensed on a local market by local market
17 basis rather than national basis.

18 But the important message here is what drove
19 competition starting in the late '90s was wireless, and
20 particularly long distance competition in the '90s, and
21 now I would even argue competition for the local access.

22 What I show you here is a chart in which the top
23 red line shows what we would have expected interstate
24 terminating switched access minutes to look like given
25 what was happening to prices and GDP, and the dotted

1 line below, what actually happened to wireline
2 terminating and interstate access.

3 The gap that opens up there is primarily due to
4 wireless. That is, wireless began to take a very, very
5 large share.

6 Interestingly enough, this whole thing developed
7 because of the development of these national plans which
8 most of us have called from anywhere to anywhere. They
9 were introduced first by AT&T, still the largest long
10 distance player.

11 They cannibalized their own business with this,
12 because then ever other cellular company had to follow
13 in the next year. And today, of course, we have not
14 only a proliferation of these plans, but the plans also
15 allow zero per minute calling in nighttime and on
16 weekends.

17 This number, which goes through 2004, is
18 woefully out of date. I haven't tried to update it.

19 I would think that a very, very large share,
20 overwhelming majority of all interstate long distance
21 minutes now go over wireless. As I said, this may
22 change with VOiP.

23 The price of the decree -- and this is one of
24 the problems of any of these decrees -- is it is
25 difficult to get rid of it.

1 The price for getting rid of it after 10 or 12
2 years was the 1996 Telecommunications Act which -- and I
3 won't go into in great detail; we don't have time -- is
4 subject to its own folly and led to enormous battles
5 between entrants and particularly MCI and AT&T and the
6 regional Bell companies, led to an unbundling regime
7 which got more and more liberal as more and more of the
8 new entrants failed and ended up with a thing called a
9 uni-platform which means the entrant could use all of
10 the facilities of the Bell companies at discounted
11 rates, 50 to 60 percent off retail, through the
12 so-called unbundling process, a provision which was
13 eventually overturned by the Court of Appeals which said
14 it went too far.

15 Also, there was a line-sharing provision which
16 is still in existence throughout Europe and most other
17 countries of the world, Japan, Australia, but which also
18 was ruled as an unjustified extension of the unbundling
19 regime by the D.C. Circuit.

20 In fact, the great savior of folly in U.S.
21 telecommunications was Steven Williams of the U.S. Court
22 of Appeals, now retired or senior status.

23 What happened in the '96 act, we wasted at least
24 \$50 billion of investment. Where the stuff went nobody
25 knows. I can't find it on eBay today.

1 MCI and AT&T were forced to enter the arms of
2 Verizon and SBC respectively, not because of the ending,
3 the D.C. Circuit opinions. They would have been forced
4 into it anyway because wireless was eating their lunch
5 so rapidly that their revenues were declining by 10 to
6 15 percent per year.

7 So, after 12 years of the AT&T decree and nine
8 years after the 1996 act, we reverted back to a
9 vertically integrated telecom sector.

10 It was not antitrust, although you could argue
11 that antitrust, certainly the equal access provision did
12 generate the nascent competition early on in long
13 distance services.

14 But we could have gotten there without antitrust
15 had the FCC been on the job or had they realized the
16 benefits of doing this. We led the way with the AT&T
17 decree, and then the rest of the world could follow with
18 their equal access provisions.

19 Today, the local bottleneck is largely
20 irrelevant. And, in fact, despite the rhetoric
21 surrounding it, the local telephone companies are in
22 deep trouble because they do not have a network which is
23 easily capable of delivering high-speed video on demand
24 and are, therefore, having to spend enormous amounts of
25 money to upgrade their networks to catch the cable

1 companies who very easily can offer voice
2 telecommunications services.

3 As a result, what has happened is with the
4 change in the regulatory regime, the incumbent local
5 carriers are now investing enormous sums in their
6 networks, far more, by the way, than the more regulated
7 EU carriers are investing in Europe or, for that matter,
8 more regulated carriers in Australia. Japan still is
9 investing a lot despite a heavily regulated system.

10 I don't know that I can give you general lessons
11 from all this. I think this is sui generis.

12 The AT&T decree may have worked in a narrow
13 sense in that it did introduce equal access into long
14 distance.

15 The cost of the vertical divestiture was
16 extremely high. Was it necessary? I think in
17 retrospect I can say probably not.

18 But I didn't have the foresight at the time to
19 say that. And it is easy enough to go back and be a
20 Monday morning quarterback.

21 But I think it is at least too facile to say
22 this is a decree that clearly was a success and one
23 which we ought to follow in other cases, although one
24 wonders what other industry would offer the same
25 opportunities for this type of vertical divestiture and

1 access.

2 But perhaps Dave has some ideas on that.

3 With that, let me just stop and say one of the
4 things that Cliff Winston and I really wanted to provoke
5 is economists looking at the impacts of antitrust
6 decrees, antitrust policy in general, more empirical
7 work.

8 Our conclusion in our paper wasn't that
9 antitrust is a failure. It was that we have no
10 empirical evidence that it is a success. And that is a
11 serious problem for a policy that's only been in place
12 for 117 years.

13 So we hope to provoke people into doing research
14 and either proving what we have done so far right or
15 wrong, as the case may be.

16 I thank you for your attention.

17 (Applause.)

18 MS. KURSH: Thank you, Bob.

19 I would like to now ask Per Hellstrom to come
20 up. Per is chief of the Unit C-3 at the Directorate
21 General for Competition, European Commission.

22 He is actively involved in the European
23 Commission's case against Microsoft, and we are very
24 grateful to him for traveling across the Atlantic to
25 share his perspectives based on his experiences with

1 Article 82.

2 MR. HELLSTROM: I would like to provide a
3 European perspective to this issue of remedies.

4 I don't really intend to go into detail in any
5 particular case. I certainly don't want this to turn
6 into another hearing on the Microsoft case.

7 I already defended that case once before the
8 court, and we are still awaiting the judgment in that
9 case.

10 But I could mention that as some of you may be
11 aware, the Commission is currently undertaking a review
12 of its policy under Article 82, which is our provision
13 for single-firm behavior.

14 And in addition to that, we are also reviewing
15 our policy as regards remedies, both under Article 81,
16 cartels, et cetera, and Article 82. And we are
17 preparing some internal guidance in this regard.

18 Just a brief overview of the legal framework in
19 Europe, which may be different than the U.S. framework.

20 We have Article 82 of the treaty, which states
21 that abuse of a dominant position shall be prohibited.

22 Now, this provision has direct effect and it can
23 be relied upon by private parties before national
24 courts, and it is the implementing regulation,
25 Regulation 1/2003, which provides the enforcement powers

1 to the European Commission to enforce Article 82 and
2 impose remedies.

3 Remedies are not mentioned in Article 82 itself.
4 In addition to that, we have the case law of the
5 Community Courts which, of course, has dealt with the
6 issue of remedies in some cases, and there is certain
7 decisional practice of the European Commission, the
8 Microsoft decision being one of those.

9 I believe, therefore, that one must separate the
10 issues of the finding of an abuse and the imposition of
11 a remedy, at least in our legal system.

12 Having said that, from the point of view of an
13 enforcement authority, I do share the view that it is
14 important to think about remedies early on in an
15 investigation.

16 But for the purposes of the discussion on
17 remedies, I think also we must assume that we have
18 already a valid finding of an abuse, for example, a
19 refusal to deal, tying, excessive pricing. And certain
20 aspects that could in theory be relevant for the
21 imposition of a remedy, such as the specific character
22 of the market, efficiencies, incentives to innovate,
23 et cetera, may in fact already have been taken into
24 account in the finding of the abuse.

25 Now, regulation 1/2003, that is the implementing

1 regulation that gives powers to the Commission.

2 The context with regard to remedies are Article
3 7, which gives the power for us to take prohibition
4 decisions and impose mandatory remedies; Article 9,
5 which provides for commitment decisions. That is
6 voluntary remedies where it is up to the parties to
7 propose adequate remedies. There is no finding of an
8 abuse.

9 And these decisions are only possible where the
10 Commission does not intend to impose a fine.

11 And then there is also provision for interim
12 measures in cases of urgency in Article 8.

13 I will focus today only on the first one,
14 Article 7, prohibition decisions, whereby the Commission
15 is entitled, where it finds an infringement of either
16 Article 81 or 82, to require the undertaking concerned
17 to bring such an infringement to end. For this purpose,
18 it may impose on them any behavioral or structural
19 remedies which are proportionate to the infringement
20 committed and necessary to bring the infringement
21 effectively to an end.

22 Structural remedies can only be imposed either
23 where there is no equally effective behavioral remedy or
24 where any equally effective behavioral remedy would be
25 more burdensome for the undertaking concerned than the

1 structural remedy.

2 In other words, two types of remedies are
3 possible, behavioral, structural.

4 As the wording indicates, the principles of
5 necessity and proportionality applies. And the aim, as
6 stated, is to bring the infringement effectively to an
7 end.

8 In other words, the Commission has the power to
9 require a company to restore the market conditions
10 absent the infringement and to impose remedies that are
11 necessary to that effect.

12 But, of course, details of any such measures can
13 only be decided on a case-by-case basis.

14 In addition to this, Recital 12 of the
15 regulation provides that with regard to structural
16 remedies, "changes in the structure of an undertaking as
17 it existed before the infringement was committed would
18 only be proportionate where there is a substantial risk
19 of a lasting or repeated infringement that derives from
20 the very structure of the undertaking."

21 Now, if we look at how this framework is applied
22 in practice, I believe that the standard scenario is to
23 have a cease and desist order plus fines.

24 In our terminology, fines are not really
25 remedies, but cease and desist orders are.

1 And by cease and desist orders, I mean an order
2 for the company to bring the abusive behavior to an end
3 and refrain from repeating such act and conduct as well
4 as any act or conduct having the same or equivalent
5 object or effect.

6 This is usually the standard phrase in an
7 Article 82 decision.

8 But a remedy, as we speak about it here today,
9 is an elaboration, then, sometimes an expansion of a
10 cease and desist order, either prescribing a certain
11 action or prohibiting a certain action, leaving the firm
12 discretion on what precisely to implement.

13 Now, how to design a remedy. In theory,
14 remedies or commitments should be effective,
15 proportionate/necessary, clear and precise, cost
16 efficient, transparent and consistent.

17 Of course, in practice, this is quite a
18 challenge.

19 And as mentioned, evidently there is an inherent
20 link between the nature of the infringement and the
21 remedies available to the Commission, and any assessment
22 of the effectiveness and necessity of the remedy must be
23 based on the facts and circumstances of each individual
24 case.

25 But here are some possible criterias, a

1 nonexhaustive list on how to assess the effectiveness of
2 a remedy, questions such as does the remedy lower
3 barriers to entry, is it likely to increase consumer
4 welfare, can it be practically implemented, monitored
5 and enforced and how quickly can the remedy restore
6 competition.

7 One question that has been raised is whether one
8 could foresee a two-step approach with regard to
9 remedies. That is, if the initial remedies imposed are
10 ineffective for one reason or another, could stricter
11 remedies be imposed.

12 Here there may be a difference in our respective
13 legal frameworks. In Europe, in order for us to impose
14 a new remedy if the initial remedy does not work, we
15 would have to respect the procedural rights of the
16 parties, and we would normally have to issue a so-called
17 statement of objections outlining the reasons why a new
18 remedy is required. And that, of course, is a procedure
19 that we know takes time.

20 Of course, this is true for the initial remedy.
21 We must provide sufficient notice in a statement of
22 objection of the remedies foreseen. It would be
23 possible to have some options, some alternatives and
24 allow the company concerned to comment on these.

25 With regard to behavioral remedies, a possible

1 definition of behavioral remedy, "a behavioral remedy is
2 a measure that obliges the concerned undertaking to act
3 in a certain way or to omit certain anticompetitive
4 conduct."

5 Compliance with behavioral remedies usually has
6 to be monitored and enforced. One can classify these
7 types of remedies according to the type of infringement,
8 anteforeclosure remedies, anticollusion remedies or
9 antiexploitation remedies.

10 I will not go into further detail on these now.

11 Common to most behavioral remedies is that they
12 do not change the incentive of the firms to engage in
13 anticompetitive behavior. As a consequence, compliance
14 has to be monitored to avoid circumvention.

15 Monitoring raises various questions as to who
16 should monitor and how. Should it be the European
17 Commission, some sector-specific regulator, competitors,
18 customers, trustees, national courts, or could one
19 resort to some arbitration mechanism, and how should all
20 this be organized.

21 I believe as regards monitoring, the U.S. is
22 probably more advanced in this regard than we are in
23 Europe. And we are currently looking into ways to
24 improve our effectiveness in this regard.

25 A structural remedy is a measure that

1 effectively changes the structure of the market by a
2 transfer of property rights regarding tangible or
3 intangible assets, including the transfer of an entire
4 business unit that does not lead to any ongoing
5 relationships between the former and future owner.

6 After its completion, "a structural remedy
7 should not require any further monitoring."

8 So structural remedies would normally involve
9 the transfer of property rights, some form of
10 divestiture. There should not be any ongoing links.

11 There should be a one-off measure, a clean
12 break, and this remedy should remove incentives and/or
13 the means of a firm to infringe competition law.

14 It may be necessary to have some sort of
15 behavioral flanking measures. Monitoring and
16 enforcement should only be necessary until divestiture
17 is completed.

18 That would be an advantage compared to
19 behavioral remedies. However, structural remedies have
20 rarely been used in Europe under Article 82.

21 However, for the future, the Commission would
22 not hesitate to impose structural remedies when
23 necessary and appropriate. In fact, we could even be
24 obliged to do so, although, of course, again it would
25 depend on the circumstances of each case.

1 I would just like to conclude with a quote from
2 Mr. Charles A. James, the former Assistant Attorney
3 General at DOJ.

4 He has stated in an article that "an antitrust
5 remedy must stop the offending conduct, prevent its
6 recurrence and restore competition. Preventing
7 recurrence must involve proactive steps to address
8 conduct of similar nature. Restoration requires
9 prospective relief to create lost competition and may
10 involve actions to disadvantage the antitrust offender
11 and/or favor its rivals."

12 I believe the Commission would fully subscribe
13 to this statement, although I should add that the
14 Assistant Attorney General also emphasized that the
15 relief, however, must have its foundation in the
16 offending conduct.

17 So in the end, it all comes back to the inherent
18 link between the remedy and the infringement identified.

19 Thank you for your attention.

20 (Applause.)

21 MS. KURSH: Thank you, Per.

22 Tad Lipsky is a partner at Latham & Watkins and
23 a former Deputy Assistant Attorney General at the
24 Antitrust Division.

25 While at the division, he organized and

1 supervised preparation of the merger guidelines and the
2 Antitrust Division's view of the United States versus
3 IBM, among many important antitrust cases.

4 His career has spanned virtually every facet of
5 antitrust law, and he has served in both public and
6 private practice, both here and abroad.

7 Welcome, Tad.

8 MR. LIPSKY: Thanks, Gail and Dan. Your careers
9 have spanned almost every aspect of antitrust law too.

10 I must say you have the organization of these
11 hearings down to an art and science.

12 It is really a great pleasure to be able to
13 focus just on the substance and you are taking care of
14 all the rest.

15 So congratulations. This has been a fascinating
16 set of presentations this morning, and, indeed, the
17 whole record of the hearings has been very interesting.

18 I enjoyed it very much. I am sure it will end
19 up being a very signal contribution to a lot of
20 subjects.

21 The remedies in some respects is really the
22 whole debate.

23 Ultimately every antitrust case comes down to
24 what is the problem and what do you want to do about it.
25 If you don't have the answer to the remedy, you really

1 aren't out of the starting gate.

2 It is interesting when Bill Baxter came to
3 Washington, he had a specific plan for some things he
4 wanted to address. Actually, the AT&T case was not high
5 on his list.

6 His list was to begin an amicus program to
7 articulate to the courts in antitrust cases some
8 economic errors and omissions that he thought were
9 endemic in the precedent.

10 It is interesting we are seeing sort of the
11 final element of that play out just this week with the
12 Legion case.

13 Just about every landmark of judicial ignorance
14 that Bill had identified has now fallen, when you look
15 at the Monsanto and Associated General Contractors and
16 NCAA versus Board of Regents and Copperweld.

17 This is really getting down to the last part of
18 that program.

19 And then he wanted to rewrite what were then the
20 effective merger guidelines, the 1968 sort of Warren
21 court, Lyndon B. Johnson version of merger guidelines.

22 Finally, the third element on his list was what
23 he had seen -- he wanted to do something about judgments
24 and decrees and the way relief was handled in the
25 division, and that meant not only cleaning out a lot of

1 old decrees but, believe it or not, when Baxter came to
2 town in 1981, it was not yet the consistent practice,
3 although it was beginning to be more consistent to have
4 sunset provisions in judgment decrees and in consent
5 decrees entered by the Antitrust Division.

6 I think both at the Commission and the division
7 that is now pretty much uniformly the practice.

8 He abolished the judgment enforcement section
9 because he thought it was very pernicious to have a
10 separate judgment enforcement section which discouraged
11 connecting the theory of remedy to the theory of relief
12 sought in a case.

13 Bill had many memorable phrases, but his way of
14 summing up this problem was to say of the division
15 litigators, he said "Everybody likes to catch them, but
16 nobody wants to clean them," by which he meant if you
17 weren't willing to clean the fish, then you probably
18 shouldn't be fishing to catch it either.

19 My presentation is really in two parts. One is
20 talking about essential facilities and mandatory access,
21 because that is such a hot part of the remedies debate
22 in the context certainly of Section 2 cases,
23 monopolization cases.

24 But it is really the way of illustrating what I
25 think is a fundamental point that is sometimes lost in

1 debating the specifics of particular cases and I think
2 needs to be emphasized.

3 Perhaps not a Baxterian phrase, but my phrase to
4 capture the issue is no sense pretending.

5 If your image of the way an industry should work
6 in a modern capitalist competitive economy is that there
7 should be a number of competitors vying for advantage to
8 supply products and services that meet demand, there are
9 some industries where you are not going to have
10 multiple -- by virtue of the cost structure or some
11 other almost element of the technology or the market,
12 you are not going to have multiple competitors.

13 This is where the essential facility doctrine
14 really starts, from an implicit recognition that if you
15 have something that meets the essential facility
16 definition and it also is something that other
17 competitors cannot practically duplicate -- is I think
18 the phrase from the seminar cases -- what you have is a
19 classic declining cost industry where you simply are not
20 going to be able to structure it and expect optimal
21 results on a competitive basis.

22 You will have to consider the viability of
23 regulatory alternatives, price limits in the framework
24 of utility regulation or some other kind of public
25 intervention, and that puts you kind of in the space

1 where you have essentially got a fundamental departure I
2 think from the antitrust vision of the way an industry
3 is supposed to operate and you need to consider whether
4 you can even attack the problem with an antitrust-like
5 remedy, be it vertical divestiture or whatever, or
6 whether you need a regulatory scheme.

7 And it also means that the costs and benefits of
8 these ways of addressing this problem need to be
9 confronted in an intellectually honest way and that you
10 might conclude that the best thing to do is to do
11 nothing because there are some problems whose remedies
12 are more costly than just suffering the problem.

13 I also wanted to point out, as long as we are on
14 the subject, there is a flaw in the essential facilities
15 doctrine, and that is that there is an element that says
16 you are not required to provide access if you don't have
17 room in your facility to provide the access.

18 That is just inconsistent with the fundamental
19 premise of an essential facility. If you are a
20 monopolist, you obviously have the incentive to
21 undersize and not build enough capacity.

22 So the fact you are actually operating at
23 capacity and don't have room to fit in access by anybody
24 else may actually be a signal that you are engaged in
25 exploiting your monopoly position.

1 So it shouldn't be a reason -- you can say the
2 essential facilities doctrine is silly because all it
3 does is identify circumstances where you have to replace
4 antitrust with regulation.

5 But at least if that's your theory, you don't
6 want to say that you are going to ignore the problem if
7 it turns out that the monopolist is in fact a monopolist
8 and doing what he is not supposed to do.

9 Finally, a point that has been touched on
10 before, the idea of intellectual property and mandatory
11 licensing of intellectual property as a remedy.

12 If your inability to duplicate is because of a
13 law that says that nobody else has the legal right to
14 make, use or sell some product or do something else,
15 then you have an inherent tension between the reward
16 structure set up by the intellectual property law and
17 the idea of antitrust intervention.

18 That is another real complicated problem. So if
19 you want to try and access remedy, here are some of the
20 costs and complications.

21 First of all, we already heard how complicated
22 it is to engage in access pricing. These are all the
23 familiar problems of traditional public utility-style
24 regulation, local distribution monopolies, gas,
25 electricity, what have you.

1 Another issue that I think tends to be ignored
2 is evasion possibilities. It is very easy to discuss
3 monopoly pricing in your premise for intervention and to
4 slip into an assumption that if you can do something
5 about monopoly pricing, that will enhance the
6 performance of the essential facility that you have.

7 But, in fact, anybody who has dealt with an
8 insurance company or bought a car or actually bought
9 anything more complicated than a toothpick realizes that
10 there are zillions of dimensions to any commercial
11 transaction. There is credit terms, there is delivery,
12 there is service, repair, do you get a case with that
13 instrument.

14 If you have monopoly problem, you have to have
15 some way of forcing, compelling the monopolist to go out
16 beyond the area of profit maximization in every
17 dimension, not just price and output but quality and
18 service and innovation and all that other stuff.

19 So these regulatory problems tend to be severely
20 underestimated.

21 I have listed some other disadvantages here of
22 access remedies. You sacrifice economies of
23 integration, as is made obvious by some of our decrees
24 over the years, the Paramount decree separating
25 exhibition from production of motion pictures.

1 You had it in the AT&T case. It comes up from
2 time to time. The institutional problems of enforcement
3 through the consent decree process I think are fairly
4 well recognized.

5 The Paramount decree, as a matter of fact, being
6 perhaps a good example, because after a course of
7 enforcement over many years, you had a situation where
8 ultimately the Assistant Attorney General had to walk
9 away from a remedy that had been adopted by the decree
10 enforcement staff, which looked to the new folks like
11 authorizing the so-called splits, the exhibition side,
12 buyers cartel.

13 So arguably you had a decree enforcement staff
14 being co-opted by the industry that they were regulating
15 and coming up with a solution that was seriously
16 anticompetitive.

17 Finally, here is a huge problem that is very
18 difficult to get a grip on but nevertheless we are
19 confident that it exists, that if you encourage
20 disadvantaged firms, usually a disadvantaged competitor,
21 to believe there is an antitrust remedy in an essential
22 facility-type context, you are encouraging them to come
23 to the agency, to invest their resources in legal
24 maneuvering rather than investing those resources in
25 innovation that would destroy the monopoly. And that's

1 a bad thing.

2 Nevertheless, as this slide is headed, once you
3 are in this space where you can't assume that there is a
4 competitive structure that will automatically achieve
5 optimal performance, you have to assess the possibility
6 that some kind of intervention and some kind of access
7 remedy, despite all the costs and burdens that I just
8 enumerated, might actually be better than doing nothing
9 or might be better than applying some other regulatory
10 remedy.

11 And some of the items that are sometimes
12 relevant to deciding whether you want to dive off that
13 cliff or not, if you are going to establish conditions,
14 prices and conditions of access, is there a regulatory
15 mechanism that is already extant that could take care of
16 that issue.

17 What most people regard as the seminal essential
18 facilities case -- it is arguable, but let's accept that
19 for right now -- U.S. versus Terminal Railroad, that's
20 where the J. Gould Railroads owned all the bridges and
21 terminals in St. Louis, and they wouldn't let the
22 western railroads use those facilities on equivalent
23 terms.

24 When the Supreme Court basically found liability
25 or instructed the lower court to find liability for the

1 Gould coalition's behavior, they sent the matter back to
2 the District Court and said fashion a decree that lets
3 the western railroads use these facilities more or less
4 on the same terms and conditions as the railroads that
5 are part of the Gould group, "but, by the way, don't
6 mess around with the ICC's ratemaking authority, you
7 can't make rates."

8 So they had the ICC there they thought they
9 could rely on to solve any specific ratemaking issues.

10 We have already heard reference to the FCC's
11 ability to adjust the access charges and in effect work
12 in cooperation with the federal District Court in the
13 Bell system decree.

14 Then you have this fascinating case of Otter
15 Tail Power, where the Supreme Court in a 4-3 decision,
16 where the dissent was actually right, but nevertheless,
17 it was a 4-3 decision where the Supreme Court
18 essentially said that on remand, the parties would have
19 to work out an access arrangement.

20 And in this particular instance, the Federal
21 Power Commission would have been the logical regulator.
22 But at that time it did not have the power to regulate
23 the access terms and conditions that the Supreme Court
24 was looking to have enforced.

25 I don't know where that left people practically.

1 I doubt that that decree did much good. But in any
2 event, since we have gone from the Federal Power
3 Commission to the Federal Energy Regulatory Commission,
4 they do now have the power to order and regulate access.

5 But, of course, things have been scrambled in
6 that industry by some fairly aggressive deregulation.

7 There are some cases which are decided more on
8 Section 1 grounds, Gamco and the Associated Press case.

9 I will not spend any time on them. Basically,
10 it is an organization where they are granting access to
11 a bunch of different competitors.

12 So if one of them is wrongfully excluded, you
13 can just order access on the same terms and conditions
14 that are available to everybody else. That makes your
15 information and regulation costs a lot lower.

16 And, finally, the question of dynamic
17 efficiencies, I think that Bob has really touched on
18 this very profound question about whether the AT&T
19 decree really has anything to do with the fact that long
20 distance rates have come down and now we have all of
21 these different forms of communication.

22 I think it is arguable -- I don't have the time
23 or energy to argue it right now. But I think it is
24 arguable that a lot of these innovations might not ever
25 have occurred without the divestiture decree.

1 AT&T had essentially invented mobile telephony
2 or at least developed it to the point where the FCC was
3 beginning to grant licenses.

4 A tremendous fraction of the immense
5 communications and data processing research in the
6 United States took place in an AT&T subsidiary known as
7 Bell Labs.

8 That was brought to an end by the decree.
9 Really I think it may turn out that the strongest case
10 for connecting the AT&T decree to the subsequent
11 explosion in competition in the communication sector is
12 more an institutional question of unbinding parts of the
13 system that were capable of innovating, although I'm not
14 sure even Bill Baxter would have identified that as a
15 specific objective of his.

16 It is difficult to draw general conclusions from
17 this history of Section 2 remedies, but let me try a
18 few.

19 The need for speed. It is often remarked how
20 long structural cases take and how the industry and the
21 technology tend to change in a manner that by the time
22 you are done, everything you thought when you started
23 the case is irrelevant.

24 Well, Exhibit A in that would be United States
25 versus IBM, where it started as a relatively restricted

1 predatory pricing case, actually, but it soon expanded.
2 It absorbed all these issues about foreign peripherals
3 being attached to the IBM system.

4 The theory shifted. And, of course, if you look
5 at the specific procedural approach that was taken in
6 the Federal District Court up in New York, where the
7 case was pending, sort of put like an eight- to 10-year
8 bump in the schedule for the trial, more or less
9 guaranteed disaster.

10 If you want to have some fun, go back and look
11 at the original 1969 IBM complaint. It sounds so
12 antique.

13 In an effort to make IBM sound like this
14 thundering, huge, unstoppable behemoth, it says its
15 revenues for general purpose computer systems went from
16 600 million to \$3 billion, as if that was something that
17 would scare us. But nowadays, \$3 billion would probably
18 not be a 1 percent market share in that particular
19 industry.

20 U.S. v. Microsoft, I am the mid-Atlantic
21 distributor of Ann Bingaman's success sheet. I really
22 love what she did in the processor license case.

23 She took it -- I think from the day that the
24 division actually opened the investigation to the day
25 that decree was entered was just about exactly one year.

1 If you can pick a targeted practice and remedy
2 it on that time schedule, it almost doesn't matter
3 whether it was good or bad, because you look at it on a
4 time schedule where things haven't changed that much and
5 you can actually make a judgment about what you are
6 doing, whether you are doing something that is helpful
7 or the opposite.

8 If it had taken 13 years, it would have been
9 ridiculous. But this is an approach that provided a lot
10 of flexibility and tended to minimize error costs.

11 The broader phase of Microsoft that we have
12 heard spoken about mostly this morning it seems to me
13 extended over a much longer time period.

14 There are a lot of shifts in remedies. You had
15 a change in administration, where certainly the emphasis
16 shifted, and that sort of fits back into the old IBM
17 pattern that you can't -- I believe I heard it said at
18 one point that we were going to go into the liability
19 determination and that phase of Microsoft without any
20 clear idea of what the remedy was going to be.

21 Of course, there were some fairly notorious
22 developments on that subject, both in the District Court
23 and in the Court of Appeals, the bit about, well, we won
24 World War II, so we get to determine how the Japanese
25 have to behave.

1 And then U.S. versus Western Electric, which was
2 sort of the middle and the end phase of the AT&T
3 litigation. Back in the 1910s, it was thought that AT&T
4 had a monopoly of long distance which it was using to
5 snuff out competition of local telecommunications.

6 In the 1950s incarnation of U.S. versus Western
7 Electric, the theory was that AT&T had a monopoly of
8 telecommunications equipment that was being used to
9 monopolize long lines and local.

10 And then finally in the 1974, the final phase of
11 the case, the theory was that it was the local
12 monopolies that were used to monopolize the other part.

13 So this is a little bit gratuitous. It is
14 perfectly possible that over that horrendous stretch of
15 time, all three theories might have been true when they
16 were asserted. Yet, I think it is only in the final
17 phase that you have a good match between the theory of
18 liability and the remedy that was proposed.

19 I think that's what made -- to the extent it
20 worked, I think that's what made the U.S. versus AT&T
21 decree work.

22 Institutional suitability of different elements
23 of our society, of our political and legal system to
24 manage relief in these large cases, we all know that the
25 legislature can only intervene selectively and to set

1 broad principles.

2 It is very difficult when you do that to try to
3 achieve any kind of economic policy coherence. It only
4 happens rarely, for example, in the Airline Deregulation
5 Act, when essentially Congress said forget economic
6 regulation, we are going back to antitrust.

7 We have sort of the opposite in communications
8 regulation, all kinds of interventions for all kinds of
9 conflicting and indistinct policy purposes.

10 Administrative regulation itself tends to
11 reflect that policy and coherence that often
12 characterize legislation.

13 The executive is a little bit more coherent. At
14 least you have the President theoretically in charge of
15 what the Assistant Attorney General does, and the
16 Assistant Attorney General at least in theory is in
17 charge of what the trial staff does.

18 It tends to be better directed and more
19 coherent, but it is not immune from distractions and
20 from other agendas, as I think is perhaps illustrated by
21 some of the side-winding that has occurred in almost
22 every major Section 2 structural case since World War
23 II.

24 Finally, the judicial role. Of course, the
25 Federal District Court is very much in command of what

1 happens in its own courtroom.

2 Griffin Bell loves to tell the story he was
3 appointed directly to the Fifth Circuit Court of
4 Appeals, and at his investiture the chief judge said
5 "well, Griffin, you made a hell of a mistake, you know
6 up on this court you have to get at least one other guy
7 to agree with you before you can do anything, but in
8 Federal District Court, you are pretty much in command
9 of the courtroom."

10 I think Judge Green's phase of United States
11 versus AT&T illustrates certainly the best of what can
12 happen when he gets ahold of a good structural Section 2
13 case, and maybe in the later phases he might also have
14 illustrated perhaps not the worst of what can happen but
15 some of the disadvantages, that even judges are not
16 immune from the kind of bunker mentality that sets in
17 after you have witnessed these two litigants going back
18 and forth and perhaps have some views of your own, based
19 on the evidence, of course, but nevertheless we do have
20 examples.

21 Judge Wiezanski in United Shoe Machinery
22 Corporation or -- I have forgot the name of the judge in
23 the Paramount decree, and there is also some evidence of
24 that from the New Jersey court, where the same judge had
25 responsibility for administering United States versus

1 Western Electric for '56 to '82 -- anyway, 26 years.

2 You can do the subtraction.

3 In conclusion, if I had to derive a number of
4 crisp, identifiable principles from our hundred-plus
5 years of experience in these kinds of cases, to have a
6 good one, you have to have a legally sound theory for
7 attacking a monopoly and you have to have a good
8 economic analysis that convinces you that the legal
9 theory deserves to be applied.

10 And for our purposes here today, most
11 importantly, you have to be able to identify an
12 effective remedy that can actually be carried out
13 without imposing so many costs on various parts of the
14 system that it is not worth the trip.

15 And if you wanted to identify a good candidate
16 for a structural case, I think given all of these
17 difficulties, you need, number one -- this is something
18 that is only useful for important problems.

19 The administrative costs and complexities, the
20 type of focus, long-term focus on these kinds of issues
21 that is necessary to bring them to successful conclusion
22 means that you don't mess around with lemon carts even
23 if they are monopolies.

24 You are looking for very long-term performance
25 issues and very big and important industries.

1 Finally, to return to the point I was trying to
2 make with the initial presentation about access remedies
3 and essential facilities, you have to be intellectually
4 honest about what you are balancing.

5 You can try some limited remedies. You can look
6 at the possibility of access remedies and more
7 regulatory approaches, either under the rubric of an
8 antitrust case or perhaps you ought to be lobbying a
9 federal agency or a state agency, for that matter, to
10 impose the regulatory alternative, and you also need to
11 ask yourself the question whether given the costs and
12 benefits of all the alternatives, maybe the best thing
13 to do is nothing.

14 So thank you.

15 (Applause.)

16 MS. KURSH: We will take a 10-minute break and
17 then start off with the questions. Thank you.

18 (Recess.)

19 MS. KURSH: Back on the record. Thank you
20 everyone.

21 The way we are going to proceed for the
22 remainder of our time this morning is I will ask each of
23 our panelists in order, starting with Dave, to take just
24 a few minutes to respond to anything they heard from
25 anyone else.

1 For example, Dave, if you want to respond to Per
2 or anyone else on the panel, you should feel free.

3 And then we will proceed with our moderated
4 question session.

5 The way we have done this in the past, for those
6 of you who haven't been here before, is the agency will
7 be putting up on the slide some propositions. These are
8 not necessarily propositions that the agencies are
9 endorsing, but they are just a way for us to begin the
10 questioning as sort of a springboard for the discussion.

11 So, Dave, why don't we start with you.

12 MR. HEINER: I hate to disappoint, Gail. But I
13 don't think I have any comments to add to what the
14 others said.

15 MS. KURSH: All right, fine. Then we will -- go
16 ahead, Bob.

17 MR. CRANDALL: I'm more loquacious than Dave.

18 A couple things. First, we mentioned this in a
19 conference call. Tad raises the essential facilities
20 doctrine.

21 The problem with the essential facilities is
22 someone has to set the price. I can't imagine in the
23 modern world anything, other than maybe water utilities
24 or gas utilities, in which it would be a very easy task
25 to set the prices efficiently for access to a network

1 industry.

2 The difficulty in figuring out costs, whether
3 they are forward looking or backward looking costs, of
4 dealing with the problem of the real options for not
5 investing when technology is changing, the stranded cost
6 problem, essentially, are just enormous, not to mention
7 the fact that once you begin to have a regulated
8 approach to essential facilities, you then create
9 enormous tensions in modernizing those essential
10 facilities.

11 Once you have a set of clients using the network
12 of the local telephone companies in the United States or
13 in Europe, then any attempt by the telephone company to
14 change its network technology is going to be opposed by
15 some of those people who are using the current
16 technology.

17 So you create enormous disincentives, both from
18 the pricing and because of the argument over technology
19 for deploying new technologies.

20 So it strikes me that there is a very strong
21 presumption against the essential facilities doctrine in
22 technologically progressive industries.

23 Finally, Tad mentions the fact that there was
24 probably some benefit to breaking up AT&T because they
25 tended to control the technologies through Bell Labs and

1 everything.

2 There is something to that. Interestingly
3 enough, a lot of the students of telecom think one of
4 the great tragedies of breaking up AT&T was the
5 destroying of Bell Laboratories.

6 But at the bottom, this was a regulatory
7 problem. Had the FCC not engaged in activities to
8 foreclose entry, through the licensing spectrum or
9 through its long distance policy, remember the FCC
10 actually fought in court to try to prevent MCI from
11 offering switched long distance service.

12 The only reason they allowed MCI and the others
13 and in the so-called special access carriers was to get
14 information on what the costs are from another source so
15 they could regulate AT&T a little more efficiently.

16 So the problem at the bottom was the fact of a
17 regulatory regime which was interested in the long run
18 perpetuation of itself. That's a problem which also
19 could exist as we heard in terms of continuing to
20 supervise decrees and why sunset is a good item on
21 decrees.

22 MS. KURSH: Thank you.

23 Per.

24 MR. HELLSTROM: Perhaps a brief comment to
25 something that Dave said.

1 He said that the aim for competition authority
2 should be to create competitive opportunities rather
3 than engineer a particular market outcome.

4 I just would like to say that I think we fully
5 support that. I think the European Commission does not
6 aim to engineer market outcomes. But, of course, we may
7 disagree on what it actually means to have real
8 competitive opportunities, and there may be some
9 divergence.

10 MS. KURSH: Actually, if I could follow-up on
11 that a little bit.

12 Dave, one of the questions I had for you on that
13 point that you made, would you say that's also true in a
14 case where the theory of liability was based on the
15 monopoly resulting from the exclusionary conduct?

16 MR. HEINER: Well, I think I was mainly focused
17 on the experience Microsoft has had to date, which was a
18 case where there was not an acquisition of monopoly
19 cases.

20 Is that what your question is going to?

21 MS. KURSH: Yes.

22 MR. HEINER: My comment was focused on the
23 monopoly maintenance situation. In that case, it seems
24 appropriate to try to create opportunities but not
25 necessarily go so far as to try to have a particular

1 market outcome in terms of share.

2 MS. KURSH: Thank you.

3 Tad?

4 MR. LIPSKY: Just maybe to respond briefly to
5 Bob's remark.

6 There is no question that the occasions for
7 invocation of the essential facility doctrine are
8 becoming more rare because of a lot of industries like
9 electric power.

10 As I suggested, the public policy focus has been
11 more on maximizing the areas of the industry that can be
12 deregulated or where market-based solutions can be
13 implemented.

14 So we no longer have a regulated utility kind of
15 as our mental model for the way that that industry
16 works. But it shouldn't be excluded that there are
17 areas that would be candidates for the application of
18 that doctrine.

19 Again, I don't argue with the fact that the
20 costs and complexities of administering an access
21 pricing program can be just enormous. That could be a
22 very good reason for just saying "tough, here is an
23 essential facility."

24 And if Congress isn't willing to adopt a
25 tailored regulatory regime to address it, probably we

1 are going to do more harm than good by attacking it with
2 antitrust remedies.

3 I think you will actually find at least more
4 than a hint of that style of reasoning in this new line
5 I guess what I would call soft immunity cases in which I
6 would put both Town of Concord versus Boston Edison and
7 also arguably the Trinko case, where you have an
8 antitrust remedy that is sought to be overlaid on a
9 regulatory background and where the court says the
10 standard for immunity for federal antitrust is a very
11 high one.

12 It is the plain repugnancy standard, which was a
13 term first used in Terminal Railroad, that we are not
14 going to rule, we are going to reject the argument for
15 immunity, but nevertheless, we refuse to recognize the
16 validity of the claim.

17 That's why I call it kind of soft immunity. It
18 is a legal ruling that the claim will not go forward.
19 But it is not under the traditional rubric of either
20 express or implied immunity from antitrust prosecution.

21 MS. KURSH: Thanks.

22 Tad, let me follow up a little bit on that. You
23 had said -- and I think that's what you were addressing
24 right now -- that there may be times when the best thing
25 is to do nothing.

1 Can you set out what are the guideposts for
2 those situations? What are you looking for? When do
3 you make that determination that the best thing is to do
4 nothing?

5 MR. LIPSKY: It is very hard to define in the
6 abstract other than to say you have to look at all the
7 costs and benefits in the particular industry.

8 It is not something that lends itself really to
9 an ideological type of approach.

10 For example, there was a phase of the AT&T case
11 when, and this was the rationale that the entry of the
12 decree was based on and much of the dialogue or debate
13 in the early implementation of the decree, including
14 decisions made on applications for waiver of the line of
15 business restrictions and so forth.

16 You used to constantly hear the phrase that the
17 RBOCs had the incentive and ability to fill in the
18 blank, but basically to goldplate, to enter at less than
19 remunerative prices, to do all kinds of things to
20 exclude competitors and so on and so forth and,
21 therefore, these incentives and the ability to restrict
22 competition in the market they proposed to enter either
23 that they be kept out or that it be conditioned.

24 I think that argument is logically sound. But
25 if all you can say for the arguments is that it is

1 logically sound, it seems to me you have only taken like
2 the first step, because you had to worry about things
3 like if we exclude the RBOCs, what is going to happen to
4 innovation, what is going to happen to competition in
5 this line of business, who is going to administer the
6 restriction, who is going to decide whether a Humvee is
7 a car if they are applying to enter the car market and
8 they produce a Humvee.

9 All those hideous administrative chores are
10 costly. They encourage strategic behavior. They have
11 all the costs and also some of the benefits that I have
12 identified.

13 It is really the weighing of the costs and
14 benefits which is the critical step. It is not simply
15 having a logical argument as to why a remedy of a
16 certain type ought to address a certain type of
17 anticompetitive behavior. It is very extremely fact
18 specific.

19 MS. KURSH: With that, let's start with our
20 first proposition, slide number 2. I will read it for
21 the record.

22 "Relief should 'terminate the illegal monopoly,
23 deny to the defendant the fruits of its statutory
24 violation, and ensure that there remain no practices
25 likely to result in monopolization in the future.'"

1 It is a quote from United Shoe Machinery.
2 First, I will start with the basic question whether
3 everyone on the panel agrees that these are appropriate
4 remedial goals in a Section 2 case.

5 MR. HEINER: I will comment briefly.

6 We had occasion to look at this in connection
7 with the Section 2 case against Microsoft, where this
8 particular quote which was brought out.

9 Our understanding of its meaning was that the
10 "terminate the illegal monopoly" part of that would
11 apply in a monopoly acquisition case as opposed to a
12 monopoly maintenance case.

13 Understood that way, it seems to make sense.

14 The next clause, "deny to the defendant the
15 fruits of its statutory violation," I think one has to
16 then look at the causation issue, what were the fruits
17 of the violation.

18 And if as I was saying during my 15 minutes, if
19 the causation is relatively weak, there may be lesser
20 occasion to try to effect change.

21 And the last clause seems to be relatively
22 noncontroversial, I would think.

23 MS. KURSH: Does anyone have a different view or
24 is there a general agreement?

25 MR. CRANDALL: I think it is incredibly

1 optimistic that the last clause could be achieved by any
2 decree, particularly given the difficulty of even
3 understanding what caused the monopoly to start with.

4 But in high-tech industries, given the rapid
5 rate of change, imagine I guess -- we haven't raised --
6 have you raised MediaPlayer yet?

7 MR. HEINER: I briefly referenced it.

8 MR. CRANDALL: The idea that somehow breaking
9 off MediaPlayer -- that's right, you talked about
10 selling the one without Realplayer.

11 The idea that that somehow was necessary to
12 prevent Steve Jobs from getting into the business of
13 distributing music seems rather naive now in retrospect.

14 I think things change so rapidly you can't
15 possibly satisfy that last clause in a lot of industry.

16 MS. KURSH: But is it an appropriate goal to be
17 reaching for that?

18 MR. CRANDALL: To dream the impossible dream? I
19 suppose.

20 MS. KURSH: I will take that.

21 MR. HEINER: Let me offer two qualifications.
22 The word "ensure" is obviously a very strong word.
23 Whether you could really ensure anything in this area is
24 kind of a question mark, I think.

25 And as I read the quote -- and it may or may not

1 be what the court had intended -- but I would read it as
2 ensure that there remain no practices likely to result
3 in unlawful monopolization.

4 There may be natural economic forces and there
5 may be someone built a better mousetrap leading to a
6 very high market share. That is something I think we
7 don't try to remedy through antitrust.

8 MS. KURSH: If you were to tweak the quote
9 somewhat, in a monopoly maintenance case would you agree
10 that determining the unlawful exclusionary conduct would
11 also be an appropriate goal?

12 MR. HEINER: I would think so.

13 MS. KURSH: Let me throw out some other
14 possibilities as goals and see what people think about
15 them.

16 Do we get agreement that punishment is not an
17 appropriate equitable goal for the enforcement agencies
18 in the United States anyway?

19 MR. HEINER: You will get agreement from Me.

20 MR. CRANDALL: You mean in a civil sense or a
21 criminal sense?

22 MS. KURSH: Either one.

23 MR. CRANDALL: To the extent you invoke as one
24 of the goals of deterrence, I suppose you can justify
25 doing that.

1 I can't imagine you could do it for Section 2.
2 That is one of the arguments for criminal penalties or
3 treble damages in section 1. Of course, we have no
4 studies that show whether it works, it deters collusion
5 or not.

6 MS. KURSH: Let me follow up on that for a
7 moment.

8 You used the word deterrents. Do you think it
9 is an appropriate goal of a Section 2 remedy to try to
10 deter others from engaging in Section 2 violations?

11 MR. CRANDALL: Once again, I think it is
12 impossible to imagine that it would work. I can't
13 imagine that somebody engaged in some new industry where
14 he gains 80, 90 percent market share is going to be
15 deterred unless there are criminal penalties associated
16 or very large financial penalties associated with a
17 certain market share, which I would hope would never
18 take place.

19 I can't imagine this is sufficiently certain
20 that it could work as a deterrent in a Section 2 case.

21 MS. KURSH: Tad, do you have any views on
22 whether punishment or deterrence of others are
23 appropriate goals?

24 MR. LIPSKY: I don't think punishment is
25 something that comes in to most questions of

1 monopolizing conduct.

2 You can imagine episodes that might occur within
3 the context of a Section 2 litigation where other
4 statutes are brought to bear that do properly have
5 punishment and deterrence elements, thinking of things
6 like destruction of evidence or intimidation of
7 witnesses or crimes collateral to any judicial
8 proceeding or government prosecution.

9 But I think there was a case called Empire Gas
10 which was brought as a criminal Section 2 case where it
11 was probably the only Section 2 claim that also included
12 a federal firearms count.

13 I wish I could remember the specific
14 circumstances. Probably somebody riding around the
15 Midwest countryside using a 30 ought 6 to shoot at his
16 competitors' propane tanks or something.

17 AUDIENCE MEMBER: Dynamite.

18 MR. LIPSKY: Dynamite, thank you. It is so
19 helpful to have Greg here in the audience. He really
20 knows his firearms.

21 MS. KURSH: I think I heard at least two
22 panelists, maybe more, maybe Dave and Per mention about
23 helping disadvantaged rivals.

24 What are the views of the panelists on whether
25 that is an appropriate Section 2 remedy, remedial goal?

1 MR. HELLSTROM: I think I may have mentioned in
2 that I quoted something stated by Mr. Charles A. James.

3 MS. KURSH: What is your view on it, Per? Do
4 you think that in the EU helping disadvantaged rivals is
5 an appropriate goal in a Section 2 case -- not Section
6 2.

7 MR. HELLSTROM: I think if you have a
8 foreclosure abuse that forecloses competition, and that
9 is presumably also some competitors, indeed, a remedy
10 would probably favor some of the rivals in that it would
11 allow if they had been unlawfully foreclosed, allow them
12 to enter or stay in the market, yes. That would be
13 favorable to them.

14 MR. CRANDALL: To the economist, it sounds a
15 little bit like the infant industries argument. And
16 politically it strikes me as a bad general idea because
17 it risks creating a set of clients from whom you can't
18 disengage because they require the favorable environment
19 in order to survive.

20 MS. KURSH: Dave, do you see a distinction
21 between opening up the opportunities for rivals and
22 helping disadvantaged rivals?

23 MR. HEINER: The phrase "helping disadvantaged
24 rivals" could be subject to a range of interpretations,
25 I suppose.

1 If it means creating opportunities, I think
2 that's exactly what we need to do.

3 One could imagine a fuller interpretation of
4 that phrase that could mean take the assets of the
5 defendant and transfer them to the disadvantaged rival.
6 That would seem to go too far.

7 I think that phrase which Mr. James used
8 possibly could be subject to being misread.

9 MS. KURSH: And, Per, if I could ask you to just
10 comment. Do you see the remedial goals different under
11 European law than in the United States in this area?

12 MR. HELLSTROM: I'm not too familiar with
13 remedial goals in the United States. It is hard for me
14 to comment.

15 MS. KURSH: Do you see them as different than
16 the ones in this proposition?

17 MR. HELLSTROM: Clearly, I would agree with Dave
18 that it is not really the purpose to terminate the
19 illegal monopoly insofar as our Article 82 relates to
20 abusive behaviors.

21 It is more about terminating the abusive
22 behavior and not the dominant position as such.

23 So I would agree with that statement.

24 MS. KURSH: If we can go to slide number 3 for a
25 moment.

1 I will read this quickly. I think someone
2 already commented on it.

3 "The fruits of a violation must be identified
4 before they may be denied."

5 Of course, that is from Microsoft.

6 In essence, that's saying that one -- we talked
7 about earlier one goal is to deny the fruits of a
8 violation to the defendant.

9 How do you determine what the fruits of a
10 violation are? Does anyone have some thoughts on how
11 you should go about making that determination?

12 MR. HEINER: That is something that is supposed
13 to come out during liability phase, I would think.

14 The next sentence from this decision goes on to
15 say what the fruits were in the Microsoft case. And
16 what they said was that Microsoft had inhibited nascent
17 competitive threats.

18 So the logical remedy the court explained was to
19 remove those inhibitions on a going forward basis, and
20 that's what was done in the consent decree.

21 MS. KURSH: Tad or Bob, do either one of you
22 have some thoughts about general principles that should
23 be applied when deciding what fruits flow from a
24 particular violation or is it just a very fact-specific
25 determination?

1 MR. CRANDALL: I don't like the term "fruits."
2 It strikes me that this suggests that the real issue
3 here is the monopoly profits of the defendant.

4 I can imagine a situation in which Microsoft had
5 reaped even greater returns from its operating system
6 position, monopoly, and being a perfectly discriminating
7 monopolist, which an economist might say there is no
8 grounds for intervention here because the output is at
9 an optimal level.

10 This is a battle that has gone on for years. It
11 is not so much that the greedy monopolist earned
12 monopoly profits but rather that profits and outputs are
13 distorted.

14 I would prefer it to say the effects of a
15 violation must be identified, the effects on prices and
16 output, rather than fruits.

17 MS. KURSH: Tad?

18 MR. LIPSKY: We have this system in the United
19 States where you have the government which never seeks
20 damages or relief that will redound to the government's
21 benefit as a purchaser.

22 So they don't care about fruits in general,
23 except in the most kind of Elysian and abstract sense
24 that any remedial system like antitrust is supposed to
25 work, you did something wrong, you have to pay back.

1 Then, of course, we have the fantastic system
2 with these wonderful talk about fruits, subsidies to
3 private action. You have mandatory treble damages and
4 payment of attorney fees and notice pleading and
5 discovery and joint and several liability.

6 It just goes on and on and on so that you have
7 this entire population which stretches 12 stories high
8 from here all the way up to Connecticut Avenue of people
9 working to either get or defend people from having to
10 pay these spectacular sums which are surely in excess of
11 anything that could reasonably be described as fruits of
12 the violation.

13 It is almost like the system is designed so that
14 we will never seek an intelligent answer to that
15 question.

16 It does have a meaning in the sense that it was
17 referred to in the first part of the previous quote,
18 which is if you have a case where you think the monopoly
19 is attributable to a certain type of behavior, then you
20 have a real problem. Then you have to decide whether to
21 actually have a structural remedy where you break
22 something up.

23 Beyond that meaning of fruits, I think we have a
24 problem implementing that in our system.

25 MS. KURSH: All right. Can we turn to slide 5.

1 Jumping ahead a little bit to keep things
2 moving. We have talked about this a little. Let's get
3 into it in more detail.

4 A famous quote from Trinko, "No court should
5 impose a duty to deal that it cannot explain or
6 adequately and reasonably supervise. The problem should
7 be deemed irreparable by antitrust law when compulsory
8 access requires the court to assume the day-to-day
9 controls characteristic of a regulatory agency."

10 We have had some discussion about this already,
11 but I think it is worth a little more.

12 In Trinko, the Court specifically was addressing
13 refusals to deal.

14 Tad, I would start with you. What if any
15 refusals to deal do you believe are irreparable?

16 MR. LIPSKY: Well, I don't think any refusal to
17 deal is irreparable.

18 The question is whether it is irreparable at a
19 tolerable cost. I think that's what I was trying to
20 suggest.

21 If Judge Green had not had the FCC to fall back
22 on for the implementation of the access charge element
23 of the MFJ remedy, I think he might well have concluded
24 that it was an impossible task, that as meritorious as
25 the division's case was, it was simply not an acceptable

1 judicial function for him to be involved in.

2 I wonder if he could have just said in the
3 Tunney Act proceeding this is a violation of Article 3,
4 courts don't do this.

5 It is almost what is suggested in this quotation
6 from Trinko, and I suppose that in the right case, he
7 probably would have been upheld in that.

8 MS. KURSH: Are there other types of cases,
9 let's say predatory pricing or other types of refusal to
10 deal cases where you think the cost of a remedy are
11 going to be so high or so difficult to effectively
12 monitor and enforce that the agency should not be
13 bringing the cases?

14 Anyone want to comment on that?

15 MR. CRANDALL: The Robinson-Patman Act. Any
16 reduction in price is unlawful.

17 MS. KURSH: Do you think that even if the cost
18 of a conduct decree is very high that there is value in
19 bringing the case with a simple "sin no more" kind of
20 judgment, the violation is enjoined?

21 MR. LIPSKY: If there ever is a good predatory
22 pricing case brought, I think that would be a good
23 example.

24 The IBM case started that way. It started
25 essentially as a predatory pricing case involving a

1 Model 90 and very advanced for them, very advanced
2 computers that control data -- they were beating IBM to
3 the prestige customers like the MIT Labs and Lawrence
4 Berkeley and so forth.

5 So there was a valid predatory pricing claim
6 that could have been discussed back in 1969.

7 Unfortunately, things worked out so that that
8 aspect of the case was obscure.

9 But there would be an occasion to say all right,
10 let's have a big fine, let's have a big kind of remedial
11 punishment for engaging in blatant predatory pricing
12 behavior.

13 MS. KURSH: But for -- I'm sorry. Let me just
14 follow up on that.

15 In a government case, what do you see as the
16 appropriate relief in a predatory pricing case that you
17 believe should be brought?

18 MR. LIPSKY: I think arguably you could just
19 have some kind of fine or penalty. I'm not suggesting
20 that the remedy in a predatory pricing case would be
21 price regulation.

22 I think especially in a market like that, which
23 was extraordinarily dynamic and remains dynamic, I
24 wouldn't attempt to impose any kind of forward-looking
25 remedy.

1 MS. KURSH: Dave?

2 MR. HEINER: I would just say generally I think
3 that a sin no more remedy, once the sin is identified,
4 will likely be more efficacious and easier to administer
5 than remedies in the form of thou shall do something.

6 Whenever you have a defendant creating something
7 new or doing something they haven't done before, I think
8 we are getting into more challenging areas and certainly
9 have seen that in various Microsoft remedies, I think.

10 MS. KURSH: If oversight, control, regulation is
11 unworkable or extremely costly, should that be a basis
12 for a structural remedy? Anyone? Any takers?

13 MR. CRANDALL: Not necessarily. It may well be
14 that -- as an economist, when I talk about cost, I'm
15 talking about the effect on output, not just the
16 administrative cost of carrying out the decree.

17 It may well be that the structural remedy
18 creates more economic cost than doing nothing.

19 So ruling out a behavioral decree and then
20 looking at a structural decree is okay, but that doesn't
21 mean to say necessarily you go with a structural decree.

22 MR. HEINER: It may well be also, I think, as I
23 was suggesting earlier, if it is so costly to administer
24 an access remedy, that may reflect in part the fact that
25 perhaps the underlying objective is too ambitious or

1 there shouldn't really be liability in the first place.

2 MS. KURSH: I wanted to follow-up. Do people
3 agree with that, if there does not seem to be an
4 appropriate effective remedy, that suggests that maybe
5 there was not underlying liability to begin with?

6 Per, do you have a view on that?

7 MR. HELLSTROM: I have my doubts on that
8 approach. I think that puts the cart before the horse
9 in a sense.

10 I think one should carefully analyze the
11 behavior and try to establish whether there is an abuse.

12 As we said, there are various alternative
13 remedies. A simple cease and desist order could be an
14 appropriate remedy, together with a fine.

15 So I'm not sure if indeed there are such
16 situations.

17 MR. LIPSKY: I hesitate to make any absolute
18 statement about that. The theory is the theory and the
19 remedy is the remedy. You can imagine good theories and
20 bad remedies and vice versa.

21 MR. HEINER: My statement was not absolute
22 either. It was a maybe kind of statement.

23 Just to elaborate on it a little, the central
24 antitrust issue involving Microsoft over the past 10
25 years or so has been this question of building features

1 into Windows and this second question involving
2 interoperability that has become quite prominent
3 recently.

4 I have really been struck by this tying issue,
5 as we have gone around the world literally talking to
6 enforcement agencies about it, that the agencies may
7 have a clear view on liability, but we don't seem to get
8 to a remedy that will be deemed satisfactory.

9 Again, this is why we really couldn't settle the
10 European Union case. The Commission had taken the view,
11 not unreasonably, that a settlement really ought to
12 address the issue on a going-forward basis for years to
13 come. It should not just address MediaPlayer
14 functionality.

15 So Commissioner Monti was looking for something
16 that we could really generalize. And, frankly, there
17 was nothing we could come up with.

18 It seems to me that the reason for that was that
19 anything you would propose, the remedy was worse than
20 the perceived harm. You would lose the benefits of
21 integration over time.

22 It is those benefits that also lead us back to
23 thinking, gee, should there be liability in the first
24 place.

25 And then we have the remedy which didn't come

1 out of the settlement but was imposed and further drives
2 on the point that there shouldn't be any liability. We
3 will hear from the European court on that and see how it
4 comes out.

5 MS. KURSH: Do any of the panelists have a view
6 on what is appropriate equitable relief in a product
7 design case?

8 Are there limitations? Is there a template that
9 we should be following? No? Okay.

10 MR. CRANDALL: I don't know how you can
11 generalize that.

12 MR. DUCORE: I would like to follow up a little
13 on this point about irremediability, if there is such a
14 word.

15 And maybe I will be provocative here. Maybe I
16 should give the disclaimer that I should have given
17 before, that whatever I say are my own views and not the
18 views of the Commission or commissioner.

19 But from the perspective of an enforcement
20 agency, does anybody on the panel think, especially in
21 the context of the U.S. system, where you can have
22 follow-on private litigation -- that's all about money
23 generally.

24 Is there a value in an agency, enforcement
25 agency taking on perhaps a difficult, complex situation

1 and establishing the point that what took place was a
2 Sherman 2 violation or a Section 5 violation and even if
3 it is not able to fashion a specific, effective going
4 forward conduct remedy, set the stage for the victims of
5 that conduct then coming forward with follow-on
6 litigation to get the damages that, after all, the
7 agency generally doesn't seek on its own?

8 MR. CRANDALL: I will offer a view on that.

9 I don't see the antitrust laws as being designed
10 to redistribute income.

11 The way you put it, you avoided one large class
12 of people, namely, the trial attorneys who are going to
13 benefit from that.

14 I don't see that there is an overwhelming social
15 benefit from doing that, and there have to be better
16 ways to redistribute income than doing it that way.

17 MR. LIPSKY: Given all of the incentives for
18 private litigation that exist under the U.S. system, I
19 would say that what you are proposing is kind of
20 dangerous, because it used to be that you have a
21 criminal case and there would or wouldn't be a trial and
22 there would be a plea, and sort of word would get out,
23 and at some point the private litigation, the class
24 actions would follow.

25 Nowadays, all you need is a press release saying

1 that some agency somewhere in the world is investigating
2 some industry, and, kaboom, you have an MDL, even where
3 the press release says it is the European Commission
4 investigating, not even the United States that is
5 investigating.

6 Given this -- it just happens -- there used to
7 be just the criminal cases and then it went to all the
8 horizontal cases. Now it is even vertical cases, like
9 Dentsply.

10 You immediately get follow-on class actions the
11 minute something comes to light. The same with U.S.
12 Tobacco.

13 The whole litigation bar is sitting out there
14 like the Strategic Air Command on hairtrigger alert.

15 I think the necessity for the agencies to go
16 forward and establish liability, as you have described,
17 I think that's in many ways a dangerous approach.

18 Now, it is another thing to say should the
19 agencies be articulating and focusing on competition
20 problems. Absolutely. Usually, at least for the major
21 Section 2 cases, all of these cases arise in kind of a
22 broader policy context.

23 The AT&T case are years of debate about what to
24 do about this or that part of telecom, and there is a
25 White House Office of Telecommunications policy that was

1 involved and the FCC was involved.

2 And the Division and the Commission should be
3 vigorously involved in those kinds of debates. And they
4 have investigative tools that are appropriate for
5 situations like that.

6 But on the narrow proposition if there is no
7 hope of an efficacious remedy should the agencies
8 nevertheless go forward and prosecute just to get the
9 determination on the record that this was bad, somehow
10 that rubs me very much the wrong way.

11 MR. DUCORE: What about to establish the points
12 of that so it might be easier to challenge the next
13 conduct that's similar earlier in the process, maybe at
14 a point where you could more easily follow up on an
15 efficacious remedy?

16 MR. CRANDALL: If? I don't understand.

17 MR. DUCORE: In other words, take on a hard
18 case, hoping to be able to design a good remedy but not
19 steering away from the case I will say simply because
20 you are not sure you can develop the remedy but
21 nevertheless if you establish liability, then setting
22 the stage so that if the next industry comes along and
23 does the same thing, you are better positioned perhaps
24 to challenge it more quickly and stop it before it
25 reaches a point where it is irremediable.

1 MR. LIPSKY: I guess you could defend the United
2 States versus Robert Crandall on that case. But it is
3 not the same Bob Crandall. It is the former chairman of
4 American Airlines.

5 I think it is a good point in the context of
6 legal theory. U.S. versus Crandall is sort of the
7 perfect illustration of something that was conduct that
8 was debatably within the attempt defense. I think it
9 was brought as a civil case primarily for that reason.

10 It did have the result that the agency wanted,
11 which was to establish that this kind of inchoate offer
12 to collude would work as an attempt case where the
13 parties could collectively exercise monopoly power.

14 Of course, inchoate collusion, invitations to
15 collude has since become kind of an active prong of
16 antitrust under other statutes as well. I think it
17 served the intended purpose.

18 I think well-advised business people are told
19 that inchoate forms of collusion, offers to collude,
20 even though they may not meet the standards of Section 1
21 of the Sherman Act, are nevertheless very bad ideas.

22 In the Section 2 area, in the monopolization
23 conduct area, though, I wonder if there isn't enough
24 difference industry to industry and form of conduct to
25 form of conduct.

1 It might be a relatively rare case where you
2 actually want to accomplish or where there is any
3 objective in trying to accomplish the plausibility.

4 Offering natural gas and gas water heaters as a
5 bundle might be more or less desirable in ways that
6 offering a computer operating system and a
7 Windows-compatible Internet browser are not. It could
8 go either way.

9 So I think you query what you really accomplish
10 in trying to establish a standard, given that a lot of
11 these cases occur in very dynamic industries.

12 MS. KURSH: Tad, on a somewhat different point,
13 I have a question for you.

14 In Aspen Skiing, the District Court had ordered
15 the parties to offer jointly a four-area coupon book, as
16 you might recall, similar to the one that Ski Co was
17 offering at another resort.

18 Do you have any view on whether this aspect of
19 the remedy in Aspen Skiing helped or hurt consumers and
20 when if ever forcing the only two competitors in a
21 market to collaborate is good for consumer welfare?

22 MR. LIPSKY: Well, Aspen is a funny little case,
23 because the market power issue was stipulated the wrong
24 way.

25 But if you can force yourself to imagine that

1 the four ski slopes in Aspen, Colorado had a monopoly
2 anything, maybe you can picture a world in which all the
3 ski slopes in North America are owned by two companies,
4 and one owns 75 percent of them and the other owns 25
5 percent of them. So in the average ski resort, you
6 would have a situation like Aspen.

7 You could respectively argue that this is more
8 like the U.S. versus Associated Press or Gamco Warehouse
9 kind of situation.

10 Here is an efficient arrangement. The terms and
11 conditions have been set historically by the parties for
12 ordinary profit-maximizing reasons. And you could order
13 them to collaborate if you thought that the conduct
14 was -- that the larger competitor's conduct in cutting
15 off cooperation with the smaller competitor was an
16 attempt to maintain this monopoly.

17 There is a leak in that theory, though, and that
18 is in order to get its refusal to cooperate with I
19 forget which ski company was the evil monopolist and
20 which one was the gallant David challenging Goliath.

21 But the problem was the David ski company said
22 we will give you a voucher, we will give our customers a
23 voucher redeemable at the local bank in cash.

24 It was actually more remunerative for the
25 monopolist to accept that voucher than to allow people

1 to use their credit cards, because they didn't even have
2 to pay the merchant fee, the clearance fee associated
3 with use of the credit card.

4 To me, as I say, if you can force yourself to
5 believe that it was a monopoly case, I think the whole
6 case could have been solved simply by enjoining that
7 act, that the defendant should have been required when a
8 customer of the other ski company came up and said
9 "here, I will give you this cash, this face value cash
10 cost-free voucher for your tickets," the defendant could
11 have been required to accept that and that would have
12 solved the whole problem.

13 Now, I think maybe the issue you were trying to
14 get at is the one lurking below the surface of
15 cooperation between competitors.

16 Of course, that is a huge problem and it is
17 alluded to in Trinko, of course. But Aspen Skiing
18 actually is a little bit different because of the
19 externality, the joint product of allowing customers to
20 use all the competitors.

21 That is actually a product that had independent
22 utility to customers in Aspen Skiing, which would not be
23 true.

24 You wouldn't buy a form of long distance service
25 just because it allowed you to make a call on MCI and on

1 AT&T. That would make no sense.

2 It is in the AT&T-type situation, where there is
3 no utility in the use of multiple competitors, that you
4 have the much greater danger and no apparent benefit of
5 the forced collaboration.

6 MS. KURSH: In a refusal to deal with a rival
7 situation, how does the court, the agency establish the
8 terms in which the rivals have to deal?

9 MR. LIPSKY: That's, of course, what most of my
10 remarks were devoted to, what a terrible dilemma that
11 is.

12 The presence of a regulatory agency helps, query
13 whether a court can ever do it absent the Associated
14 Press/Gamco Warehouse kind of situation.

15 MR. CRANDALL: I would demur on that.

16 My discussion of this with the regulatory agency
17 in many cases can't come close to getting it right. The
18 fact they have more resources to throw at it doesn't
19 suggest they will get the prices right.

20 It may be something for courts to avoid. It
21 doesn't suggest a regulatory solution necessarily.

22 MR. LIPSKY: Bob, do you allow the intellectual
23 possibility that there could be a case where as
24 imperfect as the regulatory solution might be, with all
25 the costs and benefits considered, it might be better to

1 regulate rather than if your alternative is to do
2 nothing?

3 MR. CRANDALL: I suggest something like water
4 distribution or gas distribution, something where the
5 technology is extremely simple and not changing very
6 much. That's a possibility.

7 Once you get beyond that, I think it is
8 problematic.

9 MS. KURSH: Thank you very much.

10 Dan, do you have something?

11 MR. DUCORE: One question to try to wrap that
12 up.

13 The FTC and DOJ have slightly different
14 functions. We are not always in front of a judge.

15 I guess the question for a panel is whether they
16 see a value in whether you call it an investigation or
17 administrative litigation that leads to some report that
18 identifies the issue and sort of ties it up that a
19 court-type remedy doesn't seem workable here, Congress
20 should step in and deal with it in some way?

21 MR. CRANDALL: You are suggesting just an
22 investigation, an inquiry, but not necessarily
23 litigation?

24 MR. DUCORE: If the concern is that we are not
25 equipped to write a decree or order, that it goes

1 forward and specifically modulates conduct and there
2 isn't an existing regulatory agency that we think would
3 be well equipped but at least flag it for consideration.

4 MR. CRANDALL: I think it is perfectly
5 appropriate for the FTC or the DOJ to be doing analyses
6 of these things.

7 The question is do they bring cases. Earlier
8 you were suggesting you might bring a case even though
9 you don't have an appropriate remedy and it's just a
10 learning experience so that you are better prepared next
11 time.

12 I think Dave might be concerned that you spent
13 10 years on Microsoft trying to learn how to do it
14 better the next time.

15 MR. DUCORE: What I was getting at is if all you
16 can get -- my earlier point I don't think I made it as
17 clear.

18 If you could only have what is called a
19 sin-no-more remedy, you did this, this was unlawful,
20 don't do that again, that obviously may set up private
21 actions, but it also sets the precedent so we have told
22 you not to do this again, if the next guy comes along
23 and maybe he is doing it, maybe we could get a judge to
24 tell him stop earlier in the process.

25 It is not that you couldn't have a remedy. It

1 is that the remedy would simply be you shouldn't do that
2 anymore.

3 MS. KURSH: All right. On that note, I would
4 ask everyone to join me in thanking our panelists for
5 their insight.

6 We will see everyone this afternoon at 1:30. We
7 pick up on remedies and some other interesting topics to
8 get into.

9 Thank you. 12:00 p.m.

10 (Whereupon, at 12:00 p.m., the hearing was
11 recessed, to be reconvened at 1:30 p.m. this same day.)

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1 purposes of the antitrust laws.

2 The discussion session in this panel will have
3 particular emphasis on structural and conduct remedies
4 in Section 2 matters.

5 Also on our panel is a representative from the
6 European Commission to share his perspectives based on
7 emerging remedies under European law.

8 On behalf of the Division, I thank our panelists
9 for participating today and sharing their views with us.

10 I will introduce each in more detail before he
11 speaks. But in brief, our speakers in the amended order
12 of appearance are the following.

13 Andy Joskow is a senior vice president and
14 director of NERA Economic Consulting.

15 Dietrich Kleemann is head of the task force on
16 ex post assessment of merger decisions, Directorate
17 General for Competition, European Commission.

18 We are scheduled to have also Franklin Fisher,
19 who is the Jane Berkowitz Carlton and Dennis William
20 Carlton professor of microeconomics at the Massachusetts
21 Institute of Technology, and hopefully he will be able
22 to join us in a few minutes.

23 Then John Thorne, who is senior vice president
24 and deputy general counsel at Verizon Communications.

25 And Richard Epstein, the James Parker Hall

1 distinguished service professor of law at the University
2 of Chicago Law School.

3 Thanks to my colleagues at the FTC and the
4 division for organizing this hearing.

5 The organization of the panel is as follows. We
6 will have three panelists speak for approximately 15
7 minutes each. Then we will take a short break. The
8 final two panelists will speak.

9 Each panelist will have a couple minutes to
10 respond to the other presentations, and then there will
11 be a moderated discussion led by Dan and me.

12 In that time period also, David Heiner, who was
13 on the panel this morning who is, I believe, deputy
14 general counsel of Microsoft, has graciously agreed to
15 join us and maybe will also be participating, if he
16 likes, in the moderated discussion.

17 We will not be taking any questions from the
18 floor, and we plan to end at 4:30.

19 Before introducing our first speaker, I would
20 like to turn things over to my co-moderator, Dan DuCore.

21 MR. DUCORE: On behalf of the Federal Trade
22 Commission, I want to thank our panelists for graciously
23 volunteering their time and their views today to help
24 assess remedies for single-firm antitrust violation
25 cases. I was going to say Sherman 2, but we do it under

1 Section 5 of the FTC Act.

2 As I think it became pretty clear in this
3 morning's session, I will say Sherman 2 violations are
4 sometimes hardest to make out.

5 I think it is probably equally true that once
6 you have made them out, figuring out the best way to
7 remedy those problems is at least equally hard.

8 And unlike some other areas in merger
9 enforcement and certainly horizontal agreements
10 enforcement, Sherman 2 single-firm conduct violations
11 are of necessity, particularly fact intensive when it
12 comes to designing remedies, both in terms of what the
13 theory of the harm is and how the industry operates.

14 As someone whose office has to deal with
15 remedies for all kinds of antitrust cases every day, I'm
16 going to be particularly interested in hearing about
17 broad approaches as well as some of the more detailed
18 issues having to do with administrability and, as part
19 of that, what do you do if it is not clear that a
20 remedy, a workable remedy doesn't do more harm than
21 good.

22 We talked a little bit about that this morning.
23 This afternoon we are going to focus a little more on
24 the difference between the conduct remedy approach and
25 the structural approach.

1 So with that, we are about to start, except I
2 have to make a couple of logistical announcements.

3 One is in case of an emergency and if an alarm
4 goes off, walk, do not run, to the exit and do not take
5 the elevator but take the stairs down stairs and walk
6 across the street, and there will be obviously people
7 directing you to where to go. I suspect that won't be
8 an event this afternoon.

9 Also, the restrooms, if anybody in the audience
10 needs them, are out the hall to the left, the men's room
11 to the immediate left, the women's room past the
12 elevators to the left.

13 Finally, please turn off all electronic devices,
14 especially cell phones, Blackberries and other hand-held
15 devices which in particular can create static if they
16 are operating near the microphones.

17 So without any further ado, and I don't know if
18 you are going to restructure the order again.

19 MR. ELIASBERG: We have the good fortune that
20 Dr. Franklin Fisher has been able to join us now.
21 Welcome, Frank.

22 Frank, I will sort of leave it to you. If you
23 need a moment to catch your breath, we can have Andy go
24 first.

25 DR. FISHER: I can go first.

1 MR. ELIASBERG: I appreciate you going back to
2 the bullpen, Andy.

3 DR. FISHER: Of course, you understand that I am
4 tempted to talk about the effects of deregulation on the
5 behavior of airlines. Perhaps not.

6 MR. ELIASBERG: Franklin Fisher is the Jane
7 Berkowitz Carlton and Dennis William Carlton professor
8 of microeconomics at the Massachusetts Institute of
9 Technology, Emeritus, where he has taught for 44 years.

10 He has served as director of CRA International
11 since 1967 and is a director of the National Bureau of
12 Economic Research.

13 His book, "Industrial Organization, Economics
14 and the Law," is widely read by lawyers and economists
15 alike.

16 Frank, let me assure you we are delighted to
17 have you here today.

18 DR. FISHER: Thank you. I am delighted to be
19 here, although somewhat more stressed than I thought I
20 was going to be.

21 All right. Well, the question of how to design
22 remedies in Section 2 cases isn't easy.

23 Unlike prospective mergers which can be blocked
24 or price fixing cases or collusion cases where actions
25 can be enjoined, single-firm monopoly cases even when

1 won tend to founder on remedy issues.

2 Structural relief can be and often is seen as
3 too drastic, and injunctive relief can simply turn into
4 an effort to prohibit actions already in the past and
5 already obsolete or can require continuing and perhaps
6 continual judicial supervision.

7 Too often in the past antitrust authorities have
8 failed adequately to consider the problem of remedies.
9 And I'm delighted to see an actual hearing is taking
10 place on this subject.

11 With those encouraging remarks, I have two parts
12 to this talk.

13 I want first to discuss what I think the
14 desirable objectives are that a Section 2 remedy or
15 maybe any remedy should be, and then I want to exemplify
16 some of this by talking about the Microsoft case and
17 suggested remedies in it.

18 I was the principal economic witness for the
19 Division in that case. And I'm going to talk about
20 these two things.

21 Here are the five things that I think one ought
22 to try to achieve, and it will turn out that some of
23 them are impossible to achieve and you can't achieve
24 some of them without making some of the others
25 difficult.

1 And while I don't think it is a whole mess, I do
2 think it is a very complicated issue.

3 The first one is one ought to want to restore
4 competition. That ought to be a primary objective. One
5 ought to want to undo the anticompetitive effects of the
6 violation.

7 That may not be possible. Indeed, it may not be
8 clear what would have happened in the absence of the
9 violation. That's particularly true in innovative
10 industries.

11 Second, the punishment as it were ought to fit
12 the crime. I realize these are civil cases, but you
13 know what I mean. One wants to fit the remedy to the
14 violation.

15 It is natural to require that the remedy be
16 reasonably consonant with the liability findings. In
17 particular, it is natural to require that the remedy be
18 such that had it been in place at the time, the
19 violations would not have occurred.

20 But while that requirement is as the law is
21 developed as I understand it, that requirement may
22 satisfy the standard for consent decree hearings under
23 the Tunney Act, it is not guaranteed to satisfy the
24 important objective of restoring competition.

25 I will exemplify that when we talk about the

1 Microsoft case.

2 A broader remedy that prohibits violations, not
3 merely those found liable but similar to those to be
4 liable, may still not work.

5 This is likely to happen if the defendant used
6 the anticompetitive actions to ward off a threat to its
7 monopoly power at a crucial moment, with similar threats
8 unlikely to arise again or perhaps ever.

9 Next one would like to disgorge monopoly
10 profits. The violator shouldn't be permitted to profit
11 from the violation. Otherwise, there won't be any
12 disincentives for it or others to repeat such
13 violations.

14 But, of course, fines are unusual in Section 2
15 cases. On the other hand, fines may not be necessary.

16 The treble damage provision of the Clayton Act
17 certainly encourages private suits, and the loss of such
18 a suit can result in considerably more than the
19 disgorgement of monopoly profits.

20 I really don't like that answer. I can't tell
21 from your faces whether you like it or not, but I don't.

22 Treble damages also encourage -- here, by the
23 way -- I don't know if you have been given my text. If
24 you have, in the text there is a really Freudian error.
25 The text I recently discovered says "treble damages also

1 encourage reasonably basic private suits" --the word
2 "basic" should be "baseless" -- "sometimes suits that
3 follow a federal investigation, even though that
4 investigation doesn't result in an actual case and
5 finding of liability."

6 Particularly in large class action suits, this
7 results in a kind of legalized privacy, with the mere
8 certification of a class enough to produce settlement by
9 defendants greatly at risk.

10 That's mainly a problem I think for Section 1
11 cases. But the whole issue of treble damages is too
12 complex to simply assume that they should continue and
13 will result efficiently in the disgorgement of monopoly
14 profits.

15 One possible answer would be to require the
16 defendants to compensate those that were injured (back
17 to the federal case) as well as paying something above
18 that, since otherwise they or others may be tempted to
19 take advantage of these situations, and in return the
20 compensated victims should give up their rights to sue
21 for treble damages.

22 D, I'm quite fond of this one, but it is
23 difficult. Make the remedy self-enforcing. If
24 possible, one wants the remedy to serve for itself.

25 You want a situation to be created in which

1 market forces prevent the recurrence of the same or
2 similar violations, as opposed to injunctive relief.

3 That kind of remedy ideally doesn't require
4 continued and long judicial supervision and continued
5 wrangling and litigation that can go with that.

6 Ordinarily, of course, this is going to require
7 some sort of structural remedy. That isn't easy to do.

8 In the first place, courts are traditionally
9 reluctant to grant structural relief, which usually
10 means divestment or breakup. In the second place,
11 crafting one is not easy and may sometimes be
12 impossible.

13 Too often in the past the antitrust
14 authorities -- let me say for the moment I will talk
15 about something in the quite distant past. You don't
16 have to worry, guys. You weren't around. I was.

17 The antitrust authority has simply assumed that
18 a somewhat arbitrary divestment is what is called for.
19 That may have gone hand in hand with the naive belief
20 that monopoly power equals large market share, so that
21 simply breaking up the defendant would be sufficient
22 without the relationship of the breakup to the
23 violation.

24 That was certainly true of the great fiasco of
25 the IBM case. I, by the way, was the principal witness

1 for IBM in the IBM case.

2 The government's remedy proposal never reached
3 the court but was discussed at deposition by an
4 economist whom I will courteously not name.

5 He proposed breaking up IBM into four successor
6 companies, each of which would have one and only one
7 tape plant or disk plant. No consideration was given to
8 whether computer companies with only one such plant were
9 likely to be viable.

10 The focus was exclusively on reducing IBM's
11 supposedly very large market share, which was measured
12 by the government in truly peculiar ways, having nothing
13 to do with market power.

14 Structural remedies need to be better thought
15 through than that.

16 I'm sorry. I can't stop myself from telling the
17 following story:

18 That witness never testified at trial. It came
19 out at his deposition.

20 And there was a truly peculiar set of things in
21 the deposition, which began with the witness being
22 instructed not to answer the questions of how many
23 successor companies he proposed to have. And the
24 grounds for that -- first, I quote the lawyer in
25 question -- "I won't tell you."

1 Upon being told that that was not cognizable
2 under the Federal Rules, he offered to tell if the room
3 would be cleared of people not connected with the case.

4 IBM's lawyer said "I don't see anybody in the
5 room not connected with the case." And the lawyer for
6 the Justice Department observed that my son and the son
7 of the late John McGowan, who both of us were working on
8 the case, were present he said "the boys."

9 So they sent the boys out of the room. And now
10 the lawyer was willing to give the grounds.

11 He said "I'm not going to let him tell because
12 it might upset the stock market."

13 Well, there was some discussion as to whether
14 that came under the Federal Rules, and decided to let
15 the answer go on, provided the room was still further
16 cleared of everybody not totally essential.

17 Nicholas Katzenbach, then general counsel for
18 IBM, asked if it was okay if he stayed. The lawyer said
19 yes, but I couldn't.

20 I said I was going to go out and join my
21 12-year-old son, who was no doubt calling his broker at
22 that very moment.

23 The witness then testified about the tape plants
24 and the disk plants. But the number was sealed and
25 referred to as X in the transcript.

1 The motion to unseal, like many things in the
2 IBM case, remained undecided. That was in 1974. The
3 case ended in 1982 with that motion still undecided by
4 Judge Edelstein.

5 That number was four to anybody with any sense
6 who can count the number of tape plants and disk plants
7 that IBM had, and it was also four to anybody who was
8 with that same witness at a cocktail party a couple
9 weeks later and heard him say it was four.

10 Believe me, the IBM case was full of things like
11 this, some much worse.

12 Anyway, I could not talk about remedies without
13 getting to that. It lives with me still.

14 The last thing is I think, as I already said,
15 one ought to try to avoid remedies that require
16 prolonged and complicated judicial oversight.

17 That's likely to be true of complicated
18 injunctive relief, and it is particularly burdensome if
19 the injunction is to hold for long periods of time in a
20 changing industry.

21 Now I want to talk about Microsoft.

22 One of the things about Microsoft is almost none
23 of the remedies proposed were without flaws, maybe none
24 of them without.

25 I have to talk first a little bit about the

1 underlying economics and what is called the
2 "applications barrier to entry", and then I have to talk
3 about the violation.

4 This won't take very long, and then the conduct
5 remedies all the problems and the structural problems,
6 ultimately some problems.

7 Here is the story on the underlying economics.
8 How long have I got? I will speak slower.

9 First place, this is the way things stood in the
10 business in the late 1990s and to some extent still
11 stand, I think.

12 Applications written for one operating system
13 generally don't run on others. It is expensive to port
14 them. You have to start all over to port them to
15 another operating system.

16 Secondly, software application writing has large
17 economies of scale. The costs are all up front, big
18 costs. They are the costs of writing the program,
19 debugging the program, writing the manuals that go with
20 it. Putting out extra copies of the program costs
21 essentially zero.

22 As a result, application writers prefer to write
23 for operating systems which have many users so they can
24 spread the fixed costs over a large number of customers.

25 On the other hand, not surprisingly, computer

1 users prefer operating systems that have a large number
2 of applications.

3 As a result, an operating system that becomes
4 relatively popular for whatever reason attracts more
5 applications. These attract additional users, which in
6 turn attract even more -- well, this is badly written.
7 It should say which in turn attract even more
8 applications, which in turn attract even more users and
9 so on.

10 Eventually that operating system attains
11 monopoly power as other operating systems find it
12 difficult or expensive to attract application writers.
13 This is the so-called applications barrier to entry.

14 Microsoft was the beneficiary of this, starting
15 at least with Windows 95 and continuing onward. And if
16 Microsoft had simply been content with this relatively
17 natural phenomenon, there would not have been an
18 antitrust case and there certainly wouldn't have been a
19 successful antitrust case.

20 But Microsoft was not content with this. It
21 sought to destroy or contain two innovations, Netscape's
22 browser and Sun Microsystem's Java, that threatened to
23 weaken or remove the applications barrier to entry.

24 I'm not going to discuss exactly how those would
25 have worked, but I will -- that's relatively available

1 elsewhere.

2 There is -- I can't resist it -- government
3 Exhibit 39. By the way, you mustn't think that I retain
4 in my memory after whatever it is, eight years, what is
5 in every single exhibit in the case. This happens to be
6 my favorite.

7 Government Exhibit 39 is an e-mail that says you
8 should care about the browser even more than does Bill
9 Gates, because if we lose the browser, we lose basically
10 everything, and goes on about the operating systems will
11 turn into a commodity and so on.

12 Microsoft basically was found to have violated
13 the antitrust laws by its actions in those two
14 dimensions.

15 This was a great victory for the government.
16 But the events leading to the remedy, in my opinion,
17 eventually turned that victory into another fiasco.

18 What remedies were suggested and what were the
19 problems with them? Well, with perhaps one exception
20 which wasn't exactly considered seriously by the
21 government, I believe, every suggested remedy had
22 important defects in terms of the objectives that I
23 listed above.

24 I begin with the conduct remedies.

25 There is the one in the ultimate settlement.

1 This is a remedy -- basically it is a conduct remedy
2 that matched the violation. It did that and might deter
3 similar conduct.

4 It didn't restore competition, and it may have
5 left Microsoft secure in having destroyed two really
6 important threats.

7 Well, there is an issue here. That would
8 satisfy and did satisfy Tunney Act proceeding. But this
9 wasn't an ordinary a Tunney Act proceeding.

10 This wasn't a proceeding before liability. This
11 was a proceeding after liability had been decided,
12 appealed, affirmed, certiorari had been denied, and the
13 case came back again with a remand on remedy.

14 By the way, I didn't have much to do with the
15 remedies which is why I'm criticizing them. I was
16 retained briefly by the Antitrust Division after the
17 remand on remedy, but there was no serious work involved
18 in that.

19 The remedy that eventually emerged might have
20 been appropriate for a pretrial consent decree, but it
21 wasn't appropriate after liability was finally decided.
22 It gave up the fruits of victory.

23 It is entirely possible -- one doesn't know --
24 that if you think about it, Microsoft may have succeeded
25 in destroying the threats to the applications barrier to

1 entry at the golden moment in which they were there.
2 And trying to put the toothpaste back in the tube
3 afterwards doesn't work.

4 Another remedy that was a conduct remedy
5 suggested was allowing other operating systems to use
6 the application programming interface of Windows; that
7 is, give the other makers of other operating systems
8 enough information so that programs written for Windows
9 would run on their operating system. They could design
10 their operating systems that way.

11 Well, that would certainly have been effective
12 if it had succeeded. It would, however, have
13 required -- it might have gone too far, in fact.

14 It would have required prolonged and complicated
15 judicial oversight. Anybody who has ever been involved
16 in writing a complicated software program -- and believe
17 me, I know at the moment from bitter experience and the
18 programs I'm involved with are nothing like as
19 complicated as operating systems -- knows that even with
20 the best will in the world, if you try to make the
21 program available to other programmers or teach them how
22 to do things with it, it is very hard.

23 And there wouldn't have been the best will in
24 the world, and there would have been for a very long
25 time continued wrangling over whose fault it was that

1 this wasn't succeeding. And that would have required
2 continued judicial oversight.

3 Now I come to structural remedies. The first is
4 the one one might most naturally think of. It was
5 called the Baby Bills for reasons that should be
6 apparent.

7 It was one in which there would have been three
8 successor companies made out of Microsoft. Each one of
9 them would have had the right to Windows.

10 There were a number of objections to this, some
11 of them valid, some of them not quite so impressive.

12 The first one was; Would successor companies
13 have kept their versions of Windows compatible with the
14 installed base of programs? There was a lot of talk
15 about that.

16 I think the answer was of course they would,
17 because they would have had a big incentive to attract
18 the people with the installed base of program.

19 The second one sounds funny but isn't, the
20 question of who would get Bill Gates, who may not have
21 been an asset in the trial, believe me, but he was
22 certainly an asset to the company and would still be.
23 And you can't divide him up, so to speak.

24 The one that wasn't typically mentioned but I
25 think ought to be bothersome is the following.

1 Eventually the phenomenon that I talked about in
2 the underlying economics would take over again, and one
3 or the other of these companies would get ahead, the
4 snowball effect would take over, the application remedy
5 would occur and the thing would be restored.

6 Of course, each of these companies would be
7 owned by the original Microsoft shareholders, so that in
8 some sense anyway the monopoly profits it would have
9 earned later would accrue back to the owners of the
10 violator.

11 The remedy proposed by the Antitrust Division
12 was to break up Microsoft into two successor companies,
13 one with the operating systems and the other with the
14 applications, particularly Microsoft Office, in the
15 belief or the hope that the applications company would
16 have a big incentive to encourage competition and
17 operating systems.

18 Maybe that would have worked. It is somewhat
19 roundabout, and it is not obvious that if it worked, it
20 would have been self-enforcing.

21 Not obvious that it would have worked, and I
22 don't find it particularly attractive. It never got, so
23 to speak, much past the starting block.

24 The remedy that I think is attractive, although
25 also has problems, is the one proposed by Herbert

1 Hovenkamp, but so far as I know, not apparently
2 seriously discussed in the higher reaches of the Justice
3 Department.

4 This was the following. Pick a number, N. You
5 have to study what the number N should be. Then require
6 Microsoft to auction off N licenses to Windows together
7 with the requisite know-how. Do nothing further.

8 This is simple. And it improves competition.
9 No breakup is required. If the ultimate monopoly gains
10 do not necessarily occur, the ultimate gains don't
11 necessarily principally accrue to the original Microsoft
12 shareholders, which is attractive, as opposed to the
13 Baby Bill remedy.

14 This seems to me to be a model of remedy design,
15 despite its possible flaws. And I wish it had been more
16 seriously discussed.

17 But Microsoft, like other cases, is a case in
18 which it was not obvious that there is any really,
19 really good remedy.

20 I happen to hate the one that eventually arose
21 in the settlement, but other people made that.

22 Thank you.

23 (Applause.)

24 MR. ELIASBERG: Thank you, Frank.

25 Dietrich Kleemann is head of the task force on

1 ex post assessment of merger decisions, Directorate
2 General for Competition, European Commission.

3 Dietrich, welcome.

4 Can we just check with the panelists,
5 double-check to be sure the Blackberries are off. Thank
6 you.

7 MR. KLEEMANN: Frankly spoken, at first I think
8 I'm not the best place to speak to you here today in
9 this hearing because of our more than 16 years since the
10 beginning of your merger work, I was a member of the
11 merger task force and today a proud member and followed
12 the European Commission.

13 However, I think that there are quite
14 significant similarities between remedies under merger
15 regulation and remedies that would be called abuse cases
16 under Article 82 of what you would call attempt to
17 monopolize.

18 But let me just take a short look at our
19 experience in the remedies.

20 Since we started, we have had more than 3000
21 final decisions in European merger control, but out of
22 them, only 19 prohibitions and maybe 28 restores in the
23 second phase.

24 That is what you would call a second request,
25 more or less, which is normally like a prohibition

1 decision.

2 On the other hand, we had 140 clearance
3 decisions with remedies in the first place and 79
4 decisions with remedies in phase two. And frequently
5 these decisions were not only related to the remedy but
6 to the whole package.

7 So I think one can say that around 8 percent of
8 all our cases we intervened by way of remedies, and the
9 question is now can the antitrust practice use a benefit
10 from this rich experience in merger control.

11 I said there are similarities. However, there
12 are also differences between the remedies in merger
13 control and antitrust.

14 First of all, from a more formal point of view,
15 our remedies are based on commitments proposed by the
16 parties.

17 The remedies in abuse cases are imposed by the
18 authority on the parties. However, I would say this is
19 a more formal difference because of costs.

20 In a merger case the Commission would always
21 negotiate remedies with the merging parties and give
22 guidance and indicate what would be necessary to clear a
23 case at the end for the parties to have any incentive to
24 follow this guidance in order to avoid the prohibition
25 decision.

1 I think more important is the difference between
2 behavioral and structural remedies.

3 As my colleague, Per Hellstrom, certainly
4 outlined this morning, for cases under violation 1 of
5 2003, behavioral remedies are the rule and structural
6 remedies are only the exception.

7 I think we will come back to this point later in
8 the discussion certainly.

9 By contrast, in merger control, because it deals
10 with structural competition problems, not just behavior
11 of a party, the most adequate remedies are normally
12 structural ones. That meets the classical divestiture.

13 Although I must admit the borderline between
14 structural remedies and behavioral remedies is not
15 always clear. It is only clear if I limit the
16 structural remedy. There are many other instances where
17 you could say it has behavioral elements but also
18 structural elements.

19 However, having said this, in appropriate cases,
20 we accept also typical behavioral remedies. This is the
21 case that divestiture, for instance, is not feasible or
22 would not be meaningful. However, to prohibit blankly
23 the case would not be proportionate.

24 And there we have two groups in particular. To
25 one are those I would call the access remedies. I will

1 go through this later on. The other group which also
2 plays a significant role are changes to long-term
3 exclusive contracts.

4 However, as I said, we have structural remedies.
5 Here you see an overview from our so-called remedy
6 studies carried out on 96 cases between '96 and 2000.

7 And you see around 60 percent of remedies were
8 divestitures. The others were sometimes cutting links
9 between competitors by exiting a joint venture was even
10 17 percent.

11 Long-term exclusive licenses which are sometimes
12 replacing classical divestitures because they were
13 partially related to what they call -- they have limited
14 competition.

15 You can't divest forever a brand because there
16 would then -- there would be more companies in different
17 countries.

18 So we intend to exercise and that, I must say,
19 wasn't always very successful. Not surprisingly, the
20 most successful remedy was to find in the right place
21 the transfer of a stand-alone business, where you didn't
22 have to make a package, a remedy to cut off all
23 services. It was a clear-cut business which was sold.

24 I emphasize the importance of access remedies in
25 merger.

1 They are maybe related to the access to
2 infrastructure, for instance, to a network, platforms,
3 the telecommunications sector and so on, to technology,
4 which implies the licensing of intellectual property
5 sometimes and access to what I would call essential
6 inputs.

7 This talks about, for instance, in the media
8 sector, the content, TV content and so on or, for
9 instance, in the electricity sector, we had the case
10 where we organized auctions to open up the market to
11 give excess electricity in a situation where we had a
12 merger structure.

13 The main purpose was always either to avoid
14 foreclosure effect, maybe resulting from vertical links,
15 where we had to get control of our essential upstream
16 facilities, such as a decoder base, for instance, and so
17 on.

18 And the second purpose which went way off with
19 the first one together was to lower barriers to entry so
20 as to outbalance the loss of competition but open up the
21 market to new competitors.

22 A crucial issue, however, with these kind of
23 remedies, much more than was with structural remedies,
24 is the way how you implement it.

25 First of all, sometimes nearly part of the

1 problem is how to determine from the outset the terms of
2 access, price to be paid, for instance, the general
3 conditions.

4 It has taken one to lead a very strong and
5 mandatory, which is very often not feasible for the
6 Commission itself. You wouldn't set up otherwise a task
7 force for 10 years for an individual case.

8 So we need there to rely on trustees, sometimes
9 in a very official way on regulators, which help us to
10 monitor these remedies.

11 And the last one is the best one, a kind of
12 safeguard by the market when you impose a rapid
13 evaluation procedure, a fast resolution period.

14 And just not to run out of time, I will give you
15 at the end maybe a practical example which was the case,
16 Newscorp Telepiu, a case of pay TV in Italy where one of
17 two TV players controlled by Newscorp acquired Telepiu,
18 the by far leading pay TV player in Italy.

19 The case led virtually to a monopoly. On the
20 other hand, we were confronted with a scenario where
21 although this was not a failing company case, there was
22 quite a high likelihood that the second player would
23 accept the market over time, and that would mean we
24 would have had a monopoly in any event.

25 So on balance, it was better for the consumer

1 and better for the market to have some kind of a
2 regulator place a number of far reaching commitments
3 which were all designed to facilitate new entry into
4 this pay TV market so to have at least a chance that in
5 the future in the evolving market there won't be this
6 problem.

7 We see typically a set of remedies which are
8 here combined but are used separately. The first was
9 limiting exclusivity for TV rights so to make them
10 available for newcomers.

11 There we had a commitment getting the output
12 rights for early termination for existing, limiting on,
13 the other hand, distribution of future output use or
14 football rights to two, prospectively three years, and
15 limiting the exclusivity to the DTHI, their viewers, so
16 as to enable user companies pay for the other TV spot.

17 It was such as the upcoming ADSL such that the
18 DVD or such as the cable network, which are not very
19 much involved in Italy, get a chance to get premier
20 content on their transmission means.

21 The second one will also enable them further to
22 have immediately the necessary anchor channels you need
23 for a successful pay TV.

24 So Telepiu had to grant access to third parties
25 to its premier content, the premium sport channels and

1 the premium Hollywood TV channels.

2 Of course, this raised the question how to
3 calculate the price. We did that at a fixed rate and
4 so-called retail market basis.

5 That means looking at the retail price of
6 Telepiu and deducting the costs of that on the basis of
7 a wholesaler. It means the costs added on some other
8 factors like benchmarking were similar to situations in
9 other countries.

10 As a counterpart, they had to grant access to
11 third parties to their technical platform, the
12 condition, the related services, which would enable a
13 new entrant to access the old channels now on DTH,
14 because without access to the similar decoder base of
15 Telepiu, this would not have been possible.

16 There was a classic element that said if you had
17 to divest this DTT business, the two channels, in this
18 evolving market, in particular in Italy, all this was
19 subject to a detailed dispute resolution arrangement,
20 and here in particular the most sensitive parts were
21 taken over by the Italian media and telecom regulator,
22 the so-called Ajicom, which was committed to apply his
23 own word in dispute settlements to this specific case,
24 and in fact did it very successfully.

25 I think two years ago in the decision they

1 reduced the price for the wholesale offer for premium
2 content by around 40 percent.

3 Having said this, this is a typical example, but
4 also you have a very limited number of cases where you
5 have this complex set of remedies which we thought were
6 the appropriate solution in this specific situation.

7 You may notice that many of the features in this
8 case or general features of merger committees could also
9 play a major role in antitrust abuse cases.

10 But on balance, I would say antitrust can
11 benefit from our experience in merger control, certainly
12 as the implementation is concerned, all the technical
13 stuff with trustees and so on.

14 But I think also in certain instances in terms
15 of the substantive solution.

16 Thanks.

17 (Applause.)

18 MR. ELIASBERG: Thank you, Dietrich.

19 Our last speaker before the break is Andrew
20 Joskow.

21 Andrew is senior vice president and director of
22 NERA's Washington, D.C. office.

23 Dr. Joskow is a former deputy assistant attorney
24 general for economics at the Antitrust Division and also
25 a senior staff economist on the President's Council of

1 Economic Advisors and a member of the joint FTC/DOJ task
2 force on efficiencies that drafted the efficiency
3 sections of the 1992 horizontal guidelines.

4 Andy, welcome.

5 DR. JOSKOW: Thanks for inviting me.

6 It is very nice to see some old Department of
7 Justice colleagues here. Thanks for coming.

8 When I was listening to Professor Fisher talk
9 about the IBM case, it became clear to me that these
10 cases just infect people's beings over time.

11 The expert that Professor Fisher was talking
12 about was a professor at the school where I went to
13 undergraduate college. And as an alumnus -- I will keep
14 you guessing -- as an alumnus, I met him a number of
15 years later, and it was clear to me that he never
16 recovered.

17 So in that vein, what I want to talk about today
18 is this issue of structure versus conduct.

19 What I want to do is take it from the point of
20 view of merger remedies, which is a somewhat settled
21 area, and try to talk a little bit about the principles
22 that make us say structure, yes in mergers. Behavioral,
23 no. But in Section 2, maybe less yes, structural, maybe
24 more yes, conduct.

25 And as I said, it is quite well developed and

1 the Antitrust Division has a merger policy guide, and it
2 kind of lays out things quite simply.

3 But when we start talking about Section 2, we
4 just see a whole host of issues where there are lots of
5 possibilities, but each possibility seems to create
6 problems.

7 We talk about divestiture or breakup, all kinds
8 of organizational design problems. If you make a
9 mistake, you can't go back.

10 Exclusive dealing contracts, you can prohibit
11 them, but there are lots of ways or often ways to
12 recreate those contracts in other ways.

13 You can prohibit the tie in a tying case, but
14 you risk the loss of certain integration efficiencies in
15 certain cases.

16 Predatory pricing, I don't know what to do in
17 that case. I will talk about that a little bit later.

18 You have all kinds of various cease and desist
19 orders, some of which could be beneficial, but at the
20 same time you risk them being anticompetitive or outside
21 the violation being discussed.

22 So mergers, there is a single goal. The remedy
23 isn't trying to make competition better than it was
24 before the merger, just trying to restore competition.

25 The structure seems to strongly prefer a way to

1 do that, a structural remedy, usually through divesting
2 assets or an existing business, and all that with the
3 hope of preserving any efficiencies inherently in the
4 merger.

5 Quoting from the guideline, "restoring
6 competition is the only appropriate goal with respect to
7 crafting a merger."

8 It is interesting that these guidelines are
9 written almost in the negative in the sense they talk
10 about why conduct remedies would be bad, less why
11 structure would be good.

12 Why are conduct remedies bad in a merger case?
13 Well, there is the direct cost of just monitoring a
14 conduct remedy through the life of a consent decree.
15 That should be "cost," not "coast."

16 Indirect costs of evading the spirit of a
17 decree. For example, you could say you have to have a
18 price cap, but there are lots of ways of undermining a
19 particular price cap, and, of course, that doesn't
20 necessarily get to all -- prices don't necessarily get
21 to all the aspects you want to preserve in a competitive
22 market.

23 If you constrain pro-competitive behavior, for
24 example, prohibiting price discrimination could
25 eliminate the possibility for efficient pricing in some

1 cases and just generally constrain the ability of the
2 merger, of a firm to flex its muscles in the market.

3 It seems clear that structure is the way to go.
4 And mergers are about changing structure, and what you
5 want to get out of competition is lower prices, improved
6 quality, more innovation.

7 And the way to get that is to maintain rivalry
8 within the market, and that means separating assets.

9 If you went the other way, as I said, price
10 protection as an example, that really undermines the
11 multiple -- it doesn't preserve the multiple dimensions
12 of competition that we were talking about.

13 This is the benefit of the Hart-Scott-Rodino
14 Act. It allows assets to be divested before they are
15 scrambled so you don't have to deal with this problem of
16 where do we put Bill Gates and these assets. Everything
17 is already separate.

18 Now, there is a preference in these situations
19 to divest an existing business entity.

20 That is something that Dietrich mentioned in one
21 of his examples. And that begins to get to the issue
22 of, well, what is it we are trying to do, once you have
23 found a violation in a merger, what is the but-for world
24 that you are looking for?

25 Are you trying to get the Herfindahl back to

1 1800 if you went from 1800 to now? Well, not
2 necessarily because once you get to the remedy phase,
3 you are really looking to make sure you created an
4 entity that will allow competition to be restored.

5 That may mean taking more than just bringing the
6 merger back to 1800. We need to have sufficient assets
7 in order to make sure the firm has the incentive to
8 compete.

9 In a sense, there has been a market test in a
10 merger case because the business is already designed.
11 You have a sense of what assets are necessary in order
12 to compete in the premerger world.

13 Even so, after all that, being kind of the
14 general way to go, the FTC studied these things back in
15 1999, and they found kind of a mixed bag in the success
16 of structural remedy.

17 So even in a merger case, you really need to be
18 careful. One of the things that actually came out of
19 that study was the increased preference for an ongoing
20 business that already existed as a form of public
21 remedy.

22 So what about in the Section 2 case? The
23 conduct arises from the existence of monopoly power. So
24 the thought would be, well, you want to change the
25 firm's structure so that it doesn't have the ability or

1 incentive to restrain competition in the future.

2 But what does that mean? You want the remedy to
3 be tied to the violation, as Professor Fisher said.

4 But how far do you want to go? This is
5 something maybe we can talk about in discussion.

6 What is the but-for market structure? If
7 Microsoft had an 80 percent market share and whatever it
8 did violating Section 2 brought it to a 90 percent
9 market share, does that mean we just want to bring it
10 back to 80 percent or do we say that's not enough, it
11 will just happen again and you want the Baby Bills?

12 Exactly where do we want to go?

13 I think the difficulty in going very far is
14 because the structural remedy is very difficult because
15 firms just aren't divided up this way.

16 In the case of a horizontal divestiture, it is
17 not necessarily neatly divided in that way.

18 What are the necessary assets, what are the
19 necessary intellectual property, what are the necessary
20 employees to create a going concern and have these
21 separated entities?

22 It seems that the risk of failure in a situation
23 is quite great, that you just don't create the right
24 firm. The market essentially unravels and goes back to
25 the way it was.

1 And I think this is why we really don't see this
2 very much, this type of remedy, the horizontal
3 divestiture.

4 We have to go back to 1911 for the Standard Oil
5 case and the American Tobacco case to see that. It was
6 rejected later in the United Shoe case. And I think the
7 horizontal, "let's turn Microsoft into three," was
8 fairly quickly rejected early on.

9 What about vertical divestitures? Does that
10 work?

11 There you would think that the lines within a
12 firm may be clearer. You have the input part of the
13 firm, the output part of the firm. You can see how
14 changing the vertical relationship between two companies
15 might change the incentives for foreclosure.

16 So this is what happened in AT&T. We had a form
17 of a vertical divestiture. But even there, when we had
18 structural relief, we had it seemed like limitless
19 ongoing needs to monitor the lines of business the Bell
20 operating companies were in.

21 There were connecting issues simply because
22 there had to be an ongoing relationship between the two
23 companies, not just two companies, but the long distance
24 companies and the operating companies.

25 In Microsoft, again, maybe it would have been

1 easier to split along operating system lines and
2 application system lines.

3 But I sort of agree that even if there weren't
4 huge loss of efficiencies, it is not clear to me that
5 this indirect type of divestiture would have led to the
6 ultimate entry of a competing operating system company.
7 It seemed highly theoretical.

8 Again, it could have -- because of the network
9 effects, it could have easily unraveled and gotten the
10 market right back to where it was.

11 There is just no practical experience really in
12 having a world of competing operating systems. It seems
13 like quite a leap to think "well, we can just do it."

14 So in thinking about structure, it seems that in
15 mergers, the benefits are pretty high to having some
16 type of structural or divestiture remedy, whereas, the
17 costs are pretty low. They often can be accomplished
18 without forgoing efficiencies.

19 When you have to forgo a lot of efficiencies,
20 the case for divestiture might be weaker, but in general
21 I think it is pretty strong.

22 In Section 2 cases, on the other hand, it seems
23 like the costs are pretty high. You don't really have
24 much experience in competition in the particular market,
25 and it is not clear that the competitive process would

1 necessarily be enhanced if the market just reverted back
2 to monopoly.

3 It would be difficult to determine how far to go
4 with structure if your goal is really just to try to
5 apportion how much of the monopoly was gained as a
6 result of the anticompetitive conduct.

7 The efficiency losses could be pretty
8 substantial.

9 Still, most likely you will require ongoing
10 monitoring anyway, particularly in the vertical case and
11 possibly even in the horizontal case.

12 So what about behavioral remedies in Section 2?
13 Well, like any behavioral remedy, there is ongoing
14 monitoring.

15 Evasion clearly can be a problem. But it seems
16 to me that in certain cases, exclusive dealing, tying,
17 bundled discounts, they can be prohibited fairly broadly
18 within consent decrees.

19 And they do get at this issue of, well, what is
20 the incremental effect of the anticompetitive conduct.
21 Because it focuses on the effect on facilitating entry,
22 and even if there is some loss of efficiency to the
23 dominant firm, it seems like that loss in many cases is
24 worthwhile in order to in a sense help rivals and
25 improve and facilitate entry.

1 Dentsply is a particular example of a pretty
2 simple remedy, not attempting to break up Dentsply.

3 That leaves us with attempted monopolization,
4 which seems to me to fall outside of both of these
5 cases, structural versus conduct.

6 Is there an irremediable violation? That
7 question has been asked. This one has bothered me for a
8 long time.

9 It seems that whenever anyone thinks of
10 prohibiting lower end prices, that seems
11 anticompetitive, expanding output, that seems
12 anticompetitive, limiting the magnitude of price cuts,
13 that seems also anticompetitive.

14 Breaking up the airline doesn't seem to be the
15 way to go if you think about the American Airlines case
16 because there are strong network effects. There aren't
17 many hub airports with two hub carriers.

18 So, again, that seems really not the way to go.
19 Maybe fines are a remedy, although in the American
20 Airlines case, you really didn't have recoupment.

21 I'm not sure if this would be a disgorgement or
22 some kind of fine for deterrence.

23 Is guess that leaves open the question if you
24 don't have a remedy, is there a case.

25 The agencies have the obligation to enforce the

1 antitrust laws, but they certainly have an interest in
2 deterring what they think to be anticompetitive
3 predatory pricing.

4 But it seems to me that this may be a situation
5 where there is no clear structural or conduct remedy
6 that one could put forward in any kind of very
7 broad-based fix, such as thou shalt not violate Section
8 2, or something like that.

9 It just seems like it doesn't really get at the
10 specific conduct and it is just adding a criminal
11 contempt portion to one's obligations under the Sherman
12 Act.

13 So just in summary, it seems that in mergers,
14 the structural remedies and the basis for those remedies
15 seem pretty clear.

16 In Section 2 cases, I think the case is weaker.
17 That's not to say never, but I think that the historical
18 experience has been limited, which would probably limit
19 one's desire to go in that direction.

20 So I think in the case of Section 2, I think it
21 is more likely desirable to focus on some form of
22 conduct remedy.

23 Thank you.

24 (Applause.)

25 MR. ELIASBERG: Thank you, Andy.

1 Why don't we take a 10-minute break and come
2 back for the last two speakers.

3 Thank you.

4 (Recess.)

5 MR. ELIASBERG: Welcome back.

6 Our first speaker will be John Thorne, who is
7 senior vice president and deputy general counsel at
8 Verizon, where he works on antitrust trade regulation,
9 merger review and strategic initiatives. He is coauthor
10 of several academic treatises, including "Federal
11 Communication Law and Federal Broadband Law."

12 John, welcome.

13 MR. THORNE: Thank you very much. I don't have
14 any slides. So you can relax your eyes a little bit.

15 The first thing I want to say is I did read in
16 preparation for this session Richard Epstein's new book
17 on consent decrees, and I cannot praise it enough. It
18 is a wonderful concise summary of an awful lot of
19 history, and I found it very useful in preparation here.

20 I recommend it to the Commission. I wanted to
21 offer my own gift to the people studying this topic,
22 partly because this is a book that was written in 1992.
23 It has been revised and it is way out of date. You
24 can't find it anyplace.

25 But it has a full history of the AT&T breakup

1 decree and prior decrees in a way that you can't find.

2 When we rewrote the treatise, even though this
3 is longer, there is hardly anything in here about Judge
4 Green anymore.

5 Dan, I want to give you those as a present.

6 MR. ELIASBERG: Thank you, John. We greatly
7 appreciate it. But Richard's book was only 144 pages.

8 MR. THORNE: I'm serious. You may actually find
9 those are useful as references. Put it in the library.

10 MR. ELIASBERG: Thank you very much.

11 MR. THORNE: My experience and the reason I'm
12 the token business person on this panel is I worked on
13 the AT&T breakup remedy from 1983 to 1996.

14 I also worked on several antitrust consent
15 decrees along the way, for example, most recently the
16 Verizon-MCI merger decree, which is still pending before
17 Judge Emmett Sullivan in the D.C. Court.

18 I wrote some books about the experience. There
19 is an awful lot to say about the AT&T breakup decree,
20 and I'm attempting to tell you interesting stories about
21 it.

22 The first story I will tell is it was actually
23 the third of three government cases that resulted in
24 consent decrees against the AT&T company.

25 In fact, the second one, the one that resulted

1 in a consent decree the year I was born, 1956, it is
2 interesting. If we have time, maybe if we have
3 questions, I want to come back to it.

4 I know a current question relating to my friend
5 Qualcomm or Microsoft or others is should we take all of
6 their intellectual property and let other people have it
7 at either free or at discounted nondiscriminatory terms.

8 That question was answered and implemented in a
9 consent decree in 1956 against the Bell system.

10 There is some interesting history there. The
11 one decree I was going to focus on for a couple minutes
12 is this 1982 AT&T breakup decree implemented in 1984.

13 It was agreed to by the parties and approved in
14 1982. A lot of litigation preceded that. I could talk
15 about that. I won't.

16 Starting in 1982, that was not -- when you think
17 of settlement, consent decree, that's the end of the
18 case, done. The lawyers go home, the parties now start
19 complying.

20 That was actually the beginning of more
21 litigation than had preceded the decree. There were
22 7,782 briefs filed with Judge Green, plus an additional
23 large number.

24 I didn't actually count them. I can get the
25 numbers if you guys want the number, a large number of

1 briefs, hundreds if not thousands of briefs filed with
2 the Department of Justice, which had its own shadow
3 docket.

4 In fact, every week, if you went to the DOJ
5 offices, they had an updated table of what was pending
6 at DOJ, the motions docket on the purple table.

7 Judge Green issued countless orders. There was
8 a criminal trial and a conviction of NYNEX for
9 criminally violating the decree's provisions. It was
10 overturned in the D.C. Circuit.

11 Besides that appeal, there were 15 other
12 consolidated groups of appeals in the D.C. Circuit.
13 There were about a half a dozen certiorari issues.

14 The '82 decree itself was summarily affirmed in
15 the Supreme Court, over a dissent by three justices. It
16 was written by then Justice Rehnquist, who wasn't the
17 chief at that point.

18 He was concerned that Judge Green was embarking
19 on a nonjudicial function. He did not want to
20 inadvertently create a judicial branch, the common
21 carrier bureau of the FCC, and he was worried that might
22 ensue. He recognized that was a bad thing.

23 If you go over to the D.C. court's new annex
24 where they built that sort of circular structure right
25 next to the old Barrett Prettyman Courthouse building,

1 you will see a series of exhibits.

2 I contributed one of the exhibits. It is about
3 Judge Green and the legacy he left, because in fact he
4 did create something like the FCC's common carrier
5 bureau.

6 He and the 1982 decree were put out of business
7 with the 1996 act of Congress called the
8 Telecommunications Act of 1996.

9 Now, there is an interesting debate. I don't --
10 I will just give you my view of it quickly, an
11 interesting debate on whether the AT&T decree did any
12 substantive good at all in terms of competition.

13 People who say it did a lot of good claim that
14 the decree brought down long distance prices by 70
15 percent and gave us colored telephones.

16 Both of those statements are not true. Long
17 distance prices did come down very substantially, but
18 more than 100 percent of the price decrease is
19 attributable to a different phenomenon that was going on
20 over at the FCC, a reduction of access charges. Major
21 costs for long distance prices came down almost as much
22 as the access prices came.

23 The colored telephones, the plethora of new
24 devices, that is something the FCC accomplished before.
25 They came up with a plug and play rule. You have a plug

1 in the side of your wall, and you start mixing and
2 matching telephones.

3 That was not a benefit of the decree. There was
4 a different effect from the breakup, and that is that
5 the breakup disbursed the power of a single firm.

6 A very powerful single firm was broken up into
7 eight or 10 or 11 entities. It was AT&T, which was the
8 long distance manufacturing arm initially, seven
9 regional local telephone companies.

10 They had a jointly owned separate services
11 company, Bellcorp, and there was Cincinnati Bell and
12 Southern New England Telephone, which had been partially
13 owned by AT&T.

14 The diversity of behaviors of the different
15 firms you would have expected. If you sliced up one
16 thing and sent the pieces off on their own, the
17 diversity was largely stifled by line of business
18 restrictions that attached to seven of the firms.

19 Judge Green had said in approving the decree
20 that we the public would not tolerate a king over the
21 means of our political processes or economic processes,
22 in his view much better to have local warlords.

23 That's what we got. Some of the efficiencies of
24 a larger firm were sacrificed. Many of those
25 efficiencies have been recreated since, reacheived since

1 the divestiture happened.

2 But the topic here is not what is the applicable
3 structure of telecommunications markets. The question
4 is what did we learn about remedies, both structural and
5 conduct remedies.

6 The AT&T decree involved both kinds of remedies.

7 Both the structural and the conduct aspects of
8 the AT&T decree derived from a belief held by Bill
9 Baxter -- maybe there's some in the room who worked with
10 him -- the belief that vertical integration by a
11 regulated monopoly firm is a bad thing.

12 So the solution was in part structural, take
13 apart the vertically integrated pieces, separate things
14 that are competitive from the regulated monopoly
15 businesses.

16 And there was a regulatory component. Let's
17 forbid the reintegration of the new vertical, things
18 that will sprout, let's quarantine the regulated
19 monopoly.

20 The structural remedy was very painful, it was
21 expensive. It changed an awful lot of things.

22 It made an opportunity for me personally. So
23 I'm grateful for that. And it is a credit to Judge
24 Green that he was able to pull it off. He was an expert
25 administrator and he got it done.

1 The conduct regulation is what created the 8,000
2 briefs filed afterward.

3 The basic idea was almost everything was
4 prohibited and it required Judge Green repeatedly and
5 the Justice Department even more so to keep answering
6 these two kinds of questions, what is allowed, what is
7 okay and, on the other hand, can we have an exception,
8 please.

9 So, for example, I can't do this justice -- the
10 books do it justice -- but March 22, 1985, Judge Green
11 issued this order from his court, "Pacific Bell" -- that
12 was one of the telecoms in California, now it is AT&T --
13 "is permitted to provide telephone service to Mrs. Mary
14 Campbell who lives in the Plymouth exchange in the
15 Stockton, California LATA via the Placerville central
16 office in the Sacramento, California LATA."

17 September 10, 1991, June Green ordered,
18 "Wisconsin Bell may provide interLATA cross-boundary
19 foreign exchange service to Ms. Vicky Mallard and
20 Mr. Ricky Schultz."

21 There is a category of behaviors or services
22 called information services. Green ruled it was okay to
23 provide time and weather announcements as a public
24 service and separately a kind of wireless service that
25 had been prevalent, paging services -- nobody in this

1 room uses paging services anymore, but people used to
2 carry pagers to be summoned.

3 Green said it was okay for the local telephone
4 companies to provide paging services, provide time,
5 provide paging, but not okay to provide the time over a
6 paging signal to your wristwatch. He ruled that was not
7 okay.

8 The telephone companies were forbidden from
9 manufacturing customer telephone equipment or network
10 telephone equipment.

11 And the question came up what if it breaks, can
12 you fix it, is repair a permitted or prohibited
13 manufacturing function.

14 Judge Green answered the detailed question "what
15 does it mean to manufacture." And Bell Atlantic -- I
16 was there at the time -- filed a brief which we called a
17 certificate of compliance, which was our way of trying
18 to get an answer to a further question.

19 We were going to tell them how we are going to
20 comply with his definition of manufacture. We said we
21 understood we could continue providing advice, not
22 repair, but advice to manufacturers to help fix product
23 defects.

24 Judge Green issued an order saying I refuse, the
25 court refused to clarify the point.

1 Instead, he declared some of what we were
2 proposing may be forbidden and it would be subject to
3 enforcement proceedings.

4 That's 1988. Judge Green directed us to seek
5 guidance from the Department of Justice. The Justice
6 Department refused to provide guidance because it has
7 neither the obligation nor the resources to do so.

8 But later the Justice Department told a
9 different Bell company it could engage in some repair
10 functions.

11 We took that as a good sign. DOJ asked Judge
12 Green to confirm the DOJ interpretation because, quote,
13 "the decree's manufacturing prohibition is ambiguous
14 with respect to repairs."

15 Judge Green refused to consider the DOJ request.

16 Three years later, it was my son's birthday, I
17 remember this. It was July 10. All of the telephone
18 networks in suburban Maryland and Northern Virginia and
19 Washington, D.C. went out.

20 There was a problem with signaling machinery
21 that was generating a bunch of garbage messages. All
22 the networks went down.

23 Bell Atlantic thought they had people who knew
24 how to fix this. They flew to Texas to Alcatel here are
25 our ideas for how to solve the problem.

1 I called up whoever was on duty at DOJ that day.
2 I think it was Connie Robinson. She may have been on
3 holiday or something. Don Russell had to take the call.

4 I said, "Don, we want to send people to try to
5 fix the phone." I don't remember if I called or not;
6 the phones weren't working.

7 I got a message through to DOJ, "we will try to
8 help repair this, is that okay with you?" They said
9 "well, we don't know."

10 They had an emergency motion in front of Judge
11 Green, asked can we go help try to fix the telephone
12 networks that had been out for several days.

13 Green agreed and immediately authorized it and
14 wrote "repair and fixing and troubleshooting and so on
15 are things that are normally done, that are
16 appropriately done. I don't think can by any stretch of
17 the imagination can they be regarded as either the
18 manufacture or design of the equipment."

19 Wireless service is now a big business. There
20 are now more wireless phones. Everybody has one, just
21 in case you get summoned for something.

22 1983, that was not the case. 1983 AT&T is in
23 the middle of the divestiture negotiations. We signed
24 the decree in '82 implementing it and drawing these
25 boundaries around what are the permitted calling areas.

1 They were drawn with respect to the land
2 facilities, the 99.9 percent of what the local Bell
3 companies had.

4 AT&T went to DOJ and said, wait a minute, these
5 wireless phones won't fit neatly in the land boundaries,
6 moving customers don't respect the geography the same
7 way, the networks will have different scales.

8 And DOJ said, wait a minute, of course wireless
9 is confined to the LATA boundaries, just like the land
10 services are.

11 This was probably, in contract terms, a mistake
12 of law, a mistake of fact. There had been no meeting of
13 the minds on how to treat wireless.

14 We went to Judge Green, and Green ruled wireless
15 would be confined. So for 13 years, every time we
16 wanted to expand a wireless service area, we had to go
17 back to Judge Green to get it preapproved.

18 The long distance prohibition, very easy in
19 concept, a difference between local and long distance
20 calls.

21 Left to answer were things like can you switch a
22 long distance call. It is not carrying a long distance
23 call but can the local switches switch a call, can they
24 provide directory assistance or operator service, is it
25 okay to put out a local pay phone that is capable of use

1 for long distance calls.

2 These were all big issues and briefed
3 extensively.

4 Small number of lessons from this experience.
5 One -- and you will hear this more from Richard, I
6 expect, or certainly read it in his book -- is a lesson
7 that humility is much to be preferred than exuberance,
8 enthusiasm of ambitious remediers.

9 Richard's subtitle, "less is more," that is
10 absolutely right.

11 When markets and technologies are changing,
12 nobody, not even the very good staff of the Justice
13 Department, is accurately able to predict how that will
14 end up.

15 We have examples of what seemed like very
16 reasonable predictions on which much was staked that all
17 came to nothing.

18 I suggest as a very positive concrete idea the
19 Antitrust Division manual on remedies, which goes
20 through lots of boilerplate. It ought to be added
21 something about considering the limits of your knowledge
22 for predicting the future.

23 There is an obvious connection between the
24 quality and the sureness, the certainty of your
25 substance and how good the remedy is going to be.

1 Section 2 is a harder thing to figure out,
2 whether you actually have a violation. It translates
3 immediately into the difficulty of coming up with a good
4 remedy.

5 Bill Baxter, God bless him, wanted to forbid all
6 vertical integration by a regulated monopoly. It was
7 premised in a kind of regulation that was going out of
8 style then.

9 That remedy ignored the other technologies that
10 were looming, wireless and Internet. It resulted in a
11 freeze of things as they existed in 1982, so simple
12 things like telephone service or complex things like
13 whether there were vertical deficiencies or vertical
14 problems.

15 In one important respect, the Bell decree was
16 very, very bad. Probably the worst thing about it was
17 it reached out and covered markets that had not been the
18 subject of the litigation.

19 There was a category of activities that had been
20 part of a bill in Congress that hadn't passed called
21 information services.

22 The government, thinking it is a competitive
23 business, just like long distance or equipment
24 manufacturing, said let's prohibit any involvement with
25 overly regulated monopolies in information services.

1 That had effects that ranged from tiny to significant.

2 On the tiny side, useful services like voice
3 mail were delayed by my estimate about four years. It
4 turns out that voice mail, if you don't answer the phone
5 and someone takes a message, that's something a local
6 telephone company can provide for you more efficiently
7 than any external service provider.

8 Four years of delay getting that. More
9 significant effects were wireless business which was not
10 litigated or really meant to be covered by the decree.
11 I think that was crippled compared to Europe.

12 We were delayed compared to Europe in deployment
13 of wireless services as a result of the restrictions on
14 wireless.

15 I personally think, not to go through this in
16 detail, that our development of the Internet was delayed
17 by about a decade by these restrictions.

18 We had the second string building the Internet
19 instead of the people that had more of the core assets
20 needed to do a good job of it.

21 It is important before I sign off here to
22 compliment Judge Green, give him and the staff of DOJ
23 the highest compliments that are possible.

24 Judge Green had -- I have anecdotes about Judge
25 Green being a great administrator before he got the job

1 and when he got the job.

2 But he could not keep up with the pace of
3 regulation that this decree produced. That means it
4 can't be done by anybody. I have statistics on that.
5 But that's gilding the lily.

6 One last point, then. I think there is a strong
7 connection from the certainty of your substance to how
8 the remedy is going to work.

9 But there is an opposite effect as well. There
10 is sort of a feedback from problems of remedy to
11 substance.

12 You see this reflected in the recent Trinko
13 decision, where Justice Scalia writes, "Effective
14 remediation of violations of regulatory sharing
15 requirements ordinarily require continuing supervision
16 of a highly detailed degree. We think Professor Oletto
17 got it right that no court should impose a duty to deal,
18 a substantive requirement that it can't explain or
19 adequately and reasonably supervise."

20 If a problem is irremediable by antitrust law,
21 we shouldn't have that as a problem, or, in my terms,
22 you shouldn't be setting yourself up to find violations
23 you can't fix. It is better to cut the law off.

24 This comes up probably most vividly in the
25 current debates over whether discounted bundles should

1 be Section 2 problems. Microsoft offers you a
2 discounted bundle of multiple products, should that be a
3 violation.

4 And if you can't fix that, then the answer
5 probably is it shouldn't be a violation. I will stop
6 there.

7 (Applause.)

8 MR. ELIASBERG: Thank you, John.

9 Richard Epstein is the James Parker Hall
10 distinguished service professor of law, faculty director
11 of curriculum and director, law and economics program,
12 University of Chicago Law School, where he has taught
13 since 1972.

14 He has also been the Peter and Kirstin Senior
15 Fellow at the Hoover Institution since 2000.

16 He served as editor of the Journal of Law and
17 Economics from 1991 to 2000.

18 Richard has written on a wide range of legal and
19 interdisciplinary subjects, including the recent book on
20 antitrust called "Consent Decrees and Practice" that
21 John just mentioned.

22 Richard, welcome.

23 MR. EPSTEIN: Thank you.

24 You see that John and I have very different
25 styles. And in fact, if I had talked to John before I

1 wrote the stuff on the AT&T decree, it would have been a
2 much longer book because I would have had to go through
3 all of these situations.

4 Let me see if I can talk a little bit about
5 this, and I'm going to I think start with a point that
6 John ended on, which is the relationship between your
7 confidence in the substantive law and your ability to
8 design remedies on the other.

9 Before I actually came back to look at antitrust
10 laws in some detail, I had sort of forgotten there was a
11 Section 2 and always thought the only thing a sensible
12 antitrust law could do was to try to regulate horizontal
13 behavior by controlling such cases as cartels and
14 divisions of markets, and then as the more difficult
15 task to figure out what should happen with respect to
16 mergers.

17 The reason why the first task is relatively easy
18 and the second task is more moderately difficult is in
19 the first case, you are generally but not always
20 confident that the efficiency gains are very small from
21 horizontal collusive arrangements but the restrictive
22 practices are large.

23 Then as you start going over to the merger
24 areas, you are never quite sure what the relative
25 magnitudes are going to be. So you have a lot of

1 problems to worry about.

2 Now, when you come to Section 2, after I figured
3 out what this was all about, you realize that there the
4 worm may have completely turned and that virtually every
5 practice which is going to be attacked under Section 2
6 will be the kind of practice which will have some
7 substantial efficiency gain.

8 So you will have to go into a question of
9 whether or not its restrictive component is going to be
10 large enough so as to justify losing that particular
11 gain in question.

12 If your basic intuition is that the magnitudes
13 are going to be roughly of equal proportion at best and
14 you know that the administrative solutions are going to
15 be far more difficult than in the other areas, there is
16 a part of me -- it is not the part of me which I
17 actually believe in 100 percent -- which says maybe we
18 should call the whole thing off and the way in which we
19 solve the problem of remedies under Section 2 is to get
20 rid of liability under Section 2 of the Sherman Act so
21 you don't have anything to worry about at all.

22 I have become reluctantly persuaded that there
23 are a number of cases in which the strategies of
24 foreclosure by contract and otherwise may have some
25 modicum of success.

1 I guess I backed off that provision and I now
2 believe an ideal operation of either the FTC or the FCC
3 or the DOJ might be able to bring some positive good to
4 this area, even though I think to some extent it is a
5 long shot.

6 In doing this, I should say that I have worked
7 both with Microsoft, although not on the antitrust case
8 here but on other matters, and certainly I worked with
9 John Thorne with respect to the various things having to
10 do with the implementation of the 1996 Act.

11 And indeed, I think I gave him the single worst
12 advice he ever received in the history of mankind when I
13 told him that the statute was actually drafted, this '96
14 Act, in an intelligent fashion.

15 The lesson I learned from that is it wasn't the
16 statute is so difficult. It is one of the things you
17 worry about is the constant drift between a statute
18 which seems to have a game plan that is moderately
19 coherent and administrative implementation and
20 interpretation of it, which can easily run awry.

21 So the whole question of drift within
22 administrative agencies is to me one of the single
23 biggest problems you have with legislative reform.

24 Where you start off, the various questions, and
25 how it is that you manage to keep the relative balance

1 on the remedial side direct to the administrative issue
2 to the judicial enforcement is to me a very major
3 problem.

4 In dealing with this, what I did -- and this was
5 an inspired thing that Microsoft asked me to do -- is
6 write a history of some of the consent decrees that
7 actually emerged from the various sorts of litigation
8 under Section 2.

9 The first case was a Section 1 case which I
10 talked about, which had to do with the meatpackers case.

11 Though it was a Section 1 case, all the mistakes
12 came in Section 2 guise. What I mean by that is you had
13 there a situation in which there was evident collusion
14 among the packers with respect to the distribution of
15 their goods, but the remedies decided to impose on each
16 of the companies restrictions on what they could do
17 unilaterally in those markets in which they had no
18 monopoly to begin with.

19 Essentially what happened when the thing was
20 subject to litigation is Justice Cardozo was a good
21 common lawyer and said "you make a bed of nails by
22 contract with the Justice Department, you expect to be
23 stung and burned every time you try to roll over on this
24 bed of nails, and I'm not going to let you out of it."

25 So you have this weird situation where the

1 government continues, in many cases for 30 or 40 years,
2 to insist upon the enforcement of provisions that are in
3 the contract without making any independent evaluation
4 of why it is that they have the slightest bit of good
5 they can confer on anybody.

6 The first lesson one learns about consent
7 decrees is that shorter is better, 40 years is too long,
8 open-ended is simply inexcusable. Once you get over
9 three or five years out, it is almost sure you are going
10 to be making a mistake.

11 What you want to do is to recognize that
12 Shakespeare was right when he said that brevity is the
13 soul of wit. You don't want these things to run on.

14 The explanation was given the movement of
15 companies and technologies are almost always
16 unanticipated.

17 The packers case and Swift and Company actually
18 had its final litigation in the 1960s and had to do with
19 an acquisition of the Greyhound Bus Company.

20 So you can see that the continuity across these
21 cases was in fact something which simply could not be
22 sustained.

23 As you start to move on -- I will not talk about
24 all the cases. But let me talk about one which I think
25 is perhaps the poster child of inept management with

1 respect to unilateral practices, although, again, it is
2 not quite a unilateral practice case, and that has to do
3 with the United Shoe Machinery case.

4 This is a transaction which began with the
5 merger of United Shoe in 1899. To the extent it is a
6 merger case, of course it is not a pure unilateral
7 practices case.

8 The logic behind this merger was in fact one of
9 immense economic advantage in that shoe making was an
10 extremely complicated process and that you had separate
11 companies, each of whom owned patents which controlled
12 separate stages in the processes.

13 And if you tried to negotiate piecemeal
14 transactions amongst them, what you did is you ran into
15 a classic version of the double, triple, quadruple
16 marginalization problem.

17 When you all the companies, essentially what you
18 did is you created a patent pool which allowed somebody
19 to smoothly price the entire process from soup to nuts.

20 What was interesting is that the antitrust
21 sophistication circa 1910 was probably greater than the
22 antitrust sophistication circa 1960 on this matter, and
23 the Supreme Court let this thing go, understanding
24 exactly what was happening, even though it would not
25 have used language like "double marginalization" or any

1 of the terms we use today.

2 What happened is after the merger took place,
3 the government just would not let go. This was part of
4 Woodrow Wilson's exuberant progressivism.

5 What you then do is you try to attack various
6 kinds of contractual restrictions that are imposed upon
7 the various lessees of United Shoe Machinery's
8 equipment, most of which had some degree of exclusivity
9 associated with them.

10 To take a simple kind of provision, if it turns
11 you want to use one of our particular machines, you have
12 to use all of our particular machines, and you have to
13 use them for certain periods of length.

14 All these clauses, at least if you take the view
15 of the modern law, essentially engage in the sin known
16 as foreclosure, which means by virtue of the fact that
17 you now control something at one stage of the market,
18 you will preclude competition from taking place at
19 something either upstream or downstream from the thing
20 that you control.

21 The lesson I think one has to learn from this is
22 extremely important, and it actually carries over I
23 think very well to the Microsoft cases.

24 What happens is the government managed after
25 some great deliberation to win these cases, and all of

1 these offending clauses in the first round of litigation
2 were removed.

3 So now the question is what's going to happen in
4 the marketplace. And the answer in this particular case
5 was absolutely nothing.

6 It turned out that there may have been a 2
7 percent or a 5 percent difference, but that there were
8 huge efficiency advantages associated with being able to
9 get all of your equipment from a single supplier such
10 that if any part of the stream went down, you would know
11 whom to turn to for repair, and that vertical
12 integration was prized by customers, who did not love
13 the thought of trying to mix and match 27 different
14 pieces from 14 different companies, knowing that the
15 interconnections would never be quite right and having
16 each company say that the other fellow had done it
17 wrong.

18 If it is a 15 percent monopoly premium you are
19 paying for piece of mind, it is money well spent in the
20 eyes of many people.

21 What happens is that the clauses themselves
22 turned out to have very little value with respect to the
23 way in which United Shoe continued to operate its
24 business.

25 There is a very important lesson to be learned

1 from this, which is if you keep the clauses in place and
2 start to fight over them, all of a sudden somebody will
3 actually believe you know something about the way in
4 which your business runs, and by making such a big deal
5 of it as a defendant, all you do is you create the
6 impression that they have greater causal efficacy than
7 in fact they do in the marketplace.

8 So I have a piece of free advice to all clients
9 of mine or nonclients of mine, which is that any time
10 somebody wants to attack one of your contractual
11 provisions on the grounds that it creates market power,
12 exclusion foreclosure, whatever it is, you just
13 surrender, pull the damn thing out and let business go
14 on exactly the same way as it did before.

15 Here I think I disagree a little bit with Frank
16 Fisher with respect to the question about how potent
17 were the various exclusionary provisions Microsoft that
18 had with respect to the kind of things that go on his
19 desktop and so forth.

20 I thought Microsoft made a horrific set of
21 mistakes in terms of the way in which it handled the
22 early stages of the litigation, by hanging on to these
23 clauses as if everything depended upon them.

24 When in fact once they were removed, it turned
25 out that the modifications that were made with respect

1 to Microsoft Explorer probably had much more to do with
2 the decline of Netscape than any kind of contractual
3 provisions that you have.

4 So what you say in effect is this. If you keep
5 the contractual injunction in place in these sorts of
6 situations, everybody is now going to impute high
7 restrictive, low efficiency value with respect to the
8 particular practice in question, and you won't have a
9 laboratory experiment which will allow you to sort these
10 things out.

11 If my intuitions about end-to-end services are
12 correct -- and I think those intuitions are right as
13 much in the United Shoe case as they are in the
14 Microsoft case and vice versa -- what you want to do is
15 pull the plug on the restriction and then simply rely on
16 the efficiency with respect to the products that you
17 want.

18 As it turns out, I think in this world, monopoly
19 is not necessarily an ideal situation, but it is
20 certainly one which is not necessarily less preferable
21 than other situations in which you have coordination
22 problems to replace it.

23 To use the very fancy language some people use
24 today, when you start having to put together equipment
25 from multiple players, it is kind of like a self-imposed

1 anticommons problem. You have this guy here, that guy
2 there, everybody is getting in everybody else's way.

3 And it may well be that empirically the commons
4 problem, taking everything from a single supplier, even
5 if it is able to expand its control by virtue of the
6 network it has, is a better solution for you than
7 anything else.

8 So now, having said all this, how do we start to
9 think about these questions of design?

10 I will not take too much more time because I
11 think the discussion is important. But I want to say a
12 couple things about John Thorne's remarks.

13 It is not that I disagree with him, but
14 strangely enough, I don't think that John actually
15 talked about the single worst features associated with
16 the decree which were the original structural choices
17 that were made with respect to.

18 If you go back, the FCC was not the world's most
19 nimble agency in the '60s and '70. But by the
20 mid-1970s, after the MCI case and so forth, it did begin
21 to tinker with the prospect that the way in which you
22 try to handle the common carrier system as a common
23 carrier issue was to mandate various kinds of
24 interconnections between the central system and anybody
25 else who wanted to get on.

1 What happened is if you had kind of a trunk
2 line, other people could hook on and start to add their
3 service. And the theory would be that the function of
4 the legal system would be to make sure that any rival
5 competitor could reach any customer on the AT&T system,
6 and if you could start on the AT&T system, you could
7 reach anybody from a rival competitor.

8 Of course, if you had two rival competitors in
9 different places, then you would have to be able to go
10 from rival A through AT&T, if need be, back to rival B.

11 So that what happens is that the way in which
12 you expanded competition under these things is to
13 mandate intersection.

14 The question is how do you do it. If I
15 understand the situation correctly, what you simply do
16 is ensure compatibility, just as you would in the
17 Microsoft case, and you don't worry very much about
18 pricing issues.

19 The brute fact of the matter is early on if you
20 were tiny in the AT&T system as B, you are getting a
21 subsidy by virtue of the interconnection.

22 What is nice about this subsidy is that it
23 shrinks with time, because as you become larger now, it
24 turns out access to your customers by the main carrier
25 is more valuable than it was to begin with, and after a

1 while you get yourself into a nice equilibrium.

2 In my view, if they had done that first in the
3 1982 decree and if they had basically blown up all of
4 the unbundled network pricing elements associated with
5 the 1996 Act, you would have been able to see a fairly
6 coherent expansion of what has happened.

7 The thing that I wanted to stress about this is
8 when you are talking about these network industries, of
9 which I think both the computing and I think the
10 telecommunications industries qualify -- but United Shoe
11 does not -- what you want to do in effect is to make
12 sure that interconnections can be obtained at the lowest
13 possible cost and to do nothing else thereafter.

14 It is not that you are going to get yourself
15 into a perfect solution.

16 But I think if there is anything that I learned
17 from the AT&T decree is this constant, mindless, numbing
18 rhetoric about how it is when you force people to sell
19 things to other people at prices that administrators
20 will now determine, incorrectly as a matter of force and
21 effect, that we have somehow removed ourselves closer to
22 a competitive system.

23 The truth about the matter is John I think was
24 right when he alluded to the fact that the rate cap
25 system was a pretty sensible way in which to run that

1 business, because what rate caps essentially did is you
2 didn't try to use cost-plus pricing, but you took into
3 account the fact that generally speaking, there are
4 always going to be greater efficiencies in telecom.

5 So if you just lower in real terms the rates by
6 2 or 3 percent a year and do nothing else, they will get
7 a little monopoly profits, you will get a lot of
8 administrative savings, and there will be a huge amount
9 of administration underneath the kind of caps that take
10 place.

11 So that kind of mix on remedies is I think
12 exactly what you are after.

13 Here is the way in which I start to think about
14 Section 2 in a word, is that I think basically damages
15 are not particularly important one way or another when
16 you are bringing these government suits, which is why
17 they have not been brought.

18 I think the invalidation of certain kinds of
19 contractual provisions is certainly appropriate and
20 relatively easy to implement, and my advice to both
21 firms is that you basically pull them out of the
22 agreement so that you don't have to fight that battle
23 under adverse terms.

24 And most of the structural remedies are a case
25 of too much at too high a cost. And in general, I can

1 think of no cases that succeeded on this.

2 I would guess that it was in the trillions of
3 dollars over the last 25 years that we could attribute
4 to bad remedial design in telecommunications, a really
5 very big and substantial number.

6 United Shoe was a small little case. But
7 remember, when they finally got frustrated at the
8 inability to make the contractual restrictions change
9 the behaviors in markets, they broke up the firm, and it
10 sort of went belly up.

11 I think one has to remember that. I'm a lawyer.
12 I don't start with existence theorems about how the
13 government can improve things by picking the optimal
14 choice.

15 I'm a guy who believes that you start with a
16 breach and realize it is substantial, and unless you can
17 find a clean kill, the best thing to do is to stay your
18 hand.

19 Thank you.

20 (Applause.)

21 MR. ELIASBERG: Thank you, Richard.

22 Before we get into the moderated discussion, why
23 don't we go down the panel here and see if any of the
24 speakers would like to take a moment or two to comment
25 on what the other speakers have said.

1 So with the request that it just be a minute or
2 two, Franklin, let me start with you. Any thoughts?

3 DR. FISHER: Yes. I can't resist it.

4 MR. ELIASBERG: Try to speak into the
5 microphone, please, for the court reporter.

6 DR. FISHER: Sure.

7 I can't resist it. I think the dictum that
8 every practice under Section 2 has large efficiency
9 gains is wrong.

10 I think it is correct -- that every practice
11 under Section 2 is likely to be defended as having large
12 efficiency gains is not the same thing.

13 MR. ELIASBERG: Okay.

14 Dietrich, anything?

15 MR. KLEEMANN: Maybe to John's remark about the
16 remedies, actual remedies.

17 I remember you said maybe in a Section 2 cases,
18 behavior, yes. However, it is not too clear.

19 I want to add something which is I would say any
20 intervention of the state in terms of structural
21 remedies is an intervention into the right of property.

22 If you see a merger case, there the parties,
23 they change themselves, the market such so you can say
24 if they do this in an anticompetitive way, it might not
25 so much be covered by their right of property to do

1 this, and you can't intervene against such operation.

2 By contrast, in that case, nobody changes the
3 market structure in the same sense. Simply they use a
4 given market structure to achieve some anticompetitive
5 goals.

6 And for me, it is not so obvious that you can
7 intervene in such a situation easily into the property
8 rights of a party which is always some kind of action as
9 if you would an expropriation.

10 On the other hand, you can say commercial
11 property is certainly not to be used in an absolutely
12 free way.

13 It is subject to some fundamental applications.
14 And these fundamental applications certainly include the
15 respect of the basic rules for market economy.

16 And if you heard these basic rules in a very
17 clear, blatant way, it might be justified to intervene
18 into the property rights. But I repeat it probably is
19 in legal terms as opposed to merger control a last
20 resort.

21 Therefore, the hurdle is much higher.

22 MR. ELIASBERG: Thank you.

23 Andy, any thoughts?

24 DR. JOSKOW: Just one thing. I think there is
25 some consensus about what we are saying with regard to

1 structure versus conduct.

2 What I hear what I think is happening is what we
3 are saying about remedies is actually tying it back to
4 what one might say about what is a real good liability
5 case.

6 If we are saying that, well, you can probably
7 make something out of cases where we can limit or remove
8 certain contractual provisions, at least to foreclosure
9 and reductions of competition, in some cases I think we
10 are in the types of legitimate cases we may be talking
11 about.

12 I think that is important too.

13 MR. ELIASBERG: Thank you.

14 John, any thoughts?

15 MR. THORNE: Can I ask a question instead of
16 making a comment?

17 MR. ELIASBERG: Well, you may ask, yes.

18 MR. THORNE: This is a question for Dietrich.

19 In your remarks, you talked about access
20 remedies as being one of the primary ways you resolve
21 mergers.

22 Then the first issue you listed under the topic
23 of access grants is setting the terms for the access
24 grants, price and other terms.

25 I wondered, you have a large body of mergers

1 where you have insisted on access grants. How do you
2 deal with the effect of that requirement on investment,
3 investment either by the firm where the requirement is
4 placed, which might want to invest less in stuff it has
5 to give away on regulated terms or incentives of the
6 demanders for access who might not build as much of
7 their own stuff if they can borrow it for free from
8 others?

9 MR. KLEEMANN: First of all, I think I have to
10 say access remedies are the most important behavior
11 remedies, certainly not in general the most important,
12 which are still clear-cut remedies such as divestiture.

13 However, there are situations, in particular in
14 industries where you have essential facilities and where
15 there is the high risk of foreclosure combining
16 essential facilities vertically with players where you
17 have to find a way out.

18 It is certainly true an eternal argument of all
19 incumbents in the possession of platforms or networks
20 that if you interfere with their strategies, you stifle
21 any kind of new investment.

22 Take only the current debate in Germany or in
23 Europe about the demands of the German Telecom to get
24 for their super quick DSL network, fiber network, an
25 exception from the generally regulated rule. Otherwise,

1 as I said, they would not invest.

2 In my view, this can, however, not be an excuse
3 to do something, to simply accept that one guy is going
4 to foreclose a market at the outset with all the severe
5 consequences for the future development.

6 Having said this, if you go to impose such an
7 access remedy, you have, however, to be fair.

8 I just mentioned in my short statement our
9 solution in the Telepiu case, where we started with the
10 certain bases, a price which is feasible, including a
11 certain margin for them and also some benchmarking with
12 other similar situations, other markets.

13 I think this is a realistic approach, and I
14 don't think that Telepiu's investment over the last
15 three or five years has been harmed by this.

16 Having said this, of course you should do all
17 this in a careful way and not going to impose easily
18 without carefully examination of this kind of
19 commitment.

20 But to confuse and generally to renounce this
21 kind of commitment, even in blunt cases of market
22 foreclosure, I would say would be a general kind of
23 resignation in this area.

24 And I saw in some statements if you are caught,
25 if it is communicated as it is, and I found this kind of

1 resignation, in particular, given the importance of
2 these kind of markets that have these remedies is not
3 acceptable.

4 MR. ELIASBERG: Richard, do you have a comment?

5 MR. EPSTEIN: I have a couple comments.

6 One, I think with respect to the whole problem
7 about Section 2, I think there are some of these
8 practices which are inefficient. I think they have
9 small efficiency gains and small inefficiencies.

10 One of the things that is most striking about
11 many of these contractual restrictions is they did a
12 little foreclosure and they did a little good. And
13 getting rid of the provisions didn't change things very
14 much.

15 One of the things you always worry about when
16 people knock down contractual terms is if you leave
17 freedom of price, so whatever you couldn't get in the
18 contract term you may well get in the price term.

19 So it is not at all clear you made some major
20 sort of social advancement with respect to these things.

21 With respect to what was just said about the
22 European approach on the remedy side, it is probably
23 something more that David can speak to than I.

24 But the striking differences between the EU
25 remedies with respect to the Microsoft and the American

1 remedies are very dramatic. What happens is there are
2 two dangers here, and I think he has only alluded to
3 one.

4 The first danger is, of course, that monopoly
5 foreclosure will take place.

6 The other danger is while subsidization through
7 expropriation of the transactions, where you no price
8 term associated with them for the divestiture of
9 intellectual property or patents of some kind or another
10 or prices that are well below the cost and, in fact, one
11 of the problems about John's industry which I think
12 shows this is if you go back to the history of telereg
13 pricing, what those guys managed to dream up in the FCC
14 was they gave you a very small rate and said they would
15 be depreciating it on you.

16 Since they gave you a small rate base, they gave
17 you a very low rate of return. The standard history of
18 regulated industries on pricing is if you give people a
19 large rate base, taking very little risk and they get a
20 smaller rate of return, and if give them a higher rate,
21 what they did under telereg was to give them a small
22 base and a low rate, which had really very after adverse
23 consequences.

24 The Supreme Court, they would not attack this as
25 either a statutory construction matter nor in the end as

1 a takings and regulatory kind of takings issue.

2 MR. ELIASBERG: Thank you, Richard.

3 Why don't we go to the moderated discussion.

4 And with this we will not only have our panelists, but
5 David Heiner has graciously agreed to also participate.

6 Let's take a look first at slide 4.

7 And I will go ahead and just read this into the
8 record.

9 "Finding the right remedy for antitrust
10 violations is never easy, and we have never been
11 particularly good at it."

12 And that comes from Herbert Hovenkamp's "The
13 Antitrust Enterprise."

14 Would I be correct in assuming that there is no
15 disagreement with that among any of the panelists?

16 MR. EPSTEIN: Actually, there is some. One of
17 the reasons why there is some disagreement is I think
18 Herbert got the remedies wrong.

19 He was really very harsh on the Microsoft
20 remedy. I think, for example, he wildly overrated the
21 technical efficiency of the OS 2 system and created the
22 error that I think constantly happens, which is to
23 assume whenever there is a restricted practice which we
24 have now struck down, it was that practice rather than
25 the inherent merits of the product which led to the

1 loss.

2 I thought of all the Microsoft exhibits I read
3 the one that was really devastating on that point was
4 the one prepared by Kevin Murphy which went through the
5 question of why it was all the other systems had failed,
6 given very powerful and detailed explanations based on
7 structure architecture and design.

8 Yes, I think we aren't particularly good at it.
9 It is not the case that the author of the quote is
10 necessarily immune from the criticism.

11 MR. HEINER: I could pick up on that a little
12 bit and specifically comment on the remedy that
13 Professor Fisher pointed out that Professor Hovenkamp
14 proposed in the Microsoft case.

15 First off, I would agree with the quote and I
16 would agree with the thrust of Professor Fisher's
17 presentation that remedies are certainly hard in Section
18 2 cases.

19 I have personally found that to be the case with
20 respect to the Microsoft issues that I have been dealing
21 with for many years.

22 My sense of the situation is that to some extent
23 it may be that remedies are so hard in Section 2 cases
24 because quite often the underlying structure is in fact
25 efficient and perhaps even the conduct is efficient as

1 to which there has been liability determined.

2 But when you get to the remedy phase, you maybe
3 begin to have second thoughts about some of that.

4 That is sorted of pointed up by Professor
5 Fisher's application about the applications barrier to
6 entry in the Microsoft case.

7 The applications barrier to entry is a
8 reflection of natural economic forces, as the professor
9 said.

10 It reflects the value of compatibility to
11 consumers. They want to get a PC that is the same as
12 other PCs, it runs the same applications.

13 Many of the remedies that were proposed through
14 the years went to try to attack the applications barrier
15 to entry and thereby break compatibility.

16 People turned away from those remedies quite
17 properly because they didn't want to give up that
18 benefit. I think that was very much the case with the
19 remedy number 5 that we saw from Professor Hovenkamp.

20 The idea there was that Microsoft should be
21 obliged to conduct an auction of the Windows source
22 code, the crown jewels of the company essentially, to
23 end licensees who would then go out and offer Windows in
24 competition with one another.

25 What would have happened in that case is that

1 the value of Windows and the price would have
2 essentially tended toward zero.

3 Any time you have two or three or more firms
4 with the exact same information good with a zero
5 marginal cost, they will tend to compete the cost down
6 to zero.

7 The effect would have been quite dramatic in
8 terms of taking away the value of what is really one of
9 the most valuable products of all time.

10 The three firms, to try to break out of that,
11 would have sought to differentiate their products.

12 They would have competed with one another to add
13 different features and thereby break compatibility.
14 That would not have been maintained, and customers would
15 have lost the benefit of that.

16 That I think is why the Division did not go down
17 that path. But I do think it illustrates the broader
18 point about many times the remedies may point up that
19 the existing situation is efficient.

20 MR. ELIASBERG: Frank, did you want to make a
21 comment on that?

22 DR. FISHER: Well, I don't agree with that.

23 MR. HEINER: I know.

24 DR. FISHER: I agree that the successor firms
25 under that remedy would try to differentiate themselves

1 and try to improve their products in various ways.

2 All of them would have a great big incentive of
3 remaining compatible with the existing stock of
4 programs. I think it is unlikely they would try to
5 differentiate themselves in ways that would break
6 compatibility.

7 MR. EPSTEIN: I think the difficulty with that
8 logic is the only way they could avoid breaking down
9 compatibility is to meet with one another.

10 What you would have is a contract combination in
11 restraint of trade. It would have to take place because
12 the gains, as Frank says, from coordination are so
13 great.

14 But it can only take place underneath some sort
15 of government supervision to make sure that while those
16 folks are sitting in the room to figure out compatible
17 features they don't manage to figure themselves out on
18 compatible prices.

19 In addition to that, as everybody is trying to
20 develop products to make sure that they can make the
21 compatibility, everybody has to slow down with respect
22 to what they are doing to make sure the compatibilities
23 will survive.

24 My own view about it is so long as you allow for
25 some degree of competition on top of the operating

1 system that was designed under the Kollar-Kotelly
2 decree, that's all that you can expect.

3 I will say this, since he was my former student.
4 When Doug Ginsberg actually evaluated this particular
5 portion in the state case which Hovenkamp helped to
6 author, he did not give a Chevron deference kind of
7 answer which said we don't know what is going on there,
8 when are not smart enough to figure all this out, if she
9 thinking it is right, we are just going to let it fly.

10 He said well done. This was in fact very much
11 considered on the part of the Justice Department.
12 Frank's position lost. And frankly, well done.

13 DR. FISHER: Frank doesn't agree with that
14 either.

15 MR. EPSTEIN: I'm stunned to hear.

16 DR. FISHER: The compatibility I was talking
17 about -- we may be using the term a little bit
18 differently -- was remaining compatible so that any
19 program that ran on Windows at the time that this
20 occurred would continue to run on the operating systems
21 as they developed at the other company.

22 I was not referring to a situation in which they
23 had to remain compatible with each other other than
24 that.

25 MR. EPSTEIN: I did misunderstand you.

1 But having that understanding, it seems to me
2 that software designers who were now going to have to be
3 compatible with foreign-compatible systems are going to
4 have incentives that are less than ideal.

5 This is a case in which the monopoly platform
6 has an advantage and it is shown by virtue of the fact
7 that you can design something for a market where you
8 will get 10X as opposed to 2.5.

9 That's why it is that Macintosh, although it is
10 finally moving up there, is always essentially first we
11 do the Microsoft system and two years later you come out
12 with it.

13 What is the difference in the number of programs
14 for one system as opposed to the other?

15 MR. HEINER: It is large.

16 MR. EPSTEIN: 10, six, whatever it is.

17 That's one of the things you start to give up in
18 this game. There are no free lunches here.

19 DR. FISHER: It is true, and I thought I said
20 so, that it is probable that eventually anyway the
21 natural effects will take over and one of these things
22 will become very large again.

23 That's perfectly true. That's a defect. You
24 can't prevent that.

25 MR. EPSTEIN: So the frictions aren't worth

1 running.

2 MR. HEINER: Let's turn to that different point,
3 which is the natural tendency of the market to move on
4 in high-tech industries.

5 It is kind of interesting to see now in 2007, is
6 there a huge excitement when Microsoft comes out with
7 Windows Vista, the latest version, are people running to
8 get Vista to run Vista applications?

9 And the answer unfortunately for Microsoft seems
10 to be not as much as we might like.

11 Where is the excitement today in terms of
12 applications? It is all Internet-based services. So it
13 is the YouTubes of the world and My Space and Friendster
14 and Flickr and Yahoo and Google and all that. That
15 runs across any browser on any operating system.

16 Here is another case where technology does move
17 on, market forces tend to take care of themselves. I
18 don't know what will come in 2010 and 2012.

19 Microsoft will be offering its own
20 Internet-based services increasingly in the years to
21 come.

22 But it does feel like already the discussion we
23 had in the late '90s is moving on.

24 MR. ELIASBERG: With that in mind, looking back
25 again at the statement by Hovenkamp and putting aside

1 that people who live in glass houses should not throw
2 stones, Richard's point, I would ask particularly of
3 Frank and Richard, any Section 2 cases come to mind,
4 government Section 2 cases where the remedy was right,
5 where the agency got the remedy right?

6 MR. EPSTEIN: Microsoft.

7 MR. ELIASBERG: Frank?

8 DR. FISHER: None. I'm not suggesting it was an
9 easy task either.

10 MR. ELIASBERG: Not one case?

11 When you said no, you mean no to Microsoft or no
12 case at all?

13 DR. FISHER: I don't agree with it for
14 Microsoft, and I cannot think of any case in which it
15 has been really very well done.

16 That is partly because -- three reasons why.
17 One, I'm probably not familiar as I sit here with all
18 the cases. I think that is probably true.

19 Two, it is a very difficult problem.

20 Three, until fairly recently, my impression is
21 if you go back historically that the record of the
22 amount of thought put into this in Section 2 cases is
23 rather poor.

24 MR. ELIASBERG: Okay.

25 MR. THORNE: Let me amplify the number of

1 Section 2 cases that might have come out correctly.

2 The Seventh Circuit decision written by Judge
3 Cudahee in MCI versus AT&T drew a distinction.

4 They articulated a broad essential facilities
5 doctrine that probably does not exist in American law.

6 They drew a distinction between kinds of
7 circuits that AT&T was voluntarily selling to others.
8 When MCI came up to the windows and said "can I have
9 some of those too, please," AT&T said "no."

10 That was a violation. So that piece of it was
11 decided by the court as a violation. And the remedy was
12 you must provide to MCI what you voluntarily sell to
13 others on the same terms.

14 There was another piece where MCI came to the
15 window and said I haven't built my long distance lines
16 to San Francisco, will you give me big chunks of your
17 long distance network, and Judge Cudahee said no, we are
18 not going to give that to you. That's an asset. If you
19 want to compete for it, you have to build yourself.

20 His decision and the remedy which is if you are
21 voluntarily offering something, don't discriminate
22 against rivals, that was a pretty simple one and I think
23 correct.

24 MR. EPSTEIN: That fits with my program, which
25 is nondiscrimination is another way of saying

1 interchange which is something you mandate.

2 It is kind of a common carrier remedy. The
3 reason you do it through the antitrust situation as
4 opposed to the FCC is since they voluntarily priced it
5 so you didn't have to have a ratemaking hearing going on
6 in order to deal with that issue.

7 So that you got the real advantages of
8 essentially both halves.

9 MR. THORNE: If you are worried about investment
10 deterrents, when a firm voluntarily sets the terms, you
11 don't worry about it and you say do for others what you
12 do for others.

13 MR. EPSTEIN: To me that has always been the
14 pattern and the great mistake in the 1996 act which was
15 amplified by the administrative rules was the horrific
16 pricing with respect to the unbundled network elements.

17 That was done through legislation and then
18 through pricing at the administrative level.

19 The basic position I would take and it applies
20 to the Microsoft remedy in Europe is transferring
21 assets, no, facilitating interconnections, yes, where
22 you would like to be.

23 MR. ELIASBERG: Andy?

24 DR. JOSKOW: I'm not sure zero is the right
25 answer on the government's effectiveness.

1 I don't know effectiveness, but on what were
2 appropriate remedies.

3 I mentioned the Dentsply case which was about
4 false teeth. That was a Section 2 case. It seems to me
5 certainly the exclusive dealing contracts were the place
6 to look in that case because the jury is still out on
7 what happened.

8 Visa and MasterCard, which is really a Section 1
9 case but like a Section 2 case, if there is a finding of
10 liability, the rule about allowing banks to issue cards,
11 presumably American Express cards, seemed to be where to
12 look.

13 You can argue about whether those contracts were
14 efficient, and the argument had been strong they should
15 have won the case. Once there is liability, it seems
16 like those remedies are the place to look.

17 That is consistent with what we have been saying
18 in these kind of very stark contractual cases. If there
19 is anyplace where there was a remedy, it would be in
20 those cases.

21 MR. EPSTEIN: Visa is a client. What can I tell
22 you?

23 I didn't work on this case. The Walmart case
24 which talked about the illegal tie-in between the
25 various debit and credit cards as opposed to the pin

1 debit, this is another illustration.

2 There is \$3 billion paid out. They removed the
3 restrictions, and eight people decided to abandon the
4 thing, or a number like that. You can check with the
5 Visa people.

6 The change in actual on-the-ground behavior by
7 virtue of removal of the tie was nonexistent. Keeping
8 this tie is yet another version of a suicide pact that
9 many large corporations do. They overestimate the value
10 of the restraint to their business.

11 If you are sitting there and you have a bunch of
12 customers, a thousand coming in, even only 5 percent of
13 them use whatever you think to be the elicited tying
14 thing. You don't want to chase away 5 percent of your
15 business.

16 Dennis Carlton gave his most sophisticated
17 testimony and great class action stuff. In the end, it
18 is like as Rick Blaine said, it is not worth a hill of
19 beans in this crazy world.

20 DR. FISHER: Just one thing about that.

21 I am in fact the Jane Berkowitz Carlton and
22 Dennis Carlton --

23 MR. EPSTEIN: Dennis is an old and dear friend.

24 DR. FISHER: He is an old and dear friend of
25 mine too. He may in fact have given a great deal of

1 fine testimony, but it was only at the class action
2 side.

3 The guy who gave the testimony in the Walmart
4 suit generally was me.

5 MR. EPSTEIN: I stand corrected. I thought you
6 guys did a terrific job of lawyering.

7 It is interesting, this is another point which
8 we didn't talk too much about.

9 Essentially network industries tend to be
10 two-sided industries, and they don't have any unique
11 pricing equilibrium.

12 Trying to drive everybody down to marginal costs
13 gives you all the same problems that you had with the
14 marginal cost controversy and the bridge which Viccerrey
15 talked about in the 1940s.

16 These are very hard things to work out. That
17 was just another case in which the tie-in arguments were
18 very eloquent but the actual change occurred after the
19 lawsuit was finished.

20 MR. ELIASBERG: Perhaps hold that thought.
21 Before we go on, did you have any questions,
22 Dan?

23 With that respect, why don't we have slide
24 number 8.

25 The slide reads "Conduct remedies are more

1 effective than structural remedies in Section 2 cases."

2 Dietrich, I will let you off the hook on this
3 one because we understand from you and Per that indeed
4 under your regulation, 2001 regulation, there is a
5 presumption in favor of civil remedies.

6 So you sort of have it mandated to you. But I
7 would like to start out with getting the reaction of the
8 other panelists.

9 Yes or no, is it more accurate or not that
10 conduct remedies are more effective than structural
11 remedies in Section 2?

12 MR. EPSTEIN: It is an ambiguous question.

13 Certainly they are if effective means does it
14 make as great or a smaller change. It makes a much
15 greater change to use a structural remedy than a conduct
16 remedy.

17 But if effectiveness means do you get more
18 social surplus from the remedy, which is more Draconian,
19 I think, in most cases, the answer is not.

20 So what you want is a remedy which is less
21 intrusive because it does modest harm and almost no bad,
22 as opposed to one which is like to create harm because
23 it is effected with the wrong sign attached to it.

24 MR. ELIASBERG: In your thinking, usually
25 conduct remedies will do less harm?

1 MR. EPSTEIN: And a little bit of good. My
2 basic schtick on that is usually the underlying business
3 doesn't change that much.

4 That's not an argument for keeping it. In my
5 book, I advocated unilateral surrender, which I said
6 that rather than even get yourself into trouble and
7 having all these learned economists, why would you want
8 to invite trouble from Dennis? What you do is pull the
9 damn thing out, and it turns out you keep 90 percent of
10 your business.

11 MR. ELIASBERG: On that score, Frank, given the
12 chair that you hold and also the positions that I
13 understood you to be making in your presentation, what
14 are your views on this, particularly with respect to
15 what you said about Microsoft?

16 DR. FISHER: I agree with the first half of what
17 Richard said. I'm not sure about the second half.

18 Conduct remedies are easier to get. They are
19 easier -- they are not as likely to do serious harm. I
20 agree with that.

21 They can be awfully difficult to supervise
22 effectively.

23 The part I don't necessarily agree with is they
24 basically have no effect.

25 I think structural -- there are not a whole lot

1 of cases with really big structural remedies, and I
2 think rightly so.

3 MR. ELIASBERG: Anybody else?

4 MR. KLEEMANN: One problem in this respect.

5 If we are talking about behavioral remedies and
6 structural remedies, it seems that there is a clear
7 distinction between those in practice.

8 There are remedies which are just at the fall
9 line. Just to give you an example, we had the case
10 where we had a monopolist in France for energy who
11 bought up a large German competitor and they would
12 remove a potential competitor.

13 We had to look at the situation. The structural
14 remedies, we cannot force EDF to sell four or five
15 French nuclear power plants. Therefore, we had to see
16 for a different way to open up the French market and to
17 create the market.

18 As a rule of thumb, to have a market, you need
19 an ability of one sort of the nature of customers.

20 And, therefore, we asked EDF to auction on a
21 regular basis 6000 megawatt capacity in so-called
22 virtual power plants.

23 At least for five years it is going on. This
24 facilitated significantly the creation of the market in
25 France in terms of protecting this.

1 You would see the first sign since we are able
2 because we asked them to behave in a certain way, you
3 would define as access to energy, gasoline comes through
4 too.

5 But we couldn't change the sector of the market
6 completely. I would be cautious to put too much
7 emphasis on difference too.

8 MR. THORNE: I agree with Richard that the
9 question is ambiguous and it depends on what kind of
10 conduct you are prohibiting or requiring.

11 The dimension on which remedies get really bad
12 is the time dimension. It is not like wine that gets
13 better if you save it.

14 Conduct remedies you enforce over long periods
15 of time. Structural remedies, you do them and then the
16 market and the firms, they get on with life.

17 Bad things that are part of a structural remedy
18 get cured in the market adjusting. Conduct remedies can
19 skew things over a long period and have much more
20 harmful effects.

21 MR. ELIASBERG: If you have a structural remedy,
22 you would be saying it is important not to have
23 something where there is a conduct remedy preventable,
24 for example, like a line of business.

25 MR. THORNE: Bill Baxter had a very good idea

1 when he came to the Antitrust Division. There were all
2 these -- he had a program of let's root them out and
3 vacate them.

4 They way outlived their lifetime. Anything that
5 takes very long to happen is probably a bad idea.

6 DR. JOSKOW: This reads like an empirical
7 question. The problem is under the second clause,
8 structural remedies, we really don't have many examples
9 to look at.

10 I do agree with the instinct that people have
11 with regard to substantial costs and through structural
12 remedies.

13 The conduct remedies, on the other hand, you
14 can't think of conduct remedies that don't require the
15 kind of line of business intervention. You can think of
16 conduct remedies that are structural in the sense that
17 you are in or out.

18 So in that sense, in those cases they could be
19 effective.

20 MR. EPSTEIN: I would draw a distinction on the
21 conduct remedies. I think things like the early decrees
22 from United Shoe. It says these foreclosure clauses
23 will never be used again in a lease, and they lasted for
24 30, 50 years.

25 I think when the conduct remedies start to say

1 you have to provide a mix of services at certain kinds
2 of prices --

3 MR. THORNE: Let's license all patents at
4 reasonable royalties.

5 MR. EPSTEIN: Which is in many of these decrees,
6 which is a suicide pact.

7 There is a pretty good empirical reason to
8 believe if you take compulsory licenses, ideally if you
9 had to only issue compulsory licenses, you couldn't
10 practice the patent, you would want the income stream to
11 equal exactly on net what you would get if you practiced
12 the patent before, and that would leave you indifferent.

13 The theory would be if the government paid a
14 lump sum, you get the marginal cost at the back end.

15 I'm not aware of any instance associated with
16 any compulsory licensing scheme where that condition has
17 been met. Almost invariably what happens is the
18 licenses come very cheap in many industries or in
19 certain industries like the copyright stuff, the radio
20 cases, things where they have different reasons, many of
21 the licenses, the increases are so high they drive half
22 the stations out of business.

23 This is a situation where in some industries you
24 are systematically low and others you are systematically
25 high. So you don't want to be systematically in that

1 business.

2 MR. DUCORE: To what extent do people think that
3 the efficacy of a conduct remedy would vary or would
4 depend on the kind of violation, for example, an
5 exclusive dealing violation versus a predation
6 violation?

7 MR. EPSTEIN: In exclusive dealing, you could
8 prohibit the foreclosure clauses. The ASCAP decree, the
9 first time out of the box they said you cannot license
10 one of these things where you have to take it for the
11 whole time of the station as opposed to the amount of
12 time that's being dedicated to music.

13 Over the next 70 years of that decree, nobody
14 ever argued about that provision.

15 I think with the exclusionary, you have some
16 fairly good fixes.

17 But in predation, I wouldn't know what it is.
18 Do not sell it below cost in an industry where cost
19 declines at 22 percent a year this year and 42 percent
20 next year?

21 It is so incoherent to me it seems to me what
22 you have done in the name of a conduct remedy what you
23 have done is you have a ratemaking procedure done
24 through some sort of special master.

25 MR. DUCORE: We have broken up the slide. The

1 next slide would be structural remedy.

2 I think we can talk about whichever slide is up
3 there. My next question is along the lines of similar
4 to what kind of conduct violation.

5 Does it make a difference in your views, in your
6 thinking about a structural versus a conduct remedy
7 whether the violation itself is a monopoly acquisition
8 violation versus a monopoly maintenance violation?

9 MR. EPSTEIN: By conduct? I know what it means.
10 You are not talking about mergers in the acquisition
11 side?

12 MR. DUCORE: No. But if the conduct led to the
13 monopoly that didn't exist previously, does that make
14 more of a case for a structural remedy?

15 MR. EPSTEIN: I can't think of any reason. Can
16 you? I think most of us -- we are willing to surrender
17 on both cases.

18 DR. JOSKOW: You still have to think about in
19 the business sense what the market would have looked
20 like.

21 I don't think we have any idea. That puts aside
22 the practical issues we discussed with regard to
23 structural remedy.

24 MR. DUCORE: Does it make a difference whether
25 in the trial, assuming there has been a trial, that

1 there is no evidence -- that the evidence shows that
2 there was no necessarily efficiency basis for the
3 monopoly, the monopoly was caused by the conduct? Does
4 that reduce your concern about fixing a structure?

5 MR. EPSTEIN: I think somebody, Frank or
6 somebody mentioned reversability is an extremely
7 important consideration in these things.

8 In fast-moving technological industries, you
9 can't reverse the 2006 in 2007. Given the pace in which
10 these cases run, you are typically talking years' delay.

11 I think the effort to try and get yourself back
12 to the old situation and sort of engineer forward from
13 that to where you would have been in the absence of is
14 just hopeless.

15 DR. FISHER: I agree with that. I don't want
16 you to think I'm totally negative.

17 MR. EPSTEIN: We agree on 85 percent.

18 DR. FISHER: Yes, but it is not the same 85
19 percent.

20 MR. EPSTEIN: It has to be.

21 DR. JOSKOW: The same 60 percent.

22 DR. FISHER: Anyhow, I agree with all of that.

23 The pure way the question was posed supposes
24 that the monopoly is solely the fruit of conduct that
25 has no efficiency consequences. And presumably you

1 could take that to mean that if you prohibited the
2 conduct, the monopoly would cease to exist.

3 I think that's very rare. But if that is true,
4 that would be the case with prohibiting conduct.

5 The question I think may presuppose that
6 reversability is possible.

7 MR. ELIASBERG: I want to be sure I understand.

8 For example, in United Shoe, to take a case that
9 is a little more neutral to everyone, the situation may
10 well be that the contracts involved added to monopoly
11 power, added to a larger market share. But absent it,
12 there would still be, if you will, a monopoly.

13 So is everyone saying the same thing, that is to
14 say, that in a situation like that, a structural remedy
15 would be inappropriate?

16 MR. EPSTEIN: It would create the vertical
17 difficulties that the merger managed to overcome.

18 Remember that was a situation where you had guys
19 lining patents up. The last thing you want to do is
20 destroy the efficiencies.

21 So you got rid of the clauses, and it turned out
22 it made relatively little difference. And then the
23 government had another breakup, and that made a lot of
24 difference and didn't help anybody.

25 By that time, foreign competition was real in

1 the United States. And now the major American
2 competitor is no longer.

3 I have to go in two minutes to catch a plane.
4 Can I make one little kind of observation?

5 On the intellectual property stuff --

6 MR. ELIASBERG: Which was the next slide.

7 MR. EPSTEIN: It is property. There is some
8 Supreme Court or Court of Claims case that somehow the
9 takings clause doesn't protect issued patents out there
10 which I think is most dangerous stuff.

11 The systematic attack on intellectual property
12 is often misguided. If it is not, you reform the
13 intellectual property law, change fair use. The last
14 thing you want to do is either bolster or weaken a
15 patent in the context of an antitrust dispute.

16 That's why I don't like the EU approach with
17 respect to Microsoft. In its original version, it said
18 all trade secrets shall go into the public domain.

19 It is not only in Europe. It is worldwide. The
20 last decree was awfully generous in allowing the
21 competitors to take the stuff from Microsoft and use it
22 to build rival networks.

23 I know you have gone ape over the case. It
24 can't be because you think it is the same as the
25 American decree.

1 MR. HEINER: I touched on this a little bit this
2 morning before you got here.

3 MR. EPSTEIN: You did go ape.

4 MR. HEINER: The proposition -- I think you
5 might as well put up the next slide on IP. The
6 proposition was --

7 MR. ELIASBERG: Slide 9.

8 MR. HEINER: -- should IP be treated the same as
9 other kinds of property.

10 What we are concerned about now under the
11 European approach is will IP be treated as property at
12 all.

13 That's the fundamental question, because this is
14 a case where we have a few dozen patents at issue and a
15 decision or a statement of objections recently by the
16 Commission that seems to suggest, although it is hard to
17 tell, that maybe those patents aren't worth much at all
18 and that the trade secrets are really not to be valued
19 at all and the same for the copyright, for that matter.

20 So for us, the first line of defense is just
21 should IP be treated as property, period.

22 MR. EPSTEIN: Thank you all. I have to run to
23 catch a plane.

24 MR. ELIASBERG: Let me sort of ask a follow-up
25 question that repeats a bit what David and Richard were

1 going into.

2 In a Section 2 case, when should compulsory
3 licensing be considered? No takers on this?

4 DR. FISHER: I will give it a try. I'm doing
5 this on my feet. I'm sitting down.

6 One could imagine a case in which a patent has
7 been grossly misused and misused in such a way as to
8 preserve a monopoly.

9 One way to get around that is to say, okay,
10 let's stop the misuse. Another way to get around it is
11 possibly the only way to reverse that might be to have
12 compulsory licensing.

13 That's the best I can do with it. I'm not
14 really certain.

15 MR. ELIASBERG: I am going to put you on the
16 spot, Andy, in your position with NERA.

17 Sometimes you have to quickly make an assessment
18 and a statement. What are your views on that?

19 DR. JOSKOW: I agree with Frank.

20 MR. THORNE: There was an actual experiment run
21 in the 1956 Bell decree which required at that point the
22 premier American research facility, Bell Labs, to
23 license on reasonable terms all its patents and,
24 secondarily, not to practice them itself except to the
25 extent they were used in providing accounting for a

1 telephone service.

2 So the AT&T company was not allowed to sell
3 computers to people even though they invented them,
4 lasers or transistors or any of the gear they naturally
5 would have done if they used their own patents.

6 They could license them. I don't know if that
7 was good or bad. It was a very large experiment run on
8 a very large generator of IP.

9 MR. ELIASBERG: Let me ask you, John, if you
10 know, in that decree, was the compulsory licensing
11 royalty-free or not?

12 MR. THORNE: To a small number of favored
13 providers, they were royalty free. For most people who
14 would want to use the patents, they were on reasonable
15 terms.

16 I think in the almost 30 years that that decree
17 was in effect, I think there were maybe two disputes
18 brought to a magistrate in the District Court.
19 Otherwise, they appear to have been without dispute and
20 they were cheap and nondiscriminatory.

21 MR. ELIASBERG: Sort of a follow-up question for
22 anybody on the panel. And Dietrich, I'm also looking
23 toward you on this one.

24 When is it appropriate to have a royalty-free
25 license in a Section 2 case? Not just compulsory but

1 royalty-free.

2 MR. KLEEMANN: If I can take a position, it is
3 with respect to the merger practice. It is not an issue
4 there so much.

5 The issue for us is a merger, for instance,
6 where one company takes over assets to which essential
7 patents relate, and essential patents are those which
8 cannot be circumvented by producing a certain product.

9 That means if a competitor gets these kind of
10 essential patents, there is a high risk that he could
11 exclude all his competitors as a consequence, and there
12 either we would have a case at all and there are cases
13 where we had this danger and the merger was abandoned
14 afterwards. Or we would at least ask in large instances
15 on the fee to spend basis, which is by the way in many
16 industries the standard.

17 In particular, if you have the standard-setting
18 bodies, they are all working on the lease rent terms.
19 That would be the type of case for us.

20 MR. ELIASBERG: It is usually not -- Frank, Andy
21 and John, anyone care to address this?

22 DR. FISHER: The only merit I can see in a
23 royalty-free licensing as opposed to compulsory
24 licensing at reasonable royalties is it prevents
25 argument about what the reasonable royalties are.

1 Apart from that, it seems to me that there isn't
2 any case for that. That seems to be simply an
3 expropriation of intellectual property.

4 I'm unable to think of a situation in which
5 that's the only way to remedy the problem.

6 MR. ELIASBERG: Okay. Andy or John?

7 DR. JOSKOW: It does seem like one can always
8 think about that in a competitive market, but for the
9 monopoly, there was some competitive prices, competitive
10 royalty that one can imagine is out there so that it is
11 hard to imagine that one would want to therefore impose
12 zero royalties.

13 Even in the merger cases, when there is
14 licensing required, what is required is paid up licenses
15 with no ongoing royalties often. But it has to do with
16 more of the ongoing interaction between the two firms.

17 But even in cases like that, you want some kind
18 of compensation for the product.

19 MR. THORNE: As a believer in the principle that
20 you learn something about whether there is a violation
21 from whether there's a remedy, I can't imagine a
22 violation that requires that as a remedy.

23 MR. DUCORE: Again, a consensus that a zero
24 royalty is never appropriate.

25 MR. THORNE: The consensus is nobody can think

1 of a violation where that would be the right remedy.

2 MR. DUCORE: Is it sort of a philosophical
3 concern that there must be value to the intellectual
4 property or is it a concern that we haven't come across
5 a fact pattern that demonstrates that but for the
6 illegal conduct, the intellectual property holder would
7 have had nothing of value to hold out to customers?

8 DR. FISHER: Had that been the case, it was
9 pretty farfetched. What is happening is there would
10 have been competing patents.

11 But the defendant has managed somehow to make
12 competing patents unprofitable or to absorb or it bought
13 up all the competing patents as we established the
14 monopoly and, therefore, has been able to charge a high
15 price for the patents.

16 The monopoly offense, the effect is to acquire
17 the patent monopoly.

18 Arguably you could say it would be worth very
19 little if they had done that. I can't think of an
20 actual case.

21 DR. JOSKOW: The patents competed in the market,
22 right?

23 DR. FISHER: They didn't because every time
24 somebody filed for a patent, these guys came along and
25 bought it up.

1 I don't know of any case like that.

2 MR. DUCORE: What about a situation where,
3 assuming the facts exist to show this, you could show
4 that but for the violation, technology would have gone
5 along in a direction that didn't infringe patents?

6 In other words, you have some kind of failure to
7 disclose and lock in and things of that nature, so that
8 by the time -- it was a fact issue clearly.

9 But the thrust of the violation is that the
10 technology practitioners would not have locked
11 themselves into this technology and then had liability
12 to the patentholders.

13 DR. FISHER: I'm not going to say anymore.

14 DR. JOSKOW: We think we know what case you are
15 talking about.

16 MR. ELIASBERG: There are no comments on that
17 one. Actually, I would -- can we have slide 6, please.

18 This is a quote from Microsoft 3. "Relief
19 should be tailored to fit the wrong creating the
20 occasion for the remedy."

21 I think all of you have talked or made allusions
22 to the different types of, different kinds of Section 2
23 violations.

24 I just wanted to go back to this.

25 Vis-a-vis conduct versus structure, this whole

1 notion of conduct versus structure, not to repeat what
2 people have said about the virtue of conduct in general
3 or the virtue of structure in general or all that, but
4 thinking of the frequent types or classifications of
5 Section 2 conduct, predatory pricing, predatory business
6 bidding, refusal to deal, bundled discounts, are there
7 any where it seems cry out for a conduct decree or any
8 that seems to on the other hand cry out for an approach
9 where structural relief would be more appropriate?

10 DR. FISHER: Can I comment on the quote?

11 MR. ELIASBERG: Yes.

12 DR. FISHER: That is one of the appropriate
13 objectives of if you want a remedy to satisfy. I would
14 be happier if it had said relief should be tailored to
15 fit the consequences of the wrong creating the occasion
16 for the remedy.

17 I don't think it is enough -- this is putting
18 the genie back in the bottle again. I don't think it is
19 enough to say we are going to tailor something that if
20 1947 ever comes around again, this wouldn't happen.

21 If you could figure it out, what you want to do
22 is restore competition. That doesn't necessarily go
23 with this.

24 MR. ELIASBERG: Anything else?

25 DR. JOSKOW: What is the wrong? Is it the

1 monopoly or is it the conduct?

2 It seems like it is hard to determine how much
3 of a monopoly is because of the behavior. So it seems
4 that this is really talking about the incremental
5 effects of the behavior. If that's what it is talking
6 about.

7 DR. FISHER: I think it assumes Judge
8 Ginsburg -- I don't think that's what he meant. I agree
9 that's what he ought to have meant.

10 MR. THORNE: One difference you haven't focused
11 on is the difference between relief that is ordered
12 after an adjudication of a violation versus a consent
13 decree, which is a little bit like a plea bargain, where
14 the defendant is facing breaking up into eight or nine
15 or 10 or 12 pieces.

16 Instead, I will accept the other conditions that
17 you want and then the sentence reads as relief should
18 not go beyond addressing the violations that were being
19 proved in the case that got started prior to the
20 settlement as opposed to you have a willing defendant
21 and you have thought of a lot of other good things the
22 defendant could do to improve the markets and you would
23 like to impose a lot of those things too and the
24 defendant seems willing to agree to them.

25 MR. KLEEMANN: Maybe I would subscribe totally

1 to this merger control. Everything is about to avoid
2 the risk of anticompetitive interpretation and not about
3 the consequence.

4 It is a risk situation. I wonder whether this
5 could be typical in abuse cases where you are not
6 creating the structural change but with a certain
7 behavior which has consequences.

8 MR. ELIASBERG: Well, I think we have run out of
9 time. And I would request that the audience join me in
10 a round of applause thanking our panel.

11 (Applause.)

12 (Whereupon, at 4:30 p.m., the hearing was
13 concluded.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

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4 I HEREBY CERTIFY that the transcript contained
5 herein is a full and accurate transcript of the notes
6 taken by me at the hearing on the above cause before the
7 FEDERAL TRADE COMMISSION to the best of my knowledge and
8 belief.

9

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DATED: APRIL 2, 2007

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BRENDA SMONSKEY

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