

# The Essential Facilities Doctrine: What Does It Mean To Be Essential?

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# THE ESSENTIAL FACILITIES DOCTRINE: WHAT DOES IT MEAN TO BE ESSENTIAL?

## I. INTRODUCTION

If we truly learn everything we need to know in kindergarten, the concept of sharing is fairly easy to understand. In the grown-up world of antitrust law, however, the notion of “share and share alike” becomes much more complicated.

The duty to share is mandated by the essential facilities doctrine. This doctrine imposes on firms that control an essential facility, “the obligation to make the facility available on non-discriminatory terms.”<sup>1</sup> In other words, if a court finds that a facility is essential, the court can require the owner to provide equal access at fair prices to all those who desire to use the facility.<sup>2</sup>

A recent and important case involving essential facilities is *Blue Cross & Blue Shield v. Marshfield Clinic*.<sup>3</sup> Blue Cross argued that the Marshfield Clinic<sup>4</sup> and its doctors were essential facilities such that any health maintenance organization (HMO) could demand access on fair and equal terms.<sup>5</sup> The Seventh Circuit Court of Appeals held that the Marshfield Clinic and its doctors were not essential facilities.<sup>6</sup> Consequently, the Clinic had no duty to share its physicians with Blue Cross’ HMO, Compcare.<sup>7</sup>

While the essential facilities doctrine has received considerable attention from courts and commentators,<sup>8</sup> there is no precise definition

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1. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (citing *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 410-11 (1912)). The Seventh Circuit held that AT&T denied MCI access to an essential facility when AT&T refused to interconnect MCI to a local distribution network. *MCI*, 708 F.2d at 1132-33.

2. *Id.*

3. 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1288 (1996).

4. The Marshfield Clinic is located in Marshfield, WI. Although the town only has a population of 20,000, the Marshfield Clinic employs over 400 doctors and is the fifth largest physician-owned clinic in North America.

5. *Id.* at 1413. The court stated that an “HMO provides medical services through physicians with whom it has contracts specifying their compensation . . . . This means that the HMO must be able to line up enough physicians with whom to contract to provide its subscribers with a more or less complete menu of medical services.” *Id.* at 1409.

6. *Blue Cross*, 65 F.3d at 1413.

7. *Id.*

8. See, e.g., Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the “Essential Facilities” Doctrine*, 1996 COLUM. BUS. L. REV. 1 (1996); Scott D. Makar, *The Essential Facility Doctrine and the Health Care Industry*, 21 FLA. ST. U.L.

of what the word essential means.<sup>9</sup> Indeed, an essential facility has been alternately defined as: the need of the public at large, the need of the individual competitor, the market power possessed by the facility's owner, and the preferences of consumers. Therefore, there is much confusion about what makes a facility so essential that it must be shared.

This Comment attempts to delineate a uniform definition of what it means to be essential. Part I explains why the four-part test for essential facilities set out in *MCI Communications Corp. v. American Tel. & Tel. Co.*,<sup>10</sup> provides no help in defining just what it means to be essential. Part II of this essay discusses the different approaches courts and commentators use to characterize a facility as essential. In Part III, the author argues that the term "essential" should only apply to those facilities that are public necessities.

## II. ESSENTIAL TO WHOM? ESSENTIAL TO WHAT?

In the *MCI Communications* case, the Seventh Circuit established four elements that are necessary to prove liability under the doctrine of essential facilities: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."<sup>11</sup> This test neither defines what the word "essential" means, nor describes any process for determining which facilities should be subject to the test. The four elements merely establish a threshold of "liability"<sup>12</sup> which allows a court to impose the remedy of equal and fair access.

Notice that the *MCI* test contains a giant assumption. If one examines the first and second elements, one notices immediately that the test assumes that the facility in question is, in fact, essential. The *MCI*

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REV. 913 (1994); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990); David Reiffen & Andrew N. Kleit, *Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?*, 33 J.L. & ECON. 419 (1990); James R. Ratner, *Should There Be An Essential Facility Doctrine?*, 21 U.C. DAVIS L. REV. 327 (1988); David J. Gerber, Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 VA. L. REV. 1069 (1988); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS L.J. 433 (1987); William B. Tye, *Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine*, 8 ENERGY L.J. 337 (1987).

9. See Kezsbom & Golman, *supra* note 8, at 27 (arguing that courts have been exercising substantial discretion in the definition of essentiality).

10. 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

11. *Id.* at 1132-33.

12. *Id.*

test suffers from circular reasoning. A facility is deemed essential if it satisfies the four elements. However, before one can satisfy the elements, one must believe that the facility is essential in the first place.

Phillip Areeda notes that the trouble with the essential facilities notion is that it begins "with the assumption that all business assets are subject to sharing."<sup>13</sup> Areeda wonders, "[d]o we really want to assume that everything we have is up for grabs?"<sup>14</sup> According to the *MCI* test, it appears that everything is up for grabs and that every facility is essential.

In his treatise on antitrust law, Herbert Hovenkamp lists three categories of facilities, which the courts have found to be essential:

- (1) natural monopolies or joint venture arrangements subject to significant economies of scale;
- (2) structures, plants or other valuable productive assets that were created as part of a regulatory regime, whether or not they are properly natural monopolies or
- (3) structures that are owned by the government and whose creation or maintenance is subsidized.<sup>15</sup>

Such a categorization is not helpful in determining what is essential. Hovenkamp merely details those facilities which have created liability for those who control them. This Comment takes one step back and tries to determine what facilities are so essential that the four-part test should be applied. Right now, the only limit on what is essential is the creativity of the plaintiff's attorney who brings the action.

The essential facilities doctrine is a "circuit-generated"<sup>16</sup> theory which draws on four Supreme Court decisions for support.<sup>17</sup> None of these four decisions, however, specifically address the doctrine of essential facilities.<sup>18</sup> While the four-part test has found considerable support in other circuits,<sup>19</sup> the case law is inconsistent regarding what

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13. Areeda, *supra* note 8, at 852 n.46.

14. *Id.*

15. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 7.7, 274 (1994).

16. Ratner, *supra* note 8, at 334.

17. *Id.* See, e.g., *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945); *Otter Tail Power Co. v. United States*, 410 U.S. 366, *reh'g denied*, 411 U.S. 910 (1973); *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585 (1985).

18. Ratner, *supra* note 8, at 334.

19. Four circuits have followed the four-part test in *MCI*. See, e.g., *Willman v. Heartland Hosp. East*, 34 F.3d 605 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995); *City of Anaheim v. Southern CA Edison Co.*, 955 F.2d 1373 (9th Cir. 1992); *Laurel Sand & Gravel, Inc. v. CSX Transp.*, 924 F.2d 539 (4th Cir. 1991), *cert. denied*, 502 U.S. 814 (1991); *McKenzie v. Mercy Hosp. of Independence Kansas*, 854 F.2d 365 (10th Cir. 1988).

makes a facility essential.

### III. DIFFERENT DEFINITIONS OF ESSENTIALITY

#### A. *Essential to the Public*

Some courts have forced owners to share a facility because the public at large required access to a vital good or service.<sup>20</sup> To gain an understanding of this approach, it is necessary to begin with the seminal case, *United States v. Terminal Railroad Ass'n*,<sup>21</sup> which engendered the principle of sharing that now forms the purpose behind the essential facility doctrine. The Terminal Association consisted of a group of firms in St. Louis that controlled access to the only two railroad bridges which spanned the Mississippi river.<sup>22</sup> The Supreme Court held that the Terminal Association must provide access on "just and reasonable terms" to all those railroad companies desiring to use the bridges.<sup>23</sup>

In ordering this unique remedy, the Supreme Court noted the "topographical condition peculiar to the locality."<sup>24</sup> Because there were no other alternatives to the bridges, the Court held that the Terminal Association must act as "the impartial agent of all who, owing to the conditions, are under such compulsion, as here exists, to use its facilities."<sup>25</sup> Indeed, public access to the bridges were an absolute necessity because of the lay of the land. This idea of public necessity is further demonstrated by the great number of people affected by the restriction on interstate commerce.<sup>26</sup> Twenty-four railroad lines converged at the gateway city of St. Louis, the hub of our growing nation's commerce.<sup>27</sup>

Further support for using public need to define essentiality is found in *Associated Press v. United States*.<sup>28</sup> In this case, more than 1,200 newspapers formed a cooperative, the Associated Press, in order to achieve efficiency in news reporting.<sup>29</sup> Applicants however, were denied admission to the Associated Press if they competed with

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20. See, e.g., *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945).

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

22. *Id.* at 391.

23. *Id.* at 411.

24. *Id.* at 404.

25. *Id.* at 405.

26. *Id.* at 405.

27. *Id.* at 395.

28. 326 U.S. 1 (1945).

29. *Id.* at 4.

members.<sup>30</sup> The Supreme Court held that the Associated Press must provide equal access to the cooperative.<sup>31</sup>

Justice Frankfurter, in his concurring opinion, believed that such an association was vital to the public interest. Frankfurter noted that the Associated Press:

has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them.<sup>32</sup>

Indeed, the public depends on the unimpeded, free "flow of news."<sup>33</sup> Frankfurter even anticipated the objections of those who criticized the Court for treating the Associated Press as a public utility. Responding to such criticism, Frankfurter wrote, "[t]he relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of 'public utility.'"<sup>34</sup> Because the public relied on the free flow of information, the Associated Press, like the bridges in *Terminal Railroad Ass'n*, was essential to the entire nation.

The third Supreme Court decision offering support for a definition of "essential" based on public need is *Otter Tail Power Co. v. United States*.<sup>35</sup> Several cities brought suit against Otter Tail, an electric utility company, which refused to sell or wheel power to local municipal distribution systems.<sup>36</sup> The Supreme Court affirmed the district court's order enjoining Otter Tail from refusing to wheel or sell power to the municipalities.<sup>37</sup> In this case, the duty to share a facility was imposed on a public utility that supplied electricity.

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30. *Id.*

31. *Id.* at 21.

32. *Id.* at 28-9 (Frankfurter, J., concurring).

33. *Id.* at 29.

34. *Associated Press v. United States*, 326 U.S. 1, 29 (1945) (Frankfurter, J. concurring).

35. 410 U.S. 366, *reh'g denied*, 411 U.S. 910 (1973).

36. *Id.* at 368.

37. *Id.* at 376.

Such a concern for the public is manifested in other decisions in which courts have declined to apply the doctrine for policy reasons. In *Pontius v. Children's Hospital*,<sup>38</sup> the district court declared that the essential facility doctrine should not apply to decisions about hospital staff privileges. Similarly, in *Robles v. Humana Hosp. Cartersville*,<sup>39</sup> the court stated that it is "inappropriate to apply a doctrine which would prevent a hospital from keeping doctors it had adjudged unqualified off its staff. Neither public policy nor the Sherman Act can countenance such a result."<sup>40</sup>

The fourth element of the *MCI* test, "the feasibility of providing the facility,"<sup>41</sup> offers further proof that public policy should determine what is essential. Indeed, the courts have interpreted the fourth element to mean that a firm does not have a duty to share a facility if the firm has a valid business justification.<sup>42</sup> In *Anaheim*, the Ninth Circuit did not require a firm to share a facility when such a remedy would cause customer rates to increase.<sup>43</sup> The court noted that there is no duty to share in this case because the "public interest is well served" by the lowest possible rates.<sup>44</sup>

### B. Essential to Competition

The purpose of the essential facility doctrine flows from the *Otter Tail* decision in which the Supreme Court noted its concern that Otter Tail's market power in the transmission market was utilized to create a monopoly in another market.<sup>45</sup> Therefore, the doctrine of essential facilities is intended to restrict a firm from extending "monopoly power from one stage of production to another, and from one market into another."<sup>46</sup> The Ninth Circuit stated that unless the facility "is used to improperly interfere with competition, it cannot be called essential."<sup>47</sup>

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38. 552 F. Supp. 1352, 1370 (W.D. Pa. 1982).

39. 785 F. Supp. 989, 995 (N.D. Ga. 1992).

40. *Id.* at 995-96 (quoting *Pontius*, 552 F. Supp. at 1370).

41. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1131 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

42. *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992).

43. *Id.* at 1380.

44. *Id.* at 1381.

45. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-79, *reh'g denied*, 411 U.S. 910 (1973).

46. *Anaheim*, 955 F.2d at 1379 (quoting *MCI Communications Corp. v. American Tel. & Tel.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)).

47. *Anaheim*, 955 F.2d at 1380.

Areeda understands that there are three parts to any determination of what it means to be essential. First, a facility is essential if “the plaintiff is essential for competition in the marketplace.”<sup>48</sup> Second, the facility must be essential to the individual competitor. A facility is “critical to the plaintiff’s competitive vitality” if the plaintiff cannot effectively compete without that facility.<sup>49</sup> Third, duplication of the facility and practical alternatives must not be available.<sup>50</sup> All too often, however, courts and attorneys only focus on one of the three factors.

1. The Moral Hazard of Defining Essential as merely “Essential to the Competitor”

Attorneys have creatively used the word “essential” to describe the competitor’s need. William Tye argues in his essay, “*Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine*” that application of the doctrine often “focuses unduly on the effect of the denial of access on the plaintiff’s ability to compete—not on the infringement of competition which is the objective of the antitrust law.”<sup>51</sup> Indeed, the purpose of antitrust law is not to protect “competition as a process of rivalry,” but to protect “competition as a means of promoting economic efficiency.”<sup>52</sup> Consequently, the purpose of antitrust law in protecting competition as a whole is contradicted when the needs of an individual competitor define the meaning of essential.

Part of the reason why courts have begun using essential to define a competitor’s need stems from the Supreme Court decision in *Otter Tail*.<sup>53</sup> While *United States v. Terminal Railroad Ass’n*<sup>54</sup> and *Associated Press v. United States*<sup>55</sup> involved concerted action under section one of the Sherman Act,<sup>56</sup> the Supreme Court in *Otter Tail*<sup>57</sup> extended the

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48. Areeda, *supra* note 8, at 852.

49. *Id.*

50. *Id.*

51. Tye, *supra* note 8, at 345.

52. State of Ill. ex rel Burris v. Panhandle Eastern, 935 F.2d 1469, 1483 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) (quoting Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 48 U.S. 934 (1987)).

53. 410 U.S. 366, *reh’g denied*, 411 U.S. 910 (1973).

54. 224 U.S. 383 (1912).

55. 326 U.S. 1 (1945).

56. The Sherman Act, section 1, states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding

duty of sharing to unilateral action under section two of the Sherman Act.<sup>58</sup>

There exists a moral hazard when plaintiffs bring an essential facility claim against a single competitor. Indeed, firms might try to use the doctrine to take a "free ride" on the efforts of a competitor.<sup>59</sup> Without a firm statement of what the word essential means, plaintiffs will continue to argue that a rival's facility is essential to the plaintiff's needs.

Several cases offer an example of the dangerous possibility that a competitor will take a free ride. In *Twin Lab. v. Weider Health & Fitness*,<sup>60</sup> Twin Lab. and Weider both produced nutritional supplements for bodybuilders.<sup>61</sup> Weider however, owned two widely-read bodybuilding magazines.<sup>62</sup> Because Twin Lab. owned a magazine with a substantially smaller circulation, Twin Lab. argued that Weider's magazines were essential facilities such that Weider should offer Twin Lab. advertising space in Weider's magazines.<sup>63</sup> The court held that Weider's magazines were not essential facilities.<sup>64</sup>

Similarly, in *Olympia Equip. Leasing v. Western Union Telegraph*,<sup>65</sup> Olympia argued that Western Union's sales force was an essential facility.<sup>66</sup> Olympia reasoned that no company could compete with an established firm such as Western Union if it did not add Olympia's name to the list of suppliers that Western Union distributed to its own customers.<sup>67</sup> The Seventh Circuit held that the essential facility doctrine

\$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1990).

57. 410 U.S. 366, *reh'g denied*, 411 U.S. 910 (1973).

58. The Sherman Act, section 2, states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1990).

59. *Id.*

60. 900 F.2d 566 (2nd Cir. 1990).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 569.

65. 797 F.2d 370 (7th Cir.), *reh'g denied*, 802 F.2d 217 (1986), *cert. denied*, 480 U.S. 934 (1987).

66. *Id.* at 377.

67. *Id.*

does not "imply a duty in existing firms" to inform their customers about a new firm.<sup>68</sup>

## 2. Inability to Duplicate the Facility

Many courts boil the issue of essentiality down to whether the facility is capable of replication. The Tenth Circuit stated that, "[a]s the word essential indicates, [a plaintiff] must show more than inconvenience or even some economic loss; [he] must show an alternative to the facility is not feasible."<sup>69</sup> Similarly, the Seventh Circuit has deemed a facility essential "if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."<sup>70</sup> According to the Ninth Circuit, the second element of *MCI*, the inability to duplicate,<sup>71</sup> is "effectively part of the definition of what is an essential facility in the first place."<sup>72</sup>

Critics have noted the unfairness of this approach to the essential facility doctrine.<sup>73</sup> Scott Makar argues in his essay, "*The Essential Facility Doctrine and the Health Care Industry*,"<sup>74</sup> that "[e]quating 'inability to practicably duplicate' with 'essentiality' can unjustifiably infer that an existing facility is 'essential' simply because one competitor cannot 'practically' duplicate it."<sup>75</sup> Tye argues that it is absurd to declare a facility essential merely because it cannot be reasonably duplicated.<sup>76</sup> Carrying this principle to its logical extreme "would require any restaurant with empty tables to be forced to include on its menu the offerings of an outside sidewalk hot-dog vendor if the vendor could not itself supply seating for its customers elsewhere at lower cost."<sup>77</sup> These critics emphasize that there are no bright line rules for determining when a facility is incapable of duplication or when alternatives are impractical.

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68. *Id.*

69. *City of Chanute, Kansas v. Williams Natural Gas Co.*, 955 F.2d 641, 648 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992) (quoting *Twin Labs. Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990)).

70. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)).

71. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

72. *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992).

73. See Makar, *supra* note 8, at 922-23; Tye, *supra* note 8, at 347-48.

74. Makar, *supra* note 8, at 913.

75. *Id.* at 922.

76. Tye, *supra* note 8, at 348 n.41.

77. *Id.*

### C. Essentiality Equals Market Power

Professor Hovenkamp notes that "a properly defined essential facility must define a relevant market."<sup>78</sup> If a "facility does not constitute or control a relevant market, then competitive alternatives are available and the facility can hardly be characterized as 'essential.'"<sup>79</sup> Some courts have defined an essential facility by that facility's market power. In *Blue Cross*, the court held that the Clinic was not an essential facility because it did not even control fifty percent "of any properly defined market."<sup>80</sup> Similarly, in *Castelli v. Meadville Medical Center*,<sup>81</sup> the Third Circuit held that a hospital was not essential because of the existence of other hospitals in the market.<sup>82</sup>

Because of this reliance on markets in defining what is essential, the danger exists that the plaintiff may try to manipulate the geographic and product markets in order to make the defendant's facility essential. The best example of market manipulation occurs in *Blue Cross*. Blue Cross drew "a dizzying series of concentric circles around the Clinic's [satellite] offices" in order to demonstrate that the Clinic's doctors were the only physicians in a certain area.<sup>83</sup> In addition to gerrymandering the geographical markets, Blue Cross tried to show monopoly control of "very narrowly defined medical procedures, called 'Diagnostic Related Groups.'"<sup>84</sup>

In *McKenzie v. Mercy Hosp. of Independence Kan.*,<sup>85</sup> the plaintiff, a doctor, continually redefined the scope of his essential facilities argument. In his complaint, the plaintiff applied the essential facilities

78. HOVENKAMP, *supra* note 15, § 7.7 at 274.

79. *Id.*

80. *Blue Cross*, 65 F.3d at 1413. While the court concluded that the Clinic had a "monopoly market share of the HMO 'market'" the court stated that the HMO market is "not a proper market." *Id.* Blue Cross & Blue Shield has filed a petition for Writ of Certiorari to the United States Supreme Court on the issue of whether HMOs are separate markets or merely part of the overall health care financing market.

81. 702 F. Supp. 1201 (W.D. Pa. 1988), *aff'd*, 872 F.2d 411 (3d Cir. 1989).

82. *Id.*

83. *Blue Cross*, 65 F.3d at 1411. The court noted that the "Clinic employs all the physicians in Marshfield itself and in several other towns—but one of these towns has only one physician—and all the physicians in one entire county—but a county that has only 12 physicians." *Id.* at 1409.

84. *Id.* at 1411. These Diagnostic Related Groups defined separate markets for "circumcision of a male 17 years old or older, circumcision of a male under 17, hysterectomy, and reconstructive surgery for the uterine system . . ." *Id.*

85. 854 F.2d 365 (10th Cir. 1988).

doctrine to the "entire hospital."<sup>86</sup> Later in the proceedings, the plaintiff declared that only "obstetrical care and emergency care" were essential facilities.<sup>87</sup> Finally, the essential facility description changed again such that the district court limited its essential facility analysis to the emergency room only.<sup>88</sup>

### *E. Essential Because of Consumer Preferences*

A few courts have considered consumer preferences in deciding whether a facility is essential. The risk inherent in this approach flows from the application of the essential facility doctrine to unilateral action under section one of the Sherman Act. Because a plaintiff may bring an action against a single competitor, courts must engage in a comparison of two competing facilities. When comparing two facilities, the danger exists that a court might deem a facility essential merely because the customer likes the defendant's facility better than the plaintiff's.

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

In *Aspen Skiing Co. v. Aspen Highlands Skiing*,<sup>89</sup> two skiing companies offered a discounted six-day lift ticket that covered the three mountains owned by Aspen Skiing Co. and one mountain owned by Highlands.<sup>90</sup> Highlands brought suit when Aspen Skiing Co. began selling a three-mountain ticket instead of the four-mountain ticket which included Highland's mountain.<sup>91</sup> The Supreme Court upheld the jury's verdict that the four mountain ticket was an essential facility.<sup>92</sup>

The Court acknowledged that customers preferred the "flexibility" and the increased "number of challenging runs available . . . during the week's vacation."<sup>93</sup> The Court noted that consumer surveys indicated that over fifty-percent of those responding to the survey wanted to ski Highlands, but would not if it was left off the ticket.<sup>94</sup>

Somehow this analysis of consumer preference is justified because it focuses on the popularity of the plaintiff's facility. In two other cases, however, the Seventh Circuit considered the popularity of the defen-

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86. *Id.* at 369.

87. *Id.*

88. *Id.*

89. 472 U.S. 585 (1985).

90. *Id.* at 590.

91. *Id.* at 593.

92. *Id.* at 611.

93. *Id.* at 606.

94. *Id.*

dant's facility in determining whether the facility was essential.

## 2. *Fishman v. Estate of Wirtz*

In *Fishman v. Estate of Wirtz*,<sup>95</sup> a group of investors led by Fishman attempted to purchase the Chicago Bulls.<sup>96</sup> The NBA Board of Governors did not approve the sale to Fishman because he had not secured a lease with Chicago Stadium.<sup>97</sup> A second group of investors was successful in gaining the NBA's approval to buy the Chicago Bulls because a member of this group, Wirtz, owned Chicago Stadium.<sup>98</sup> Fishman brought suit against Wirtz, claiming that Fishman was unfairly denied access to Chicago Stadium, an essential facility.<sup>99</sup>

In determining that Chicago Stadium was an essential facility, the district court compared the Stadium with another indoor stadium in Chicago, the Amphitheatre. The court found that the Stadium had a greater seating capacity and better lighting for television.<sup>100</sup> The district court qualified its reliance on consumer preferences by "[c]onceding that a facility is not essential merely because it is better than or preferable to another . . . ."<sup>101</sup> The court concluded, however, "that the stadium was not just better—it was 'unique.'"<sup>102</sup>

Unlike the district court, the Seventh Circuit expressed no reservations about using consumer preferences to affirm the decision that Chicago Stadium was, in fact, an essential facility. In response to Wirtz's argument that a finding of essentiality should only be based on "objective economic reality," the Court of Appeals acknowledged that "'objective economic reality' is often a function of personal preferences."<sup>103</sup> The court added that the market power of the Stadium was a function of the "'personal preferences' of basketball patrons."<sup>104</sup> Therefore, the court concluded, "preferences are relevant" in ascertaining whether a facility like Chicago Stadium is essential.<sup>105</sup>

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95. 807 F.2d 520 (7th Cir. 1986).

96. *Id.* at 525.

97. *Id.* at 527.

98. *Id.* at 529.

99. *Id.* at 530.

100. *Id.* at 539.

101. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986).

102. *Id.*

103. *Id.* at 540.

104. *Id.*

105. *Id.*

### 3. *Blue Cross & Blue Shield v. Marshfield Clinic*

Such reliance on the quality and popularity of the defendant's facility was completely rejected in *Blue Cross*.<sup>106</sup> Blue Cross argued that the Clinic and its doctors were essential facilities because of their reputation as the best. Indeed Blue Cross argued "that the Clinic's reputation is so superb that no one will sign up with an HMO or preferred-provider plan that does not have the Clinic on its roster."<sup>107</sup> Recognizing that such reliance on consumer preferences has no place in antitrust analysis, the court stated that "[t]he suggestion that the price of being 'best' is to be brought under the regulatory aegis of antitrust law and stripped of your power to decide whom to do business with does not identify an interest that the antitrust laws protect."<sup>108</sup>

As the court in *Blue Cross* makes clear, consumer preferences should not determine what facilities are essential. However, without a uniform definition of what it means to be "essential," evidence of reputation and popularity may filter into the essentiality equation.

### III. ESSENTIALITY REQUIRES COMPARISON

With no direction from the Supreme Court and no consistency among the circuits, the courts are floundering in their attempt to define an essential facility. The courts have no mechanism for distinguishing which facilities should and should not be subject to the four-part test for liability found in *MCI*. A uniform definition of "essential" that is based on public necessity should eliminate many of the problems inherent in the definitions based on competition, consumer preferences, and market power.

#### A. *A Uniform Definition of "Essential"*

Gregory Werden argues, in his essay, *The Law and Economics of the Essential Facility Doctrine*,<sup>109</sup> that the legislative and administrative branches of government should determine what facilities are essential.<sup>110</sup> Indeed, Werden would not invoke the essential facilities doctrine "unless there is a pre-existing regulatory agency capable of

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106. *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (Jan. 11 1996) (No. 95-1118).

107. *Id.* at 1413.

108. *Id.*

109. Werden, *supra* note 8, at 433.

110. *Id.* at 480.

adequately supervising relief . . . .”<sup>111</sup> If the legislature has not seen fit to regulate an industry, then the facilities within that industry are not essential. Lawrence Sullivan also details a “‘public utility’ approach” to the essential facility doctrine.<sup>112</sup> Sullivan understands *Terminal Railroad Ass’n* and *Otter Tail* as creating a rule that “treats scarce resource or natural advantage monopolies the way regulatory law treats a public utility.”<sup>113</sup> Sullivan notes that these cases impose a duty on essential facilities that resembles the two duties imposed on a public utility, “a duty to provide reasonable service and nondiscriminatory access, and a duty to charge no higher than reasonable prices.”<sup>114</sup>

A uniform definition of “essential” flows from the public utility approaches endorsed by Werden and Sullivan. Indeed, the public need should define what is essential. Therefore, as a prerequisite to applying the test for liability in *MCI*, a court should determine whether the public’s need for access to the facility justifies treating that facility as a public utility.

The Seventh Circuit’s latest pronouncement on the doctrine offers some support for the public utility approach. In response to Blue Cross’ contention that the Marshfield Clinic “restricted staff privileges” at hospitals which the Clinic controlled, the Seventh Circuit held that “[h]ospitals are not public utilities, required to grant staff privileges to anyone with a medical license.”<sup>115</sup> Indeed, this Comment argues that courts should compare the public’s need for the facility in question with the public’s need for regulated utilities such as electricity or water. For example, in *Marshfield Clinic*, the Seventh Circuit implied that health care is not as essential as electricity. In some ways, courts already engage in such comparisons. In *Cyber Promotions, Inc. v. America Online, Inc.*, a federal district court considered whether an e-mail service was an essential facility.<sup>116</sup> The district court held that e-mail was not like a railroad terminal or a telephone communications facility.<sup>117</sup>

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111. *Id.*

112. LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 48, 126 (1977).

113. *Id.* § 48, at 125.

114. *Id.* § 48, at 126.

115. *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (Jan. 11 1996) (No. 95-1118).

116. 948 F. Supp. 456, 463 (E.D. Pa. 1996)

117. *Id.*

### B. *Public Policy vs. Economic Analysis*

This uniform definition of "essential" necessarily involves a consideration of public policy. One commentator, however, has urged a strict economic approach to the essential facilities doctrine. Makar argues that pure reliance on public policy has no place in the essential facility doctrine.<sup>118</sup> Makar believes that it is "unfortunate" when the courts consider public policy instead of economic factors when applying the doctrine of essential facilities.<sup>119</sup> Makar argues that the courts should conduct an "economic balancing of the pro-competitive and anti-competitive effects of exclusion."<sup>120</sup>

Mere reliance on economic factors, however, overlooks the fact that public policy in *Terminal Railroad Ass'n* engendered the essential facility doctrine in the first place. The *MCI* test for liability rightly involves an analysis of economic factors, however, the initial determination of what is essential has very little to do with economics. Indeed, courts must consider public policy in determining the "kinds of facilities one is entitled to keep for oneself."<sup>121</sup>

### C. *Fairness Under Section Two of the Sherman Act*

There is something fundamentally fair about forcing a group of firms under section one of the Sherman Act to share a facility that is necessary for all. In *Terminal Railroad Ass'n*, the Supreme Court underscored this notion of fairness when it noted that a necessary facility, such as the only two bridges spanning the Mississippi river, should not be exclusively owned and controlled by "less than all of the companies under compulsion to use them . . . ."<sup>122</sup> Indeed, no one questions the application of the essential facilities doctrine to concerted action under section one of the Sherman Act. Areeda notes that the concerted action itself may be "evidence of essentiality" because it demonstrates not only the importance of the venture, but also that such a venture is "beyond the individual capacity of the collaborators."<sup>123</sup>

When applied to the conduct of a single firm under section two of the Sherman Act, support for the essential facilities doctrine waivers for a

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118. Makar, *supra* note 8, at 939.

119. *Id.*

120. *Id.* at 919.

121. Areeda, *supra*, note 8, at 851.

122. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 409 (1912).

123. Areeda, *supra* note 8, at 845.

variety of reasons. Areeda notes that the doctrine cannot automatically apply to the conduct of a single firm because such unilateral action is "omnipresent" and difficult to remedy.<sup>124</sup> Indeed, as previously discussed, if a firm can bring an action against a single competitor, the risk is that the firm may try to take a free ride on that competitor's efforts.

However, a uniform definition of an essential facility, based on public policy considerations, ensures a measure of fairness when the essential facility doctrine is applied to the unilateral action of a single firm under section two of the Sherman Act. Indeed, by focusing only on those facilities that are truly essential to the public, one eliminates the incentive to sue a competitor just because that competitor has a better facility.

#### *D. Elimination of Consumer Preferences*

The most disturbing aspect of the essential facilities doctrine is that some courts have relied on consumer preferences in determining what is essential. Tye argues that the antitrust law "would be stood on its head" if firms had "an obligation to affirmatively take steps to achieve the success of a competitor."<sup>125</sup> By creating a uniform definition of essential that relies solely on the public's need for that facility, courts can eliminate considerations of consumer preferences.

#### *E. Elimination of Market Power Considerations*

By defining the word "essential" in relation to the public interest, one eliminates any considerations of market power in determining what is essential. Note however, that if a court finds that a facility is essential, the court must still apply the *MCI* liability test. The first element in *MCI* requires a finding by the court that the owner of the facility be a "monopolist."<sup>126</sup> Consequently, the court must still consider market power in deciding whether liability attaches to the owner of the essential facility.

### IV. CONCLUSION

Amazingly enough, the essential facilities doctrine is almost 85 years

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124. *Id.* at 844.

125. Tye, *supra* note 8, at 348 n. 41.

126. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

old and there is still no consensus about what it means to be essential. Because the Supreme Court has never specifically addressed this doctrine, the circuit courts' need a uniform definition of "essential." Indeed, a facility is truly essential when public necessity justifies treating that facility as a public utility. The duty to share a facility should only arise when occasioned by the needs of the public. Consequently, the needs of the competitor, the preferences of the consumer, and the analysis of the market are all irrelevant in determining what facilities are so essential that they must be shared.

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