ARTICLES

ACCESS DEMANDS TO PAYMENT SYSTEMS JOINT VENTURES

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> The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors.[1]

I. INTRODUCTION

Joint ventures play a critical role in the U.S. economy. Often they will seek to limit their membership, and when they do they face the risk that an excluded party will resort to antitrust litigation in order to compel its admission to the venture.[2] Antitrust access disputes have had a profound impact on competition among payment systems joint ventures, which include credit card, Automated Teller Machine (ATM), and Point of Sale (POS) networks. A lack of clarity in the legal standards governing access demands has made litigation in this area increasingly common.[3] Due to vague standards, competitors often encounter incentives to compete through litigation (or by arranging treaties), rather than by offering better products or services.

1. United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 116 (1975).
2. The term "access demands," for purposes of this article, refers to situations in which a joint venture refuses a person or firm participation in the venture. This assumes that the restriction in membership is not used to impose any other type of restraint. In other words, the source of any anticompetitive effect is the denial of access and not any other restraint imposed by the venture. Membership restrictions that ventures might use to impose other types of restraint would be analyzed under the rubric appropriate for that type of restraint.
3. *See* SCFC ILC, Inc. v. VISA U.S.A., 36 F.3d 958 (10th Cir. 1994); Mastercard Int'l Inc. v. Dean Witter, Discover & Co., 1993-2 Trade Cas. (CCH) ¶ 70,352 (S.D.N.Y. 1993); *see also* David A. Balto, *Antitrust and Credit Card Joint Ventures*, 47 CONSUMER FIN. L.Q. REP. 266 (1993).

This article describes a model for structuring the analysis of these access claims, which will lead to more effective judicial decision making and greater competition in the marketplace. Part I describes how the lack of a structure for analyzing access demands involving payment systems has led to decreased competition between payment systems. Part II discusses recent developments involving access demands brought against single firms. Courts have become more sensitive to the economic impact of these access demands and consequently have carefully structured their analyses of these claims. Part III explains how the lessons of those single-firm cases can be applied to demands for access to joint venture facilities. The section suggests a three-part structure for analyzing these access demands. First, is the joint venture's facility critical to the ability of the excluded party to compete in the market? Second, can the excluded party duplicate the facility either individually or with others? Finally, does the joint venture possess market power? Unless each of these conditions are met, the access claim should not reach the jury. Part IV explains why membership restrictions are efficient. It considers whether the typical rationale for denying access to a joint venture—the prevention of free-riding—applies to network joint ventures, such as credit card and ATM networks, which generally appear to be more efficient as they grow in size.

II. Access Demands and Payment Systems Joint Ventures

To function effectively, joint ventures often adopt membership eligibility standards. These standards may exclude from the venture firms in competition with member firms. An excluded party might then sue the venture and its members, contending that its exclusion constitutes an unlawful group boycott in violation of Section 1 of the Sherman Act.[4] Litigation involving access demands has played an important role in the development of both credit card and ATM joint ventures.

A. *The Worthen Case*

VISA and Mastercard are associations whose membership consists primarily of the banks that issue their cards. While today practically all U.S. banks are members of both associations, this has not always been the case. When Mastercharge (the predeces-

4. 15 U.S.C. § 1 (1988).

sor of Mastercard) and National BankAmericard (the predecessor of VISA) were first formed their memberships were separate, and there was vigorous competition between the two card systems. Card-issuing banks[5] were *either* a National BankAmericard bank *or* a Mastercharge bank. This dichotomy stemmed from a National BankAmericard "anti-duality" rule, which prohibited banks from issuing both National BankAmericard and Mastercharge cards.

In the early 1970s the anti-duality rule was challenged by an Arkansas bank, Worthen Bank, in *Worthen v. National BankAmericard*.[6] Worthen, a National BankAmericard member sought to become a Mastercharge card-issuer (and thereby hold both Mastercharge and National BankAmericard accounts), and challenged the BankAmericard anti-duality rule as a per se illegal group boycott, in violation of Section 1 of the Sherman Act. The lower court agreed with Worthen, but the Eighth Circuit, relying extensively on an amicus brief from the Antitrust Division of the Department of Justice, reversed.[7] The litigation was settled after the appellate court decision.

To clarify the antitrust risk posed by its anti-duality policy, National BankAmericard sought the advice of the Antitrust Division. Specifically, National BankAmericard sought a business review letter from the Department approving a proposed expanded anti-duality rule. After considering the matter for more than a year, the Antitrust Division declined to approve the proposed anti-duality rule. It suggested that a prohibition on duality among card-issuing banks might be permissible. However, it declined to approve a restriction on merchant bank duality, primarily because insufficient information was available to determine the competitive effects of the rule.[8] Faced with the threat of expensive private litigation and an ambivalent Antitrust Division, National BankAmericard reversed its position and abandoned its anti-duality rule.

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5. Banks perform two separate functions involving credit cards: (1) "card-issuance," issuing credit cards to consumers; and (2) "merchant processing," handling business credit card transactions. Thus, the article refers to banks as card-issuers and merchant banks.

6. 345 F. Supp. 1309 (E.D. Ark. 1972), *rev'd*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

7. *Worthen*, 485 F.2d at 130.

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

On balance, the *Worthen* litigation and the Justice Department position ultimately did not foster competition between credit card systems. With no anti-duality rule, banks and merchants rushed to join both associations, and within a short time National BankAmericard and Mastercharge had largely overlapping memberships. The impact of duality on credit card competition has been mixed.[9] On one hand, the emergence of "duality" enhanced both consumer and merchant convenience by permitting merchants to use a single bank for both National BankAmericard and Mastercharge transactions. During the 1970s and 1980s there was a tremendous increase in the number of merchants that would accept credit cards. On the other hand, the repeal of the anti-duality rule sounded a death knell to competition between the two card associations.[10] Overlapping membership created a significant incentive for most members to assure that both associations offer nearly identical products. There has been relatively little competition between the associations in either interchange fees[11] or systems developments. State antitrust officials, in particular, have recognized the "corrosive effect of duality."[12]

B. *The National Bank of Canada Case*

In 1980 Mastercard's anti-duality rule for its Canadian licensees was challenged in *National Bank of Canada v. Interbank Card Association.*[13] Mastercard (Interbank) was a late entrant into the Canadian credit card scene and, like VISA, had an anti-duality rule for its Canadian members. When a Mastercard bank merged with a VISA bank, Mastercard, invoking its anti-duality rule, gave

9. For a detailed discussion of the impact of duality, see David A. Balto, *Ending Mastercard-VISA Duality Would be Win-Win Move*, AM. BANKER, Sept. 20, 1994, at 20.

10. *See* DONALD I. BAKER & ROLAND E. BRANDEL, THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS ¶ 23.02[3] (2d ed. 1988); Balto, *supra* note 3, at 266-68; William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541 (1983); Jules Bernard, *New Directions in Bankcard Competition*, 30 CATH. U. L. REV. 65 (1980).

11. An interchange fee is a fee paid by the merchant's bank to the cardholder's (consumer's) bank for processing the transaction. The bank card association sets this fee and, until the advent of the Discover Card, Mastercard and Visa set the fee on a fully allocated cost basis.

12. *See* Lloyd E. Constantine, *Antitrust Issues in Regulated Industries* 84, Address before the Charles River Associates (Dec. 6, 1990) ("it is now the states' role to halt the corrosive trend of duality"). Constantine is the former head of the New York Antitrust Division. There is a renewed debate on duality within the bankcard associations. *See Mastercard and VISA Scuffle in New Debate on Duality*, AM. BANKER, Dec. 28, 1993, at 1.

13. 507 F. Supp. 1113 (S.D.N.Y. 1980), *aff'd*, 666 F.2d 6 (2d Cir. 1981).

the bank an ultimatum: either withdraw from VISA or lose its membership in Mastercard. The bank refused to withdraw from VISA. Mastercard subsequently terminated the bank's Mastercard membership and this litigation followed.

As in *Worthen*, the court rejected the bank's claim that the anti-duality rule was per se illegal and instead applied a rule of reason analysis. The court upheld the anti-duality rule, focusing extensively on the efficiency rationale for restricting membership. The court noted that the rule was: (1) adopted when Mastercard entered the market; (2) necessary to protect the original members' start-up costs in the venture; and (3) enforcable only for a limited period of time (that is, eight years based on anticipated recovery of start-up costs). Moreover, the court declared that the "underlying purpose of the exclusivity provision was to enhance competition in the Canadian credit card market by introducing a new product, Master Charge."[14]

Thus, unlike in the United States, in Canada membership in either Mastercard or VISA has remained exclusive. Because of this distinct membership, competition between Mastercard and VISA is far more lively in Canada than in the United States.[15] Canadian interchange fees seem more competitive in that they change more frequently and currently are less than those in the United States. Similarly, merchant discounts in Canada are on average over *40% less* than in the United States; merchants often switch banks due to differences of only a few basis points on the discount.[16] VISA and Mastercard also compete aggressively on systems innovations. From a cardholder's perspective, non-duality has led to a proliferation of product development and product innovations. Finally, even though there are fewer cards per consumer in Canada, credit card usage is approximately 60% greater in Canada than in the United States.[17]

14. *Nat'l Bank of Canada*, 507 F. Supp. at 1123. The Second Circuit affirmed the district court opinion in part on the merits and in part on grounds that appellant failed to demonstrate a link between the behavior complained of and anticompetitive consequences to United States commerce. *Nat'l Bank of Canada*, 666 F.2d at 6.

15. Donald I. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 UTAH L. REV. 999, 1065-68 (describing how credit card competition is more aggressive in Canada than in the United States).

16. *Id.*

17. *See* Balto, *supra* note 9, at 21.

C. *ATM Networks*

ATM networks have also been the subject of several access demands. In the mid-1980s there was aggressive competition in New England between BayBanks, the largest proprietary ATM network in the United States at the time, and Yankee 24, a joint venture ATM network formed to enable banks with smaller ATM systems the opportunity to compete with BayBanks. Yankee 24 offered an aggressive pricing structure to attract banks, while both networks offered low fees to consumers in order to attract accounts. When BayBanks sought access to Yankee 24, it was denied. Baybanks sued, claiming that its exclusion was an illegal group boycott.[18] When the parties settled, Yankee 24 admitted Baybanks and promptly eliminated its incentive pricing structure. Soon thereafter, consumer fees increased.

In 1983, the PULSE ATM network in Texas faced a similar access demand from First Texas Savings and Loan ("First Texas"). At the time PULSE and a similar-sized network named MPACT competed aggressively in Texas. First Texas, a member of MPACT, claimed that its exclusion from PULSE would constitute an illegal group boycott. Recognizing that admitting First Texas could create a de facto merger with MPACT, PULSE sought a business review from the Justice Department. PULSE posed three alternatives to the Antitrust Division: (i) admitting First Texas; (ii) generally admitting members of competing networks; or (iii) implementing an anti-duality rule. The Department only addressed the first alternative, saying that at that time admitting First Texas would not constitute an antitrust violation. The Department noted that the increased consumer convenience that would result from the admittance of First Texas (allowing First Texas cardholders access to both PULSE and MPACT) appeared to outweigh the loss of rivalry that might occur between the two competing networks.[19]

Within six months after the Department issued its business review letter, virtually every MPACT member had joined PULSE, and MPACT had eliminated its incentive pricing. Consumers ulti-

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

19. Letter from William F. Baxter, Assistant Attorney General, Antitrust Division, to Donald I. Baker (Aug. 3, 1983). The Department did not address the other two alternatives because it did not consider them ripe for review.

mately felt the sting of the admissions, as several banks increased their consumer fees.[20]

D. *The VISA-Discover Card Case*

The most prominent ongoing access dispute involves a suit brought by Dean Witter (the issuer of the Discover Card[21]) seeking access into VISA for Discover's financial institution subsidiary, MountainWest Financial.[22] Dean Witter had sought to issue a "Prime Option" VISA card. Dean Witter claimed that VISA's bylaws (especially Bylaw 2.06), which deny membership to any institution that issues Discover cards, American Express cards, "or any other card deemed competitive by the Board of Directors," was an illegal group boycott in violation of Section 1 of the Sherman Act. In response, VISA contended that its exclusion of a competitor was justified by the need to maintain and promote intersystem competition and to prevent free-riding on the VISA system by competitors. VISA also filed a counterclaim alleging that Dean Witter's acquisition of MountainWest's assets violated Section 7 of the Clayton Act[23] by partially merging the competing credit card systems and significantly reducing intersystem competition in the general purpose credit card market.

VISA moved for summary judgment, arguing that because Dean Witter was a viable competitor in the credit card market, VISA's action in excluding Dean Witter from membership, as a matter of antitrust law and policy, could not violate Section 1. VISA contended that Dean Witter had a viable antitrust claim only if it could demonstrate that either: (1) VISA possessed market power in the relevant market and Dean Witter was foreclosed from competition with cardholders or merchants; or (2) VISA membership was an "essential facility" necessary for Dean Witter

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20. Ironically, three years later First Texas attacked PULSE's interchange fee structure, relying on PULSE's market power—power due in part to the de facto merger with MPACT. *In re* Arbitration Between First Texas Savings Ass'n and Financial Interchange, Inc., 55 ANTITRUST & TRADE REG. REP. (BNA) No. 1380, at 340 (Aug. 25, 1988); *see* Karen L. Grimm & David A. Balto, *Consumer Pricing for ATM Services: Antitrust Constraints and Legislative Alternatives*, 4 GA. ST. U. L. REV. 839, 852-57 (1993). First Texas sued seeking the ability to assess additional charges for PULSE cardholders using First Texas ATMs. The arbitrator ruled that PULSE was required to permit surcharges or rebates at their ATMs.

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

22. SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993), *rev'd*, 36 F.3d 958 (10th Cir. 1994).

23. 15 U.S.C. § 18 (1988).

to compete in the general credit card market. Under these standards it was clear the court would have granted summary judgment for VISA, because Discover Card clearly had been able to compete successfully in the general credit card market without VISA membership. In August 1992, the court denied VISA's motion. Although it observed that VISA's policy argument was "well taken" and "made with considerable force and persuasion," the court declined to dismiss the case observing that the situation was "unique . . . in antitrust jurisprudence" and that there was "no controlling authority directly on point."[24] Moreover, there were several factual disputes, such as whether VISA possessed market power, that could only be resolved at trial.

1. *Trial and District Court Decision*

The jury returned a verdict for Dean Witter, and on April 1, 1993 the judge denied VISA's motion for judgment notwithstanding the verdict. VISA argued that although the case was subject to a rule of reason analysis, the court should have dismissed the case as a matter of law based on the use of a preliminary "legal screen." The court considered three screens: a market power screen; an "economic sense" screen; and an essential facility screen. With regard to market power, the court held that Dean Witter had presented evidence sufficient to enable the jury to conclude that VISA members, through their combined share in VISA and Mastercard (approximately 72%), possessed market power in the relevant market.[25] The court further held that Dean Witter had presented an economically plausible claim, because excluding Dean Witter was arguably in the interests of VISA members.

The decision to deny the motion focused upon VISA's argument that the court should adopt an "essentiality" threshold, that is, that the case should be dismissed unless Dean Witter could demonstrate that membership in VISA was essential for it to com-

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

25. The court arrived at this share by aggregating the shares of each VISA member in the general credit card market, regardless of what brand of card the member issued. This effectively merged the market shares of VISA cards (46%) and Mastercard cards (26%). The court's aggregation of market shares in this fashion is open to criticism. Courts apply a market power screen to determine if a practice will adversely affect prices or output. Measuring the aggregate market shares of VISA members is uninformative. The fact that VISA cardholders possess a 72% market share does not mean that Dean Witter is excluded from that portion of the market, since those cardholders are not restricted from acquiring a Dean Witter card.

pete. Under VISA's proposed essentiality threshold, when a joint venture excludes a competitor it would not be subject to rule of reason examination "unless the competitor meets a heightened standard—showing that it is unable to compete without the withheld property."[26] In other words, the plaintiff must demonstrate that the venture is an "essential facility" necessary for it to compete.

VISA argued that absent such a rule cooperative activity and innovation would be inhibited. "Compulsory sharing of private property discourages innovation and the creation of new products;" VISA's "right to deal with whomever it chooses should be upheld and respected by the antitrust laws" unless VISA was found to possess monopoly power, or unless the property was an essential facility for competition in the market.[27] VISA concluded that a "duty to share or deal must be imposed only under very limited conditions—conditions captured in the notions of essentiality or market power . . . tantamount to monopoly or deprivation of an input necessary to effective competition."[28]

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

On the essential facilities question, the court observed that "Sears clearly cannot make such a showing . . . . [i]t does not need membership in VISA in order to compete in the general purpose charge card market."[29] Relying heavily on the Supreme

26. *VISA*, 819 F. Supp. at 972.
27. *Id.* at 973.
28. *Id.* at 974.
29. *Id.* at 980.

Court's 1945 decision in *United States v. Associated Press*,[30]—permitting access when the excluded parties suffered a "competitive disadvantage"[31]—the court held that a showing of "essentiality" was unnecessary for the decision.

Having determined that there existed no basis in law for reversing the jury's verdict, the court reviewed whether there was a legally sufficient evidentiary basis. At the beginning of its analysis, the court made clear that "its view of the evidence differs from the jury's findings."[32]

> If the court had been the fact-finder . . . it would most likely not have concluded that keeping Sears out of the VISA system substantially harms competition in the relevant market. In fact, the court would have concluded that the harm to competition from letting Sears into the VISA system is greater than any harm from keeping Sears out. If it had been the fact-finder, the court would have been inclined to find no net harm to competition from Bylaw 2.06. . . .[33] The court believes that Bylaw 2.06 fosters intersystem competition in the relevant market. . . . Simply adding another high-priced card issuer, as Sears has always been with both the Discover Card and the Sears charge card, to the VISA system will not solve the problem. It may provide short-term intrasystem competitive benefits within the VISA system, but in the long run, in the court's judgment, the damages from such inclusion will outstrip the benefits. *Eventually, consumers will be left with one more top-ten VISA issuer charging relatively high interest rates and a VISA/MasterCard system which will dominate the general purpose charge card field to an even greater extent than it does today.*[34]

The court's observations regarding the competitive impact of permitting Dean Witter to join VISA are particularly noteworthy because the court was the trier of fact in equity for VISA's counterclaim. Thus, like the jury, it also had a responsibility to weigh the evidence. Although the court clearly disagreed with the jury's assessment of the competitive effect of excluding Dean Witter, it was forced to leave the jury verdict intact because sufficient evidence existed to support the jury's findings.

30. 326 U.S. 1 (1944). The decision in *Associated Press* is of dubious precedential value. *See infra* notes 104-11 and accompanying text.

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

32. *Id.* at 983.

33. *Id.*

34. *Id.* at 983-84 (emphasis added).

The analysis of the Section 7 counterclaim focused on the intersystem competitive effect of Dean Witter's admission into VISA. The court found that intersystem competition was important and helped "promote innovation in the development of transactional processing systems and merchant base expansion, thereby benefitting consumers."[35] It noted that Dean Witter's admittance to VISA would likely harm intersystem competition because Discover would not compete as vigorously with VISA after it had issued Prime Option, and Dean Witter would have access to confidential VISA information. Despite these findings, the court declined to enter judgment on the counterclaim for VISA because it did not believe that the likely harm to competition would be significant in light of Dean Witter's expressed intention during the litigation to continue to market the Discover card vigorously. Therefore, the court dismissed the Section 7 counterclaim.

2. *Tenth Circuit Decision*

On September 23, 1994, Judge Moore, writing for the Tenth Circuit, reversed.[36] The court began by emphasizing that the focus of the antitrust laws is the impact of a practice on consumers, and cited Justice Breyer for the proposition that the objective of antitrust regulation is "to improve people's lives . . . [through] economic efficiency . . . and more efficient production methods . . . [and] through increased innovation."[37] Considering the context—that of an antitrust suit where "a successful competitor alleges antitrust injury at the hands of a rival"—a focus on the actual impact on consumers was very important. The court, citing Judge Easterbrook, observed that whenever competitors "invoke the antitrust laws and consumers are silent," an inquiry into the impact on "consumers becomes especially pressing."[38] Analyzing the critical issues of market power and efficiency through their "impact on consumers," the appellate court ended up with an entirely different result.

35. *Id.* at 995.
36. SCFC ILC, Inc. v. VISA U.S.A., 36 F.3d 958 (10th Cir. 1994).
37. *Id.* at 962.
38. *Id.* at 965.

a. *Market Power—Expert Testimony Alone is not Enough*

The court next considered whether VISA possessed market power. Identifying the existence of market power first requires a definition of the relevant market, which in this case had been obscured. Although the parties had appeared to litigate the case based on a systems market, the real focus of Discover's claims involved *issuer competition.* Discover argued that: (1) the purpose of excluding it from VISA was to protect VISA members from competition at the *issuer* level; and that (2) the benefits from the entry of a Prime Option card would impact credit card *issuance.* Thus, the court concluded that the relevant market power inquiry was VISA's power in the credit card issuer market. This issuer market did not appear concentrated: there existed thousands of credit card issuers, and no single issuer had more than a twelve percent market share.

The Tenth Circuit then addressed the district court's use of the aggregation theory proposed by Discover's expert, and the expert's claim that VISA's ability to pass a rule that excluded Discover was evidence of its market power. The court observed that collective rulemaking should not necessarily warrant antitrust suspicion, because such ancillary restraints generally increase joint venture efficiency. The *effect* of the rules, and not the rulemaking itself, should be the focus of the market power inquiry, Judge Moore concluded. With this in mind, Judge Moore found Discover's case wholly lacking: Discover had presented no evidence that VISA's rule led to higher prices or lower output. Quoting the Supreme Court, he rejected the expert's testimony, because " '[e]xpert testimony is a useful guide to interpreting market facts, but it is not a substitute for them.' "[39] In short, the expert testimony alone was insufficient to demonstrate that VISA possessed market power.

b. *Efficiency—Excluding a Competitor may be Procompetitive*

The court then considered whether the VISA anti-duality rule was "reasonably necessary" to the success of the venture. VISA claimed that the purpose of the rule was to protect its property from intersystem competitors who sought to free-ride on VISA's efforts. VISA also claimed that, because of the small number of

39. *Id.* at 969 (citing Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2598 (1993)).

intersystem competitors, admitting Discover might harm intersystem competition and eventually lead to government regulation of VISA as a possible monopolist. Case law and Justice Department antitrust guidelines have recognized both of these concerns. Discover presented two arguments that VISA's efficiency claims were pretextual. First, Discover claimed that the true purpose of the rule was to prevent entry of a low price competitor. This argument was unavailing; an intent to harm a rival was simply irrelevant to whether the restraint harmed consumers. Thus, the evidence the district court relied upon, that VISA's members sought to harm Discover, was "not an objective basis upon which . . . liability may be found."[40]

Discover's more novel second argument suggested that the efficiency justification was pretextual because VISA, unlike most joint ventures, was "open," that is, it had admitted thousands of members after its initial risk-taking phase. In addition, since VISA was a *network* joint venture whose integrative efficiencies grew as its membership increased, a rule excluding others could not be procompetitive.

The court did not directly address this second claim. Instead it simply found that neither policy nor precedent supported it. In doing so, the court explained how the trilogy of Supreme Court exclusionary restraint cases—*Terminal Railroad*,[41] *Associated Press*,[42] and *Aspen Ski*[43]—did not compel a contrary result and could be distinguished: *Terminal Railroad* was an extraordinary case; *Associated Press* never stated that a joint venture could not exclude; and *Aspen Ski* focused on conduct that changed the character of the market, a condition absent in this case. More importantly, the court emphasized that exclusion from VISA did not constitute exclusion from the market and that Discover had presented no evidence that it could not develop the Prime Option card independent of VISA membership.

In the end, the court determined that the bylaw was both collateral and essential to VISA's business because the bylaw prevented competitors from free-riding on VISA's efforts. In doing so it relied on an extensive discussion of *Rothery Storage & Van Co.*

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40. *Id.* at 970.
41. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
42. Associated Press v. United States, 326 U.S. 1 (1945).
43. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

v. Atlas Van Lines, Inc.[44] *Rothery*[45] held that a joint venture's exclusivity rule was a legitimate response to the threat of free-riding.

More important than the lack of legal support for Discover's arguments was the fact that Discover presented no evidence that the bylaw harmed consumers. Indeed, the court observed that the credit card market is "structurally competitive," with scores of issuers "targeting different consumer groups and consumer needs."[46] Discover already competes vigorously in the market, and a goal to compete "*more effectively*" did not "constitute[ ] the proverbial sparrow the Sherman Act protects."[47] Consequently the court concluded that because

> there was no evidence price was raised or output decreased or [Discover] needed VISA USA to develop the new card, we are left with a vast sea of commercial policy into which [Discover] would have us wade. To impose liability on VISA USA for refusing to admit [Discover] or revise the bylaw to open its system to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces. Whatever currents [Discover] imagines VISA USA wrongly created . . . can be better corrected by the marketplace itself. The Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare."[48]

The case is currently on appeal to the United States Supreme Court.[49]

E. *The Mastercard-Discover Card Case*

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

44. 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

45. *Rothery* is a decision by former Judge Bork that had been joined by Justice Ginsburg while she sat on the D.C. Circuit with Bork. Bork filed an amicus brief in the *VISA* case supporting Discover's position.

46. *VISA*, 36 F.3d at 972.

47. *Id.*

48. *Id.*

49. For a discussion of the impact of the decision in *VISA* on competition in the credit card market, see Balto, *supra* note 3, at 270-71.

their refusal to permit issuance of the Prime Option card violated the antitrust laws.

The district court rejected Mastercard's motion to dismiss the counterclaim in August 1993.[50] First, the court rejected Mastercard's claim that Dean Witter failed to allege sufficient facts to establish concerted action. The court held that allegations that "alleged competitors entered into an agreement that was designed to further their own economic interests" sufficiently demonstrated concerted action.[51] At this early stage of litigation, allegations that executives of the Mastercard member banks who were serving on the Mastercard board when the alleged exclusionary decisions were made, were sufficient to survive the motion to dismiss.

Second, the court rejected Mastercard's claim that Dean Witter failed to allege properly an unreasonable restraint of trade. As in the *VISA* case, Mastercard argued that its decision to deny Dean Witter's application did not constitute an unreasonable restraint of trade because Dean Witter was independently capable of competing in the credit card market. The court disagreed; like the court in Utah it relied on *Associated Press* to hold that a restraint need not inhibit all competition in the relevant market to fall within the scrutiny of the antitrust laws. The parties settled the case in November 1993.[52]

F. *A Net Assessment of Access Demands in the Context of Banking Joint Ventures*

The record of over twenty years of access demands is not a promising one for competitors or consumers. First, despite frequent litigation, the standards governing these access demand claims remain particularly cloudy. Although the *VISA* case was judged under the rule of reason, the failure to structure that inquiry by adopting a series of threshold inquiries makes it difficult

50. 1993-2 Trade Cas. (CCH) ¶ 70,352 (S.D.N.Y. 1993).

51. *Id.* at 70,839.

52. Under the settlement, Mountainwest was not admitted into Mastercard. Rather, NationsBank, a Mastercard member, will be permitted to issue a Prime Option Mastercard, co-branded with Dean Witter. *See Dean Witter, Mastercard Settle; Deal Calls For New Nationsbank Card*, 61 Banking Rep. (BNA) 851 (Nov. 29, 1993); *see also Seeking an Edge, Prime Option Opts to Lower Its Interest Rate*, CREDIT CARD NEWS, Feb. 15, 1994 (stating that although the card has yet to be issued, NationsBank has already had to "cut the [card's interest] rate to make Prime Option stand out in a market crowded with low-rate cards. . . . Observers say the flood of new low-rate cards in just the three months since Prime Option was announced forced the card to lower its pricing.").

to predict how any factfinder is likely to assess the "reasonableness" of membership exclusion. That the judge and the jury reached *opposite* conclusions about the competitive effect of the admission of Dean Witter into VISA only emphasizes the magnitude of this uncertainty.

Second, because of this uncertainty, banking joint ventures are often presented with a difficult and unsalutary choice: either admit the competitor and face the risk of government enforcement action (as described below),[53] or deny access and litigate the denial all the way to a jury with substantial litigation costs, the threat of treble damages (the treble damages in the VISA case are estimated at approximately $1 billion), and little certainty of success. Banking joint ventures, which are typically not-for-profit entities, do not possess either the capital or the stamina for private litigation. Faced with the choice between the risks of private litigation and those of government enforcement, in most cases the venture will likely disregard the threat of litigation brought by the enforcement agencies and admit the competitor. It is no surprise that the two cases brought in the past year, involving suits against Mastercard and NYCE, were settled with the admission of the competitor.

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

Finally, as the BayBanks and PULSE litigation demonstrates, uncertain legal standards provide incentives for potential or actual competitors to avoid competition with the venture by de-

53. Payment systems joint ventures face the risk of government enforcement from three sources: the Antitrust Division of the Justice Department, the Federal Reserve Board, and State Attorneys General. For a description of the risks of government enforcement, see David A. Balto, *Antitrust Analysis of Financial-Institution Joint Ventures*, WORLD COMPETITION, June 1993, at 107.

manding and receiving access. As described above, joint ventures often seek to restrict participation for legitimate competitive reasons. Where efficiencies of scale are attainable only through limited industry participation, antitrust policy might welcome such restrictions because they enable development of multiple, competing ventures and are more likely to yield an efficient market outcome. Where unclear legal standards persist, private parties will continue to use antitrust litigation, or the threat of litigation, to compel admission to banking joint ventures. In this way, competition between banking joint ventures has and will continue to diminish.

III. The Limited Circumstances in which Courts Have Ordered Access Involving Single Firms

Access claims are often brought against single firms challenging the denial of access to a facility or business relationship as a violation of Section 2 of the Sherman Act,[54] under what has been characterized as the "essential facility" doctrine. This doctrine requires a monopolist to share its facility or business relationship where the denial of access would permit the monopolist to extend its monopoly into an adjacent market. The circumstances in which the courts have required access are very limited. Requiring access to a facility is basically a public utility type of regulation and is at cross purposes with two of the essential ingredients of antitrust: protection of freedom of association (including the right not to sell to a particular buyer)[55] and encouragement of rivalry and innovation. Thus, a leading antitrust treatise has suggested that the essential facility doctrine should be limited to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately."[56]

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54. 15 U.S.C. § 2 (1988).

55. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

56. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 736.2 (1993 Supp.). The only successful essential facility cases are those that have effectively met these standards. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (electric power lines); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1987) (basketball arena); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) (mountain), *aff'd on other grounds*, 472 U.S. 585 (1985); MCI Communications Corp. v. AT & T, 708 F.2d 1081 (7th Cir.) (local

Perhaps the most important essential facility case was MCI's successful suit against AT&T in the early 1980s.[57] MCI, an emerging long distance carrier, sought access to AT&T's local telephone exchange. AT&T refused and MCI sued claiming that the refusal violated Section 2. MCI claimed that without access to the local exchange it would be unable to offer long distance service to local residential customers effectively. Finding that a jury could have concluded that the refusal constituted an act of monopolization, the court assessed the challenged conduct under the essential facility doctrine. The court set forward a four-part test for establishing liability for essential facility claims:

> (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.[58]

The court's rationale for applying the doctrine to single-firm conduct was that "a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market to another."[59]

The essential facility doctrine was very much in vogue in the mid to late 1980s. At the time, Judge Michael Boudin observed that "[d]espite its embarrassing weakness, the [essential facility] doctrine is nevertheless alive and well in the lower courts, doing mischief and gaining momentum."[60] In 1988, the ABA Antitrust Section held a seminar on "cutting edge" issues that focused largely on that doctrine.[61] Since that seminar was held there have been a number of interesting trends in cases decided under the doctrine. First, the courts have increasingly recognized that the doctrine is primarily concerned with the effect of exclusion from the facility on competition in the primary market, that is, the

telephone exchanges), *cert. denied*, 464 U.S. 891 (1983); Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977) (football stadium), *cert. denied*, 436 U.S. 956 (1978).

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

58. *Id.* at 1132-33.

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

60. Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 402 (1986).

61. A.B.A. Sec. Antitrust Law, Fall 1989 National Institute—The Cutting Edge of Antitrust: Exclusionary Practices (1989). Selected papers from this seminar are reprinted in 58 ANTITRUST L.J. (1989).

market in which the excluded party competes with the owner of the facility.[62] Second, courts have held that the fact that a facility offers a service that is simply *less costly* than other alternatives (or offers some type of competitive advantage) does not make the facility essential.[63] Third, the courts have focused on the effect of the exclusion on the "competitive process," rather than on the harm to any individual plaintiff.[64] What is most remarkable about some of these cases is that the facility at issue was of the type traditionally perceived as essential: natural gas pipelines, electric utility transmission lines, railroad lines, or computer reservation systems. It is also notable that all of these cases were resolved by the courts without a full trial.

The most critical issue is the degree of competitive impediment that must be imposed to compel access. In the joint venture context, as in the *VISA* case,[65] a plaintiff could argue that access should be required if it would offer a "competitive advantage." That argument is based on the Supreme Court's opinion in *Associated Press v. United States.*[66] In the single firm context, recent court decisions have soundly rejected the notion that a "competitive advantage" is sufficient to compel access. For example, in *City of Anaheim v. Southern California Edison Co.*,[67] the Ninth Circuit considered a claim brought by municipal utilities that the denial of access to certain high-power transmission lines (the "Pacific Intertie"), providing access to power at significantly lower cost than other sources of power, violated the essential facility doctrine. The court found that the power lines were not essen-

62. *See supra* note 59 and *infra* note 63.

63. *See, e.g.*, City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 648-49 (10th Cir.) (holding that no "severe handicap" is imposed by requiring city to purchase pipeline's gas rather than less expensive gas from third party—a showing of "inconvenience or economic loss" insufficient), *cert. denied*, 113 S. Ct. 96 (1992); *Alaska Airlines*, 948 F.2d at 544-46 (rejecting essential facility claim because denial of access would only impose financial burden on excluded competitors, not "eliminate" them); Laurel Sand & Gravel, Inc. v. CSX Transp., 924 F.2d 539, 544-45 (4th Cir.) (holding that denial of trackage rights did not support essential facilities claim where plaintiff could have purchased (more costly) train service), *cert. denied*, 112 S. Ct. 64 (1991); Twin Labs. v. Weider Health & Fitness, 900 F.2d 566, 569-70 (2d Cir. 1990); Advanced Health-Care Services, Inc. v. Giles Memorial Hosp., 846 F. Supp. 488, 498 (W.D. Va. 1994).

64. *See Alaska Airlines*, 948 F.2d at 544 (stating that a facility "will be considered 'essential' only if control of the facility carries with it the power to *eliminate* competition in the downstream market"); *see also* Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir.) ("unless [the facility] can be and is used to improperly interfere with competition, it can not be called essential"), *cert. denied*, 113 S. Ct. 305 (1992).

65. SCFC ILC, Inc. v. VISA U.S.A., 36 F.3d 958 (10th Cir. 1994).

66. 326 U.S. 1 (1945).

67. 955 F.2d 1373 (9th Cir.), *cert. denied*, 113 S. Ct. 305 (1992).

tial, because the municipal utilities had many alternative means of obtaining power at reasonable rates.[68] Moreover, the theory that access should be compelled because it would offer a source of less expensive power was inconsistent with the purposes of the doctrine. The court, quoting the district court judge, explained:

> the Cities' whole argument asks the Court to turn the essential facilities doctrine on its head. Rather than seeking to impose a duty to deal based on the harm that would result to competition from the monopolist's refusal, the Cities seek to impose a duty to deal based on the extent to which a competitor might benefit if it had unlimited access to the monopolist's facility.[69]

The court concluded that a potential savings was not enough to turn the Pacific Intertie into an essential facility.

The clarification of this doctrine with respect to single firm cases appears to be having the desired effect. In the past several years, all of the reported essential facility cases have been resolved without a trial on the merits.

IV. What is the Appropriate Approach to Compulsory Access Claims Involving Payment System Joint Ventures?

Unfortunately, the clarity arising in the law of single firm cases such as *MCI* and *City of Anaheim* has not yet found its way to access demands brought against joint ventures. The Supreme Court's 1984 decision in *Northwest Wholesale Stationers* clarified the scope of per se illegality for access demands when it declared that exclusions by joint ventures are not per se illegal where the venture "does not possess market power or exclusive access to an element essential to effective competition."[70] Although *Northwest Wholesale Stationers* clarified the dimensions of per se liability, it did not explain how the liability inquiry under the rule of reason should be structured. Despite the need for an analytical framework for resolving liability under the rule of reason without a full-trial, no appellate court has furnished one. Thus, the courts have had little guidance for structuring analysis under the rule of reason in order to resolve liability without a full trial.[71]

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68. *Id.* at 1381.

69. *Id.*

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

71. For a thorough and insightful analysis of the inadequacy of traditional rule of reason analysis, see Baker, *supra* note 15, at 1036-41.

A. *Preliminary Observations*

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

1. *Policy Considerations*

Analysis of antitrust claims based on an exclusion of a competitor from a joint venture should address four important policy considerations. The initial concerns focus on competition. First, in many circumstances, requiring rivals to collaborate may diminish competition by placing what otherwise would be an effective independent competitor of the joint venture within the venture itself. Second, requiring joint ventures to admit rivals may diminish incentives to form collaborative ventures by denying co-venturers who undertook significant risks to achieve market acceptance to share the benefits of market success with parties that did not share the risks.

The third and perhaps most important concern is that of predictability. Where legal standards are ambiguous, it is difficult for businesses to assess the risks of certain conduct. Where possible, antitrust should prefer tests that improve predicability. As Congress recognized when it passed the National Cooperative Production and Research Act of 1993 ("NCPRA"),[72] uncertainty in the law may deter desirable joint activity, by creating the perception of exaggerated antitrust risks. This cost is especially significant when it involves collaborative activity, because these ventures often can bring new products and services to the market that can not be provided by any individual member of the venture. Thus, the rule of law governing mandatory access should be predictable so that business executives can plan collaborative activities with an understanding of the effective legal standard. A broad "reasonableness" standard lacks predictability and, to some extent, may inhibit procompetitive collaboration that re-

72. 15 U.S.C. §§ 4301-4305 (1993). The Senate report that accompanied the NCPRA states: "Our antitrust laws rely on private as well as public enforcement, however, and the fear of a private action for treble damages can be a powerful deterrent to procompetitive conduct where uncertainty exists regarding the applicable antitrust standards." S. REP. FOR S. 574, *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 729 (June 10, 1993); *see also* Thomas M. Jorde & David J. Teece, *Innovation, Cooperation and Antitrust*, 4 HIGH TECH. L.J. 1, 36 (1989) (describing how uncertainty in the law deters effective collaboration).

quires a limited membership. In the situation of access demands, a more structured inquiry is possible and should be adopted.

A final policy consideration is the effective use of judicial resources. Antitrust trials are costly, both for the parties and the courts. Thus, in many contexts, the courts have attempted to optimize their efficiency, as well as foster predictability, by structuring the relevant legal inquiry so that a full trial may be unnecessary.[73] Notably, while almost all the recent Section 2 access cases have been resolved based on summary motions, several Section 1 cases have not.[74] Thus, in order to facilitate effective use of the courts and improve predictability, the rule of law should provide for a threshold inquiry under which the court may be able to resolve the litigation.

2. *Is a Stricter Standard for Joint Ventures Appropriate?*

The more difficult policy question is why a stricter standard should be applied to a refusal to provide access by a joint venture than a refusal by a single firm. After all, the effects of the denial of access on the plaintiff and the market are the same whether the facility is owned by a single firm or a joint venture. A single firm typically faces liability for a refusal to provide access under Section 2 only if: (1) it is a monopolist; (2) its facility is essential to the plaintiff's competitive viability; (3) the facility is not capable of duplication; and (4) there is no reasonable basis for the denial. For joint ventures the standards are far less clear, but the decisions in the banking cases suggest that there may be liability under Section 1 if: (1) the joint venture possesses a large market share (but is not a monopolist); and (2) the facility offers a competitive advantage. Thus, the standards for joint ventures seem considerably stricter than those for single firms.[75]

Applying a stricter standard for joint ventures needs explanation. Generally, the Supreme Court has observed that there are stricter standards for finding liability under Section 1 than Section 2 because of the risks of collusion.[76] The few commentaries

73. *See* Antitrust Law Developments 57 (3d ed. 1992); Baker, *supra* note 15, at 1103-04; Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity than Ever*, 62 Antitrust L.J. 327 (1994) (describing how recent Supreme Court decisions have sought to establish relatively clear, generalized rules to improve certainty in the law).

74. *Compare infra* note 63 *with infra* note 104.

75. *See* William Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 Antitrust L.J. 855, 864-69 (1989).

76. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984) ("Concerted activity inherently is fraught with anticompetitive risk. It deprives the market-

that have addressed the issue in the context of access demands have suggested that the differing standards are based on the distinction between unilateral and concerted action, and the greater likelihood that refusals to deal by joint ventures will lead to collusion among their members.[77]

It is questionable whether an assumption that joint ventures will exclude potential members in order to enforce a collusive agreement (for example, an agreement restricting its members' prices or output) is justifiable. First, the single firm standard of illegality should accurately detect joint behavior that threatens economic harm. As Professors Areeda and Turner have observed, joint action in the form of a cartel is hampered by "divergent interests, strong temptations to cheat on the cartel price, nonprice competition, and changes in market shares."[78] In order to overcome these problems, the members of a cartel would have to "emulate a monopoly and fully control the operations and sales of the members."[79] Second, an assumption that joint venturers will exclude potential members in order to enforce a collusive agreement also runs counter to economic theory, which suggests that cartel members will seek to *include* all competitors in order to police behavior and ensure cooperation.[80]

The stricter standard applied to concerted action can yield inconsistent results in the market. Joint ventures will incur liability not incurred by single firms, even though their conduct only restrains trade to the same extent as that of single firms, and even though the joint ventures do not possess monopoly power collec-

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place of the independent centers of decisionmaking.... In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.").

77. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1d (1993 Supp.) (The law is more concerned with concerted action because "conspiracies... are relatively infrequent, easily appraised for reasonableness, and simply remedied through prohibition"); David J. Gerber, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities,"* 74 VA. L. REV. 1069, 1095-98 (1988).

Areeda and Hovenkamp's observation that refusals by joint ventures are "simply remedial" may be overstated somewhat. Often attempts to remedy these refusals have led to even more litigation. *See* Baker, *supra* note 15, at 1076 & n.305 (observing that in some cases where the court mandated access, there was substantial subsequent litigation over the terms of access).

78. PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 405b (1978); *see* Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, 857 F.2d 55, 67 (2d Cir. 1988) ("the cartel is inherently more fragile than the single-firm monopolist. The interests of the cartel as a whole often diverge substantially from the interests of individual members.") (quoting HERBERT HOVENKAMP, FEDERAL ANTITRUST LAW § 4.1, at 83 (1985)).

79. PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 405b (1978).

80. Gerber, *supra* note 77, at 1095-98 (explaining why the collusion assumption is inconsistent with economic theory).

tively.[81] Finally, the remedy sought in a compulsory access claim, that of admitting the excluded party, seems inconsistent with the concern of preventing collusion. Compelling the admission of new members, especially competitors, would appear to *raise* rather than reduce the risks of collusion.[82]

Applying stricter standards to joint ventures than to single entities may have several adverse effects on competition. First, as Congress recognized in passing the NCPRA, joint ventures serve an important role in bringing productive activity to the economy that sometimes cannot be provided by single firms. Applying stricter, or even less precise standards, may deter this productive activity. Second, in markets where single firms compete with joint ventures, the joint ventures may be placed at a competitive disadvantage, because they face a greater threat of liability if they deny access. Third, under the *Associated Press*[83] standard, if the joint venture acquires some sort of competitive advantage it may be compelled to share it with its competitors. Thus, the threat of compulsory sharing dampens the incentives to compete vigorously, for if the joint venture succeeds and acquires a competitive advantage or market power, it might be compelled to grant competitors access. Similarly, it dampens the incentives to innovate, for if the joint venture invents a "better mousetrap," that innovation may have to be shared. Fourth, the stricter standard creates disincentives for the creation of competing joint ventures, since competitors can use the compulsory access doctrine to free ride on an existing successful venture, rather than suffer the risk associated with organizing a venture of their own. Finally, in order to avoid the risk of liability based on market power, a venture may choose to operate at "a suboptimal scale for fear that an efficiently sized venture would lead to compulsory access."[84] Thus, several recent commentaries have suggested that access to joint ventures should be judged by essentially the same standards as are applied to single firms.[85]

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81. Blumenthal, *supra* note 75, at 866-67.

82. *Cf.* PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1477 (1986) (suggesting, in the trade association context, that the stricter Section 1 standard be applied only to trade association activities that restrict competition between the association's members, whereas the single firm standard should apply to other types of restraints).

83. United States v. Associated Press, 326 U.S. 1 (1944).

84. Blumenthal, *supra* note 75, at 868.

85. *See* Baker, *supra* note 15, at 1102-11; Blumenthal, *supra* note 75, at 868; Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 477-78 (1987); *see also* Department of Justice, Antitrust Division, *Antitrust Enforcement Guidelines for International Operations*, 4 Trade Reg. Rep. (CCH) ¶ 13,109.10, ¶ 3.42 (1988)

B. *How Should the Analysis be Structured?*

This article proposes a three-part inquiry, similar to that used in single firm essential facility cases, to structure the analysis of a joint venture access demand.[86] First, can the excluded party duplicate the facility either individually or with others? Second, is the joint venture's facility critical to the ability of the excluded party to compete in the market? Finally, does the joint venture possess market power? Unless each of these conditions are met, the access demand should not reach the jury.

[hereinafter *International Guidelines*] ("the Department generally will be concerned about a joint venture's policy of excluding others only if (i) an excluded firm cannot compete in a related market or markets (that is, a market or markets with respect to which the joint venture product or service is a complement or an input) in which the joint venture members are currently exercising market power without having access to the joint venture and (ii) there is no reasonable basis related to the efficient operation of the joint venture for excluding other firms"); Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 963 (1993) ("the requirement of open access is limited to cases that fall within the 'essential facility' rubric, such as real estate multiple listing services"); Mary Lou Steptoe, An Antitrust Enforcement Perspective on Membership Restrictions, Prepared Remarks Before the 30th Annual Symposium on Associations and Antitrust Trade Association and Antitrust Law Committee Bar Association of the District of Columbia 25 (Feb. 16, 1994) [hereinafter *Steptoe speech*] ("the requirement of open access should be limited to situations in which membership approximates what has been characterized as an essential facility").

86. This discussion assumes that the denial of access is simply an exclusion from the venture, rather than part of an underlying agreement not to compete by the members of the venture. If the denial of access is part of a membership restriction that enforces an underlying agreement not to compete, the restriction may be subject to summary condemnation. For example, if members of a venture restrain competition among themselves by agreeing to refrain from advertising, that agreement might be condemned without full rule of reason analysis. The venture's exclusion from membership of those who engaged in advertising might also be summarily condemned. *See Steptoe speech*, *supra* note 85, at 16-17; Remarks of Walter T. Winslow, Associate Director, Bureau of Competition, FTC, 55 ANTITRUST L.J. 309, 317 & n.58 (1986).

This distinction helps to clarify the result in *Associated Press.* In *Associated Press*, the members had agreed to a system of exclusive territories. Each member had the power to veto the admission of new applicants in its territory. Exclusion from the association raised competitive concerns because it enforced that system of exclusive territories. The Court's concern was with the underlying restraint, not with the mechanism used to enforce it. Thus, the Court only struck down a member's veto power. It did not compel Associated Press to admit anyone. *See Associated Press*, 326 U.S. at 24 (Douglas, J. concurring); *see also* Consolidated Metal Prods., Inc. v. American Petroleum Inst., Inc., 846 F.2d 284, 292 n.21 (5th Cir. 1988) (stating that the holding in *Associated Press* "may be based more on the territorial division imposed by AP than on any boycott"); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1367 n.30 (5th Cir. 1980) (same); Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 842 (1989) ("remedy was to enjoin this discrimination, but the Court was very careful *not* to say that the Associated Press had to admit everyone").

1. *Can the Facility be Duplicated?*[87]

The second inquiry focuses on the question whether the plaintiff, either alone or with others, can create an alternative to the facility within a reasonable time. If the defendant can establish that the plaintiff could provide such an alternative facility, the access claim should be dismissed. This inquiry would require analysis of two subsidiary issues. The first focuses on entry barriers and the second focuses on the structure of the market—that is, whether there are regulatory or other barriers to entry at the venture level,[88] and whether there is sufficient network demand available to create an alternative network.[89] If the joint venture has less than 50% of the available market demand, it seems likely that there is sufficient available demand to create an alternative network.[90]

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

87. A preliminary factor that should be considered in each step of the analysis is defining precisely the facility to which the claimant seeks access. For example, does the claimant seek access to a computer system, a trademark, a group of merchants or a group of banks? Some facilities, such as an interchange system, may be far more difficult to replicate than a product mark, particularly if there is insufficient demand to support a second network. A factfinder that defines the facility at issue too broadly may erroneously decide the joint venture possesses a facility impossible to duplicate economically, while a factfinder that defines the facility too narrowly risks erroneously deciding that the joint venture's facilities may all be duplicated in a piecemeal fashion, overlooking a significant positive externality deriving from sheer size. *See* John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571, 597-98 & nn. 109-112 (1993) (describing effect in which increase in network's size increases its value to the consumer); *id.* at 601 & n. 124 (positing that first firm to establish large base in network industry captures the most significant positive externality available in the market). Thus, disaggregating the elements of a payment system will lead to clearer decision making. *See* Baker, *supra* note 15, at 1099-102.

88. For example, the *Health Care Industry Policy Statements* observe that because entry barriers into forming joint purchasing groups are not great, "it is not necessary to open a joint purchasing arrangement to all competitors in the market." 4 Trade Reg. Rep. (CCH) at 20,786.

89. If a network has achieved a certain "critical mass" there may be insufficient demand for the creation of an alternative network. *See* Stevens, *supra* note 87, at 592-93.

90. *See* Baker, *supra* note 15, at 1108.

One example of the type of case that meets these standards involves the challenge brought in the mid-1970s by the Justice Department against two regional Automated Clearing Houses ("ACHs") that excluded thrifts from their membership.[91] On the issue of duplication, the Department believed that there was insufficient available volume for the thrifts to create a competing ACH. Moreover, the Federal Reserve Board's almost total subsidy of the ACH operations made independent competitive alternatives economically unfeasible. The cases were settled with the admission of the thrifts.

The ability of the plaintiff to replicate the network is critical. Where the excluded party is able to compete effectively with the joint venture, its mandatory admission into the venture is likely to diminish competition in the market in which the venture competes. It will decrease the likelihood that the excluded party will enter independently to compete against the joint venture. As described earlier, in the ATM area, the compulsory admission of competitors has led on several occasions to the diminution of intersystem competition.

Where competition at the joint venture or system level is possible, courts should be reluctant to mandate access too readily because of the impact on system competition. The VISA-Discover history provides an excellent example of the technological benefits competition may produce. When Dean Witter began issuing the Discover Card, VISA denied Dean Witter access to its point of sale transaction authorization terminals. (At the time, these terminals were not as universal as today.) Faced with this denial of access, Dean Witter had two choices: it could litigate or innovate. Conceivably, it could have brought an antitrust claim arguing that the transaction clearance system was essential, because without it the cost of authorizing transactions would have been much higher. Instead, Dean Witter chose the path of innovation and created its own terminals and transactions authorization system. Many merchants found these terminals to be more attractive than the products offered by VISA and Mastercard. Discover Card thus led the conversion of merchants from paper to electronic processing. In response, VISA and Mastercard had to improve their transaction processing system. Ultimately, consumers

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

benefitted through lower cost and more efficient transaction processing.

2. *Is the Facility Essential to Compete in the Market?*

The first question focuses on how the competitive process is affected by the exclusion. The Supreme Court has proclaimed that the antitrust laws were enacted for the "protection of *competition*, not *competitors*."[92] As the Tenth Circuit observed in the *VISA* case, although a party may be prevented from joining a collaboration, that exclusion does not necessarily have a significant impact on the market. The mere fact that a party is excluded from a collaboration is, in and of itself, insufficient to demonstrate injury to competition. The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.[93] The Supreme Court in *Northwest Wholesale* implicitly recognized the importance of this distinction when it approved of the district court's dismissal of the case because there "simply [was] no showing by the Plaintiff . . . of a restraint of competition as distinguished from possible damage to the Plaintiff by being expelled from the association."[94] The federal antitrust agencies have adopted this standard. The FTC and the Justice Department, in their recently issued *Health Care Industry Policy Statements* observed that "[t]he focus of the analysis is not on whether a particular provider has been harmed by the exclusion, but rather whether the exclusion reduces competition among providers in the market and thereby harms consumers."[95]

Thus, the court should first consider whether membership in the venture is essential for the excluded firm to compete effectively in the relevant market. The "essential to competition stan-

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

93. *See, e.g.*, Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 547 (2d Cir. 1993); Fishman v. Estate of Wirtz, 807 F.2d 520, 543 (7th Cir. 1986) ("The concern of the antitrust laws with the integrity of the competitive process . . . means that we can only find a violation . . . if we have reason to believe that the competitive process has been subverted"); Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-65 (7th Cir. 1982); Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n, 767 F. Supp. 1573 (M.D. Fla. 1991); Weight-Rite Golf Corp. v. United States Golf Ass'n, 766 F. Supp. 1104 (M.D. Fla. 1991); Pretz v. Holstein Friesian Ass'n, 698 F. Supp. 1531, 1539 (D. Kan. 1988); Hassan v. Independent Practice Assocs., 698 F. Supp. 679, 695 (E.D. Mich. 1988); Martin v. American Kennel Club, Inc., 697 F. Supp. 997, 1002-03 (N.D. Ill. 1988).

94. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 298 n.9 (1985).

95. 4 Trade Reg. Rep. (CCH) at 20,786.

dard" is the standard adopted in essential facility claims.[96] That is, if the plaintiff is able to compete without access to the venture, then access is not essential. For example, MCI could not effectively compete as a long distance telephone service without access to the local telephone exchanges, because these exchanges were the only means to reach local customers. Moreover, MCI could not replicate the AT&T local exchanges, because the exchanges were a regulated monopoly.

Focusing on whether access to the facility is essential to competition in the market will fulfill the policy objectives discussed earlier. First, if the party seeking access is an effective independent competitor, access would not be compelled. Thus, competition at the level of the joint venture will not diminish. Second, identifying whether the party seeking access is capable of effectively competing in the market without access, in many cases, may be relatively simple.[97] Such a test will thus improve predictability and facilitate business planning.

When the facility offers some sort of cost advantage, such as in the electric utility litigation discussed earlier,[98] the inquiry becomes more complicated. Such an advantage normally should not make a facility essential. As the FTC's Acting Director of the Bureau of Competition has stated: "[i]f the facility offers a cost advantage or is capable of being duplicated, the denial of access will typically not raise antitrust concerns."[99] For example, in *Northwest Wholesale,* the excluded party, Pacific Stationers, lost about $10,000 in rebates, which apparently had little or no effect on its ability to compete.[100] This was not a sufficient advantage to make the purchasing cooperative essential.

In other cases, however, the cost advantage may be so substantial that the denial of access effectively precludes the excluded

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96. *See* Alaska Airlines v. United Airlines, 948 F.2d 536, 544 (9th Cir. 1991) (facility is "essential" if it is vital to competitive viability and competitors cannot effectively compete in the relevant market without access to it).

97. In fact this issue has been dispositive in resolving a number of single firm access cases without a trial. *See supra* note 63.

98. *See supra* notes 67-69 and accompanying text.

99. *Steptoe speech, supra* note 85, at 24; *International Guidelines, supra* note 85, at ¶ 3.42 n.95 ("The mere fact that it is more costly for excluded firms to enter the joint venture market or markets on their own rather than through the joint venture does not by itself make access to the joint venture essential").

100. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). During the period of its exclusion, Pacific's sales actually increased by 33%.

party from effectively competing in the market.[101] For example, an alternative form of access may be so costly that the excluded party is unable to compete in terms of price. Before accepting the claim, a court should look for evidence that because of this impediment the excluded party was a relatively insignificant competitor in the market.

Some courts, like the district court in the *VISA* case, have used a fairly lax standard of essentiality—that access should be required if it would offer a "competitive advantage." This argument is often based on the Supreme Court's opinion in *Associated Press v. United States.*[102] Associated Press ("AP") was a cooperative wire service that prohibited its newspaper members from making news gathered by themselves available to non-members prior to publication by AP. The organization's membership requirements permitted an incumbent member to veto the admission of a competing newspaper in its geographic area. These restrictions were challenged by the Justice Department. In defense, AP argued that because other wire services (INS and UPI) were available to nonmembers, and because non-member papers could gather their own news, its services were not strictly necessary to operate a competing newspaper. The Court rejected this argument, holding that inability to belong to and buy news from the largest news agency could seriously affect the publication of competing newspapers.[103] Based on this reasoning, the courts in the credit card cases have assumed that the competitive advantage offered by a joint venture need not be essential to competitive survival to require access to the joint venture; it may be sufficient that without such access the excluded competitor is at a significant competitive disadvantage.

Associated Press is 50 years old and has not played a prominent role in decisions involving access claims. With the exception of the credit card cases, none of the other recent decisions that have permitted the plaintiff to go to trial have relied upon or

101. For example, in the Multiple Listing Service (MLS) cases brought by the FTC, it was clear that the MLS network could not be replicated and that denial of access prevented the excluded brokers from effectively competing in the market. *See, e.g.*, United Real Estate Brokers of Rockland, Ltd., C-3461 (Sept. 27, 1993); *see also* Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325 (1970) (explaining that firms denied access to an MLS often cannot compete effectively with member firms).

102. 326 U.S. 1 (1945).

103. *Id.* at 17-18.

even cited *Associated Press.*[104] Some have argued that the facility in *Associated Press* was essential to competitive viability.[105] It is worth stating that the decision is not a paradigm of clarity: the opinion of the Court garnered only three votes. The majority consists of three different opinions and it is difficult to decipher the grounds for the judgment of illegality.[106] One of the opinions relied explicitly on First Amendment concerns.[107] The plurality opinion seems to base its assumption that AP had market power on the fact that it was "large," rather than by defining the relevant market and determining the existence of market power. The opinion does not even discuss the potential loss of competition between AP, INS and UPI by permitting members of competing news services to compel their own admission into AP.[108]

Many prominent antitrust commentators have criticized the decision. Judges Posner and Easterbrook observed that the decision undermined incentives for venture members to invest in the venture.[109] Former Judge Bork stated that the opinion never addresses the "real question whether the exclusivity of membership tended to make possible efficiencies of operation or merely injured rivals for the purpose of establishing local monopolies."[110]

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104. *See, e.g.*, Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217 (7th Cir. 1993); Thompson v. Metropolitan Multi-List, 934 F.2d 1566 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 295 (1992); Spence v. Southeastern Alaska Pilots Ass'n, 789 F. Supp. 1014 (D. Alaska 1992); Medlin v. Professional Rodeo Cowboys Ass'n, 1992-1 Trade Cas. (CCH) ¶ 69,787 (D. Colo. 1991); Carleton v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926 (D. Vt. 1991).

105. The Court observed that failure to have access to AP news could "have the most serious effects upon the publication of competitive newspapers" and that it was practically impossible for a newspaper to develop a competitive source of news. *Associated Press*, 326 U.S. at 17. Antitrust commentators and the Justice Department appear to have interpreted *Associated Press* as applying essential facility principles. *See* Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 842 (1989); Brief for the United States as Amicus Curiae Supporting Reversal at 16 n.14, Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) (No. 83-1368) (citing *Associated Press* for the proposition that "[w]here a joint venture of competitors provides a product or service *necessary to effective competition*, depriving a competitor of access to the product or service might well be found to be anticompetitive") (emphasis added).

106. *Associated Press*, 326 U.S. at 32 (Roberts, J., dissenting) ("I am unable to determine on which of [the] possible [Sherman Act] grounds the judgment of illegality is rested").

107. *Id.* at 28-29 (Frankfurter, J., concurring).

108. Justice Roberts observed in his dissent that the result in the case "may well result not in freer competition but in a monopoly in AP or UP, or some resulting agency." *Id.* at 48 (Roberts, J., dissenting). Justice Roberts's observations seem quite prescient, since AP today has a near-monopoly position in the news service market. *See* Baker, *supra* note 15, at 1034-35, 1068-72.

109. *See* RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 768-69 (1981).

110. *See* ROBERT BORK, THE ANTITRUST PARADOX 341 (1978). Bork later observes that "[p]erhaps the decision stands for the proposition that efficiency is lawful so long as there

Former Assistant Attorney General Donald Baker observed that *Associated Press* is inconsistent with the efficiency-based thinking of the Supreme Court's recent joint venture cases, *Broadcast Music* and *NCAA*.[111] Thus, the precedential value of *Associated Press* is open to question.

Moreover, even if *Associated Press* provided a sound legal basis for compelling access where a facility offered only a competitive advantage, such an interpretation may lead to less than competitive results. Such a rule would encourage competitors to seek access whenever their competitor had acquired some sort of advantage in terms of cost or product differentiation. This result would spur litigation and dampen the incentives for innovation. Any competitive advantage that resulted from innovation would have to be shared with one's rivals. Permitting access based solely on competitive advantage would amount to an insurance policy for laggards, encouraging competitors to sit on the sidelines and demand access only after the competitor's product has succeeded. From an economic perspective, it would be preferable for the excluded competitor to attempt to replicate or surpass the competitive advantage, by producing a better product.

3. *Does the Joint Venture Currently Possess Market Power in the Primary Market?*

Courts, like the Tenth Circuit in *VISA*, increasingly have used a market power screen to dismiss cases, arguing that consumers probably will not be injured unless the firm imposing the restraint possesses market power.[112] Cases involving access demands have met a similar fate when the excluding party lacked market power.[113]

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is a means by which the law can require that it be shared. Where it cannot be shared . . . the cause of the efficiency must be destroyed." *Id.* at 342.

111. Baker, *supra* note 15, at 1036; *see also* Phillip E. Areeda, *Essential Facilities: An Epithet In Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 844-45 (1989).

112. *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987); Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 191 (7th Cir. 1985) (applying market power threshold in upholding horizontal restraint); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 19-23 (1984).

113. *See* Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 546-47 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 878 (9th Cir. 1987); *Rothery Storage & Van Co.*, 792 F.2d at 229; Goss v. Memorial Hosp. Sys., 789 F.2d 353, 355 (5th Cir. 1986); Rickards v. Canine Eye Registration Found, Inc., 783 F.2d 1329, 1333 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986); *cf.* Joseph Kattan & David A. Balto, *Analyzing Joint Ventures' Ancillary Restraints*, 8 ANTITRUST 13, 17 (1993) ("joint ventures ordinarily have no cause for concern

The use of a market power screen, or a monopoly assessment based on market share, may not lead always to accurate results. In a network it is very difficult to measure market share: what constitutes an appropriate measure is not a simple question. William Blumenthal has observed that various properties of networks—alternative routings, market failure, and critical mass—make it difficult to use historic transaction data as a measure of market power.[114] Aggregating all the transactions of venture members regardless of which network was used cannot accurately determine market share.[115] For example, assume a metropolitan area with 200 ATMs, and assume further that every one of the ATMs has the service mark of the CIRRUS national network. Under the *VISA* district court precedent, it would be appropriate in determining the market power of the networks participating at these ATMs to consider all of the transactions at any given ATM as CIRRUS transactions. That might lead one to conclude that CIRRUS is a monopolist in the market. Yet assume that each of these ATMs also has the logos of MOST, PLUS, and several other ATM networks. This aggregation approach, which would define each of these networks as a monopolist, does not make sense.[116]

When, on the basis of its market share, a joint venture seems to possess market power, courts face a perplexing problem. Bringing a rival into the venture only *augments* the venture's market power. If a joint venture is "too large," it is difficult to see why a court should attempt to "cure" the exercise of market power by forcing the venture to accept more market power. As the Justice Department noted in its amicus brief in *Northwest Wholesale Stationers*:

> It would make little sense indeed to interpret the antitrust laws as providing a basis for the forced expansion of a procompetitive horizontal arrangement to the point where the arrangement itself violates those laws. Not only does such an approach have little to recommend it as a matter of consis-

about liability for membership exclusions unless they are potentially vulnerable to a determination of market power").

114. *See* Blumenthal, *supra* note 75, at 861-64.

115. This was the approach used by the district courts in the *VISA* and *Mastercard* decisions.

116. The more appropriate approach may be to calculate market share based on the *network's* share of all transactions sent through a given ATM. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 296 (1985) ("Unless *the cooperative* possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted.") (emphasis added).

> tency, it could also lead to a loss of the substantial procompetitive benefits usually associated with purchasing cooperatives and similar joint ventures.[117]

Because the measure of market share may be deceptive or uninformative, other types of evidence should be used to identify the existence of market power. First, there may be evidence that the exclusion resulted in either raised prices or decreased output. Second, the members of the joint venture may possess such an overwhelming proportion of the potential volume of transactions (or other measure of potential capacity) that no other comparably efficient joint venture is likely to have the minimum efficient scale to compete effectively. Third, there may be unique barriers to duplication of the joint venture facility (such as those created by regulation in the *MCI* case).

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

> the relevant market power inquiry . . . is whether the membership at issue is an "element essential to effective competition." An association's members could have a large market share in some market, but unless the facility controlled by the association was essential to competition in that market, exclusion from the facility might not have any effect on competition in that market.[118]

4. *Remedy*

The question of remedy is not a simple one. Where a competitor prevails in a compulsory access claim, it should not be admitted necessarily into the venture and allowed to use the venture's service or trademark. Providing open access to a trademark may diminish the incentives for firms to maintain the value of the mark or the product; in turn, the value of the mark may decline. Moreover, as the legislative history of the National Cooperative Research Act suggests,[119] compulsory licensing may also serve as

117. Brief for the United States as Amicus Curiae at 16, *Northwest Wholesale Stationers, Inc.* (No. 83-1368); *see Steptoe speech, supra* note 85, at 27-28 ("If a joint venture is *too large*, it is difficult to see why a court should attempt to *remedy* the potential exercise of market power by forcing the venture to accept *more* market power. Interpreting the antitrust laws to require the forced expansion of a procompetitive venture to the point where the venture itself violates those laws, would make little sense indeed.").

118. *Steptoe speech, supra* note 85, at 23-24.

119. *See infra* note 129 and accompanying text.

a long-run disincentive to risk-taking and product differentiation. Thus, compulsory licensing of the trademark should be disfavored out of deference to the public policies which give trademark owners broad rights to refuse to deal with others.[120]

In addition, where a competitor has prevailed in an access claim, its admission may raise concerns of improper information exchanges or other forms of improper coordination. Admission into the venture may facilitate the exchange of competitively sensitive information, without the procedural safeguards against such sharing that antitrust orders have imposed on co-venturers in concentrated markets.[121]

For example, assume that a court found that an ATM network transaction authorization system could not be replicated. The excluded competitor should not necessarily be admitted as a full member. A preferable result might be to permit access to the transaction authorization system, but not to the service or trademark. In this way, the excluded party would continue to offer competition in product differentiation and development. Moreover, because the competitor would not be a full member, the risks of improper information exchanges or other forms of improper coordination would be diminished.[122]

Finally, as many commentators have noted, where access is compelled, the new members should be required to "pay their fair share of total investment."[123] This fair share must take into account the risk and investment incurred by the earlier members of the venture.

C. *Analysis Under the Structured Inquiry*

The structured inquiry would lead to more efficient decision-making and fewer anticompetitive results. For example, in the BayBanks-Yankee 24 dispute described earlier, the court would

120. *See* Baker, *supra* note 15, at 1099-102, 1119-22; Werden, *supra* note 85, at 475 ("The patent and copyright laws provide substantial freedom for intellectual property owners to ensure that adequate resources are devoted to the creation of productive new ideas. Restricting this freedom pursuant to the essential facility doctrine would most likely lessen economic welfare substantially.").

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

122. This was fundamentally the approach taken in litigation involving access demands brought against electric power pools. *See* Central Iowa Power Cooperative v. FERC, 606 F.2d 1156, 1165 (D.C. Cir. 1979) (finding no anticompetitive harm where the nonmember of an electric power pool could receive the benefits of the pool by purchasing power from other pool members).

123. Baker, *supra* note 15, at 1122-23; *see* Kattan, *supra* note 85, at 963; Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 903-04 (1985).

have been able to dismiss the case without sending it to the jury. Because BayBanks was already a strong competitor in the market, access to Yankee 24 was not "vital to competition." Moreover, the possibility of replication was not at issue because BayBanks had already created its own ATM network. Thus, the structured inquiry approach would have resulted in a more efficient use of judicial resources.

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

V. Efficiency Rationales for Limiting Membership in a Joint Venture

Limitations on membership may offer great procompetitive potential, by protecting risk-taking and preventing free-riding.[124] As the former Assistant Director of the FTC's Office of Policy & Evaluation has observed:

> Venture participants have a legitimate interest in ensuring that their coventurers make valuable contributions to the mission of the enterprise, and for this reason require the ability to exclude potential participants who cannot make meaningful contributions to the enterprise or would fail to share fully in the risks of the venture. . . . If free and open access is required, potential venturers may decide to avoid entering a joint venture, and incurring the risk that membership in the venture

124. Although this discussion focuses on the justification of preventing free riding, there are many other potential justifications that may be relevant in any individual case. *See e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973) (where the technical feasibility of providing access was a relevant factor).

> entails, because they may be required to share the fruits of the joint venture with outsiders if the venture succeeds but will be required to bear the losses alone if the venture fails. This free rider effect creates a serious risk that some efficiency-enhancing projects would be delayed or altogether deterred.[125]

A second important objective of membership restrictions is to prevent a venture from being so overinclusive that its size or scope deters the development of competing ventures.[126] Overinclusiveness has been identified as a particular risk in joint ventures that provide health care services. Both federal antitrust agencies have stated that overinclusiveness, rather than membership exclusion, is the primary concern when analyzing joint ventures.[127] Both agencies have recently challenged physician joint ventures because they were overinclusive.[128] The *Health Care Enforcement Policy Statements* recently issued by the FTC and the Justice Department also recognize this issue.[129]

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125. Kattan, *supra* note 85, at 963; *see* Areeda, *supra* note 111, at 849-50; Pitofsky, *supra* note 123, at 902; John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571, 620-21 (1993); *International Guidelines*, *supra* note 85, at ¶ 3.42 ("Forcing joint ventures to open membership to all competitors . . . would decrease the incentives to form joint ventures, particularly those that are formed to undertake risky endeavors such as research and development and innovative manufacturing. . . . An enforcement policy that denied a joint venture the ability to select its members might also encourage firms to forego risky endeavors in the hope of being able to gain access through antitrust litigation to the fruits of the successful endeavors of others.").

126. *See* FTC Statement of Enforcement Policy with Respect to Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982, 48,990-91 (1981) ("Serious antitrust concerns might . . . arise if the formation of a plan appeared to eliminate a significant amount of 'potential competition'. . . . Therefore, if the formation of a plan . . . makes impracticable the formation of other plans that would otherwise be likely to enter the market, potential competition from those plans may be eliminated and antitrust enforcement action may be warranted."); U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in the Health Care Area* ("Policy Statements"), 4 Trade Reg. Rep. (CCH) ¶ 13,152 (Sept. 27, 1994) [hereinafter *Health Care Policy Statements*] ("In certain circumstances network membership restrictions may be procompetitive by giving non-member providers the incentive to form other networks in order to compete more effectively with the network").

127. *See* Prepared Remarks of Charles F. Rule, Assistant Attorney General, Antitrust Division, before the Antitrust Section of the Connecticut Bar Ass'n at 15 (Mar. 11, 1988); CMI letter.

128. *See* Justice Department, Antitrust Division, Press Release, Oct. 12, 1983 (announcing Department's intention to challenge creation of Stanislaus Preferred Provider Organization, Inc.; 50 to 90% of the providers in the relevant market were members of the PPO); *cf.* Home Oxygen & Medical Equipment Co., C-3530; Home-care Oxygen & Medical Equipment Co., C-3532 (Oct. 31, 1994) (Starek, C., dissenting).

129. Health Care Policy Statements, *supra* note 126, at ¶ 13,152 (Sept. 27, 1994).
The risks of overinclusive joint ventures were also recognized by Congress when it enacted the National Cooperative Research Act of 1984. 15 U.S.C. §§ 4301-4305 (1988). The Act's legislative history notes that:

> The greatest potential for harm . . . exists when a joint R&D venture is overinclusive—that is, when the venture includes a greater percentage of the potential market than it should under the circumstances. Overinclusiveness . . . reduces

To preserve opportunities for other market entities to compete with the joint venture and to protect them from the risk of market power, it is often appropriate to restrict the size of the venture. A *network* joint venture may experience significant efficiencies, known as network externalities, as a result of increased size. Thus "size" issues for ATM or credit card joint ventures may be more complex than for typical mergers or joint ventures.[130] Because of these efficiencies, it may be that enforcement agencies should allow networks to remain open to new members. However, William Baxter, the former Assistant Attorney General in charge of the Antitrust Division, has observed that although ATM joint ventures can achieve greater efficiencies through economies of scale, these efficiencies will cease to be significant once a joint venture reaches a certain size. Beyond the point where these efficiencies are significant, Baxter suggests that the size of the networks should be restricted to encourage the creation of competing networks rather than one large network.[131]

The issue of whether the efficiencies inherent in a network joint venture require the venture to be open or closed was also studied by the National Commission on Electronic Funds Transfer (NCEFT) in the mid-1970s. At the time, some commentators argued that because of the efficiencies of EFT networks, these networks should be compelled to share their facilities with all comers; some States incorporated this concept into sharing statutes. In 1977 proceedings before the NCEFT, the Justice Depart-

> the number of competing R&D efforts [and] may increase the costs to society of mistakes in R&D strategy because there will be fewer other businesses pursuing different and potentially successful R&D paths. Moreover, as the number of its competitors with which a joint venture participant is required to share the benefits (or losses) of R&D increases, incentives to innovate may be decreased because the benefits of winning and the costs of losing in R&D competition may be reduced.

H.R. REP. No. 1044, 98th Cong., 2d Sess. 9, 10, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3131, 3134-35.

130. "Network externalities" in this context reflect the fact that the value of a network to a consumer depends upon the number of users and the identities of other specific users. The larger the network, the greater the number of consumers who will join it; and conversely, the smaller the network, the fewer the number of consumers who will join it. "Positive" network externalities reflect the fact that the value of the network increases to all of its incumbent users as new users join. *See* Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. ECON. REV. 424 (1985); Stevens, *supra* note 87, at 597-98.

131. *See* WILLIAM F. BAXTER, PAUL H. COOTNER & KENNETH E. SCOTT, RETAIL BANKING IN THE ELECTRONIC AGE: THE LAW AND ECONOMICS OF ELECTRONIC FUNDS TRANSFER 77-97 (1977); *see also* David A. Balto, *Antitrust Analysis of Financial Institution Joint Ventures*, 16 WORLD COMPETITION 107, 113-14 (1993).

ment opposed the concept of mandatory sharing because the Department believed mandatory sharing would reduce the incentives for creating competing networks.[132] The NCEFT adopted the Justice Department's view.[133] In addition, the Justice Department actively opposed the adoption of state sharing statutes.[134] Thus, limitations on membership serve a valuable goal by preserving both actual and potential competition with the venture. If a firm may obtain the product or service provided by the venture elsewhere, exclusion may be procompetitive, so long as non-affiliated firms have incentives to support a competing joint venture or to compete on their own.[135]

The concern about overinclusiveness was part of the reason that the states' attorneys general challenged the Entree point of sale ("POS") debit card joint venture.[136] Entree was a joint venture of Mastercard and VISA and, thus, consisted of many of the most likely entrants into the national POS market.[137] The States alleged that by entering the market through a single joint venture, VISA and Mastercard in effect had foreclosed the development of competing POS ventures. The case was settled when VISA and Mastercard agreed to abandon the Entree joint venture.

VISA and Mastercard since have created independent POS networks, Interlink and Maestro. In response to the concerns of the States, each network adopted rules preventing any bank member from belonging to a competing network.[138] Competition between the networks has been aggressive and far more significant

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132. *See* Department of Justice, Antitrust Division, Policy Statement on Sharing to the National Commission on Electronic Fund Transfers (Jan. 13, 1977). At the same time, the Division declined to approve a statewide ATM-POS network in Nebraska, largely on the ground that the network, by including virtually all the financial institutions in the state, was overinclusive. *See* Letter from Donald I. Baker, Assistant Attorney General, Antitrust Division to William B. Brandt, Nebraska Bankers Association (Mar. 7, 1977).

133. *EFT in the United States*, *in* NAT'L COMM. ON ELECTRONIC FUND TRANSFERS, FINAL REPORT (1977).

134. Remarks by Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, Department of Justice, before the Federal Bar Ass'n and American Bar Ass'n, *Antitrust Analysis of Joint Ventures in the Banking Industry: Evaluating Shared ATMs* (May 23, 1985); *see also* BAKER & BRANDEL, *supra* note 10, app. F, at A-141 n.5.

135. *Steptoe speech*, *supra* note 85, at 19.

136. *See* New York v. VISA U.S.A., Inc., 1990-1 Trade Cas. (CCH) ¶ 69,016 (S.D.N.Y. 1990); *see also* Balto, *supra* note 3, at 267.

137. In addition, VISA and Mastercard allegedly controlled the two national ATM networks, PLUS and Cirrus, which also were considered potential entrants into the market.

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

than the competition in the credit card market.[139] Each network competes with the product diversity and systems of the others. Each vigorously competes to sign up both banks and merchants, by offering lower fees and other incentives. In addition, the fees charged within the networks, including interchange fees, are less than those charged to credit card users.[140] The active competition between Maestro and Interlink indicates that the states' decision to challenge duality was correct.

One argument posed in the *VISA* litigation is that even if these free-riding and overinclusiveness justifications are generally legitimate, they are inapplicable to banking joint venture networks because these networks have admitted thousands of members after the risk-taking phase. The argument is that the traditional free-riding justification is inapplicable because: (1) the membership rules at issue permit admission of any financial institution *except* a competitor; and (2) these networks are efficient particularly because they are "open."[141]

A. *Should a Different Rule of Law Apply to a Membership Rule that Excludes Only Competitors?*

Not all access demands are problematic: where a prospective member does not compete with the venture (and is not a potential competitor of the venture) its admission raises few competitive problems. However, a competitor may not be a typical potential member (that is, one that wishes to improve its ability to compete), but rather, a competitor may be a potential member that intends to subvert the competitive process. As described earlier, in a number of banking joint venture cases competitors of the joint venture network have used antitrust claims to compel admission, resulting in a diminution of competition.

A rule of law that would make it easier for *competitors* to compel access into a joint venture may diminish competition in the ven-

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139. *See* Jeffrey Kutler, *Bankers are Burying the Hatchet to Join Forces for Debit Push*, AM. BANKER, Feb. 8, 1994, at 20.

140. *See* Mickey Meece, *Bank of America is Going to Bat for Maestro*, AM. BANKER, Apr. 5, 1994, at 10; *Debit Card War Faces Tough Choices*, AM. BANKER, Feb. 7, 1994, at 17; *Economics—More Issuers Get Debit Interchange*, POS NEWS (Jan. 1, 1994) (describing competition in interchange fees).

141. *See* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, __ COLUM. BUS. L. REV. __ (forthcoming 1995).

ture's market.[142] Such a rule is without precedent. In no case other than the *VISA* district court decision has a joint venture been compelled to admit new members when these members were actual or potential competitors of the joint venture. *Associated Press* is the only other case where the court struck down an exclusive membership rule of a venture that arguably did not have a bottleneck monopoly.[143] The newspapers seeking admission competed only with the venture's member newspapers and not with the Associated Press wire news service. *Associated Press* did not compel the defendant to admit any entity; it merely banned the practice of permitting incumbents to veto membership of new applicants. The order did not require the admission of any entity that would have competed with the Associated Press, and the Court's analysis surely would have been different had the excluded party been the Reuters or INS wire service rather than local newspapers.

Where competitors have been able to use access claims (and the threat of treble damages) to force their way into joint ventures, consumers have not benefitted for several reasons. First, selectivity in membership can be crucial to the delicate dynamics of collaborative decision-making in joint ventures. It may be very difficult for a venture to act against the interests of any individual member, especially a large member.[144] Also, a single member may attempt to tailor the joint venture's product to fulfill its own competitive agenda. As a leading commentary on payment systems has observed:

> The competitive complexity of a payments partnership is enhanced by the fact that its members are primarily competitors in selling the joint payments product to consumers and merchants. . . . Since individual members have separate and distinct business strategies, a major member may be expected to try to tailor the joint product or its terms to serve its parochial needs. If successful, these efforts may make the joint product less attractive to other members, merchants, or consumers—all to the detriment of the payments partnership's broad mission.[145]

142. This tendency for reduced competition is the reason that, in most cases, courts have mandated admission of competitors only into "bottleneck"-type ventures that could not be effectively replicated by the plaintiff.

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

144. There was evidence presented at the *VISA* trial that Dean Witter's purpose in seeking membership in VISA was to deter VISA from competing as aggressively against Discover Card. *See* Balto, *supra* note 3, at 271 & n.38.

145. BAKER & BRANDEL, *supra* note 10, ¶ 23.01, at 23-24.

Second, selectivity in membership often will enhance a venture's ability to compete. Forcing the admission of members with diverse or contrary interests may diminish competition to a least common denominator basis. One leading commentator has observed:

> Because joint ventures have multiple owners who may otherwise compete with one another, the enterprise provides fertile ground for conflict. Decisionmaking can suffer when participating firms have differing objectives or opinions on the course of the venture, and the enterprise is vulnerable to efforts by participants to free ride on co-venturers. . . . This "problem of trust" can stifle the transfer of technology that may be critical to the success of joint ventures and, indeed, may inhibit would-be collaborators from entering into ventures in the first place.[146]

Third, selectivity in membership can be vital to the success of a collaboration. A venture may seek to compete by offering a certain type of product or a certain standard of quality. If the venture cannot limit its membership to those who adhere to its objectives, success may be elusive. For example, in *Hassan v. Independent Practice Associates*,[147] the court rejected a claim brought by two allergists that their exclusion from an independent practice association was an illegal group boycott. The record was undisputed that the plaintiffs disagreed with the IPA's cost containment policy (which the plaintiffs had violated). Thus, the court concluded that the expulsion of the plaintiffs was "justified by enhancing economic efficiency and making markets more competitive."[148]

Finally, mandating access for a competitor may be a poor solution because it may increase disputes within the venture, especially if the new member has a different competitive strategy. Mandating access cannot eliminate the basic conflicts between

146. Kattan, *supra* note 85, at 945; *see* Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 67 (2d Cir. 1988) (observing how the interests of a cartel as a whole often diverge substantially from the interests of individual members).

147. 698 F. Supp. 679 (E.D. Mich. 1988).

148. *Id.* at 694. Enforcement agencies also have recognized the importance of this type of exclusivity. *See Health Care Policy Statements*, *supra* note 126, at ¶ 13,152 ("there may be procompetitive reasons associated with [excluding health care providers], such as the provider's competence or ability and willingness to meet the network's cost-containment goals"); *see also* FTC Staff Opinion Letter to J. Bert Morgan, Esq. (Nov. 17, 1993) ("exclusion of physicians [from proposed physician network] appears likely to be procompetitive, by helping [network] to establish and maintain a reputation as a truly 'preferred' provider network, and thus distinguishing [network] and its physicians from other, lower quality, or more costly physicians and networks competing in the market").

an outsider and its new partners. At best, it simply shifts the conflicts from the courthouse to the governing bodies of the joint venture.[149] If the "outsider" competes with the joint venture, it may have a special incentive to use its voice and vote to retard the joint venture's efforts and innovations in the network market. For example, in the BayBanks-Yankee 24 matter described above, the aggressive competition between the two networks decreased after BayBanks compelled its admission as a member of Yankee 24.

B. *Should a Different Rule of Law Apply if the Joint Venture has been "Open" or if the Venture Exhibits Positive Network Externalities?*

Arguably the free-riding and risk-taking rationale for membership exclusions may be inapplicable for joint ventures, like ATM and credit card networks, which have admitted members after their risk-taking phase and generally have an "open" membership policy. This argument distinguishes between open joint ventures (that is, that admit new members) and closed joint ventures (that is, that restrict membership). Because inclusiveness in network joint ventures produces positive network externalities, one could argue that joint ventures with positive network externalities should not be permitted to exclude members so long as those members can improve competition within the joint venture.

This argument is questionable for several reasons. First, under this premise, any joint venture characterized by positive network externalities would operate as a *public utility* with the obligation to admit all comers. Some potential venture participants might offer little to the venture; others may pose a significant threat of free-riding. Still others may want to join the venture solely to impede the competitive efforts of the venture. A rule of law that *required* open access would prohibit a venture from excluding any of these participants.[150]

Second, a joint venture characterized by positive network externalities would never have a valid basis to deny access to a com-

149. Baker, *supra* note 15, at 1098-99.

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

petitor. Positive network externalities gained from inclusiveness are not infinite. At some point the network may reach an optimal size, and those externalities may cease to be significant.[151] When a network reaches optimality, the addition of more members wastes resources. There also may be beneficial reasons for denying access even where positive network externalities continue to be significant.[152] Taken to its logical conclusion, a rule of law that prohibited a venture from closing would permit competitors access regardless of whether the admission of new members produced economic efficiency and greater positive externalities.

Under such a rule of law, practically any competitor could argue that access to the joint venture's product would enable it to increase competition. This would ultimately lead to more consolidation and the creation of a single network. While a joint venture may need to be open at its inception, at some point the members of the joint venture may decide that the venture is large enough and choose to close ranks. Such a rule of law would prohibit a joint venture from ever being able to make that decision without facing liability.

Third, as noted earlier, a rule of law that compelled a joint venture to admit new members, thereby forcing the venture to accept increased market power, would seem to be inconsistent with the interests of competition policy. As an Antitrust Division official recently stated, "an antitrust rule forbidding exclusion could result in the creation of market power that was not there to start with. That would make no sense."[153]

Fourth, treating a joint venture with positive network externalities as a public utility would deter risk-taking and innovation. If joint ventures are "told in advance, as a matter of law, that they are going to have to grant compulsory access to their competitors

151. *See* Gerber, *supra* note 77, at 1111; Stevens, *supra* note 87, at 621-22.

152. A recent survey of electronic service networks suggests three reasons why denial of access may be socially beneficial, even in the presence of network externalities: "(1) if it is necessary to ensure the quality of network services . . . , (2) if excluded firms constrain the prices of firms using the network . . . , or (3) if the supracompetitive profits produced by exclusionary practices are necessary to induce firms to undertake the risky investments required to develop networks . . . ." *See* MARGARET E. GUERIN-CALVERT & STEVEN S. WILDMAN, ELECTRONIC SERVICES NETWORKS A BUSINESS AND PUBLIC POLICY CHALLENGE 19 (1991).

153. FTC WATCH 3 (Feb. 28, 1994) (description of remarks of Willard K. Tom, Counselor to the Assistant Attorney General, Antitrust Division, before the 30th Annual Symposium on Associations and Antitrust Trade Association and Antitrust Law Committee Bar Association of the District of Columbia (Feb. 16, 1994)).

whenever they achieve a really significant success, then the law has blunted their incentive to invest and innovate."[154]

Fifth, this argument goes beyond the few cases which have compelled access. For example, in *Associated Press* the Supreme Court did not prohibit Associated Press from having a closed membership. It only prohibited Associated Press from permitting local newspapers to veto the membership of competing newspapers.[155]

It is difficult to predict the impact of a rule of law that would treat VISA or Mastercard like a public utility and require them to be open to any new member. In the ATM area, however, consumers have not benefitted from compelled sharing. Some States have adopted a public utility model and have enacted mandatory sharing statutes that compel ATM networks to provide open access. Other States have not addressed the issue and have permitted sharing to evolve of its own accord. The Federal Reserve Board has studied the impact of state mandatory sharing statutes on ATM deployment and usage. It has found that in those States which have compelled mandatory sharing, output in terms of ATM deployment and card usage is less than in those States that do not require sharing.[156]

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

VI. CONCLUSION

Because of the current ongoing antitrust litigation, the banking industry faces a critical turning point. Choices made in resolving these cases will have a significant impact on the level of competition between bank networks and the growth of various consumer financial services. The lack of clarity in the legal standards governing access demands has inhibited the development

154. BAKER & BRANDEL, *supra* note 10, ¶ 21.05(2) at 21-36; *see also* Pitofsky, *supra* note 123, at 902 ("Incentives for risk-taking and innovative efforts will certainly diminish if advantages of the undertaking must be made available to non-participants").

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

156. Elizabeth S. Laderman, *The Public Policy Implications of State Laws Pertaining to Automated Teller Machines*, FED. RESERVE BANK OF SAN FRANCISCO ECON. REV. (Winter 1990).

of payment systems joint ventures and has encouraged competitors to compete in the court house, rather than in the marketplace. When competitors force their admission into a venture, rather than competing by offering better products and services, consumers do not benefit.

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

> By *clarifying* and *eliminating* the apprehensions about antitrust risk, this legislation will allow joint ventures that can increase efficiency, facilitate entry into markets, and create new productive capacity that otherwise would simply not be achieved.... Now is the time to strip away *outdated impediments* to economic growth and to our potential and to begin real movement in this last decade of the 20th century.[157]

Although President Clinton's concern about "outdated impediments" is not a call for a revolution in antitrust thinking, it is germane as the courts evaluate the guidance provided by *Associated Press.* Joint ventures are an ever more essential facet of the economy; providing a clear, predictable standard for the risks they face from access demands will enhance their ability to compete.

157. President's Remarks on Signing the National Cooperative Production Amendments of 1993, 28 WKLY. COMP. PRES. DOC. 1058 (June 10, 1993) (emphasis added).