

March 12, 2009

Mr. Matthew Kellison
Senior Competition Law Officer
Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9
Fax: (819) 953-8546
E-mail: Matthew.Kellison@cb-bc.gc.ca

Re: Comments on Updated Enforcement Guidelines for Abuse of Dominance

Dear Mr. Kellison:

I am the Director of the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law. The Institute is a non-partisan, independent academic center designed to explore the impact of antitrust enforcement on the individual consumer and the public, and to shape policy issues.¹ My faculty colleague Professor Brett Frischmann and I provide these comments regarding the Updated Enforcement Guidelines for Abuse of Dominance Provisions of the Canadian Competition Act.

Our comments are limited to the sections of the Guidelines dealing with unilateral refusals to deal. We are the authors or co-authors of several articles dealing with this issue.² In this body of work, we advocate that a regime of non-discriminatory access is appropriate for infrastructure controlled by a single firm (or group of firms) where access produces significant positive downstream externalities which benefit both competition and society generally.

We thus applaud the continued inclusion of provisions dealing with unilateral refusals to deal as a possible abuse of dominance under Canadian Competition law. This is consistent with

¹ Full information about the Institute for Consumer Antitrust Studies is available at <http://www.luc.edu/antitrust>.

² These articles include Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. xx (forthcoming 2009); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WISC. L. REV. 360; Mark A. Lemley & Brett M. Frischmann, *Spillovers*, 100 Colum L. Rev. 257 (2007); Brett Frischmann and Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L. J. 1 (2008). These articles are all available on <http://ssrn.com> by searching under the author's names. Copies are also available upon request.

the case law of the United States, the European Union, and over thirty five other jurisdictions which impose liability and open access obligations upon a monopolist controlling a facility that is essential for competition in either upstream or downstream markets.

However, we also believe that the Updated Enforcement Guidelines as currently drafted are unduly narrow in being limited to situations where the dominant firm also has "market power in the downstream (or retail) market for the market in which the facility is used as an input." Updated Enforcement Guidelines, Appendix IV at p. 40. While many of the cases involve this situation, liability for refusal to deal should not be limited to this setting for the harm to competition and consumer welfare is the same whether or not the dominant firm in control of the essential facility is also a downstream competitor.

The European Union has recognized the need for liability in this precise situation in the Magill case, Joined Cases C-241 & C-242/91, *Radio Telefis Eireann (RTE) v. Comm'n*, 1995 E.C.R. I-743, 4 C.M.L.R. 718 (1995), where television stations in Ireland refused to provide copyrighted program listing to a new entrant who wanted to publish for the first time a multi-channel programming guide for which there was great consumer demand. By definition, none of the television stations were in this new market, and their refusals to supply prevented the emergence of this new product and harmed consumer welfare.

We think this is important. Unilateral (or collective) refusals to deal to prevent the emergence of new products and services is a strong illustration of how a well defined essential facilities doctrine can facilitate significant spillovers and other type of important positive downstream externalities for the benefit of competition, consumers, and society at large. We urge that the Competition Bureau revise its Updated Enforcement Guidelines accordingly.

We would be pleased to answer any questions or provide any additional information that would be of assistance to the Bureau.

Sincerely,



Spencer Weber Waller
Professor and Director
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law



Brett M. Frischmann
Visiting Professor of Law
Cornell Law School

Associate Professor
Loyola University Chicago School of Law