Opening Statement to the AMC
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Thank you for inviting me to provide my views on monopolistic refusals to deal. I have submitted a number of papers to the Commission that propose administrable legal rules for enforcing the antitrust laws in this area.

The rule of reason approach that I have proposed is designed to achieve the competitive goals of the antitrust laws. Monopolistic refusals to deal can harm competition. They can prevent entry that would erode or eliminate the monopoly. They also can limit competition in markets that use the monopolist's product as an input or complement. Administrable antitrust rules can be formulated that prevent these competitive harms while maintaining the innovation incentives of the monopolist. These rules also would lead to innovation by entrants and competitors of the monopolist.

The legal rules that I proposed – including the use of the price benchmark – are administrable, even in the less common cases where there is no previous history of dealing.[2] In addition, the price benchmark has much in common with the profit-sacrifice/no economic sense analysis proposed by Doug Melamed, the DOJ and others.

I readily acknowledge that properly implementing this rule of reason approach takes effort. It is harder to do a better job. Per se rules obviously are easier to administer. But, antitrust analysis is like hurricane relief. Even though it may be difficult, it is important to carry out correctly, rather than throwing up your hands in despair over the magnitude of the task. I do not think that per se legality would serve the interests of competition and consumer welfare in either the long run or the short run.

Moreover, I think that mandating a rule of *per se legality* for refusals to deal has several problematic implications for a number of important antitrust policy issues.

1. A rule of per se legality for refusals to deal necessarily also would imply a rule of per se legality for tying arrangements. Refusing to sell a "tied" product to an unintegrated firm that wants to create its own "system" is analytically equivalent to refusing to sell an input that an unintegrated firm would use to compete.

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[1] Professor of Economics and Law, Georgetown University Law Center; senior consultant, CRA International. My views are my own and are not necessarily shared by others at these institutions.

[2] Most refusal to deal cases involve termination of a prior course of dealing or a situation where the defendant has sold the product to others. My analysis also concerns refusals to deal where there is no prior history of selling. (These cases are less common, though they do occur. For example, Verizon's refusal to supply UNEs to AT&T and other CLECs was one recent case, though it also had a regulatory overlay that affected the antitrust analysis.) Despite the relative rarity of such cases, I have focused on them because they are less well understood by antitrust policy makers. Moreover, if the law is restricted only to situations where there is a previous course of dealing, monopolists more often will refuse to deal from the start.

2. Rejecting the use of a "price benchmark" for determining whether the refusal to deal is anticompetitive also would imply a rejection of the profit-sacrifice and no economic sense standards. This is because I determine the price benchmark by applying the "profit-sacrifice" test calculation, as discussed in the materials that I have distributed. Both rely on the same estimation of costs and substitution patterns. The tests are nearly convergent for refusals to deal.
3. Adopting an antitrust rule of per se legality for this conduct also implies the need for price regulation by expert regulatory agencies. Critics of my analysis argue that generalist courts lack the expertise to apply these rule of reason standards. This defeatist rationale for laissez-faire is flawed. If the courts are not up to the task now, a better approach would be to educate the courts or replace them with another institution that has the requisite expertise. Maybe that means assigning these cases to the FTC. But, it more likely would mean a formal regulatory body. In our economy, the task of dealing with the conduct of durable monopolies typically has been assigned to expert regulatory agencies like the FCC or the FERC.

I think that antitrust is up to the task of carrying out rule of reason analysis of refusals to deal, even where there is no previous history of dealing. I also think that antitrust modernization should mean making antitrust analysis more sophisticated and economically rigorous. Retreating into per se rules of legality is a poor substitute for such rigor.

Thank you. I would be happy to answer your questions.