Before the
COMISIÓN FEDERAL DE COMPETENCIA

Reconsideration Recourse, RA-007-2011	Case File No. DE-37-2006

Declaration of Economists and Antitrust Scholars on Behalf of Radiomóvil Dipsa S.A. de C.V. (Telcel)

INTRODUCTION

We have been asked to provide our views regarding the desirability and potential impact of the adoption of a "price-squeeze" theory of antitrust liability in México. As discussed in detail below, it is our opinion that any rule that threatens a vertically integrated firm with antitrust liability based on the claim that the difference between that firm's upstream and downstream prices leaves its downstream rivals with an insufficient profit margin (a) improperly substitutes a rule of competitor welfare for consumer welfare and (b) will elevate prices to consumers.

We urge the Comisión Federal de Competencia (Cofeco) to use this case as an opportunity to make it unmistakably clear that Mexican antitrust law protects consumer welfare, not competitors. Specifically, we recommend that Cofeco rule that a price squeeze, however defined, does not support an independent cause of action under the Ley Federal de Competencia Económica (LFCE).[1]

BACKGROUND AND EXECUTIVE SUMMARY

A price squeeze, or "margin squeeze," is a theory of antitrust liability in which a vertically integrated firm sells some input (over which it has a monopoly) to downstream firms with which it also competes in the sale of some final product to end users. Under a price-squeeze theory, the focus of analysis is the margin between the monopolist's wholesale input price and the downstream retail price. In the case of an alleged price squeeze, the non-vertically integrated competitor finds that the margin between these two prices is too small to enable it to achieve a sustainable level of profit. Sometimes that margin is alleged to be negative—that is, the monopolist's wholesale price to competitors exceeds its downstream retail price to consumers. In either case, the competitor then complains that the vertically integrated firm is "squeezing" the downstream market to gain a second monopoly by leveraging its upstream monopoly power.

México's antitrust law, the LFCE, contains broad mandates that require analysis and interpretation by the antitrust enforcement agency (Cofeco) and the courts as to whether specific kinds of conduct constitute a violation. This case against Radiomóvil Dipsa S.A. de C.V. (Telcel) involves the termination pricing of competitors' calls on Telcel's wireless network. It is México's test case involving a price-squeeze theory of antitrust liability. Cofeco must decide whether to support or rebuke the proposition that an alleged price squeeze in the telecommunications industry constitutes a cause of action under the LFCE.

The Supreme Court of the United States and the U.S. Department of Justice recently rejected the invitation to make an alleged price squeeze by a telecommunications carrier an independent cause of action under antitrust law in the ***linkLine*** case.[2] In contrast, the European Court of Justice has in two instances, and subject to considerable criticism, accepted that invitation.[3] México must choose between those antitrust paradigms. We submit that Cofeco's choice is clear, for it is not possible to advance consumer welfare by adopting an antitrust rule that punishes a firm for failing to protect and ensure its competitors' profitability.

Telcel has asked us to file this declaration to express our opinions regarding the advisability of Cofeco's preliminary adoption of a price-squeeze theory of antitrust liability in

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1. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 Diciembre 1992, art. 10 (Mex.).
2. Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109 (2009).
3. Case C-280/08 P, Deutsche Telekom AG v. Comm'n, 5 C.M.L.R. 27 (European Ct. of Justice 2010); Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, 2011 E.C.R. I-0000.

the Final Resolution issued on April 7, 2011. We file this declaration in our individual capacities and not on behalf of any academic institutions with which we are affiliated. We present our credentials in Appendix I.

We do not presume to opine on the meaning of the LFCE. Rather, our opinions in this Declaration are based on general principles of law and economics that have influenced the development of antitrust policy in the United States and other nations.

On the basis of our application of those general principles to the facts of this case, we conclude that the adoption by Cofeco of a price-squeeze theory of liability will deter efficiency-enhancing conduct. Vertical integration, both complete and partial, is socially beneficial and is a common feature of any modern economy. Firms in such an economy must be able to make decisions about upstream and downstream integration without the threat of antitrust liability. Vertically integrated firms likewise need to be free to reduce retail prices (as long as that action is not predatory) with concern only for their own overall profitability. Any rule that threatens a vertically integrated firm with antitrust liability based on the claim that the difference between that firm's upstream and downstream prices leaves its downstream rivals with an insufficient profit margin substitutes a rule of competitor welfare for consumer welfare. The recognition of price-squeeze antitrust liability elevates final prices for consumers.

By way of explanation, when a rival complains that a regulated bottleneck provider's pricing is "squeezing" its margins, the real complaint is either that the unregulated downstream retail price is too low or that the regulator has erred by permitting an access price for the bottleneck input that is too high. The complaining rival thus seeks either (a) to restrain retail price competition between itself and the provider of the bottleneck input (fixing or stabilizing the regulated monopolist's retail prices) or, in the alternative, (b) to second-guess, collaterally attack, and nullify the decisions of the legislators and regulators responsible for establishing the regulatory regime. In either case, the consumer will suffer.

Although the issues we discuss herein may influence a court's review of the Final Resolution, they are, more importantly, issues that we believe Cofeco, as the national enforcement agency of the LCFE, should consider. In our judgment, the Final Resolution has broad significance (beyond the confines of this case) because it poses this fundamental question: does the LFCE exist to advance the welfare of México's consumers? Cofeco's answer in response to Telcel's reconsideration recourse has the potential to shape Mexican antitrust law for years to come.

As we noted at the outset, we recommend that Cofeco rule that a price squeeze, however defined, does not support an independent cause of action under the LFCE unless Mexican antitrust law be subverted to protectionist ends. The basis for this recommendation can be summarized into two major points:

> (1) Adoption of a price-squeeze theory of liability invites a government-managed cartel that would raise prices to consumers. Because a vertically integrated dominant firm cannot ascertain how it should price in the downstream market to avoid engaging in an unlawful price squeeze, the firm likely will default to a strategy of *refraining* from pricing "competitively." In other words, because of the uncertainty caused by the prospect of a price-squeeze theory of liability, a dominant firm's safe strategy is to raise its retail price to the level at which the least-efficient retailer does not complain. The dominant firm then maximizes profit subject to the constraint that other non-integrated firms must be assured of attaining some targeted level of profitability. Consequently, the

dominant firm must act as the price leader and intentionally cede market share to the benefit of its rivals. This outcome harms consumers.

(2) Where a firm has no antitrust duty to deal, the terms upon which it chooses to deal should not form the basis for an antitrust violation.

SUMMARY OF THE CASE

Cofeco accused Telcel of increasing the price of interconnection to its network for independent retailers—known as the termination fee—to a level higher than the price offered to its own local wireless telephone service customers that included its self-determined termination cost. Cofeco investigated this matter to determine whether, pursuant to Article 10(XI) of the LFCE, Telcel intended to cause, and/or caused, directly or indirectly, an increase in its competitors' costs and/or a decrease in the demand for their services, thereby creating an exclusive advantage in its own favor and unlawfully displacing other fixed (wireline) and mobile telecommunications network operators (TNOs) from the relevant market, as defined by Cofeco.

For Telcel's actions to constitute what the LFCE terms a "relative monopolistic" practice, Cofeco must show that Telcel's actions "increased the costs, hindered the process of production, and/or reduced the demand [of a competitor's product or service]."[4] To determine a violation of Article 10, it is first necessary to: (1) define the relevant market, (2) determine that the conduct has the object or effect of unduly displacing other companies from the market, substantially preventing their access, or establishing exclusive advantages in favor of one or several persons, and (3) determine that the party responsible has substantial power in the relevant market.[5]

In conducting its analysis, Cofeco defined the relevant market to be the "termination of calls on Telcel's network"[6] and found, not surprisingly, that Telcel has "substantial power" in this market for the termination of calls onto its *own* network.[7] Cofeco also found that Telcel competes with the wireless claimants directly and indirectly through Telmex (Telcel's wireline affiliate).[8]

Telcel argued that it does not have market power of antitrust concern in this defined market because it has no power to unilaterally set prices or restrict supply. Mexican law and regulation require carriers to provide interconnection and terminating access. Any carrier that denies or restricts access is subject to immediate revocation of its wireless concession.[9] Moreover, the price and conditions of terminating access at issue in this case were (and remain) subject to regulation by the Comisión Federal de Telecomunicaciones (Cofetel). Under the regulatory scheme, the parties have the option of setting the fees and conditions among themselves through arms-length negotiations. If the parties cannot agree upon the fee or other conditions for interconnection, one or both parties may request Cofetel's intervention for resolving the dispute.[10] Cofetel's determination of the terms and conditions is subject to review

4. Comisión Federal de Competencia México, Resolución, Radiomóvil Dipsa, S.A. de C.V. (DE-37-2006), at 42 (Apr. 7, 2011) (English translation) [hereinafter *Resolución*].
5. *Id.* at 45.
6. *Id.* at 4-51.
7. *Id.* at 51-58.
8. *Id.* at 43.
9. *Id.* at 52-53.
10. *Id*. at 54-58.

by the Secretary of Communications and Transport (SCT) and the courts. The fees are reciprocal.[11] The fees that are the basis for this proceeding against Telcel were in some cases agreed to by the parties and in other cases were the result of Cofetel's intervention.[12]

Cofeco dismissed Telcel's arguments that it cannot exercise market power in this regulated industry and that the public regulation of Telcel's conduct and fees meant that Telcel could not violate the LFCE.[13] Cofeco reasoned that the fees entered into by agreement (where the parties were able to agree and hence did not seek Cofetel's intervention) are *not* subject to Cofetel's regulatory oversight.[14] Cofeco also found that where Cofetel had intervened and set prices, but where Telcel appealed, the judicial review of the fees somehow rendered them unregulated. Cofeco thus concluded that, despite this regulatory scheme, Telcel had the unilateral ability to set fees.[15]

Cofeco also dismissed Telcel's argument that the LFCE requires the competitors to exist in the same relevant market in which Telcel was found to have substantial power. Cofeco reasoned instead that the LFCE requires only that Telcel's actions reduce demand for competitors' products or services in a "related market."[16]

Cofeco found that, during the relevant time period (approximately the years 2006-2009), certain of Telcel's fees to its wireless and wireline competitors for terminating access exceeded the prices that Telcel charged end-user customers for wireless phone service—both for "on-net" calls (which originate and terminate on Telcel's network) and for "off-net" calls (which originate on Telcel's network and terminate on another carrier's network).

Cofeco concluded that Telcel's conduct violated Article 10, Section XI of the LFCE because Telcel's actions had the objective and effect of increasing the costs of competitors; simultaneously decreasing demand for their services; establishing exclusive advantages in favor of itself; and displacing third-party competitors in the "related" fixed and mobile phone service markets.[17] Cofeco found that, by offering prices to end-user subscribers that were lower than the terminating access charges to competing carriers, Telcel increased the costs of the fixed and mobile competitors of Telcel and Telmex.[18] With regard to the one wireless complainant, Cofeco found that that complainant could not price services competitively with Telcel. With regard to the five wireline complainants, Cofeco found that Telcel's charges raised their costs, which had the effect of increasing their prices, lowering demand for wireline services, and shifting usage to wireless service. In antitrust parlance, Cofeco claimed that Telcel was engaged in a strategy of raising rivals' costs.[19]

Finally, and despite the fact that Telcel's alleged conduct is classified as a "relative" monopolistic practice under the LFCE (akin to a "rule of reason" cause of action under U.S. law), as opposed to an "absolute" practice (akin to a *per se* violation), Cofeco performed no

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11. *Id.* at 30-31.
12. *Id.* at 33-35.
13. *Id.* at 261-71.
14. *Id.* at 127-35.
15. *Id.* at 323.
16. *Id.* at 243-60.
17. *Id.* at 60-61.
18. *Id.* at 58-59.
19. *See* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 28-35 (3d. ed., Addison Wesley Longman 2000).

thorough economic analysis of the effect of Telcel's conduct on competition in the relevant markets. Rather, and in response to Telcel's argument that Cofeco had failed to assess whether Telcel's conduct injured competition, Cofeco appeared to conclude that Telcel bore the burden of demonstrating a lack of harm to competition.[20]

I. THE FINAL RESOLUTION INVITES A GOVERNMENT-MANAGED CARTEL THAT WILL RAISE RETAIL PRICES TO CONSUMERS

Economists often distinguish between intentions and effects. One perverse effect of an antitrust rule that ensures profit margins for competitors is that, to avoid liability for monopolization, the vertically integrated monopolist has an incentive to behave like the leader of a cartel and seek to ensure that its competitors have a sufficient margin to avoid the risk of a price-squeeze claim. The only safe haven for the vertically integrated firm is to forbear from setting prices to consumers lower than the competitors' wholesale costs plus whatever the competitors consider a fair margin. Moreover, if wholesale prices must be reduced each time that retail prices are reduced (so as to preserve profit margins of those participants who depend on rivals as a source of supply), then there may be an outbreak of live-and-let-live price rigidity in the market. Thus, the price-squeeze theory of liability converts antitrust law into a vehicle for implementing and enforcing what in any other context would be labeled an illegal cartel or price-fixing agreement.[21]

It was this very risk of higher retail prices for consumers that caused the Supreme Court of the United States in *linkLine*,[22] with the support of the U.S. Department of Justice,[23] to reject the price-squeeze doctrine: "Recognizing a price-squeeze claim where defendant's retail prices remain above cost would invite the precise harm we sought to avoid [in earlier cases]: Firms might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability."[24] That concern for consumer welfare is notably absent from the *Deutsche Telekom* opinion,[25] in which the European Court of Justice specifically recognized that (1) DT's wholesale services were regulated, (2) the German regulatory body had in fact established a wholesale price, and (3) DT had no ability to lower the wholesale price.[26] Almost unbelievably, the ECJ suggested that DT consider raising its retail price.[27]

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20. *Resolución*, *supra* note 4, at 271-86.

21. *See* Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271, 278 (2008) ("Where there is a duty to deal under the antitrust laws, application of the theory is likely to create incentives for inefficiency as firms either raise price or cease production to avoid liability."). However, the option to cease production in the downstream market may not be available to a regulated firm, as it may have an "obligation to serve" and thus may face a statutory or regulatory barrier to exit. *See* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 127-29 (Cambridge Univ. Press 1997).

22. Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109, 1120 (2009).

23. Brief for the United States as Amicus Curiae Supporting Petitioners, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., No. 07-152 (filed Sept. 2008).

24. *linkLine*, 129 S. Ct. at 1120.

25. Opinion of Advocate General, Case C-280/08 P, Deutsche Telekom AG v. Commission (Apr. 22, 2010).

26. *Id.* ¶¶ 2-3.

27. *Id.* ¶ 13.

One of these two outcomes serves consumer welfare. The other does just the opposite, protecting competitors to the detriment of consumers.

A. The Final Resolution Subordinates a Consumer-Welfare Standard to a Protectionist Competitor-Welfare Standard

John Sutton explains that the Bertrand, Cournot, and joint-profit-maximization formulations of oligopoly pricing "capture the notion of the toughness of price competition."[28] Sutton notes that the toughness of competition "is an exogenously given characteristic of the market" that "will depend," in part, "on such institutional features as the presence or absence of anti-trust laws."[29] It follows that the toughness of price competition in a given country will reflect, more importantly, the substantive content of that nation's antitrust law. In particular, an antitrust rule that invites a firm to complain to the antitrust enforcement agency about a price squeeze by a vertically integrated rival causes the strategic interaction among firms in the downstream market to mutate into the softest form of price competition—which, in the limit, is joint-profit maximization.

In our judgment, the principal beneficiaries of the Final Resolution are Telcel's competitors. Putting aside the fact that companies such as Telefonica, Spain's and one of the world's largest telecommunications carrier, need no subsidy, there is no economic rationale for making Telcel's shareholders and customers fund such a subsidy even if it were necessary. As we have explained, increasing the complaining firm's margin would require increasing the retail price of the service at the expense of customers, or reducing the wholesale price of the service, which would require cross-subsidies from other services, again at the expense of customers. The more accurate assessment is that the subsidy inherent in a liability rule for margin squeeze turns antitrust law into a tool for rent-seeking behavior by competitors.[30]

Finally, although the recognition of a price-squeeze antitrust claim would harm consumers, the rejection of the theory would not. The alleged anticompetitive effect of a margin squeeze is not credible, as perhaps evidenced by the absence of proof of displacement of Telcel's downstream competitors. Spectrum is a durable resource, as are towers and transmitters. Even if one carrier were driven into bankruptcy, its assets would not evaporate. The same reasoning applies to the durable assets of wireline carriers that Cofeco believes Telcel could displace. The company would be reorganized under bankruptcy law (with a lower cost structure) or (less

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28. JOHN SUTTON, SUNK COSTS AND MARKET STRUCTURE: PRICE COMPETITION, ADVERTISING, AND THE EVOLUTION OF CONCENTRATION 6 (MIT Press 1991). *See also* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 559-60 (Cambridge Univ. Press 2004); John Sutton, *Market Structure: Theory and Evidence*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2301, 2310-11 (Mark Armstrong & Robert Porter eds., North Holland 1989) (explaining "toughness of price competition" as "the functional relationship between market structure . . . and equilibrium price"); CLEMENT G. KROUSE, THEORY OF INDUSTRIAL ECONOMICS 67-71 (Basil Blackwell, Inc. 1990); Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011, 1019-31 (Richard Schmalensee & Robert D. Willig eds., North Holland 1989) (discussing measurement of strategic interaction and conjectural variations in oligopoly).

29. Sutton, *Market Structure: Theory and Evidence*, *supra* note 28, at 2311 n.9.

30. Such an outcome occurred in U.S. long-distance services. *See* PAUL W. MACAVOY, THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES (AEI Press & MIT Press 1996); PAUL W. MACAVOY & MICHAEL A. WILLIAMS, DEREGULATION OF ENTRY IN LONG-DISTANCE TELECOMMUNICATIONS (Institute of Public Utilities, Michigan State Univ. 2002); Jerry A. Hausman & J. Gregory Sidak, *Why Do the Poor and the Less-Educated Pay More for Long-Distance Calls?*, 3 CONTRIBUTIONS IN ECON. & POL'Y RES. art. 3 (2004), *available at* http://www.bepress.com/bejeap/contributions/vol3/iss1/art3/.

likely) its assets would be sold in liquidation (subject to antitrust supervision) to another firm that would then enter the Mexican marketplace.[31] Under these circumstances, it does not make economic sense to contend or argue that a margin squeeze could displace one of Telcel's competitors. Lawyers and economists have long understood this principle when assessing the plausibility of predatory pricing in a network industry.[32] The principle should not be forgotten here.

B. Determining and Setting Prices Is the Function of Regulators, Not Antitrust Enforcers and the Courts

The public utility cases regarding alleged price squeezes are highly technical *regulatory* proceedings that are typically protracted and fact intensive. Before his elevation to the Supreme Court of the United States, Justice Breyer noted, in *Town of Concord,* that a price-squeeze case requires a court to "act like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years."[33] Price-squeeze cases are precisely the kinds of proceedings that would be unwieldy to examine through the lens of antitrust litigation. Imputation analysis requires the estimation of incremental cost. Even so ambitious and invasive a monopolization case as the Bell System divestiture did not attempt to use antitrust litigation as a tool for regulating the price of wholesale services supplied by the monopoly carrier.[34]

The experience with price-squeeze cases brought by antitrust authorities in Europe confirms the economic and factual complexity of correctly estimating and then implementing the imputation analysis. It becomes necessary to hypothesize what is the cost structure that an efficient competitor must shoulder, and then it becomes necessary to determine whether the defendant's wholesale and retail prices permit the hypothetically efficient competitor to earn a rate of return from the retailing activity deemed to be sufficient and sustainable.[35] This kind of analysis, however, merely underscores that the requisite work is that of a public utilities commission, not that of an antitrust enforcer or an antitrust tribunal.

By definition, Cofeco's work as de facto rate regulator of every vertically integrated industry in Mexico would never end because exogenous economic events would compel wholesale and retail prices to change over time, such that—in the absence of periodic intervention by Cofeco—a given profit margin would shrink and jeopardize the survival of competitors. Price-squeeze litigation would become enduring cost-of-service regulation that would tax Cofeco's resources. At more than 500 pages in length, the Final Resolution is not an antitrust opinion—it is a regulatory order. In the present reconsideration matter before it, Cofeco has a closed record and is now prepared to issue an opinion.

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31. *Cf.* J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207 (2003).

32. SIDAK & SPULBER, *supra* note 21, at 92-94.

33. Town of Concord v. Boston Ed. Co., 915 F.2d 17, 25 (1st Cir. 1990).

34. United States v. Am. Tel. & Tel. Corp., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

35. *See, e.g.*, Michele Polo, *Price Squeeze: Lessons from the* Telecom Italia *Case*, 3 J. COMPETITION L. & ECON. 453 (2007); Laura Ferrari Bravo & Paolo Siciliani, *Exclusionary Pricing and Consumer Harm: The European Commission's Practice in the DSL Market*, 3 J. COMPETITION L. & ECON. 243 (2007); Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector*, 1 J. COMPETITION L. & ECON. 355 (2005).

But what happens when Telcel subsequently lowers its retail price in response to market demand changes? Or when Telcel incurs additional costs for terminating access and raises its wholesale price? Will Cofeco have any choice but to continue to regulate in this situation? And what happens if *Cofetel* sets a termination fee, but Telcel then lowers its retail price? Will Cofeco preempt Cofetel and order Telcel to offer its competitors a lower wholesale fee? Will Cofeco order Telcel to raise its retail prices? These tasks define a responsibility that Cofeco is not well suited to assume.

Finally, allowing an antitrust price-squeeze claim in this situation—where the service at issue is regulated—would permit companies to evade the regulatory process simply by accepting any terms proposed by the incumbent and then filing a complaint with Cofeco. The purpose of the "mutual agreement or Cofetel intervention" approach—which is set forth in the laws and regulations whereby the parties may either agree to terms or seek Cofetel's involvement—is to avoid the regulator's unnecessary involvement in those matters where the parties can reach mutual agreement. The purpose of that approach is ***not*** to provide a mechanism whereby a rent-seeking party may choose which government agency it might prefer to have regulating its competitors—sector-specific regulator or antitrust authority.

II. When a Firm Has No Antitrust Duty to Deal, the Terms on Which It Deals Should Not Be Construed as Anticompetitive

Where a firm has no antitrust duty to deal, the terms upon which it chooses to deal should not then form the basis for an antitrust violation. If a firm may lawfully refuse to deal entirely, then it cannot cause any greater harm to competition by agreeing to deal with its competitors on terms that they find undesirable.

Before a firm can be found to have engaged in an anticompetitive price squeeze, it must have an antitrust duty (as opposed to a regulatory duty) to supply the product or service that is the basis for the squeeze. Even a dominant firm has an antitrust duty to deal only under one of two antitrust theories: (1) *refusal to deal*, and (2) *essential facilities*.

Under Article X of the LFCE, an illegal refusal to deal occurs when a firm refuses to sell products or services to a particular firm or firms despite the fact that the products or services "are normally offered to third parties."[36] In this case, Telcel offered terminating access because it had been ordered to do so. Where a party supplies a service because it is compelled to do so by regulation, it cannot be claimed that the party "normally offers" the service to third parties. With respect to the essential facilities theory, the Supreme Court of the United States held in *Trinko* that where an agency has the power to compel access and regulate its scope and terms, an essential facilities claim should be denied.[37] The Court observed that a doctrine with such reliance upon the unavailability of access to a facility serves no purpose where access already exists.[38]

Some observers may speculate that the ECJ embraced a price-squeeze theory in *Deutsche Telekom* because the Court considered German regulators ineffective, with the result being that

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36. L.F.C.E. art. 10.
37. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004).
38. *Id.* at 411.

DT was permitted to charge too high a wholesale rate to its competitors.[39] In other words, concern over "regulatory capture" might cause the antitrust enforcer to doubt the efficacy of sector-specific regulation. Even if this concern was the underlying basis for the ECJ's opinion, and even if it were the court's as opposed to legislature's prerogative to assess the efficacy of regulation, such a finding does not somehow transform a regulatory obligation into an antitrust duty. And, in any event, Cofeco made no finding regarding the essentiality of the services at issue, nor of regulatory failure infecting Cofetel's oversight of Telcel's wholesale rates. To the contrary, Mexican law and regulation clearly compel access, and Cofetel clearly has the power to regulate the terms and conditions of that access. Telcel's duty to deal arises from México's telecommunications regulation, not its antitrust law.

CONCLUSION

It is neither feasible nor desirable to use antitrust law to make a vertically integrated firm responsible for ensuring the profitability of its competitors in the downstream market. Doing so would create a powerful and perverse incentive for the vertically integrated firm to raise its retail price to reduce the risk of antitrust lawsuits by unprofitable downstream competitors. Such a consequence is antithetical to consumer welfare.

Cofeco should reverse the finding that Telcel has violated the LFCE.

Respectfully submitted,

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October 14, 2011

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39. *See* Damien Neven, Chief Competition Economist, DG Competition, The Relationship Between Competition Enforcement and Sector Regulation, Presentation at the Université Libre de Bruxelles, at 6, 19 (Nov. 2009).

APPENDIX I: QUALIFICATIONS

A. Robert H. Bork

My name is Robert H. Bork. I have written about and practiced antitrust law for more than half a century. I am the author of *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1978; 2d ed. 1993), which the Supreme Court of the United States has cited in various decisions. I taught antitrust law at Yale Law School, where I was the Alexander M. Bickel Professor of Public Law. I have served as Solicitor General of the United States and as a Circuit Judge on the U.S. Court of Appeals for the District of Columbia Circuit. While sitting on the D.C. Circuit, I wrote the court's 1986 opinion in the *Rothery* case, which clarified the need for sound economic analysis in rule-of-reason antitrust cases.[40] In 1992, after I had resumed private law practice, I successfully argued the *Brooke Group*[41] predatory pricing case before the Supreme Court of the United States. In 2007, Professor Gregory Sidak and I filed an amicus brief of antitrust scholars that successfully urged the Supreme Court of the United States to grant certiorari in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*[42] to examine questions about the price-squeeze theory of liability under section 2 of the Sherman Act, as well as the more fundamental question of whether the price-squeeze portion of the historic *Alcoa*[43] monopolization decision of 1945 had been implicitly overruled by the Court's consumer-oriented antitrust jurisprudence of the past three decades. I have been a fellow at the American Enterprise Institute, the Hudson Institute, and the Hoover Institution of Stanford University. Before entering academia, I was a partner at Kirkland & Ellis. I earned undergraduate and law degrees from the University of Chicago.

B. Michael J. Boskin

My name is Michael J. Boskin. I am the T.M. Friedman Professor of Economics at Stanford University and a Senior Fellow at the Hoover Institution. I am also a Research Associate at the National Bureau of Economic Research. I have served on several federal advisory panels and as an adviser to presidents and prime ministers, finance ministries, and central banks around the world. From 1989 to 1993, I served President George H.W. Bush as Chairman of the Council of Economic Advisers. I have also been an adviser to the U.S. Senate Finance Committee, the U.S. Congressional Budget Office, and the Joint Committee on Taxation in the U.S. Congress. I currently serve on the corporate boards of directors of Exxon Mobil and Oracle, and I previously was a director of Shinsei Bank and Vodafone. I have worked on antitrust and regulatory matters in government and as an expert witness on behalf of a major telecommunications carrier. I have served as a consultant to numerous other businesses and government agencies, including the U.S. Department of Labor, the Joint Economic Committee in the U.S. Congress, and the Organization for Economic Cooperation and Development. I chaired the Congressional Advisory Commission on the Consumer Price Index, whose report has transformed how government statistical agencies around the world measure inflation, GDP, and

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40. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986).
41. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
42. 555 U.S. 438, 129 S. Ct. 1109 (2009).
43. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d. Cir. 1945).

productivity. My research has addressed world economic growth, tax and budget theory and policy, U.S. saving and consumption patterns, and the implications of changing technology and demography on capital, labor, and product markets. I have received numerous professional awards and citations, including the National Association of Business Economists' Abramson Award for outstanding research and its Distinguished Fellow Award, the Medal of the President of the Italian Republic in 1991 for my contributions to global economic understanding, and the 1998 Adam Smith Prize for outstanding contributions to economics. I have published articles in the *American Economic Review*, the *Journal of Political Economy*, the *Quarterly Journal of Economics*, the *Review of Economics and Statistics*, the *Journal of Public Economics*, and many other publications. My essays appear regularly in the *Wall Street Journal* and other leading newspapers. I also write a bi-monthly column on global economics that is syndicated in 145 countries. I earned an undergraduate degree, an M.A., and a Ph.D. in economics from the University of California at Berkeley.

C. Kenneth G. Elzinga

My name is Kenneth G. Elzinga. I am the Robert C. Taylor Professor of Economics at the University of Virginia, where I teach microeconomics and antitrust economics. My research in antitrust has concerned defining relevant markets, predatory pricing, and merger enforcement. My works have been cited by the Supreme Court of the United States,[44] and I was the economic expert for the prevailing parties in three prominent antitrust cases decided by the Supreme Court: *Matsushita* and *Brooke Group* (both predatory pricing cases) and *Leegin* (involving resale price maintenance).[45] My articles have appeared in the *American Economic Review*, the *Journal of Law & Economics*, the *Harvard Law Review*, the *Antitrust Law Journal*, the *Supreme Court Economic Review*, and other journals. I have been a consultant on antitrust matters for the Antitrust Division, the Federal Trade Commission, and the Nuclear Regulatory Commission. I have published several articles on predatory pricing.[46] My books on antitrust include *The Antitrust Penalties: A Study in Law and Economics*,[47] *The Antitrust Casebook: Milestones in*

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44. Texas Indus. v. Radcliff Materials, 451 U.S. 630, 636 (citing KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS (Yale Univ. Press 1976)); Ford Motor Co. v. U.S., 405 U.S. 562, 582 (1972) (citing Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969)); United States v. Falstaff, 410 U.S. 526, 551 (1973) (citing Kenneth G. Elzinga, *The Beer Industry*, *in* THE STRUCTURE OF AMERICAN INDUSTRY ch. 4 (4th ed., Walter Adams ed., Macmillan 1971)).

45. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *Brooke Group*, 509 U.S. at 226 (citing Kenneth G. Elzinga & David E. Mills, *Testing for Predation: Is Recoupment Feasible?*, 34 ANTITRUST BULL. 869 (1989)); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

46. Kenneth G. Elzinga & David E. Mills, *Predatory Pricing in the Airline Industry:* Spirit Airlines v. Northwest Airlines, *in* THE ANTITRUST REVOLUTION 219 (5th ed., John E. Kwoka & Lawrence J. White eds., Oxford Univ. Press 2008); Kenneth G. Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 23 (1970); Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 GEO. L.J. 2475 (2001); Kenneth G. Elzinga, *Collusive Predation: The Case of* Matsushita v. Zenith, *in* THE ANTITRUST REVOLUTION 220 (3d. ed., John E. Kwoka, Jr. & Lawrence J. White eds., Oxford Univ. Press 1999); Kenneth G. Elzinga & David E. Mills, *Is Predation Rational? Is It Profitable? Comments to Adams, Brock and Obst*, 11 REV. INDUS. ORG. 759 (1996); Donald J. Boudreaux, Kenneth G. Elzinga & David E. Mills, *The Supreme Court's Predation Odyssey: From Fruit Pies to Cigarettes*, 4 SUP. CT. REV. 57 (1995); Elzinga & Mills, *Testing for Predation*, *supra* note 45.

47. ELZINGA & BREIT, THE ANTITRUST PENALTIES, *supra* note 44.

Economic Regulation,[48] and *Antitrust Penalty Reform: An Economic Survey*.[49] I earned an undergraduate degree from Kalamazoo College and an M.A. and Ph.D. in economics from Michigan State University.

D. Paul W. MacAvoy

My name is Paul W. MacAvoy. I am the Williams Brothers Professor Emeritus of Management Studies at the Yale School of Management. I have held chaired professorships at the Massachusetts Institute of Technology and the University of Rochester, and I was also Dean of the Management Schools at Rochester and Yale. I was a member of President Ford's Council of Economic Advisers and served as the co-chairman of the President's Task Force on Regulatory Reform. I was the founding editor of the *Bell Journal of Economics and Management Science*, now known as the *RAND Journal of Economics*. I have written many scholarly articles and books on regulation and antitrust, including the causes and consequences of the antitrust breakup of the American Telephone & Telegraph Company and the subsequent Telecommunications Act of 1996. My book *The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services* (AEI Press & MIT Press 1996) analyzes the perverse situation (directly relevant to this case) in which antitrust or regulatory intervention promotes tacit collusion in an oligopolistic industry, to the substantial detriment of consumer welfare. The Supreme Court of the United States has cited this book and other scholarly publications of mine. In 2007, I joined an amicus brief of antitrust scholars urging the Supreme Court of the United States to hear the *linkLine* case and abolish the margin squeeze as a theory of antitrust liability. I have been a director of the Alumax Corporation, the American Cyanamid Corporation, the Chase Manhattan Bank Corporation, the LaFarge Corporation, and the United States Synthetic Fuels Corporation. I hold honorary doctorates from Bates College and Sacred Heart University and the Cross Medal from Yale University. I earned an undergraduate degree from Bates College and a doctorate in economics from Yale.

E. George L. Priest

My name is George L. Priest. I am the Edward J. Phelps Professor of Law and Economics and the Kauffman Distinguished Research Scholar in Law, Economics, and Entrepreneurship at the Yale Law School. At Yale, I directed the John M. Olin Center for Studies in Law, Economics and Public Policy. I have been president of the American Law and Economics Association. I have published more than 180 articles, including articles in such journals as the *Journal of Law & Economics*, the *Journal of Legal Studies*, the *Journal of Law, Economics & Organization*, the *Harvard Law Review*, the *Yale Law Journal*, the *Yale Journal on Regulation*, and the *Journal of Competition Law & Economics*. Many of my writings address the application of antitrust law to network industries experiencing rapid technological change.[50] I

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48. KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST CASEBOOK: MILESTONES IN ECONOMIC REGULATION (Dryden Press 1982).

49. KENNETH G. ELZINGA & WILLIAM BREIT, ANTITRUST PENALTY REFORM: AN ECONOMIC SURVEY (Am. Enterprise Inst. 1986).

50. *See, e.g.*, George L. Priest, *Antitrust Enforcement in the Information Age*, 4 TEX. REV. L. & POL'Y 141 (1999); George L. Priest, *Flawed Efforts to Apply Modern Antitrust Law to Network Industries*, *in* HIGH-STAKES ANTITRUST 117 (AEI/Brookings Press 2003); George L. Priest, *Perspectives on the Future Direction of Antitrust*, 22 ANTITRUST 21 (2008); George L. Priest, *The Antitrust Suit Counteroffensive to Tort Reform*, LEGAL

have also published many opinion pieces on business regulation in the *Wall Street Journal*, the *New York Times*, and *Fortune Magazine*. From 1987 to 1988, I served on the President's U.S. Commission on Privatization. I have served as a consultant to the Federal Trade Commission and the Institute for Civil Justice at the RAND Corporation. I am a member of the Council of Academic Advisers to the American Enterprise Institute. I earned an undergraduate degree from Yale and a law degree from the University of Chicago.

F. J. Gregory Sidak

My name is J. Gregory Sidak. I am the chairman of Criterion Economics, L.L.C. in Washington, D.C., and the Ronald Coase Professor of Law and Economics at the Tilburg Law and Economics Center at Tilburg University in The Netherlands. I am also the founding co-editor of the *Journal of Competition Law & Economics*, published quarterly by the Oxford University Press. From 1981 to 1982, I was Judge Richard A. Posner's first law clerk on the U.S. Court of Appeals for the Seventh Circuit. From 1986 to 1987, I was Senior Counsel and Economist to the Council of Economic Advisers in the Executive Office of the President. From 1987 to 1989, I was Deputy General Counsel of the Federal Communications Commission. Thereafter, I practiced law with Covington & Burling and subsequently became the F.K. Weyerhaeuser Fellow in Law and Economics at the American Enterprise Institute and directed its research initiative on telecommunications regulation. I have been a Senior Lecturer at the Yale School of Management and a Visiting Professor of Law at Georgetown University Law Center. I have published six books and more than eighty articles in scholarly journals, including an article on the law and economics of margin squeeze.[51] The Supreme Court of the United States has cited my writings in its antitrust and telecommunications decisions. With Judge Robert Bork, I filed the amicus brief of antitrust scholars in the *linkLine* case, described earlier. I have advised more than thirty telecommunications and media companies on antitrust and regulatory matters in North America, Europe, Asia, and the Pacific. In addition, I have served as a member of the U.S. Advisory Board for NTT DoCoMo, Japan's largest wireless telecommunications company, and in that capacity briefed DoCoMo's chairman semiannually on the strategic implications of emerging regulatory and antitrust trends. I earned undergraduate and masters degrees in economics, and a law degree, from Stanford University.

G. Pablo T. Spiller

My name is Pablo T. Spiller. I am the Jeffrey A. Jacobs Distinguished Professor in Business and Technology at the Walter A. Haas School of Business at the University of California at Berkeley. I am also a Research Associate at the National Bureau of Economic Research. My research addresses the economics of regulation and antitrust, regulatory issues in developing countries (including telecommunications regulation), institutional analysis, political economy, positive political theory and the courts, and industrial organization. I have published articles in the *Handbook of Telecommunications Economics*, the *Journal of Law & Economics*, the *Journal of*

BACKGROUNDER, May 12, 1989; George L. Priest, *The Justice Department's Antitrust Bomb*, WALL ST. J., June 2, 2009; George L. Priest, *Rethinking Antitrust Law in an Age of Network Industries* (Yale Law Sch., Yale Law & Econ. Research Paper No. 354, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031166.

51. *See* J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. COMPETITION L. & ECON. 279 (2008).

Political Economy, the *Quarterly Journal of Economics*, the *RAND Journal of Economics,* and many other publications. My authored or edited books include *The Institutional Foundations of Public Policy in Argentina*,[52] *Regulación de los Sectores de Infraestrctura v Energéticos en México*,[53] and *Regulations, Institutions and Commitment: A Comparative Analysis of Telecommunications Regulation*.[54] I have served as a consultant to The World Bank, the InterAmerican Development Bank, the U.S. Federal Trade Commission, the U.S. Department of Transportation, Mexico Energy Regulation Commission, Mexico Antitrust Commission, the United Nations Development Program, the Ministry of Economics of Argentina, and the Central Bank of Uruguay. I am the editor-in-chief of the *Journal of Law, Economics and Organization* and an associate editor of the *Journal of Comparative Economics*, the *Journal of Applied Economics*, *Regulation Magazine*, and *The Utility Project*. I am on the boards of advisers of the Center for Institutional Analysis, the Independent Institute, the Center on Global Prosperity, the SSRN Advisory Board, and Law and Positive Political Theory. I am a former president of the International Society for New Institutional Economics. From 1992 to 1998, I was a Senior Fellow at the Institute for Policy Reform. I earned B.A. and M.A. degrees in economics from the Hebrew University of Jerusalem and M.A. and Ph.D. degrees in economics from the University of Chicago.

H. Daniel Spulber

My name is Daniel F. Spulber. I am the Elinor Hobbs Distinguished Professor of International Business and Professor of Management Strategy at the Kellogg School of Management, Northwestern University, where I have taught since 1990. I am also Professor of Law at the Northwestern University Law School (Courtesy). I am the founding editor of the *Journal of Economics & Management Strategy*, published by Wiley-Blackwell Publishing. My research expertise is in the areas of international economics, industrial organization, microeconomic theory, regulation, law and economics, antitrust, entrepreneurship, and management strategy. My works have been cited by the Supreme Court of the United States.[55] I have provided expert testimony in cases in the telecommunications industry and other network industries. I am the Research Director for the Searle Center on Law, Regulation and Economic Growth. From 2001 to 2006, I served as Founding Director of Kellogg's International Business & Markets Program. I have published numerous journal articles in economics journals and law reviews, including the *American Economic Review*, the *Journal of Political Economy*, the *Quarterly Journal of Economics*, the *RAND Journal of Economics*, the *Columbia Law Review*, the *New York University Law Review*, the *Harvard Journal of Law and Public Policy*, and the *Yale Journal on Regulation*. I am the author of twelve books in the areas of microeconomic

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52. PABLO T. SPILLER & MARIANO TOMMASI, THE INSTITUTIONAL FOUNDATIONS OF PUBLIC POLICY IN ARGENTINA (Cambridge Univ. Press 2007).

53. REGULACIÓN DE LOS SECTORES DE INFRAESTRCTURA V ENERGÉTICOS EN MÉXICO (Pablo T. Spiller & Carlos Sales eds., ITAM/Porrua Grupo Editorial 1999).

54. REGULATIONS, INSTITUTIONS AND COMMITMENT: A COMPARATIVE ANALYSIS OF TELECOMMUNICATIONS REGULATION (Pablo T. Spiller & Brian Levy eds., Cambridge Univ. Press 1996).

55. *See* Verizon Commc'ns Inc. v. Fed. Commc'ns Comm'n, 535 U.S. 467, 514, 549, 551, 563 (2002) (citing SIDAK & SPULBER, *supra* note 21, at 284-85); J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 YALE J. ON REG. 117, 124-25 (1998); J. Gregory Sidak & Daniel F. Spulber, *Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 COLUM. L. REV. 1081, 1093 (1997)).

theory, regulated industries, and management strategy, including ***Economics & Management of Competitive Strategy***,[56] ***Networks in Telecommunications: Economics and Law*** with Christopher Yoo,[57] and ***Regulation and Markets***.[58] I earned an undergraduate degree from the University of Michigan and an M.A. and Ph.D. in economics from Northwestern University.

I. David J. Teece

My name is David J. Teece. I am the Thomas W. Tusher Professor of Global Business at the Haas School of Business at the University of California, Berkeley. I am also the co-founder and chairman of Berkeley Research Group, LLC. My research concerns the theory of the firm and strategic management, the economics of technological change, knowledge management, technology transfer, and antitrust economics and innovation. I have also held teaching and research positions at Stanford University and Oxford University. I have testified before Congress on regulatory policy and competition policy. I am the author of more than 200 books and articles, and I am the editor of the journal *Industrial & Corporate Change,* published by the Oxford University Press. My most recent book is *Dynamic Capabilities and Strategic Management: Organizing for Innovation and Growth* (Oxford University Press 2009). My research has been cited by the Supreme Court of the United States. I have testified as an expert witness in many notable antitrust cases in which innovation has figured prominently, including the *Oracle-PeopleSoft* merger and the *Rambus* and *Unocal* standards-setting litigation. I earned a Ph.D. in economics from the University of Pennsylvania and have also received three honorary doctorates.

56. DANIEL F. SPULBER, ECONOMICS & MANAGEMENT OF COMPETITIVE STRATEGY (World Scientific Press 2009).

57. CHRISTOPHER YOO & DANIEL F. SPULBER, NETWORKS IN TELECOMMUNICATIONS: ECONOMICS AND LAW (Cambridge Univ. Press 2009).

58. DANIEL F. SPULBER, REGULATION AND MARKETS (MIT Press 1989).