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Legal Policy Section
Antitrust Division
U.S. Department of Justice
Suite 3234
950 Pennsylvania Avenue, NW
Washington, DC 20530

Donald S. Clark
Office of the Secretary
Federal Trade Commission
Room H-135 (Annex Z)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments Regarding Section 2 Hearings, Project No. P062106

To Whom It May Concern:

Enclosed please find "Essential Facilities, Infrastructure and Open Access," our draft work arguing for the retention and revision of the Essential Facilities doctrine, an important and timely debate in connection with the issue of Single Firm Conduct and the Antitrust Laws. This is a work in progress that we are revising and expanding in connection with eventual law review publication but wanted to share our work with both agencies in connection with the ongoing hearings on Section 2 of the Sherman Act. Per the instructions on the web site, we are submitting these comments both electronically and in hard copy in duplicate to both agencies.

Our article examines an age old debate about the nature and limits of property rights and the current manifestation of this debate in antitrust law. Many areas of law struggle to balance private property rights*most importantly, the right of exclusion*with the public's right of access to essential resources. What is the best way to manage resources that provide both public and private benefits? For years, academics and law makers have debated this question with respect to transportation systems, communication networks, scientific research, and a variety of other "infrastructural" resources. Many press for private control of such resources, arguing that the market most efficiently distributes their respective costs and benefits. Others take the position that these resources should be managed in an openly accessible manner. Advocates for this approach maintain that private control often is overly restrictive and unfairly allocates benefits to a few private parties.

In the antitrust area, this tension is mediated by the essential facilities doctrine. Under certain circumstances a monopolist incurs antitrust liability in denying a competitor access to a facility under the exclusive control of the monopolist. While versions of this doctrine go back to the beginning of the antitrust laws, it has been heavily criticized by many commentators and by the Supreme Court itself in dicta.

In our article, we advocate for the revitalization of the essential facilities doctrine and answer these criticisms. Our article seeks to 1) connect the essential facilities debate in the antitrust field to the broader question of private rights versus open access in other areas of the law, particularly intellectual property law; 2) propose and apply an economic theory of infrastructure

that comprehensively defines what facilities are essential and must be shared on an open and non-discriminatory basis; and 3) demonstrate that courts are capable of applying this test in antitrust and elsewhere.

Attached you will find our draft in MS Word. Please do not hesitate to contact any of us if you have any questions or need any further information. We hope you find our draft of use in the hearings and any eventual report on the question of single firm conduct and the antitrust laws.

Sincerely,

Spencer Weber Waller
Loyola University Chicago School of Law

Brett Frischmann
Loyola University Chicago School of Law