



UNILATERAL CONDUCT WORKING GROUP BREAKOUT SESSION HANDOUT ROOMS 1-3

MARGIN SQUEEZE/ESSENTIAL FACILITIES HYPOTHETICAL

BigTelco, the dominant provider of telecommunications services in Freeland, has an 80% share of the local telephone market. It also uses its telecom facilities (switches, fiber optic cables, and associated equipment) to provide Internet broadband services at retail to its telephone customers. *BigTelco* is the only Internet broadband service provider in Freeland. *BigTelco*'s fiber optic infrastructure was built with the help of subsidies from Freeland's government as part of a national broadband strategy. To obtain legislative support for those subsidies, *BigTelco* informally agreed to provide access to at least two competing ISPs for an extended period, which it has done. Firms A and B obtained access to *BigTelco*'s telecom facilities to offer wholesale Internet broadband transport services. Based on long-term contracts, Firms A and B are charged a wholesale price of 28 Freeland Currency Units ("FCUs") per customer per month. This access has allowed them to compete with *BigTelco* in retail Internet broadband service provision.

Until recently, *BigTelco* charged its retail customers 35 FCUs per month for broadband Internet access, while A & B each charged 32 FCUs per month. Earlier this year, in an effort to increase its customer base, *BigTelco* lowered its retail price to 30 FCUs per month. A and B argue that the new retail price of 30 FCUs, in combination with the long-term wholesale price of 28 FCUs, constitutes a "margin squeeze," because they incur an additional cost of 4 FCUs per customer per month to provide retail services. A and B also argue that *BigTelco*'s telecom facilities are an "essential facility" without which retail broadband competition is impossible. Specifically, to match *BigTelco*'s 30 FCU per month rate, A and B would incur a loss of 2 FCUs per month (30-28-4), rendering retail competition unprofitable.

The Freeland Competition Agency ("FCA") proposes to take legal action against *BigTelco*. It may, if it chooses, request the assistance of the Freeland Telecoms Regulator.



UNILATERAL CONDUCT WORKING GROUP BREAKOUT SESSION HANDOUT ROOMS 4-6

REFUSAL TO DEAL HYPOTHETICAL

BigPharma (“BP”) is a multinational pharmaceutical manufacturer. It has won a Freeland Government auction for an exclusive 100-year lease to exploit the resources in Freeland’s rain forest, whose plants are the exclusive source of ingredients for new biologic drugs for which BP has applied for patents and plans to produce in Freeland and in other countries. (The rain forest’s potential for biologic drugs was well known in the business community, including by all pharmaceutical producers, in Freeland at the time of the auction.) Over many years BP has established an extensive wholesale distribution network within Freeland through which it distributes its portfolio of branded pharmaceuticals, and through which it plans to distribute its new biologic drugs. (The network distributes directly to “big box” chain retailers and to hospitals, as well as to independent resellers who sell to small pharmacies and provide samples to doctors.)

FreelandPharma (“FP”) is a relatively small producer of mainly generic pharmaceutical products, which produces and sells its products solely in Freeland. Currently FP sells primarily to small pharmacies and small hospitals; it has only a very small market share in sales of existing drugs compared to BP. FP has developed, but does not yet market, biologics, including ones that may compete with BP’s biologic offerings. FP believes that its biologics would not infringe the patents (if granted) for which BP has applied.

FP has requested the right to sublease plots “on reasonable negotiable terms” within BP’s leased rain forest, to allow it to obtain the ingredients “without which we (FP) will be unable to produce biologics and therefore compete in the market for biologic drugs.” BP also has refused FP any access to the rain forest. (BP has allowed access to certain timber companies for commercial logging of trees that BP does not use in the production of its biologics.) In addition, BP has refused to sell to FP the ingredients for biologic drugs BP has obtained from the Freeland rain forest. Furthermore, FP has requested access (“on reasonable negotiable terms”) to BP’s wholesale network and BP has refused.

FP has approached Freeland’s Competition Authority (“FCA”) and requested that the FCA find that BigPharma’s conduct violates Freeland’s competition law. FP argues that it is impossible to replicate BigPharma’s wholesale distribution network at reasonable cost, and that the network represents an “essential facility” which is vital to effective retail pharmaceutical competition in Freeland. (FP adds that its retail prices would be lower and Freeland consumers could benefit from lower retail prices if it had access to the network.) FP also argues that BigPharma’s refusals to sublease its rain forest holdings or to sell biologic ingredients from the rain forest have no efficiency justification, and is merely aimed at creating and permanently maintaining a monopoly position in biologic drug sales within Freeland.